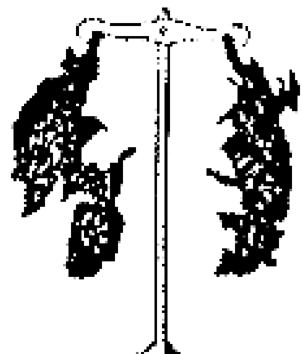
# ZANZIBAR YEARBOOK OF LAW (ZYBL)

Accessed from LHRC Constitutional Database

## VOLUME 1

## 2011




**Zanzibar Legal Services Centre (ZLSC)**

# ZANZIBAR YEARBOOK OF LAW (ZYBL)

**Published by:**

**ZANZIBAR LEGAL SERVICES CENTRE (ZLSC)**
House No. 37 Migombani (Opposite Migoz Supermarket)
P.O Box 3360 Zanzibar, Tanzania
Tel.: +255 24 2233784 Fax: +255 24 2234495
E-Mail: E-Mail: info@zlsc.or.tz
Website: www.zlsc.or.tz

**Sub-Office: Chake Chake, Pemba**
P.O. Box 18 Chake Chake, Pemba
Tel.: +255 24 2452936 Fax: +255 24 2452916

© Zanzibar Legal Services Centre (ZLSC)

ISBN 9987-697-10-0

*Published with the kind support from the Embassy of Sweden, Dar es Salaam, Tanzania; the Embassy of Finland, Dar es Salaam, Tanzania; Norwegian Embassy, Dar es Salaam, Tanzania; and Ford Foundation, Office for Eastern Africa, Nairobi, Kenya.*

Accessed from LHRC Constitutional Database

# ZANZIBAR YEARBOOK OF LAW (ZYBL)


## Advisory Editorial Board

| | |
|---|---|
| Hon. Omar Othman Makungu | Chief Justice of Zanzibar - Chairperson |
| Hon. Othman Masoud Othman | Attorney General of Zanzibar - Member |
| Hon. Awadh Ali Said | President, Zanzibar Law Society - Member |
| Ms. Fatma Iddi Ali | Chairperson, ZAFELA - Member |
| Ms. Khadija Shamte | Member, Zanzibar Law Society - Member |

## EDITORIAL COMMITTEE

| | |
|---|---|
| Prof. Chris Maina Peter | Chair of the Board, ZLSC - Chairperson |
| Ms. Safia Masoud Khamis | Board Member, ZLSC – Member |
| Ms. Josefrieda Pereira | Board Member, ZLSC - Member |
| Ms. Salma Haji Saadat | Board Member, ZLSC – Member |
| Ms. Harusi Miraji Mpatani | Executive Director, ZLSC – Secretary |

## EDITORIAL MANAGEMENT

**Managing Editor**

| | |
|---|---|
| Prof. Chris Maina Peter | Chair of the Board of Trustees, Zanzibar Legal Services Centre (ZLSC); and Professor of Law, School of Law, University of Dar es Salaam, Tanzania. |

**Editorial Advisor**

| | |
|---|---|
| Prof. Saida Yahya-Othman | Final Draft Ltd, Dar es Salaam, Tanzania. |

**Editorial Assistant**

| | |
|---|---|
| Dr. Juliana Masabo | School of Law, University of Dar es Salaam. |


Accessed from LHRC Constitutional Database

# International Editorial Advisory Board

Prof. Gudmundur Alfredsson,
Raoul Wallenberg Institute of Human Rights and Humanitarian Law,
Lund,
SWEDEN.

Ms. Evelyn A. Ankumah,
Executive Director,
Africa Legal Aid,
The Hague,
THE NETHERLANDS.

Prof. Thomas F. Geraghty,
Northwestern School of Law,
Northwestern University,
Chicago,
UNITED STATES OF AMERICA.

Prof. Ameze Guobadia,
The Nigerian Institute of Advanced Legal Studies,
Lagos,
NIGERIA.

Hon. Mr. Justice Ben Kioko,
African Court of Human and Peoples' Rights
Arusha,
TANZANIA.

Ms. Alice Mogwe,
Executive Director,
Ditshwanelo,
Gaborone,
BOTSWANA.

Dr. Maria Nassali,
Executive Director,
International Governance Alliance,
Kampala,
UGANDA.

Prof. Joseph Oloka-Onyango,
Faculty of Law,
Makerere University,
Kampala,
UGANDA.

Prof. Abdul Paliwala,
School of Law,
University of Warwick,
Coventry,
UNITED KINGDOM.

Hon. Prof. Sam Rugege,
The Chief Justice of Rwanda,
The Supreme Court,
Kigali,
RWANDA.

Prof. Abdallah Jumbe Saffari,
Advocate,
Dar es Salaam,
TANZANIA.

Prof. Eduard Somers,
Ghent School of Law,
University of Ghent,
Ghent,
BELGIUM.

Prof. Dr. Ulrike Wanitzek,
Faculty of Law,
University of Bayreuth,
Bayreuth,
GERMANY.

Judge Abdulqawi A. Yusuf,
International Court of Justice,
The Hague,
THE NETHERLANDS.

Accessed from LHRC Constitutional Database

# FOREWORD

**H.E. Dr. Ali Mohamed Shein**
**President of Zanzibar and Chairman of the Revolutionary Council**

It is an honour for me to be invited to write the Foreword for the very first Volume of the Zanzibar Yearbook of Law (ZYBL) published by the Zanzibar Legal Services Centre (ZLSC). I understand that Zanzibar is only the second country in Africa, after the Republic of South Africa, to publish a Yearbook of this nature. This is an important feat for which Zanzibar should be legitimately proud.

Zanzibar has a rich legal history. Over the years, it has established a dual system of law combining and blending smoothly the common law system and the Islamic system. The two systems have existed harmoniously, providing the people of Zanzibar the means of peaceful settlement of disputes in their daily life.

The Revolutionary Government of Zanzibar respects and upholds the rule of law and is determined to consolidate and safeguard through independence of the judiciary and good governance which is in place in Zanzibar. In cooperation with its development partners, the government is in the process of developing a legal sector reform strategy involving all stakeholders in order to ensure that the people contribute meaningfully to moulding the legal system that governs them.

I understand that the Zanzibar Yearbook of Law will cover academic contributions from beyond Zanzibar. I trust that contributions on global, African, East African, Tanzanian and Zanzibar issues on legal matters will provide information on what is happening in the legal field in Zanzibar; and will also help the reader to learn about international issues of interest through this publication. This makes the Zanzibar Yearbook of Law a distinctive contribution by Zanzibar to legal knowledge.

I have no doubt in my mind that under the Advisory Board let by the Chief Justice of Zanzibar, the quality of the Yearbook will improve in the years to come. The Zanzibar Yearbook of Law is a very welcome publication constituting an important milestone in the development of the law in Zanzibar and an important player in the Zanzibar academic field.

..........................................

**Dr. Ali Mohamed Shein**
**PRESIDENT OF ZANZIBAR AND**
**CHAIRMAN OF THE REVOLUTIONARY COUNCIL**

Accessed from LHRC Constitutional Database

# PREFACE

The publication of Volume 1 of the *Zanzibar Yearbook of Law* (ZYBL) by the Zanzibar Legal Services Cente (ZLSC) marks a milestone in the development of the law on the isles and indeed in the whole of East Africa. No East African country has a yearbook in the field of law, notwithstanding the fact that all of them have Faculties and Schools of Law of long standing. In fact the Faculty of Law of the University of Dar es Salaam, the oldest in the region, is 50 years old.

The legal field in Zanzibar was partially affected by the abolition of the normal Common Law legal system after the Revolution in 1964. At that time the law was highly developed with Zanzibar publishing her own *Zanzibar Law Reports* (ZLR) which were incorporated into the *East African Law Reports* (EALR) in 1957. Until today Zanzibar does not have its own law reporting mechanism, something which the Zanzibar Judiciary should consider seriously.

At the same time, the Zanzibar legal fraternity has no forum for promoting the law in the form of a journal. This has denied Zanzibar lawyers an avenue to discuss law and probably critique the decisions made by the courts of law on the isles.

*Zanzibar Yearbook of Law* intends to fill some of these historical gaps and push Zanzibar into the fast lane again in the legal field. The *Yearbook* will be publishing about twenty contributions every year. These cover global, regional and municipal issues. There will be reviews of interesting legal texts and a summary and list of all laws enacted by the Zanzibar House of Representatives in the particular year. This aim is reflected in the contents of this maiden volume which has managed to attract some of the very best legal brains in Africa and beyond. The aim is to make the *Yearbook* the main source of legal reference in Zanzibar, Tanzania, East African region, the African continent and the globe. This is a tall order which we are prepared to meet.

This is a common entreprise and everyone is welcome to contribute to the prosperity of the *Yearbook* which belongs to all of us.

Chris Maina Peter
Managing Editor
ZANZIBAR

Accessed from LHRC Constitutional Database

# Table of Contents

Foreword – H.E. Dr. Mohamed Ali Shein, The President of Zanzibar v
Preface vi
Contents vii
List of Contributors x
Abbreviations xii

**Lead Article**

Access to Justice and Justice Delivery in Tanzania: Unblocking the Barriers. 3-15
*Mohamed Chande Othman*

**General Articles**

The Right to Democratic Governance in International Law and the African Charter on Democracy, Elections and Governance. 19-45
*Adama Dieng* and *Charles Riziki Majinge*

The Current Debate on the Integration and Sovereignty and Its Relevance in Africa Today. 47-80
*Joram Mukama Biswaro*

The ICC on Trial: A Decade of International Criminalisation of Africa. 81-102
*Nsongurua J. Udombana*

The African Commission on Human and Peoples' Rights: Its Relevance in Modern Day Africa. 103-127
*Bahame Tom Nyanduga*

Regional Integration in Africa with a Specific Focus on the East African Community. 129-153
*John Eudes Ruhangisa*

The Role of Paralegals in the Provision of Legal Services. 155-162
*Dunstan Mlambo*

Kony, Museveni and the International Criminal Court: An Alternative View. 163-177
*Alex Obote-Odora*

Accessed from LHRC Constitutional Database

Challenges to the African Human Rights System with Special Reference to the United Republic of Tanzania. 179-191
*Michelo Hansungule*

Development of a Culture of Lawlessness in Tanzania and its Impact on Human Rights and Good Governance. 193-222
*Thomas Bashite Mihayo*

The Rationale behind Separating the Investigative Aspects of the Criminal Justice from Prosecution in Tanzania. 223-231
*Eliezer Mbuki Feleshi*

Foreign Investors and Privatisation in Tanzania. 233-248
*Stella Nyagonchera Machoke*

Provision of Social Security to the Excluded in the United Republic of Tanzania: Legislative and New Policy Directions. 249-264
*Tulia Ackson*

The Rights of the Child in Tanzania: Recent Developments in the Law. 265-281
*Helen Kijo-Bisimba*

**Articles on Zanzibar**

Challenges Facing the United Republic of Tanzania's Constitution and the 10th Amendment of the Zanzibar Constitution. 285-299
*Abubakar Khamis Bakary*

Union and Constitutional Review in Tanzania. 301-309
*Ibrahim Mzee Ibrahim*

A Concise Review of the Zanzibar Court System since the 1964 Revolution. 311-320
*Augustino Stephen Lawrence Ramadhani*

Ship's Registration in Zanzibar: An Assessment of the Law and Practice 321-337
*Ibrahim Mbiu Bendera*

Civil Accountability: A Legal Reflection behind the MV Spice Islander I 339-357
*Mohamed Makame*

Accessed from LHRC Constitutional Database

**Shorter Articles**

The Union of Tanzania Mainland and Zanzibar: Challenges and Prospects. 361-367
*Lilian Melkizedeki Kimaro*

The Submission for Extension of the Continental Shelf by the United Republic of Tanzania to the United Nations and the reaction of Zanzibar. 369-382
*Charles Riziki Majinge*

**Book Reviews**

BURGESS, G. Thomas (ed.), *Race, Revolution and the Struggle for Human Rights in Zanzibar: Memoirs of Ali Sultan Issa and Seif Sharif Hamad,* Athens: Ohio University Press, 2009. 385-390
*Haroub Othman*

**Recent Developments in the Law in Zanzibar**

Development of the Law in Zanzibar in 2011. 393-393

**Glossary** 397-399

**Table of Cases** 401-405

**Selected Publications on or About Zanzibar** 406-409

Accessed from LHRC Constitutional Database

# List of Contributors

**ACKSON, Tulia:** Senior Lecturer in Law and Associate Dean, School of Law, University of Dar es Salaam, Tanzania.

**BAKARY, Abubakar Khamis:** Minister of Justice and Constitutional Affairs, Revolutionary Government of Zanzibar, Zanzibar, Tanzania.

**BENDERA, Ibrahim Mbiu:** Advocate of the High Court of Tanzania; and Executive Partner at M & B Law Chambers, Dar es Salaam, Tanzania. He is a past Vice President of TLS, the Bar Association of Mainland Tanzania.

**BISWARO, Joram Mukama:** Ambassador of the United Republic of Tanzania to Ethiopia.

**DIENG, Adama:** United Nations Secretary-General's Special Adviser for the Prevention of Genocide and former UN Under Secretary-General and and Registrar, United Nations International Criminal Tribunal for Rwanda, Arusha, Tanzania.

**FELESHI, Eliezer Mbuki:** The Director of Public Prosecutions of the United Republic of Tanzania, Dar es Salaam, Tanzania.

**HANSUNGULE, Michelo:** Professor of Law, Centre for Human Rights, Pretoria University, Pretoria, Republic of South Africa.

**IBRAHIM, Mzee Ibrahim:** Director of Public Prosecutions, Zanzibar.

**KIJO-BISIMBA, Helen:** The Executive Director, Legal and Human Rights Centre, Dar es Salaam, Tanzania.

**KIMARO, Lilian Melkizedeki:** Foreign Service Officer, Ministry of Foreign Affair and International Co-operation, Dar es Salaam, Tanzania.

**MACHOKE, Stella Nyagonchera:** State Attorney, Ministry of Constitutional Affairs and Justice, Dar es Salaam, Tanzania.

**MAJINGE, Charles Riziki:** Doctoral Candidate, London School of Economics, London, the United Kingdom.

**MAKAME, Mohamed**: Member of the Academic Staff, Zanzibar University (ZU), Tunguu, Zanzibar.

**MIHAYO, Thomas Bashite:** Retired Judge of the High Court of Tanzania; and President, Tanzania Retired Judges Association (TARJA).

**MLAMBO, Dunstan:** Chairperson, Legal Aid South Africa and Judge President of the Labour and Labour Appeal Courts, Republic of South Africa.

Accessed from LHRC Constitutional Database

**NYANDUGA, Bahame Tom:** Advocate of the High Court of Tanzania; and former Commissioner, African Commission on Human and Peoples' Rights, Banjul, The Gambia.

**OBOTE-ODORA, Alex:** Consultant in International Criminal, Humanitarian and Human Rights Law; and former Senior Legal Advisor and Special Assistant to the Prosecutor and Chief of Appeals and Legal Advisory Division, United Nations International Criminal Tribunal for Rwanda, Arusha, Tanzania.

**OTHMAN, Haroub:** The late Professor of Development Studies, University of Dar es Salaam; and Chairman of Zanzibar Legal Services Centre.

**OTHMAN, Mohamed Chande:** The Chief Justice of the United Republic of Tanzania.

**RAMADHANI, Augustino Stephen Lawrence:** Judge, African Court of Human and Peoples' Rights, Arusha, Tanzania; and Retired Chief Justice of the United Republic of Tanzania.

**RUHANGISA, John Eudes:** Registrar, East African Court of Justice; and Associate Professor of Law, Tumaini University Makumira, Usa River, Arusha, Tanzania.

**UDOMBANA, Nsongurua J.:** Professor of International Law and Dean, Faculty of Law, University of Uyo, Akwa Ibom State, Nigeria.

Accessed from LHRC Constitutional Database

## ABBREVIATIONS

| | |
|---|---|
| ACHPR | African Commission on Human and Peoples' Rights |
| ACRWC | African Charter on the Rights and Welfare of the Child, 1990 |
| AD | *Anno Domini* (label of years following 1 BC in the Julian and Gregorian Calendars) |
| ADF | Allied Democratic Force |
| ADR | Alternative Dispute Resolution |
| AEC | African Economic Community |
| AG | Attorney General |
| AGM | Annual General Meeting |
| APRM | African Peer Review Mechanism |
| APT | Association for the Prevention of Torture |
| ASP | Afro-Shirazi Party |
| AU | African Union |
| BBC | British Broadcasting Corporation |
| BIT | Bilateral Investment Treaty |
| BLM | Baraza la Mapinduzi |
| BOT-EPA | Bank of Tanzania External Payment Arrears Account |
| CAF | Confederation of African Football |
| Cap | Chapter of the Laws |
| CAR | Central African Republic |
| CAT | Court of Appeal of Tanzania |
| CCM | Chama Cha Mapinduzi |
| CEDAW | Convention on Elimination of all Forms of Discrimination Against Women |
| CEMAC | Central African Economic and Monetary Community |
| CEN-SAD | Community of Sahel-Saharan States |
| CEPGL | Economic Community of Great Lakes Countries |
| CERD | Committee on Elimination of Racial Discrimination |
| CERWC | Committee of Experts on the Rights and Welfare of the Child |
| CESR | Centre for Economic and Social Rights (Nigeria) |
| CHADEMA | Chama cha Demokrasia na Maendeleo |
| CHFs | Community Health Funds |
| CHRAJ | Commission on Human Rights and Administrative Justice |
| CIA | Central Intelligence Agency |
| CJ | Chief Justice |

Accessed from LHRC Constitutional Database

| | |
|---|---|
| CLCS | Commission on the Limits of the Continental Shelf |
| CLRDC | Community Law & Rural Development Centre (Durban) |
| CMA | Commission for Mediation and Arbitration |
| CODESRIA | Council for the Development of Social Science Research in Africa |
| COMESA | Common Market for Eastern and Southern Africa |
| CRC | Convention on the Rights of the Child |
| CUF | Civic United Front |
| DAWASA | Dar es Salaam Water and Sewerage Authority |
| DAWASCO | Dar es Salaam Water and Sewerage Corporation |
| DECI | Development Enterpreneourship for Community Initiatives |
| DFID | Department for International Development (UK) |
| DM | District Magistrate |
| DNA | DeoxyriboNucleic Acid |
| DPP | Director of Public Prosecution |
| DRC | Democratic Republic of the Congo |
| DWT | Deadweight Tonnage |
| EAC | East African Community |
| EACA | East African Court of Appeal |
| EACJ | East African Court of Justice |
| EACROTANAL | Eastern African Centre for Research on Oral Traditions and African National Languages (Zanzibar, Tanzania) |
| EALA | East African Legislative Assembly |
| EALS | East African Law Society |
| ECCAS | Economic Community of Central African States |
| ECOSOC | Economic & Social Council |
| ECOWAS | Economic Community for West African States |
| Ed | Editor |
| EEZ | Exclusive Economic Zone |
| EPA | External Payments Arrears/Economic Partnership Agreements |
| EU | European Union |
| FBI | Federal Bureau of Investigations |
| FES | Friedrick Ebert Stiftung |
| FFU | Field Force Unit |
| FIFA | Fédération Internationale de Football Association (International Federation of Association Football) |
| G 55 | Group of Fifty Five (Tanzania Mainland) |

Accessed from LHRC Constitutional Database

| | |
|---|---|
| GEPF | Government Employees’ Provident Fund |
| GMT | Greenwich Mean Time |
| GN | Government Notice |
| GNRC | Global Network of Religion for Children |
| GNU | Government of National Unity |
| GRT | Gross Register Tonnage |
| GTZ | *Deutsche Gesellschaft für Internationale Zusammenarbeit* (German Agency for International Cooperation) or GIZ |
| H.L. | House of Lords |
| HBMC | Her Britannic Majesty’s Court |
| HIPC | Heavily Indebted Poor Countries |
| HIV/AIDS | Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome |
| IAEA | International Atomic Energy Agency |
| IBRD | International Bank for Reconstruction and Development |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICJ | International Court of Justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICT | Information Communication Technology |
| ICTR | International Criminal Tribunal for Rwanda |
| IDPs | Internally Displaced Persons |
| IGAD | Inter-Governmental Authority on Development |
| IIUM | International Islamic University Malaysia |
| IOC | Indian Ocean Commission |
| KCK | Kituo Cha Katiba |
| MCA | Millennium Challenge Account |
| MDGs | Millennium Development Goals |
| MRU | Mano River Union |
| MSA | Merchant Shipping Act (1894) |
| MV | Marine Vehicle |
| NAFTA | North American Free Trade Agreement |
| NATO | North Atlantic Treaty Organization |
| NEC | National Executive Committee |
| NEPAD | New Partnership for Africa’s Development |
| NGOs | Non-Governmental Organisations |
| NHIF | National Health Insurance Fund |

Accessed from LHRC Constitutional Database

| | |
|---|---|
| NOLA | National Organisation for Legal Assistance |
| NPS | Tanzania National Prosecutions Service |
| NPSA | National Prosecutions Service Act (Tanzania) |
| NRA | National Resistance Army (Uganda) |
| NRM | National Resistance Movement (Uganda) |
| NRT | Net Register Tonnage |
| NSSF | National Social Security Fund |
| OAS | Organization of American States |
| OAU | Organisation of African Unity |
| OIC | Organisation of Islamic Conference |
| *op.cit* | *opere citato* (in the work cited) |
| OSIEA | Open Society Initiative for East Africa |
| OTP | Office of the Prosecutor (International Criminal Court) |
| OUT | Open University of Tanzania |
| PGC | Postgraduate Certificate |
| PGD | Postgraduate Diploma |
| PhD | Doctor of Philosophy |
| pp. | pages |
| PPF | Parastatal Pensions Fund |
| PSC | Peace and Security Council |
| PSRB | Political Service Retirement Benefits Scheme |
| R.E. | Revised Edition |
| R.I.Gs | Robben Island Guidelines |
| R.M. | Resident Magistrate (Tanzania Mainland) |
| RECs | Regional Economic Communities |
| REPOA | Research on Poverty Alleviation (Tanzania) |
| RGZ | Revolutionary Government of Zanzibar |
| SACU | Southern African Customs Union |
| SADC | Southern African Development Community |
| SCSL | Special Court for Sierra Leone |
| SERAC | Social and Economic Rights Action Centre (Nigeria) |
| SLT | Scottish Law Times |
| SMZ | Serikali ya Mapinduzi ya Zanzibar |
| SSRN | Social Science Research Network |
| SUMATRA | Surface and Marine Transport Authority |
| SUZA | State University of Zanzibar |

Accessed from LHRC Constitutional Database

| | |
|---|---|
| TANU | Tanganyika African National Union |
| TARJA | Tanzania Retired Judges Association |
| TAWLA | Tanzania Association of Women Lawyers |
| TISS | Tanzania Intelligence and Security Service |
| TLCA | Tanzania Law of the Child Act |
| TLS | Tanganyika Law Society |
| TNC | Transitional National Council (Libya) |
| TPDF | Tanzania Peoples Defence Forces |
| TPS | Tanzania Prisons Service |
| TRA | Tanzania Revenue Authority |
| TUCTA | Trade Union Congress of Tanzania |
| TUKI | Taasisi ya Uchunguzi wa Kiswahili |
| U.N.T.S. | United Nations Trade Series |
| UAR | United Arab Republic |
| UDHR | Universal Declaration of Human Rights |
| UDSM | University of Dar es Salaam |
| UEMOA | West African Economic and Monetary Union |
| UK | United Kingdom |
| UMA | Arab Maghreb Union |
| UN | United Nations |
| UNA | United Nations Association |
| UNCITRAL | United Nations Commission on International Trade Law Rules |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCTAD | United Nations Conference on Trade and Development |
| UNECA | United Nations Economic Commission for Africa |
| UNGA Res | United Nations General Assembly Resolution |
| UNICEF | United Nations Children's Fund |
| UNOHCHR | United Nations Office of the High Commissioner for Human Rights |
| UNSC | United Nations Security Council |
| UPDF | Uganda Peoples' Defence Force |
| URT | United Republic of Tanzania |
| USA | United States of America |
| USD | United States Dollar |
| USSR | Union of Soviet Socialist Republics |
| V. | Versus (against) |

Accessed from LHRC Constitutional Database

| | |
|---|---|
| VAT | Value Added Tax |
| WILDAF | Women in Law and Development |
| WTO | World Trade Organization |
| WWII | World War Two |
| ZAFELA | Zanzibar Female Lawyers Association |
| ZEC | Zanzibar Electoral Commission |
| ZEMOG | Zanzibar Election Monitoring and Observer Group |
| ZLCA | Zanzibar Law of the Child Act |
| ZLRC | Zanzibar Law Review Commission |
| ZLS | Zanzibar Law Society |
| ZLSC | Zanzibar Legal Services Centre |
| ZSGRP | Zanzibar Strategy for Growth and Reduction of Poverty |
| ZSSF | Zanzibar Social Security Fund |
| ZU | Zanzibar University |
| ZYBL | Zanzibar Yearbook of Law |

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# LEAD ARTICLE

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# ACCESS TO JUSTICE AND JUSTICE DELIVERY IN TANZANIA: UNBLOCKING THE BARRIERS

*Mohamed Chande Othman*[1]

I. Introduction
II. Delays in the Commencement of Criminal Trials
III. Delays in the Determination of Cases
IV. Judicial Backlog
V. Judicial and Legal Strength
VI. Right to Legal Representation and Legal Aid
VII. Court Procedures and Technicalities
VIII. Court Processes
IX. Access to Justice and Victims
X. Affordability and Access to Justice
XI. Alternative Dispute Resolution (ADR)
XII. Conclusion

Accessed from LHRC Constitutional Database

## I. Introduction

This article focuses on access to justice and the formal justice system. First, it examines a number of critical issues affecting access to justice and justice delivery in Tanzania. These are presented sequentially rather than hierarchically or in any order of priority. As will be evident, they are inter-woven. Second, it highlights the barriers that impede meaningful access - obstacles that significantly limit the entitlement and full enjoyment of access to justice and of the guaranteed constitutional and human rights. Thirdly, it proposes ways in which access to justice could be enhanced and justice delivery augmented. The expectation is that this exposé will stimulate further debate on sustained responses. Major reforms are required to unblock the path towards accessible and timely justice to all in Tanzania.

A holistic and purposive approach to sustainable development, human rights and the rule of law takes access to justice as referring to the ability of an individual, group or community to seek the protection and vindication of the law and obtain a remedy for the violation of rights and/or the enforcement of legal obligations through both the formal and/or the customary or traditional justice systems. Appreciated that way, access to justice is far more than just an alleyway to the justice system or the Courts. Access to justice envelops a lot more than institutions and structures. It includes the entitlement and enjoyment of legal rights and of equality before the law, access to legal information, exclusion of

---

[1] Chief Justice of the United Republic of Tanzania.

gender bias in laws and the ability and opportunity to invoke the justice apparatus. It also encompasses legal representation and legal aid, formal and non-formal dispute resolution mechanisms, court processes and procedures and the mechanisms for the enforcement of awards and decisions. It has been well explained that "access to justice in its true sense refers to a much broader bundle of issues which may impact or affect the ability of individuals or communities to seek redress for perceived wrongs and these may transcend the formal justice system."[2] Access to justice is now recognized as a human right, a social movement and a value commitment.[3] In sum, it should be viewed as "a goal with shifting posts" - the more it is enhanced, the more new challenges will have to be indentified and resolved.[4]

To begin with, the Constitution of the United Republic of Tanzania, 1977 and the Constitution of the Revolutionary Government of Zanzibar, 1984 both provide for the normative source for the protection of basic rights and the institutional arrangements for the formal justice system. The former in Article 13 and the latter in Article 12 guarantee the equality and protection of all persons before the law, without discrimination. By Article 107A (1) of the Constitution of Tanzania the Judiciary is the authority with the final decision on the dispensation of justice in the country. All Courts are required only to observe the provisions of the Constitution and of laws.

The awareness of legal rights and access to legal information remains an access-to-justice issue of major significance for many Tanzanians. Legal awareness is a first step in the journey to invoking the formal justice system. Individuals have legal rights only as far as they are aware of them and can at least expect to enforce them.[5] Moreover, often for formal justice to be engaged, it must be moved. Many a times, lay persons, uninformed on the morass of laws, have real difficulties in steering their cases to and in Courts. The poor, women and other vulnerable persons and groups have testing hurdles not only in accessing but also in obtaining justice. In terms of legal awareness, at least two barriers are detectable. First is the ordinary person's lack of basic knowledge of laws and court procedures. While compulsory primary education and adult literacy programmes have resulted in a marked increase in the educational level of Tanzanians, a sizeable part of the population, urban and rural, remain ignorant of many laws. This inhibits the choices they may have to make in seeking justice. Moreover, where they can invoke the formal justice system, a difficulty

Accessed from LHRC Constitutional Database

---

2 DIAS, A.K, "International Law and Sources of Access to Justice," in Dias, A.K. and Welch, G.H., (eds.), *Justice for the Poor, Prospects on Accelerating Access*, Oxford University Press/UNDP, 2009, p. 5.

3 DIAS, A.K and Welch, G.H. (eds.), *Justice for the Poor, Prospects on Accelerating Access*, ibid. p. ix.

4 JERSEY, Paul de, C. J. "Access to Justice: What are the basic requirements and do we achieve them in Australia," Paper presented at the Access to Justice Conference, Caxton Legal Centre Inc., 11 Oct. 2001.

5 SANDEFUR, R.L, *Access to Justice*, Emerald Group Pub. Ltd., U.K., 2009, p. 3.

arises in navigating through the myriad laws, procedures and the Court hierarchy.

Second is the language hurdle. While Kiswahili is the national language, most laws are in English. At the lower level of the Court hierarchy, i.e. the Primary Courts, the proceedings and the judgments are mandatorily in Kiswahili.[6] No major inconvenience occurs there. In contrast, at the District Courts and the Resident Magistrates' Courts the language employed is either English or Kiswahili.[7] At the High Court and the Court of Appeal justice delivery is predominantly in English, much as at times proceedings also take place in Kiswahili where one or both parties do not understand English. However, all judgments, rulings and decrees are written in English. The question that crops up is this: In which language is access to justice better enhanced? The recent cry by stakeholders and the public to translate into Kiswahili the Constitutional Review Bill before its consideration by Parliament was a serious manifestation of the access to laws problematic facing Tanzanians.[8] The complexity of the language issue is further compounded when it is viewed in the context of the future, as the East African Community member States move further towards economic and monetary integration and ultimately, a political federation.

On access to legal information, reference must be made to the efforts of the Judiciary in providing on its websites, free on- line access to court decisions and other legal material as a way of enhancing public access to the formal justice system. The dissemination of laws and procedures must be given priority by all concerned stakeholders.

The second acute access to justice challenge in Tanzania relates to the geographical or physical access for those who wish to invoke the formal justice system to settle disputes. The issue here is whether the hierarchy and network of courts are reasonably accessible to all, in particular rural communities and those in remote localities. Section 11 (1) of the Magistrates' Court establishes in every District a District Court. The difficulty of access to these courts is best exemplified by these two situations: For a resident of Iyongwe village, Kilindi District, Tanga Region to invoke the District Court, he or she will have to approach the Handeni District Court situated 190 kilometers away. Similarly, a resident of Mwakijembe, Mkinga District, Tanga Region will have to bring his/her case before the Muheza District Court, some 113 kilometers away. The reason for this is that there are no District Courts at either Kilindi or Mkinga Districts, as is the case in over 30 other districts in Tanzania.

Accessed from LHRC Constitutional Database

[6] Section 13 (1), The Magistrates' Courts Act, Cap 11 R.E. 2002.

[7] Section 13 (2), Ibid.

[8] See Sheria ya Marekibisho ya Katiba, Sheria 2011 (Sheria No 8 Sw/2011), The Constitutional Review Act, 2011 (Act No 8 Eng/2011).

Accessed from LHRC Constitutional Database

Another facet of this aspect of access to justice is reflected in the lack of High Courts in several regions in Tanzania Mainland. For a litigant in Kibondo District, Kigoma Region to file his or her appeal in the High Court, the proximate Court is the High Court at Tabora, which is about 674 kilometers away. The non-existence of Courts at many levels of the hierarchy in the formal justice system constitutes a major denial of access to justice. The solution to this can be found in increased prioritization and commitment by the Government and the Judiciary in the form of sustained Court infrastructural development throughout the country. For justice to be accessible, Courts must be available and they must be proximate.

The third pressing challenge facing access to justice is the delay, at times inordinate, in the delivery of justice. An unreasonable delay in the administration of justice is nothing but an unconscionable denial of justice.[9]

In this regard, Article 107A (2) (b) of the Constitution of Tanzania provides:

> In delivering decisions in matters of civil and criminal nature in accordance with the laws, the Court shall observe the following principles, that is to say:
>
> (a)…..
>
> (b) not to delay dispensation of justice without reasonable ground.

The delay in justice delivery is mirrored essentially in three situations - delays in the commencement of criminal proceedings, the duration of cases in their entirety within the formal justice system and the number of cases pending at the end of each year with the ensuing previous backlogs.

## II. Delays in the Commencement of Criminal Trials

The criminal justice system in Tanzania, like that of many other countries, is riddled with an unacceptable number of pre-trial detainees. Hundreds, if not thousands, languish over long periods in custody pending the commencement or conclusion of trials. Worse still, numerous detainees who have been charged with bailable offences also remain in custody either due to stringent bail conditions imposed by the law and the Court or because of inability to post bail. As of 1st January 2012, the prison population of Tanzania stood at 36,656 persons, of whom 19,693 were remandees. Of these, 13,849 were facing charges arising out of bailable offences. Delayed and lengthy trials that ultimately lead to the acquittal of the accused are clearly cases of denial of justice as nothing can

---

[9] PRADEEP, K.P. 'Access to Justice - New Challenges', at http/www.lawyersclubindia.com.

recompense such a person for the suffering inflicted through a prolonged sojourn in remand.[10]

The most frequent cause for the delay in the commencement of criminal trials is incomplete investigations. At times, non-availability of witnesses and lack of transport facilities or non-transportation of suspects or accused on remand by the police or prison authorities compounds the problem. For example, in Lindi region, suspects or accused charged before the Ruangwa District Court, Mtwara Region are held at Nachingwea prison, Nachingwea District, a distance of 44 kilometers. Similarly, in Mwanza Region, those charged before the Misungwi District Court are held at Butimba prison, Mwanza District, some 50 kilometers away. Worse still, those before the Chato District Court in Geita region are held at Biharamulo prison in Kagera region, a distance of 64 kilometers. In the same region, those before the Bukombe District Court are held at Kahama Prison in Shinyanga region, 98 kilometers away. This situation finds reflection in many districts in Tanzania where law enforcement infrastructure and facilities are non-existent.

With the aim of accelerating criminal trials, Section 225 (4) of the Criminal Procedure Act[11] sets timelines restricting the period of adjournments, which can only periodically and progressively be extended on certification by a Regional Crime Officer or a State Attorney or ultimately, the Director of Public Prosecutions (DPP). With regards to the latter's authority and the conduct of court proceedings, Section 225 (4) (c) provides:

> Wherever a certificate is filed in Court by the Director of Public Prosecutions or a person authorized by him in that behalf stating the need for and grounds for a further adjournment beyond the adjournment made under paragraph (b), the court shall not adjourn such a case for a period exceeding an aggregate of twenty four months since the date of the first adjournment given under paragraph (a).

In particular regard to the institution, control and supervision of criminal prosecutions over which by Article 59B (2) of the Constitution[12] the DPP enjoys vast powers, it is significant to note Article 59B (5) thereof which enjoins that authority to take into account three basic considerations in the exercise of his or her powers; namely (a) the need for dispensing justice, (b) prevention of misuse of procedures for dispensing justice and (c) public interest.

---

[10] MKAPA, Benjamin William, "The Legal System Should be More Accessible and Affordable to More Tanzanians," in PETER, Chris Maina & Helen Kijo-Bisimba (eds.), *Law and Justice in Tanzania, Quarter of a Century of the Court of Appeal*, Dar es Salaam: Legal and Human Rights Centre, 2007, Chp. 2, p. 38.

[11] Cap. 20, R.E. 2002.

[12] See also, Section 10(1) (a), National Prosecutions Service Act, 2008 , Act No 27, 2008; Section 10 (3), The Office of the Attorney General's Discharge of Duties Act, 2005 (Act No 4 of 2005).

Accessed from LHRC Constitutional Database

The acceleration and completion of criminal investigations by the police remains a prime requirement in overcoming delays in both the commencement and the timely completion of trials. Any quickening of this process would advance the cause of justice. Courts are required to apply the above provisions of the Criminal Procedure Act bearing in mind the rights of suspects and accused. These protected rights must not be compromised by an imaginary fear of public safety or a blanket application of the law by judicial officers.

## III. Delays in the Determination of Cases

It is a constitutional principle that the delivery of justice should not be delayed without reasonable grounds (Article 107A (2) (a)). Clearly implicit therein is the requirement that the dispensation of justice may only be delayed where there is a reasonable justification to that effect. Each case must be approached on its own set of circumstances and facts. The word "reasonable" is defined in the Chambers Twentieth Century Dictionary, 1972 to mean "endowed with reason, just, not excessive". The Concise Oxford Dictionary, 1975 has it as "not extortionate, tolerable, fair." In determining whether or not delay in justice delivery has been occasioned, regard must be taken of the duration or length of delay, the complexity of the case, the conduct of any of the parties and their advocates, the resultant prejudice to the accused, if any, and whether or not justice has miscarried. In this regard, it is worth noting Article 20 (4) (c) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) which provides for the right of an accused to be tried without undue delay.[13]

## IV. Judicial Backlog

A particular aspect of the delay in justice delivery that is also a significant bottleneck in ensuring effective access to justice concerns the backlog of cases. By backlog is meant the number of cases that have been outstanding in the Courts for a period of more than two years.[14] While in 2011, the trend throughout Tanzania's courts is of a reduced backlog, given the increase in litigation and capacity limitations, cases continue to accumulate, mostly at the Primary and District Court levels. In the final analysis, success in the dispensation of justice will be measured by the reduction and elimination of the backlog of cases, up to now a chronic phenomenon.

New strategies are being adopted and special measures are underway. For the speeding up of criminal trials, Case Flow Management Committees at the national and other levels of the Court hierarchy, composed of representatives of the Judiciary, Police, Attorney General, DPP and Community Services officers address delays attributable to the law enforcement processes. With the common

[13] *F. Nahimana and Others v Prosecutor*, Case No ICTR-99-52-A, para. 1074, Appeal Judgment, 28 November, 2007.

[14] Draft Report, The 2010 Annual Statistics Report of the Judiciary of Tanzania.

Accessed from LHRC Constitutional Database

causes of delays often interlocking, the Committees are able to disentangle both general and specific bottlenecks occasioning any inordinate delay in rendering criminal justice or likely to result in a denial of justice.

With the exception of the Court of Appeal, Resident Magistrates and Judges in other Courts plan their court schedules on the basis of a direct or an individual calendar system rather than a master calendar system. Through an individual calendar system, once a case is assigned to a particular judge or magistrate, it is that judicial officer who is fully responsible and who attends to all matters of the case until it is finally determined.

The role of Magistrates and Judges in controlling the court process is also a measure for success or failure in accelerating justice delivery. In the adversarial system of justice – a common law vintage - inherited by Tanzania, it often rests upon the parties to invoke and move the judicial engine. That system is premised upon a presumption of conflict, party control, judicial impartiality and zealous advocacy.[15] Perhaps a bit of an exaggeration, the Court room is an arena for a contest, even a war, between opposing parties.[16] Based in party autonomy, a key foundation of the adversarial system of justice is that the parties and not the Judge have the primary responsibility for defining the issues and for carrying the dispute forward.[17] In such a system, usually the role of Magistrates or Judges is that of detached umpires, not stewards of the litigation process. The trial Judge or Magistrate also serves as "a gatekeeper" for evidence.[18] The system is also dependent on examination and cross-examination of witnesses to test credibility and elicit facts and the truth. When all is considered, I would submit that a more pro-active control of the judicial process by the Court is not incompatible with a Magistrate's or Judge's responsibility as an impartial judicial officer. As we reform our justice system, we must avoid being blinded or hypnotized by the apparent attraction and full force of the adversarial approach to justice. Non-adversarial approaches to justice are also compatible with our values.[19]

As a matter of policy, the Judiciary in its Client Service Charter, 2002 has committed itself to a two year time frame as the life expectancy of a case in Court. The best position, no doubt, is the earliest and speedy disposal of a case.

Accessed from LHRC Constitutional Database

---

[15] KING, M.; Freiberg, A, Batagol, B, Hymas, R, *Non-Adversarial Justice*, Annadale, N.S.W.: The Federation Press, 2009, p. 2 and Chapter, 1.

[16] KUBICEK, T.L. *Adversarial Justice America's Court System on Trial*, Algora Publishing, U.S.A. 2006, p. 12.

[17] Review of the Adversarial System of Litigation, Australian Law Reform Commission, 29th November, 1995.

[18] VAN KOPPEN, P.J and Penrod, S.D (Ed.), *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems*, N.Y.: Kluwer Academic Plenum Publishers, 2003, p. 3.

[19] C.f. "Adversarialism and non-adversarialism are not mutually exclusive," King, M, Freiberg, A, Batagol, B, Hymas, R, Non-Adversarial Justice, Ibid., p. 5.

The Court, the parties, State Attorneys and Advocates all share the burden of ensuring the delivery of timely justice.

Again with the aim of accelerating trials, Order VIII A Rule 3 (3) of the Civil Procedure Act[20] introduced in 1994 sets out various speed tracks that civil cases are required to cruise. The maximum thereunder is a period of twenty-four months, which can only be departed from by the Court where it is necessary in the interests of justice.[21] The Civil Procedure Decree of Zanzibar[22] does not contain similar provisions.

## V. Judicial and Legal Strength

One factor contributing to the delay in justice delivery is the low judge-population ratio. There is a glaring scarcity of Magistrates, especially at the Primary Courts. Of the 1,105 Primary Courts in Tanzania, 346 are being attended to by roving or visiting Magistrates based elsewhere who dispense justice during periodic visits. Commendable is the decision of the Government on 3rd February 2012 to grant the Judiciary permission to recruit 300 Primary Court Magistrates with Bachelor of Laws degrees as the minimum qualification for appointment.

Today, Tanzania has a judge-population ration of 1:537,500 and Zanzibar 1:205,800. In 2008, India had a ratio of 1:71,400 persons. The ratios in Europe in 2008 were much lower - 21: 100,000 in Austria, 24: 100,000 in Belgium, 25: 100,000 in Germany, 27: 100,000 in Hungary and 28: 100,000 in the Czech Republic.

Access to justice is also greatly facilitated by legal representation by advocates or other legal aid providers. With 2,317 enrolled advocates by 15th April 2012, Tanzania is dwarfed by South Africa which has 10,000 practicing lawyers in a population nearly similar to that of Tanzania - 43 million.[23] While today Tanzania has one advocate per 18,558 persons, in 1999 South Africa had one lawyer per 4,300 inhabitants.[24] In the whole of Kigoma Region, there is only one practicing Advocate and only one legal aid provider, the National Organization for Legal Assistance (NOLA) with only one Advocate resident there. Similarly, Zanzibar with 46 practicing Advocates based there has one Advocate per 26,843 persons. The strength and spread of practicing legal professionals needs to be increased in order to cope with the demand for accessible and expedient justice delivery.

Accessed from LHRC Constitutional Database

[20] Cap 33, R.E. 2002.

[21] Order VIIIA (4).

[22] Cap. 8, Laws of Zanzibar.

[23] McQUOID-MASON, D., *Access to Justice in South Africa*, 17 Windsor Year Book, pp. 230, 230 (1999); See also, "The Delivery of Civil Legal Aid Services in South Africa," Vol. 24 Issue No. 6 *Fordham International Law Journal*, 2000, pp. S 111-S 142.

[24] Ibid, p. 230.

Accessed from LHRC Constitutional Database

## VI. Right to Legal Representation and Legal Aid

A significant barrier in accessing justice is the inadequacy of legal services, particularly legal representation for the indigent accused. It is a truism that many accused persons charged with grave offences such as sexual violence and armed robbery are unrepresented by legal counsel during trials and on appeals. The offence of rape may carry a sentence of life imprisonment, with the mandatory minimum being a sentence of thirty years imprisonment. In drawing petitions or memorandums of appeal, many convicted accused rely on Prisons Wardens or even other inmates. The inability to engage and instruct an Advocate in such cases places an accused or appellant in a most precarious situation in terms of the full exercise of the right to defend oneself against a criminal charge.

Expressing this aspect of access to justice on the occasion of the 25th Anniversary of the Court of Appeal of Tanzania, Benjamin Mkapa, the former President of Tanzania had this to say:

> The majority of our people are poor, and if access to justice is determined by ability to afford professional legal counsel, the majority of tax payers who sustain our judicial system will be the very ones to be shut off from it. In other words we will tax the majority of Tanzanians to provide justice to the minority who can afford it. … But a line must be drawn, a threshold determined, below which no citizen should find him or herself, unable to access justice in a free and democratic society. Legal discrimination on the basis of economic status is not right.[25]

In Tanzania, by the Legal Aid (Criminal Proceedings) Act, 1969[26] a Judge or any Presiding Officer may appoint an advocate to represent an accused person in any charge made against him or her at the Government's expense.[27] As a matter of entrenched practice and given financial resource limitations, this discretion is fully exercised only in respect of accused charged with capital offences. It has also been used, albeit in a limited manner, for accused charged with offences related to illicit trafficking or possession of drugs.

With regard to access to legal representation in civil cases, there is no guaranteed right for an indigent litigant to be assigned an advocate at Government expense. The generosity of the law, if at all it can be so described, is only to grant remission of court fees on the filing of a civil case *"in forma*

---

[25] MKAPA, Benjamin William, "The Legal System Should be More Accessible and Affordable to More Tanzanians," op. cit.

[26] Cap. 21 R.E. 2002.

[27] C.f. In Zanzibar, by Section 197, Criminal Procedure Act No. 7 of 2004 the Court may assign an Advocate to defend an accused at any trial involving a capital offence at the expense of the Government.

*pouparis"*.[28] This places a stern limitation to the enjoyment by the poor and other disadvantaged persons, including women, of their rights and of access to the formal justice system.

On the legal aid gap, a noteworthy effort is being made by legal aid organizations that provide *pro bono* legal services. The Tanganyika Law Society, the Zanzibar Law Society, the Tanzania Association of Women Lawyers (TAWLA) and Legal Aid Clinics operated by Law Faculties of Universities also offer appreciable legal representation to indigent persons. These initiatives must be multiplied and supported.

A dire need exists for a Government legal aid policy, a comprehensive legal aid scheme and the adequate allocation of resources to allow indigent accused charged with or convicted of serious offences and poor litigants in civil cases to avail themselves of effective legal representation. Inevitably, the inability to engage or obtain legal representation affects the fairness of the formal justice system.

Accessed from LHRC Constitutional Database

## VII. Court Procedures and Technicalities

For completeness, a discussion on access to justice must address procedural barriers and court processes. Article 107A (2) (e) of the Constitution directs the Court to observe the principle that justice is to be dispensed without being tied up with undue technical provisions which may obstruct the dispensation of justice.

Court procedures are a must. They are indispensable for the orderly conduct of court business. Court rules weed out frivolous matters. Without procedures, chaos would reign and litigation would be endless. It is irrefutable that rules of procedure are "handmaids rather than mistress of justice".[29] However, what is to be decried and expunged are cumbersome, excessive, onerous, obstructive and unnecessary procedures.

The "tyranny of technicalities" in law and justice is not a new problem; it is only that it has not been eradicated. In an article titled 'Technicalities of English Law' published as early as 18th September 1823, John Stuart Mills criticised the English Courts for the quashing of criminal charges on technical grounds, including in one instance the omission of a Magistrate's name in an indictment that had charged bakers for selling bread otherwise than by weight and in another, because an illiterate informer, instead of writing the word "afternoon" had written "after-noon".[30]

---

[28] Rule 8, Court Fees Rules, G.N. No 308 of 1964.

[29] COLLINS, R.M., *Coles and Ravensher* (1907) 1 K.B. 1.

[30] *Morning Chronicle*, 18 Sept.1823, p. 2 cited in *The Collected Works of John Stuart Mill*, XXII, Newspaper Writings December 1822 – July, 1831, Part I, Ann P. Robson and John M. Robson (eds.), Toronto: University of Toronto Press, London: Routledge and Kegan Paul, 1986.

He succinctly lamented:

> All formalities which do not facilitate the attainment of truth, are utterly useless, and as they almost always enhance the trouble and experience, they amount to a tax upon justice, and frequently the utter denial of it.[31]

Efforts need to be constantly made to simplify and streamline Court procedures to render them more user friendly and less technical. The choice must always be substantive justice, not mechanical justice. A technical application of rules of procedure should not foreclose the attainment of substantive justice. Litigation should not turn into a contest of technicalities or theatrics in advocacy. As a Constitutional principle, substantive justice must prime over legal technicalities.

## VIII. Court Processes

Another major obstruction in the path to increased access to justice and justice delivery relates to court processes. Effective and transparent processes reduce the costs and duration of litigation. They increase efficiency. Today, especially at the subordinate courts, the Judiciary operates manually, not electronically. The Judiciary must keep pace with technology, particularly court related electronic solutions. It has to embrace Information Communication Technology (ICT), much as this is an acknowledged costly affair. The typewriter, pet-named "Marimba" in the lower Courts is purposely being replaced by the Computer. There is a phenomenal increase in computer literacy among Resident Magistrates and Judges. Case Management System and Court Recording Systems have been introduced and are operating in some of the Courts. A widespread use of ICT by the Courts would greatly reduce the frequent complaints by intending appellants on the late or non availability of records of proceedings and judgments for appeals purposes. Technology is an asset to justice delivery. Court process reforms must embrace it fully.

## IX. Access to Justice and Victims

A discussion on access to justice would be remiss without any reference to victims of crime and others excluded or marginalized by laws and the justice system. In our criminal justice system, essentially it is the DPP who represents public interest and those of the victims of crime. Often, the victim's role in our Courts is one confined mostly to that of a star prosecution witness.[32]

[31] Ibid.

[32] C.f. At the Primary Court level, it is the complainant of a criminal wrong who pursues his or her own prosecution before the Court.

Accessed from LHRC Constitutional Database

## X. Affordability and Access to Justice

Access to justice may be seriously hindered by costs. To be readily available, justice must be affordable. A perusal of the court fees in Tanzania and Zanzibar shows that they are not an impediment to access to the formal justice system. In the former, the fees for filing a Constitutional petition are Tz shs 10,000/=, a civil application Tz shs 2,000/=, a plaint from Tz shs 3,000/= to 120,000/= and a civil appeal Tz shs 1,500/=.[33] In Zanzibar, the court fees for filing a Constitutional petition are Tz shs 5,000/= and a civil application Tz shs 5,000/=. In *Lybeorpoulous v Svilan*, Kernot and District Court of SA,[34] the Court had this to say on court fees:

> In a society governed by law no barrier can be erected against reasonable access to the courts against vindication and protection of legal rights. To ensure that litigation is not frivolously commenced, modest fees have traditionally been exacted but the courts have reserved a dispensing discretion to ensure that, where litigation can be seen to be justifiable, poverty is no bar to the operation of the law.

Court fees are not the only cost of litigation. Instructing and maintaining learned counsel and, for an unsuccessful party, meeting the opposing party's costs may prove to be an expensive affair for low or even middle income Tanzanians. In one election petition arising out of the 2005 parliamentary elections, an unsuccessful party was taxed costs at about Tz Shillings 40 million (USD 25,000). It is vital, therefore, that the poor are not priced out of the justice system by exorbitant fees and associated costs. That apart, self representation in Court proceedings, particularly where complex cases are involved, carries a certain risk. This can be mitigated by legal representation provided it is reasonable and affordable to an impecunious litigant.

## XI. Alternative Dispute Resolution (ADR)

Allen and Mohr have fittingly advised - taking a dispute to court ought to be a *last resort*, not a *first choice*.[35] It is universal that justice is dispensed through both the formal and informal systems- all essential to the just and fair determination of disputes. Traditional or customary systems which often entail community participation go a long way in rendering appropriate justice at the grassroots level. The methods often employed include reconciliation, mediation and peaceful and amicable settlement of disputes. Picking a leaf from this system, for a number of minor criminal offences and civil disputes at the ward

---

[33] See, The Court Fees (Amendment) Rules, 1997, G.N. No. 248 of 19/6/1997.

[34] Case No SCCIV-01-703 (2001) SASC 254, 2nd August, 2001, para. 23.

[35] ALLEN, E.L and Mohr, D.D., *Affordable Justice: How to Settle Any Dispute, Including Divorce, Out of Court*, West Coast Press, 2nd ed. July 1998, p. 2.

Accessed from LHRC Constitutional Database

level, formal justice is dispensed by Ward Tribunals established under the Ward Tribunals Act.[36] The primary function of these Tribunals is to secure peace and harmony by mediating and endeavoring to obtain just and amicable settlement of disputes.[37] With regard to suits of a civil nature, a court annexed mediation process by which the Court attempts to resolve the case through mediation has been in place since 1994.[38] Furthermore, the Commission for Mediation and Arbitration (CMA) set up as an independent government department mediates or arbitrates over labour disputes.[39] The CMA's success in the mediation and arbitration of labour disputes has significantly reduced litigation that would have ended up at the Labour Division of the High Court. Viewed as a whole, deservedly, ADR mechanisms must be part of the equation for meaningful access to justice and justice delivery.

## XII. Conclusion

Access to justice is not just an alleyway to the justice system or the Courts. It engulfs a right much wider and more interconnected with the rule of law, human rights and other social justice matters, including concerns affecting the poor and the most vulnerable. To make meaningful strides, critical barriers to access to justice must be overcome. Measures would include the raising of legal awareness and paying special attention to Kiswahili as the prime language for justice delivery. The formal justice system needs to spread out and move down to the communities, particularly to rural and remote areas of Tanzania. Communities should not bear the brunt and high cost of striving to bring institutional justice. Timely justice must be turned into a norm, not an episodic event in justice delivery. A comprehensive legal aid policy, schemes and programmes need to be developed and buttressed. The scope of legal representation for the indigent in both criminal and civil proceedings must be expanded to include those most likely to bear an unacceptable risk in self-representation in Courts of law. Substantive justice must override technicalities and theatrics of the law. Access to justice, if successful in all its aspects, will lead to sustainable human, social and economic development. This goal must always be kept in view.

Accessed from LHRC Constitutional Database

---

[36] Cap. 206, R.E. 2002.

[37] Sections 8 (1), 16 (1).

[38] See, Order VIIIA-C, Civil Procedure Code, Cap 33, R.E. 2002.

[39] Part III, Commission for Mediation and Arbitration, The Labour Institutions Act, Act No. 7 of 2004.

Accessed from LHRC Constitutional Database

# General Articles

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# THE RIGHT TO DEMOCRATIC GOVERNANCE IN INTERNATIONAL LAW AND THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE

*Adama Dieng*[1] *& Charles Riziki Majinge*[2]

I. Introduction
II. Democratic Governance in International Law
III. Democracy and the United Nations
IV. International Financial Institutions and the Right to Democracy
V. Regional Organizations and the Development of the Right to Democracy
VI. Rationale of Promoting Democracy
VII. The Development of the Right to Democratic Governance in Africa
VIII. The Process Leading to the Adoption of the African Charter on Democracy
IX. The African Charter on Democracy, Elections and Governance
X. Evaluating the Impact of the Democracy Charter
XI. Challenges to Democratic Governance in Africa
XII. Conclusion

## I. Introduction

The protection and enjoyment of international human rights is increasingly being acknowledged as a universal entitlement. This argument is premised on the fact that since the adoption of the landmark Universal Declaration of Human Rights in 1948, a significant number of human rights instruments which articulate entitlements and duties of peoples have been adopted both at the international and regional levels. This recognition of rights is founded on the notion of universality with the primary claim that human rights matter for everyone regardless of place of origin, sex or social status. For example, the international community has moved to recognize and reaffirm various rights which previously were not considered as part of mainstream human rights. The rights of women, children, the disabled, indigenous people, minorities and people in same sex relationships among others, have been progressively recognized and their protection has beem assuming a universal trajectory. This recognition is significant because it has placed these issues, previously limited to national discussion, in the international arena.

---

[1] United Nations Secretary-General's Special Adviser for the Prevention of Genocide and former UN Under Secretary-General and and Registrar, United Nations International Criminal Tribunal for Rwanda, Arusha, Tanzania.

[2] Doctoral Candidate, London School of Economics, London, the United Kingdom.

Accessed from LHRC Constitutional Database

The right to democratic governance connotes the right of people to be consulted and to participate in the process by which political values are reconciled and choices are made. Rights to free speech, participation in public affairs, freedom of assembly and association and religion are some of the elements which underpin the right to democratic governance. Despite this claim of universality it is worth acknowledging that its enjoyment has been neither uniform nor universal because countries have a different perception on how attributes related to democracy can be pursued and realized. For example, the right of the governed to decide who should be their governor may be universal, except in the way this right is exercised - through either direct or representative democracy. Similarly, irrespective of one's country of origin, it is universally acknowledged that all people have the right to participate in the determination of issues which independently or collectively affect them though clearly the mode of participation may differ from one society to another.

In 2007, African Union member states adopted the African Charter on Democracy, Elections and Governance. Essentially this Charter reaffirms the African commitment to democratic governance and advancement of international human rights values that Africa has progressively embraced. However, this Charter is not the first instrument to articulate the right to democratic governance in Africa; rather it builds upon previous initiatives which were adopted to advance similar objectives. This contribution seeks to examine the reasons behind the negotiation and eventual adoption of the African Charter on democracy. Why did African countries decide to embrace democratic values which they seem to have rejected by their indifference to various international and regional instruments they committed to respect? If African countries failed to implement democratic ethos reflected in international instruments which they have progressively signed, what guarantees are there that the adoption of the Democracy Charter will herald a new era of democratic governance on the continent? Perhaps a crucial question is: How does the Charter respond to the legitimate claims of African people to democracy or to recent events in the North African 'Arab Spring' that have led to the collapse of autocratic regimes in Egypt, Libya or Tunisia? This contribution seeks to answer these questions.

This article aims to further explore the linkage between the right to democracy and human rights. The nexus between democracy and human rights can be inferred in the right to political participation which requires that people be given an opportunity to participate in the determination of issues affecting them independently or collectively. Similarly, the right to the claim for self-determination of peoples that has been internationally recognized can be considered to represent the recognition of the right to democracy at the collective level. Self-determination entails the right of peoples to determine their destiny and the way they want to be governed. Indeed, it is on the basis of the right to participate in public affairs and the right to self-determination, both enshrined in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR),

Accessed from LHRC Constitutional Database

that the Vienna Declaration and Programme of Action was adopted in 1993 during the World Conference on Human Rights.

Paragraph 8 of Section I of the Programme of Action states that 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing … that the international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world'. Reading from this provision one may ask: What kind of democracy was the 'international community' mandated to promote? What happens if the government subjects itself to the popular will of the electorates in a process considered unfair? Can it still be argued that the will of the people has been exercised? Or can the international community impose its own version of democracy? And in any case who has the mandate to evaluate or legitimize a particular democratic process according to the international standards? While addressing these issues, this contribution will argue that Africa can no longer claim that democracy is an imposition of the western countries which do not take into account the peculiar nature of African problems. Rather, it is a concept well ingrained in different commitments that African countries have undertaken both at the regional and international levels.

Despite this linkage between democracy and human rights and the role of the international community to support democratic reforms, it gives rise to a number of interlocking questions mainly because democracy remains a contested concept from one society to another. It is an ideal whose embrace is equalled by its critique. However, a closer examination demonstrates that countries do not object to the usefulness of the concept itself; rather, they insist on their own version which they consider relevant and reflective of their particular situation. In fact the challenge to democratic governance lies in the way the concept is conceptualized and advanced by different constituents. These differences are critical because they mean that each contesting party defines democracy in a way that advances its claims. It is partly because of this contestation of democracy as to its legal status in international law and its context specific application that has provided a compelling need for this inquiry.

## II. Democratic Governance in International Law

Despite the pessimism of earlier scholars and jurists on the appropriateness of democracy with universal values, some western countries progressively enshrined this concept in their constitutions and fully recognized that the will of the people shall be the basis of any government authority. The government of the United States through its American Declaration for Independence in 1776 reaffirmed that citizens are endowed with 'inalienable rights' protected by governments which 'derive their just powers from the consent of the governed'. Similarly, the French government in the constitution adopted after the French revolution in 1789 reaffirmed the right of the people to be the basis of

Accessed from LHRC Constitutional Database

government authority. Earlier before, the British government had recognized in 1215 through the Magna Carta rights of citizens. Arguably, these developments did not mean that the concept of democracy was gaining universal recognition; rather it meant that citizens were progressively being recognized as the basis for legitimate government authority. This argument is made in light of the fact that even in the western countries which considered themselves pioneers of democracy, during this period until the mid-20th century, the right to participate in a democracy such as voting was confined to a narrow section of society, defined by class, race and sex.

The recognition of democracy as the key feature of government gained currency at the end of the 19th century when some Western powers recognized that states needed to adopt a certain form of government to guarantee predictability in commerce and international relations. For example, Woodrow Wilson described America's entry into World War I as a necessary undertaking to make the world 'safe for democracy'. Arguably this decision did not result in a world safe for democracy because victorious powers who redrafted the rules after the war punished the defeated powers, causing discontent which led to another war. Nevertheless, this was an initiative which demonstrated that big powers were willing to take both safe and risky measures to promote democracy beyond their national frontiers as long as it served their interests. The right to democratic governance can be argued to have crystallised through four different contexts namely: through the United Nations, international financial institutions (IFIs), regional institutions and individual countries: These contexts are examined in detail below.

Accessed from LHRC Constitutional Database

## III. Democracy and the United Nations

The right to democracy and democratization process took a new trajectory after the Second World War. This period witnessed the negotiations and adoption of the United Nations Charter and other international human rights instruments which reinforced the right to democracy. Worth noting is that the term 'democracy' does not appear in the United Nations Charter and indeed is not a pre-requisite for membership in the organization. This reality was reflected in the non-intervention and sovereign equality of states principles whose adherence was held dear by all countries especially small and developing ones wary of external interference in their domestic affairs.

While the United Nations Charter and the Universal Declaration of Human Rights did not make express provision for the right to democracy, today's articulation of the right to democratic governance is premised on the UN Charter and different international human rights instruments. As to why neither the Charter nor the UDHR make the articulation of the right to democratic governance, can be attributed to the fact that in the immediate post war period democracy was considered as a domestic affair. And since the UN Charter was premised on sovereign equality of states and non-intervention, any advancement

Accessed from LHRC Constitutional Database

of democracy would have been considered by countries as unwarranted intervention in internal affairs of states denying them their right to determine their system of governance in accordance with their needs and aspirations. Indeed, Western countries were morally compromised to champion the right to democracy precisely because they were still abusing the very ideals of democracy they were purporting to advance through oppression and subjugation of their colonial subjects.

After the adoption of the UN Charter and Universal Declaration of Human Rights, the international community was confronted with the challenge of the cold war, which was essentially premised on the differences in ideologies between Eastern and Western countries on how the world order should be structured. This had profound implications on the development of the right to democracy. It is in this period that under the auspices of the United Nations the international community negotiated and adopted the ICCPR and ICESCR. The negotiations and adoption of these instruments galvanized the progressive recognition of the right to democratic governance. It reaffirmed the right to self-determination of peoples which essentially recognizes the right to democracy at the collective level. It also made the right to political participation that called for state parties to guarantee and facilitate the right of citizens to participate in the determination of affairs which directly affected them central to its enforcement. The articulation of the right to political participation was significant because it reaffirmed the obligation of states to create a conducive environment within which this right could be exercised. Worth noting is that during the cold war period the international community adopted different international instruments which can be argued to reaffirm the right to democratic governance. However, these instruments remained largely in texts without enforcement due to the prevailing realities of the cold war.

The collapse of the Berlin wall in 1989 heralded the end of the cold war and provided an opportunity for the United Nations to advance the right to democratic governance. The question worth posing is: What changed, to elevate the right to democratic governance to a global entitlement as stated by Tom Franck? The post cold war period witnessed the triumph of western inspired liberal democracy and the failure of communist ideology as a form of democracy. But what brought these abrupt changes in the global democracy discourse? Many factors militated against this outcome - the desire of citizens in countries to live in an environment where personal freedom and the right to participate in decisions affecting them were respected. Also the economic dimension which accompanied the liberal form of democracy was considered to be conducive in advancing both the material and political wellbeing of citizens in countries that were yet to adopt these reforms.

Invoking the UN Charter and other international human rights instruments, the United Nations progressively assumed the role of working together with member states to create an environment within which democracy and human rights could be realized. For example in 1991, the UNGA adopted a

resolution stressing that 'periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social, and cultural rights'. Indeed, the UN Secretary General Boutros Ghali, while reaffirming the crucial role of the United Nations in advancing democracy, stated that 'democracy is an ideal that belongs to all humanity.'

In 1999, the United Nations Commission on Human Rights adopted what can be considered a ground breaking resolution on democracy, in the sense that for the first time the UN body had adopted a resolution specifically focused on the role of democracy in advancing international human rights. The resolution recognized the rich and diverse nature of the community of the world's democracies and reaffirmed the right to full participation and other fundamental democratic rights inherent in any democratic society. The significance of this resolution lay in its successful attempt to challenge the long held views that what happens within states was of little significance for other countries. It is no wonder that China and Cuba, countries known for their opposition to interference in their domestic affairs, abstained from this resolution.

It is worth noting that while the United Nations has taken various major steps to promote democracy it has eschewed promoting a specific 'version' of democracy. For example in 2005, the UN established the UN Democracy Fund whose main objective was to support 'democratization throughout the world'. While the 2005 Summit Outcome Document reaffirmed that democracy is a universal value based on the expressed will of the people to determine their political, social and cultural systems, it rejected any 'single model of democracy,' noting that 'democracy does not belong to a single country or region'. Indeed, in the earlier Report titled *Agenda for Democratization*, the Secretary General had noted that 'the imposition of foreign models contravenes the UN Charter principles of non-intervention in internal affairs'. The report emphasised that 'it is not for the United Nations to offer a model of democratization or democracy or to promote democracy in a specific case.' Rather the organization considered its objectives as simply 'to offer assistance and advice leaving countries to choose the form, pace and character of their democratization process.'

Despite this resistance by the United Nations to advance a specific version of democratic governance, international bodies set up to interpret international human rights instruments have significantly contributed to the recognition of the right to democratic governance in international law. Arguably, some of these instruments are not binding as international treaties but their interpretation provides much needed guidance to states and institutions while discharging their obligations underpinned by these instruments. The interpretative role of these

Accessed from LHRC Constitutional Database

bodies deny excuses for countries wanting to ignore their responsibilities on the pretext of ambiguities in the wording of the respective treaty.

In 1996 the UN Human Rights Committee in its General Comment on the right to participate in public affairs reaffirmed the cornerstone of the right to democratic governance. The General Comment noted the right of every citizen to take part in the conduct of public affairs and urged governments, irrespective of their constitutional systems, to adopt measures necessary to ensure that citizens have an opportunity to enjoy the right to participation. In fact the Committee stipulated what would amount to the 'conduct of public affairs' by stating that it covers all aspects of public administration, formulation and implementation of policy at the local, regional and international levels. The Committee further asked states to establish constitutional frameworks within which the right could be exercised by citizens. Commenting on the right to vote, the Committee urged states to guarantee the right without restrictions and allow citizens to exert influence through public debate and dialogue with their representatives or through their capacity to organize themselves.

The UN Human Rights Committee, while interpreting Article 5 paragraph 4 of the Optional Protocol to the ICCPR, observed that 'restriction on political activities outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs'. In this communication the Committee asked the state party to provide compensation to the victim and ensure that similar violations do not occur in the future. As such it can be argued that while the international community adopted different instruments augmenting the right to democratic governance, it is only after the end of the cold war in early 1990s that these instruments and institutions took measures to interpret these commitments into concrete results.

## IV. International Financial Institutions and the Right to Democracy

Beginning the 1990s, the World Bank changed its approach in the way it dealt with its client countries by stating that good governance is a legitimate concern of the institution. This change was largely prompted by the World Bank Report in 1989 on Sub Saharan Africa which characterized the crisis in the region as the 'crisis of governance'. Examining this new approach of doing business by the World Bank and the IMF, the question is not whether they advanced democracy on the continent but rather what kind of democracy they advanced and what underlying approach lay behind their policies. A closer examination of the Bank`s commitment to governance issues in this period demonstrates that it was influenced significantly by the need to promote free market economies and a conducive environment for foreign investment consistent with their policies. However, one can argue that for these institutions it was a radical departure from their previous practice when they had avoided trading on this path of governance and democratization. This reluctance can be attributed to their founding

Accessed from LHRC Constitutional Database

instruments which prohibited them from getting involved in domestic affairs of a political nature within their member states.

While countries in the global south have been ardent critics of the 'democratization wave' labelling it as another western inspired imperialism project, they did little to counter the democratization process undertaken by the multilateral global governance institutions like the World Bank and the IMF. Perhaps this state of affairs can be attributed to the fact that the rejection or acceptance of these institutions' democratization agenda came with consequences. Most African countries complied with the Bank's prescriptions not so much in the belief of democracy itself but rather because they expected these institutions to fund a significant part of their development agendas, hence the need to comply with its governance and rule of law directives.

## V. Regional Organizations and the Development of the Right to Democracy

Though the right to democracy did not find its way into the United Nations Charter, it did figure in other constitutive regional instruments adopted in the post-war period, notably the European Convention on Human Rights and the Charter of the Organization of American States (OAS). Admittedly, the former did not make an express articulation of the right to participation but its accompanying protocol and progressive interpretation by the European Court of Human Rights have made democratic governance a core feature of the European integration. This aspect concretizes the notion that the right to democratic governance assumed international stature before it could gain a foothold in many countries. The European Charter, while making no direct reference to democracy, requires its members to hold free elections at reasonable intervals by secret ballot. Closely related to this is the 1990 Charter of Paris which requires EU members to build, consolidate and strengthen democracy as the only system of government for EU nations.

The OAS preamble reaffirmed that 'representative democracy is an indispensable condition for the stability, peace and development of the region'. It futher stated that one of its core purposes was 'to promote and consolidate representative democracy, with due respect for the principle of non-intervention'. In 2001, the OAS adopted Inter-America Democracy Charter which guarantees that 'every state has a right to choose, without external interference in its political, economic and social system and organize itself in the way appropriate to itself'. It can therefore be argued that while international efforts to progressively translate commitments to democratic governance into concrete results were constrained by the cold war realities, regional efforts achieved significant progress especially when member states were committed to the same ideals as reflected in the respective instruments. Indeed, this argument is demonstrated by the advancement of the right to democracy through the European Charter on Human Rights by the European Union member states.

Accessed from LHRC Constitutional Database

Critical examination of the right to democratic governance would demonstrate that it is not only international institutions such as the United Nations and World Bank or IMF which have been at the fore of its promotion, but even individual countries have adopted the right to democratic governance as the criteria underpinning their relationship with other countries. For example, increasingly, powerful countries such as the United States, Germany, Britain, and France among many others condition their economic assistance to developing countries on 'good governance' and 'democratic reforms'. In fact countries like the United States and Britain have even justified military intervention in other countries to build democracy. Similarly, the US has established what it calls the Millennium Challenge Account (MCA) which requires countries to democratize and adopt good governance systems in order to qualify for funding. It is not only powerful countries which have adopted this strategy of linking economic assistance to democratization but also powerful regional institutions such as the European Union have adopted a similar strategy. From the so-called 'Copenhagen criteria', countries wishing to join the European Union club are required to observe the rule of law and democracy as a prerequisite. Depending on the country concerned, democracy is increasingly defining the relationship between countries especially developed western countries and least developed countries in the global south.

Accessed from LHRC Constitutional Database

## VI. Rationale of Promoting Democracy

Amidst this wave of democratization, what kind of democracy exactly is being promoted? Is the understanding of democracy uniform among international actors such as the World Bank, the United Nations and individual donor countries? Among these actors, though they share common premises on the fundamentals of democratic society such as the respect for human rights, free and fair elections, and citizenship participation in public affairs or accountability by government institutions, they adopt different strategies in translating their vision of democracy. Each actor promotes democracy in a way which it deems appropriate in achieving its own interests or advancing its own objectives. For example, the World Bank promotion of the right to democratic governance has always been centered on its efforts to promote accountability in the use and allocation of funds provided by the Bank and advancement of the free market economies.

For donor countries like the US or Great Britain, democracy promotion has meant that countries must follow the western style form of liberal democracy, advance human rights and fight terrorismall critical to the latter`s national and security interests. For the United Nations, democracy is increasingly being linked to peace and stability and respect for human rights and the rule of law. The assumption being that if countries become accountable to their own people, adopt transparent electoral systems, recognize and respect human rights of women, children, minorities or the disabled, they will mitigate the causes of conflict and in the process concentrate on development issues.

From the UN perspective it can also be argued that the development of the right to democratic governance was further concretized by the 'new era' of the rule of law and accountability for past crimes, which emerged after the cold war. The argument was that if a country respects the rule of law where the state is accountable to its electorate, addresses corruption and venal governance and the government works toward improving the welfare of its citizens, it would gain the hand of the international community to improve its social economic conditions. All these objectives were advanced in the context of the United Nations Charter and other international human rights instruments that had been adopted earlier by the United Nations member states.

Despite the multitude of institutions and countries with different motives and strategies in advancing democracy, it should be acknowledged that these actors have significantly contributed to making the right to democratic governance a legitimate claim just like any other right enshrined in the different international human rights instruments. The fact that African countries have recognized and affirmed the importance of this right through different instruments can be argued to represent a new milestone in the recognition of democratic governance as a right within African political and legal dimensions. The next section will examine the development of the right to democratic governance in Africa and how this development contributed to the efforts to negotiate and adopt the African Democracy Charter.

Accessed from LHRC Constitutional Database

## VII. The Development of the Right to Democratic Governance in Africa

Having examined the development of the right to democratic governance in international law, it is important that we examine its development and understanding in the African legal and political context. The recognition and progressive development of the right to democratic governance in Africa cannot be discussed without linkage to the global events which characterized its development and uptake. Events taking place after the collapse of the Berlin wall were decisive in galvanizing the recognition of the right to democratic governance in Africa. While previously African countries had the luxury of choosing between various competing systems as reflected in the cold war configuration, after this period countries were compelled to adopt 'democratic reforms' tailored to the western form of democracy. This abrupt change did not come cheap because African governments were compelled to embrace reforms even if they were against them or such reforms threatened their continued hold on power.

There are many factors that provided a compelling need for African countries to progressively recognize and reaffirm the right to democratic governance. The increasing global scrutiny on the importance of democracy in development, the practice of wealthy nations and international financial institutions to condition their assistance to the respect for democracy, popular discontent among citizens eager to win their 'freedoms' against autocratic

leaders organized under the banner of civil societies, all these collectively compelled African governments to adopt institutional and legal frameworks to advance democracy in Africa. It is this commitment, demonstrated through a wide array of instruments, that this contribution seeks to examine and reappraise the dividing line between reality and rhetoric of African leaders to the cause of democracy in Africa.

While it would be unrealistic to generalize all African countries' commitment to democracy during and after the cold war, it can nevertheless be argued that most countries adopted similar measures which made the progressive realization of the right to democratic governance difficult. The political leadership in post-independent Africa was acquired through two means. One was dictatorship, where governments came to power through military coups and hence citizen's choices were hardly respected. Under this category were countries like Nigeria, Sudan, Guinea and others. The second mechanism was observed in countries that upheld regular elections for political office for both the President and the legislature. However, participation was limited to appointees of the ruling party. As such any political participation had to be undertaken in the framework of the ruling party.

The OAU Charter adopted and promulgated in 1963 did not contain the word 'democracy'. This fact can be assessed from the historical context within which the Charter was adopted. When the Charter was adopted in 1963, the organisation was more preoccupied with the desire to address the challenge of colonialism on the continent than the aftermath of colonialism itself. It is against this reality that the Charter was underpinned by the clause of non-interference in internal affairs and sovereign equality among the member states. It was in this period that some countries such as Central African Republic, Ethiopia, Nigeria, Uganda and Sudan abused the fundamental rights and freedoms of their people without being sanctioned either by the OAU or its member states. This state of affairs was premised on the recognition by African countries of the western colonial masters being their common enemy posing an existential threat to their survival as independent sovereign nations. But also the view that condemning their peers for human rights violations might lead to the scrutiny of their own records discouraged most of them from criticizing other countries for human rights violations.

In 1981, the OAU adopted the African Charter on Human and People's Rights. This Charter, adopted on the heels of widespread violations of human rights on the continent, was testimony that Africa was waking up to the reality of the cost resulting from human rights abuse inflicted on its citizens. The Charter did not expressly recognize the right to democratic governance but it recognized and reaffirmed some fundamental rights that were previously absent. Most of the rights and duties relevant to the advancement of the right to democratic governance were already provided for under various international human rights instruments such as the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. Nevertheless, the adoption of this

Accessed from LHRC Constitutional Database

instrument was significant because it was considered as a 'home grown' solution to the human rights violations on the continent.

In general, the adoption of the Charter carried a symbolic value as a document negotiated and adopted by Africans themselves rather than one adopted within the framework of the international community. In reality this document did not change much in the advancement of the right to democratic governance in Africa because military coups and dictatorships continued to proliferate on the continent, single party states which effectively limited political participation became the norm rather than the exception and restriction on the enjoyment of most civil and political liberties continued unabated in the name of national security. Despite this grim reality, it is evident that having the provision adopted in the Charter recognizing the right to freely participate in the affairs of government provided an impetus in the later development and influence on the right to democracy on the continent.

In 1990, African countries under the same OAU adopted the 'African Charter for Popular Participation in Development and Transformation'. This Charter was adopted during the Conference titled 'International Conference on Popular Participation in the Recovery and Development Process in Africa'. The wording of the title was notable because it did not mention the word 'democracy' in its theme. Despite the non-mention of democracy, this Conference significantly contributed in the acceleration of democratic reforms through the recognition that popular participation was critical to economic and social development. Another distinctive feature of this Conference was that it was a collaborative effort between the OAU, African governments, non-governmental organizations and United Nations agencies. Its main objective was to search for a collective understanding of the role of popular participation in the development and transformation of Africa. This development marked a milestone in the advancement of the right to democratic governance on the continent because it demonstrated that African governments recognized the need for the people and in particular civil societies to participate in the decision making process of their governments.

## VIII. The Process Leading to the Adoption of the African Charter on Democracy

In 2007 African countries adopted the African Charter on Democracy, Election and Governance as a mechanism to enhance democracy on the continent. The negotiations and adoption of the Democracy Charter were preceded by four important instruments which collectively had reaffirmed the right to political participation as the basis of legitimate government. These instruments were the Declaration on Unconstitutional Change of Government, the African Union Constitutive Act, the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance and the African Peer Review Mechanism. This section will provide an in-depth examination of these developments and how

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

they influenced the ultimate negotiations and eventual adoption of the African Democracy Charter.

Through the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, the OAU Heads of State and Government made a clear articulation of the role of democracy in advancing good governance and the rule of law. The Declaration rejected the unconstitutional change of government as 'an unacceptable and anachronistic act, which is in contradiction of our commitment to promote democratic principles and conditions'. This was a milestone in a continent where a few years previously the word democracy was viewed as a challenge to the established legal and political order. Specifically the Assembly recognized that 'the principles of good governance, transparency and human rights are essential elements for building representative and stable governments and can contribute to conflict prevention'. What is significant in this articulation is that the OAU had realized that good governance and the rule of law were linked to the scourge of conflicts which continue to afflict post-colonial Africa.

Departing from its previous stance where it considered democracy an imposition of western powers, the OAU went to great lengths to reaffirm the need to provide 'a solid underpinning to the OAU's agenda of promoting democracy and democratic institutions in Africa beyond invoking relevant declarations issued by various sessions of our Assembly and the Council of Ministers'. In fact the organization recognized that 'these principles are not new; they are, as a matter of fact, contained in various documents adopted by our Organization'. The Declaration on the Unconstitutional Change of Government was significant in the sense that it articulated what AOU considered to constitute democratic governance.

This demonstration of commitment by African leaders to democratic governance raises some questions- why, all of the sudden, were unconstitutional changes in government seen as a threat to peace and stability of the continent? This question is significant because previously Africa had witnessed several military coups without any response from the OAU. One can argue that the price tag of these military coups was becoming unsustainable in terms of human life and also the significant increase in refugees, poverty and transnational crime. Indeed in the Declaration the Heads of State and Government recognized that unconstitutional changes of government are sometimes the culmination of a political and institutional crisis linked to non-adherence to common values and democratic principles as enumerated in the Declaration. Despite the commitment demonstrated through the adoption of this Declaration, a closer examination of the ability and willingness of the OAU/AU member states to live up to their obligations shows that the majority of them have failed to adhere to these principles. So clearly, the significance of this Declaration was not in the wording but rather in the very process and ultimate recognition of the linkage between lack of democracy and the rule of law, and and the proliferating conflicts and unconstitutional changes of government.

Accessed from LHRC Constitutional Database

Another significant feature of the Declaration was the consensus of African leaders on what would constitute 'unconstitutional change of government'. This definition was adopted as a means to give effect to the principles of democratic governance agreed upon in the Declaration. Unconstitutional change of government was defined to include (i) military coup d'états (ii) interventions by mercenaries to replace a democratically elected government (iii) replacement of democratically elected governments by armed dissident groups and rebel movements and (iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

While the Algiers and Lomé Declarations were crucial in reaffirming the role of democracy in Africa's social and political development, the adoption of the African Union Constitutive Act in 2002 was incisive in advancing the right to democratic governance. The African Union (AU) which replaced the OAU, was founded to address challenges facing the African continent in the 21st century, building on the legacy of the OAU. Issues such as refugees, internally displaced persons, poverty, widespread abuse of rights and freedoms and dictatorships, among others, had continued to dominate the continent with little or no intervention from the OAU. Indeed, the fact that the founding Charter of the OAU was categorical on non-intervention in internal affairs of its member states meant that the organization and its members were ill-positioned to intervene in these issues. Yet, it must be admitted that it was not only the Charter which was the reason for this indifference but also the lack of political courage and inadequate resources among the OAU member states; all combined to make active involvement of the organization in solving the continent's most pressing challenges difficult.

The contribution of the Constitutive Act (CA) in advancing the right to democratic governance in Africa may be seen in light of its objectives which include the 'promotion of democratic principles and institutions, popular participation and good governance'. It also provides for the 'promotion and protection of human rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. Among the principles of the CA are 'respect for democratic principles, human rights, the rule of law and good governance', condemnation and rejection of unconstitutional changes of government, respect for the sanctity of human life, and condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

A closer examination of the objectives and principles underpinning the adoption of the CA, would demonstrate that the position adopted by the African leaders was a significant departure from the earlier positions when the founding Charter of the OAU was silent on the role of the organization in promoting democratic principles on the continent. As already argued in this contribution, the real challenge to the promotion of democratization on the continent has been the commitment of African leaders to put into practice their statements and

declarations. The fact that the new CA reaffirmed the central pillars in the OAU Charter which had inhibited its ability to take action against recalcitrant states confirms that, while the organization was committed to undertake changes, the framework would not alter the status quo. For example, the new Act reaffirmed the sovereign equality and interdependence among member states of the AU, respect of borders existing on achievement of independence, non-interference by any member state in the internal affairs of another and prohibition of the use of force or threat of force among its member states.

Demonstrating its willingness to radically depart from the OAU founding Charter, the AU Constitutive Act made provision for interference in internal affairs of states in certain situations. . This intervention was made dependent on some specific aspects such as the need to avert 'war crimes, genocide and crimes against humanity'. Another innovation in the Constitutive Act was the provision which empowered AU member states to seek intervention to restore peace and security in their countries.

While the CA demonstrated the willingness of the AU to take measures to advance and safeguard the right to democratic governance, these efforts have been inhibited by the political realities within which the organization operates. For example, though the AU was empowered to intervene in internal affairs under specific circumstances, it is clear that the specific criteria for intervention, such as genocide, war crimes or crimes against humanity, were vague. What is the role and responsibility of the AU member states in responding to atrocities once the Peace and Security Council (PSC) determines that the situation constitutes a threat to international peace and security? In fact looking at the dithering response of the AU members to the situation in Libya or Ivory Coast, it is clear that the ghost of non-interference in internal affairs still haunts the organization due to the failure by the member states to agree on modalities of intervention. While the organization established the PSC as the primary body of the Union to address peace and security issues on the continent, the body continues to face serious constraints that significantly hinder its capability to effectively respond to peace and security challenges on the continent.

In 2001, the AU adopted what was later to be known as the New Partnership for Africa's Development (NEPAD). This initiative, which can significantly be attributed to the commitment of Presidents Mbeki and Wade, was planned and adopted as the 'home grown solution' to Africa's problems. In 2001, while in Davos attending the World Economic Forum, President Mbeki outlined what he called 'Millennium Africa Recovery Plan'. This initiative was meant to be a blueprint of Africa's development through which development partners would work to support the African development process. In the same year, President Wade of Senegal presented to the Summit of Francophone African leaders in Cameroon what he called the OMEGA plan which he considered also as a blueprint for African progress. These two initiatives were then merged to form what came to be called NEPAD. Essentially, NEPAD was conceived as the program for articulating the vision of Africans on how they

Accessed from LHRC Constitutional Database

wanted to develop and spell out priorities of what Africans themselves considered important for their development.

From its conception, the main objectives of NEPAD were to enhance economic development and improve gender empowerment and governance on the continent. The extent to which NEPAD contributed to the advancement of the right to democratic governance on the continent can be seen in the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance adopted by the Assembly of Heads of State and Government in Durban in 2002. In this Declaration, African leaders agreed to work together in policy and action in pursuit of the following objectives: democracy and good governance, economic and corporate governance, socio-economic development and the African Peer Review Mechanism. Additionally, the Declaration reaffirmed the commitment of the organization to promote 'democracy and its values in their respective countries'. Specifically, the participating Heads of State and Government renewed their determination to enforce the rule of law, equality of all citizens before the law and the liberty of the individual, equality of opportunity for all, the inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office, and adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments.

Re-echoing the Declaration on the Unconstitutional Changes of Government and the Constitutive Act, the NEPAD Declaration went further to clearly articulate what can be considered as attributes of a 'good democratic system'. The Declaration committed member states to ensure that their national constitutions reflect the democratic ethos and provide for demonstrably accountable governance and promote political representation, thus providing for all citizens to participate in the political process in a free and fair political environment. It also required them to enforce strict adherence to the position of the African Union (AU) on unconstitutional changes of government and other decisions of the continental organization aimed at promoting democracy, good governance, and the rule of law. Members were also required to strengthen and, where necessary, establish an appropriate electoral administration and oversight bodies and provide necessary resources and capacity to conduct elections which are free, fair and credible. They were also asked to reassess and where necessary strengthen the AU and sub-regional election monitoring mechanisms and procedures.

In light of these pronouncements it can be argued that, at least rhetorically, African countries demonstrated a strong commitment to advance democracy and its values on the continent. But it is worth posing the question: What compelled the AU to adopt the NEPAD Declaration while it had already adopted other similar instruments such as the Declaration on the Unconstitutional Changes of Government and the Constitutive Act of the African Union? There are many reasons for this decision. For example, it should

Accessed from LHRC Constitutional Database

be noted that though NEPAD was a 'home grown solution' it essentially relied on the international community to fund its plans. Indeed, during the G-8 Summit in 2002 Western countries reaffirmed their commitment to the NEPAD initiative and promised to provide required resources to support African countries attain development and democratic reforms. Consequently, it may be contended that this initiative had to take democracy 'seriously' if it was to garner support from western powers that were to fund the realization of its objectives. In addition, G-8 countries and other influential international institutions such as the World Bank and the European Union were willing to fund initiatives which they felt were keen to promote democracy and good governance, aspects they considered crucial for Africa's social, economic and political progress.

Galvanizing the commitment of the African Union to the democratic ideals reflected in various instruments adopted to that effect, was the adoption of the African Peer Review Mechanism (APRM) initiative in March 2003. This Mechanism was established to promote adherence to and fulfillment of the commitments contained in the NEPAD Declaration. APRM is an instrument voluntarily acceded to by the AU member states as a self assessment mechanism examining the extent to which the concerned country complies with the democratic tenets enshrined in the NEPAD Declaration. It basically allows a country to undertake self assessment on key issues such as democratic governance, human rights, corporate governance and economic governance and management. Worth noting is that this mechanism is voluntary and a country is not obliged to sign up to it; rather it does so only as a way of demonstrating its commitment to the ideals espoused by the African Union and NEPAD. A distinguishing feature of this mechanism is that it allows other countries to review the country concerned on how it addresses the contents of the NEPAD Declaration. In other words, though the process is voluntary, once a country joins it must accept the review conducted by its peers.

Essentially, APRM was seen and considered as an alternative mechanism which could counter the collective humiliation where outsiders are always on the heels of African countries 'lecturing' them on democracy. The continuous role of international financial institutions such as the World Bank and western countries was considered as interfering too much in the domestic affairs of African countries. It has been a common practice for these institutions and countries to condition their financial and economic assistance to the process of democratization and respect for human rights. The fact that the benchmarks of this assessment were always framed outside the continent without the involvement of African governments increased the hostility of African countries towards democracy and its attributes as espoused by the western countries and institutions. It can therefore be argued that APRM was conceived as another alternative of not only ensuring commitments of African countries to what they agreed upon in various declarations and commitments but also to ensure that benchmarks used to determine compliance to these attributes are voluntary and

Accessed from LHRC Constitutional Database

conceived within Africa and reflect the existing realities in Africa's democratic setting.

## IX. The African Charter on Democracy, Elections and Governance

Efforts undertaken by the African Union to promote democracy on the continent through the adoption of various instruments such as the Charter on Popular Participation and Recovery, the Declaration on the Unconstitutional Changes in Government, the African Union Constitutive Act, and the NEPAD Declaration on Democracy, Political and Economic Development among others were all reaffirmed by the adoption of the African Democracy Charter. In 2007 during the eighth Ordinary Session of the AU Assembly, African leaders adopted the African Charter on Democracy, Elections and Governance. Despite this apparent commitment by African leaders to promote democracy on the continent, it is worth asking what reasons drove this shift which provided a compelling need to adopt an instrument specifically to promote 'democracy and governance' on the continent. This question is significant because since the end of the cold war African leaders have been in the forefront in adopting ground breaking instruments to further democracy on the continent, yet the reality has been contrary to the spirit of these initiatives. Despite the wide gap between reality and rhetoric on the state of democracy in Africa, it is argued that this fact should not obscure the organization's efforts in setting standards within which the right to democratic governance continues to be articulated and pursued by the larger African polity.

The objectives of the Charter include adherence to the universal values and principles of democracy and respect for human rights, promotion of the rule of law, holding free and fair elections, democratic change of governmens and consolidation of good governance by promoting democratic culture and practice. The Charter further reaffirms the role of African countries in promoting citizen's participation, transparency, access to information, freedom of the press and accountability in the management of public affairs. For the first time, Africa through this Charter recognized the role of the international community in the enhancement of democracy and governance on the continent. This is significant because it acknowledges that Africa as part of the international community must commit itself to democratic ideals which are universally shared.

Unlike previous instruments which had made provision for democracy without articulating the extent to which member states were to be bound, the Charter on Democracy compels its members to 'recognize popular participation through universal suffrage as an inalienable right of the people' and 'ensure constitutional rule and particularly the constitutional transfer of power'. It also requires member states to 'entrench the principle of the supremacy of the constitution in the political organization of the state'. In fact the Charter even encourages its members to effect constitutional amendments through national consensus and if possible, through a referendum. Clearly this was a gigantic leap

Accessed from LHRC Constitutional Database

on the democratic front in a continent where constitutional democracy had been on the fringes for much of its post independence history. Similarly, the Charter requires state parties 'to develop necessary legislative and policy frameworks to establish and strengthen a culture of democracy and peace.' Unfortunately, the Charter does not expound on how the members can create a culture of peace or on the mechanism through which this culture can be attained or nurtured.

What makes the Democracy Charter different from previous similar instruments on the democratization process in Africa? The imperative of this Charter is premised on its binding nature and clear articulation of what democracy entails. This argument is made in light of the fact that, despite having a plethora of instruments reaffirming the role of democracy on the continent, it is only this Charter which articulates not only the attributes of democracy but also makes it mandatory for member states to adhere to its principles. For example, this Charter can be contrasted with the NEPAD Declaration which, despite its extensive elaboration of democracy and its attending attributes, demands only voluntary compliance. This is reflected in the voluntary nature of the African Peer Review Mechanism (APRM) which is a mechanism created to make the content of the NEPAD Declaration a reality.

The Democracy Charter goes an extra mile in advancing democratic rule on the continent unlike the previous instruments in terms of defense of democratic principles. For example the Charter states that 'when a situation arises in a state party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union'. This provision is significant because it makes a direct link between maintenance of the constitutional order and the peace and stability on the continent. If for example, the Peace and Security Council considers an unconstitutional change of government likely to endanger peace and stability, it may act accordingly by either authorizing sanctions, intervention through force or any other means it may deem appropriate. The Charter makes it clear that the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their state. Similarly, the Charter reaffirms the role of judicial institutions in punishing the perpetrators of an unconstitutional change of government. Specifically it states that 'perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.'

In what may be considered an innovation, the Democracy Charter provides a mechanism within which the contents of the Charter may be realized both at the national level of its member states and continental level. At the national level it mandates state parties to initiate appropriate measures such as legislative, executive and administrative actions to bring national laws and

Accessed from LHRC Constitutional Database

regulations into conformity with the Charter. State parties are also required not only to promote political will to attain the goals of the Charter but also to incorporate commitments and principles of the Charter in their national policies and strategies. At the regional level, the AU Commission is required to work together with Regional Economic Communities (RECs) to advance the goals of the Charter by encouraging ratification. On the continental level the AU Commission is mandated to develop benchmarks for implementation of the commitments and principles of the Charter and evaluate compliance by state parties. Also as a way of advancing the goals of the Charter, the Commission is tasked with creating favorable conditions for democratic governance by facilitating harmonization of policies and laws of state parties.

Recognizing that successful democratic reforms are linked to poverty eradication, the Charter requires its member states to promote and provide free and compulsory basic education especially to girls, minorities, people with disabilities and rural inhabitants. This provision is significant mainly because poor social economic conditions have greatly inhibited the development of democracy on the continent. For example, it is not an isolated case in most African countries that people sell their voting cards in exchange for food or clothes or that they are directed to vote for specific candidates in exchange for or promise of such items. This has meant that some politicians, exploiting the poverty and illiteracy of their compatriots, have made their way to parliament or other elective offices through fraudulent means which in the process have affected the right of the people to participate and make informed choices in electing their leaders.

It can therefore be argued that while African countries have consistently argued that democracy must mean different things for different contexts and people, this contribution has reaffirmed the fact that democracy contains attributes which can be considered universal. Indeed, different rights and entitlements reflected in various African Union instruments such as the Constitutive Act, the NEPAD Declaration and others do not contradict universal values reflected in international human rights instruments which most African countries are party to. Rather, they reaffirm the important existing nexus between these regional and international instruments.

While various initiatives undertaken by the organization have contributed to the advancement of democracy on the continent, the extent to which the organization has succeeded in advancing democracy and democratic governance can only be determined by evaluating the impact of these initiatives. Amidst the current democratic challenges facing the continent, how have these instruments impacted the growth of democracy on the continent? This is the subject of the the next section.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

## X. Evaluating the Impact of the Democracy Charter

A critical reappraisal of the democratization process in Africa demonstrates that the rhetorical commitment of African countries to advance democracy has not matched the reality in practice. A question worth asking is what have been the obstacles to the realization of democratic governance in Africa? Legal and institutional frameworks adopted to advance democracy were either deliberately formulated in a weak language or lacked a definite enforcement mechanism, thus rendering them less effective. For example while the Democracy Charter makes it clear that any unconstitutional change of government should be condemned and sanctions imposed, the Charter states that the offending country shall maintain its membership within the organization and continue to discharge its obligations towards the organization such as payment of its financial dues to the organization's regular budget. In fact the Charter mandates the organization to maintain diplomatic links and work towards the restoration of democracy in the country. However, this aspect is detrimental to the advancement of democracy because it allows the country concerned some form of legitimacy and ability to lobby other countries to refrain from taking stern action against its rule.

The definition of unconstitutional change of government in Africa has been and continues to be problematic. While the Declaration defines what may constitute unconstitutional change of government, it is evident this definition has not found its way into the political realities of African countries. The question is, how does the African Union distinguish between military coups in Niger or Mauritania, for example, with the election debacle in Kenya or Zimbabwe? While both situations from the definition of the Declaration can be considered to fall under 'unconstitutional change of government' clause, they have been treated differently by the organization. In Niger and Mauritania the military regimes were swiftly suspended while the regimes in Zimbabwe and Kenya were not, notwithstanding the fact that the latter countries fall under the category where 'an incumbent government refuses to relinquish power to the winning party after free, fair and regular election.'

Examining the working nature of the Peace and Security Council as the 'guarantor' of democracy, it is clear that its role in advancing the right to democratic governance has been limited. While the AU-PSC *Protocol* requires that its members conduct free and fair elections and respect their outcomes, the electoral records of most African countries are hardly without blemish in this regard. For example, Rwanda has been a member of the AU-PSC since 2010. In that very year, Rwanda held an election in which the incumbent won by more than 90%. Opponents of the governing regime were accused of terrorism and imprisoned while others were barred from participating in the election. Similarly, recent elections in Egypt (before the Arab Spring) and Ethiopia were marred by irregularities and voter intimidation, and incumbents also won by more than 90%. Indeed, in examining the records of AU-PSC members, both past and present, it becomes clear that most do not live up to the ideals they

purport to promote. That member states with the responsibility of defending and promoting the organization's values are often the very countries violating them does not bode well for the realization of democratic governance.

The capacity and willingness of African countries to conduct free and fair elections continue to be highly constrained. This has meant that in almost all African electoral processes, opposition parties continue to claim against the 'state rigging machinery' in favour of incumbents and the ability of the incumbent to unduly benefit from state resources at the expense of their opponents. The situation in Ivory Coast has been another major test for the organization in addressing democratic governance challenges in Africa. While the UN and the Ivory Coast Electoral Commission concluded that incumbent Laurent Gbagbo had lost the November 2010 presidential election to his opponent, Gbagbo was unwilling to relinquish power. The organization issued carefully worded statements calling upon the parties to abide by the election results as pronounced by the Electoral Commission. When Gbagbo persisted, the AU-PSC suspended Ivory Coast from the AU. This decision was in line with the requirements of the unconstitutional change of government adopted earlier by the AU. The question that this episode raises is whether the organization can go beyond issuing statements and suspensions in order to resolve electoral impasses of the sort witnessed in Ivory Coast, Kenya or Zimbabwe. The answer would be difficult to predict mainly because throughout its history the AU has learned that military intervention is a costly undertaking that should be pursued only as a last resort and where there is a clear willingness on the part of its members to provide the necessary resources to ensure success.

The Democracy Charter further provides for the trial of perpetrators of unconstitutional changes of government before a competent court of the African Union. The judicial aspect raises some interesting questions regarding the role of judicial institutions established under the auspices of the organization to advance the cause of democracy in Africa. The AU Constitutive Act and its accompanying protocol has a provision establishing the African Court of Justice and Human Rights but so far this Court has not been empowered to deal with the crimes associated with unconstitutional changes of government. It remains to be seen if and how African leaders will be willing to subject their peers to judicial process to account for the violation of the Constitutive Act or Democracy Charter, given the reluctance of African countries to subject their leaders to account for the crimes they commit while in office. This further reaffirms the suspicion of African countries towards international judicial institutions such as the International Criminal Court which has attracted a hostile reaction among African countries for being the agent of western powers by unduly singling out Africans while ignoring crimes committed elsewhere.

Examining the NEPAD Declaration and the Mechanism established to operationalize it one can argue that the institutional and legal framework adopted to realize the content of the Declaration is weak and ineffective. The APRM is weak in the sense that its membership is voluntary and countries can decide

Accessed from LHRC Constitutional Database

whether to join or not. Admittedly, it can be argued that given the impressive number of countries that have signed up for the APRM, it may be assumed that these countries are committed to 'self-assessment' on the measures they have taken to advance democracy and good governance on the continent. Nevertheless, this Mechanism in reality has not lived up to its expectations precisely because most countries which have subjected themselves to this review have been prominent in abusing the very ideals they signed to uphold. For example, Kenya, Uganda, Ethiopia and Rwanda have subjected themselves to the APRM yet a look at events such as the conduct of free and fair elections, protection of human rights and fundamental freedoms or democratization process in these countries shows that they have not taken adequate measures to advance them.

While the Democracy Charter reaffirms that the constitution shall be the supreme law of the land and that it should not be changed or amended to infringe the principles of democratic change, the practice of amending constitutions because of the self interest of political elites continues to be an issue of great concern. Incumbents have taken their numerical advantage in the National Assembly to pass constitutional amendments to remove term limits allowing them to rule for as long as they like. For example, while in 1995 Uganda adopted a constitution in a highly regarded process, the current President Yoweri Museveni taking the numerical advantage he enjoys in the legislature supported a constitutional amendment which removed term limits for the office of the President. Indeed in 2011 he was re-elected for the record fifth term of five years. Similar practices have been replicated in other African countries such as Cameroon, Senegal, Niger or Guinea.

Accessed from LHRC Constitutional Database

## XI. Challenges to Democratic Governance in Africa

If commitment to democracy can be determined through declarations and resolutions, then one can argue that Africa has made strong gains advancing democratic governance. Examining democratic realities on the continent one cannot fail to see that democracy in many African countries continues to face serious challenges which threaten even to undo the modest achievements made in the past twenty years after the end of the cold war. Most of the commitments which have been made by African leaders such as respect for free and fair elections or constitutional democracy have attracted nothing but contempt. While there have been few positive cases, they cannot be considered to represent a bigger trend. Most African leaders continue to rig elections with impunity, alternative political views are suppressed by ruling elites and political participation continues to be constrained in the name of national security. All these practices continue with little or no substantive involvement of the organization to compel countries to honour their commitments as enshrined in the various AU instruments such as the Constitutive Act and the Democracy Charter.

One of the major challenges related to democracy in Africa is how the Democracy Charter responds to the legitimate concerns of the African people demanding democratic change, as witnessed through the 'Arab Spring' recently in some North African countries. The response of the organization to these events demonstrates that while it significantly contributed to address these events, it lacked both decisive political will from its members and resources to intervene to address human rights violations that characterized the uprising. For example, the AU-PSC first discussed the situation in Libya at its 261st meeting in February 2011, where, among other things, it expressed 'deep concern' at developments in the country and 'strongly condemn[ed] the indiscriminate and excessive use of force and lethal weapons against peaceful protestors, in violation of human rights and international humanitarian law.' The AU-PSC called on the Libyan authorities to 'ensure the protection and security of the citizens and also ensure the delivery and provision of humanitarian assistance to the injured and other persons in need'. Moreover, the AU-PSC underscored that 'the aspirations of the people of Libya for democracy, political reform, justice and socio-economic development are legitimate'. This is interesting in that it represents the first occasion on which an AU-mandated organ—the AU-PSC—has directly linked political and governance issues with violations of human rights in a specific country. While these efforts can be applauded, it was the United Nations that took concrete measures to protect civilians. In fact, the AU subsequently condemned the military intervention by NATO as exceeding its mandate, which was limited to protecting civilians and facilitating humanitarian assistance.

Another significant challenge facing the right to democratic governance in Africa is the prospect of asking some leaders who don't believe in democratic ideals to advance democracy. For example, even those tasked to mediate between parties involved in issues such as electoral disputes include those who came to power through the abuse of the very process they try to embrace. When the African Union wanted to appoint a special envoy to mediate between parties involved in the Ivory Coast election impasse, it appointed Raila Odinga, the Prime Minister of Kenya. The fact that Prime Minister Odinga came to power as a product of a political compromise between the incumbent who had refused to relinquish power and the opposition leader who had claimed electoral victory greatly compromised the credibility of Prime Minister Odinga, a fact which led to his rejection by the Ivorian government. Yet, this is the reality in African politics, that the organization relies on mediators with questionable credibility. Similarly when Libya imploded, among the mediators appointed by the AU was Yoweri Museveni of Uganda whose re-election had triggered international and national condemnation for failing to meet international standards.

While the Constitutive Act and other instruments make citizen participation in politics and government affairs the core of the democratization process, most African countries have allowed multiparty politics with stringent measures attached, so that it has become extremely difficult to exercise this

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

right. Some of the restrictions include the requirement of being a registered political party member for running for public office and the requirement to seek permission from the police before holding political rallies. For example in Tanzania independent candidates are not allowed and any Tanzanian wishing to participate in politics or run for public office must register and be sponsored by a political party. This clearly violates the right to participate because the participation is limited to a political parties' framework approved by the government. This requirement contravenes Tanzania's obligation as reflected in the AU and other relevant international instruments to which Tanzania is party. Similarly, the Democracy Charter is categorical to the effect that those who come to power through unconstitutional means should not be allowed to run for public office again. Despite this requirement, reality demonstrates otherwise. Precisely how the AU planned to enforce this provision is unclear. For example in the DRC, Madagascar, Rwanda among many other countries, the incumbent came to power through military means only to legitimate themselves through a 'popular will of the people'. This practice continues to inhibit democratic governance because there is a wide gap between theory and reality. Africa can no longer claim that democracy is an imposition of the western countries which do not take into account the peculiar nature of African problems. Democracy and democratic governance have been amply recognized by African countries through different instruments; inter alia the Constitutive Act, the NEPAD Declaration on Democracy, the AU Democracy Charter and APRM. Democracy should be seen as a process which goes beyond voting and vote counting. It should be seen as a process which requires commitment to democratic values such as freedom of speech and expression, citizens' participation in decision making, equal opportunities and responsibilities, which, incidentally African countries have agreed to embrace and uphold. Allowing people to participate in the democratic process should be the core of any democratic process and in fact the Democracy Charter and NEPAD Declaration mandate African countries to take steps to create a conducive environment where this right can be exercised.

Poverty and illiteracy challenges afflicting people in most African countries cast doubt on the ability and willingness of African governments to create that conducive environment. It is unrealistic for some African countries to continue depending on external forces to create the requisite environment to enable citizen participation in decision making. In fact in most countries governments have abdicated this role to NGOs and civil societies, which is likely to widen the gap between the governors and the governed. As such, we argue that African governments have a primary responsibility to take deliberate measures to improve the social economic conditions of their people. It is only through such initiatives that citizens in these countries can meaningfully exercise their right to democratic governance through direct participation or representatives chosen through informed choices and transparent processes.

## XII. Conclusion

In this contribution it has been argued that the right to democratic governance in Africa, though well enshrined in various international and regional instruments, remains largely unfulfilled. This argument is reflected in the growing trend of African countries to adopt a wide range of instruments reaffirming the role of democracy in the development of the continent only to discard them when they are required to implement them. Similarly, the continued practice of African countries to disregard democratic tenets in order safeguard their personal interests casts doubt on their willingness to put their commitment into actions It is also evident that African countries continue to be on the defensive from what they consider to be western interference and continued neo-colonialism. While Africa as part of the global community has a responsibility to advance democratic values universally shared, it is equally true that the practice of powerful countries and institutions to conditionally promote democratic values that suit their political and security interests at the expense of African people and their governments continues to negatively impact the right to democratic governance on the continent. This argument is made in light of the fact that in some cases donor countries and institutions have been willing to ignore calls for democratic reforms when such reforms are deemed to threaten the hold on power of regimes they consider allies.

It has further been argued that the growing challenge of 'mass uprising' as happened in Tunisia, Egypt and Libya, was something African leaders had not included in the capabilities of their long suffering citizens. The traditional thinking has always been that governments are replaced by military coups, mercenaries, armed dissidents or refusal of incumbents to relinquish power. The events in Tunisia, Egypt and Libya present a different trajectory on the 'unconstitutional change of government' paradigm. While in its rhetoric the AU has committed to advance democracy in its member states, it is precisely the lack of democracy that has given ground for citizens' discontent. The popular uprising in the Arab world provides a compelling push to the organization and its members to embrace real democratic reforms which can translate democratic commitments into concrete results in people's lives. This argument recognizes that when countries adopt declarations and resolutions reaffirming their democratic commitments and yet their practices speak differently, it diminishes their credibility and harms the organization before its own members and the international community.

The article has also shown that while the continent continues to face serious challenges especially in the ability of most African countries to fully abide by these commitments, there are some positive developments which demonstrate that some countries are willing to undertake necessary reforms to reaffirm the right to democratic governance enshrined in the Charter. The recent example of Zambia, where the incumbent lost and accepted the outcome through a fair and transparent electoral process, illustrates the imperative of the right to

Accessed from LHRC Constitutional Database

democratic governance on the continent. However, one example is not adequate to clearly claim that the right to democratic governance is finally taking hold in Africa. Rather there is a need for a sustained commitment to democracy to ensure that these aspirations are translated into concrete outcomes.

Clearly, the AU can function effectively if its members want it to do so. Without collective political will of African leaders and institutions to compel their peers, most of these commitments as reflected in various instruments will remain redundant and irrelevant to the African people. The failure of the organization to undertake robust measures against Libya under Gadhafi or Ivory Cost under Gbagbo reflects their reluctance to condemn their peers even when it is clear that such leaders have violated their commitments to the organization and lost legitimacy in their own countries. This unfortunate situation presents the AU with a serious ‘credibility crisis’ before its own people and the international community on how it can move beyond issuing political statements and take concrete measures to safeguard a democratic ethos and make democracy a reality as envisaged in its founding instruments. To realize democratic governance, African countries will have to move beyond adopting resolutions and declarations by undertaking concrete measures to guarantee the fundamental rights enshrined in these instruments. As already stated in this contribution, democratic governance goes beyond holding periodic elections and allowing people to vote. It also requires a guarantee of different rights such as the rights to freedom of expression, assembly, political accountability, improved social economic conditions, and full participation of citizens in decision making directly or indirectly through elected representatives chosen through an informed and transparent process.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# THE CURRENT DEBATE ON INTEGRATION AND SOVEREIGNTY AND ITS RELEVANCE IN AFRICA TODAY

*Joram Mukama Biswaro*[1]

I. Introduction
II. Some Conceptual definitions and Theoretical Approaches
III. Rationale for Integration
IV. African Integration
V. Integration versus Sovereignty in Africa
VI. Challenge to Sovereignty
VII. The African Experience
VIII. Critical Analysis of Article 4(h) and (j) of the Constitutive Act
  A. Non - Intervention
  B. Intervention
  C. The Role of African Regional Economic Communities (RECs) in the Implementation of Military Forcible Measures under Article 4 (h)
IX. Reflections, Observations and the Way Forward
X. The Way Forward

Accessed from LHRC Constitutional Database

## I. Introduction

When states join with others in economic or political blocs, they cede some national sovereignty. The European Union (EU) started as a free trade zone and built considerable political integration over a period of several decades. But the EU is far from being a unified state or a satisfactory Europe-wide democratic order; substantial sovereignty still remains with EU member governments. The AU experience in integration is, in a way, not very different to the EU model. In a globalized world, integration is inevitable; that is why the integration and sovereignty debate is back on the world agenda today. In this respect, it is important to note that integration and sovereignty are complementary to each other and that the integration process should proceed in a gradual and incremental manner.

These concepts have of late attracted various scholars, policy-makers and decision-makers as a new area of inquiry. Their theoretical foundations have been varied, as have been the defininitions of the concepts themselves. Perhaps

---

[1] Ambassador of the United Republic of Tanzania to Ethiopia and Visiting Professor, University of Addis Ababa, Ethiopia.

the difficulties of definition were memorably summed up by Donald Puchala who compared the quest for a definition of integration to a blind man being confronted with the task of defining an elephant.[2]

The main objective of this chapter is, therefore, to encourage and provoke a wide debate on the underlying dynamic of integration from an African perspective, and also to contribute further to its social, legal, technological, economic, and political dimensions. Additionally, it intends to take the debate beyond the Westphalian conception as well as examine the role of leadership in the integration process.

## II. Some Conceptual Definitions and Theoretical Approaches

For the purpose of our deliberation, one could describe integration as both a process and an end state whereby an intergovernmental organization (IGO), representing two or more countries, pool their resources together with a view to creating a larger and a more open economy expected to benefit member countries. Basically, the process of economic integration can take the following forms: Preferential Trade Arrangement (PTA), Free Trade Area (FTA), Customs Union (CU), Common Market (CM), Economic Union (EU), Monetary Union (MU) and Political Union (PU).

More simply, it is a series of voluntary decision by previously sovereign states to remove barriers to the mutual exchange of goods, services, capital or persons. This definition captures the economic aspect of integration which is informed by two theories, functionalism and neo-functionalism.

The functionalist approach viewed the twentieth century as characterized by growing numbers of technical issues that could be resolved only by cooperative actions across boundaries[3] carried out by technical experts whose approaches were essentially based on political considerations.[4]

The theory suggests that emphasizing cooperation in order to find solutions according to a specified need or function creates the basis for a thickening web of structure and procedures in the form of institutions. Successful cooperation in one functional setting would enhance the incentive for collaboration in other fields. To the extent that tasks in specific functional areas could be successfully completed, attitudes favourable to cooperation in other sectors would be developed.

The goal of functionalism was not to create a new “super state” above the member states, but rather to blur the lines dividing public and private. This was to be achieved through the creation of a web of international activities that

---

2 PUCHALA, Donald, “Of Blind Men, Elephant, and Internation Integrationin,” No. 10 *Journal of Common Market*, 1972, p. 267.

3 MITRANY, D., *The Functional Theory of Politics*, London: Martin Robertson, 1975.

4 MITRANY, D., *The Functional Theory of Politics*, 1966.

Accessed from LHRC Constitutional Database

would overlay national and political divisions. Links were to be developed along pragmatic lines, at the logical level for each functional goal, regardless of national or political boundaries. These interlocking institutions would create mutual dependencies and make war unfeasible regardless of ideological differences that divide states. Functionalism is essentially concerned with economic integration and not direct political integration.

Neo-Functionalism theory, on the other hand, posits that integration results from the need to shift specific functions away from exclusive nation-state control towards supranational institutions.[5] Therefore, unlike functionalism, neo-functionalism accords a role to politics. It places major emphasis on the role of non-state actors, especially the "secretariat" of the regional organization involved and those interested associations and social movements that form at the level of the region, in providing the dynamics for further integration.

It is worth noting that member states remain important actors in the process. They set the terms of the initial agreement, but they do not exclusively determine the direction and extent of subsequent change. Rather, regional bureaucrats in league with a shifting set of self organized interests and passions seek to exploit the inevitable "spillovers" and "unintended consequences" that occur when states agree to assign some degree of supranational responsibility for accomplishing a limited task and then discover that satisfying that function has external effects upon other interdependent activities.

This is the theory that informed the evolution of the European Union and most regional economic communities in Africa. Integration efforts, however, cannot be accomplished without addressing the question of sovereignty. The notion of the sovereignty of the state is an original building block of the Law of Nations. It typically requires respect for territorial integrity and for the rule that a treaty cannot bind a state unless it has given its consent to be so bound. It is important to emphasize the opposite as well; it is an act of sovereignty to become party to an international agreement or a member of an international organization. This has additional implications - states cannot invoke their national law or constitution as a justification for not respecting their international obligations. And a change of government in a particular country will not affect the binding nature of existing agreements to which that state is a party. To this end, it is states that are the subjects of Public International Law, not governments.

The process of integration should be voluntary and consensual. Integration which proceeds by force and coercion amounts to imperialism. Although empire building has, historically, some of the characteristics currently attributed to integration, modern scholarship has been insistent that the process of integration should be regarded as non-coercive. Taking a historical perspective, the most significant attempts at building political communities in the past have been

[5] Ibid.

Accessed from LHRC Constitutional Database

directed towards the creation of nation-states. Nationalist sentiments preferred to describe this as unification rather than integration.

It can further be argued that, whereas the concept of integration refers to a voluntary process of pooling resources for a common purpose, regionalism means regional approaches to problem solving. This could include: regional integration, regional cooperation or both. The terms “regional integration” and “regional cooperation” have in common the involvement of neighboring countries in collaborative ventures. However, regional cooperation implies that this is organized on an *ad hoc* and temporary basis through a contractual arrangement of some sort around projects of mutual interest, while regional integration involves something more permanent.[6]

Perhaps at this point one needs to define sovereignty. Historically, sovereignty has been associated with four main characteristics. First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. And finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation of world order. What is significant today is that the reach of these components - internal authority, border control, policy autonomy, and non-intervention - is being challenged in unprecedented ways.

The modern world and the conditions brought about by globalization have forced a rethink about these traditional views. In introducing his September 1999 Annual Report to the General Assembly, United Nations Secretary General Kofi Annan said: “Our post-war institutions were built for an international world, but now we live in a global world.”[7]

The debates in Africa about attacks on sovereignty often reveal deeper problems about statehood, weak states and the legitimacy of the government of the day. What should concern Africans, as part of the debate about the future of regional integration among African nations, is the fallback to sovereignty as a broad shield which delegitimizes international (and often local and regional) disapproval when international obligations are not respected, human rights are abused or when corruption goes unchecked. This is an old trick; the South African apartheid government was an enthusiastic user as it used this same line

Accessed from LHRC Constitutional Database

---

[6] WINTER, L.A. & Maurice, S., *Regional Integration and Development*, Washington D.C.: Oxford University Press, 2003.

[7] ANNAN, Kofi A., Secretary General’s Speech to the 54th Session of the General Assembly, UN doc. SG/SM/7136 (1999). Quoted in OLOO, A., Volume 4 No. 2 *AU Integration Bulletin*, September 2011.

of argument. When sovereignty is rediscovered for this purpose it is a cause for concern.[8]

Sovereignty has always been regarded as a core element in International Relations and Law. The Treaty of Westphalia in 1648 marked the advent of the contemporary 'Doctrine of State Sovereignty'. However, there is a dual perspective incorporating the internal and external dimensions of the concept which may co-exist to varying degrees.[9] Weber views a sovereign state as an 'institution claiming to exercise a monopoly of legitimate force within a particular territory.' [10] Stated differently, a sovereign state is one that exercises supreme, legal, unlimited, unrestricted, and exclusive control over a designated territory and its population. In a similar manner, the sovereignty of a state requires recognition by other states through mutual diplomatic dealings, and usually by membership of a comprehensive international, regional or sub-regional organization (SRO).[11]

The doctrine of sovereignty is largely based on the notion of formal equality between states and the principle of non-intervention in issues that are perceived to be strictly the domestic affairs of states. The beginning of the 21st century witnessed the emergence of close to 200 sovereign states in the international system. If in some ways the doctrine of state sovereignty reinforces the notion of international anarchy, this is because the impression that a 'supreme authority' exists in the state logically challenges the existence of a 'super-sovereign' authority above the state. The only exception to this is when a state explicitly confers authority on a supra-national authority. In view of the foregoing, the notion of sovereignty has been subject to various interpretations and has confronted some challenges often dictated by real power considerations and other exigencies. Since the end of the Cold War, the debate about sovereignty has returned to the forefront.

It is worth noting the fact that regional integration can cover the full range of public sector activity, including not only the coordination of economic policies, but also regional security, human rights, education, health, research and technology and natural resource management. The concept of regional integration is thus a broader one than that of economic integration. It should be approached holistically. The degree of integration depends upon the willingness and commitment of states to share their sovereignty.

Accessed from LHRC Constitutional Database

---

[8] OLOO, A. Volume 4 No. 2 *AU Integration Bulletin,* ibid.

[9] JACKSON, R., *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge: Cambridge University Press, 2003, p. 3.

[10] Cited in HOFFMANN, S. & Keohane, R., *The New European Community: Decision-Making and Institutional Change*, Boulder: West View Press, 1995, p. 3.

[11] ONUOHA, G., A Seminar Paper presented in Dakar, Senegal on African Integration, 2009, p. 2.

It should be noted that there have been various theories on integration and sovereignty, which are outside the scope of this presentation. However, some of those theorists include J. Viner (1950), B. Balasa (1961), E. Haars (1971), E. Mandel (1970), J. Tinbergen (1959), R. Higgott (1997) and others.[12] These proponents have approached this study from both economic and political perspectives. Some of these theories have covered functionalism, neo-functionalism, federalism, realism and eclecticism. With respect to sovereignty, some of the leading theorists include Bodin, Locke and Russeau. Hugo Groius, the Dutch scholar generally acknowledged as the father of international law, first proclaimed state sovereignty as a fundamental principle of international relations in his 1625 book on the law of war and peace.[13]

## III. Rationale for Integration

Indeed, the merits and de-merits of regional integration cannot be overemphasized. In this connection, we will not belabour this point. Be that as it may, it is our considered opinion that advantages outweigh disadvantages.

Baregu[14] argues that traditional approaches to integration such as functionalism and neo-functionalism are largely descriptive, focusing much more on the aims, structures, institutions and mechanisms of integration rather than the imperatives or driving forces that lie behind these schemes. He argues that the more compelling reasons for forming and sustaining regional integration lies in its imperatives, interests or *raison d'etre* rather than in the institutional forms that are the outcome of the operationalization of the rationale. He further posits that it is also these imperatives that we should look at to identify the reasons for implementation or non-implementation of integration agreements, as well as to explain the successes and failures in existing schemes.[15]

Baregu argues that there are four types of rationale or imperative which lie behind the formation and sustenance of regional integration schemes. These are affection, gain, threat, and power. By imperatives is meant the kind of factors that create the impetus, and give rise to the drive and yearning for integration among the members. Imperatives may belong to the domain of choice or of necessity.

---

12 For details see BISWARO, Joram Mukama, *The Quest for Regional Integration in the Twenty First Century. Rhetoric Versus Reality: A Comparative Study*, Dar es Salaam: Mkuki na Nyota Publishers, 2012, pp. 2-39.

13 GROTIUS, Hugo, *Treatise on the Law of War and Peace,* 1625 (www.enotes.com/hugo-grotius).

14 BAREGU, Mwesiga, "The African Economic Community and the EAC: Any Lesson from the EU?" in AJULU, A., (ed.), *The Making of a Region: The Revival of the East African Community*, Midrand, South Africa: Institute for Global Dialogue, 2005.

15 Ibid.

Accessed from LHRC Constitutional Database

It is the extent to which the imperative exerts itself upon one's very existence that determines whether it is a choice imperative or a necessity imperative. The more the imperative impinges upon one's vision, the more it is likely to belong to necessity rather than choice. This is according to the perceptions of those involved in envisioning their future. These visions are usually expressed in the preambles of treaties establishing the integration schemes.[16]

The affection imperative is essentially emotive. It refers to a situation where countries come into an integration arrangement because they have a lot in common and feel some bonds of affection. It is frequently argued, for example, that because the East African countries are connected by common language, a common colonial heritage and cross-border affinities among different ethnicgroups, regional integration should automatically follow. Thus the preamble of the treaty begins: "Whereas the Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania have enjoyed close historical, commercial, industrial, cultural and other ties for many years …"[17] Yet it is obvious that if this were sufficient, the 1977 collapse of the original EAC, which had descended from the East African High Commission established in 1947, would not have happened. The same can be said of other regional blocs in Africa, such as ECOWAS and SADC.The point here is that affection does not seem to be a strong imperative, and if it is the major driving force behind the renewed quest for regional integration in Africa, then we are off to yet another false start.

Gain is by far the most celebrated imperative held responsible, not only for the initiation, but also the sustenance of regional integration schemes. Gain and loss are central tenets of rational choice theory, which contends that individuals and states tend to behave in a manner which maximizes their gains while minimizing their losses. Beginning with Jacob Viners concerns with trade creation and trade diversion effects, regional integration theories have largely been preoccupied with the economic welfare gains from trade within the bloc or from without. The unequal distribution of gain among members of a bloc is also held to be a vital source of potential discontent, except perhaps, if the cost of non-integration is perceived to be too high.

The preoccupation with material gain is itself a source of the major weaknesses of this approach. The weakness is that it reduces the dynamic of integration to economic motives alone and purely to trade as such. The other weakness is that it fails to distinguish between gain as cause and gain as consequence of integration. To suggest, for example, that European cooperation was motivated by considerations of gain alone is to lose sight of the peace and security imperative that gave rise to the formation of the European Coal and

[16] Ibid.

[17] Ibid.

Accessed from LHRC Constitutional Database

Steel Community (ECSC) in the first place. Indeed, in this case it may be said that economic gain is a consequence of cooperation, and not vice versa. As Arnold Baker[18] argues, even when FTAs are par to optimal, there are many other factors to consider - the existence of community consciousness, the political will and security interests.

The shared perception of threat and the quest for collective security and protection is, perhaps, the strongest incentive toward integration. This may arise from two distinct situations. One is where two or more countries find themselves locked in mutually threatening relationships and have to reach some compromise leading to peaceful co-existence. This is what lay behind the formation of the ECSC by France and Germany in 1951. The other is when there exists a perception of a common external threat, in which case countries come closer to enhance their capacity to defend themselves. This is what lay behind the formation of the North Atlantic Treaty Organization (NATO) against the perceived threat from the Soviet Union and its allies. This imperative can largely inform regional integration in Africa, once the countries concerned realize that globalization threatens their very continued existence.[19]

Power as an imperative refers to the situation where a regional hegemony forces the neighbourhood into an integration arrangement. The most extreme case would be military intervention, or regime change, to instal a compliant leadership. Hegemonic integration involves not only the existence of a relatively more powerful country in the region, but also the capacity and inclination on the part of that country to meet the costs of hegemony by offering incentives for a member to stay, and imposing sanctions on those that may want to break away. To a very large extent, the Council for Mutual Economic Assistance (COMECON) countries were brought and held together by Soviet hegemony. Likewise, the NAFTA bloc is essentially maintained by the US.[20] The hegemonic model is unlikely to work in the African setting for apparently contradicting reasons. On the one hand there is hardly a country that could be considered a viable hegemony that is able to obtain legitimacy and muster the resources to pay the costs of maintaining a stable hegemonic arrangement. And on the other hand, suspicions of hidden hegemonic motives on the part of a number of countries in regional blocs persist. These include South Africa in SADC, Nigeria in ECOWAS, Kenya in EAC and Ethiopia in IGAD. The hegemonic model is however handicapped by the imperative of sovereignty

Accessed from LHRC Constitutional Database

[18] BAKER, Anold, B., “Into the Dustbin of History Economic and Asia-Pacific Cooperation,” (www.econ.duke.edu/journal/dje) (1996) as cited in OLOO, A., Volume 4 No. 2 *AU Integration Bulletin*, September, 2011.

[19] BAREGU, Mwesiga, “The African Economic Community and the EAC: Any Lesson from the EU?” op. cit.

[20] Ibid.

which, for small and weak countries, is so passionately guarded that it becomes an additional obstacle to deeper integration.[21]

## IV. African Integration

Briefly, in Africa political and socio-economic integration is not a new phenomenon. One could argue that it is rooted in Pan Africanism that culminated in the establishment of the Organization of African Unity (OAU) in 1963. For our present purpose, it emerged with the dawn of independence as a demonstration of the willingness of African leaders to stem the adverse effects of Africa's balkanization. It was the political and economic reactions to these adverse effects that triggered the establishment of a large number of intergovernmental agencies operating in the field of integration, to enable African countries to speak with one voice and to ease constraints linked to the limited size of national markets. This rapid increase in the number of integration-based institutions reached its peak, first in the 1980s, with the adoption of the Lagos Plan of Action and Final Act of Lagos, then in the 1990s and in the 2000s, the coming into force of the Treaty establishing the African Economic Community (AEC) or the Abuja Treaty and the Constitutive Act establishing the African Union, respectively.[22]

Indeed, the idea of Regional Economic Communities (RECs) on the continent is not new. During the past four decades, Africa has experimented with various RECs, with varying degrees of success. The former EAC 1967 was probably the oldest, followed by the Economic Community of West African States (ECOWAS), formed in 1975. The decision[23] of the OAU in 1976 to divide Africa into five regions gave added impetus to these initiatives, also leading to the formation of the Economic Community of Central African States (ECCAS), The Arab Maghreb Union (UMA), and the Southern African Development Coordinating Conference (SADCC), which was later transformed into the Southern African Development Community (SADC).

However, the continent has also been home to a number of regional organizations and initiatives that have not conformed to the neat divisions of regions. For instance, Inter-Governmental Authority on Development (IGAD), a grouping of seven states in East Africa and the Horn, was initiated as the Intergovernmental Authority of Drought and Development (IGADD), formed in response to the catastrophic drought of the 1970s and 1980s. Sierra Leone, Guinea and Liberia also formed the Mano River Union (MRU), and are also members of ECOWAS. Besides this, there are several monetary and customs unions whose memberships deviate from those five regional organizations - the

---

[21] Ibid.

[22] KOUASSI, R.N., "The Itinerary of the African Integration Process: An Overview of the Historical Landmarks," Volume 1 No. 2 *African Integration Review*, 2007.

[23] The Report of OAU Heads of State and Government, December, 1976.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

Central Africa Economic and Monetary Union (CEMAC), the West Africa Economic and Monetary Union (WAEMU), and the Southern African Customs Union (SACU) are cases in point. These overlapping memberships have not always assisted Africa's integration project. Furthermore, it can be argued that the earlier attempts at regional integration were basically inward looking exercises in which gradual internal trade liberalization was coupled with protectionism against outsiders.

The more recent attempts at economic integration - the 'new regionalism'- can be traced back to the Lagos Plan of Action (LPA), adopted at a second extraordinary session of African heads of state and government of the OAU in Lagos in July 1980. This was the culmination of a series of continental reflections on how best to deal with the unfolding African political and economic crisis, marked by declining terms of trade and rapidly shrinking global trade. In essence, the LPA and the final Act of Lagos (FAL) were the first continental responses to the African economic crisis of the late 1970s and early 1980s. The LPA *inter alia* aimed at:

- promoting the economic and social integration of African economies in order to enhance self-reliant and self centred development;
- creating national, sub-regional, and regional institutions in pursuit of self-reliance; and
- undertaking proper planning in all sectors of development with a view to achieving modern economies at the national, sub-regional, and regional levels by the year 2000. In this respect, it committed African governments to establishing an AEC by the year 2000.

But the LPA was stillborn, torpedoed by lack of political will on the part of African political leaders, and, more significantly, by the World Bank report entitled *The Accelerated Development in Africa: An Agenda for Action (the Berg Report)*, whose neo-liberal approach - withdrawing the state from economic intervention, and opening up of African economies to more private sector participation and the privatization of public enterprises - dominated economic development discourse and policy making thereon. The West ensured that the program failed as it was not in their interest.

A decade elapsed before Africa made another attempt at continental economic integration. In June 1991, at the 27th summit of head of states and governments, the OAU adopted the treaty establishing the African Economic Community (AEC) - the Abuja Treaty. It recognized previous efforts and achievements at regional and sub-regional levels, and set out to establish conditions for achieving a 'unified and self sustaining economy' on the continent. Its main objectives are to:

- promote the integration of African economies with a view to increasing Africa's economic self-reliance and achieving self-sustainable economic, social, and cultural development;

- establish a continental framework for the mobilization and utilization of human and material resources; and
- coordinate and harmonize the policies of existing economic communities with a view to fostering the establishment of the AEC.

The Abuja Treaty came into force in1994. It was envisaged that AEC would be in place by the year 2028, to be implemented in six transitional stages as follows:

- 1994-99: Existing regional economic communities to be strengthened, and new ones established;
- 1999-2007: Existing tariffs to be stabilized, and economic sectors to be integrated, coordinated and harmonized;
- 2007-17: A free trade area and customs union to be established;
- 2017-19 Tariff system within RECs to be coordinated and harmonized, and continental customs union and common external tariff (CET) created;
- 2019-23: An African common market to be created, and monetary, financial and fiscal policies harmonized; and
- 2023-28: As the final stage, pan-African economic and monetary union and parliament to be created.

But like the LPA, the Abuja Treaty has remained largely on the drawing board, and has been overtaken by events as African leaders have scrambled to reposition the continent globally. The creation of the AU and NEPAD in 2002 more or less ended Abuja's decade of activity. Some observers have suggested that, with the inauguration of the SADC and the new EAC the first phase of the Abuja process was completed. However, there is little evidence that the Abuja process was directly responsible for either the revival of the EAC or the transition from SADCC to SADC in southern Africa. In any case, the process of reviving the EAC predated the Abuja Treaty, and, once apartheid was out of the way in southern Africa, SADCC could no longer continue on the conference trail, and had to find something worthwhile to do.[24] The transition from a coordinating conference to a development community was therefore a logical step. Be that as it may, the AU and NEPAD are direct descendants of the ideas behind the Abuja process. According to their founding fathers, the new initiatives are about the political renewal and economic regeneration of the continent, based on the following three principles:

[24] OLOO, A., Volume 4 No. 2 *AU Integration Bulletin*, September, 2011.

Accessed from LHRC Constitutional Database

- Mobilizing the African people to take their destiny into their own hands, and to create a bulwark against plutocratic regimes;
- Entrenching political democracy, respect for human rights, and good governance; and
- Implementing a clear program of economic regeneration which can raise African countries from depths of economic disaster.

These questions have preoccupied African minds for the best part of the last three decades. NEPAD is in this sense a successor to the earlier initiatives outlined above, and even more significantly, to a series of initiatives unveiled by the UN Economic Commission for Africa (ECA) in the 1970s, culminating in the revised framework of principles for the implementation of the New International Economic Order in 1976. The framework proposed a development agenda based on self- reliance, self -containment, democratization and equity.

NEPAD, like the Abuja Treaty and the LPA before it, recognizes the need to strengthen Africa's RECs, thus enabling them to serve as the building blocks of an African economic regeneration. The NEPAD initiative also acknowledges the limited markets of existing national economies, and therefore concludes that successful economic regeneration can only be brought about by pooling markets and resources; hence it talks of the need for African Countries to combine their resources in order to enhance regional development and economic integration. NEPAD needs to be seen as 'the development framework for Africa and the engine for the continent's socio-economic growth.'

It is against this backdrop of attempted regional economic integration, ultimately directed at African economic regeneration, that the revival of integration in Africa must be situated. In other words, integration in Africa has been revived on the premise defined by an overarching continental determination to achieve a political renewal and economic regeneration via the activities of RECs.

The OAU option for the African economic integration process, incorporating the AEC, confirms the idea that integration can be carried out in several ways. Reading the objectives and implementation modalities of African economic integration shows that in the long run, the OAU intended to establish economic and monetary union.

Can this noble integration objective be attained considering the precarious nature of the economic structures of the African Continent? Indeed, the economic challenges facing Africa have increased and are mainly structured around the following issues: development financing, repayment of a heavy external debt, regional and continental integration, industrialization, economic

Accessed from LHRC Constitutional Database

and political governance as well as the challenges of ceding sovereignty.[25] Furthermore, there are the political challenges of conflict and instability as well as the social ones of malaria and HIV/AIDS.

It should be recalled that in the late 1980s, African countries were faced with numerous challenges and adopted, against their will, the structural adjustment program of the Bretton Woods System in order to carry out far-reaching reforms of their economies and adapt them to the global economy. First, Africa was weighed down by a heavy external debt burden on which the first initiatives taken to promote Africa's economic and political integration have so far only had limited impact. However, the heavily indebted poor countries' initiatives provided significant debt relief. Second, the Continent is weakened in a world dominated by the establishment of major economic entities. The quest for efficient and lasting solutions to these major challenges gave rise to the Sirte Declaration, which in turn, led to the birth of the AU in July 2002, at the 38th OAU Summit held in Durban, South Africa. It is worth emphasizing that in establishing the African Union, the Heads of State and Government also unanimously agreed to provide the new institution with a historic program called the New Economic Partnership for African Development (NEPAD). The AU has therefore an expanded mandate intended to meet the challenges of the 21st Century including that of sovereignty.

Accessed from LHRC Constitutional Database

## V. Integration versus Sovereignty in Africa

The current debate on deeper integration in Africa and beyond raises alarm about the loss of sovereignty for the states involved. The fear is that the presence of regional institutions existing beyond the territorial and jurisdictional control of the nation state and enjoying power will restrict the freedom of governments to act unilaterally. Against this background, the earlier enthusiasm for integration seems to be running out of steam now that the international agreements and obligations agreed upon by these very same states have to be implemented and respected.

The loss of sovereignty warning seems to be premised upon a particular value judgment - that it would be undesirable if regional institutions exercise meaningful powers. The real concerns are about the loss of state control and about "interference" with the power of national governments. In this debate the distinction between state and government is not always recognized. Sovereignty is technically a feature of states (the primary subject of international law) and not of governments; although governments act on behalf of their states.

A more fundamental question is often not asked – what is the source of the power of these governments? Are they democratically elected through free

---

[25] KOUASSI, R.N., "The Itinerary of the African Integration Process: An Overview of the Historical Landmarks," op.cit.

and fair elections and do they exercise their national powers in dispensation characterized by the rule of law?

Concerns about threats to national sovereignty may be well founded in instances where supra- national bodies act in an *ultra vires* manner or when they usurp power over areas best left to legitimate national structures. Then the apprehension is in effect about the threat to popular sovereignty. This has been a long standing debate in the European Union where the European Commission enjoys extensive powers over areas which used to fall under national jurisdictions. However, in Africa we are far from a situation where RECs can exercise similar powers. Their dilemma is often the opposite - they have weak institutions, ill- defined mandates and vague powers. In any case regional organizations do not enjoy inherent powers; they are the creatures of international agreements concluded and ratified by the very states which have come together in the belief that such bodies will improve trade, development and effective cooperation. They establish specific regional structures and grant them the powers necessary to fulfil the mandates formulated in the founding instruments.

Accessed from LHRC Constitutional Database

The debates about loss of sovereignty in Africa is clouded by many other issues which relate to questions of domestic governance, legitimacy and state power, separation of powers and the rule of law generally. In countries where the exercise of state power can be reviewed by national courts of law and be tested against the norms in a supreme constitution, there will be fewer concerns about loss of "government policy space." Courts of law will, as a rule, not pronounce on the soundness or otherwise of government policies; they review specific acts of measures to determine their lawfulness. In such societies judicial control over exercise of power (when they impact on the rights of natural or legal persons) is a typical and necessary feature of democratic governance. Judicial review, a critical press and vigilant civil society are not, and should not, be perceived by popularly elected governments as a threat to their authority. The popular will is the source of democratic rule.[26]

Another perception is that African governments will lose their ability to determine their own policy priorities and development strategies if regional structures gain power over development issues. While it is true that most African nations are faced with scarce resources and the absence of sufficient technical and institutional capacity, it can be argued that regional integration is part of the answer to the multi faceted problems of development and is frequently a necessary instrument for promoting development through expansion of small domestic markets and the facilitation of trade with neighboring countries and third parties.

Similarly, while it is true that continental or regional trade agreements bring technical challenges when, for example community law has to be

[26] OLOO, A., Volume 4 No. 2 *AU Integration Bulletin*, September, 2011.

implemented, joint health and safety standards have to be met and regional trade rules have to be respected, this is in essence the nature of the exercise. Trade in goods and services is regulated through continental or regional legal arrangements aimed at facilitating cross border movement and limiting the power of participating governments to impose domestic restrictions. These arrangements are not premised on a design to undermine state sovereignty. The fact that some analysts see a hidden agenda here may have more to do with an 18th Century view about the state than appreciating contemporary realities.

The need to protect sovereignty gains a different dimension when African states agree among themselves to establish regional trade arrangements or institutions of cooperation and integration. It is difficult to understand how their sovereignty can be undermined by the very same bodies which they have established for quite specific purposes and through their own sovereign decisions. If, however, there is no political interest to honor freely concluded agreements, regional institutions cannot deliver and will not live up to the expectations for which they have been created. This raises a more fundamental question about their understanding and use of international law generally and of treaties in particular.

There may also be political as well as historical reasons why African governments are sensitive about their sovereign rights. But then the lines of the argument should be clear. What is to be protected? How should this be done? And where do the threats come from?

The discussion about integration and sovereignty and when to protect it is a universal one. In times of economic hardship there is a greater temptation for politicians to rediscover the ideals of sovereignty. Nevertheless, it remains a legitimate question to ask whether countries and governments in a global economy are not "obliged to subject some level of domestic prerogative to international rules and disciplines? If so, is that a gain or loss to the well being of societies?[27]

Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally this is exactly why "sovereign nations" agree to such treaties. They realize that the benefits of cooperative action that a treaty enhances are greater than circumstances that exist otherwise. For example, the WTO agreement is a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the members of the WTO have made a bargain. In exchange for the benefits they expect to derive as members of the WTO, they

---

[27] The Future of WTO-Addressing Institutional Challenges in the New Millenium. 2004 pp.109-110. For further information refer to OLOO, A., Volume 4 No. 2 *AU Integration Bulletin*, September, 2011.

Accessed from LHRC Constitutional Database

have agreed to exercise their sovereignty according to the commitment they have made in the WTO agreement.

On the positive side, some scholars openly declare that regional integration will not result "in the loss of state sovereignty". Those falling in this school of thought argue that, there is room for debating sovereignty issues in a world of globalization and deeper regional integration. The debate from their point of view should address questions about the allocation of specific powers; should they be located in national institutions or within regional structures? What level of government or institution would be best suited to the task at hand? What powers does it need to govern a particular matter and enforce the applicable rules? Which approach will bring optimal benefits?

Against this background, matters which are essentially about local affairs belong to the national or sub-national level. Others however, may be best performed through inter-state or regional arrangements. The challenge is for the participating states to decide at what level each relevant function shall be performed. Once this question has been answered and the appropriate legal design adopted, national governments should lend their support and allow the arrangement to bear fruit.

This debate is an old one and in federal dispensations there are many formulas to determine concurrent, residual and state (as opposed to federal) powers. The nature of the task at hand will provide some of the answers. When a group of states come together and agree on rules for sharing common water resources on which they all depend (e.g. River Nile), or dealing with an environmental disaster which transcends "sovereign borders", the joint interest in preserving and respecting the higher (supra national) values and concomitant rules is obvious. Then, to evoke "sovereign rights" with regard to that part of a regional river flowing over the national territory of one of the member states will undermine the very *raison d'etre* for a joint legal arrangement in the first place.[28]

## VI. Challenge to Sovereignty

Some analysts have argued that sovereignty is being eroded by one aspect of the contemporary international system, globalization, and others that it is being sustained, even in states whose governments have only the most limited resources, by another aspect of the system, the mutual recognition and shared expectations generated by international society. Some have pointed out that the scope of state authority has increased over time, and others that the ability of the state to exercise effective control is eroding. Some have suggested that new norms, such as universal human rights, represent a fundamental break with the past, while others see these values as merely a manifestation of the preferences of the powerful. Some students of international politics take sovereignty as an

[28] OLOO, A., Volume 4 No. 2 *AU Integration Bulletin*, September, 2011.

Accessed from LHRC Constitutional Database

analytic assumption, others as a description of the practice of actors, and still others as generative grammar.[29]

This muddle in part reflects the fact that the term "sovereignty" has been used in different ways (by those in power), and in part it reveals the failure to recognize that the norms and rules of any international institutional system, including the sovereign state system, will have limited influence and always be subject to challenge because of logical contradictions (non-intervention versus promoting democracy, for instance), the absence of any institutional arrangement for authoritatively resolving conflicts, power asymmetries among principal actors, notably states, and the differing incentives confronting individual rulers. In the international environment actions will not conform tightly to any given set of norms regardless of which set is chosen. The justification for challenging specific norms may change over time but the challenge will be persistent.

The exercise of one kind of sovereignty – for instance, international legal sovereignty – can undermine another kind of sovereignty, such as Westphalian sovereignty, if the rulers of a state enter into an agreement that recognizes external authority structures, as has been the case for the members of the European Union. A state such as Taiwan can have Westphalian sovereignty, but not international legal sovereignty. A state can have international legal sovereignty, be recognized by other states but have only the most limited domestic sovereignty either in the sense of an established structure of authority or the ability of its rulers to exercise control over what is going on within their own territory. In the 1990s and beyond, some failed States in Africa, such as Somalia, served as unfortunate examples.

State sovereignty, however, has continued to be a guiding principle on which international relations are based. Governments still cling tenaciously to their possession of sovereignty, although the sacrosanct status of unfettered sovereignty is being increasingly questioned. Part of the assault has come from the traditional critics of sovereignty, for instance, the opponents of war, who argue that armed conflict is an integral, inevitable, and regrettable consequence of a world in which sovereignty reigns. From this view, dismantling sovereignty is the necessary prerequisite for world peace. At the same time, the rise of other concerns such as human rights creates collision points with state sovereignty. Those who abuse their own citizens have long justified mistreatment of individuals and groups by arguing that sovereign states possess absolute authority over their citizens; therefore, how states act within their sovereign jurisdiction is their own business and never the concern of the international order.

---

[29] CERNY, P.G., *The Changing Architecture of Politics: Structure, Agency and the Future of the State*, London: Sage, 1990, p. 13. Also see BISWARO, Joram Mukama, "Integration and Sovereignty," a paper presented at the Fifth Conference of African Ministers of Regional Integration, in Nairobi Kenya on 5-9 September, 2011.

Accessed from LHRC Constitutional Database

The bloody internal conflicts in the Balkans and parts of Africa have challenged the idea that state sovereignty provides license for governments to do as they please to their citizens or, where governments are incapable or nonexistent, not to protect portions of their populations from internecine or external ravage. Using the United Nations as a vehicle to justify its actions, the international system has, on numerous occasions, vowed that it will almost certainly continue into the future to involve itself in these situations in order to prevent further abuse and to protect citizens.

In brief, the twentieth century has witnessed the norms of international legal sovereignty and Westphalian/Vattelian sovereignty being universally accepted. It has often been tacitly assumed that these norms would be accompanied by effective domestic sovereignty; that is, by governance structures that exercised competent and ideally constructive control over their countries' populations and territory. This assumption has proven false. Poor, even malevolent, governance is a widespread problem. Badly governed states have become a threat to interests of much more powerful actors - weapons of mass destruction have broken the connection between resources and the ability to do grievous harm, genocides leave political leaders in democratic politics with uncomfortable choices, and transnational diseases and crime are persistent challenges.

Accessed from LHRC Constitutional Database

## VII. The African Experience

Africa has experienced at least three distinct models of non-state sovereignty. The colonial phase established states in which the majority of people were subjects and not citizens. The colonial states and by extension the colonized populations were subordinate to other states. Post colonialism saw these subjects become, as the result of their own struggles against imperialist control, citizens with varying rights to own property, confer citizenship, vote and be voted for, among others.[30] In this model of a representative democracy, sovereignty revolved around the holding of periodic "free and fair" elections. Elections produced leaders who made public policy and enabled the citizen, through his or her vote, to hold government accountable for the delivery of pre-election promises.

As indicated before, various efforts and initiatives aimed at Africa's closer integration include the 1981 Lagos Plan[31] and the African Economic Community (AEC) in which development objectives and measures that Africa should undertake in order to achieve socio-economic progress are spelt out. The adoption of the Sirte Declaration, the Constitutive Act NEPAD and the AU

---

30 MAMDANI, Mahmood, (1996), *Citizens and Subjects: Contemporary Africa and the Legacy of the Late Colonialism*, Princeton: Princeton University Press, 1996.

31 The Treaty Establishing the African Economic Community (i.e. The Abuja Treaty) Abuja, Nigeria, 3rd June, 1991.

Commission's strategic plan are some of the latest contributions towards this objective.

From this perspective, we may assess the state of member states' sovereignty in the African Union by interrogating some of the AU principal instruments such as the Constitutive Act and organs of the Assembly - the Executive Council, the Permanent Representatives' Committee (PRC), the Pan African Parliament and the African Court of Justice and Human Rights.

In the preamble to the Constitutive Act of the AU, the Heads of State and Government stated that they are "determined to take all necessary measures to strengthen their common institutions and provide them with necessary powers and resources to enable them to discharge their respective mandates effectively." This seems to indicate that Member States realize the need to grant powers to the common institutions, which in essence entails transferring some of their sovereign powers to the AU, if they are to achieve the objectives set out in Article 3. It includes ceding some legislative powers to the Pan-African Parliament (PAP), judicial powers to the African Court of Justice and Human Rights, and powers over enforcement and implementation of decisions domestically.

One of the objectives listed in the Constitutive Act is defence of "the sovereignty, territorial integrity and independence of its Member States" (Article 3 (b)). While this may be reminiscent of its predecessor's preoccupation with preserving state sovereignty, which in essence came down to non-interference in the internal affairs of Member States, the Constitutive Act allays fears of complacency by expressly stipulating that it has a right to intervene in "grave circumstances, namely war crimes, genocide and crimes against humanity" (arts 4 (h)). It may also intervene upon request by a member state "in order to restore peace and security" (Article 4 (j)).

## VIII. Critical Analysis of Article 4(h) and (j) of the Constitutive Act

As Girmachew Alemu Aneme has correctly argued, Article 4(h) of the Constitutive Act is a binding legal norm that places direct obligations on member states of the AU. The pioneering nature of Article 4(h) is related especially to the grounds of intervention and its impact on the reinterpretation of the principles of sovereignty and non-intervention under international law. No international treaty had so far provided an agreement between almost all states in a continent to use force inside each other against the commission of genocide, war crimes and crimes against humanity. The possible factors that motivated AU members to enact such an Article include the Rwandan genocide. Arguably, the finding that the 1994 Rwandan genocide was preventable was a strong reminder to African States to empower the AU in order to prevent repetition in future. However, such influence should be seen in combination with the practical commitment of AU member states to fight the commission of massive atrocities inside a member state. The pro-interventionist normative and practical

Accessed from LHRC Constitutional Database

development in two African SROs were also factors that contributed to the promulgation of Article 4(h). Specifically, the practical experiences of ECOWAS and SADCC in the 1990s had the impact of challenging the strict adherence to the non-interference norm under the OAU. Moreover, the subsequent normative developments in these SROs had already exhibited the promulgation of provisions that allow the organization to intervene in their member States. These provisions can generally be taken as precursors to Article 4(h) even though the latter has distinct features and terms of its grounds and institutions of implementation.

Despite these glaring regional experiences, it took over one hour for the Tanzanian delegation (which proposed it) and other like-minded delegates to convince the august assembly at the 36th OAU Summit in Lome, Togo in July, 2000 to accept and ultimately adopt and insert this clause into the Constitutive Act. Tanzania was requested to recast its proposal and explain the circumstances in which such an Article could be applied. The delegation, composed of experienced legal minds of the likes of the late Chief Parliamentary Draftsman Lushagara and Ambassador Charles Kileo, rose to the occasion and timely delivered.

Besides the analysis of Article 4(h) that reflected on the above issues, one can analyse Article 4(h) in terms of its constituent elements. The analysis of this Article leads to the following conclusions. Firstly, AU's right of intervention under Article 4(h) is exercised collectively by all member states rather than by the organization. This can be gathered from the fact that the reference to the "Union" under this Article, as we shall see, is a reference to the AU Assembly which is composed of all member States. The AU Assembly is the supreme decision-making organ. This means that sovereign power is retained by member states of the AU. As such, AU's right of intervention under Article 4(h) is a collective right. Secondly, intervention under Article 4(h) targets the commission of genocide, crimes against humanity and war crimes by governmental and non-governmental actors inside the territory of a member state. This can be derived from the fact that intervention under Article 4(h) is an exception to the non-intervention norm that governs relationships between the AU member states.

Thirdly, the measures of intervention under Article 4(h) are generally forcible measures that are required to protect the population inside the targeted state. The effectiveness of the intervention depends on the application of both military and non-military forcible measures. The application of military forcible measures requires the consideration of a number of criteria. For instance, there should be reasonable prospects of success in military operations. Where the application of military forcible measures is not feasible, non-military forcible measures such as economic, political and military sanctions are the only alternatives. The implementation of military and non-military measures presupposes the failure of a member state to fulfil its primary responsibility to protect its people from crimes under Article 4(h). There may be two forms of

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

such failure: the state may be the perpetrator of the crimes or it might be unable to protect its people because of its weakness. In this context, both are equal possibilities especially in situations where governments are not elected and state institutions are inherently weak.

Fourthly, The Assembly is the organ that has power to make final decisions to authorize the implementation of intervention as per Article 4(h). As argued above, the AU Assembly is not necessarily legally obliged to seek permission from the UN Security Council (as per Article 53 (1) of UN Charter) in order to implement its intervention inside member States. This is because intervention under Article 4(h) of the Constitutive Act is different from Article 53(1) of the UN Charter in terms of its grounds, aim and basis. Thus, intervention under Article 4 (h) is based on commission of genocide, crimes against humanity and war crimes by governmental and non-governmental forces inside an AU member state. The aim is to protect the population inside a targeted state from the above crimes. The basis for intervention is the fact that the consent of member states is given in advance under the Constitutive Act. Conversely, enforcement action under Article 53(1) of the UN Charter is aimed at maintenance of peace and security. The grounds of enforcement are the existence of threat to peace, breach of the peace and aggression. The UN Security Council authorizes enforcement aiming at forcing one or more member states responsible for the existence of one of the above three grounds to comply with the decision of the Ccouncil.[32]

Nevertheless, if and when member states of the AU that is a target of an AU Assembly decision on intervention rejects such decision despite its advance consent, and the Assembly wants to use force, despite the rejection, the Assembly is required to get UN Security Council authorization under Article 53(1) of the UN Charter. This is because the absence of consent removes the legal basis of such use of force. Moreover, the possible confrontation between the target state and the other members of the AU is a matter of international peace and security, the maintenance of which is the primary responsibility of the UN Security Council. It is worth noting that rejection of the AU Assembly on intervention most likely comes from the targeted state which itself is the perpetrator of crimes under Article 4 (h). Conversely, where the target is not a party to the commission of crimes, it is highly likely that it abides by its obligation to implement the AU Assembly decision.[33]

Fifthly, the wording of Article 4(h) indicates that the three grounds of intervention (genocide, crime against humanity and war crimes) are exhaustive. Moreover, the status of the three crimes as peremptory norms of international law also indicates that the commission of each crime has serious consequences on the population inside a state that warrants intervention. In terms of their

---

[32] ANEME, G.A., "A Study of the African Union's Right of Intervention against Genocide, Crimes against Humanity and War Crimes," Faculty of Law, University of Oslo, 2008.

[33] Ibid.

meaning, the AU adopts the same meaning of crimes given under international law. As such, the meanings of the grounds of intervention under Article 4(h) have a relative clarity. In this regard, the proposed amendment of Article 4(h) to add the dubious ground of "a serious threat to legitimate order" is a setback as it has no established meaning under international law. The wording of Article 4(h) implies that intervention inside a member state can only commence once the commission of the crimes is ascertained. This may sound unreasonable taking into consideration that preventive intervention saves more lives when there is enough evidence that crimes are in their preparatory stages. Nevertheless, the principles of sovereignty and non-intervention which are rules that govern the relation between states and the exceptional nature of their intervention is against such broad interpretation which cannot be inferred either from Art 4(h) of the Constitutive Act or the other regional treaties and interpretive instruments.[34] Consequently, the detection of commission of the crimes in the early stages is decisive in protecting and saving as many lives as possible and not otherwise.

Accessed from LHRC Constitutional Database

### *A. Non -Intervention*

The AU Constitutive Act rules out unilateral intervention between member states. However, there is no provision similar to Article 2(7) of the UN Charter that bars the AU from intervening in internal affairs of its member states. Unilateral intervention among member states is taken as a common security threat on the continent.[35] Apart from the direct principle of non-interference by any member state in the internal affairs of another, the non-intervention norm is also expressed through many principles of the organization. Thus, the Constitutive Act rejects subversive activities in member states. Subversion is defined as constituting "any act that incites, aggravates or creates dissension within or among member States with the intention to destabilize or overthrow the existing regime or political order by, among other means, fomenting racial, religious linguistic, ethnic and other differences" in violation of the Constitutive Act and the UN Charter.[36] Subversion does not only include the use or threat of military force, which is prohibited under the Constitutive Act, but also non-military means of interference. In a similar tone to the declaration of the AU, the protocol of amendments to the Constitutive Act of the AU proposes two additional principles on subversion that request "restraint by any member state from entering into a treaty or alliance that is incompatible with the principles and objectives of the Union" and prohibit "any member state from allowing the use of its territory as a base for subversion against other Member States."[37]

---

[34] Ibid. pp. 175-178.

[35] Sirte Declaration 2004 Article 8 (1).

[36] Assembly /AU Dec.71 (14) Article 1(a) AU Non Aggression and Defence Pact, 2005.

[37] Protocol on Amendments to the Constitutive Act adopted on 11th July, 2003 (Assembly/AU Dec. 26/11). Note that this protocol is yet to enter into force.

The AU non-intervention principle is based on the principles of sovereign equality and interdependence among member states and respect of borders existing on achievement of independence. The principles of "peaceful co-existence of member states and their right to live in peace and security" and the peaceful resolution of conflicts among member states are also the basis of the AU non-intervention norm.

### *B. Intervention*

Intervention in member states under the AU constitutes an unprecedented principle under international law. The AU is endowed with the 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 Protocol on amendments to the AU Constitutive Act (not yet in force) adds "a serious threat to legitimate order to restore peace and stability to the member State of the Union" as another ground that would trigger intervention by the AU in a member state besides war crimes, genocide and crimes against humanity.

The AU member states have also agreed on the right to request intervention from the Union in order to restore peace and security. This is a case of intervention by invitation. International law generally recognizes the right of states to invite third states to militarily intervene inside their territory. The request for intervention by a member state is made to the Assembly of the AU, which is the supreme decision making body. The issue of intervention by invitation is riddled with many controversies. The most controversial elements include the issue of who is entitled to request intervention on behalf of the state (this involves the whole issue of recognition of governments), what constitutes "peace and security" in member states and what standards will the Assembly of the AU use to accept or reject the invitation from a member state as provided for in Article 4(j) of the Constitutive Act. The analysis of these issues is beyond the scope of this study. However, if the late Brother Leader Muammar Gaddafi had requested any assistance from the AU during the NATO and its surrogates' bombardment of his country, what would have been the reaction?

### *C. The Role of African Regional Economic Communities (RECs) in the Implementation of Military Forcible Measures under Article 4 (h)*

The AU Assembly and the Executive Council generally provide that the relation between the AU Peace and Security Council and the RECs is based on the principles of subsidiarity and variable geometry. An explanation on the meaning of the principle of subsidiarity and the challenges to their applicability in relation to the implementation of military forcible measures under Article 4(h) by the AU Peace and Security Council and the security mechanisms of African SROs is as follows:

Accessed from LHRC Constitutional Database

*(a) The Principle of Subsidiarity*

The concept of subsidiarity provides that small units be given the 'possibility and means for realizing that of which they are capable' and larger units focus on 'spheres which surpass the powers and ability of the smaller units'. The principle of subsidiarity is 'an organizational principle which demands the transfer of competences to inferior communal units, where local tasks and regional problems are concerned.'[38] Thus the central notion of the principle of subsidiarity is connected with the identification of the level of authority that can achieve a given goal in a more efficient and effective manner. In this regard Andy and Persaud explain that there are two distinct approaches to the practice of subsidiarity - top-down and bottom-up. In the latter, central authority is subsidiary or auxiliary to the lower levels of power. Only when action or measures from the lowest possible level of government appear inadequate to attain a given goal would the higher level of authority intervene. Conversely, in a top-down approach, the benefits of subsidiarity accrue to central institutions. In any particular field, the powers enjoyed by central institutions are limited to those areas in which intervention measures from the central body seem necessary to achieve a given objective and goal. [39]The AU Peace and Security Council Protocol affirms the application of the principle of subsidiarity when it provides that the cooperation between the AU Peace and Security Council and the security mechanisms of the SROs 'shall be determined by the comparative advantage of each and prevailing circumstances.'

In the context of the meaning explained above, the principle of subsidiarity does not question the powers and mandate of the AU and SROs. Nor does the principle allow actions beyond the mandates of both the AU Peace and Security Council and the security mechanisms of the SROs. Rather, the principle allows flexibility in the exercise of the powers and mandates given to both.

*(b) The Principle of Variable Geometry*

The principle of variable geometry is the other principle of cooperation between the AU Peace and Security Council and the African sub-regional security mechanisms. In its institutional application, the principle of variable geometry is linked with the process of European integration. The online Concise Encyclopaedia of the European Union defines the principle of variable geometry as one based on 'the concept of a community in which some countries integrate more (or faster) than others. In the context of the relationship between the AU

[38] ANDY W.K. and R.B. Persaud, "Subsidiarity, Regional Governance, and Caribbean Security" 2001 cited in ANEME, G.A., *A Study of the African Union's Right of Intervention against Genocide, Crimes against Humanity and War Crimes*, Oisterwijk: Wolf Legal Publications, 2011. op. cit. at p. 245.

[39] ANDY W.K. and R.B. Persaud, op.cit. at p. 245.

Accessed from LHRC Constitutional Database

and African SROs, the principle of variable geometry allows flexibility in the utilization of some SROs by the AU to implement its decisions such as intervention under Article 4(h). For instance, the AU can utilize the more developed SROs in terms of institutions, logistics and experience in other sub-regional bodies with little or no capacity to carry out intervention under Article 4(h) of the Constitutive Act.

*(c) Major Challenges to the Application of the Principles of Subsidiarity and Variable Geometry*

The major challenge to the application of these principles is the lack of a formal agreement between the AU and the SROs on intervention under Article 4(h).The Peace and Security Council Protocol provides that the SROs are part and parcel of the continental security architecture. It further provides that the details of relations between them shall be worked out in a Memorandum of Understanding (MoU). In 2005, the AU Commission produced a draft MoU on the relationship between the AU Peace and Security Council and the security mechanisms of the SROs. According to the Memorandum, areas of cooperation between them include intervention as per Article 4(h) of the AU Constitutive Act. In July 2007, the AU assembly adopted the Protocol on relations between the AU and the Regional Economic Communities (RECs), Article 30 of which provides inter alia, that the AU and SROs agree to determine the modalities of the relationship in the promotion of peace and stability through an MoU between the Union and the RECs.[40]

Despite the above provisions, final agreement is yet to be reached on the modalities of their cooperation on the promotion of peace and stability in general and on their roles in the implementation of intervention under Article 4(h) in particular.[41] Thus the details of cooperation in relation to the said Article are not clear. Nevertheless, several issues can be raised in connection with the cooperation between these organizations based on principles of subsidiarity and variable geometry within the context of the implementation of military intervention under Article 4(h) of the Constitutive Act as follows:

(i) The Need for Clear Agreement on Utilization of RECs and other Sub-Regional Arrangements

All Members of the eight recognized Regional Economic Communities (RECs) of the AU are also members of the AU with the exception of Morocco. Thus, as State parties to the AU Constitutive Act they have a treaty obligation to implement military intervention as per Article 4 (h).

[40] Assembly/AU/Dec.166(IX)2007.

[41] ANEME, G. A., "A Study of the African Union's Right of Intervention against Genocide, Crimes against Humanity and War Crimes," op.cit.

Accessed from LHRC Constitutional Database

However, such obligation does not include the utilization of the SROs by the AU. But they can be used only with their consent, which consent may be expressed through the conclusion of a specific agreement between the AU and a sub-regional organization. The agreement would go through the decision-making process of the AU (the Assembly) as well as the sub-regional organization in accordance with the applicable rules of procedure. Nonetheless, efforts are underway to address the matter within the African Standby Force framework.

(ii) The Principle of Subsidiarity and Implementation of Military Intervention under Article 4(h)

Within the context of the specific agreement discussed above, it can be stated that the AU Constitutive Act and the Peace and Security Council Protocol allow the application of the top-down approach, as defined above, in the relation between the AU and SROs in the implementation of Article 4(h). The application of the top-down approach is clearly indicated by the mandate given to the AU Assembly to pass the final decision. Moreover, as implementing organs of the AU Defense and Security policy, the AU can utilize SROs to implement military intervention under Article 4(h). The standard of the AU's top-down approach is the comparative advantage of utilizing military intervention. This comparative advantage relates *inter alia*, to logistical and financial capacity, practical experience and knowledge of the neighborhood where a target State is located. In the context of the top-down approach the SRO implements military intervention under the direction of the AU Assembly and the PSC.[42]

(iii) The Principle of Variable Geometry and the Implementation of Military Intervention inside Third States

As defined above, this principle allows the AU to utilize an SRO with a clear comparative advantage to implement intervention in a third State under Article 4(h). The third State can be a non-member of an SROor located in another sub-region. The AU's utilization of an SRO in a third State is justified as long as the third State is a party to the Constitutive Act and the utilization has a comparative advantage.

However, there might be practical and normative difficulties, especially when the third State is located in another sub-region. For instance, the normative structure of an SRO may not allow the involvement of the organization in a third State. Moreover in such cases, advantages of practical knowledge of the

[42] Ibid.

Accessed from LHRC Constitutional Database

neighborhood are absent, thereby affecting the effective implementation of the military intervention in a third State.[43]

On the surface, this may not seem to amount to a transfer of sovereign powers to the AU, but Member States did in effect transfer some of their sovereign powers by ratifying the Constitutive Act which empowers the AU to intervene in such circumstances. However, apart from a few instances, the AU has generally avoided intervening in the internal affairs of Member States. Nevertheless, the AU has recently deployed a peacekeeping mission in the Sudan and Somalia; it also restored peace and security in the Comoros, where AU forces led by Tanzania did a commendable job of restoring law and order in separatist Comoros with respect to Anjouan Island in 2008. This is, once again another piece of evidence on the determination of the AU to maintain peace and security on the continent. These examples not only point to the AU's departure from its predecessor's stance of non-interference in internal affairs, but also show that the AU is exercising some powers ceded to it by Member States. This can, therefore, be construed as qualitative change.[44]

As stated above, the AU's Constitutive Act also envisages that Member States will cede their sovereign powers to the entities of the AU (Article 5), in order to effectively exercise their powers and competencies. The Assembly of the AU, inter alia, 'determines the common policies and decisions of the Union as well as ensures compliance by all Member States; and gives directives to the Executive Council on the management of conflicts' (Article 9). In terms of these powers and functions, the Assembly is in charge of issues of common interest and ensures their execution (such as common position on UN Security Council reform), including imposing sanctions for non-compliance (Article 23). These are competencies that are traditionally vested in the executive branch of a state. This means that states must cooperate and indeed cede some of their executive powers to the union to enable the AU Assembly to carry out the functions stated above, and to ensure compliance.

Decisions are ratified in the Assembly by 'consensus or failing which, by a two thirds majority of the Member States of the Union, apart from procedural matters which require a simple majority' (Article 7). This means that even if not all members agree with a decision, they are bound by it regardless of their individual positions on that particular matter. The sovereign powers in question include those related to enforcement and implementation of decisions of the Assembly domestically. States should therefore accept and implement the common policies adopted by the Assembly which may include economic policies, research, monetary and financial affairs, trade, customs and immigration, transport, communication and tourism and such other issues of common interest to the members.

---

[43] Ibid at pp. 244-251.

[44] BISWARO, Joram Mukama, *Perspectives on Africa's Integration and Cooperation: From OAU to AU - Old Wine in New Bottle?* Dar es Salaam: Tanzania Publishing House, 2005.

Accessed from LHRC Constitutional Database

However, apart from a few instances pointed out above,[45] the AU Assembly is still generally reluctant to interfere in the internal affairs of Member States. This is despite the fact that Article 4(g) of the Constitutive Act provides for the principle of non-interference by any member state (and not necessarily the AU) in the internal affairs of another, which could be interpreted to mean that the AU can in fact interfere as an institution. With regard to human rights issues, for example, some Member States have prevailed upon the Assembly to block publication of reports of AU organs which are unfavourable to them in the name of protecting their sovereignty. However, AU Member States have adopted the principle of condemnation and rejection of unconstitutional change of governments. The rejection of impunity is also a principle adopted by the Member States; that they strengthen their commitment to the rule of law. The challenge here remains the enforcement of such legal instrument. Furthermore, because of the lack of appropriate classification of the AU decisions during their drafting, some Member States have taken advantage of this shortcoming by not implementing or domesticating some decisions and protocols into their national laws. In this case, many decisions and protocols are not implemented accordingly. Other AU organs also have similar limitations.

Accessed from LHRC Constitutional Database

## IX. Reflections, Observations and the Way Forward

As it can easily be seen from the many examples given, regional integration and cooperation have become a pervasive feature of international relations. In spite of the existence of various blocs, which have Secretariats and regular technical and ministerial level meetings and summits of Heads of State and Government, in certain regions, like Africa, integration efforts have had a limited impact so far, perhaps because the reality on the ground does not match with ideals in treaties, protocols and MOUs. The degree of integration in some places remains highly superficial. Thus, results have to some extent fallen below expectations. This has been due to a number of constraints, including:

**(a)** ***Membership issues:*** On a continental basis and also within sub-regions, for example, many African countries belong to several groupings or sub-groupings that sometimes compete, conflict or overlap amongst themselves rather than complement each other. This adds to the burden of harmonization and co-ordination, and is wasteful duplication in view of constrained resources.

**(b)** ***Slow ratification of protocols and reluctant implementation of agreed plans:*** Probably due to low political commitment and/or perceived or real losses and sacrifices involved, a number of countries have been reluctant to fully implement integration programs on a timely basis. This has been partly caused by the lack of prior cost-benefit analysis and broad internal

[45] WACHIRA, G.M. & Ayola, "Sovereignty and United States of Africa: Insight from the EU," No. 144 *ISS Journal*, 2007.

consultations on the part of the member countries concerned. In some cases, changes in the socio-economic and political dynamics within the member States involved have also militated against implementation of regionally agreed programs, especially where socio-economic sacrifices are concerned.

**(c)** ***Socio-economic policy divergence:*** Inconsistency or incoherence at the macroeconomic level has also been a source of problems for the systematic implementation and "internationalism" of the regional integration agenda in national programs. It has been impossible to integrate regionally where there have been continuously glaring inconsistencies involving policy, implementation and information at the national level. There is, therefore, a need for an appropriate policy mix and co-ordination at the national level that targets low inflation and fiscal discipline.

**(d)** ***Limited national and regional capacities:*** The lack of mechanisms and resources for effective planning, co-ordination, implementation, monitoring and pragmatic adjustment of programs on the ground has been another constraint on regional integration. As a result, many programs and projects remain on the shelves of various offices without being implemented.

**(e)** ***In the area of trade and mobility of factors of production:*** integration has been relatively more outward-looking at the expense of intra-regional trade. In the case of Africa, xenophobia has partly hampered labor movement among members, while capital mobility has been constrained by largely undeveloped financial markets. This was evident in East Africa during the debate aimed at fast-tracking the ECA integration process in 2006/007. Some citizens of the regions rejected the process on the grounds that integration would declare them jobless as more skilled workers from other Member States would take up their posts and land. Xenophobia was also demonstrated in regional riots that erupted in South Africa in 2008, wounding or claiming the lives of many people, especially foreigners.[46]

**(f)** ***Domestic and international financial and investment constraints:*** Especially in the Third World, these have also hampered regional integration, which requires considerable resources to plan, coordinate, implement and monitor progress in its implementation. There is low saving as a percentage of GDP, while foreign direct investment (FDI) remains elusive in Africa, Latin America and The Caribbean. Furthermore, overseas development assistance (ODA) has also been dwindling in some of these countries due to donor fatigue.

---

[46] BISWARO, Joram Mukama, *The Quest for Regional Integration in the 21st Century in Africa, Latin America and Beyond: Rhetoric v/s Reality*, Brasilia, Brazil: Funac, 2011.

Accessed from LHRC Constitutional Database

**(g)** ***Lack of full private sector involvement at both planning and implementation stage:*** This has not elicited maximum deliberate input from this important sector, which usually has the financial resources and owns productive capacity. In most countries the private sector remains weak and is still not well organized. Civil society involvement has also been wanting. In this connection, public and private sector partnership needs to be encouraged at all levels.

**(h)** ***High degree of vulnerability to exogenous shocks:*** This is including heavy and unsustainable external debt burdens (the majority of HIPCs are in Africa), inadequate and erratic external resource inflows, adverse weather patterns, natural disasters and unfavourable terms of trade. Civil strife – itself a result of abject poverty and other forms of socio-economic and political instability – has also exacted its toll.

## X. The Way Forward

Accessed from LHRC Constitutional Database

Progress has been rather slow, and the reality has fallen far short of aspirations in most regional integration schemes. There is however, ample room for improvement when it comes to implementation. Practical measures could be geared towards:

(i) Eradicating wasteful or costly duplication of multiple memberships and rationalizing some overlapping sub-regional blocs. This should be based on priority needs and efficiency from a comparative advantage.

(ii) Securing irrevocable commitment beyond mere political rhetoric amongst member countries of the various sub-regional blocs to the ratification and punctual implementation of treaties, protocols and decisions etc., without inefficiencies, lapses or reversals is necessary.

(iii) The process should be all-inclusive and participatory. At the national level, there should be coherent co-ordination, awareness, engagement of the private sector and civil society, whole-hearted political will, and rules implementation and accountability.

(iv) Strengthening technical capacity for conducting informative cost benefit analysis and ensuring fair and equitable sharing of the costs and benefits of integration should be the starting point among Member States.

(v) Government should be free to decide the level and manner in which they interact with each other. Once legal arrangements have been established for pursuing common interests, compliance should be monitored and unlawful actions should be corrected.

(vi) As the integration process advances, it should draw its work rules against fragmentation of the joint enterprise. National sovereign acts in defiance of the common rules are unlawful and therefore should not be tolerated. If

the jointly agreed rules are not respected the chaos of old style power politics and gunboat diplomacy will reign.

(vii) Government officials should be clear as to why the specific arrangement is necessary, what it should achieve, and what power it should enjoy.

(viii) It should not be possible for participating member States subsequently to deny the effect of what they have agreed to.

(ix) The capacity for comprehensive and consistent planning, policy formulation and implementation at the national level should be strengthened in the member countries to reduce the risk of conflicting policy objectives, and enhance synchrony and complementarity. Capacity also needs to be sharpened to effectively tackle all stages of integration.

(x) Providing the necessary financial and technical resources, in part through international, regional and national private sector involvement at all stages of integration is important. Foreign direct investment, equity investment, development of financial markets and increased technical and financial support through international development partnerships should be mobilized for this purpose. Member-States and sub-regional blocs, for their part, should create an enabling legal, institutional, socio-economic and political environment that supports and attracts financing for integration.

(xi) Member countries should pay the agreed financial contributions fully and punctually. Furthermore, considering that assessed contributions from member countries and external donor assistance may not be enough to fund integration programs and projects, other non-traditional sources of funding need to be explored.

(xii) Depending on the level of asymmetry, the solidarity principle needs to be encouraged and adopted. This could involve introducing trust funds which cater for specific projects in less developed Member States.

(xiii) Development, harmonization and integration of national and regional financial markets, including elimination of barriers and reducing risks affecting free movement of labour and capital, are important.

(xiv) Effective pooling of resources and expertise to tackle cross-cutting regional challenges, such as environment, terrorism, drug and human trafficking, infrastructure, governance, gender, HIV/AIDS, peace, security and conflict prevention and resolution, can help to reduce the average costs of delivery, and also assist in harmonizing and raising standards.

(xv) Regional integration treaties, protocols, leadership and priorities should be unambiguous in providing binding rule-based frameworks and results-oriented milestones to guide national, sub-regional and regional actions required for envisaged eventual continental integration. Furthermore, effective monitoring, follow-up and corrective mechanisms should be put

Accessed from LHRC Constitutional Database

in place and enforced. In this regard, the regional and continental bodies should be adequately staffed and resourced, with authority to act.

(xvi) In Third World regional integration schemes such as in Africa, negotiation capacity, especially in the area of multilateral trade, needs to be strengthened from a regionalized vantage point. A good example to emulate is that of CARICOM.

(xvii) The goals of regional integration must be broad and holistic instead of restricting them to economic matters which usually defeat the purpose.

(xviii) The AU in collaboration with the RECs must lead the process of integration in terms of popularizing, sensitizing, and allaying fears among the African populace.

These are prescriptions with several legal and political ramifications, demanding complex institutions and structures and extensive political will, dedication as well as unity of objectives and commitment. It is good to note that some of the propositions presented above depend largely on popular participation in its entirety. Without sufficient participation of various stakeholders in the political process where decisions relating to regional cooperation and integration programs and projects are taken or through adequate consultations, efforts and initiatives face the risk of becoming easy prey for sabotage.

We can conclude this overview of the development of various mechanisms of regional cooperation and integration in the 21st Century with several brief observations, as follows:

**First,** regionalism is a truly global phenomenon and therefore imperative.

**Second**, within the global trend of regionalism there are important differences in the types of organization that are being set up, ranging from rather loose and non-binding agreements to the complex institutional architecture set up.

**Third**, the text of an agreement reflects what the parties have adopted as their obligations. Therefore, to conclude the actual treaty which sets up the organization is to perform an act of sovereignty.

**Fourth,** there is no blueprint, simple or single path of regionalism. The way in which different regional mechanisms develop is contingent upon a multitude of factors, both internal and external to the region.

From this study it can be further concluded that regional integration and cooperation in the 21st century in Africa and beyond is a real, relevant and imperative. Each regional integration arrangement will undertake the process, bearing in mind the specific material conditions existing in that region.

Both the driving forces for more regional integration and cooperation and the obstacles which may limit those aspirations vary across the different continents, as indicated in the case studies above. Above all, one of the challenges that stands out and cuts across all regions is the challenge of ceding

Accessed from LHRC Constitutional Database

sovereignty. But even this varies from one regional integration scheme to another. In spite of all this, regionalism is a global phenomenon.

It is a basic principle of international law that States may limit their sovereignty by treaty. African States have done so in the Constitutive Act of the African Union. They have decided that sovereignty would no longer trample underfoot human rights should the latter be abused by the governments whose basic obligation is to protect them. They have consequently conferred a right of intervention on their regional organization in respect of grave circumstances specified in the AU Constitutive Act. The possible occurrence or actual existence of these circumstances is to be determined by the AU Peace and Security Council. Intervention may then be authorized by the Assembly of the Union as was the case with Comoro in 2008.

Nonetheless, it must be recognized that the incorporation of the principle in the basic law of the AU constitutes a pioneering act in international law. A right to intervene in cases of grave circumstances regarding human rights violations now exists Africa. This right also represents a paradigm shift in enforcement action by regional organizations under the UN Charter. The AU no longer needs to seek a determination by the UN Security Council that a humanitarian crisis in an African State constitutes a threat to the peace or breach of the peace. It still requires, however, a formal endorsement and support from the Security Council under Chapter VIII of the Charter. The AU itself recognizes the need for such endorsement not only to respect the law of the Charter, which is important for avoiding chaos and insecurity in international relations, but also to obtain financial and logistical assistance for costly military operations.

In view of the above, one can argue that strong judicial institutions have an important role to play in economic integration. They act as guardians of the processes and arbiters of inter-institutional and community-state relational problems inherent in them. For example, the character of a community court reflects the depth of integration desired and how much of a role is given to law in the integration process. A limited role for courts reflects unwillingness to relinquish sovereignty, and may hamper the attainment of deeper integration. In this respect the community courts of Africa have a crucial role to play in advancing economic integration through the law. They have to evolve their own jurisprudence that ensures compliance with treaty obligations, checks excesses on the part of community institutions, engenders investor confidence and nurtures a sense of judicial discipline and legitimacy among national courts.[47] Indeed an active community court with broad subject matter and personal jurisdiction can sometimes push forward integration in the face of political inertia. Nowhere has this forward integration been truer than within the EU. The jurisprudence of the European Court of Justice (ECJ) has been critical to the community's development. The COMESA, EAC, ECOWAS and SADC courts

[47] OPPONG, R.F., *Legal Aspects of Economic Integration in Africa*, Cambridge: Cambridge, University Press, 2011, p. 164.

Accessed from LHRC Constitutional Database

have a crucial role in managing inter-institutional and community-state relations in their respective regions.

However, without the active support of national courts and individuals, they cannot perform this role effectively and efficiently. A trilateral relation among individual litigants, national courts and community courts is important to ensure effectiveness of Africa's economic integration processes. The jurisprudence of COMESA, EAC, ECOWAS, and SADC courts points to the importance of this trilateral relationship. Their jurisprudence may offer useful lessons to the African Court of Justice. However, it is doubtful whether the African Court of Justice is equipped to address, effectively, the issues faced by the community courts. For example, there are provisions in the Protocol on the Statute to the African Court of Justice and Human Rights that require amendment, before the court can truly develop this trilateral relationship which will enable it to perform effectively its role in Africa's economic integration.

The current debate on integration and sovereignty is not new though more relevant today than ever before. However, the journey towards a fully fledged regional integration in Africa and beyond could be long, rough and tough. Challenges and fears are enormous, but hopes, opportunities and prospects to the Promised Land are immense. The resulting mission is, however, inevitable. Some difficult decisions concerning sovereignty must be taken for integration to take shape. Africa must therefore be ready to swallow the bitter pill.

Accessed from LHRC Constitutional Database

# THE ICC ON TRIAL: A DECADE OF INTERNATIONAL CRIMINALISATION OF AFRICA

*Nsongurua Udombana*[1]

I. Introduction
II. In Search of a Unicorn
  A. The Essentiality of the ICC
  B. The Essence of Complementarity
  C. Troubling Signals
III. Double Standard Negates Justice
  A. Universalism Precludes Selectivity
  B. Exceptionalism Is Morally Indefensible
IV. Concluding Thoughts

Accessed from LHRC Constitutional Database

> "For the time being, war criminals in Latin America, Asia and the West – the former Yugoslavia excepted – seem at no risk of being brought before the ICC."[2]

> "If I may say so, this is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States."[3]

## I. Introduction

Colonel Muammar Gaddafi's dreadful death on October 20, 2011, in the hands of Libyan rebel (a.k.a. revolutionary) fighters, brought a dramatic closure to possibly the most violent of the Arab Spring's political uprisings – 'possibly' because it is not yet clear how the carnage in Syria will unravel.[4] For more than four decades – forty-two years precisely, making him the longest serving Arab

---

[1] Professor of International Law and Dean, Faculty of Law, University of Uyo, Akwa Ibom State, Nigeria.

[2] WAUGH, Colin, "Don't be a Dictator in the Wrong Continent at the Wrong Time," *New African*, June, 2012, p. 22 at p. 23.

[3] HOILE, David, "Is the ICC Fit for Purpose," *New African*, Mar. 2012, 8 at 9 (*quoting* Robin Cook, former British Foreign Minister).

[4] See, *e.g*. BAKRI, Nada and Alan Cowel, "No Letup in Syrian Crackdown on Protesters, Activists Say", *New York Times,* 18th August, 2011, *available at* www.nytimes.com/2011/08/19/world/middleeast/19syria.html?ref=syria ("The United Nations has said that at least 2,000 people have been killed since the uprising started in mid-March and that thousands were missing or detained").

and African ruler -[5] Gaddafi (1942-2011) lived and ruled by the 'sword' and, unsurprisingly, died by the 'sword': a brutal end to a brutal rule. His cruel death was a severe mercy in that he went to his grave – in a secret location in the Sahara Desert – before he could answer remote "questions that have deprived Libyans from sleep and tormented them for years"[6] and immediate questions for which the International Criminal Court (ICC) issued a warrant for his arrest in June 2011.

By the terms of the indictment, the ICC Pre-Trial Chamber I considered that there were reasonable grounds to believe that Muammar Gaddafi and Saif Al-Islam Gaddafi are criminally responsible as indirect co-perpetrators, while Abdullah Al-Senussi was criminally responsible as indirect perpetrator,[7] for two counts of crimes against humanity: Murder, within the meaning of Article 7(1)(a) of the ICC Statute; and persecution, within the meaning of Article 7(1)(h) of the Statute.[8] Gaddafi's indictment was triggered by United Nations (UN) Security Council Resolution 1970.[9] Acting under Chapter VII of the UN Charter[10] and deploring "the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government",[11] the Council decided "to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the [ICC]".[12] Following his death, the Pre-Trial Chamber I formally terminated the case against Muammar Gaddafi on November 22, 2011, but the two other suspects remain at large.

Prior to the Libya situation, the Security Council, after "[d]etermining that the situation in Sudan continues to constitute a threat to international peace and security",[13] referred the situation in Darfur to the Office of the Prosecutor (OTP)

Accessed from LHRC Constitutional Database

---

5 See MACFARQUHAR, Neil, "An Erratic Leader, Brutal and Defiant to the End", *New York Times*, 21st October, 2011 at A16 ("Colonel Muammar el-Qaddafi, the erratic, provocative dictator who ruled Libya for 42 years, crushing opponents at home while cultivating the wardrobe and looks befitting an aging rock star, met a violent and vengeful death on Thursday in the hands of the Libyan forces that drove him from power").

6 FAHIM, Kareem and Rick Gladstone, "Qaddafi, Son and Former Defense Aide Buried in Secret Place", *New York Times*, Oct. 25, 2011 at A12 (quoting a statement by Libya's Transitional National Council (TNC)).

7 See Rome Statute of the International Criminal Court, adopted 17th July, 1998, entry into force 1st July, 2002, A/CONF.183/9 [hereinafter "ICC Statute"], Article 25(3)(a).

8 See *Prosecutor v. Muammar Gaddafi, Saif Gaddafi & Abdullah Al-Sensuni,* Case No. ICC-01/11-01/11 (Warrant of arrest issued on the defendants on allegation of crimes against humanity in Libya).

9 See Security Resolution 1970, UN Doc. S/RES/1970 (2011) [hereinafter "Resolution 1970"].

10 See preamble.

11 Ibid.

12 Ibid. para. 4.

13 Security Council Res. 1593, UN Doc. S/Res/1593 (Mar. 31, 2005) [hereinafter "Resolution 1593"], preamble.

of the ICC in 2005.[14] On July 14, 2008, the OTP presented evidence to the Pre-Trial Chamber and sought for an arrest warrant against President Omar al-Bashir. On March 4, 2009, the Pre-Trial Chamber issued the first warrant for the arrest of al-Bashir,[15] listing ten counts on the basis of his individual criminal responsibility as an indirect co-perpetrator of crimes in Darfur, Western Sudan, including war crimes and crimes against humanity. A second warrant of arrest was issued on July 12, 2010, after the Pre-Trial Chamber satisfied itself that "there are reasonable grounds to believe that Omar al Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups";[16] in order words, al-Bashir is indicted for genocide, the crime of all crimes or, as the Genocide Convention describes it, an "odious scourge".[17]

How has the ICC fared in its first ten years, from a prosecutorial and adjudicatory point of view? This question is important because available evidence indicates that all the situations for which warrants of arrests have been issued by the ICC Pre-trial Chambers, or for which prosecutions have commenced, originate in Africa. Beside the Libya and Sudan referrals, there are currently five other referrals, all of them on Africa: Uganda, Central African Republic (CAR), Democratic Republic of Congo, Kenya, and Cote d'Ivoire. In

Accessed from LHRC Constitutional Database

[14] Ibid. para. 1. The Council also indicated that it acted under Chapter VII of the UN Charter. *See ibid.* preamble.

[15] See *Prosecutor v. Omar Hassan Al Bashir,* Case No. ICC-02/05-01/09.

[16] See ibid. *(Second Warrant of Arrest)* (July 12, 2010), *available at* http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf. The genocidal acts (*actus reus*) alleged against Al-Bashir, apart from the intent (*mens rea*), are killing, within the meaning of Article 6(a) of the ICC Statute; causing serious bodily or mental harm, within the meaning of Article 6(b); and deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of Article 6(c). This indictment for genocide comes about five years after this writer criticized the UN Commission of Inquiry on Darfur for failing to found genocidal intent against Al-Bashir. See Nsongurua Udombana, "An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur" (2006) 40 *Int'l L.* 41. For a critique of the genocide charges against Al-Bashir, see Alex de Waal, "Moreno Ocampo's Coup de Theatre", *Monthly Review,* July 30, 2008, *available at* http://www.monthlyreview.org/mrzine/dewaal300708.html (stating: "For nineteen years, President Bashir has sat on top of a government that has been responsible for incalculable crimes. Hundreds of thousands of Sudanese citizens have died in violence, or been starved or rendered homeless, or have been tortured or otherwise punished. The head of state must bear much responsibility for these countless crimes committed by those who profess their loyalty to him. Two weeks ago, Moreno Ocampo succeeded in accusing Bashir of the crime for which he is not guilty. That is a remarkable feat".); and CAYLEY, Andrew T., "The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide" Volume 6 *Journal of International Criminal Justice*, 2008, p. 829 at p. 840 ("The crimes perpetrated by Al Bashir's regime are proven facts. Serious disagreement remains, however, as to whether Al Bashir and the Sudanese government intended actually to destroy, in part, the Fur, Masalit and Zaghawa peoples of Darfur").

[17] Convention on the Prohibition and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 [hereinafter "Genocide Convention"], preamble.

total, fifteen cases in seven situations have been brought before the ICC.[18] Recently, the Court handed down its first judgement and sentence in *Prosecutor v. Thomas Lubanga Dyilo*.[19] Mr. Dyilo's trial started on January 26, 2009; and after long delays,[20] he was found guilty on March 14, 2012 of conscripting and enlisting children under the age of 15 and using them to participate in hostilities. He has been sentenced to fourteen years in prison on July 10, 2012,[21] of course, with a right of appeal which could also take some years to conclude.

Meanwhile, these indictments and arrest warrants against some African personalities – some of them powerful heads of states – discomfit many in Africa, who see the ICC as a neo-imperialist court with a mission to 'fix' or civilize the 'Dark Continent'. Ongoing investigations are overwhelmingly African, making the whole affair look like victimisation. Thus, Africa's political class in particular, cynically perceives the ICC Prosecutor as a 'persecutor'. This Article attempts to unpack some of the legal and political issues arising from these developments. It argues that any international criminal justice policy worthy of the name must be grounded on universality, which precludes favouritism and selectivity. Those who offer the gift of 'democracy' to the world and who are overtly concerned with the aspirations and freedoms of the "wretched of the earth" should, like Caesar's wife, live above board.

As a framework for a brief literature review, Part II examines the imperatives of the ICC in advancing international criminal justice. It argues that the ICC's value will lie not merely in the cases it will inevitably adjudicate, but in its ability to effectively compel states to prosecute most of these crimes at the domestic levels since justice, like charity, must begin at home. Part III interrogates the increasing perception that the ICC is a neo-imperialist institution and advances reasons why the charge has lingered and what needs to be done to build confidence in the project of international criminal accountability. The Article concludes with some reflections.

## II. In Search of a Unicorn

The international community established the ICC to replace impunity with accountability and summon the mightiest from the corridors of power to those of

[18] Information on each of these referrals is available at http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/.

[19] *Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06, Trial Chamber I, Judgment, Mar. 14, 2012.

[20] These delays were largely caused by repeated clashes by the Prosecutor with judges and defense counsel over the confidentiality of evidence. See BOSCO, David, "Justice Delayed," *Foreign Policy*, 29th June, 2012, available at http://www.foreignpolicy.com/articles/2012/06/29/justice_delayed (last visited July 11, 2012).

[21] See also Thomas Lubanga Dyilo sentenced to 14 years imprisonment, ICC Press Release, July 10, 2012, ICC-CPI-20120710-PR824, *available at* http://www.icc-cpi.int/NR/exeres/3EABAD63-FC6B-448A-9614-5BA2AECF10CF.

Accessed from LHRC Constitutional Database

justice. Its eventual establishment in 2002, domiciled at a sleepy suburb of The Hague, brought an "extraordinary optimism for the prospects of international criminal justice".[22] Kofi Annan, the UN Secretary-General, captured the mood of the international community when, following the sixtieth ratification of the ICC State, he announced that "[i]mpunity has been dealt a decisive blow".[23] This Part explores these and related issues.

### *A. The Essentiality of the ICC*

The adoption of the ICC Statute in 1998, by the UN Diplomatic Conference of Plenipotentiaries,[24] was historic in several respects. First, the ICC Statute codifies many customary law crimes that developed through centuries of uniform and consistent state practice - genocide,[25] crimes against humanity,[26] war crimes (including grave crimes under international humanitarian law (IHL),[27] and the crime of aggression.[28] The internationalization of these crimes is recognition that "there are certain norms of *international* criminal law that transcend national boundaries and, like fundamental human rights norms, are regarded as universal in acceptance and thus should be universal in application."[29]

Second, the ICC Statute establishes, for the first time, a permanent court to prosecute crimes of international concern, a sort of therapeutic institution to cure some severe pathologies of the modern world. The Assembly of State Parties to the Statute is convinced that the ICC:

> is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law, as well as to the prevention of armed conflicts, the preservation of peace

---

[22] BURKE-WHITE, William,, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" Volume 49 *Harvard International Law Journal*, 2008, p. 53 at 53.

[23] Press Release, Office of the Secretary-General, Transcript of Press Conference with President Carlo Ciampi of Italy and Secretary-General Kofi Annan in Rome and New York by Videoconference, UN Doc. SG/SM/8194 (11th April, 2002).

[24] See ICC Statute, *supra* note 94.

[25] See ibid.Article 6.

[26] See ibid. Article 7.

[27] See ibid. Article 8.

[28] See ibid. Article 5(2) ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime").

[29] FREELAND, Steven, "The Internationalization of Justice - A Case for the Universal Application of International Criminal Law Norms," Volume 4 *New Zealand Yearbook of International Law*, 2007, p. 45 at 47.

Accessed from LHRC Constitutional Database

> and the strengthening of international security and the advancement of post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, in accordance with the purposes and principles of the Charter of the United Nations.[30]

The establishment of the ICC was a culmination of the global community's episodic efforts towards international criminal justice since, at least, the post WWII era.[31] The Nuremberg and Tokyo prosecutions that followed WWII,[32] though often cynically referred to as 'victors' justice', were seen as part of "the determined battle of civilization to preserve the entire world from destruction,"[33] more so as the International Court of Justice (ICJ) was unsuitable for the resolution of all types of disputes. The post-Nuremberg *ad hoc* international and internationalised tribunals – in the former Yugoslavia,[34] Rwanda,[35] Sierra Leone,[36] Cambodia,[37] East Timor,[38] *et al.* – marked a second

Accessed from LHRC Constitutional Database

[30] See Strengthening the International Criminal Court and the Assembly of State parties, Resolution ICC-ASP/9/Res.3 (Dec. 10, 2010) [hereinafter "Res. ICC-ASP/9/Res.3"], preamble.

[31] The UN General Assembly first muted the idea of an international criminal court in 1946. *See* Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, GA Res 1/95, UN Doc. A/Res 41/1 (11th December, 1946). For a historical perspective on the establishment of the ICC see BASSIOUNI, M. Cherif, "Historical Survey: 1919 – 1998", in BASSIOUNI, M. Cherif (ed.), *International Criminal Law: Enforcement* (2nd ed., 1999) Volume III at 597.

[32] The International Military Tribunal at Nuremberg was created by the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945; Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 United Nations Tready Series 279, 284 [hereinafter "Nuremberg Charter"]. See also Charter of the International Military Tribunal for the Far East, 26th April, 1946, TIAS No. 1589, at 11, 4 Bevans 27 [hereinafter "Tokyo Charter"].

[33] Opening Statement of Joseph Keenan at the Tokyo Tribunal, *cited in* KEI, Ushimura, *Beyond the "Judgment of Civilization": The Intellectual Legacy of the Japanese War Crimes Trials, 1946–1949* (Tokyo: International House of Japan, 2003) at 4.

[34] See Security Council Resolution UN Doc. S/RES/827 (1993) (establishing the International Criminal Tribunal for the former Yugoslavia ("ICTY")).

[35] See Security Council Resolution UN Doc. S/RES/955 (1995) (establishing the International Criminal Tribunal for Rwanda ("ICTR")).

[36] See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000); and UDOMBANA, Nsongurua, "Globalization of Justice and the Special Court for Sierra Leone's War Crimes," Volume 17 *Emory International Law Review*, 2003, p. 55.

[37] *See* Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850 (1999), Annex, and Tribunal Memorandum of Understanding between the United Nations and the Royal Government of Cambodia, 9 November 2000).

[38] *See* UN Transitional Administration in East Timor, Regulation No. 2000/15, UN Doc. UNTAET/REG/2000/15 (2000); and LINTON, S., "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor," Volume 25 *Melbourne University Law Review,* 2001, p. 122.

post-WWII effort to remove impunity for atrocious crimes. However, their functioning largely depended on the political will of some powerful members of the Security Council.[39] These tribunals deliver only *ex post facto* justice; the ICC has the potential to exact punishment in the midst of a crisis.[40] And unlike the *ad hoc* tribunals, which are subsidiary organs of the Security, the ICC is fashioned to wrest some powers from the Council, by effectuating a change in interstate relations and removing an important category of interstate disputes out of the realm of diplomacy, where the Council holds court, to the realm of compulsory adjudication.[41]

Third, the ICC Statute codifies the principle of individual responsibility for international crimes,[42] which "would be applied without exception, whether to the lowliest soldier or the loftiest ruler".[43] The Statute, perhaps more significantly, deflates the balloon of official immunity[44] in which senior states officials, including heads of states, used to hide themselves while perpetrating grave crimes against the peace and humanity. This assault on immunity reflects a shift in the international legal paradigm that increasingly focuses on the individual. Stale doctrines such as immunity are no longer treated as articles of blind faith, particularly when they relate to criminal conducts of state officials.[45] As the Nuremberg Tribunal stated long ago:

Accessed from LHRC Constitutional Database

[39] It took about forty years for the post-WWII tribunals to be replicated in the former Yugoslavia and Rwanda, which demonstrates the reluctance of states to agree on the creation of international criminal justice institutions.

[40] See KASTNER, Philipp, "The ICC in Darfur-Savior or Spoiler?" Volume 14 *ILSA Journal of International and Comparative Law,* 2007, p. 145 at 146.

[41] See MORRIS, Magdalene, "High Crimes and Misconceptions: The ICC and Non-party States," Volume 64 *Law & Contemporary Problems,* 2001, p. 13 at 25-26.

[42] See ICC Statute, *supra* note 94, Article 25(2) ("A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute").

[43] ANNAN, Kofi, "Africa and the International Court," *New York Times*, 29th June, 2009, available at http://www.nytimes.com/2009/06/30/opinion/30iht-edannan.html?adxnnl=1&adxnnlx=1317845173-fNrNNlEorCaZt5chng9SPA [hereinafter 'Annan, "Africa and the International Court"'].

[44] See ICC Statute, *supra* note 94, Article 27(1) (providing, "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence").

[45] Major international instruments, the jurisprudence of international and national tribunals, and the practice of UN organs all make it clear that immunity will no longer be a defense against prosecution for international crimes. See e.g., ICC Statute, *supra* note 94, Article 27. See KRITZ, Brian A. and Jacqueline Wilsont, "No Transitional Justice Without Transition: Darfur - A Case Study" Volume 19 *Michigan State University College of Law Journal of International Law*, 2010-2011, p. 475 at 482 ("The ICC's establishment trumpets the fact that neither governments nor individuals can hide behind cover of state sovereignty when implementing actions that run counter to minimum standards of behavior set forth in international law").

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[46]

### *B. The Essence of Complementarity*

The global community wisely built into the ICC Statute the principle of complementarity, which seeks to maintain a healthy balance between international law and the sovereignty of states.[47] The principle requires states to have the first bite on the prosecution pie, even in high profile cases. The ICC Statute states, implicitly, that the effective prosecution of crimes of international concern "must be ensured by taking measures at the national level and by enhancing international cooperation".[48] It calls on "every State to exercise its criminal jurisdiction over those responsible for international crimes".[49] The Statute confirms these preambular provisions in Article 1, which provides that the ICC "shall be complementary to national criminal jurisdictions". It works out its details in Article 17, which deals with admissibility, and Article 20, which deals with the *ne bis in idem* rule.[50]

The complementarity requirement, like the local remedies and subsidiarity rules in human rights law,[51] underlines the general principle that the international system is subsidiary to domestic systems. The advantage that national courts have over international systems is that they have easy access to evidence and witnesses. They also have greater interest in prosecuting especially if the crimes were committed within their jurisdictions, though such interest could raise concerns of fairness and impartiality.[52] Thus fashioned, the ICC is not a court of

---

[46] International Military Tribunal Nuremberg, *The Trial of Major War Criminals Before the International Military Tribunal, Nuremberg, Nov. 14, 1945 – Oct. 1, 1946* (1947) at 447.

[47] STIGEN, Jo, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity,* Leiden and Boston: Martinus Nijhoff Publishers, 2008, p. 17.

[48] ICC Statute, *supra* note 94, preamble.

[49] Ibid.

[50] The *ne bis in idem* rule protects both an accused person and the Court: an accused person from being prosecuted twice; and the Court from dissipating its limited resources where justice has already been done. See JONES, John and Steven Powles, *International Criminal Practice,* New York: Transnational Publishers, 2003, at 396.

[51] See, e.g., UDOMBANA, Nsongurua, "So Far So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights" Volume 97 No. 1 *American Journal of International Law*, 2003, p. 1; and CAROZZA, Paolo, "Subsidiarity as a Structural Principle of International Human Rights Law," Volume 97 No. 1 *American Journal of International Law*, 2003, p. 38 (arguing that the notion of subsidiarity can help to understand and evaluate the fundamental structure of international human rights law).

[52] See THOMPSON-FLORES, Thomas, "The International Criminal Court: Will It Succeed or Fail? Determinative Factors and Case Study on this Question," Volume 8 *Loyola University Chicago International Law Review*, 2010, p. 57 at 71.

Accessed from LHRC Constitutional Database

first instance; it is not even a court of appeal; rather, it is a court of 'last resort'. It can only try a small number of cases – those most accountable for large-scale criminal atrocities – when states are unable or unwilling to genuinely prosecute.[53]

It remains to be seen how the ICC works out the complementarity principle in practice. Of the total number of indictments so far made, three – Uganda, DR Congo, and CAR – are state referrals, reflecting the deference that the ICC makes to national criminal justice systems, which is an essential component of complementarity.[54] Sudan and Libya are Security Council referrals; they bring the ICC into the centre of international effort to manage conflicts and indicate that the Council sees the Court as complementing its primary responsibility of maintaining and promoting international peace and security.[55] Kenya and Côte d'Ivoire are *proprio motu* investigations, which is the third trigger mechanism under the ICC Statute.[56]

Since the ICC is "more a utilitarian institution than a utopian one",[57] the OTP should deliberately encourage national governments to prosecute international crimes themselves so that the ICC can maximise its impact with its limited resources.[58] Arsanjani and Reisman also argue that drafters of the ICC Statute generally conceived the Court to be a check on recalcitrant states rather than as a mechanism that would allow states to voluntarily cede jurisdiction over domestic legal matters.[59] Such 'proactive complementarity' will require the ICC

Accessed from LHRC Constitutional Database

---

[53] See ICC Statute, *supra* note 94, Article 17. See also Luis Moreno-Ocampo, Address at Nuremberg: Building a Future on Peace and Justice (24-25 June, 2007), *available at* http://www.icccpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMOnuremberg_20070625_English.pdf (explaining that "a system of complementarity was designed whereby the Court intervenes as a last resort, when States are unable or unwilling to act"); and BASSIOUNI, M. Cherif, "The ICC – *Quo Vadis?*" Volume 4 *Journal of International Criminal Justice*, 2006, p. 421 at 422 [hereinafter 'Bassiouni, "The ICC – *Quo Vadis?"*'] ("The ICC is, to a large extent, an international jurisdictional safety net designed to pick up where national jurisdictions are unwilling or unable to exercise jurisdiction").

[54] See ICC Statute, *supra* note 94, preamble & Article 1 (providing that the ICC "shall be complementary to national criminal jurisdictions").

[55] See UDOMBANA, Nsongurua, "Pay Back Time in Sudan? Darfur in the International Criminal Court," Volume 13 No. 1 *Tulsa Journal of Comparative and International Law*, 2005, p. 6 at 18.

[56] See ICC Statute, *supra* note 94, Article 13. The Statute permits the OTP to seek "authorisation of an investigation" after analysing "the seriousness of the indictment received" and concluding that "there is a reasonable basis to proceed with an investigation". See *ibid.* Article 15.

[57] See BASSIOUNI, "The ICC – *Quo Vadis?"op. cit.* at 422.

[58] See BURKE-WHITE, op. cit. at 53 (noting that the ICC currently is engaged in passive complementarity, which suggests that the ICC should simply substitute international forum for a domestic one).

[59] See ARSANJANI, Mahnoush and W. Michael Reisman, "Developments at the International Criminal Court: The Law-In-Action of the International Criminal Court," Volume 99

to provide technical assistance and capacity-building support to national criminal justice systems within the Court's jurisdiction. In fact, this is one of the tasks that the Assembly of State Parties to the ICC Statute has set for itself.[60]

The ICC is also expected to act as a subversive force, by pressuring many states to reform their archaic criminal justice and prison systems. The criminal justice system in many countries, especially in Africa, goes to great lengths to harass and intimidate accused persons during investigations and trials. Convicted persons also live in humiliating and degrading prison conditions;[61] indeed, most of Africa's prisons are clean versions of hell, fuelled by what Sarkin calls a "veil of ignorance".[62] The proliferation of criminal laws in many states also allows much enforcement discretion to prosecutors and the police to the extent that they effectively define the law on the street.To provide best practices for states, the ICC must function with efficiency and reasonable speed, with procedural and practical guarantees of fairness. As this writer stated elsewhere, "[t]he ability of the Court to force states and non-state entities to respect and comply with its decisions depends on the general perception of the legitimacy and fairness of its process."[63]

### *C. Troubling Signals*

Penologists still disagree on the basis of criminal punishment, but the two major goals are to punish the guilty and deter would-be perpetrators of evil.

---

*American Journal of International Law*, 2005, p. 385 at 387. *Cf.* KLEFFNER, Jann K., *Complementarity in the Rome Statute and National Criminal Jurisdictions,* Oxford: Oxford University Press, 2008 at 213 ("If one considers this practice of auto-referrals, one cannot fail to notice its tension with the formal framework of complementarity in general and the procedural setting of complementarity in particular").

[60] See Res. ICC-ASP/9/Res.3, ibid para. 5 (resolving "to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity").

[61] See SARKIN, Jeremy, "Prisons in Africa: An Evaluation from a Human Rights Perspective," Volume 9 *Sur - International Journal on Human Rights*, 2008, p. 23 at 23 ("Generally speaking, those incarcerated in African prisons face years of confinement in often cramped and dirty quarters, with insufficient food allocations, inadequate hygiene, and little or no clothing or other amenities"). *See also* Njabulo Ncube, Zimbabwe: "Travesty of Justice", *Financial Gazette* [Harare] (June 10, 2011), *available at* http://allafrica.com/stories/201106140713.html (reporting: "There are instances where the justice system is used to drive a political point home. So there are others who will spend long years without going to trial in order for the authorities to communicate a message to political opponents. … Prisoners seem not to be a priority for the main parties and this is surprising for the opposition whose social democracy ideology has justice as its main principle").

[62] SARKIN, Jeremy, "Prisons in Africa: An Evaluation from a Human Rights Perspective," ibid at 23.

[63] UDOMBANA, Nsongurua, "Pay Back Time in Sudan? Darfur in the International Criminal Court," Volume 13 No. 1 *Tulsa Journal of Comparative and International Law,* 2005-2006, p. 1 at 56.

Accessed from LHRC Constitutional Database

Kritz, for example, argues that "[t]rials communicate that the culture of impunity that permitted heinous abuses is being replaced by a culture of accountability", providing some degree of security to victims and admonishing and deterring potential future abusers.[64] Though deterrence is one of the goals envisaged in the ICC framework, there are still practical problems towards making the goals of international criminal justice a reality. Besides, the sort of state-sponsored violence which the media recently beamed to living rooms across the world – following the 'Arab Spring' – raises doubts on the deterrent impact of international criminal prosecutions.[65] Despite the assault on head-of-state immunity and the indictment of al-Bashir, it would appear that the likes of al-Qaddafi (Libya) and al-Assad (Syria) are prepared to massacre their own peoples and damn the consequences.

During his four decade reign, Gaddafi employed violence in a theatrical manner. He eliminated critics through public trials and executions and staged kangaroo courts in soccer fields or basketball courts, "where the accused were interrogated, often urinating in fear as they begged for their lives".[66] Similarly, the wave of Arab unrest that started with the Tunisian uprising in January 2011 reached Syria in mid-March. Assad's Government launched a series of withering crackdowns, sending tanks into restive cities as security forces opened fire on demonstrators. Several thousands of demonstrators are estimated to have been killed and thousands more jailed.[67] An estimated three thousand lives have been lost in the carnage in the first half of 2012 alone;[68] and it is still counting.

These modern day fascists behave like men who have sold their souls to the devil and, like Faust or, for that matter, Gaddafi, are waiting to be dragged down to Hell. The heinousness of their crimes, coupled with their shameless

Accessed from LHRC Constitutional Database

---

64 KRITZ, Neil J., "Progress and Humility: The Ongoing Search for Post-Conflict Justice," in BASSIOUNI, M. Cherif (ed.), *Post-Conflict Justice,* New York: Transnational Publishers, 2002, p. 55 at 58.

65 See e.g., KU, Julian G. and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" Volume 84 *Washington University Law Quartely,.* 2007, p. 777 (analyzing whether a potential perpetrator of humanitarian atrocities would likely be deterred by the risk of future prosecution and arguing that the empirical and theoretical assumptions underpinning the deterrence rationale of international criminal prosecutions are dubious or highly debatable); and AKHAVAN, Payam, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" Volume 95 *American Journal of International Law,* 2001, p. 7 at 31 (noting that achieving prevention against an entrenched culture of impunity and fostering inhibitions against widespread rape, pillage, and murder in a context of habitual violence cannot be realised through a few *ad hoc* tribunals or some domestic trials).

66 MACFARQUHAR, Neil, "An Erratic Leader, Brutal and Defiant to the End," op. cit (adding: "The events were televised to make sure that no Libyan missed the point").

67 See "Syria's Crackdown Has Killed More Than 3,500 - U.N." *Reuters*, 8th November, 2011, available at http://uk.reuters.com/article/2011/11/08/uk-syria-un-idUKTRE7A72LM20111108 (last accessed Nov. 13, 2011).

68 See NORDLAND, Rod and Hwaida Saad, "With Strikes, Syrian Rebels Showcase Their Reach," New York *Times*, 29th June, 2012 at A10 (noting that the violence has especially worsened since the UN Monitoring Mission suspended its activities on 16th June, 2012).

impunity,[69] suggests, ominously, that the crimes the ICC Statute seeks to punish are probably pre-rational, emerging from Kant's 'Radical Evil' – "an evil that exceeds the bounds of instrumental rationality, that seeks no objective beyond itself."[70]

The next Part explores these contradictions further.

## III. Double Standard Negates Justice

The reckless disregard by African countries to major crises in Africa often allows Western countries to intervene and project themselves as saviours. In principle, the pursuit of a new vision of international law that is predicated on respect for human and peoples' rights and the rejection of impunity should be welcomed by many. The problem is that this vision often ends up as self-serving, with Western states high-jacking the movement to proselytize the gospel of political and economic liberalism at the expense of the non-Euro-American 'other'. As Mutua explains, "[i]nternational human rights law, perhaps the most important transformational idea of our times, is fraught with conceptual and cultural problems. Human rights norms seek to impose an orthodoxy that would wipe out cultural milieus that are not consonant with liberalism and Eurocentrism".[71] The form and content of this evangelization depend on the context, but its wages is a *World on Fire*.[72]

Accessed from LHRC Constitutional Database

---

[69] The UN Economic & Social Council [ECOSOC] defines 'impunity' as "the impossibility, dejure or defacto, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims". ECOSOC, Sub-Committee On Prevention of Discrimination and Protection of Minorities, *Question of Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights),* Annex II, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) *(prepared by* Louis Joinet). See generally VINUALES, Jorge, "Impunity: Elements for an Empirical Concept" Volume 25 No. 1 *Law and Inequality*, 2007, p. 115.

[70] KOSKENNIEMI, Marti, "Between Impunity and Show Trials," Volume 6 *Max Planck Yearbook of United Nations Law,* 2002, p. 1, extracted in STEINER, Henry *et al.*, *International Human Rights in Context: Law, Politics, Morals,* Oxford: Oxford University Press, 2008 at 1245.

[71] MUTUA, Makau, "A Critique of Rights in Transnational Justice: The African Experience," in AGUILAR, Gaby Ore and Felipe Gomez Isa (eds.), *Rethinking Transitions Equality and Social Justice in Societies Emerging from Conflict,* Mortsel: Intersentia, 2011 at 32 [hereinafter 'Mutua, 'A Critique of Rights'].

[72] See *passim* CHUA, Amy, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability,* New York: Doubleday, 2003) ("a kind of never-ending story detailing the ways in which contemporary globalization ignites violent conflagration through a volatile mix of export versions of free market democracy;" BAXI, Upendra, "Reflections on the Sixth Annual Grotius Lecture," Volume 19 *American University International Law Review,* 2003-2004, p. 1255 at 1257 [hereinafter "Baxi, Reflections"].

This Part examines how the selective indictments of persons for international crimes reinforce the charge that the ICC is a neo-imperialist institution.

### *A. Universalism Precludes Selectivity*

The AU has repeatedly urged the UN Security Council to "defer the process initiated by the ICC" against al-Bashir,[73] in accordance with Article 16 of the ICC Statute, which allows the Council to defer cases for one year. Some commentators argue that Article 16 "represents one way in which the tension between the search for peace and the demands for justice may be mediated".[74] However, the AU's repeated requests for deferral, and similar requests by the Arab League and some activists,[75] have received little support from Western member countries of the Security Council. This refusal has further increased the resentment that the AU has towards the ICC. In June 2010, the AU Assembly expressed "its disappointment" that the Council has not acted upon its request to defer the proceedings initiated against al-Bashir.[76]

The AU is also irked by its marginalization in the process leading to and immediately following UN Security Council Resolution 1973 to authorize a no-fly zone in Libya.[77] Even the manner in which the no-fly zone was implemented by the North Atlantic Treaty Organization (NATO) leaves very little to cheer.

Accessed from LHRC Constitutional Database

---

[73] Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, AU Doc. Assembly/AU/Dec.221(XII) (Feb. 2009) [hereinafter "Decision on Indictment"], para. 3. *Cf.* Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc. PSC/AHG/COMM.1(CCVII), Oct. 29, 2009, para. 5.

[74] JALLOH, C.C. *et al.,* "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court," Volume 4 *African Journal of Legal Studies*, 2011, p. 5 at 11. See also generally CIAMPI, Annalisa, "The Proceedings Against President Al Bashir and the Prospects of their Suspension Under Article 16 ICC Statute" Volume 6 *Journal of International Criminal Justice*, 2008, p. 885.

[75] See, e.g., CLOONEY, George and John Prendergast, "U.S. Must Help Stop Sudan's Slow-Motion War", *USA Today*, 8th June, 2010, at 8 (arguing for the inclusion of Article 16 within a set of policy incentives towards Sudan).

[76] Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV), AU Doc. Assembly/AU/Dec.296(XV) (July 2010), para. 4 [hereinafter "Decision on Progress Report"]. *Cf.* Decision on the Implementation of the Assembly Decision on the International Criminal Court Doc.EX.CL/670(XIX), AU Doc. Assembly/AU/Dec.366(XVII) (July 2011) [hereinafter "Decision on ICC"], para. 6 (calling on AU Member States not to cooperate in the execution of the arrest warrant and requesting the "UN Security Council to activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of Justice as well as peace in the country").

[77] See Security Council Resolution 1973 (March 2011), para. 4 [hereinafter "Resolution 1973"] (approving "*all necessary measures* … to protect civilians and civilian populated areas under threat of attack" in Libya).

NATO visibly shifted from protection of civilians, as envisaged by Resolution 1973, to a regime change war, which was accomplished with the slaughter of Gaddaffi. As the AU Peace and Security Council (PSC), observed during the conflict: "There are no Libyan planes flying, but bombardment of the country by NATO forces has intensified. This means the no fly zone resolution was achieved under false pretence."[78] The AU Assembly has also expressed its "DEEP CONCERN at the manner in which the ICC Prosecutor handles the situation in Libya which was referred to the ICC by the UN Security Council through Resolution 1970 (2011)."[79]

These outbursts by the AU organs could be seen as a spontaneous reaction against what many African leaders increasingly perceive as neo-imperialism,[80] a view that is gaining acceptance even in scholarly circles.[81] In fact, some commentators suggest that the current international criminal law is imperialistic, given the "oppressive practices by which states may seek to redefine the world in their image, by defining a 'universal' in opposition to an 'other' – the idea of the 'dynamic of difference' – and seeking to bring the other within the universal by way of the 'civilizing mission.'"[82] There may be some truths in these accusations, given the complicity in the conflicts that often results in heinous crimes and the selectivity in holding perpetrators of these crimes accountable.[83]

---

[78] ZHARARE, Hebert, "AU Security Organ Slams Nato over Rights Abuses", *Herald* (Zim.), 26th May, 2011, *available at* http://allafrica.com/stories/201105261264.html (reporting the AU Peace and Security Council). Probably, the AU should seek an Advisory Opinion of the International Court of Justice on the implementation of Security Council Resolution 1973.

[79] Decision on ICC, *supra* note 75, para. 6. See also "African Union Opposes Warrant for Qaddafi", *NEW YORK Times*, July 3, 2011 at A10 (reporting: "The African Union has called on its member states to disregard the arrest warrant issued by the International Criminal Court against Col. Muammar el-Qaddafi of Libya, a move that could weaken the court's ability to hold him accountable for any crimes committed against his people").

[80] See e.g., PSC Communiqué, AU Doc. PSC/Min/Comm(CXLII) (July 2008) [hereinafter "PSC July Communiqué"], paras. 3 & 7 (where the PSC accuse the ICC of "double standards" and that the arrest warrant amounts to a "misuse of indictments against African leaders"). *Cf.* Final Communiqué of the Expanded Meeting of the Executive Committee of the OIC at the level of Permanent Representatives on the ICC's Moves Targeting the President of Sudan, New York 27 March 2009 par. 2 (where the Organization of Islamic Countries frowns at the "selectivity and double standards" evident in the decisions of the ICC, noting that these will "adversely affect the credibility of the international legal system*"), cited in* TLADI, Dire, "The African Union and the International Criminal Court: The Battle [for the Soul of International Law," Volume 34 *South African Yearbook of International Law*, 2009, p. 57 at 62.

[81] TLADI *(ibid.)* at 58 (asserting that the ICC is "a Western imperial master exercising power over African subjects").

[82] NIELSEN, Claire, "From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law," Volume 14 *Auckland University Law Review,* 2008, p. 81 at 82 (adding: "Such imperialism can be seen in the practices of powerful Western states at international law after 1945", ibid). See generallyANGHIE, Antony, *Imperialism, Sovereignty and the Making of International Law,* Cambridge: Cambridge University Press, 2005 (examining the relationship between imperialism and international law).

[83] See generally EBERECHI, Ifeonu, "Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union's Cooperation with the ICC," Volume 3 *African Journal of*

Accessed from LHRC Constitutional Database

The current indictments, which parade virtually only African suspects at the ICC, raise credibility questions and give the impression that the ICC is a tool for the collective humiliation of Africa.

Reacting to those who oppose the ICC for being fixated on Africa, Annan asks: "Is the court's failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?"[84] Of course not; the fact that all the current case dockets are on Africa do not diminish the seriousness of the crimes, but they raise questions of equality before the law. As a principle that regulates the members of a society, justice should be applied on the basis of fairness and equality.[85] Thus, when different sets of principles are applied to similar situations – when, for example, one person is condemned for an offense while the other is treated far more leniently for the same offense – then such actions dilute not only the meaning of 'equality before the law', but also the fundamental principle of 'non-discrimination' on the basis of geography or other considerations. Truth and justice must be uncompromisable because they represent the first virtues of human society.[86] And if international criminal justice is a universal ideal, then major powers ought not to take distinctive approaches to justice that reflects their values and interests.[87]

The Security Council has contributed to the legitimacy crisis currently facing the ICC by its 'holier-than-thou' attitude towards Africa, even when it is obvious that this body is uneven in its commitment to international peace, security, and justice. The Council and the OTP treat Africa as if it is a laboratory with which to experiment the new international criminal justice system; otherwise, why should the OTP shout "crucify them, crucify them" in Africa while maintaining "sealed lips" in other regions? Why should "a body of law that purports to be based on universal values of all humanity … be animated by exclusions, notions of civilization, and imperialism"?[88] Why are Western

*Legal Studies,* 2009, p. 53 (discussing Western complicity in Africa's conflicts and how it could undermine the project of international criminal accountability).

84 ANNAN, Kofi, "African and the International Court", op. cit. (further arguing: "We have little hope of preventing the worst crimes known to mankind, or reassuring those who live in fear of their recurrence, if African leaders stop supporting justice for the most heinous crimes just because one of their own stands accused").

85 This explains why justice bears such emotive connotations as fairness, impartiality, rightness, even-handedness, fair dealing, honesty, and integrity. See generally RAWLS, John, *A Theory of Justice,* Oxford: Oxford University Press, 1999 (Revised Edition).

86 See ibid. at 4 (arguing that, in a just society, "the rights secured by justice are not subject to political bargaining or to the calculus of social interests").

87 See generally BRADFORD, Anu and Eric A. Posner, "Universal Exceptionalism in International Law," Volume 52 *Harvard International Law Journal,* 2011, p. 1 at 5 ("When creating international norms, powerful nations characteristically advance interpretations of international law that reflect their values and advance their interests").

88 NIELSEN, Claire, "From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law," op. cit. at 82.

Accessed from LHRC Constitutional Database

countries reluctant to demonstrate equal missionary zeal for justice in respect of grave crimes committed in Iraq, Afghanistan, Pakistan, Chechnya, Gaza, *etcetera*? Why is Africa such an attraction as to earn it the unedifying title of "the ICC's favourite customer"?[89] Are the brutal massacres in Syria of less magnitude than those in Libya, where the Security was quick to authorize military intervention[90] and to refer the alleged egregious crimes to the OTP for investigation?[91] Why are Western countries looking 'the other way' as vicious regimes in other Arab countries murder unarmed civilian protestors? What reasons, if not strategic economic interest, account for the West's reluctance to take action against these brutal regimes? Or is the OTP afraid of offending some powerful states which care less about Africa and more about their economic and other interests?

No doubt, *Thomas Lubanga Dyilo*'s conviction will send a message to dictators and tyrants around the world that impunity does not pay – provided, of course, that those who commit these atrocities are the less powerful. Practice has shown that it is easier to prosecute politically indispensable individuals in weak states than powerful and well-connected individuals or, for that matter, regime supporters in post-conflict states. Indeed, according to Bosco, "ICC's first decade has demonstrated repeatedly that however much states may like the abstract notion of international justice, they're not often willing to elevate it to the top of their policy agendas – or defend it in the face of competing interests".[92] Such selectivity in prosecutions makes some to see the ICC as "an imperfect animal crafted only to target Africans and not worth the money spent";[93] and such perceptions increase anti-ICC sentiments.

The present writer submits that double standard will diminish faith in the project of international criminal justice and accountability. If the two global infrastructures for maintaining peace (Security Council) and curbing impunity (ICC) continue to work selectively, neither will advance, let alone entrench, the rule of law.

Accessed from LHRC Constitutional Database

---

[89] IGWE, Chikeziri, "The ICC's Favourite Customer: Africa and International Criminal Law" Volume XLI No. 2 *Comparative and International Law Journal of Southern Africa,* 2008, p. 294.

[90] In March 2011, the UN Security Council adopted Resolution 1973 (2011) to authorize Member States, acting nationally or through regional organizations or arrangements, to take all necessary measures to protect civilians under threat of attack in Libya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.

[91] In Resolution 1970, adopted on 26th February, 2011, the UN Security Council referred the crisis in Libya to the ICC, imposed travel bans on key Libyan leaders, and froze their assets. See Resolution 1970. However, the referral did not change events in Libya, as Gaddafi refused to step down, thereby triggering months of fierce fighting between government forces and rebel groups backed by the North Atlantic Treaty Organization (NATO).

[92] BOSCO, David, "Justice Delayed," op. cit.

[93] WAUGH, Colin, "Don't be a Dictator in the Wrong Continent at the Wrong Time," op. cit. at p. 23.

### *B. Exceptionalism is Morally Indefensible*

Part of the reasons why emotions are running high in Africa is that some of these indictments validate Africa's peripheral influence in the comity of nations.[94] Africa appears to be a theatre – to be acted upon – rather than an actor on the global stage of politics, trade, finance, development, environment, criminal justice, *etcetera*. Paradoxically, it is the Western powers that perpetrated heinous crimes of slavery and colonialism against Africa – without any atonement – that are also on the driver's seat of current international criminal justice. Besides, some of the powerful states have consistently refused to ratify the ICC Statute; indeed, roughly 70 percent of the world's population is outside the ICC's jurisdiction.

The Vienna Convention on the Law of Treaties provides that "A treaty does not create either obligations or rights for a third State without its consent";[95] meaning that those Security Council Members who are not parties to the ICC Statute are freed from any form of (financial) obligations arising even from a referral they participate in making.[96] Curiously, some of these third states – the United States (U.S.), the Russian Federation, and China – are voting, or acquiescing, to refer other third states to a court that they treat with contempt. Such Orwellian philosophy is morally indefensible as it amounts to what the French call *l'hypocrisie la plus totale*.

The current international politics of exceptionalism shows that modern international law – and international relations – is still characterised by the Hobbesian anarchical state of nature. The U.S., the sole superpower after the Cold War, constantly undermines the international legal order it helped to create, which sometimes suggests that the languages of law and rights are mere stratagems of imperialistic foreign policy.[97] The U.S. has put financial and diplomatic resources into advancing human rights, but it refuses to ratify most of the major human rights and other treaties. As Bradford and Posner reflect:

Accessed from LHRC Constitutional Database

---

[94] *Cf.* Open Forum, Africa: "AU, the Intricacy of Foreign Interference," *Financial Gazette* [Harare], 29th September, 2001, available at http://allafrica.com/stories/201110031444.html ("The AU's voice seemed to drown in the wider periphery of the coalition of forces and interests that are at play in the Libyan conflict situation").

[95] Vienna Convention on the Law of Treaties, adopted May 22, 1969, entry into force Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter "Vienna Convention"], Article 34.

[96] See, e.g., Resolution 1970, op. cit, para. 8 ("*Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily") (italics in the original).

[97] See generally CHOMSKY, Noam, "Great Powers and Human Rights: The Case of East Timor", in CHOMSKY, Noam, *Powers and Prospects: Reflections on Human Nature and the Social Order,* New York: South End Press, 1996, p. 169.

> [The U.S.] promoted the international trade system yet has engaged in protectionist measures. It hosts the United Nations and is its largest dues-payer, yet it has violated the U.N. Charter by launching wars without U.N. Security Council … approval, and frequently has been in arrears on its dues. It helped negotiate a number of important treaties – including the Law of the Sea Convention, the Rome Statute, which created the … ICC, and the Vienna Convention on Treaties – and then refused to ratify them. It has resisted numerous efforts to strengthen the laws of war and to ban weapons such as landmines.[98]

Opponents of the international adjudicatory mechanisms argue that such institutions are threats to American values and U.S. foreign policy; indeed, international relations scholars of the realist school generally regard international adjudication as either irrelevant or dangerously quixotic in an anarchic world.[99] Thus, the ICC is seen as an institution that will likely advance a liberal ideology that "contains a toxic measure of anti-Americanism".[100] Undoubtedly, the U.S. opposition to the ICC has impacted on how other states perceive the Court.[101] Meanwhile, the post-September 11 'terror' wars – the wars *on* and *of* 'terror'[102] – and the resultant 'war on law' invite a sustained examination of the U.S.' pretensions to being an apostle, and a drumbeat, for human rights. The shameful torture techniques against *Al Qaeda* operatives in Guantanamo Bay and Abu

Accessed from LHRC Constitutional Database

---

98 See BRADFORD, Anu and Eric A. Posner, "Universal Exceptionalism in International Law," op. cit. at 4 (footnotes omitted). See also SCHABAS, William A., "United States Hostility to the International Criminal Court: It's all About the Security Council" Volume 15 *European Journal of International Law*, 2004, p. 701.

99 See, e.g., MEARSHEIMER, John, "The False Promise of International Institutions" Volume 19 *International Security*, 1995, p. 5; and generally POSNER, Eric and John Yoo, "A Theory of International Adjudication" *University of Chicago Law & Economics* (Olin Working Paper No. 206, February, 2004); *University of California at Berkeley Public Law Research Paper No. 146*, *available at* SSRN: http://ssrn.com/abstract=507003 or http://dx.doi.org/10.2139/ssrn.507003 (last visited July 12, 2012).

100 BORK, Robert H., *Coercing Virtue: The Worldwide Rule of Judges,* 2003 at 10. *Cf.* John R. Bolton, Undersecretary of State for Arms Control and International Security, American Justice and the International Criminal Court, remarks at the American Enterprise Institute (3rd November, 2003), available at http://www.state.gov/t/us/rm/25818.htm (referring to the ICC as "an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence").

101 See, e.g. BROOMHALL, Bruce, "Toward U.S. Acceptance of the International Criminal Court," Volume 64 *Law and Contemporary Problems*, 2001, p. 141.

102 See BAXI, Upendra, "The 'War *on* Terror' and the 'War *of* Terror': Normadic Multitudes, Aggressive Incumbents, and the 'New' International Law – Prefatory Remarks on Two Wars" Volume 43 *Osgoode Hall Law Journal,* 2005, p. 7 at 8 [hereinafter "Baxi, Prefatory Remarks on Two Wars"] (observing, "never before September 11, 2001 ("9/11"), were acts of terror described in terms of a 'war,' nor were the practices of counter-'terror'").

Ghraib[103] – in pursuit of the war on terror, which the Bush Administration regarded as a "just war" – show that evil sometimes stands represented in the guise of the good.[104] The "black holes" of Guantanamo Bay and Abu Ghraib, not to mention the extraordinary renditions, are emblematic of the horrors committed by "the very Good Samaritan global hegemon that now further stands attributed with large, devious, delirious, delusionary, overwhelming, globally pernicious, and even historically impossible ethical 'burdens' to cure the accursed state of [world] affairs".[105] Such hypocrisy has justifiably met with resentment by "countries not powerful enough to treat international law as an *a la carte* menu."[106]

The AU's response to the referrals in respect of Sudan and Libya is obviously political, but it is probably informed by the politicization of the ICC itself. If the Security Council had authorised a military intervention to stop the heinous crimes in Darfur when the crisis began, as some commentators advocated,[107] it would have achieved, at least two ends. First, the authorization would have saved many lives and sent a strong message to al-Bashir that impunity is no longer an option. Second, it would have legitimised any post-conflict measures taken to bring perpetrators of the crimes to justice. Having failed to fulfil its original UN Charter mandate, as it did in Rwanda,[108] the Security Council is now using the ICC to reassert its diminished authority, as it did with the International Criminal Tribunal for Rwanda (ICTR). These after-the-fact measures do not achieve much result, or appease Africans, because they are much like learning geology after a devastating earthquake.

Accessed from LHRC Constitutional Database

---

[103] See generally SANDS, Philippe, *Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W Bush's Illegal War,* New York: Viking, 2005) (indicting President George Bush for waging a 'war on law' and holding that the Bush administration's war in Iraq and its treatment of detainees/prisoners at Guantánamo and Abu Ghraib, has seriously damaged the international order, the rights of individuals, and America's standing in the world). See also KOH, Harold H., "On American Exceptionalism" Volume 55 *Stanford Law Review*, 2003, p. 1479 at 1480-83.

[104] See LEVINAS, Emmanuel, *Beyond the Verse: Talmudic Readings and Lectures* (Gary D. Mole trans.), Bloomington: Indiana University Press, 1994, pp. 66-67.

[105] BAXI, Upendra, "The 'War *on* Terror' and the 'War *of* Terror': Nomadic Multitudes, Aggressive Incumbents, and the 'New' International Law – Prefatory Remarks on Two Wars" op. cit. at 16.

[106] BRADFORD, Anu and Eric A. Posner, "Universal Exceptionalism in International Law," op. cit. at 3 & 4.

[107] See e.g., UDOMBANA, Nsongurua, "When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan" Volume 27 No. 4 *Human Rights Quarterly*, 2005, p. 1149 (denouncing the apparent posture of neutrality by the international community to the atrocities in Darfur and calling for military intervention to stop the killings and help the victims).

[108] See DALLAIRE, Roméo, *Shake Hands with the Devil: The Failure of Humanity in Rwanda,* Toronto: Random House Ltd., 2003) (a haunted and horrifying account by a former UN force commander of the ethnic slaughter in Rwanda in 1994 and how the international community turned a blind eye to the tragedy).

## IV. Concluding Thoughts

The normative and institutional architecture for international criminal accountability crystallized with the adoption of the ICC Statute and the subsequent establishment of the Court in 2002. To its credit, the Court has survived the hostility of big powers, in particular the U.S., which, though not still a State Party, has now pledged to help investigations when possible.[109] Ten years down the road, it is hoped that other states, particular State Parties, will renew their commitments to the cause of justice for atrocious crimes that has shaken the conscience of mankind. The Court's continued existence is expected to give victims of these crimes hope that justice will be done. However, with just one final judgment to the Court's credit – after ten years of huge investment in time and resources[110] – there are lingering doubts whether the end justifies the means. As Bosco argues, "For all the distance the court has covered, however, its 10-year anniversary is still far from joyous. Growing pains and the dilemmas of prosecuting complex crimes, often in the midst of war, have left even some true believers frustrated."[111]

Notwithstanding the ICC's modest efforts, there are still many obstacles on the path to ending impunity. One of the continuing challenges is how the ICC will change the perception that, like the World Trade Organisation (WTO), it is an instrument for the decolonisation of Africa.[112] In 2011, the AU called on African State Parties to the ICC to "ensure that the position of the ICC Prosecutor goes to an African".[113] Obviously, it takes more than Africa's block votes to appoint an ICC prosecutor or, for that matter, a judge. The elections of Mrs. Fatou Bensouda of Gambia to the coveted OTP[114] and Chile Eboe-Osuji of Nigeria to the ICC Bench[115] must be seen as gestures of conciliation from the

Accessed from LHRC Constitutional Database

---

[109] See BOSCO, David, "Justice Delayed," op. cit. (noting: "Once personae non gratae in Washington, court officials now confer regularly with the State Department and White House staff").

[110] The ICC currently has a staff approaching 1,000 and has spent over one billion Euros in its first decade. See HOILE, David, "Is the ICC Fit for Purpose," op. cit. at 9.

[111] BOSCO, David, "Justice Delayed," op. cit. (adding that the Court's political problems have been more dramatic in Africa, where animosity has continued).

[112] *Cf.* WAUGH, Colin, "Don't be a Dictator in the Wrong Continent at the Wrong Time," op. cit. at 23 (comparing the ICC with the WTO set up "as a body to serve the interests of the richer industrialised world by accessing bigger world export markets for its manufactured goods").

[113] Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), AU Doc. Assembly/AU/ Dec.334(XVI) (Jan. 2011), para. 9.

[114] See Consensus Candidate for the Next Prosecutor, *ICC Press Release*, Dec. 1, 2012, ICC-ASP-20111201-PR749, *available at* http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202011/pr749 (last visited July 10, 2012).

[115] See Assembly of States parties to the Rome Statute elects six judges, *ICC Press Release*, Dec. 16, 2011, ICC-ASP-20111216-PR758, *available at* http://www.icc-cpi.int/NR/rdonlyres/3FF3D38C-195B-43BA-ADF8-6AB65D1C8506/0/ICCASP20111216PR758ENG.pdf (last visited July 10, 2012) (reporting

rest of the international community, quite apart from their personal qualifications for the positions. In a related development, the UN General Assembly and Security Council elected Ms. Julia Sebutinde, a Ugandan, to the ICJ on December 15, 2011 for a term of nine years.[116] Their election is a vote of confidence by non-African states that Africans could be trusted to impartially handle the jobs of prosecutor and judge, as the case may be.

Bensouda's appointment as Prosecutor, in particular, will make it difficult to sustain the argument that the ICC is Eurocentric, though the manner she exercises her prosecutorial discretions will go a long way in restoring the damaged confidence in the project of international criminal accountability. Perhaps one way of building confidence in the ICC is for the OTP to strive to initiate timely investigations and prosecutions on genuinely grave cases without waiting for referrals from the politically charged UN Security Council. As Bassiouni remarks, "it is better not to have an ICC than to have it in the service of a political body that has hardly distinguished itself by adherence to the rule of law".[117] When the Security Council takes the initiative, it undermines the ICC's legitimacy and undercuts the argument that it is free from bias. Here is why:

> The fact that the Security Council can bar ICC activities on particular situations and the possibility that the Security Council can refer situations concerning states not party to the Rome Statute can create a perception that the ICC is a tool of the stronger Western states supporting the Security Council. Since the Security Council makes these decisions based on the political calculations and tradeoffs among the five permanent members, rather than a judicial investigation of the facts of a situation by the ICC, a perception that the interests of the permanent five is the more important determinant is unavoidable.[118]

---

that at the second meeting of its tenth session, the Assembly of States Parties elected six new judges of the ICC, including Nigeria's Eboe-Osuji).

[116] See United Nations General Assembly and Security Council elect Ms Julia Sebutinde as a Member of the Court, *ICJ Press Release*, No. 2011/39, Dec. 15, 2011, *available at* http://www.icj-cij.org/presscom/files/5/16855.pdf (last visited July 11, 2012). Sebutinde is the first African woman to be elected a judge of the ICJ; until her election, she was a judge at the Sierra Leone Special court.

[117] BASSIOUNI, M. Cherif, "The ICC – *Quo Vadis?*" op. cit. at 422. *Cf.* JALLOH, C.C. *et al.*, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court," op. cit. at 11 (arguing, "since the ICC is an independent judicial body, there ought not to be interference in its work by a political body such as the UNSC").

[118] IBRAHIM, Abadir, "The International Criminal Court in Light of Controlling Factors of the Effectiveness of International Human Rights Mechanisms," No. 7 *Eyes on the ICC*, 2010-2011, p. 157 at 199 (adding: "It would be a missed opportunity to distance itself from the Security Council if a case that the ICC could have taken up without the involvement of the former is referred to it via Chapter VII of the UN Charter").

Accessed from LHRC Constitutional Database

The ICC is still a work in progress. Africa should put its sword into its ploughshare, notwithstanding some past irritations from the former Prosecutor, and use its now improved leverage to make the ICC work justly and equitably. In any event, Africa is also campaigning to secure two permanent, albeit non-veto wielding, seats in the UN Security Council, which could further improve its leverage. Appointments of this kind are usually not apolitical; and winning this more coveted prize demands tact, not fight. If the AU continues in its current politics of brinkmanship with the larger international community, it may end up shooting itself in the foot. Wisdom should reckon with the unforeseen.

Accessed from LHRC Constitutional Database

# THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: ITS RELEVANCE IN MODERN DAY AFRICA

*Bahame Tom Nyanduga*[1]

I. Introduction
II. The African Commission - Background
III. Structure of the African Commission
IV. Mandate
  A. Promotion
  B. Robben Island Guidelines
  C. Protection Mandate
V. The Communication Procedure: Evolution of an African Human Rights Jurisprudence
VI. Special Mechanisms
VII. State Reporting
VIII. Challenges
IX. African Commission and the African Court on Human and Peoples' Rights: Is the Commission Still Relevant
X. Conclusion

Accessed from LHRC Constitutional Database

## I. Introduction

The history of the Africa Commission has to involve an analysis of the evolution and eventual adoption of the African Charter on Human and Peoples' Rights, without which there would be no African Commission. On the other hand, the jurisprudence of the African Commission traverses the broad spectrum of the rights stipulated under the African Charter, which by itself merits a separate paper.

Writing about the present demands an examination of the historyof the African Commission, including the challenges it has experienced since its establishment in 1987. That, it seems to me, is quite a herculean task and therefore as a compromise, this contribution covers those aspects of the history and the current situation which allow me to draw some conclusions, in particular, relevant lessons regarding the role of the African Commission in modern day Africa. A good part of this paper will draw from personal reflections based on my six year experience on the Commission.

---

[1] Advocate of the High Court of Tanzania; and former Commissioner, African Commission on Human and Peoples' Rights, Banjul, The Gambia.

## II. The African Commission - Background

The African Commission is a regional human rights monitoring mechanism, similar to the European Commission on Human Rights (prior to its disbandment),[2] and the Inter American Commission on Human Rights,[3] which to date continues to discharge its mandate under the auspices of the Organization of American States, alongside the Inter American Court on Human Rights.[4] These are regional organisations which complement the universal human rights mechanisms, under the United Nations system.[5] The African Commission on Human and Peoples' Rights was established in 1987 pursuant to Article 30 of the African Charter on Human and Peoples' Rights as the regional body for the promotion and protection of human rights in Africa.[6] The African Charter on Human and Peoples' Rights was adopted by member states of the then Organisation of African Unity (OAU) in 1981 and entered into force on 21st October, 1986.

The African Charter on Human and Peoples' Rights was adopted during a period when the human rights situation across the continent was characterized by massive and grave violations of human rights arising from authoritarianism and the political insecurity and instability prevailing in many parts of the continent. Civil wars (Katanga, Biafra, Sudan) some of which continued into the 21st century (Liberia, Sierra Leone, Sudan); ethnic-based massacres and pogroms, including some of genocidal proportions,(Rwanda, Burundi); assassinations, military coups and dictatorships (Central Africa Republic, Ethiopia, Nigeria, Ghana, Togo, Uganda, and Zaire), were a source of violations of human and peoples' rights, in particular, the violation of the rights of women, children and refugees, to mention but a few.

Accessed from LHRC Constitutional Database

---

2 The European Commission on Human Rights existed between 1953 and 1998. The Convention for the Protection of Human Rights and Fundamental Freedoms, (European Convention on Human Rights) signed by member states of the Council of Europe on 4 November 1950, was abolished upon the entry into force of the 1994 Protocol 11 to the Convention.

3 The Inter American Commission on Human Rights was established in 1959, following the adoption of the American Declaration of the Rights and Duties of man in April 1948, the first international human rights convention of its type. In 1969 the OAS adopted the American Human Rights Convention which created the Inter American Human Rights Court, which has been inexistence since 1979. The Commission and the Court work in tandem - See Article 33 of the American Convention on Human Rights and delimitation of their functions and powers under Chapters VII and VIII respectively of the Convention.

4 http://oas.org/en/iahrc/mandate/whta.asp

5 The human rights bodies under the UN System include the Human Rights Council, The Human Rights Committee, The Committee on the Elimination of Racial Discrimination, The Committee on the Elimination of Discrimination against Women, and the Committee of the Rights of the Child.

6 Article 30 reads as follows; "An African Commission on Human and Peoples' Rights, hereinafter called 'the Commission' shall be established within the Organisation of African Unity to promote human and peoples' Rights and to ensure their protection in Africa."

Accessed from LHRC Constitutional Database

The independence of African States, to many peoples in Africa, remained an illusion. In other words, to the citizenry in many African countries, independence did not bring any fundamental changes, in respect of their perception of genuine freedom. What they experienced was a substitution of one form of authoritarian rule - white colonial rule – with another of nationalist African dictatorships. The African States remained as oppressive as ever, notwithstanding their expressed adherence to the Charter of the United Nations and the Universal Declaration of Human Rights, upon joining the United Nations. African States also acceded to, or were party to the evolution of various international human rights instruments which were adopted after their independence.

The African Charter was therefore drafted, negotiated and adopted under this international context which was characterised by the cold war between the East and Western Blocs, and the political environment in Africa, both of which impinged on the human rights landscape, particularly in the 1960s, 70s and 80s. Many states were ruled by authoritarian one party or military governments of different political hues and philosophies. Their common denominator was the firm grip on power, where political pluralism or dissent was not tolerated. This phenomenon of centralised political control was characterised by a severe restriction of basic rights such as the rights to freedom of assembly, freedom of expression and association. Political parties were proscribed. Assassinations of political opponents, massacres based on ethnicity and terror and civil war against people belonging to or supporting the opposition were commonplace.

The political landscape did not change until sometime in the early 1990s when the wind of democratic change swept across the African continent, following the collapse of the Berlin wall in Europe. The question to ponder and revisit is - what role did the African Commission play in those tumultuous years of the cold war and military dictatorships in Africa, and what lessons have been learnt from this dark part of Africa's history? Have these lessons, if any, enhanced the role and capacity of the African Commission to discharge its mandate? Have African states, whose primary responsibility is to protect the human rights of their people, learnt from their past and hence improved their human rights records?

## III. Structure of the African Commission

The African Commission was established under Article 30 of the African Charter, and it is composed of eleven members elected by the Assembly of African Heads of State and Government from among:

> ... African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in

matters of human rights, particularly consideration being given to persons having legal experience.[7]

Membership of the African Commission is not a fulltime occupation. Once elected by the African Union Assembly of Heads of State and Government, members of the Commission serve for a period of six years, and are eligible for re-election. The African Commission is presumed to be an independent organisation, free from any political influence or other considerations, in spite of being an institution within the African Union. It enjoys a degree of autonomy from its political benefactors, the Assembly of Heads of State and Government, the Executive Council, and the African Union Commission.

Its independence has over the years been a matter of considerable debate, in particular during the formative years when its composition included sitting government officials and at one time a government Minister, and lately, an Ambassador. However, in spite of the stipulation under Article 31(1), that members shall be personalities of high morality, integrity and impartiality, and despite their solemn declaration to discharge their duties impartially and faithfully[8] made upon election, perceptions of lack of autonomy and independence continue to afflict the Commission. These fears arose from the fact that the Commission was not forthcoming in stating its position during situations which called for a strong African voice against the violations of human rights by African governments. That is notwithstanding the fact that members of the Commission are elected and serve in their personal capacity[9] and not as representatives of their respective states or governments.

Of late the composition of the Commission includes a sizeable number of members who have served, or continue to serve, as members of National Human Rights Institutions in their respective countries. One member is a Chief Justice, another is a CEO of a National Election Commission, and there are a number of private legal practitioners and advocates.[10] This composition to a large extent has done a great deal to assuage the criticisms from civil society, which previously

Accessed from LHRC Constitutional Database

[7] See Article 31 up to 39 of the African Charter on Human and Peoples' Rights about the process of election of Commissioners by the Assembly.

[8] See Article 38 of the African Charter.

[9] See Article 31(2) of the African Charter which reads as follows: [t]he members of the Commission shall serve in their personal capacity.

[10] During my tenure 2003 to 2009, at the beginning the composition included an Ambassador, former Attorney General, three civil servants, one working in a Ministry of Communication and two who worked in the Ministries of Justice in their respective countries, three Chairpersons of National Human Rights Commissions. Others were an academic, a magistrate, a staff member of a Law Society, and a former death row inmate who worked in Civil Society upon release, following democratisation in the 1990s. Subsequently with the biennial elections of new members, some of these were replaced by a Chief Justice, two members who were concurrently or past members of National Human Rights Institutions, civil society activists and three legal practitioners. Currently there are at least three members of NHRIs that I know of.

considered it heavily weighed in favour of governments. On the other hand, African states, particularly through the AU Assembly, have expressed displeasure whenever the African Commission condemned States for human rights violations in their territories. Occasionally, the Assembly has delayed the adoption of the African Commission's Activity report because of displeasure expressed by a Member State due to a prejudicial report about the human rights situation in that country.[11]

Article 41 of the Charter stipulates that the AU Chairperson[12] shall be responsible for staff and services necessary for the Commission's effective discharge of its duties. The African Commission's operational activities and the running of its Secretariat are financed through the regular budget of the African UnionTherefore its efficacy can be enhanced or impaired by the level of staffing or the resources and other services made available to it by the African Union.

## IV. Mandate

The mandate of the African Commission is provided for under Article 45 of the Africa Charter, i.e., the promotion and protection of human and peoples' rights. It is also charged with the task of interpreting the Charter at the request of a State or an institution of the AU, or an African organization recognised by the AU. It may perform any task as may be entrusted to it by the Assembly of Head of States and Government, and undertake investigation into human rights situations.

The Commission shall discharge its mandate based on the human rights and legal principles established under the Charter.[13] Another important aspect of the Commission's work is that it is guided by Rules of Procedures which are adopted by the Commission itself under Article 42(2). The Rules of Procedure of

---

[11] See Decisions and Declarations of the 3rd Ordinary Session of the AU Assembly, 6-8 July 2004, Addis Ababa Ethiopia; Assembly/AU/Dec.49(III) Rev.1: Decision on the Annual Activity Report of the ACHPR; Doc EX.CL/109(V) para 5 reads as follows:[s]uspends the publication of the 17th Annual Activity Report in accordance with paragraph 4 above pending the possible observation by the Member State concerned. For a background to this Decision one may need to read the ACHPR 17th Annual Activity report which contained a Report of a fact-finding mission to the said Member State, which highlighted gross human rights violations committed by the said Member State.

[12] When the African Union was established under the 2000 Constitutive Act of the African Union, and replaced the OAU, the defunct office of the Secretary General of the OAU Secretariat became that of the Chairman of the African Union Commission.

[13] Besides the basic human and peoples' rights and fundamental freedoms stipulated under the Charter, the Commission shall apply Article 60 and 61 of the African Charter, which require the African Commission to draw inspiration from international law on human and peoples' rights, and other regional, international, UN and AU instruments in the field of human rights, and take into consideration other general or special international conventions as subsidiary measures to determine principles of law, as well as African practices consistent with international norms on human and peoples' rights, etc. respectively.

Accessed from LHRC Constitutional Database

the Commission provide for the manner in which different activities of its mandate are discharged.[14]

### *A. Promotion*

First and foremost, once new members join the Commission following their election, every member of the Commission is designated four or five countries in Africa for which he/she is responsible for promoting activities, and to carry out any other human rights related activity in those countries.[15]

The promotion mandate of the African Commission is stipulated under Article 45(1) of the African Charter. The African Commission promotion mandate involves a broad range of activities which include, *inter alia,* the collection of documents, undertaking studies and research on human rights problems in Africa, organising conferences and symposia, dissemination of information, encouraging national organizations involved in human and peoples' rights, formulating and recommending to governments principles and rules for solving human rights problems, on which governments may base legislations, and to cooperate with African and international institutions concerned with the promotion of human and peoples' rights.

In some African countries, the African Human rights system is not very well known, unlike the United Nations mechanisms which are well known compared to the African Charter and the African Commission and its mechanisms. This is due to a number of reasons, such as the absence of national programs to promote the African Charter, technical and financial assistance and programs given by the United Nations, and to a certain degree,[16] not much attention being paid to the African Commission by some African States and governments, in spite of professing to adhere to the African Charter on Human and Peoples' Rights.[17]

Accessed from LHRC Constitutional Database

---

[14] The African Commission adopted new Rules of Procedure in May 2010, replacing rules which had been operation since 1995.

[15] During my six year tenure on the African Commission, I was designated Commissioner Rapporteur for purposes of promoting activities in the following countries - Botswana, Malawi, Mozambique, Seychelles, and South Africa. The term Commissioner Rapporteur has been coined by the Commission itself to describe the Commissioner responsible for the said countries, who together with the Legal Officer assigned to work with him/her, deal with all promotional issues, including leading the Commission's examination of a State Report under Article 62 at the Commission's sessions.

[16] At one of the promotional seminars organised by the ACHPR on Economic Social and Cultural rights, held in Pretoria, South Africa, in 2006, A South African participant, stated that he would rather go to Geneva, to attend a meeting of the then UN Commission on Human Rights, which after all pays for the tickets of participants from Third World countries, than waste time going to Banjul to attend a session of the African Commission.

[17] The author wishes to point to two cases in point -; the first being that African States commemorate the United Nations Human Rights day on 10 December every year, to observe the adoption of the Universal Declaration of Human Rights but rarely commemorate the

The African Commission organises seminars, conferences, and workshops in collaboration with States, bringing together representatives of States, NHRIs and civil society from within a sub region or throughout Africa, as well as international NGOs, to deliberate on topical human rights issues, with a view to disseminating the Charter provisions. Such seminars, workshops, and conferences have been conducted in numerous countries on issues ranging from the death penalty, the rights of indigenous peoples and minorities, the rights of women, the problem of torture, inhuman, degrading treatment and punishment, and other human rights questions. These workshops and conferences have inspired the adoption of ground breaking declarations, and other instruments, such as the Robben Island Guidelines.[18]

During the promotional missions, the Commissioner, accompanied by a Legal Officer from the Secretariat, meets high level government officials, such as the Chief Justices, Attorneys General, Ministers of Justice, other sectoral ministries and departments responsible for human rights, (i.e., gender issues, internal affairs) National Human Rights Institutions, Police and Prisons officials, Law Societies as well as members of civil society to review the human rights situation and address critical issues and challenges facing the particular state. The discussions with national institutions, such as national human rights institutions, (NHRIs) where they do exist, the Police and Prison departments, involve an introduction to the African Human rights system, the African Charter and the work of the African Commission. The Commissioner Rapporteurs visit universities, in particular Faculties of Law to evaluate how human rights education is incorporated into the legal studies. They also visit ministries of education to see if national curricula incorporate human rights education, with a view to inculcating a human rights culture through human rights education.

The promotion missions are therefore an important part of the work of the Commission. They aim at establishing how State Parties abide by their obligations under Article 1 of the Charter, which requires every State Party to recognize the rights, duties and freedoms enshrined in the Charter, and adopt legislative, administrative and other measures to give it effect. They have also been used to follow upon the implementation of recommendations adopted by the Commission under the communications procedure, or as part of previous mission reports, or concluding observations.

Dankwa states the following concerning promotion and protection activities:

---

African Human Rights day, which commemorates the entry into force of the African Charter on Human and Peoples' Rights on 21 October 1986. The second one is the fact that in spite of the universal ratification of the African Charter on Human and People's Rights, State reports for some of them are not submitted as required by Article 62.

18 For full text of the Resolution and the Robben Island Guidelines, see the Resolutions adopted during the 32nd Ordinary Session of the African Commission, held at Banjul, The Gambia, between 17th and 23 October 2002. Ref. website of the African Commission on Human and Peoples' Rights.

Accessed from LHRC Constitutional Database

> [d]espite the distinction drawn between the promotion and protection functions of the Commission, as is evidenced by Articles 30 and 45 of the Charter, matters falling under the latter may be and have been, taken up during promotional visits. The distinction is of less relevance where there is cooperation from the host country. On a promotional visit to Botswana, the present writer took up with relevant authorities a communication by J.K. Modise on alleged deprivation of his citizenship. The assurances given to me by the President of Botswana that he had granted citizenship to Modise turned out to be true, although the communication lingered before the Commission thereafter for years because the complainant was not satisfied with the type of citizenship granted to him ...[19]

As part of the sensitization of the Commission's work, the Commissioner Rapporteur would also promote the work of other mechanisms established by the Commission, such as those responsible for the rights of women, rights of refugees and asylum seekers, or internally displaced persons, depending on the particular human rights situation in a country being visited. If the situation demands a promotion mission by thematic Special Rapporteur, then such a mission would also be conducted either simultaneously or independent of the country specific Commissioner Rapporteur.

The Commissioner Rapporteur also engages members of civil society organisations (CSOs) and NGOs. The latter have, during the existence of the Commission, played a significant role in reporting the human rights situation and violations in their respective countries. NGOs have become, informally, the eyes and ears of the Commission on the ground. Their relationship with the Commission has been institutionalised by the adoption of a resolution on the granting of observer status to the Commission. The status conferred on NGOs and CSOs of various descriptions on the continent and beyond, has been of mutual benefit to the Commission and NGOs. As a case in point, the observer status of an NGO is not a condition for lodging communications before the Commission. However, observer status of an NGO to the African Commission has been made a condition to lodge a case before the African Court on Human and Peoples' Rights. At the level of the African Commission, observer status

[19] See DANKWA, Victor, "The Promotional Role of the African Commission on Human and Peoples' Rights," in EVANS, Evans and Rachel Murray (eds.), *African Charter on Human and Peoples' Rights: A System in Practice 1986-2000*, Cambridge: Cambridge University Press, 2008, p. 344. Prof Victor Dankwa is a former member and Chair of the African Commission. For a better understanding of the J. K. Modise communication before the Commission on the right to citizenship, see Communication 97/93 John K. Modise 7th Annual Activity Report1993-4, and 14th Annual Activity Report: 2000-1. The decisions are also reported in Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights: Extracted from Commission's Activity Reports 1994-2001, Institute for Human Rights Development, Banjul, the Gambia.

Accessed from LHRC Constitutional Database

enables the NGO to participate in the pubic sessions of the Commission and contribute to the debate on the agenda items of the Commission. NGOs with observer status are entitled to receive documents of a public nature produced by the Commission.[20]

### *B. Robben Island Guidelines*

Writing about the background to the adoption of the Robben Island Guidelines, Andrew R. Chigovera, a former Commissioner, states the following:

> [a]t the 28th Ordinary Session of the African Commission, the Association for the Prevention of Torture (APT), an international NGO enjoying Observer Status to the African Commission and committed to working with it internationally to tackle the global problem of torture and ill-treatment, proposed to the African Commission to hold a joint workshop in order to formulate concrete measures which would be taken for effective implementation of the provisions of Article 5 of the African Charter ... The Robben Island Guidelines were adopted by the African Commission during the 32nd Ordinary Session. These Guidelines are designed to assist States to meet their national, regional and international obligations to the effective enforcement and implementation of the universally recognised prohibition and prevention of torture.[21]

The resolution adopting the Guidelines, *inter alia*, created a Follow-up Committee composed of some members of the Commission and assigned it the task of developing strategies to promote and implement the Guidelines. It urged Special Rapporteurs and members of the Commission to widely disseminate them as part of their promotional mandate, encouraged State Parties to the African Charter to bear in mind the guidelines when submitting their state reports, and invited NGOs and other actors to widely disseminate and utilise the guidelines in their work.

### *C. Protection Mandate*

The Protection mandate of the African Commission is found in Article 45(2) of the African Charter, which states that the functions of the Commission shall

---

20 See Rule 68 of the 2010 ACHPR Rules of Procedure.

21 See Foreword to a publication of the ACHPR in collaboration with the APT, Geneva May 2003. ISBN 2-9700214-7-1. The Robben Island Guidelines (R.I.Gs) were drafted at a workshop of experts and Commissioners, under the auspices of the African Commission, held between 12 and 14 February 2002 on Robben Island, South Africa, where Nelson Mandela and other South African anti-apartheid activists were detained by the racist South African regime for many years before democratisation and the abolition of apartheid.

Accessed from LHRC Constitutional Database

include, *inter alia* "... the protection of human and peoples' rights under conditions laid down by the present Charter". The question of resources stipulated under Article 41, in my view also constitutes a condition under which the Commission operates, as required under Article 45(2), to enable it discharge its functions effectively.

Further still, the investigation and fact-finding procedure, and the communication procedure are the two processes which enable the African Commission to inquire into a human rights violation through the conduct of an in depth analysis into the violations committed against individuals and peoples by States Parties.

Fact-finding or investigation missions are conducted under Article 46 of the Charter. Fact-finding missions can also be conducted as part of investigations arising out of Article 58 in case of grave and massive violations of human rights, as may be requested by the Assembly of Heads of States and Government (an in-depth study).

The fact-finding mission may also be conducted by a Commissioner acting under the auspices of a Special mechanism (Special Rapporteur) or a group of Commissioners. These may conduct a mission in a State Party to study a human rights violation on the basis of a resolution adopted by the Commission, after setting out the terms of reference of the investigation, which will culminate in a report to the Commission. The report therefrom will eventually be shared with the State Party concerned before it is submitted to the Assembly of Heads of State and Government.

Investigation missions in the recent past have been conducted following reported cases of massive human rights violations in Cote d' Ivoire, Zimbabwe, Darfur in Sudan and Togo. As Special Rapporteur for Refugees, Asylum Seekers and IDPs, I participated in the Darfur mission in August 2004 and the Togo mission in December 2005. I subsequently conducted investigation missions as Special Rapporteur in Senegal, Mali and Mauritania, concerning the long standing issue of expelled Peuls, Mauritanians of Black African descent, who sought asylum in Senegal and Mali. By the time my term was ending in the Commission, if it was not for the coup which overthrew the Mauritanian government in 2008, the government had committed itself to the repatriation and re-integration of the refugees from Senegal and Mali.

## V. The Communication Procedure: Evolution of an African Human Rights Jurisprudence

The communication procedure is at the core of the African Commission protection mandate. Chapter III of the African Charter provides for procedures of the Commission, which include investigations under Article 46 and two types of communications - communications from States Parties to the African Charter and other communications. Communications are complaints lodged by a State

Accessed from LHRC Constitutional Database

Party to the Charter, an individual or an NGO complaining against a State for violating their rights under the African Charter. The communication procedure has been responsible for the evolution of the African Commission's human rights jurisprudence, interpreting the provisions of the African Charter.

Article 47 to the Charter states that:

> [i]f a State Party to the Charter has good reasons to believe that another State to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of the State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission.

To the best of my knowledge, I have never heard of or seen a communication under Article 47.

Article 49 of the Charter on the other hand states that:

> [n]otwithstanding the provisions of Article 47, if a State Party to the present Charter considers that another state party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organisation of African Unity and the State concerned.

Communications by states are hard to come by at the Commission. There has been only one such communication in the history of the Commission (so far), which was brought by the DRC against Rwanda, Uganda and Burundi.[22] The African Charter does not define what "other communications" are. Article 55 states merely that:

> [b]efore each Session, the Secretary to the Commission shall make a list of the communications other than those of State Parties to the present Charter and transmit to the members of the Commission, who shall indicate which communications should be considered by the Commission.

In other words, we can safely surmise that the "other communications" are all those communications which have not been submitted by State parties.

Ahmed Motala, writing on the complaints mechanisms under the African Charter writes the following:

Accessed from LHRC Constitutional Database

22 Communication 227/99; *D.R. Congo v. Burundi, Rwanda and Uganda*, emanated from the war and occupation by the armed forces of Burundi, Rwanda and Uganda of the territory of Eastern DRC, alleged grave and massive violations of human and peoples' rights, committed by the armed forces of the three countries in the aforesaid provinces of Congo since 2nd August, 1998. Read the Website of the African Commission for the decision on this Communication.

> [a]lthough the African Charter in Article 55, by referring to 'communications other than of State Parties' does not specifically identify or recognize the role of NGOs in the filing of complaints regarding human rights violations, in practice the complaints procedure before the Commission has been used mainly by NGOs who have filed complaints on behalf of individuals or groups alleging violations of the rights enshrined in the African Charter. In some cases, the Commission has received cases which reveal the existence of series of serious or massive violations of human and peoples' rights' and has dealt with such cases under the procedure prescribed under Article 58 of the African Charter.

He adds that "... NGOs have made a considerable contribution to the jurisprudence of the Commission in relation to almost every substantive provision of the Charter."[23]

The communication procedure is tied to the admissibility principle provided for under Article 56, of the African Charter, setting out seven criteria which a communication has to satisfy before it is considered, or examined by the Commission. The process of admissibility of communications is a requirement of international treaty mechanisms. Frank Viljoen writes thus:

> [e]very treaty stipulates the requirements that need to be fulfilled for complaints to be heard by the body, that is, to be admissible. The most important requirement and the one most often at issue is that domestic remedies must first be exhausted (the 'exhaustion of local remedies'-requirement). Not everyone who feels that their rights have been violated can approach the international body directly. If this were the case, the body would be flooded with cases and this would make for an unmanageable workload. More fundamentally, the state must be given an opportunity to live up to its obligation under the treaty - it must be given notice of the violation. The individual has to show that attempts to use available and effective remedies have been futile. Only then will the international body agree to deal with the case.[24]

Before the African Commission assumes jurisdiction to adjudicate over a communication it has to ensure that the complaint satisfies the admissibility test or criterion under Article 56 of the Charter. Considerable jurisprudence has emerged from the African Commission in respect of Article 56 concerning the

---

[23] See MOTALA, Ahmed, "Non Governmental Organisations in the African System," in EVANS, Evans and Rachel Murray (eds.), *African Charter on Human and Peoples' Rights: A System in Practice1986-2000*, op. cit., p. 257.

[24] See VILJOEN, Frans, *International Human Rights Law in Africa*, Oxford: Oxford University Press 2007, p. 36.

Accessed from LHRC Constitutional Database

admissibility of communications. In Communication159/96; *Union Inter Africane des Droits de l'Homme, et al v. Angola*,[25] involving a case of massive expulsion of aliens by the Republic of Angola, the Commission declared the communication admissible, notwithstanding that local remedies were not accessed hence not exhausted. It stated:

> ... according to the information at the disposal of the Commission, it appears that those expelled did not have the possibility to challenge their expulsion in Court.

Subsequently at the merits stage, the Commission states the following:

> The Commission concedes that African States in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In the face of such difficulties, States often resort to radical measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights ...

In other communications the Commission has described the acceptable test for exhaustion of local remedies. In Communications 147/95 and 146/96, *Sir Dawda K. Jawara v. The Gambia*,[26] the Commission analysed the admissibility criteria under Article 56(5) and stated the following:

> [t]his rule is one of the most important conditions for admissibility of communications, there is no doubt therefore, that in almost all the cases, the first requirement looked at by the Commission and the state concerned is the exhaustion of local remedies.
>
> The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matter through its own legal system. This prevents the Commission from acting as a court of first instance rather than a body of last resort. Three major criteria could be deduced from the practice of the Commission in determining

---

25 See page 12, Communication 159/96, 11th Annual Activity Report of the ACHPR, also reported in at paras 12 and 16; page 12; Compilation of Decisions on Communications of the ACHPR, Extracted from Commission's Activity Reports, 1994-2001. Institute for Human Rights and Development: op. cit.

26 See 13th Annual Activity Report of the ACHPR, 1999-2000, also see paras 30 -32 reported in at page 108 in Compilation of Decisions of the ACHPR; Institute of Human Rights and Development, op. cit.

Accessed from LHRC Constitutional Database

> this rule, namely, the remedy must be available, effective and sufficient.
>
> The remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

More often than not, communications cite multiple violations of the Charter provisions.

Decisions of the Commission therefore have to address the violations as alleged. The Commission has stated that where a State does not respond to complaint, the Commission will take the alleged facts as given, and makes its finding. In Communication 48/90 *Amnesty International (Consolidated with Others) v. Sudan*[27] the Commission examined violations of various Articles, including Article 4 on the right to life, in which the complainants alleged that certain individuals named in the communication were executed after summary and arbitrary trials. In its response the government provided copies of laws governing execution, but did not provide information on the said executions.

The Commission stated the following:

> ... Even if these are not all the work of forces of government, the government has a responsibility to protect all people residing under its jurisdiction. Even if Sudan is going through a civil war, civilians in areas of strife are specifically vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law.
>
> According to the Commission's long standing practice, in cases of human rights violations, the burden of proof rests on the government. If the government provides no evidence to contradict an allegation made against it, the Commission will take it as proven, or at least probable or plausible. On the information available, the Commission considers that there was a violation of Article 4 of the African Charter on Human and Peoples' Rights.

The Commission has, besides interpreting provisions which protect civil and political rights under the Charter, has also addressed collective rights, which also include Charter provisions addressing the concept of peoples' rights, even

[27] Communication 48/90 was consolidated with Communication 50/91, 52/91, 89/93, against the Sudan pertaining to situation prevailing in Sudan between 1989 and 1993. Reported in the 13th Annual Activity Report of the ACHPR 1999-2000, also reported in Institute for Human Rights and Development in Africa publication, Compilation of Decisions on Communications of the ACHPR, op.cit at page335, see paragraphs 47 to 52.

Accessed from LHRC Constitutional Database

though the same is not defined under the Charter. Two cases readily come to mind, the first being the case involving the expulsion of Mauritanians of Black African descent, and the famous case involving the Ogoni people against Nigeria.

The first case mentioned above was filed by the Malawi African Association, consolidated with five other communications[28] dealing with a situation prevailing in Mauritania between 1986 and 1992, following a military coup in 1984, whereby thousands of Black Mauritanians belonging to the Peul ethnic group , were subjected to discriminatory treatment, massacred, and about 50,000 of them expelled to Senegal and Mali, while others were persecuted and their property confiscated, leading to multiple violations of rights protected under the Charter. The complainants cited violation of several Articles of the Charter, *inter alia*, Articles 19 and 23, which relate to peoples'rights.

The Commission was however shy to define the concept of "peoples" but alluded to some generalities concerning the black Mauritanians as constituting a "section of the population". It stated the following:

> Article 23 of the Charter states: '[a]ll peoples' shall have the right to nationality and international peace and security.'
>
> As advanced by the Mauritanian government, the conflict through which the country passed is a result of the actions of certain groups, for which it is not responsible. But in the case in question, it was indeed the Mauritanian public forces that attacked Mauritanian villages. And even if they were rebel forces, the responsibility for protection is incumbent on the Mauritanian State, which is a party to the Charter. The unprovoked attacks on villages constituted a denial of the right to live in peace and security.

Article 19 provides that:

> *All peoples' shall be equal; shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.*
>
> At the heart of the abuses alleged in different communications is the question of domination of one section of the population by another. The resultant discrimination against Black Mauritanians is, according to the complainants, (cf; especially Communication 54/91), the result of negation of the fundamental principle of equality of

[28] Communication 54/91; Communication 61/91; Communication 98/93; Communication 164; and Communiction 196/97; and Communication 210/98 against Mauritania, see Annual Activity Report of ACHPR, 1999-2000. Also the reported at page 161 Compilation of Decision of the ACHPR, Institute for Human Rights and Development in Africa.

Accessed from LHRC Constitutional Database

> peoples as stipulated in the African Charter and constitutes violation of Article 19. The Commission must however admit that the information made available to it do not (sic) allow it to establish with certainty that there has been a violation of Article 19 of the Charter along the lines alleged here. It has nevertheless identified and condemned the existence of discriminatory practices against certain sectors of the Mauritanian population.[29]

Going through the alleged facts of the six communications, I find it unbelievable that the Commission did not find a violation of Article 19. The Commission failed to define whether or not the 'section of the population' discriminated against on the basis of their race or ethnicity was a people, and was content at referring to an entire ethnic group which suffered all the indignities, as a 'section of the population.' In fact the paragraph cited above in my view is a contradiction in terms. It accepts that there was discrimination in violation of Article 2 of the Charter but the Commission was not prepared to admit that 'a people', as stipulated in Article 19, had been discriminated against.

At paragraph 131 of the Decision the Commission stated the following:

> Article 2 of the Charter lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. The same objective underpins the Declaration of the Rights of People belonging to National, Ethnic, Religious or Linguistic Minorities adopted by the General Assembly of the United Nations in Resolution 47/135 of December 1992. Article 1(1) of this document indeed stipulates: 'States shall protect the existence and national or ethnic, cultural, religious or linguistic identity of minorities within their respective territories and shall stimulate the establishment of conditions conducive to the promotion of such identity.' From the foregoing, it is apparent that international human rights law and the community of States accords a certain importance to the eradication of discrimination in all its guises. Various texts adopted at the global and regional level have indeed affirmed this repeatedly. Consequently, for a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and the letter of its Article 2.

[29] See paragraphs 139 to 142 - Communication 54/91 (Consolidated) Compilations of Decision of the ACHPR, op.cit.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

In my view, Article 19 was violated.

However, that notwithstanding, the Commission had another opportunity to examine the concept of "peoples' rights" when dealing with the Ogoniland case. In *The Social and Economic Rights Action Center and Another v. Nigeria*,[30] the complainants alleged that the Nigerian Military Government, in collaboration with the NNPC, the State Oil company and Shell Petroleum Development Corporation, a multinational oil company, through unsound exploitation of oil resources in the Rivers State, poisoned soil and water, degraded the environment, and the government failed to regulate the oil companies, and did not consult the Ogoni people on the exploitation of the resources in Ogoniland. Military intervention against the resisting Ogoni communities killed people and destroyed food sources, created a system of insecurity and terror, all of which constituted multiple violations of the Charter, including Articles 14, 16, 18, 21 and 24 encompassing collective rights, ie; social and economic rights under the Charter.

In its decision the Commission stressed that under the African Charter civil, political, economic, social and cultural rights are accorded the same level of treatment. The Commission stated the following:

> [t]he present communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter ... it would be proper to establish what is generally expected of governments under the Charter and more specifically *vis-a vis* the rights themselves.

While examining whether Nigeria had violated Articles 16, 24 and 21 of the African Charter, the Commission defined the primary and secondary obligation of a state in protecting human rights. It stated thus:

> [a]t a primary level, the obligation to respect entails that the State should refrain from interfering with the enjoyment of all fundamental rights; it should respect all rights holders, their freedoms, autonomy resources, and liberty of their actions. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or family for the purpose of rights related needs. And with regard to the collective group, the resources belonging to it should be respected, as it has to use the resources to satisfy its needs.

---

[30] Adopted by the ACHPR during its 30th Ordinary Session. Read the full text of the Commission's Decision in Communication 155/96 *SERAC* and *CESR/Nigeria* on the website of the ACHPR - Communications brought against Nigeria.

Accessed from LHRC Constitutional Database

> At a secondary level, the State is obliged to protect rights holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect the beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework of an interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to enjoy their rights and freedoms, for example by promoting tolerance, raising awareness and even building infrastructure.

Therefore when the Commission examined the conduct of the Nigeria government, it found violations of the various Articles and stated the following:

> ... [u]ndoubtedly and admittedly, the government of Nigeria, through the NNPC has the right to produce oil, the income from which will be used to fulfil economic and social rights of Nigerians. But the care that should have been taken ... and which would have protected the rights of the victims complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violations of the rights of the Ogonis, by attacking, burning and destroying several Ogoni villages and homes.

The Commission went on to find that Nigeria had violated a multitude of rights of the Ogonis, *inter alia,* right to physical and mental health (Article 16), right to general satisfactory environment (Article 24), the right to freely dispose of their wealth and natural resources (Article 21), the rights to shelter and housing derived from combined violations of Articles 14, 16, and 18, and the right to food as an aspect of the right to dignity under Article 4 of the Charter.

The Commission stated that all rights are the same and should be applied equally and that collective rights are capable of protection.

## VI. Special Mechanisms

Another aspect of protection which the Commission has adopted is the special mechanisms, which are not provided for under the Charter. Special mechanisms have been established based on resolutions adopted by the Commission to address a gap in the protection regime.[31] These include the Working Groups and

[31] See VILJOEN, Frans, *International Human Rights Law in Africa*, op. cit. At p. 392 where the author states: “Starting in 1994, the Commission established a number of Special Rapporteurs to provide focal points for the Commission on issues arising from the Charter. Because the

the Special Rapporteur mechanisms. The Working Groups have tended to be short term, while the special rapporteurs are becoming a long term feature of the Commission. The Challenge is that there is an increasing demand from civil society organisations to create more and more special mechanisms for every human rights problem identified and requiring close follow up.

Unlike the Special Rapporteurs under the United Nations human rights system, which are appointed for thematic and country specific mandates, the ACHPR special rapporteurs have thematic mandates. Secondly the ACHPR special rapporteurs are serving Commissioners. To date they have not been appointed from outside the Commission. On the other hand, the composition of the Working Groups includes a Commissioner/s and experts from outside the Commission.

Examples are the Working Group on the Rules of Procedure, the Working Group of Experts on Indigenous Populations and Communities, and the Follow Up Committee on the Robben Island Guidelines.

The Working Group of Experts on Indigenous Populations and Communities in Africa, was established by a resolution of the African Commission at its 28th Ordinary Session, in order:

> ... to examine the concept of indigenous people and communities in Africa, ... to consider appropriate recommendations for the monitoring and protection of the rights of indigineous communities, ... submit a report to the Commission.

The Working Group submitted its report to the Commission during the 34th Ordinary Session held in Banjul, the Gambia, in November 2003. The report has been widely disseminated world-wide, and across Africa. It recognises the marginalisation and discrimination of indigenous populations and communities, namely pastoralists, hunter gatherers, and nomadic communities across Africa.

The Report captures the human rights violations faced by millions of indigenous people and the protection deficit they experience in African countries. It states as follows:

> The overall conclusion is that indigenous peoples and communities in Africa suffer from a number of particular human rights violations that are often of a collective nature; that the African Charter is an important instrument for the promotion and protection of the rights of indigenous peoples

---

African Charter does not provide an explicit legal basis for the establishment of special mechanisms, the Commission had to adopt a progressive interpretation to find room for these mechanisms within the Charter mandate." Rule 23(1) of the 2010 Rules of Procedure of the ACHPR states that; "[t]he Commission may create subsidiary mechanisms such as special rapporteurs, committees and working groups."

Accessed from LHRC Constitutional Database

> and communities, and that the preceding jurisprudence of the African Commission opens a way for the indigenous and communities to seek protection of their human rights ...
>
> The indigenous peoples of Africa display remarkable commonalities ... Africa's indigenous peoples have their own specific features that reflect from the specific features of the African state and its role. They have specific attachment to their land and territory, they have specific culture and mode of production that are distinct from the groups that dominate political, economic and social powers. As predominantly traditional systems, they have their own forms of governance, laws that go in the name of customary laws, modes of production and culture, all deriving from an all-inclusive indigenous knowledge system.
>
> Indigenous peoples and communities experience a range of human rights violations that ultimately boil down to a threat towards their right to existence and the social, economic and cultural development of their own choice. Articles 20 and 22 of the African Charter emphasize that all peoples shall have the rights to existence and to the social, economic and cultural development of their choice and in conformity with their identity. Such fundamental collective rights are denied to indigenous peoples. The analysis in this report of land dispossession of indigenous peoples, widespread discrimination, denial of cultural rights, exclusion from political representation, lack of constitutional and legal recognition and protection etc, clearly bears witness to this fact.
>
> The Working Group recognizes the concerns over the use of the term *indigenous peoples* in the African context. However, we sincerely hope that the concerns will not block necessary and much needed constructive action.[32]

## VII. State Reporting

Article 62 of the African Charter requires every State Party to submit a report to the African Commission about measures taken to implement the Charter, after every two years, from the entry into force of the Charter in respect of that

[32] See AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, Banjul and Copenhagen: Publisher: ACHPR & IWGIA, 2005, pp. 106 to 115.

Accessed from LHRC Constitutional Database

State.[33] State reporting has been termed a process of constructive engagement between the Commission and the State Party concerned on the legislative, administrative, and policy measures taken to implement the Charter, challenges and problems encountered. The consideration of a State Report involves the Commission engaging the State delegation during the presentation of the report at a public session of the Commission, seeking clarification on diverse areas impinging on the enjoyment of human rights, such as the treatment of people living with HIV/AIDS, the plight of people living with disabilities, the rights of women and children, the rights of indigenous peoples whose means of livelihood rely on the natural environment and land, the maltreatment of migrants and the rights of asylum seekers and refugees, the status of ratification of regional and international human rights instruments, and several other areas which need more elucidation, in the presence of other delegations and members of civil society.

In preparing the report, a Guideline on state reporting has been prepared by the Commission on which areas the State needs to highlight. As part of the preparations for the dialogue between the Commission and the State, NGOs would submit to the Commission various issues of human rights concern within the country whose report is under consideration. These NGO submissions do not form the basis of the Commissions inquiry, but invariably provide valuable information for the deliberations by the Commission. Subsequently, the Commission would prepare concluding observations, which highlight the positive developments and achievements, challenges and the Commission's recommendations. The State is expected to report to the Commission during submission of its subsequent report, about how it has implemented the recommendations.

The African Commission was until 1999, the only mechanism charged with the protection of human and peoples' rights on the continent. Notwithstanding the recognition of the African Commission's mandate to protect the African family, inclusive of children, the African Charter on the Rights and Welfare of the Child was adopted in 1990. Article 18 in the African Charter on Human and Peoples' Rights provides, *inter alia* that, "[t]he family shall be the natural unit and basis of society ..." and further that "[t]he State shall ensure the elimination of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."[34]

The protection of women and children rights provided for under the African Charter was considered inadequate and was subsequently enhanced, in the case of children, by the adoption of the African Charter on the Rights and Welfare of the Child, and in the case of women, the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in

---

33 Chapter II, The State Reporting Procedure under Article 62 of the Charter, 2010 ACHPR Rules of Procedure, op.cit.

34 Article 18 (1) and (3) African Charter on Human and Peoples' Rights.

Accessed from LHRC Constitutional Database

Africa.[35] This protocol which was adopted in Maputo, Mozambique in 2003 does not establish a specific mechanism similar to the Committee.

Upon the entry into force of the African Charter on the Rights and Welfare of the Child,[36] the African Committee of Experts was established to promote and protect the rights and the welfare of the child.[37] The African Commission therefore does not receive communications, nor undertake any promotion activity in respect of children rights. The children in Africa were given special protection due to their special vulnerability, in spite of the protection they would enjoy under the African Charter on Human and Peoples' Rights.[38]

The African Children's Charter mandates the Committee to *inter alia*, formulate and lay down principles and rules aimed at protecting the rights and welfare of the children in Africa, to monitor the implementation and ensure protection of these rights, and to interpret the children's Charter at the request of a State party, any person or institution recognised by the African Union or a State party.[39]

Accessed from LHRC Constitutional Database

## VIII. Challenges

The African Commission and the Committee have continued to operate under severe financial and administrative constraints. However, the other major problem facing the realisation of human rights in Africa was the lack of a binding enforcement mechanism against human rights violation. The Communications procedure under the African Commission and the African Committee of Experts[40] are not backed by any sanction mechanism to give force to the recommendations emanating from these bodies.

---

[35] Article 66 of the African Charter states: "Special Protocols may, if necessary, supplement the provisions of the present Charter."

[36] Adopted in July 1990 and entered into force on 29th November, 1999.

[37] Part II, Chapter Two, Article XXXII, African Charter on the Rights and Welfare of the Child, 1990.

[38] See Preamble (para 4 and 5) to the African Children's Charter, which recognizes that the African child "... occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding." Further, it recognises that, "... the child due to the needs of his physical and mental development, requires particular care with regard to health, physical, mental, moral, and social development, and requires legal protection in conditions of freedom , dignity and security."

[39] See Article XLII (a)(ii), (b) and (c) of the African Charter on the Rights and Welfare of the Child, 1990.

[40] The Communication procedure under the African Children's Charter is set out in Articles XLIV and XLV. It is not as elaborate as the Communication procedure provided for under the

## IX. African Commission and the African Court on Human and Peoples' Rights: Is the Commission still Relevant

In 1998, the OAU had adopted the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights. This protocol entered into force in January 2005 pursuant to the deposit of the fifteenth instrument of ratification/accession.[41] The African Court on Human and Peoples' Rights was inaugurated on 2nd July, 2006 at the AU Summit, held in Banjul, the Gambia, when the maiden Judges of the African Court on Human and Peoples' Rights were sworn into office, and started operating in November, 2006. The Court is based in Arusha, Tanzania.

The preamble to the protocol reiterates the conviction by OAU member states that:

> the ... attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of the ... Court ... to ... complement and reinforce the functions of the African Commission on Human and Peoples' Rights. Article 2 of the protocol reiterates the Court's complementary relationship with the African Commission in view of the ... protective mandate of the African Commission on Human Rights conferred upon it by the African Charter ...[42]

The African Court is conferred with jurisdiction to hear all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the protocol establishing the Court, and any other relevant human rights instruments ratified by the States concerned.[43] The question has often been asked: Is the African Commission still relevant in the light of the operationalization of the African Court on Human and Peoples' Rights?

The Commission is among the parties entitled to submit cases to the Court under Article 5, others being States, and African Intergovernmental Organizations. NGOs and individuals are entitled to submit cases under specified conditions. For NGOs, access to the Court is dependent on two conditions, one, that the relevant NGO should have observer status before the African Commission, and two, similar to individuals, that they satisfy the requirement of Article 34(6) of the Protocol, which provides that State, at the time of ratification or anytime thereafter, shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of the Protocol. At

---

African Charter on Human and Peoples' Rights. For instance, it is not clear whether the admissibility criteria apply when a communication is filed with African Committee of Experts.

[41] See Article 34 (3) of the Protocol.

[42] Article 2, of the Protocol on Relationship between the Court and the Commission.

[43] Article 3, of the Protocol on Jurisdiction.

Accessed from LHRC Constitutional Database

the time of writing, only Burkina Faso, Ghana, Malawi, Mali and Tanzania have deposited declarations accepting the competence of the Court to receive cases lodged by NGOs and individuals against them.

The Court may refrain from providing an advisory opinion on any legal matter relating to the Charter or any other human rights instrument if the subject matter of the opinion is a matter being examined by the Commission.[44] The Court may request the opinion of the Commission when deciding on the admissibility of cases instituted under Article 5(3). It may consider cases or transfer them to the Commission. [45] Article 8 of the Protocol requires the Court to lay down detailed conditions in its Rules of Procedure under which it shall consider cases bearing in mind the complementarity between the Commission and the Court.

In view of the existing complementary relationship, under the protocol, the Commission and the Court have worked out jointly rules on complementarity reflecting the scope of jurisdictional powers in their respective Rules of Procedure.

Complementarity between the Commission and the Court has been limited to the disposal of cases and communications only, whereas the protection mandate under Article 45(2) of the African Charter is broader.

Article 45(2) provides that the Commission shall ensure protection of human and peoples' rights under conditions laid down by the Charter. These conditions include Article 46, which provides for any appropriate method of investigation. They also include Article 58 whereby the Commission shall draw the attention of the Assembly to special cases revealed during deliberations of communications, of the existence of a series of serious or massive violation of human and peoples' rights, and in cases of emergencies duly noticed by the Commission and reported to the Assembly, in depth studies may be requested by the Assembly of Heads of State and Government.

Article 45(3) of the Charter confers on the Commission the function of interpreting the Charter at the request of a State party, an institution of the AU or an African organization recognised by the AU. The Commission has not discharged this function as provided by Article 45(3).

With the advent of the Protocol, the primary role for the interpretation of the Charter has been placed in the Court. Article 3 of the Protocol confers the jurisdiction on the Court in respect of all cases and disputes concerning the interpretation and application of the Charter. When read together with Article 5 on access to the Court, it is clear that this jurisdiction is exercisable by the Court, provided that the Commission may still interpret the Charter, in relation to complaints which shall be submitted to it by parties which cannot access the

[44] Aticle 4(1), Protocol.

[45] Article 6 of the Protocol on Admissibility of cases.

Accessed from LHRC Constitutional Database

Court, i.e., individual and NGOs, which do not satisfy the conditions set out in Article 5(3) and 34(6) of the Protocol. These may include individuals and NGOs whose States have not submitted a declaration under Article 34(6), or an NGO which does not enjoy observer status before the Commission. In this respect therefore Rule 116 of the 2010 Rules of Procedure of the African Commission states that:

> [i]f the Commission is requested to interpret the Charter under Article 45(3), it shall immediately inform the President of the Court.

And subsequently shall transmit the copy of its interpretation to the President of the Court as soon as it is adopted.

## X. Conclusion

Accessed from LHRC Constitutional Database

The history of the Commission has witnessed efforts to discharge its mandate under severe constraints. The Commission has been faced by challenges of a diverse nature, mainly due to the political environment in which it was established, and operated for a good part of its existence. Increasingly, the Commission has taken measures and initiatives to justify its existence. With a limited resource base, it has been able to carry out activities of both a promotional and protective nature. The jurisprudence coming out of the Commission over the years has clarified the Charter rights. The Special mechanisms have attracted mixed success, with some of them achieving concrete results, in terms of highlighting human rights problems in certain thematic areas.

The role of NGOs in the progressive development of the communications procedure and the special mechanisms of the Commission cannot be ignored.

The advent of the African Court on Human and Peoples' Rights to complement the protective mandate of the African Commission should not mean the demise of the Commission. A great deal of promotional work remains to be done. The Court as the body entrusted with the judicial powers to interpret the Charter and other human rights instruments, is not suited to conduct investigations, in particular involving cases of serious and massive human rights violations. The Protocol was adopted in order to supplement the Charter and not to kill the Commission. The complementarity provisions and the consultative framework provided for in the Protocol is meant to ensure a smooth working relationship between the Commission and the Court so as to ensure maximum protection of human rights in Africa. The Commission will therefore remain a potent tool of the African Union in its declared mission of developing a continent based on principles of democracy, good governance and respect for human rights as long as it is accorded the necessary support, in terms of both human and material resources.

Accessed from LHRC Constitutional Database

# REGIONAL INTEGRATION IN AFRICA WITH SPECIFIC FOCUS ON THE EAST AFRICAN COMMUNITY

*John Eudes Ruhangisa*[1]

I. Introduction
II. Defining Regional Integration
III. RECs-Building or Disintegrating the African Union?
IV. The East African Community and the Integration Agenda
  A. Collapse and Revival of the Community
  B. Customs Union
  C. Common Market
  D. Challenges to the Consolidation of the Customs Union and Common Market
  E. Secretariat
  F. The East African Legislative Assembly
  G. The East African Court of Justice
  H. Decision Making Process
  I. Low Level of Consultation
V. Zanzibar in EAC Integration
VI. Conclusion

> ... there are at least four types of rationales or imperatives that lie behind the formation of and sustenance of regional integration schemes. They are: affection, gain, threat, and power. By imperatives, we mean the kinds of factors that create the impetus, and give rise to the drive and yearning, for integration among the members. Imperatives may belong to the domain of choice or they may belong to the domain of necessity. It is the extent to which the imperative exerts itself upon one's very existence that determines whether it is a choice imperative or a necessity imperative.
>
> Mwesiga Baregu[2]

## I. Introduction

The formation of the Organisation for African Unity (OAU) in 1963, which in 2002, transformed into the African Union (AU) is a sign that the integration

[1] Registrar, East African Court of Justice; and Associate Professor of Law, Tumaini University Makumira, Usa River, Arusha, Tanzania.

[2] BAREGU, Mwesiga, "The African Economic Community and the EAC: Any Lesson from EU?" in AJULU, Rok (ed.), *The Making of a Region: The Revival of the East African Community*, Midrand, South Africa: Institute for Global Dialogue, 2005, p. 46.

Accessed from LHRC Constitutional Database

agenda for Africa started as early as the independence era for African countries.[3] The OAU Assembly of Heads of State and Government took a number of resolutions and made declarations in Algiers in September 1968 and Addis Ababa in August 1970 and May 1973 to the effect that the economic integration of the Continent was a pre-requisite for the realization of the objectives of the OAU.[4] The African Economic Community (AEC) was finally established with the adoption on 3 June 1991, of the Abuja Treaty. That Treaty provides that the AEC shall be gradually achieved through strengthening of "Regional Economic Communities" (RECs) and establishment of new ones where they do not exist.[5] To date there exist about fourteen (14) RECs established across the African Continent as follows:

- West Africa: West African Economic and Monetary Union (UEMOA), Mano River Union (MRU) and Economic Community for West African States (ECOWAS);
- Central Africa: Economic Community of Central African States (ECCAS), Central African Economic and Monetary Community (CEMAC), and the Economic Community of Great Lakes Countries (CEPGL);
- East and Southern Africa: Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Inter-Governmental Authority on Development (IGAD), Indian Ocean Commission (IOC), Southern African Development Community (SADC), and Southern African Customs Union (SACU); and
- Northern Africa: Arab Maghreb Union (UMA) and Community of Sahel-Saharan States (CEN-SAD).[6]

All the above RECs are recognised by the AU as its Regional Building Blocks. In this paper I shall discuss the extent to which the RECs are useful for the African Integration process. However, I shall focus on the East African Community. I will discuss the two integration milestones that the EAC has so far attained - the customs union and common market - by assessing their level of implementation in the Region.

Accessed from LHRC Constitutional Database

---

3 However, cooperation between Kenya, Uganda and Tanzaniacan be traced back to the colonial period.

4 Abuja Treaty 1991, Preamble.

5 Ibid, Article 28 (1).

6 UNECA 'Assessing Regional Integration in Africa' (2004) 277, at 39 available at < http://www.uneca.org/aria1

## II. Defining Regional Integration

The concept of regional integration compounded by the noble ideas of economic globalization and political liberalization is a trend that has gained momentum all over the world. Whereas in essence globalization implies increased global interdependence, regional integration manifests itself as a first step towards more open economies.[7] The two concepts regional integration and globalization complement each other as their common primary goal is to expand exchange among nations. The odds of the day make it virtually impossible for a country to increase the well being of its people without being part of the global economy. Simply put, there is no country in the world that is self sufficient in terms of natural resources and technology to the extent of operating a closed economy. It is against this background that regional integration is considered an appropriate strategy in the process of wealth creation.

In this world movement, African countries have not been left behind. Under the auspices of the AU, the Abuja Treaty earlier mentioned was negotiated and concluded. Various neighboring countries in Africa sharing common interests have come together to integrate and form what are famously known as Regional Communities (RCs). Except for the East African Community whose ultimate objective is political federation, the rest of the above mentioned regional communities focus largely on trade and economic development.

Accessed from LHRC Constitutional Database

## III. RECs - Building or Disintegrating the African Union?

The AU, an umbrella organization of African countries, considers these regional communities that entered into regional partnerships to play a complementary role and also to be the means that will drive the African countries to total unity. They are not competing among themselves but as building blocks they come together to assist the African Union achieve its objective of bringing unity and economic development to the people of Africa.

The integration of the continent as was conceived by African leaders was to start with many economic communities evolving into one African Economic Community and eventually one African Union. The logic behind this is that, since each of the 54 AU Member States belong to at least one of the 14 existing RECs, it will be easier to bring together those 14 RECs into one AEC than to unite 54 individual states.

The Abuja Treaty provides for a six-stage African integration process to be achieved in not more than 34 years.[8] The starting point consists of strengthening the existing RECs and establishing them in regions where they do

---

[7] See KIMENYI, Mwangi S., "Expectation of East African Integration," *Dialogue on the Regional Integration in East Africa*, Arusha: East African Community Secretariat, 2002, pp. 7-9.

[8] Abuja Treaty, Article (6) (1).

not exist.[9] The RECs are expected to stabilise Tariff Barriers and Non-Tariff Barriers, Customs Duties and internal taxes.[10] They would also conduct studies for gradual removal of Tariff Barriers and Non-Tariff Barriers to regional and intra-Community trade and for the gradual harmonisation of customs duties in relation to third States.[11] It is expected that the communities will evolve into free trade areas, customs unions and a common market spanning the whole Continent.[12] The Abuja Treaty envisages an AEC that shall culminate into a Pan-African Economic and Monetary Union with a single African Central Bank.[13] For this to happen, there have to be legal linkages between the Treaty establishing the AEC and treaties establishing various RECs. In this regard, the Protocol on the Relations between the AEC and the RECs provides that the RECs undertake to review their treaties to provide an umbilical link to the Community and in particular provide as their final objective, the establishment of the AEC.[14] However, there are several challenges that are likely to hamper the achievement of that goal.

The key challenge to the successful building of the AEC has been the coordination and harmonisation of policies of the RECs in order to bring them together.[15] If each of them goes its own way, there are few chances for them to achieve their ultimate common goal, namely the AEC.

Another challenge lies in the multiplicity of RECs. As I have indicated above, there are about 14 RECs that have been recognised by the AU. This increases discrepancies among various RECs which render the coordination and harmonisation work even more difficult. However, efforts to address this challenge are being made within the RECs themselves. In Eastern and Southern Africa, initiatives have been taken to bring together the EAC, COMESA and SADC[16] to form a Tripartite Free Trade Area while IGAD and IOC are applying most of the integration instruments adopted by COMESA.[17]

In West Africa there is a common programme of action on trade liberalization and macroeconomic policy convergence between ECOWAS and UEMOA.[18] ECOWAS and UEMOA have also agreed on common rules of origin

Accessed from LHRC Constitutional Database

9 Abuja Treaty, Article 6 (2) (a).

10 Abuja Treaty, Article 6 (2) (b).

11 See (n6).

12 Abuja Treaty, Article 6 (2) (c), (d), (e) and (f) (i). See also UNECA (n3) at 41.

13 Abuja Treaty, Article 6 (2) (f).

14 Protocol on the Relations between the African Economic Community and the Regional Economic Communities 1998, Article 5 (1) (a).

15 UNECA, "Assessing Regional Integration in Africa," op, cit.

16 A decision to form EAC, COMESA, SADC Tripartite Free Trade Area was made by the Summit of the three RECs heads of State on 22nd October 2008 in Munyonyo, Kampala, Uganda.

17 UNECA, "Assessing Regional Integration in Africa," op, cit. at 42.

18 Ibid.

to enhance trade, and ECOWAS has agreed to adopt UEMOA's customs declaration forms and compensation mechanisms.[19]

In Central Africa ECCAS is adopting a trade regime that takes into account the dispensations in CEMAC.[20] Other efforts have been made at the continental level to rationalize RECs. Among other solutions, the AU has, since July 2006, decided not to recognize any new REC.[21] On the other hand, many African countries belong to more than one REC. To give only the example of EAC Partner States, Burundi, Kenya, Rwanda and Uganda are also members of COMESA while Tanzania is a member of SADC as well. In addition, Burundi is a member of CEPGL and ECCAS while Kenya is a member of IGAD. Membership in two or more RECs is detrimental to the individual member state, to the various RECs it belongs to and to the African Integration Agenda as a whole.

In its 2004 Report, the United Nations Economic Commission for Africa (UNECA) identified a number of challenges associated with belonging to many RECs. In terms of multiple treaty obligations, the member state will have to face multiple financial obligations, to cope with different meetings, policy decisions, instruments, procedures and schedules.[22] Customs officials have to deal with different tariff reduction rates, rules of origin, trade documentation, and statistical nomenclature.[23] The range of requirements multiplies customs procedures and paperwork, counter to trade liberalization's goals of facilitating and simplifying trade.[24]

From the above challenges, it would seem that the integration of the Continent is still a dream that we should keep with a lot of patience and hope. However, before concluding so, it would be interesting to look into one REC's integration experience and see whether it seriously constitutes an AU Building Bloc or not.

## IV. The East African Community and the Integration Agenda

The founding countries of the East African Community[25] upon realizing that they enjoyed close historical, commercial, industrial, cultural and other ties for a long time, formed the Community with a view to realizing fast and balanced

---

19 Ibid.

20 Ibid.

21 MKWEZALAMBA, M.M. and E.J. Chinyama, "Implementation of Africa's Integration and Development Agenda: Challenges and Prospects" Volume 1 *African Integration Review,* 2007, 1-16 at 13 available at http://www.africa-union.org/root/ua/Newsletter, accessed 29th January, 2012.

22 UNECA, "Assessing Regional Integration in Africa," op, cit..

23 Ibid.

24 Ibid.

25 The Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania.

Accessed from LHRC Constitutional Database

regional development. This initiative traces its origin from the colonial period[26] but more prominently from the time of the independence struggle in East Africa when Julius Kambarage Nyerere expressed willingness to delay the independence of Tanganyika so that the three countries attained independence together if that would facilitate them becoming one Federal State. When Tanganyika got its independence in 1961, followed by Uganda in 1962 and Kenya in 1963, the enthusiasm was there to establish a solid Community soon after the independence time of all three countries. Thus in 1963, a Declaration for the establishment of a political federation was signed. However, following many disagreements about the idea of a political federation, it was finally agreed to establish the East African Cooperation.[27] This was attained in 1967 when the first East African Community was founded.[28]

It is worth mentioning here that the institutions that constituted the organisational framework of the first Community were mainly dominated by members of the Governments of the Partner States.[29] Apart from the Common Market Tribunal, the Court of Appeal for East Africa and the corporations, all other institutions were composed mainly of Heads of State and Ministers of the Partner States. Even the corporations which were supposed to be governed by their respective Boards of Directors were mainly managed by their respective Councils composed of Ministers.[30]

Accessed from LHRC Constitutional Database

### *A. Collapse and Revival of the Community*

The whole life time of the then EAC was characterized by political tensions between the Partner States due mainly to the ideological differences between their leaders. This happened at the time when the two major ideological divides, capitalism and socialism, spearheaded by the USA and USSR respectively had great influence in the politics and economy of the world. Whereas Kenya and Uganda were essentially capitalist states, Tanzania professed socialism. In this regard, Mukandala states:

> The above-mentioned ideological differences were immensely exacerbated by personal differences that emerged after the overthrow of Milton Obote by Idi Amin in Uganda in 1971. The resulting acrimony was made worse by

---

[26] Economic integration initiatives during the colonial period were not initiativers of the people of East Africa but were initiatives undertaken by the colonialists.

[27] For more discussion on the failure of the proposal for political federation see KILANGI, Adelardus, "Jurisprudence of Regional Integration: Lessons Drawn from the Past Integration Initiatives in East Africa," Volume 1 No. 1 *St. Augustine University Law Journal,* 2011, pp. 21-25.

[28] See Article 1 (1) of the *Treaty for the East African Co-operation* (Revised Edition), Nairobi: East African Printer, 1970.

[29] See Article Article 2 (1) Ibid.

[30] EAC Secretariat & GTZ, op cit. p 23.

accusations of interference in each other's internal affairs, including the harboring of subversives against Uganda.[31]

From 1971 onwards, Mwalimu Julius Nyerere, the then President of Tanzania, refused to sit with Idi Amin in any meeting.[32] This was a clear sign that the co-operation between the Partner States had become impracticable due to incompatible leadership and disagreement.

For various reasons including ideological differences,[33] the Community collapsed in 1977 when it was ten years old. As observed by Straubhaar, "it takes years to build up trust and confidence but only hours or days to destroy it"[34]. This is the sad experience of the East African Community in the past. After 16 years of separation, efforts were undertaken not merely to revive the cooperation among the three founding countries but also to make it very strong and provide room for interested new members to join.[35]

The process of reviving the East African Cooperation started in 1984, when the Governments of Kenya, Tanzania and Uganda signed the East African Mediation Agreement for the Division of Assets and Liabilities of the former East African Community. In that agreement whose negotiations were mediated by Dr. Victor Umbricht, a clause was included requiring the parties to examine and explore the possibility of reviving the Community in future. It was against this background that in the margins of the 1991 Harare Commonwealth Heads of Government Meeting, a Side East African Summit was held which decided to revive the East African Cooperation. In the same year, the then East African Heads of State held a Summit in Nairobi and issued what is known as the Nairobi communiqué. In November 1993, a new Agreement for closer East African Cooperation was signed. It was the spirit of that agreement that a Permanent Tripartite Commission for East African Cooperation (with a Coordination Committee and Technical Committees) was established, and a

Accessed from LHRC Constitutional Database

---

31 MUKANDALA, Rwekaza, "Political Cooperation" in EAC Secretariat & GTZ, ibid. p. 96.

32 EAC Secretariat & GTZ, ibid. P. 35.

33 Rwekaza Mukandala, "Political Cooperation" in EAC Secretariat & GTZ, *Perspectives for Regional Integration and Co-Operation in East Africa*, Proceedings of the 1st Ministerial Seminar on East African Co-operation, Arusha, Tanzania, 25-26 March 1999 at p. 96 identifies other reasons that led to the collapse of the Community to include: Background factors which inhibited the realization of potential gains from regional cooperation - this included demands by Kenya to have more seats than Uganda and Tanzania in decision making organs; inadequate institutional structures created in support of the regional arrangements; unequal distribution of the gains arising from regional cooperation; asymmetrical interdependence that characterized economic relations between the member states and between Africa and the rest of the world; and ideological differences and political volatility.

34 STRAUBHAAR, Thomas, *"Opening Statement", Dialogue on the Regional Integration in East Africa*, Arusha: East African Community Secretariat, Arusha, 2002, p. 1.

35 See Article 3 of *Treaty for the Establishment of the East African Community*, Arusha: EAC Secretariat, 2002.

Community formally formed on 30th November 1999 after thorough negotiations.

The Treaty for the Establishment of the East African Community was signed on 30th November, 1999 and entered into force on 7th July, 2000, following its ratification by the three founding partner states, Kenya, Tanzania and Uganda. After seven years, the Republics of Burundi and Rwanda were admitted to the Community upon acceding to the EAC Treaty on 18th June 2007, becoming full members of the Community with effect from 1st July, 2007.

The main objectives of the Community are to widen and deepen cooperation in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs for the mutual benefit of the Partner States.[36] In order to achieve the foregoing, it is the responsibility of the Community to ensure:

(a) the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States;

(b) the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development within the Partner States and which would in turn, raise the standard of living and improve the quality of life of their populations;

(c). the promotion of sustainable utilization of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States;

(d) the strengthening and consolidation of the long standing political, economic, social, cultural and traditional ties and associations between the peoples of the Partner States so as to promote people-centred mutual development of these ties and associations;

(e) the mainstreaming of gender in all its endeavors and the enhancement of the role of women in cultural, social, political, economic and technological development;

(f) the promotion of peace, security, and stability within, and good neighborliness among, the Partner States;

(g) the enhancement and strengthening of partnerships with the Private Sector and Civil Society in order to achieve sustainable socio-economic and political development; and

[36] See Article 5 (1) Ibid.

Accessed from LHRC Constitutional Database

(h) the undertaking of such other activities calculated to further the objectives of the Community, as the Partner States may from time to time decide to undertake in common.[37]

According to the Treaty the achievement of the objectives of the Community by the Partner States shall be governed by the fundamental principles including:

(a) mutual trust, political will and sovereign equality*;*

(b) peaceful co-existence and good neighborliness;

(c) peaceful settlement of disputes;

(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;

(e) equitable distribution of benefits; and

(f) co-operation for mutual benefit.

This is a very important part of the Treaty that sets out both the operational and fundamental principles to guide the Partner States in their behavior towards domestic matters and also on issues that have a bearing on the cooperation. It should be noted that given the different levels of economic development of the three states, implementation of the projects under the Treaty has to be based on clearly stated principles such as the principle of asymmetry,[38] principle of complimentarity,[39] principle of variable geometry[40] and principle of subsidiarity.[41] Any attempt to implement the Treaty in a bid to achieve the objectives of the Community under the Treaty should not lose the spirit of the fundamental and operational principles. It is against these principles that operations of the Community can be measured. The legal machinery[42] is also

Accessed from LHRC Constitutional Database

[37] See Article 5 (3) ibid.

[38] "principle of asymmetry" relates to variances in the implementation of measures in an economic integration process for purposes of achieving a common objective.

[39] "principle of complimentarity" means the principle which defines the extent to which economic variables support each other in economic activity.

[40] "principle of variable geometry" is the principle of flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds.

[41] "principle of subsidiarity" means the principle which emphasises multi-level participation of a wide range of participants in the process of economic integration.

[42] This includes the East African Court of Justice, national courts and other tribunals vested with adjudicatory powers.

guided by these important principles whenever the need to interpret the Treaty or any document relevant to the cooperation arises.

In the revived East African Community, the private sector and civil society were given a leading role to play as instruments and engines to bring about the envisioned development and community prosperity.[43]

The Treaty acknowledges in one of its operational principles that the type of cooperation the five countries are trying to build is people-centred and market-driven.[44] This is also an appreciation of the role to be played by the private sector in the process leading to regional integration. It was realised that on the need for people-driven and people-centred development, the people of East Africa should play an active role in determining the progress of the community's economic integration and the government's role should be that of facilitator, leaving the private sector and civil society to be the main actors.

In order to achieve the above mentioned objectives, the Partner States undertook to establish among themselves a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.[45] The ultimate objective of political federation is a unique feature that makes the EAC integration process much more ambitious than those of other RECs which focus mainly on trade.

It is important that in this work we make a critical assessment and evaluation of the integration milestones, among other things, so far attained by the EAC, namely the customs union and common market.

### *B. Customs Union*

The establishment of the Customs Union in East Africa and the signing of the relevant protocol on 23rd March 2004 were in total agreement with the provisions of the Treaty as customs union is recognised and marked as the entry point to the aspired regional integration.

The EAC Customs Union Protocol has been in force since 2005 and became fully operational in January 2010. According to the 2009 EAC Trade Report, all Partner States have registered an economic growth in 2008 compared to 2007.[46] The volume of EAC intra-trade in Burundi, Rwanda, Tanzania and Uganda has increased in the same period.[47] Kenya registered a volume of EAC intra-trade lower in 2008 than in 2007 due mainly to the 2007-2008 post election violence and the drought that hit the country in 2008.

---

[43] See RUHANGISA, John Eudes, "The East African Court of Justice" in AJULU, Rok (ed.), *The Making of a Region*, Midrand, South Africa: Institute for Global Dialogue, 2005, p. 95.

[44] See Article 7 (1) op cit.

[45] Ibid, Article 5 (2).

[46] *EAC Trade Report 2009* at 10.

[47] *EAC Trade Report 2009* at pp. 17-24.

Accessed from LHRC Constitutional Database

An ideal customs union should be evaluated on the basis of the following elements:

- Free circulation of goods;
- Common External Tariffs;
- Joint collection of customs duties;
- Harmonised trade framework;
- Removal of internal customs borders;[48] and
- Non-existence of Non-tariff barriers.

Most of the above elements are interlinked. For example, full free circulation of goods is a result of the realization of the other four elements and a common external tariff cannot be achieved unless the trade framework is harmonized. On the other hand, joint collection of customs duties cannot be established before total removal of internal customs borders. In the EAC, although I mentioned earlier that intra-trade has increased within the region, one cannot comfortably affirm that there is free circulation of goods. Customs laws and regulations are yet to be harmonized and this has delayed full implementation of the Customs Union. I will come back to the problem of harmonization of laws under the section on the EAC Common Market.

The Customs Union was basically established to allow and promote intra trade in the region. Inevitably trade relations and activities are bound to generate disputes which if not properly handled, can turn the whole customs union into a self-defeating exercise. Being mindful of this fact, the cusoms union protocol put in place a dispute resolution mechanism in Annex IX of the same.[49]

The mechanism consists of a possibility for an amicable settlement through good offices, conciliation and mediation to be arranged by the parties themselves[50] as well as proceedings before the East African Committee on Trade Remedies established under Article 24 of the Protocol (Committee). It is provided under the Customs Union Protocol that the Committee shall handle all matters pertaining to:

(a) rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules**,** specified in Annex III to the Protocol;

Accessed from LHRC Constitutional Database

48 CHEMENGICH, M.K., "Assessment of CU Implementation and Key Outstanding Issues for Operationalization of a Fully Fledged Customs Union," (2009) available at http://www.eac.int/customs/index.

49 Article 41 (2) of the Customs Union Protocol.

50 Regulation 5 (1) and Regulation 6, Annex IX to the Customs Union Protocol.

(b) anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in Annex IV to this Protocol;

(c) subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to this Protocol;

(d) safeguard measures provided for under the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol;

(e) dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to this Protocol; and

(f) any other matter referred to the Committee by the Council.[51]

The Protocol goes on to tie the knot against the East African Court of Justice by stating that the decision of the Committee on these matters shall be final.[52]

Arguably the EACJ is sidelined and therefore denied an important role as a judicial arm of the Community in this process under the Customs Union Protocol. The only exception is when a party challenges the decision of the Committee on grounds of *fraud, lack of jurisdiction or other illegality*,[53] in which case such party may refer the matter to Court for review in accordance with Article 28(2) of the Treaty and any other enabling provision of the Treaty.[54]

Interestingly, the review provided for under this provision can only be requested by Partner States, as Article 28 of the Treaty referred to provides *only* for references by Partner States and not any other person.

From the aforesaid, one would wonder whether the EACJ was established to play any significant role in the integration process of the East African Community. If the Court's main mandate is to ensure the adherence to law within the Community, should one conclude that the Customs Union Protocol is not part of the EAC law? I would not agree with that. The EAC Customs Union is part of the Community law whose application, interpretation and compliance therewith would have naturally come to the Court. The establishment of the above mentioned Committee with exclusive jurisdiction on matters arising out of the Customs Union and the ousting of the jurisdiction of the East African Court of Justice is in my view, contradictory and illegal.

[51] Article 24 (1) of the Customs Union Protocol.

[52] Regulation 6 (7) of Annex IX of the Customs Union Protocol.

[53] Emphasis added.

[54] Regulation 6 (7), *Ibid.*

Accessed from LHRC Constitutional Database

We may not be surprised why up to now, seven years since the Customs Union Protocol became operational, the EACJ has not received a single case on Customs Union. There was an attempt by one person who for lack of a better word I would call "a risk taker" who filed a reference in the East African Court of Justice to test the waters[55]. However, the case did not even take off as the Court dismissed it on the preliminary objection ground raised by the Respondent that the Court had no jurisdiction.

Apparently the dismissal of this case by the Court for lack of jurisdiction was a big blow especially to the Business Community which had been urging for enhancement of the jurisdiction of the East African Court of Justice. The Court was taken by its critics to have shot itself in the foot by joining the Partner States in taking away its jurisdiction, which according to the Treaty, is supposed to be that of EACJ. Perhaps the Court should have played a more proactive role and heard the matter by ruling that it had jurisdiction, but we should appreciate the fact that it is not for the Court to confer on itself the jurisdiction that has been categorically taken away. As far as implementation of the Customs Union Protocol is concerned we should not expect a miracle on the part of the Court unless the question of jurisdiction is addressed in the Protocol with necessary amendments, much as the judges may be proactive.

It may be of interest also to investigate whether the East African Committee on Trade Remedies that is referred to under Article 24 of the Protocol has been formed. To the best of my knowledge no such Committee has been formed to date. This means that the people of East Africa have nowhere to present their disputes that arise out of Customs Union. Consequently the chances of EACJ receiving appeals under its limited jurisdiction are also not there unless the Committees are formed to generate work for the Court.

### *C. Common Market*

The EAC Common Market Protocol has been in force since 1st July 2010. The Protocol provides for the following freedoms and rights for the peoples of East Africa: free movement of goods, free movement of persons and labour, free movement of services, free movement of capital and the rights of establishment and residence.[56] When the Common Market was launched simultaneously in the five EAC Partner States, there was great hope (at least from a lay-man's perspective) that East Africa was changing into a big market where transactions were going to be done without the old border barriers. Afronline, the Voice of Africa, wrote in its edition of 1st July 2010 that:

---

[55] See *Modern Holdings v. Kenya Ports Authority,* East African Court of Justice at Arusha, Reference No 1 of 2008 (Reported in *EALS Law Digest,* 2005-2011, p. 49).

[56] Protocol on the Establishment of the East African Community Common Market, Article 6 to 28.

Accessed from LHRC Constitutional Database

> Life will soon be much better for East Africans with the coming into effect of the Common Market Protocol today. The protocol will bring down barriers to movement of labour and goods in the region in what experts are saying will be a boon to the people of the bloc. [57]

This was without taking into account the fact that there are a lot of implementation instruments that, at the time of the entry into force of the Protocol (and even today), were not yet in place. As a consequence, custom union and common market protocols have met challenges that may undermine the operationalization of the two protocols.

## *D. Challenges to the Consolidation of the Customs Union and the Common Market*

To date, there are many annexes to the Common Market Protocol whose negotiations are yet to be concluded. Domestic laws are not yet harmonised to enable a free game on the expanded play ground and the existing institutional framework is not prepared to ensure the fairness of that game. Other challenges to EAC integration include the heaviness of the decision-making process and low level of consultation.

### *(i) Harmonization of Laws*

Harmonisation of laws is a commitment that Partner States made at the time of ratification, or accession to the Treaty. For purposes of cooperation in legal and judicial matters, the Treaty provides that Partner States "shall through their appropriate national institutions take all necessary steps to harmonise all their national laws appertaining to the Community".[58] The Common Market Protocol also has provisions that enjoin Partner States to harmonise their national laws. Article 32 provides that Partner States undertake to "progressively harmonise their tax policies and laws to remove tax distortions in order to facilitate free movement of goods, services and capital and to promote investment within the Community." Article 47 provides that "The Partner States undertake to approximate their national laws and to harmonize their policies and systems, for purposes of implementing this Protocol."

Harmonization or approximation of laws is tedious work that is currently being carried out by legal experts of the EAC Partner States and coordinated by the Secretariat. A number of challenges to the harmonization process have been

[57] Afronline, "East Africa common market protocol launched" (1st July 2010) available at <http://www.afronline.org/>.

[58] EAC Treaty, Article 126 (2) (b).

Accessed from LHRC Constitutional Database

identified including conflicting commitments of national experts, different legal systems and financial restraints.[59]

A sub-committee on harmonization/approximation of laws was established, constituted of experts who regularly sit to discuss how to bring closer their respective national laws to those of others. The problem with such an approach to harmonization of laws is that monitoring of compliance is not possible. *Compliance with what?* There has to be a regional legal instrument passed by competent institutions to serve as a basis for national legislation. It is my contention that harmonisation of laws ought to have been done by a supra national body with powers to make regional laws in specific areas where harmonisation is needed. For this to happen, Partner States have to agree on specific areas of regional intervention. This means that in those areas, Partner States should cede some of their sovereign powers to the regional body (EAC relevant institutions) so that it initiates policies and laws for the stability of the Common Market. Those policies and laws should serve as compulsory models for national legislation during the domestication process. The European Union (EU) follows this approach. The EU has six areas in which it has exclusive competences. This means that in these areas, the EU makes legislation and decisions on its own. The member state takes no decisions and does not interfere with the competence on these matters for it has granted the supra national body power to issue decisions in these areas.[60] They are the management of:

(1) the customs union;

(2) the economic and monetary policy;

(3) competition laws;

(4) a common position in international trade negotiations;

(5) conservation of marine biological resources; as well as

(6) concluding of some international agreements.[61]

The EU also has some supportive competences in areas such as education, tourism and sports. There are finally competences which the EU shares with member states which include food, passenger flying rights, film and television, aid to Africa, the environment, and human rights. In an area of shared competence, both the EU and the member states may make laws, but EU law has primacy over any adopted national law, and may override the right to make national laws in the area covered by an EU law.

---

[59] AGABA, S., "The Future of International Commercial Law in East Africa," Volume 13 *European Journal of Law Reform,* 2011, p. 505 at pp. 511-512.

[60] EU Representation in Ireland "The Main Competences of the EU" available at http://ec.europa.eu/ireland/about_the_eu/competences/.

[61] Lisbon Treaty, Article 3 TFEU.

Accessed from LHRC Constitutional Database

In my view, perhaps the EAC would gain much in adopting a similar approach for its harmonization of laws for purposes of making the Common Market viable.

*(ii) Cession of Sovereign Powers to Supra-national Institutions*

According to the principle of public international law, any state that joins the integration process has to cede some of its sovereignty for the interest of a bigger community. In EAC, reluctance on the part of Partner States to cede their sovereignty is evident. There are many examples to support this finding but in the interest of space let us look at the behavior of Partner States in the court room. It is almost a standard practice by the Attorneys General whenever a case is filed in the EACJ against any of the EAC Partner States to raise preliminary objections on the jurisdiction of the Court to entertain the matter. Except in the *Modern Holdings*[62] and *Mtikila*[63] cases where the Court held that it had no jurisdiction, such objections were dismissed and the Court held that it had jurisdiction. At one time, the Court's ruling that it had jurisdiction[64] led to the amendment of the Treaty to categorically state that:

> the Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.[65]

It appears that the Partner States still wish to remain fully sovereign and embrace or prefer their domestic judicial institutions to regional ones while they subscribe to the integration objectives that require them to cede a certain amount of their sovereignty. This state of uncertainty being demonstrated by the Partner States behavior is not healthy to the integration agenda. Partner States cannot eat their cake and at the same time demand to have it. It is commonly understood that regional integration creates supranational institutions whose existence is beyond the national state but having autonomous powers to serve the common interests of the contracting states.[66] Such supranational institutions including the EACJ are expected to play a vital role in the transformation of the region. In order for this objective to be realised, Partner States are expected to transfer

Accessed from LHRC Constitutional Database

---

[62] *Modern Holdings (EA) limited v. Kenya Ports Authority*, East African Court of Justice at Arusha, Reference No. 1 of 2008 (Reported in *EALS Law Digest*, 2005-2011 at p. 49).

[63] *Christopher Mtikila v. Attorney General of the Republic of Tanzania and Another*, East African Court of Justice at Arusha, Reference No. 2 of 2007 (Reported in *EALS Law Digest*, 2005-2011, p. 12.)

[64] It was the Ruling of the Court in *Prof. Peter Anyang' Nyong'o and 10 Others v. Attorney General of Kenya and Others*, East African Court of Justice at Arusha, Application No. 1 of 2006.

[65] See Article 30 (3) of the Treaty.

[66] See GRIEVES, F.L., *Supranationalism and International Adjudication*, Urbana: University of Illinois Press, 1971, p. 14.

some sovereignty to such supranational institutions in a manner that does not amount to total replacement of national sovereignty. In the absence of such solid supranational institutions, East African Community integration, like the rest of the post independence regional integration attempts, will be conspicuously over-politicized giving room to supremacy of politics over economic and other motives.[67]

Perhaps EAC Partner States could learn something from the EU - pool together some of their sovereign powers and entrust the regional institutions (Secretariat, the East African Legislative Assembly and the Court) to spearhead the integration, legislate and adjudicate in specific agreed areas.

### *E. Secretariat*

The EAC Secretariat has since its creation functioned as a coordinating body for meetings of the EAC policy organs namely the Summit and Council of Ministers and other related preparatory meetings. Yet, it is full of competent professionals competitively recruited within the Region and who are experts in their respective areas. If EAC wants a functioning Common Market, the mandate of the Secretariat must be expanded.

If the above argument of pooling together some of the sovereign powers in specific areas and ceding them to the EAC is accepted, the Secretariat should be empowered to initiate regional policies and legislation in those areas for adoption by Council and EALA. Once a law is enacted by EALA and assented to by Heads of State, it should be of direct effect in all the Partner States, the same way EU directives and legislation are of direct effect in all the EU member states. Partner States would have an obligation to adopt legislation that complies with the regional laws and policies and to adapt existing legislation to the same.

At the same time, the Secretariat should be given powers to monitor compliance by Partner States with regional laws and policies. In case of non-compliance, the Secretariat should be empowered to take the failing state to the East African Court of Justice (EACJ) without following the almost impossible procedure laid down in Article 29 of the Treaty.[68]

Accessed from LHRC Constitutional Database

---

[67] See ANYANG' NYONG'O, Peter, "Regional Integration in Africa: An Unfinished Agenda," in ANYANG' NYONG'O, Peter (ed.), *Regional Integration in Africa: Unfinished Agenda*, Nairobi: Academy Science Publishers, 1990, p. 7. For similar discussion on this, see KILANGI, Adelardus, "Jurisprudence of Regional Integration: Lessons Drawn from the Past Integration Initiatives in East Africa," op. cit, pp. 25 – 29.

[68] Article 29 of the Treaty relates to references to the EACJ by the Secretary General of cases concerning failure by a partner state to comply with its Treaty obligations. It is a difficult, almost impossible procedure mixing political and diplomatic means of dispute resolution failing which the Council of Ministers may authorise the Secretariat to seize the EACJ on the matter.

### *F. The East African Legislative Assembly*

The EALA is the legislative body of the Community. The most important functions of the EALA include approving the EAC Budget and considering EAC annual reports, audit reports and any other reports submitted to it by Council.[69] The Treaty provides for additional functions of the EALA when it states that the EALA "shall discuss all matters pertaining to the Community and make recommendations to the Council as it may deem necessary for the implementation of the Treaty".[70] It is clear that this provision gives to the EALA the right to discuss Community related matters for purposes of making appropriate recommendations to the Council and not of making relevant legislation. It would appear therefore that apart from matters relating to the EAC budget, annual reports and audit reports, the role of the EALA has been explicitly limited to discussing matters pertaining to the Community. However, the Treaty provides the possibility for any EALA member to propose a motion or introduce a Bill so long as the motion relates to the functions of the Community and the Bill relates to a matter with respect to which Acts of the Community may be enacted.[71] My reading of the Treaty has not enabled me to see those matters where Acts of the Community may be enacted. One possibility is the cases where, by virtue of Article 59 (3) (b), the EALA requests the Council to make proposals on matters on which it considers that action is required on the part of the Community for the implementation of the Treaty. For purposes of legal certainty and for the stability of the Common Market, areas of EALA legislative mandate should be very clear. If the argument of ceding some sovereign powers to the EAC in specific areas would be found appealing, then EALA would have exclusive competence to legislate in those areas. Initiation of legislation should primarily be left to the Secretariat, but EALA and the Council could also make proposals for Bills which should be subjected to extensive scrutiny by the Secretariat before consideration and adoption by the EALA. This is because the Secretariat has got experts in most of the areas of EAC interest. After a Bill has been assented to and hence becomes the law of the Community, Partner States would be under obligation to incorporate it in their respective national laws and deposit their implementing legislation with the Secretariat which should control compliance with the Community Act.

In its legislative capacity, the EALA has, since its inauguration, on 30th November 2001, enacted a number of laws such as the East African Community Customs Management Act 2004, the East African Standardisation, Quality Assurance, Metrology and Testing Act 2006 and the East African Community Competition Act 2006. These Acts ought to have had a direct impact on Partner

Accessed from LHRC Constitutional Database

[69] EAC Treaty, Article 49 (2) (b) and (c).

[70] Ibid, Article 49 (2) (d).

[71] Ibid, Article 59 (1).

States' similar legislation. If the Common Market is to function it is imperative that Partner States harmonise their laws with those enacted by EALA.

### *G. The East African Court of Justice*

When people actively interact they are likely to get into differences and disagreements. Courts of law are purposely created to address this natural eventuality of human relationships. Similarly, the more East Africa gets integrated the more disputes of a trans-boundary nature are likely to happen. The visionary founders of the East African Community foresaw this inevitable possibility and decided to create the East African Court of Justice to address such mischief. Its main mandate as enshrined in Article 23 (1) is to "ensure the adherence to law in the interpretation and application of and compliance with the Treaty."

It is against this background that I consider the EACJ as constituting a unique opportunity for the EAC integration as the main judicial organ of the Community. However, reality on the ground presents a conflicting view.

I have relentlessly spoken elsewhere[72] about the insufficient jurisdiction of the Court to handle Community law related disputes. I have also had an opportunity to talk about the persistent erosion of the existing jurisdiction through the establishment of parallel dispute resolution mechanisms within the EAC[73]. The East African Community Competition Act 2006, in Section 44, provides for a Competition Authority which has jurisdiction over disputes arising from the interpretation and application of the Act. The Common Market Protocol has given jurisdiction to entertain Common Market related disputes mainly to national courts as presented below:

> In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:
>
> (a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall enjoy the right of recourse, even where this infringement has been committed by persons exercising their official duties; and
>
> (b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is making the appeal".[74]

---

[72] See RUHANGISA, John Eudes, "Procedures and Functions of the East African Court of Justice," in GASTORN, Kennedy et al (eds.), *Processes of Legal Integration in the East African Community*, Dar es Salaam: Dar es Salaam University Press, 2011, p. 146.

[73] See the discussion above on Customs Union and the establishment of the Trade Committees with finality to determine disputes.

[74] Article 54 (2) of the EAC Protocol on Common Market.

Accessed from LHRC Constitutional Database

Clearly, any person whose rights flowing from the Common Market Protocol have been violated shall take the matter to the national courts of the state where he or she resides and shall have no recourse before the EACJ. This is even so because the Treaty provides that the Court's jurisdiction to interpret the Treaty (whose definition includes protocols) shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.[75]

In the context of a functioning Common Market, it is doubtful whether this arrangement will inspire confidence among cross-border investors. Another problem relating to conferring jurisdiction over common market related disputes to national courts is that of recognition and enforcement of judgments in a different Partner State. The Treaty provides for enforcement of EACJ judgments by national courts[76] but the Common Market Protocol is silent on the recognition and enforcement by Partner States of judgments rendered by a court of a different Partner State. Yet under the current Common Market dispute resolution arrangements, situations where a court of one Partner State would be requested to enforce a judgment of a court of another Partner State are likely to be many. To illustrate this, suppose that a big Kenyan corporation has been found in violation of EAC competition laws by the High Court of Kigali and its main assets are in Nairobi, how will victims be compensated if there are no rules for Kenyan courts to recognize and enforce the judgment of the High Court of Kigali?

It follows from the foregoing that the operationalization of the Common Market Protocol would be still a dream if necessary measures are not taken by the Summit and Council to cede powers to the EAC Organs and Institutions in some areas of cooperation such as those provided for under the Treaty, the Customs Union and the Common Market Protocols. It is essential that Community laws in those areas are enacted, incorporated into national laws and applied uniformly by all the Partner States. This is the only way harmonization of laws can be achieved for a fully functioning Common Market.

### *H. Decision Making Process*

The Treaty in Article 15 (4) provides that the decisions of the Council shall be taken by consensus. This provision also applies to all EAC meetings as long as they bring together participants from the Partner States. In practice, the Council only meets when all members are present. This has resulted in postponements of Council meetings because of lack of quorum, hence delaying the decision-making process on critical integration issues. The Protocol on Decision Making by the Council of the East African Community has identified decisions to be

[75] EAC Treaty, Article 27 (1).

[76] EAC Treaty, Article 44.

Accessed from LHRC Constitutional Database

made by consensus.[77] These decisions are mainly policy related. The Protocol provides that other decisions shall be by simple majority. [78] However EAC has never applied the simple majority rule even for taking decisions that are not policy related.

In practice, the Council has been applying the consensus rule as meaning unanimity. This has led the Council to seek an advisory opinion from the EACJ regarding the application of the requirement of consensus among others. The Court ruled that:

> consensus does not mean unanimity either from its ordinary English meaning or from legal dictionaries. And neither does it imply unanimity when used in the Treaty, the Protocol on Decision Making or the Rules of Procedure of the various Community organs.[79]

The Court did not suggest the best way of applying the consensus rule or any other decision making rule such as simple or qualified majority. For decisions of a policy nature, consensus is the appropriate rule that should be maintained. In the EU, there are very many decision-making rules, but in practice, consensus is always sought in order to get all the Member States on board for harmonious integration.

Heisenberg in her article indicates that "even when the formal decision-making rule is voting (a qualified majority vote of approximately 71 per cent), the Council bargains until there is consensus, setting a higher hurdle for itself than is mandated by the treaties."[80] It seems therefore that it is healthy for the the EAC to maintain the consensus rule, despite the difficulties pertaining to getting consensus especially on sensitive integration issues.

## I. Low Level of Consultation

Among other reasons for the collapse of the old EAC in 1977 and lamented in the preamble to the Treaty, is "lack of strong participation of the private sector and civil society in the co-operation activities." EAC integration is for the benefit of the peoples of East Africa and not for the pleasure of their leaders. Article 127 of the Treaty provides for private sector and civil society participation in the EAC integration process. It provides that:

[77] Protocol on Decision Making by the Council of the East African Community, Article 2 (1).

[78] See (n40) Article 2 (2).

[79] Advisory Opinion No. 1 of 2008 in East African Court of Justice, *EACJ Tenth Year Report*, November 2011, at 89, para 9 (6).

[80] HEISENBERG, D., "The Institution of 'Consensus' in the European Union: Formal Versus Informal Decision-making in the Council," *European Consortium for Political Research*, 2005, p. 65 at 66 available at http://www.helsinkisummerschool.fi/media/.

Accessed from LHRC Constitutional Database

(1) The Partner States agree to provide an enabling environment for the private sector and the civil society to take full advantage of the Community. To this end, the Partner States undertake to formulate a strategy for the development of the private sector and to:

(a) promote a continuous dialogue with the private sector and civil society at the national level and at that of the Community to help create an improved business environment for the implementation of agreed decisions in all economic sectors;

(b) …

(2) ...

(3) The Partner States agree to promote enabling environment for the participation of civil society in the development activities within the Community.

(4) The Secretary General shall provide the forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the community."

Accessed from LHRC Constitutional Database

From a study conducted by GTZ (as it then was) in 2009, it appears that the East African civil society organisations feel they are outside the whole process of EAC integration.[81] The lack of civil society participation is also evidenced by their exclusion from the Treaty amendment process carried out in 2006 and 2007. The amendments were carried out and completed in the record time of one week! (From 7 to 14 December 2006) and subsequently ratified within three (3) months.

The amendments gave rise to a case[82] that was brought before the EACJ by the East Africa Law Society and Others. In that case, the Applicants sought to challenge the legality of those amendments and of the whole process of amendment as contradicting the principle of the involvement of the private sector and civil society. The Court ruled that:

> construing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression to the situation lamented in the preamble of *"lack of strong participation of*

[81] GTZ/EAC "Enhancing Civil Society Participation in the Regional EAC Integration," June, 2009 available at http://www.eacgermany.org/.

[82] *The East African Law Society & 4 Others v. The Attorney General of the Republic of Kenya and 3 Others,* the East African Court of Justice at Arusha, Reference No. 3 of 2007.

> *the private sector and civil society"* that led to the collapse of the previous Community.

The Court went on to conclude that:

> failure to carry out consultation outside the Summit, Council and the Secretariat was inconsistent with a principle of the Treaty and therefore constituted an infringement of the Treaty within the meaning of Article 30.

It is my hope that the EAC leaders will take seriously the wise advice of the Court and consult widely the East African peoples before taking important decisions on the Community. If the leaders will prefer making such serious decisions without consulting the people, then the treaty slogan that the new East African Community is people-centred and private sector driven[83] will remain cosmetic political rhetoric.

## V. Zanzibar in EAC Integration

Zanzibar is an integral part of the United Republic of Tanzania[84] as a result of the union between Tanganyika and Zanzibar. It is the United Republic of Tanzania that is a recognized member to the East African Community. In other words, much as Zanzibar has its own government, constitution and parliament, it is not an independent member of the Community. Its interests within the Community are subsumed in the larger United Republic of Tanzania's interests. This means that during every East African Community meeting, consultation with Zanzibar has to be conducted first at the domestic level. This is supposedly the case due to the nature of the Union between the two sides.

According to the Articles of the Union, eleven matters were initially listed as union matters.[85] The list of union matters has been growing longer due to different factors, to reach 22 items. Oil and gas for example, which constitute number 15 on the list have been the subject of debate between the two sides. Recent attempts to sort this out hit the rocks in a committee meeting chaired by the Vice President Mohamed Gharib Bilal. The members are ministers and permanent secretaries from both sides of the union, and they met to deliberate on the union challenges the whole day without reaching a consensus on the matter. The Mainland delegation was arguing for the inclusion of oil and gas, while the

---

83 The whole of Chapter Twenty Five of the Treaty for the Establishment of the East African Community is about the role of the private sector and civil society taking full advantage of the Community.

84 See Article 1 of the Constitution of the United Republic of Tanzania, 1977.

85 These original items were: the Constitution of the United Republic of Tanzania; foreign affairs; defense; the police; authority on state of emergency; citizenship; immigration; foreign debts and trade; as well as civil service in the Union Government; taxation of individuals and institutions, customs and excise duty; harbors, civil aviation and posts and telecommunications.

Accessed from LHRC Constitutional Database

Zanzibar members maintained their exclusion stance. Also, matters of the judiciary are not included in the union matters except for the Court of Appeal[86]. Going by the principle of exclusion, what is not listed as a union matter is considered to be a non-union matter. This is the basis of the division of powers between the Union and Zanzibar governments. The two sides therefore, formed a unitary system with the Government of the United Republic of Tanzania exercising authority over all Union Matters in the United Republic and matters concerning Mainland Tanzania whilst the Revolutionary Government of Zanzibar has authority in Tanzania Zanzibar over all matters which are not Union Matters.

The mandate of the union government as far as the East African Community affairs are concerned is limited to union matters only but the identified areas of cooperation go beyond the listed union matters.[87] In order to comply with this necessary condition following the establishment of the first East African Community in 1967, three matters joined the list, which are industrial licences and statistics, higher education and civil aviation.[88] This raises one fundamental question: Who represents the interests of Zanzibar whenever non-union matters are considered in the East African Community? This has been a matter of great concern among the people of Zanzibar to the extent of publicly demanding seperate representation during East African Community activities. Zanzibar considers itself disadvantaged as far as equitable distribution of the benefits of the Community is concerned as many projects are concentrated in the mainland. It is only recently that the Council of Ministers decided that the East African Community Kiswahili Commission be hosted by the United Republic of Tanzania,[89] without stating which part of Tanzania. This could be one of the benefits of integration that would go to Zanzibar.

Accessed from LHRC Constitutional Database

86 See Item Number 21 on the List (First Schedule to the Constitution of the Constitution of the United Republic of Tanzania, 1977).

87 According to Article 5 of the Treaty for the Establishment of the East African Community, cooperation among the Partner States is to be carried out in political, economic,, social and cultural fields, research and technology, defence, security and legal and judicial affairs areas.

88 See Mwamba, "Original Union Matters had 11 items, says Khatib,", reporting in *The Daily News* during the Question and Answers session in Parliament by the then Minister of State in the Vice-President's Office (Union), Mr Muhammed Seif Khatib, on 16/06/2010. The Minister was responding to Mr Vuai Abdallah Khamis (Magogoni – CCM) who wanted to know the number of items originally listed as union matters in the Article of the Union signed by Mwalimu Julius Nyerere and Abeid Amani Karume.

89 See the Report of the 24th Meeting of the Council of Ministers held at Hotel Source Du Nil, Bujumbura, Burundi 21st – 26th November, 2011, pp. 18 – 20; Decision Reference No. EAC/CM 24/Decision 18. It was reported during that meeting that the United Republic of Tanzania was the only Partner state that applied to host the Kiswahili Commission and the verification report indicated that Tanzania qualified to host the Commission. The Republic of Rwanda was selected to host Science and Technology Commission and the Republic of Burundi to host Health Research Commission.

## VI. Conclusion

Africa's integration was conceived to start from the strengthening of the RECs and creating new ones in regions where there were none. I have raised several challenges related to the multiplicity of RECs as well as the memebrsip in many RECs at the same time. RECs also have internal problems of implementation of their respective integration agendas. I have shown the case of the EAC where the customs union and common market were supposed to be fully functioning but are not because of lack of powers at the supra-national level, and lack of harmonised implementing laws. I have also discussed other challenges facing the integration process namely the difficulties experienced in the decision making process as well as the low level of people's participation in the integration process. In view of the foregoing one would wonder whether the EAC is moving towards the achievement of its integration agenda or not. An attempt has been made to propose possible solutions for these challenges. It is my strong conviction that there is need for addressing such challenges and raising people's hopes for a united East Africa, and ultimately a united Africa.

If East African Community integration is meant to benefit the people of East Africa as regularly mentioned in the Treaty, then its processes have to be participatory and consultative. There has to be involvement of the people that integration is intended to serve. The United Republic of Tanzania needs to solve its internal union issues with Zanzibar so that the position of Zanzibar in the Community is clearly articulated.

Most important is a need for the leaders' change of mind set. Partner States should be clear in their mind whether they need integration as conventionally understood or not, and if they do, then they should be ready to cede some of their sovereignty by giving more authority to the supranational institutions of the Community.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# THE ROLE OF PARA-LEGALS IN THE PROVISION OF LEGAL SERVICES

*Dunstan Mlambo*[1]

I. Introduction
II. Obstacles in Accessing Legal Services
III. The Role of Paralegals in Access to Justice
A. Education
B. Reduction of Cost of Legal Services
C. Mediation
IV. Recognition of Paralegals
V. Usage of Paralegals in Delivering Legal Services: A Case for South Africa
VI. Conclusion

## I. Introduction

More than half of the world`s population are not satisfactorily protected by the law or the institutions established to govern them.

Access to justice is not the preserve of the rich and powerful though one sometimes gets this impression by the amount of media space occupied by litigation and court cases involving the rich and powerful even when those cases are trivial. A credible and independent justice system should enjoy the trust and confidence of all people; it must resolve disputes fairly whilst regulating contractual and other relationships reasonably without discrimination. It must also maintain law and order without resorting to draconian measures and must uphold human rights and deliver justice for all.

Legitimate justice systems are not merely "nice to have," they are every bit as important to the national infrastructure as electricity grids, telephone networks, roads, ports and financial institutions. It is also crucial to recognize the importance of the formal and informal institutions that comprise the justice sector. Creating a sustainable environment with equal access to justice requires working with different types of institutions and with various actors such as the police, the courts, prosecutors, social workers, prison officials, community leaders, paralegals, traditional councils and other local arbitrators; and taking account of the linkages between them.

[1] Chairperson, Legal Aid South Africa and Judge President of the Labour and Labour Appeal Courts, Republic of South Africa.

Accessed from LHRC Constitutional Database

In the context of the indigent and the vulnerable, particularly in developing countries, access to justice for this sector, which by far constitutes the majority in the populations of developing countries, should be viewed within the overall commitment to democracy, the strengthening of the rule of law, respect for human rights, the promotion of shared national values, an integral part to development and progress, stability, peace and the advancement of democratic governance. Broadly expressed, it should be viewed as consistent with the overall objectives towards the fulfilment of the Millennium Development Goals. Empowering the poor and disadvantaged to seek remedies for injustice, strengthening linkages between formal and informal structures, and countering biases inherent in both systems can provide access to justice for those who would otherwise be excluded.

It has been correctly said that respect for the law is at its lowest with underprivileged persons. There is a natural tendency for such persons to think of the courts as symbols of trouble and of lawyers as representatives of creditors and other sources of harassment.

Despite the commitment to ensure service delivery in the area of justice, developing countries are still not putting enough resources where needed, supposedly because of other constraints such as the debt burden, the HIV/AIDS pandemic, conflict and instability and poor governance. It is accepted that developing countries have limited financial resources. Prioritization is a mechanism often employed to allocate the available assets under these circumstances but it often leads to the exclusion of deserving cases and the perpetuation of a system of compartments. More often than not it is argued that the cases that fall outside the ambit of legal aid, for example, are simple cases, but this is not a proper response. They are simple because they are handled superficially.

The purpose of this article is to examine how access to justice for all can be realized through the use of trained paralegals who function at the interface between NGOs and legal agencies in a third world context where there is a shortage of qualified lawyers and where those lawyers operate mainly in urban areas. Paralegals have been underutilized because they are wrongly seen as a third tier of legal representation for those who cannot afford to pay legal fees.

## II. Obstacles in Accessing Legal Services

Current African civil society is confronted by a number of fault lines, the most glaring being conflict, poverty and inequality. Legal aid is, by its very nature, concerned with these features of civil society. It is closely related to poverty eradication and human development. There are strong links between establishing democratic governance, reducing poverty and securing legal aid. Democratic governance is undermined where access to justice for citizens (irrespective of gender, race, religion, age, class or creed) is not realized. I say legal aid is linked to poverty reduction since being poor and marginalized means being deprived of

Accessed from LHRC Constitutional Database

choices, opportunities, access to basic resources and a voice in decision-making. Expressed differently, lack of legal aid limits the effectiveness of poverty reduction and democratic governance programmes as participation, transparency and accountability are as a result limited. Clearly therefore legitimate justice systems need legal aid. Without legal aid, a legal system is merely an instrument of control by the ruling elite.

Legal aid is a right and governments are obliged to implement sustainable and quality controlled legal aid programs that deliver legal aid services without discrimination to all people in their jurisdictions, subject only to a transparent and reviewable assessment of need, and with special attention to women and vulnerable groups such as children, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally ill, asylum seekers, refugees, internally displaced persons, stateless persons, foreign nationals, prisoners, and other persons deprived of their liberty.

NGOs have played a leading role in the face of these societal challenges in providing access to justice in our continent. The valiant efforts of these organisations must be saluted. They have done so reliant predominantly on donor funds. Our continent has been the recipient of a very sizeable slice of donor funds regarding the provision of access to justice, so much so that some of our governments have lapsed into treating donor agencies as extensions of their departments. We need to constantly remind our governments to fulfil their responsibilities in this regard.

To be sustainable and cost effective particularly in a developing world context a legal aid program must of necessity encompass legal advice and assistance in addition to court centred legal assistance and representation. Access to justice has a much wider meaning than access to litigation. Even the incomplete form of justice that is measured in terms of legal rights and obligations is not delivered solely, or even mainly, through courts or other dispute resolution processes. To think of justice exclusively in an adversarial legal context is, truthfully, misdirected.

Governments should therefore consider appropriate alternatives to the use of lawyers through the provision of complimentary legal and related services by non-lawyers such as lay advocates, law students, paralegals, legal assistants, and other service providers. Wherever in the developing world poor people have been oppressed by a legal system and have been unable to afford the cost of legal practitioners, paralegals have sprung up. Paralegals have also stepped into the breach in post conflict situations to provide front line legal assistance. In the developing world they are the single biggest service provider in primary access to justice, unequalled even by the organized legal professions.

However, what they have in common is a practical knowledge of the operation of the law or some area of the law and a willingness to help others in their community. They cannot recite Latin passages from Cicero or Justinian but they can help poor people with their legal problems and they care enough to do

Accessed from LHRC Constitutional Database

so. Very often, their ability to assist members of their community is undermined by the restriction of certain classes of reserved work to the organized legal profession and the lack of access to formal legal services by either the paralegals or their clients.

## III. The Role of Paralegals in Access to Justice

The institution of paralegal offers a promising methodology of legal empowerment that fits between legal education and legal representation, one that maintains a focus on achieving concrete solutions to people`s justice problems; that which employs, in addition to litigation, the more flexible, creative tools of social movements.

The problem to be tackled is that paralegals are often treated with little respect by legal professionals, as they have little formal training, and are considered less prestigious. Ensuring recognition of the important role of the so called "barefoot lawyers" in dispute resolution by the legal profession and establishing the role more firmly in the context of the formal legal systems is a mission for years to come. They work as "barefoot lawyers" in many countries in Africa providing a range of advisory services to ordinary people.

Paralegals are usually drawn from communities in rural areas and therefore possess skills that lawyers rarely acquire and can therefore add complementary skills that are finely tuned to the local context such as speaking local languages, knowledge of local forms of justice and community acceptance.

Paralegals have been useful in the following areas:

### A. Education

Paralegal program initially involves the training of paralegals and these same paralegals in turn can become involved in community education programming. Such programs may include holding workshops to raise public awareness and build the capacity of individuals and groups, including civil society organizations, civil servants, government officials, and community councils. The programme may also include distributing educational pamphlets, booklets, and other resources.

### B. Reduction of Cost of Legal Services

Many studies have shown that low to moderate income people cannot afford to hire a lawyer. Paralegals provide legal services at the fraction of the cost that would be charged by attorneys. The Community based paralegals operate within the community where they enjoy the respect and trust of members of the community.

Accessed from LHRC Constitutional Database

Although the cost of legal services is a primary factor in accessing the legal system, there are many other barriers. Paralegals are mostly used in legal aid agencies to address the costs barrier.

### C. Mediation

Mediation has been successfully used to resolve land disputes and land allocation for farming purposes. Mediation is a powerful and commonly used tool because it engages with all the parties to a conflict and the process results in a win-win situation because the solution is not imposed by any one party but is arrived at through the consensus of al the parties.

The methods by which the paralegals work are diverse. For individual justice-related problems (e.g. a battered wife or a wrongfully detained juvenile), the paralegals provide information on rights and procedures, mediate conflicts, and assist clients in dealing with government and chiefdom authorities.

In this process the paralegal introduces relevant legal facts, identifies the key claims on either side and allows time for constructive discussion.

## IV. Recognition of Paralegals

Paralegals usually have no formal appearance rights, even in the most minor of courts. Community based paralegals cannot obtain insurance against professional negligence because they are not working under the control and supervision of an admitted attorney. The state is usually unwilling to provide any funding and, given the fierce competition for private funding in the developing world, income, if any, is uncertain.

In the developing world, we need to move away from an ‘all or nothing’ dichotomy. While it is preferable that the poor, like the rich, should enjoy access to a full range of qualified legal practitioners, resource constraints make this impossible. In the interim, community based paralegals can play and have always played a vital role in providing entry-level access to justice or primary access to justice, to be more specific. Governments should be encouraged to recognize and regulate paralegals.

Governments are increasingly recognizing the role of paralegals in national legislation as an affordable way of providing meaningful legal services to the poor. Lawyers too have welcomed the development as paralegals do much of their donkey work and refer the serious more complex cases to them.

It is no coincidence therefore, that developing countries are increasingly adopting the paralegal approach to justice service delivery to ensure access to justice for the poor especially those in rural areas. This model has proven to be substantially effective, far-reaching and flexible and costs considerably less than, for example, a lawyer-based model of justice service delivery to sustain.

Accessed from LHRC Constitutional Database

## V. Use of Paralegals in Delivering Legal Services: A Case for South Africa

In South Africa, the normal difficulties of accessing justice are exacerbated by gross inequalities, the high cost of legal services and the remoteness of the law from most people's lives. Such socio-economic adversity dictates the need for a comprehensive system of legal assistance for poor people, to allow their issues to be adequately articulated and to promote parity in the legal process. In South Africa there are numerous organizations involved in paralegal work.

In a constitutional state, like ours, the state has a duty to "respect, protect, promote and fulfil" every individual right to justice. This typology of duties is well recognized in international law.

These duties, both positive and negative, arise in respect of all rights. In order to understand the nature of the duty on the state, it is therefore not helpful to categorize the rights in the Bill of Rights as "civil and political" or "social and economic" because the rights in both of these imprecise categories give rise to duties - positive and negative – and impose some positive obligations and costs on government.

The duty to fulfil the right plainly obliges the state to take positive measures that enable and assist individuals to enjoy the right. It requires the state to take positive measures to assist those who currently lack access to the rights to gain access to them. This includes the adoption of "enabling strategies" to assist people to gain access to the rights through their own endeavors and initiatives, as well as more direct forms of assistance to groups in particularly vulnerable or disadvantaged circumstances.

The duty to respect a right means that the state may not take measures that result in preventing existing access. It is a classic negative duty.

Where individuals are unable, for reasons beyond their control, to enjoy the right by means at their own disposal, the state has an obligation to fulfil or provide that right directly.

In *De Lange v. Smuts NO and Others*[2] the Constitutional Court held that:

> In a constitutional democratic state, which ours now certainly is, and under the rule of law, citizens as well as non-citizens are entitled to rely upon the state for protection and enforcement of their rights. The state therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors.

[2] (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998).

Accessed from LHRC Constitutional Database

This dictum was applied in *Dingaan Hendrik Nyathi v. Member of the Executive Council for the Department of Health, Gauteng and 2 Others*[3] where the court held:

> Deliberate non-compliance or disobedience of a court order by the state through its officials amounts to a breach of [a] constitutional duty [imposed by section 165 of the Constitution]. Such conduct impacts negatively upon the dignity and effectiveness of the Courts.

The Constitution of South Africa protects the right of everyone's access to justice. In the fulfilment of this right, the state has established Legal Aid South Africa, an organization that has employed paralegals who act as a first point of contact at the Justice Centre and offer mainly legal advice which often resolves the problem. Generally paralegals have built up expertise in particular areas such as pensions, unfair dismissals, consumer issues and a variety of others. Where the paralegal cannot resolve the problem, the client is referred to an attorney or an NGO with specialist skills.

During the financial period of 2010/11 Legal Aid SA delivered legal advice to about 211,874 peoplethrough the paralegals employed at its call Centre. This was made possible through the establishment of an advice centre line run by paralegals. The call centre can be reached through a toll free number at 0800 110 110 and advice is given between 7am and 7pm.

In South Africa the government has developed a policy paper towards recognition of paralegals in providing access to justice which supports:

- A protocol for the recognition of the services of the advice offices and paralegals in the integrated justice system;
- The participation of advice offices and paralegals in the integrated justice system, in a way that allows them to retain their independence;
- Strengthening and developing the skills and capacity of advice officers and paralegals;
- Independent network of advice offices, community based organizations and professional bodies working in the integrated justice sector.

The importance of the role of the paralegal movement in the justice sector system is endorsed by the fact that there has been a proposal to re-define the term legal practitioner in the *Legal Practice Bill* to include paralegals, thereby allowing them to represent clients in court. The Bill was drawn up bearing in mind that access to legal services is not a reality for many South Africans and

[3] Constitutional Court of South Africa, Case No: CCT 19/07.

Accessed from LHRC Constitutional Database

that access to justice is unnecessarily hampered because "entry into legal profession is, in some respect, dependent on compliance with outdated, unnecessary and overly restrictive prescripts."

Although the latest draft of the Legal Practice Bill does not refer to paralegals, the Department of Justice & Constitutional Development has committed itself to the establishment of a separate regulatory framework for paralegals, in particular the work of community-based paralegals in community advice offices.

Paralegals advice offices are a useful adjunct to conventional lawyer-based legal aid services schemes, particularly in rural areas. Access to justice must be considered holistically, and paralegals are in the front line in the field when communities make their first contact with the law. The University of Kwazulu- Natal has been instrumental in setting up the Community Law and Rural Development Centre (CLRDC) in Durban to empower rural communities so that they obtain the necessary skills, self-reliance and confidence in participating in a changing South Africa. The CRLDC is also involved in educating rural communities about voting in a democracy so as to strengthen the rule of law in rural South Africa. Through the faculty of law at the University of KwaZulu-Natal, the CRLDC offers an intensive three month programme during which suitable paralegals from rural communities are trained to operate paralegal advice offices.

## VI. Conclusion

Paralegals may have several negative labels but what cannot be taken away from them is that they provide primary legal assistance and empowerment to a large segment of society. As we have seen, in South Africa they ensured that those marginalized by repressive laws still had access to legal services. It is not too late for governments especially in the developing world to support paralegal programs in a much more sustainable manner. Other branches of the legal profession have no option but to appropriately embrace para-legals as valuable partners in the delivery of legal services.

Accessed from LHRC Constitutional Database

# KONY, MUSEVENI AND THE INTERNATIONAL CRIMINAL COURT: AN ALTERNATIVE VIEW

*Alex Obote Odora*[1]

1. Introduction
II. Why Uganda is afraid of the ICC
III. The Referral of the Situation in Uganda to the ICC
IV. Concluding Remarks

## 1. Introduction

On 5th March, 2012, Jason Russell, founder of the *Invisible Children*, released a video calling for the arrest of the leader of the Lords Resistance Army (LRA), Joseph Kony. The Kony 2012 video was naïve and one dimensional. It ignored critical background material that would have provided context to the armed conflict in Uganda. It also failed to recognize that in any armed conflict there are always two or more parties. And each party to the conflict is supported by a variety of allies, including those who aided and abetted the perpetrators through financial support and supply of arms. Further, the history of armed conflicts, dating back to before the First World War, is replete with crimes committed by all parties.

Second, the Kony 2012 video presents the problems relating to armed conflict in Uganda as the responsibility of one man named Joseph Kony. This simplistic analysis creates the notion that if Joseph Kony, the linchpin, is arrested, there will be an end to the LRA as a fighting force. This notion defies common sense, for the conflict in Uganda goes beyond Kony as an individual. Third, there are key inaccuracies and omissions in the Kony 2012 video. Perhaps the most obvious one is that Jason Russell places Uganda in Central Africa. That is false - Uganda is in East Africa. If Jason Russell can be wrong on common facts that are widely known, his overall credibility must be in great jeopardy. The accuracy of the video is further put in doubt as Russell neglects to mention that both the Uganda Peoples' Defence Force (UPDF) and the LRA have committed serious crimes in Uganda and in the Democratic Republic of the Congo (DRC).

In sum, the Kony 2012 video is irresponsible and opportunistic. It is irresponsible because Jason Russell and the *Invisible Children's* viral propaganda fail to mention that Kony, having left Uganda in 2006, was no

[1] Consultant in International Criminal, Humanitarian and Human Rights Law based in Oslo, Sweden; and former Senior Legal Advisor and Special Assistant to the Prosecutor and Chief of Appeals and Legal Advisory Division, United Nations International Criminal Tribunal for Rwanda, Arusha, Tanzania.

Accessed from LHRC Constitutional Database

longer in that country and not a threat to any person living in northern Uganda. To that extent, it is not the American soldiers nor the arrest of Kony that is pertinent to the ordinary peasant in northern Uganda. It is the support provided by the Uganda government and the international community to the ordinary Ugandan who has lived in the internally displaced persons (IDP) camps for over twenty years that is a priority. Additionally, Jason Russell and the *Invisible Children* are irresponsible because while purporting to be a non-profit organisation working to protect the interests of children in northern Uganda, Jason Russell was also an agent of the Museveni regime. He spied on vulnerable children and their parents. Based on Russell's illegally obtained information, innocent Ugandans have been arrested and charged with treason.[2] In Uganda, the penalty imposed on persons convicted of treason is death.

In the article, I submit that the primary objective of the Kony 2012 video is to shield Uganda's military and political leadership from international criminal justice. By focusing only on Kony, Jason Russell seeks to present Kony as the sole person responsible for all the alleged crimes committed in a brutal conflict between the LRA and the UPDF. The video is a diversionary effort to allow the ICC to focus on the LRA while ignoring crimes allegedly committed by the UPDF.

The Kony 2012 video having set the scene for the protection of the UPDF from international criminal investigation, the Uganda government, through its representative in the East African Parliament, moved to legalise such protection by seeking an amendment to the jurisdiction of the East African Court of Justice (EACJ) which would result in evading ICC jurisdiction. Separately, Uganda and several African States also sought to amend the statute of the African Court of Justice and Human and Peoples' Rights (African Court) to allow African leaders who commit serious international crimes against their people to evade trial at the ICC. These two steps - the release of Kony 2012 video and the amendment of the statutes of the regional and continental courts - constitute a comprehensive strategy for Uganda and other like-minded African States (the ICC rejectionists) to evade prosecution by the ICC.

Uganda, through Mr Dan Wandera Ogola, a Ugandan member of the East African Parliament, tabled a motion seeking the adoption of a resolution demanding the referral of the Kenyan cases, also known as Ocampo Four, from the ICC at The Hague, to the East African Court at Arusha. The case against the Ocampo Four is premised on individual criminal accountability for crimes committed during the 2007-2008 post election violence in Kenya.

The Ocampo Four case at The Hague has no nexus with the responsibility of Kenya as a state or that of its government, the East African Community, Mr Ogola or Uganda. Indeed, Mr Ogola, the Republic of Kenya and its government

---

[2] ALLIMANDI, Milton, "Invisible Children, Makers of Kony 2012, Spied for Ugandan Regime – Wikileaks" *Black Star News,* (New York), 18th April, 2012.

Accessed from LHRC Constitutional Database

or the East African Community and Uganda are not party to the proceedings at the ICC and they have no right to appear before the court except as victims or friends of the court (*amicus curiae)* and only after their individual or joint applications to appear as such is granted by the Trial Chamber. It is, however, surprising that the East African Parliament proceeded to adopt the Ogalo motion and resolved to have the Kenya cases at the ICC transferred to the East African Court after appropriate amendment of the Court's statute. The East African Presidents (the Summit) promptly accepted the resolution and thereafter requested the Attorneys-General of the East African Community to commence the process of amendment of the Court's statute.

This futile attempt must be put in context. Mr Wandera Ogola, a 1980 law graduate from Makerere University is a practising advocate before the courts of Uganda. As an experienced lawyer and member of the East African Parliament, he is expected to be conversant with the laws of the East African Community, the court's statute and its rules of procedure and evidence. He must also know, or at least is expected to know, that the East African Court has jurisdiction only over interpretation and application of the East African treaty as provided under its Article 27. The court has no jurisdiction to try international crimes. Further, the East African Court of Justice has no investigative and prosecutorial capacity; it has no standing before the ICC and it has neither the capacity nor the expertise to entertain international criminal matters. Even if the Court's statute was amended to extend its jurisdiction, it would not necessarily cover crimes committed prior to the amendment because of *ex post facto* rules. So, why did Mr Ogola introduce a motion seeking the transfer of the Ocampo Four from the ICC to the East African Court – a court that has no jurisdiction?

The answer lies in Uganda's motives in seeking an amendment to the Court's statute. The objective of the amendment of the court's jurisdiction is not to 'help' the Ocampo Four but to protect the leaders of Uganda who are allegedly responsible for some of the most serious crimes committed in the northern part of Uganda and during its occupation of the Democratic Republic of the Congo (DRC).

A separate route adopted by Uganda to evade ICC jurisdiction is through the African Union (AU). The process of amendment of the statute of the African Court commenced when the AU directed its legal committee, drawn from Malawi, Gabon, Uganda, Liberia and Libya, to review the Africa-ICC relationship with a view to expanding the jurisdiction of the African Court to cover jurisdiction over international crimes. Therefore, in a bid to block the ICC from handling cases from the continent, the team of legal experts is expected to recommend a common position to be taken by the AU towards the Hague-based court notwithstanding that not all members of the AU are party to the Rome Treaty. Under the guise of universal jurisdiction, the AU, spearheaded by Uganda in the legal committee of experts, is determined to evade the long arm of the ICC jurisdiction by seeking to establish an African Court that can be manipulated by national governments through the appointment of judges, control

Accessed from LHRC Constitutional Database

over prosecutorial activities and provision of a limited budget. At the time of writing, the Committee of Legal Experts was still meeting in Addis Ababa, Ethiopia.

## II. Why Uganda is afraid of the ICC

Uganda has been engaged in many armed conflicts in the past forty years. Currently she is waging war against the Allied Democratic Force (ADF) inside Uganda and in the DRC. She is also engaged in armed conflict in Somalia under the umbrella of the African Union. Inside Uganda there is a low intensity conflict between the Museveni regime and the political opposition. In the course of these past and current armed conflicts, Uganda's military and political leaders are alleged to have committed serious international crimes. In the event of any of its leaders being indicted, Uganda prefers that its leaders be prosecuted by a court it can control. A weak and compliant court is in the best interests of leaders who fear they may be prosecuted at the ICC.

The armed conflicts in Uganda and in the DRC pose the greatest threats to the leadership in Kampala. There are attempts by Uganda to present the war in northern Uganda to the international community as a "just war". In the process, the Uganda government has presented some ridiculous reasons as the causes of armed conflict in Uganda. President Museveni, like his spy agent, Jason Russell, for example, has reduced the complexity of the causes of war in northern Uganda to tribalism and alleged looting of government and private property. In so doing, President Museveni created conditions in which the armed conflict in northern Uganda took an ethnic dimension and fed on Uganda's north-south historical divide. Yet, with his long experience in armed conflicts, President Museveni ought to have known that organized and systemic violence based on ethnicity tends to breed genocide as witnessed in Rwanda in 1994.

On assuming power in 1986, the Museveni military government failed to provide leadership which would have defused the ethnic divide and usher in national unity. Instead, Gen. Museveni continued to peddle allegations that the Acholi and Langi were the enemies of Uganda because they are responsible for killing civilians in the Luwero triangle (1981-1986 war) and looting their properties. Significantly, besides Museveni's allegations, there are no reports of judicial inquiry determining who, or which armed groups, are responsible for the Luwero tragedy. President Museveni has consistently refused calls to establish a judicial inquiry in the Luwero mass murders. Importantly, not a single Acholi or Langi is known to have been investigated or prosecuted for crimes committed in Luwero yet President Museveni continues to peddle these falsehoods and hold these ethnic groups collectively criminally responsible.

Overall, the purpose of the Museveni propaganda is not to identify those most responsible, but to mobilise his ethnic group, and those closely associated with it, against people from the northern part of Uganda. Writing after the

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

Rwanda genocide, Museveni justifies the use of ethnic chauvinism in his book, *Sowing the Mustard Seed,* as follows:

> Under previous regimes, the soldiers, most of whom came from the north, had been free to loot civilian property. Whenever they looted such things, for example corrugated iron roofing sheets, they would take them to their homes, and their parents would not ask where they obtained them, in spite of the fact that one could easily tell the difference between a new iron sheet and one that had been previously nailed on someone else' roof. *In this way, the whole community in Acholi and Lango had become involved in the plundering of Uganda for themselves.* In other words, the reason why those rebels in the north, organised on a tribal basis, were fighting for control of the national government, was that the NRM as a government had stopped them from looting[3] [Emphasis added]

As a mobilisation tactic, but with no evidence to support his assertions, these serious allegations were very effective. Over the years, Museveni has continued propagating his tribal views by asserting that people from northern Uganda bear collective criminal responsibility for 'crimes committed by their sons and daughters' against the people of central and western Uganda. The inference is that the Acholi and Langi are to blame for the war in northern Uganda, for that is poetic justice for whatever crimes they committed in Luwero.

The argument that the cause of armed conflict in northern Uganda is because Acholi and Langi have been stopped from looting government and private property by the Museveni government[4] cannot be sustained. However, Museveni's ridiculous and racist comments, while incorrect, have become a justification for the war in northern Uganda, and to a great extent, have taken on a life of their own as foreign and local press peddle the false assertions and present the causes of armed conflict in northern Uganda as disagreement over looting. This false premise underpins NRM policy on the dehumanization and degradation of victims, a point Jason Russell and *the Invisible Children* are either unwilling or unable to understand.

The philosophical underpinning of President Museveni's racist policy and the conduct of armed conflict in the northern part of Uganda can be traced to lectures delivered to the NRM political elites by the NRM leadership. Mr. Museveni, in his capacity as Chairman of the NRA High Command and the NRM political wing, is responsible for the political and military programme and strategy of his party. His responsibility includes approving syllabi and lecture

---

3 MUSEVENI, YOWERI Kaguta, *Sowing The Mustard Seed: The Struggle for Freedom and Democracy in Uganda,* Kampala: Macmillan, Publishers Ltd, 1997, pp 177-178.

4 Ibid., p. 178.

materials used at the NRM Political School. At this school, its Director and NRM ideologue, Commander Kabajo, in many of his lectures emphasized the NRM philosophy which divides Ugandans into two groups:

> The first group consists of human beings. They are peasants, farmers, workers and a small fraction of intellectuals. The rest are 'biological substance' who should be eliminated.[5]

This bizarre reasoning was used by Adolf Hitler in his effort to "create space" for the Aryan nation. Hitler argued for "a new philosophy of fundamental significance,"[6] a change that resulted in the extermination of Jews, Gipsies, communists and homosexuals, among other minorities. The scale of the extermination of minorities during the Nazi period was only discovered after the end of the Second World War. Museveni's philosophy is not much different. On 29th January, 1986 in his inauguration speech, Museveni unveiled a philosophy of "a fundamental change". In implementing his philosophy, Museveni has waged many wars and left millions of people dead in the DRC and several hundred thousands more in Luwero and northern Uganda. Just as the discoveries of the numbers of dead in Nazi Germany came after the ouster of Hitler, the full scale of extermination in Uganda, under the NRM leadership, will only be known when President Museveni is no longer in office.

Another leader, Cambodia's Brother Number One, alias Pol Pot, had a philosophy articulating that intellectuals were parasites and leeches and must therefore be sent to "re-education camps" or eliminated. Pol Pot's regime rounded up intellectuals and transported them to work in collective farms in the country-side to work with their hands and be 'useful' to society. The policy was tragic. In pursuit of creating a new society, commencing from Year Zero, the Pol Pot regime slaughtered thousands of his own people.[7] President Museveni's ideologue, like the Pol Pot-era advisors, still believes that the majority of intellectuals are "biological substances" who must be eliminated.

The classification of some Ugandans as 'biological substances' informs us that President Museveni has indeed created a "fundamental change" as it has become acceptable in Uganda to describe sections of the population as swine, pigs, insects, etc, quite reminiscent of the language used during the Rwanda genocide when Tutsis were referred to as cockroaches. The sub-text is that to 'murder' a swine, pig or insect is not a crime. Hence once an individual is dehumanised by the NRM regime, it becomes acceptable to slaughter them.

Consistent with the NRM theory on 'biological substances' and a further disdain for 'swine, pigs and insects' President Museveni has no moral or legal qualms confining men, women, children, the old, sick and infirm in 'protected'

---

5 *Standard Newspaper,* (Nairobi, Kenya) 25th August, 1987.

6 HITLER, Adolf, *Mein Kampf,* New York: First Mariner Books edition, 1999, p. 373.

7 CHANDLER, D., *Voices from S-21: Terror and History in Pol Pot's Secret Prison,* Berkeley: University of California Press, 1999), see pp. 41-76 on "Choosing the enemy."

Accessed from LHRC Constitutional Database

camps without adequate food, sanitation or medical care as he did in northern Uganda. Political philosopher Hannah Arendt would have described the 'concentration camps' in the northern part of Uganda as *radical evil*. Radical evil, according to Immanuel Kant, is the type of evil that is rooted in an evil motivation, an intention to do evil, a person's evil heart. Kant held radical evil to be rare and quite different from evil that is done out of ignorance or an intention to do well that has gone awry.[8]

Arendt, in *The Life of the Mind,* explains that an intention to establish 'concentration camps' during the Second World War could have come only from an intention to do evil, to achieve some end outside of commonsense reasoning[9]. In *Eichmann in Jerusalem* what Arendt tried to capture with that phrase, *banality of evil*, was the kind of radical evil that results from a particular capacity to stop thinking inherent in people like Eichmann, whose thoughtlessness was fostered by the fact that everyone around him went along unquestioningly with Hitler's extermination order and his vision of the glorious Thousand Year Reich.[10] Eichmann and his kind never suffered a "crisis of conscience",[11] and this understanding helps to explain why Arendt's reasoning and her ideas are also relevant[12] in Museveni's Uganda.

The philosophical underpinning of the NRM theory of *the other* – the 'biological substance' who is not like them – created conditions of the otherness. The NRM regime created a distance from the 'dehumanised other' and this very distance allowed some UPDF soldiers to believe and behave like Eichmann. These soldiers view their primary responsibility as terrorizing opponents of the regime as well as inmates of the 'protected' camps in the northern part of Uganda. Some of the graduates of the NRM Political School are in the police. They often torture defenceless civilians and occasionally squeeze female breasts or shoot the protestors for sport.

To the guards at the camps and elsewhere in the country, their methods of choice include locking up civilians in a stationary railway wagon and leaving the victims to suffocate to death as was done at Mukura in Teso where between 69 and 200 persons died of suffocation. The UPDF have buried civilians alive who are then left to die, as was the case at Bucoro in Gulu. This is not an aberration, but a practice adopted by the Museveni regime in waging war against its

---

8 KANT, Immanuel, *The Critique of Pure Reason,* B172-173, cited in ARNDT, Hannah, *Responsibility and Judgement: Some Questions of Moral Philosophy*, New York: Schocken Books, 2003, p. 137.

9 ARNDT, Hannah, *The Life of the Mind,* San Diego, New York and London: A Harvest Book, 1978). See particularly pp. 129-179 on "What makes us think."

10 ARENDT, Hannah, *Eichman in Jerusalem: A Report on the Banality of Evil,* New York: Viking, 1968.

11 Ibid, p. 104.

12 YOUNG-BRUEHL, E, *Why Arendt Matters,* New Haven & London: Yale University Press, 2006, pp. 159-210.

Accessed from LHRC Constitutional Database

domestic enemy, the so-called "biological substance". The practice is a violation of the laws and customs of war as well as examples of *radical evil*, and a practice that serves no useful military purpose. In implementing the Ugandan leader's vision of "fundamental change" serious international crimes have been committed by his subordinates as was the case with respect to Hitler's subordinates who killed millions of Jews in implementing the philosophy of "fundamental significance."

But for Museveni's bizarre theory on the causes of armed conflict in northern Uganda and his government's philosophy of collective hatred, the war against the LRA would have ended much earlier. President Museveni needed to milk the 'benefits' of the war for other internal and external political reasons. At the start of the 1990s, the Museveni regime introduced a scorched earth policy in its war against the LRA. The NRM northern Uganda policy was to destroy food by burning food stores and crops ready for harvest. The objective of destroying food was purportedly to deny the LRA sustenance. It was also to dehumanise the local population and to deny the civilian population respect and human dignity. To succeed in implementing this policy of degradation, the Museveni regime made no arrangement to feed the civilian population after their food and food crops were destroyed and provided no sanitary facilities or adequate lodgings for the inmates. The government knowingly failed, neglected or willingly refused to protect its citizens as required by law. A Uganda Government newspaper asked President Museveni to comment on this unacceptable conduct of the soldiers:

*New Vision* Journalist:

> People have criticised what they called "the scorched earth policy", that is, civilians were moved from areas of rebel sanctuaries to population centres, and then the burning of houses and granaries etc., to deny rebels food. Is this policy still in force?

President Museveni:

> That is a misnomer. There is no policy of scorched earth. There is a policy of destroying foodstuff being used by rebels.[13]

It is interesting that President Museveni is able to mentally separate the policy of "scorched earth policy" from the physical act of destroying foodstuff on which the civilian population depends. Perhaps Mr Museveni was suggesting that the civilian population in the affected areas are "biological substances", may be swine, pigs or insects as well, and therefore they do not need or deserve protection.

In anotherinterview, when asked whether the NRA soldiers operating in Northern Uganda were adhering to the 1949 Geneva Convention and Additional

[13] *New Vision* (Uganda), 27th June, 1989.

Accessed from LHRC Constitutional Database

Protocol II of 1977, the governing laws on armed conflicts, President Museveni replied: "What is the Geneva Convention on wars! I have never read it."[14]

President Museveni may not have read the Geneva Convention, but ignorance of the law is not a defence. In any event, the Uganda Attorney-General who is the chief government legal advisor, alongside his legal staff, is always available to advise the president. Overall, President Museveni's response signifies a complete disregard of the law. President Museveni's negative attitude to the rule of law has encouraged members of the UPDF to commit serious international crimes without fear of prosecution before domestic courts.

After the 27 June 1989 Scorched Earth Policy interview, the army continued with its policy of destroying homes by burning houses and relocating the civilian population in 'protected' camps. Within a year, there were between 1.4 and 1.6 million civilians packed in squalid compounds with no sanitary facilities, clinics or schools.

The continued existence of the 'protected' camps in the northern part of Uganda, just like the war itself, served the strategic interests of the UPDF, LRA and several NGOs. This human zoo provided a unique opportunity for some NGOs to conduct research on living conditions in squalid camps.[15] Gulu district alone was host to close to one hundred different local, international and "briefcase" NGOs. In many respects, the assortment of NGOs assisted the NRM government in prolonging the war. Overall, the concentration camps became a cash cow, rolling out money to the NGOs, medical supplies to the LRA and leaving the vast Acholi land to the UPDF. The land was eventually parcelled out to senior UPDF officers and 'investors' with connections to State House. Each of the three major players – the NGOs, LRA and UPDF - benefited from maintaining 'protected' camps for as long as it lasted. The leadership and members of the NGOs operating in northern Uganda at the relevant time are as complicit in crimes committed by the LRA and UPDF inside the 'protected' camps as are the Uganda military and political leaders.

While some of the criminal acts committed by the UPDF fall outside the ICC temporal jurisdiction, the manner and method of the commission of the crimes do provide evidence of a consistent pattern of conduct of the UPDF, a conduct that continued after 1 July 2002 when the Rome Treaty became operational. To that extent, they provide background information on the conduct and behaviour of the UPDF soldiers and its leadership during the 20-year war in northern Uganda. This is the primary reason why Uganda is afraid of the long reach of the ICC jurisdiction.

Accessed from LHRC Constitutional Database

---

[14] Panorama Program of the British Broadcasting Corporation – March, 1986.

[15] FINNSTROM, S., *Living with Bad Surrounding: War, History, and Everyday Moments in Northern Uganda,* Durham and London: Duke University Press, 2008.

## III. The Referral of the Situation in Uganda to the ICC

Uganda signed the Rome Statute on 17th March, 1999 and ratified the instruments on 14th June, 2002. As a State Party, Uganda has consented to the Court's jurisdiction for any crimes enumerated in the Statute, including subsequent amendments that may be made, arising from acts or omissions committed from 1st July, 2002.

In December, 2003, Uganda opted to refer the situation in Uganda to the ICC. Uganda's communication to the ICC limited the referral to crimes committed by the LRA. It excluded all reference to crimes allegedly committed by the UPDF. However, under Article 14(1) of the Rome Treaty, a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed by requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. Hence, under Article 14(1), the ICC may only accept referral of entire "situations" and not cases against specific individuals or acts committed in one part of the country and by only one party to the conflict. Based on the Uganda government referral, the ICC accepted to impartially investigate all grave crimes that took place throughout the sovereign territory of Uganda since the entry into force of the Rome Treaty on 1st July, 2002. On 29th July, 2004, the Prosecutor determined that there was a reasonable basis to initiate an investigation and, in August 2004 the Prosecutor commenced investigations.

On 13th October, 2005, an indictment against Joseph Kony and his senior commanders was unsealed.[16] Kony is allegedly criminally responsible for thirty-three counts on the basis of his individual criminal responsibility under Article 25(3) (a) and 25(3) (b) of the Statute. The break-down of the counts in the indictment are as follows:

- Twelve counts of crimes against humanity (murder - Article 7(1)(a); enslavement – Article 7(1)(c); sexual enslavement – Article 7(1)(g); rape – Article 7(1)(g); inhumane acts of inflicting serious bodily injury and suffering – Article 7(1)(k)); and
- Twenty-one counts of war crimes (murder – Article 8(2)(c)(i); cruel treatment of civilians – Article 8(2)(c)(i); intentionally directing attack against a civilian population – Article 8(2)(e)(i); pillaging – Article 8(2)(e)(v); inducing rape – Article 8(2)(e)(vi); forced enlistment of children – Article 8(2)(e)(vii).

[16] *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen,* Indictment, (Case No. ICC-02/04-01/05).

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

What is significant about the counts as they appear in the public version of the Kony indictment, though extensively redacted, is the fact that of the thirty-three counts, twenty-eight counts relate to allegations of crimes committed within the 'protected' internally displaced persons (IDP) camps; camps that were, at the times the crimes were committed, under the control of, and guarded by the UPDF. The remaining five counts relate to crimes allegedly committed outside the premises of the IDP camps but within Uganda. The significance of these facts is weighty because the LRA has never claimed to have effective control over any part of Uganda, particularly that of the camps which were at all times – day and night – guarded by the UPDF. Similarly the Uganda government has always insisted that the LRA has no control over any part of the territory of Uganda. The crimes allegedly committed by the LRA were in the territory controlled by the Uganda government. The role played by the UPDF with respect to the thirty-three counts will become a contentious issue between the Defence and the Prosecution should the case ever come to trial.

Further, a careful reading of the Kony indictment leaves a lot of questions unanswered. For example, what was the relationship between the LRA and the UPDF during the 20-year war in general and the indictment period in particular? How was it possible for a group of untrained fighters, barely literate, poorly organised as well as poorly armed to over-power the UPDF soldiers, at not only one, but all 'protected' camps in northern Uganda? The LRA did not only over-power the UPDF, but took time to loot food and medicine, rape and sexually assault many women and girls in the camp, and finally abduct as many children as they wanted without being confronted by the UPDF? The impression given is that the LRA was such a powerful military force, and far superior to the UPDF that it could enter and leave any camp as and when it pleased. This scenario is hard to fathom. On the other hand, was the failure to protect the camps a UPDF war strategy to destroy in whole or in part an ethnic group? The elephant in the house is: did some members of the UPDF cooperate with the LRA leadership? If so, did the UPDF leadership know or had reason to know of any relationship that may have existed between some members of the UPDF and the LRA? Did the UPDF aid or abet the LRA in the commission of any serious international crimes?

Having referred the situation in Uganda to the ICC, and the Court having broadly interpreted its responsibility to investigate the alleged crimes, it now appears that the Ugandan president is concerned that the decision to refer the situation in Uganda to the ICC may not have been a good idea. To compound Uganda's anxiety, credible information soon began to surface suggesting that the UPDF may have committed a lot more serious international crimes in the DRC than it was known at the time of the referral.

The Situation in the DRC is already before the ICC having been referred to the court by President Joseph Kabila. One of the accused persons currently on trial at the ICC who enjoyed substantial support from the UPDF is Jean Pierre Bemba. There are allegations that Bemba received critical support from the

Uganda leadership and the UPDF. In one of his books, Filip Reyntjens discusses the role played by UPDF senior officers, including support Uganda extended to Bemba in Ituri in the DRC. Reyntjens names Museveni's brother, Gen. Salim Saleh, as a soldier who had a close business and military relationship with Bemba and Brig (now Lt. General and Inspector General of Police) Kale Kayihura who was the UPDF Commanding Officer in Ituri region of DRC, the epicentre of international crimes committed by Congolese militias supported by the UPDF. When Brig. Kale Kayihura and his troops were surrounded and then captured in Ituri, it was Gen. James Kazini (deceased) with the support of the Bahema militia, who rescued him and his troops. During and after the Kayihura rescue, the Bahema militia massacred the Balendu as the UPDF looked the other way.[17]

Further, as documented by Reyntjens, Uganda's occupation of the Ituri region led to armed conflicts between the Bahema (of Ugandan origin and an ethnic group close to Museveni's Bahima) and the Balundu who have been living in the region longer than the Bahema. The UPDF's support of the Bahema against the Balundu was critical in the massacre of thousands of Balendu.[18] It may be recalled that Thomas Lubanga Dyilo who was convicted by the ICC on 14th March 2012 is an ethnic Hema and was supported by Uganda.[19] Lubanga Dyilo was convicted for the offence of recruiting and using child soldiers, a practice which is common in the NRA and UPDF.

Earlier in 2005, the International Court of Justice (ICJ) in a case brought by the Democratic Republic of Congo (DRC) against Uganda held that Uganda was responsible for war crimes and crimes against humanity committed during its occupation of the DRC. Not having criminal jurisdiction, the ICJ ordered Uganda to pay more than US$ 10 billion to the DRC in compensation.[20]

However, what appears to have triggered the rush by Uganda and some African leaders in seeking to amend the Statutes of the African Court and the East African Court respectively is the judgment by the Special Court for Sierra Leone (SCSL) in the Charles Taylor case.[21] On 26 April 2012, a Trial Chamber of the SCSL, with Justice Richard Lussick presiding, convicted former Liberian President Charles Taylor for aiding and abetting war crimes and crimes against humanity. Charles Taylor was indicted by the Prosecutor in 2003 when he was a sitting president and Head of State of Liberia.

---

[17] REYNTJENS, Filip, *The Great African Wars: Congo and GeoPolitics, 1996-2006*, Cambridge: Cambridge University Press, 2009, pp 168-169; 196-201; 205-221.

[18] Ibid, pp. 168-169.

[19] *The Prosecutor v. Thomas Lubanga Dyilo,* Judgement, Case No. ICC-01/04-01/06 (14th March, 2012).

[20] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgement, ICJ Report 2005, p. 168. See also para. 41.

[21] *The Prosecutor v. Charles Ghanky Taylor,* Judgement, Case No.SCSL-03-01-T (18 May 2012).

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

Charles Taylor was acquitted of ordering the commission of the crimes – a more serious mode of participation than aiding and abetting. Taylor was also acquitted of superior/command responsibility and joint criminal enterprise (JCE). It is reasonable to expect the Prosecutor to appeal against these two findings. Similarly, Charles Taylor will probably appeal against his conviction. It may therefore take another year before the Appeals Chamber delivers a final judgement.

However, what is relevant for our purpose currently is that aiding and abetting, a mode of participation on which Charles Taylor was convicted, is relatively easier to prove beyond reasonable doubt than, for example, ordering the commission of a crime or superior criminal responsibility. The practice of the International Criminal Tribunal for former Yugoslavia (ICTY) and Rwanda (ICTR) demonstrate that many military and political leaders appearing before the two *ad hoc* tribunals have been convicted for aiding and abetting serious international crimes. The International Criminal Court is expected to follow the precedent.

Many political and military leaders in Africa, including President Museveni, have good reason to worry about the application of aiding and abetting as a mode of participation in the commission of crimes. It is opportune to emphasise that the terms "aiding" and "abetting" are not synonymous. Aiding means giving of assistance by an accused to someone or a number of different persons. Abetting involves facilitating the commission of an act by being sympathetic thereto. In other words, the terms 'aiding' and 'abetting' refer to distinct legal concepts. The term 'aiding' means assisting or helping another to commit a crime, and the term 'abetting' means encouraging, advising, or instigating the commission of a crime. In law, either aiding or abetting is sufficient to render the perpetrator criminally liable.[22] The Prosecutor therefore has to prove, beyond reasonable doubt, only one of the above acts to render the accused guilty. The actual perpetrator need not be a subordinate of the accused or even be charged with that particular crime. Charles Taylor was found guilty for aiding and abetting foot soldiers many of whom he did not know and had never met. The central issue is that the support Taylor extended to the proxy forces in Sierra Leone substantially contributed to the commission of crimes as contained in the indictment. That fact was sufficient to sustain a conviction.

According to Judge Lussick, in convicting Taylor for aiding and abetting, he found that Taylor provided arms, ammunition, communication equipment, financial support and accommodation to proxy forces in Sierra Leone. Taylor's support, according to the judgement, "was sustained and significant".

---

[22] *The Prosecutor v. Akayesu,* Judgement (TC), Case No.ICTR-96-4-T, September 2, 1998, para.484. *See* also *The Prosecutor v. Ntakirutimana and Ntakirutimana,* Judgement (TC), 21st February, 2003, para. 787.

The Taylor judgement provides guidelines and thresholds, among other things, for assessing the participation of the UPDF and its military and civilian leadership in the conduct of armed conflicts in northern Uganda and in the DRC. There are consistent allegations that the UPDF and its leadership provided to convicted war criminal Thomas Lubanga Dyilo arms, ammunition, communication equipment and financial support. Senior UPDF officers, with the knowledge and approval of the UPDF Commander-in-chief, assisted and supported the recruitment and deployment of child soldiers for Thomas Lubanga's forces and also fought alongside Lubanga in the DRC, including participation in the armed conflict between Bahema and Balendu in which several thousand civilians were slaughtered. It is within this context that the diversionary objective of the Kony 2012 video and attempts to amend the statutes of the regional and continental courts must be understood.

## IV. Concluding Remarks

Justice is not revenge. It is a process for accountability. It is a positive act that the Uganda government, by referring the situation in Uganda to the ICC, chose the path of accountability. Uganda recognised that as a country, it was unable to conduct credible investigations relating to the armed conflicts in Uganda. Having done the right thing, Uganda must be encouraged not to undermine the ICC. In northern Ugandan many civilians have been murdered and so far there has been no justice for the victims. It is unfortunate that not a single perpetrator has been successfully prosecuted in a domestic court for the serious international crimes committed in northern Uganda. It is only reasonable that those most responsible must be held to account.

I do not share the view that the ICC targets African leaders. Currently there is no African leader under investigation by the ICC who is not alleged to have committed serious international crimes. I have no knowledge of any victim arguing that African leaders are targeted by the ICC. On the contrary, there are many African leaders against whom there are serious allegations of crimes committed by them or by their subordinates against their own people and are not under investigation by the ICC or by their respective domestic courts. It is these victims who demand accountability from their leaders. The fact that there may be other leaders in Europe, America, Asia or Latin America who are not being investigated by the ICC does not mean that those African leaders under investigation have not committed serious international crimes against their own people or that those leaders not under investigation have not committed serious international crimes deserving of investigation by the ICC. It is only appropriate that when domestic courts cannot, or will not bring the rogue leaders to justice, the ICC must take over the cases, investigate and where there is sufficient evidence, prosecute.

It is exceptionally wrong for African leaders to seek to undermine international criminal justice. Whether through disinformation, propaganda or

Accessed from LHRC Constitutional Database

manipulation as demonstrated by the one dimensional presentation of the Kony 2012 video, any attempt to undermine the ICC must be opposed by civil society, legal scholars and practitioners. Further, opportunistic attempts to amend laws governing regional and continent courts are unacceptable and must be equally opposed by civil society, legal scholars and practitioners.

Victims must be placed at the centre of international criminal justice. The justice system must not be allowed to be controlled or manipulated by 'leaders', many of whom are either perpetrators or suspects. African leaders in particular should not be permitted to pick and choose which courts they prefer. Court shopping must not be encouraged. In sum, African leaders should not be allowed to take away what semblance of dignity the victims have left in their individual and collective memory.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# CHALLENGES TO THE AFRICAN HUMAN RIGHTS SYSTEM WITH SPECIAL REFERENCE TO THE UNITED REPUBLIC OF TANZANIA

*Michelo Hansungule*[1]

I. Introduction
II. Adoption of the African Human Rights Frame
III. Periodic Reporting
IV. Some Areas of Concern
V. Special Procedures
VI. Working Groups
VII. Communication Procedure
VIII. African Court
IX. African Charter on the Rights and Welfare of the Child, 1990
X. Protocol on Women's Rights in Africa, 2003
XI. Conclusion

Accessed from LHRC Constitutional Database

## I. Introduction

Despite two decades of operation of the African Commission on Human and Peoples' Rights (ACHPR), it is simply too early to celebrate the cause of human rights in Africa. A full assessment of the de facto human rights situation as obtains today should return the predictable verdict that indeed, human rights are still very much Africa's challenge.

It is, nevertheless, true that the laying down of the normative framework of human rights together with the requisite institution-building has been accomplished, even though new work continues. Besides the thirty years of the African Charter on Human and Peoples' Rights, several frameworks have sprung up, including the African Charter on the Rights and Welfare of the Child (ACRWC) as well as the Protocol on Women's Rights in Africa.

These frameworks have given rise to a host of institutions beginning with the ACHPR. Significantly, after realizing the inherent weakness of the African Commission, a full-fledged court was added to the institutional architecture in 1998. On the far-side of the corner is the inconspicuous Committee of Experts on the Rights and Welfare of the Child (CERWC) inaugurated following the adoption of the ACRWC. We have alluded to more work because only recently, the African Union (AU) unveiled its most ambitious plans yet to construct a continent-wide Human Rights Strategy with all the consequences this entails.

[1] Professor of Law, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa; Commissioner: International Commission of Jurists (ICJ). However, the author writes in his personal capacity.

For the victims of human rights, however, this is pretty much all there is on the human rights situation in Africa. While significant progress has been made in one or two countries, most are still grappling with basic human rights issues including the historically elusive socio-economic rights. It is quite true that some political rights are beginning to be realized, a case in point being the freedom to form, join and belong to political parties and non-governmental organizations (NGOs). A lot of progress has been made across the continent in trying to make the right to organize available to citizens who could not enjoy it during colonial rule and the post-independence dictatorships. However, real expression of popular choice is and remains a pipedream to many. Newspapers are not quite there in terms of what they can and cannot report. Even democracies like South Africa realize all too often that a completely free press is not exactly what they needed after all.

As indicated, while the ACHPR, now fully funded by the AU, has been in operation for two decades, it can only claim skeletal successes to its credit. On the ground, it is a different story. Only a handful of 'clients' would demonstrate how it has positively affected their rights. This chapter briefly examines the African human rights system, taking a closer look at one or two aspects of its institutional make-up particularly the African Court which until now has remained largely prospective. The chapter will of course say something about challenges, albeit very briefly. . Naturally, the chapter will try within the constraints of the work to make one or two relevant references to Tanzania.

Accessed from LHRC Constitutional Database

## II. Adoption of the African Human Rights Frame

The adoption of the African Charter on Human and Peoples' Rights in Kenya in June 1981 was rightly heralded as a new dawn in the African struggle towards emancipation of its citizens.[2] Though a latecomer to the human rights fraternity, the African Charter was, nevertheless, celebrated throughout the continent as a natural first priority in a continent which from time immemorial has only known human wrongs. Therefore, besides its symbolic value, the African Charter represented a serious concession by the African states in terms of its sovereignty so clearly defined in the Charter of the Organisation of African Unity (OAU). For the first time in its history, the African continent was going to commit to an ambitious ground-breaking project to promote and protect the human rights of citizens.

Tanzania was among the pioneers of the African Charter. After signing it in May 1982, it ratified it on 18th February, 1984. In November 1987, the African Charter, earlier predicted to be still-born, mustered enough states to bring it into force in terms of its Article 63. Though it has since been the subject

[2] HEYNS, Christof and Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, (Fourth Edition), Pretoria: Pretoria University Law Press (PULP), 2010, pp. 29 – 40.

of two Protocols in terms of Article 66 described below, the African Charter has thus far avoided direct amendment as conceived of in article 68.

The African Charter is structured along four central features - rights and duties, safeguard measures, applicable principles and general provisions. Parts one and two define the Charter regime. Cast against the background of African nationalism of the time, part one enshrines the range of rights, freedoms and duties due to Africans. Decidedly controversially, the drafters of the Charter then proceeded to draw inspiration from ancient African traditional values and used these to impose duties alongside rights. Equally controversial is the deliberate decision to subject most of the rights to sometimes extensive limitations or claw back clauses to the extent that some of them remained hollow in content. These claw back clauses characterize particularly the so-called civil and political rights which run from Article 2 to Article 14 providing the negative right to property. Only non-discrimination, equality before the law and freedom from torture and human dignity, were guaranteed absolutely.

Accessed from LHRC Constitutional Database

Significantly, the African Charter ushered in innovative features in human rights frameworks. Among these is the historical decision to not only guarantee socio-economic rights but to provide for them alongside civil and political rights. This was aimed at implementing the concept of the indivisibility of human rights which for a long time had divided the human rights world. The second feature is the guaranteeing of what are known as 'peoples' rights'[3] in Articles 19 to 24. Normally, human rights extend only to individuals, in fact persons, but the Africans flexibly extended the concept also to rights of peoples or groups. Therefore, philosophically, it can be argued that human rights in the African context also inhere on groups as much as on individuals. Issa Shivji has eloquently expounded on the ideological context of the concept of human rights.[4]

In reality, however, most of the communications, as explained below, happen to be pleading for the protection of civil and political rights. This is amazing given the levels of poverty in Africa and, therefore, the urgency of socio-economic rights. Equally ignored are duties of the individual as well as peoples' rights even though the latter have recently started to trickle in, for example,, the highly publicized case of the Kenyan indigenous Endorois ethnic community who dared to refer the Kenyan government to the Commission accusing it of violating its right to development as enshrined in Article 22.[5] Offered neither alternative land nor effective compensation, the Endorois were evicted from their ancestral land in order to give way to government programs.

[3] See, in particular, appendix in SHIVJI, Issa, *The Concept of Human Rights in Africa*, Codesria Book Series, 1989.

[4] Ibid., pp. pp. 53 - 58.

[5] *The Centre for Minority Rights Development and Minority Rights Group International (On behalf of the Endorois Welfare Council) v. Kenya*, Communication No. 276/2003.

This case offers opportunities for similar groups like pastoralist communities in Tanzania who constantly face land challenges.

The AU conceived a modest institutional system to entrust with the difficult task of monitoring implementation of rights within the boards of the countries. In particular, Article 30 came up with a Commission of eleven (11) sometimes ill-qualified individuals to serve the Commission in their personal capacities. Despite the requirement that the Commission consist of men and women 'from among highest African personalities of the highest reputation known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights in terms of Article 31, there is no mechanism for determining this during the electoral process by the Heads of State. This is ironical, given that the individuals will be independent of governments whose Heads of State were solely responsible in terms of Articles 35 and 36 for their identification and election to office. Heads of State constitute the Electoral College, which implies political dependence of the Commissioners on the Heads of State especially their foreign ministers who actually did the identification and vetting. Needless to say, there is no process in the country to identify with stakeholder participation those individuals with the credibility to serve as Commissioners. Past Commissioners include Commissioner lawyer Tom Nyandunga whose term has just expired but also founding Commissioner rRetired Judge Robert Habesh Kisanga.

In terms of the Charter's Article 62, as later interpreted by the Commission, the Commission has the primary mandate to:

- promote the Charter;
- protect the Charter; and
- interpret the Charter.

## III. Periodic Reporting

These three related mandates were clearly biased towards promotion of the Charter, which was conceived as the primary mandate given Africa's rates of ignorance of its population. But there was also the state's fear to confront victims alleging violation of their human rights. Article 62 on 'state-party' or 'periodic reports', originally borrowed from International Labour Organisation (ILO) practice, was interpreted by the Commission as mandating it to receive and examine the reports, thus breathing life into an otherwise badly phrased Article. Tanzania was one of the earliest state parties to submit its maiden report to the African Commission.[6] Before submitting it to the Commission, the government referred the report to Commissioner Kisanga for 'advice' as to whether it complied with reporting Guidelines. This impaired the image of the

[6] First Report of Tanzania, submitted in July 1991, 11th Ordinary Session and considered in March 1992; Second Report due in May 2008, 43rd Ordinary session. The second and subsequent reports due in 2006 was consolidated to cover all arrears owing.

Accessed from LHRC Constitutional Database

Commissioner, who is declared by the Charter to be in the Commission in his personal, not representative capacity of the state which nominated and campaigned for his election.

Like other State parties, Tanzania has since fallen into countless arrears of periodic reports, which are anything but periodical. Article 62 obliges parties to report every two years but with the exception of a handful, most have done not so within the stipulated timeframe. Out of necessity, this prompted the Commission to impose a bizarre interpretation on Article 62 and grant a blanket amnesty to all defaulters. Consequently, the last 'periodic report' of Tanzania was held to clear all the outstanding nine reports before it.

During examination of the 2nd to the 10th consolidated reports, the Commission meeting in Ezulwini, Swaziland expressed the following concerns and recommendations:[7]

Accessed from LHRC Constitutional Database

## IV. Some Areas of Concern

- High number of HIV/AIDS infected/affected persons;
- No domestication of ratified treaties;
- Perpetuation of presidential detention prerogative contrary to the principle of separation of powers;
- No permanent independent institution overseeing the police;
- Retention of libel as a crime on the penal statute; and
- Provision of corporal punishment in schools.

Recommendations:

- Work with civil society organizations;
- Abolish capital punishment;
- Abolish the death penalty;
- Domesticate ratified instruments;
- Remove the offence of criminal libel;
- Revise presidential administrative detention powers;
- Provide adequate resources to the Commission on Human Rights and Good Governance; and
- Establish independent police oversight institution.

---

[7] Adopted at the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights held from 7th – 22nd May, 2008, Ezulwini, Kingdom of Swaziland. This was consolidated in terms of African Commission Guidelines in note ACHPR/?PR of 2nd April, 1999.

## V. Special Procedures

One innovation towards the promotional mandate was copied from the United Nations system. It instituted special procedures to help - follow up on thematic issues between sessions. Among these are:

- Extra-Judicial Executions in Africa;
- Freedom of Expression;
- Prisons in Africa;
- Refugees, asylum seekers, migrants;
- Internally Displaced Persons in Africa;
- Women's Rights in Africa; and
- Human Rights Defenders.

Most of these procedures are defunct, or exist only on paper. The ones that are still most active include the 'Freedom of Expression' and 'Prison Conditions in Africa' and to some extent the procedure on torture. Even as South Africa is itself literally 'burning down' over government plans to regulate media freedom, with prison terms for possession of government classified information, the South African born Commissioner Ms. Pantsy Tlakula is holding Africa-wide seminars on an African framework for the protection of the media. When Tom Nyanduga was Commissioner, he activated the procedure on refugees and IDPs but mostly through press statements. A big disappointment was the May 2008 South African xenophobia and displacement of African immigrants. While the Commission was quick to send Commissioner Nyanduga to Zimbabwe to join the United Nations-led delegation against the Murambatsvina aimed at cleaning the city of undesirable settlements, they were visible in not intervening in South Africa where people of African extraction were burnt alive together with their property while the government looked on. Another big disappointment is the procedure on women. All those appointed to this procedure beginning with a former Minister of Women of Congo-Brazzaville to the Mozambican-born legal officer who became Vice Chairperson of the Commission did not have a clear agenda save for a few seminars here and there. The procedure on arbitrary executions was mired in dispute after dispute among commissioners on who was suited to take it.

## VI. Working Groups

Besides technical themes, the Commission divided its work, for efficiency, to cater specifically for the following themes:

- Committee against Torture;
- Working Group on Indigenous Populations/Communities;

Accessed from LHRC Constitutional Database

- Working Group on Socio-economic rights;
- Working Group on Extractive Industries, Environment and Human Rights;
- Working Group on Older Persons and People with Disabilities in Africa; and
- Working Group on the Death Penalty.

As a predominantly traditional society, the United Republic of Tanzania could benefit a lot from the Working Group on Extractive Industries, Environment and Human Rights. Similarly, largely pastoralist Tanzania has a lot to contribute to and benefit from the Working Group on Indigenous Populations such as the Maasai pastoralist communities. As indicated elsewhere in the chapter, pastoralist communities in Tanzania as in East Africa and the Horn have been looking for more secure tenures in particular to preserve their traditional ways of life.

Instead of subcontracting this procedure to outside experts, as happens in the UN system, the Commission decided to allocate it to its members; this made no sense given their full schedule already as part-time staff and full time jobs in their countries. Though there are no 'country rapporteurs', Commissioners divided countries in Africa according to their language and legal skills to promote the Charter. Each Commissioner has roughly eight countries under his or her docket to promote the Charter which frankly they never do or do so sporadically. These procedures have at least been 'successful'.

Accessed from LHRC Constitutional Database

## VII. Communication Procedure

Tanzanians are not a particularly litigatious people. Therefore, only a handful of communications, as cases are known in human rights language, have trickled from Tanzania. This is despite Article 55 of the African Charter which over the years has been so liberally interpreted to mean virtually anyone can complain to the Commission on behalf of anyone else alleging one or two violations of the guaranteed rights. Further, the Commission has bent over backwards to apply the most liberal interpretation of the otherwise 'local remedies rule', in other systems a ghost in the woods, going as far as throwing completely off course sometimes very well-intentioned complaints. Admissibility conditions or conditions prior to substantive consideration of the case on merit proved obstructive initially when the Commission opened its doors but were later substantially relaxed. Despite all this, Tanzania has remained shy to the use of the communications procedure in the Commission; thus Commission jurisprudence has not grown as a direct result of the Tanzanian victims seeking the Charter intervention in their particular situations. On the other hand, countries like Nigeria, during military dictatorship in particular ironically, positively contributed way to developing jurisprudence.

However, a few daring victims attempted the use of the mechanism, among them:

(a). *Alberto Capitao v. Tanzania*;[8]

(b). *Lawyers Committee for Human Rights (on behalf of Seif Hamad) v. Tanzania*;[9]

(c). *Civic United Front (CUF) v. Tanzania*;[10]

(d). *Association Perla Salivanagu dela au Burundi v. Tanzania*;[11]

(e). *Women's Legal Aid Committee v. Tanzania*;[12] and

(f). *Southern African Human Rights NGO Network and Others v. Tanzania*.[13]

Of these, the Women's Legal Aid Committee submitted a complaint on behalf of their client alleging she was denied the right to appeal against a High Curt ruling which declined her application to have her marriage dissolved. The African Commission held Tanzania to be in breach of Article 7 (1) which guarantees the right to appeal to a competent court.

The Southern African Human Rights NGO Network challenged the death penalty earlier imposed on two Tanzanians, one Mbushuu alias Dominic Munyoroge and Kalai Singunda. Unfortunately, the Commission quashed it due to the fact that it was filed well out of Article 56 (6) which requires that complaints should be submitted 'within reasonable time' from the exhaustion of the last local remedy, if any, of occurrence of the injury complained of.

A particularly interesting case, though, is the recently launched case of *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher Mtikila v. United Republic of Tanzania*. In this case, the first of its kind for Tanzanian NGOs to bring before the African Court, Reverend Mtilika alleged violation of his right to contest the presidential election as 'independent candidate'. As it stood, the Constitution of the United Republic of Tanzania restricted the right to contest an election to candidates sponsored by a political party. The High Court ruled for him and granted him the relief he sought but this was overturned by the Appeal Court.

Besides ratifying the protocol that established the African Court, Tanzania also ratified the Court protocol in February 2006 and, thereafter became one of the first five state parties to the protocol to declare acceptance of the jurisdiction

[8] Communication No. 53/1991.

[9] Communication No. 66/1992.

[10] Communication Mo. 14/2007.

[11] Communication No. 157/1996.

[12] Communication No. 243/2001.

[13] Communication No. 333/2006.

Accessed from LHRC Constitutional Database

of the Court in terms of Article 5 as read with Article 32 to entertain complaints directly brought against it by individuals by-passing the African Commission.[14] This 'optional declaration' has created a big 'headache' for most African NGOs who would like to get to the Court directly without having to pass through the widely perceived toothless Commission. Consequently, there has been animated discussion on whether in fact the declaration requirement could be ignored and complainants in state parties to the protocol just approach the Court using the protocol and the Charter. The African Court itself has decided requesting the state parties to amend relevant parts of Articles 5 (5) and 32 (6) to remove the restriction.

## VIII. African Court

As indicated, Tanzania is state party to the African Court on Human and Peoples' Rights. Former Chief Justice of the United Republic of Tanzania Justice Augostino S.L. Ramadhani, was elected one of the eleven judges on the Court. When the Court was looking for a home, Tanzania offered Arusha, beating off competition from Mauritius which at the time had not yet ratified the Protocol. There are now twenty parties to the protocol since it came into force July 2004. The main hindrance to its operations, however, is the restriction on 'standing to bring cases'. In particular NGOs, which under the Commission are the regular complainants, are limited by the requirement that the state party they wish to complain against must be consent to being sued. Though state parties have accepted the terms of the protocol, most have not consented to the jurisdiction for the Court to entertain complaints against them. Other potential complainants include state parties with an interest in the matter, intergovernmental organizations and the African Commission on Human and Peoples' Rights. Besides the African Commission, no others have contemplated use of the mechanism in their capacity as complainants.

The need for an African Court became evident a few years when the Charter and operational force of the Commission came into force. It did not take long for the Commission itself to recognize its own inefficiency in terms of delivering on the guaranteed rights. Most people accused the Commission of pandering to the state parties or just shyly ignoring even some of the most visible flagrant violations against citizens. In turn, state parties reacted to some of the Commission decisions with disdain if not outright rejection. Consequently, a Protocol was negotiated and adopted in 1998 establishing the African Court of Human and Peoples' Rights. For all purposes, it was declared an independent body, meaning independent from the AU institutions and organs including the Assembly of Heads of State and Government and from parties before it, such as citizens. However, like the African Commission, it would receive most of its funding from the AU but unlike the Commission, the protocol

[14] Others being Burkina Faso, Mali, and Malawi. Now Rwanda and Ghana have also joined this small group.

Accessed from LHRC Constitutional Database

would unequivocally guarantee its independence. In order to promote transparency and to facilitate quick dispensation of justice, the protocol binds judges to pronounce their judgments in public and within three months of being seized with the matter. These judgments, which are not decisions or recommendations, are supposed to be supported with reasons.

The protocol addresses the perennial problem of non-implementation of the end product of the Commission processes. It specifically binds state parties to enforce the judgments rendered thereon within three months which also compels the courts to dispose of the cases and notify the parties with speed. This would be one of the litmus tests of the prospects of the courts once it begins to deliberate on cases submitted to them. The protocol does not stipulate the right to appeal. This seemingly contradicts Article 7 (1) of the African Charter on the right to a fair hearing. It is essential that the protocol be amended to prominently provide for the right to appeal. Every victim should at least have one round of appeal as part of his/her basic human rights entitlements. Nevertheless, the Court is obliged to report its activities to the Assembly of Heads of State including those who seek to dodge compliance, thus shaming the recalcitrant states into compliance.

Accessed from LHRC Constitutional Database

## IX. African Charter on the Rights and Welfare of the Child

Earlier in 1990, three years after its coming into force, the AU adopted the African Charter on Human and Peoples' Rights (ACRWC).[15] Though born more or less the same year, the model for this Charter was the Children's Rights Convention (CRC). Given their vulnerability and their invisibility, children needed a specific convention-based intervention to push forth their status to world attention. As indicated before, the Charter covers any human being of 18 years or below, including a new-born baby. Consequently, some of the rights the Charter guarantees, such as free speech, are circumscribed or limited to the capability to exercise them.

More significant rights for the child include the right to education and the right to health care. The right to education details specific entitlements, duties and obligations for the child's primary education, which is declared compulsory. This means that while the state party may not afford some of the rights or even some of the 'education rights' like tertiary education, it must not fail to take all children through primary or fundamental education, affording them with basic school requisites like text and exercise books that are gender neutral and teachers that are well trained. Similarly, government should have clear under-five plans to protect children especially at that vulnerable stage. Most children in Africa die from preventable diseases before their first birthday. If they don't die

[15] Tanzania ratified the African Children's Charter in March 2003. In the same year, she ratified the 2000 Protocol to the global CRCR on the Rights of the Child on children involvement in armed conflicts.

from their own diseases, then they die through their mothers in often uncontrolled maternal mortalities. This has been compounded by the outbreak of HIV/AIDS of which children are the most affected through mother-to-child infections. The Children's Charter has sought to be clear on this.

But the 'holding thread' in all these and other rights is the principle of the best interest of the child. Borrowed from international law, the best interest of the child rule is both a rule of procedure and a substantive law. Institutions both public and private are enjoined when deciding on children to always put the best interests of the child higher up in the hierarchy of factors it takes onto account. Decisions on whose parent or guardian the child must be trusted with, for example, need to be among factors which take the interest of the child over and above everything else. These may be emotional or moral, but also material. Most judges tend to think mothers would be best suited to look after the child particularly if they are still young but other factors may return a different conclusion. Otherwise, other human rights relevant to adults attach to children as well, including child refugees, children with disabilities, minority children and girl-children.

As indicated, implementation is monitored by an eleven-member Committee of Experts elected by the Assembly of Heads of State and Government of the AU. The Committee promotes and protects the rights and welfare of the child; this has come to mean examining state party reports and entertaining communications from victims or their representatives. Though it has, of course, attended to only a few state party reports and even fewer communications including one from Kenyan Nubian children complaining about denial of their Kenyan nationality, the Committee has slowly started to implement its work. Just like their parents,[16] Nubian children are never given identity cards or Kenyan nationality due to a racist policy which denigrades people of Nubian race.[17] In a historical first, the Committee, among other things, recommended the following measures and recommendations to redress the violations:

- That Kenya take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent in Kenya, otherwise stateless, can acquire Kenyan nationality and the proof of such a nationality at birth.
- That Kenya take measures to ensure that children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority.

---

[16] *Alike v. Kenya* (Companion case on behalf of the Nubian adults before the African Commission on Human and Peoples' Rights), www.soros.org/initiatives/justice/litigation/minors; Open Society Justice Initiative.

[17] *Nubian Minors v. Kenya* Nubian Children in Kenya. Communication 002/2009 of 25 March 2011; also same case: *Nubian Children in Kenya v. Kenya*. Communication 002/2009

Accessed from LHRC Constitutional Database

- That Kenya implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.
- That Kenya adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and the right to education, preferably in consultation with the affected beneficiary communities.
- That Kenya report on the implementation of these recommendations within six months from the date of the decision.

## X. Protocol on Women's Rights in Africa[18]

The protocol on women's rights was adopted by the Assembly of Heads of State and Government in the AU in July 2003 in Maputo, Mozambique. This groundbreaking achievement is the result of concerted efforts of, initially women only organizations led by the Africa-based Women in Law and Development (WILDAF).[19] Disappointed by progress made towards women's emancipation and in view of the apparent weaknesses in the African Charter on women's rights, WILDAF pushed for a convention on women to give visibility to women's challenges and fast-track their fuller integration in society. The final draft of the protocol was more radical than that adopted and included such issues as monogamous marriages. However, this version was substantially watered down at the adoption stage and what we see is monogamy as the preferred union but polygamous families are required to respect equality of parties in the union.

On the proposal by the Senegalese Minister of Foreign Affairs, the protocol was adopted in Maputo in July 2003. Its main purpose was to complement or build upon the Charter core [provisions] especially Article 18 on women's rights and Article 2 on non-discrimination and equality respectively. In addition to its main purpose, it zeroed in on specific trouble spots for women such as female genital mutilation (FGM), calling for its total ban. Besides obliging governments to ensure their legal, administrative and other obligations and measures, the protocol set out specific targets for the realization of some of their gender-related plans including achievement of an equity-based equal society. It addresses women in challenging situations like refugee, disability, minority, indigenous and the whole issue of the feminization of poverty and unemployment. It commits state parties to fight illiteracy, malnutrition, high mortality rates, infanticide, women involvement in armed conflict, human trafficking and prostitution, among others.

---

[18] Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

[19] . See: www,wildaf.Kenya,org; wildaf.Tanzania,org; www.wildaf.ao.org, etc.

Accessed from LHRC Constitutional Database

Institutionally, the protocol left this to the Charter organs including the African Commission and the African Court of Human and Peoples' Rights. It being merely a protocol to expand on the principles, it was felt necessary to avoid duplication of institutions by setting up women based monitoring organs. In other words, a state party to the Charter, when reporting on the measures taken and challenges met ought to include the protocol-based measures in the report. Tanzania ratified the Children's Charter in August 2008. A total of 33 AU states have ratified the Charter, thus bringing it into force.

## XI. Conclusion

To conclude, it is fair to say that despite spirited efforts in the last two decades to establish a sustainable system of human rights promotion and protection, the subject still remains a major challenge in Africa. Tanzania is one of the pioneers of the African system and, therefore, has expressed enough political will to be guided by regional human rights standards. On the other hand, this chapter shows it is one thing to establish, adopt and ratify a system of instruments but quite another for that system to work on the ground. Like all other victims, victims of human rights abuses in the United Republic of Tanzania cannot be said to be much closer to enjoying the fruits of effective protection of human rights promised them in the African human rights system.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# DEVELOPMENT OF A CULTURE OF LAWLESSNESS IN TANZANIA AND ITS IMPACT ON HUMAN RIGHTS AND GOOD GOVERNANCE[1]

*Thomas Bashite Mihayo*[2]

I. Introduction
II. Good Governance
III. Respect of Principles of Good Governance and Human Rights in Tanzania
 A. Taking Law in Own Hands
 B. Commission on Human Rights and Good Governance
IV. Emergency of Impunity and Disregard of the Law
 A. The Legislature
 B. The Executive
 C. The Judiciary
 D. The Media
 E. Violence by the Members of the Public
V. A Look at the Future
VI. Conclusion

Accessed from LHRC Constitutional Database

> Plato, a philosopher of Ancient Greece, argued that philosophers alone are fit to govern a country, because they have two important qualities: first, they have the ability to govern, and secondly, they do not like to do so. So a Platonic Republic would have in its Constitution a clause making it mandatory for philosophers to govern for a specified period of duty; and when that period was completed they would be very happy to go back to their philosophy, which is what they like doing.
>
> Julius K. Nyerere[3]

## I. Introduction

Ever since independence, Tanzania has been a unique country for its tranquillity. Its people, by and large, had deep respect for the law. The executive also respected the law, as did the other arms of State, i.e., the Judiciary and the Legislature. Disrespect for the law was both stigmatic and consequential. A child

[1] This paper was originally presented at the Annual General Meeting (AGM) of the Tanzania Retired Judges Association (TARJA) held at the Blue Peal Hotel, Ubungo, Dar es Salaam on 4th and 5th November, 2011.

[2] President, Tanzania Retired Judges Association (TARJA).

[3] See NYERERE, Julius K., *Our Leadership and the Destiny of Tanzania*, Harare: African Publishing Group, 1995, p. 27.

was brought up and supported by the entire society in general and neighborhood in particular. As a pupil, if a teacher caned me at school, I was sure to be caned again if my father knew of it.[4] Our society was God fearing, respectful and loving. When an accident occurred on a highway, people would rush there to help the injured and take care of the property of the passengers. It was the policy of the Government of the then ruling party, Tanganyika African National Union (TANU), not to build more prisons nor expand the existing ones. The reason given was that when we turn fully socialist, prisons would be irrelevant. Although that thinking was ambitious and, maybe naïve, it was still believable.

However, as a peace-loving country, we are witnessing the institutionalization of a new and very dangerous culture in the country - a culture of impunity and lack of respect for the rule of law, human rights and good governance; a culture of rewarding the perpetrators of vice; a culture of ignoring the consequences thereof; and more seriously, a culture of rewarding and/or praising and hero-worshipping people who break the law and/or just letting them off the hook. And, as if that was not bad enough, we are also seeing a culture of refusing to take responsibility when the people or institutions that we lead act with impunity, disrespect the law or act criminally or with culpable negligence, such that property and human life is lost. Among examples that come readily to mind are: the sinking MV Bukoba,[5] the Dodoma train crash,[6] Mbagala and Gongo la Mboto bomb explosions,[7] and the Zanzibar ferry disasters.[8]

Accessed from LHRC Constitutional Database

---

4 This is the experience in all cultures across the continent. See LAYE, Camara, *The African Child*, London and Glasgow: Collins Fontana Books, 1954; THIONG'O, Ngugi, *Dreams in a Time of War: A Childhood Memoir*, Nairobi: Kenway Publications, 2010; SOYINKA, Wole, *Ake: The Years of Childhood*, Abuja and Lagos: Spectrum Books Limited; and ACHEBE, Chinua, *The Education of a British-Protected Child*, New York: Anchor Books, 2009.

5 Those allegedly responsible for this accident were prosecuted in the case of *Republic v. Capt. Jumanne Rume Mweiru and Three Others*, High Court of Tanzania at Mwanza, Criminal Sessions Case No. 22 of 1998 and were all found not guilty.

6 This train disaster which took place at Igandu near Dodoma occurred during the early morning of 24th June, 2002, when a large passenger train with over 1,200 people on board rolled backwards down a hill into a stationary goods train, killing 281 people in the worst rail accident in African history. See MWANGI, George, "Death toll rises to 281 in Tanzanian train crash as rescuers pull another 40 bodies from the wreckage," *Associated Press*, 27th June, 2002.

7 On 19th February, 2011 bombs and other munitions exploded from the Gongo la Mboto military base in Dar es Salaam destroying the property of many around Ukonga area. This was a major embarrassment to the military establishment because it was hardly two years since a similar incident had occurred at the Mbagala military base in the city. Neither the chief of the military nor his minister were prepared to take political responsibility for this negligence by the military. See "JK, Mwinyi, Mwamnyange Urged to Resign over Gongo la Mboto Blasts," *The Citizen* (Tanzania), 22nd February, 2011.

8 This terrible accident through which hundreds perished is analysed in MAKAME, Mohamed, "Civil Accountability: A Legal Reflection behind the Mv. Spice Islander," (Mimeograph) dated 15th September, 2011. See also "SA divers fail to reach sunk *MV Spice Islander*," *The Guardian* (Tanzania), 15th September, 2011.

In total disregard of our national values and our Constitution, we witness political parties or groups of people reverting to tribal or religious cocoons to advance a political agenda, oblivious of the fact that this can turn our country upside down. The reaction of the executive if any, has been lukewarm and unconcerned.

I am frightened of this trend of affairs. I am also sure that applies to most of us seated here. I feel it is our duty to speak out even during our retirement with the sole aim of assisting our nation. For as Charles Kendall Adams said:

> No one ever attains very eminent success by simply doing what is required of him; it is the amount and excellence of what is over and above the required that determines the greatness of ultimate distinction.[9]

So even in our retirement, when we are expected to stay home, read papers and frequent houses of prayer, we have an obligation as senior citizens in this country to talk, if keeping quiet may be more harmful. If we do otherwise, we shall be rightly accused of being not only unpatriotic but also of liberalism for not taking a principled position on matters taking place before our very eyes.

As Mao warned:

> To let things slide for the sake of peace and friendship when a person has clearly gone wrong, and to refrain from principled argument because he is an old acquaintance, a fellow townsman, schoolmate, a close friend, a beloved one, an old colleague or old subordinate. *Or to touch on the matter lightly instead of going into it thoroughly, so as to keep in good terms*. The result is that both the organisation and the individual is [sic] harmed. This is one type of liberalism.[10]

I would like to avoid this. Therefore, it is important to stand up, speak and be counted.

## II. Good Governance

Good governance is an indeterminate term used in development literature to describe how public institutions conduct public affairs and manage public resources in order to guarantee the realization of human rights. Governance

---

[9] One of the most famous quotes by Charles Kendall Adams (24th January, 1835 – 26th July, 1902) who was an American educator and historian. Adams served as the second president of Cornell University from 1885 to 1892, and as president of the University of Wisconsin from 1892 to 1901.

[10] TUNG, Mao Tse, "Combat Liberalism" Volume II *Selected Works*, Peking: Foreign Languages Press, 1967, pp. 31-33.

Accessed from LHRC Constitutional Database

describes *"the process of decision making and the process by which decisions are implemented (or not implemented)"*. The term governance can apply to corporate, international, national, local governance or to interactions between other sectors of society. Issa Shivji thinks the words "good governance" are a bad import of big donors. He prefers to call it "good leadership." He does not like to be governed but would like to be led. He may be correct. But for now, I will stick with the former.

The concept of "good governance" often emerges as a model to compare ineffective economies or political bodies with viable economies and political bodies. Bad governance is being increasingly regarded as one of the root causes of all evil within our societies. Major donors and international financial institutions are increasingly basing their aid and loans on the condition that reforms that ensure "good governance" are undertaken. Because the most "successful" governments in the contemporary world are liberal democratic states concentrated in Europe and the Americas, those countries' institutions often set the standards by which to judge other states. Even political relationships are based on good governance since nobody wants to be associated with tyrants because it simply does not look good. Because the term good governance can be focused on any one form of governance, aid organizations and the authorities of developed countries often will restrict the meaning of good governance to a set of requirements that conform to the organization's agenda, making "good governance" imply many different things in many different contexts.

In Tanzania, literature and usage have identified good governance to contain eight major characteristics. It is participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and is guided by the rule of law. Good governance also assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making.

Good governance requires total respect for rule of law. That means, *inter alia*, existence of legal frameworks that are enforced impartially. It also requires full protection of human rights, particularly those of minorities. Impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force.

One of the key pillars of good governance is respect for human rights, the most important of which is the right to life. The Constitution of the United Republic of Tanzania of 1977 says this:

> *Kila mtu anayo Haki ya kuishi na kupata kutoka katika jamii hifadhi ya maisha yake, kwa mujibu wa sheria.*[11]

[11] Article 14.

Accessed from LHRC Constitutional Database

> [Every person has the right to live and to the protection of his life by the society in accordance with the law.]

The "right to life" Article was introduced in 1984 when the Bill of Rights was introduced. What appears to be of consensus is that both international and legal instruments on human rights seem to focus on the right to life, rightly in my view. This is because the right to life is the basis of all human rights. At the centre of any constitution is the rights to life. All other human rights emanate from that basic right. All these human rights have been jealously guarded by legal scholars and judicial pronouncements. As Chris Maina Peter says:-

> The right to life is the most important of all human rights. There is no doubt that if there were no right to life, there would be no point in having any other human right. It is therefore understandable that all important human rights instruments provide for the protection of the right to life.[12]

In the case of *Republic v. Mbushuu @ Dominic Mnyaroje and Another*[13] Justice Mwalusanya had this to say on Human Rights:

> A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction; any law that seeks to limit fundamental rights and freedoms of the individual must be construed strictly – otherwise the guaranteed rights under the Constitution may easily be rendered meaningless; the burden of proof that a fundamental right of whatever nature has been breached is on the person who asserts the breach; and once it has been established that there has been a restriction of a fundamental right, and where there are express constitutional policies seeking to save the violation, the burden of proof is then shifted to the proponent of the restriction and the standard of proof is on a balance of probabilities;[14]

In my considered opinion, once right to life is respected to the letter, the respect will overflow to other forms of human rights. We as a people, cannot pretend to uphold human rights if we do not protect the right to life with all

---

[12] See also *Universal declaration of Human Rights of 1948, International Convent on Civil and Political Rights of 1966 and the European Convection for the Protection of Human Rights and Fundamental Freedom of 1950,* to mention but a few.

[13] [1994] 2 LRC 335.

[14] KIJO-BISIMBA, Helen and Chris Maina Peter (eds.), *Justice and Rule of Law in Tanzania: Selected Judgment and Writings of Justice James L. Mwalusanya and Commentaries*, Dar es Salaam: Legal and Human Rights Centre, 2005, p. 42.

Accessed from LHRC Constitutional Database

commitment, force and zeal. As we shall see later, Tanzania as a country is drifting away from the protection of human rights.

## III. Respect of Principles of Good Governance and Human Rights in Tanzania

In a foreword for a document titled *The Tanzania Development Vision 2025* President Benjamin William Mkapa had this to say:-

> Peace, stability and security of citizens and their property constitute a fundamental and necessary environment for development. Without these prerequisites, this Vision will be meaningless and no development will occur. It is, therefore, the responsibility of each one of us to eschew anything which can divide Tanzanians, such as on the basis of religion, tribe, race, gender or place of origin.[15]

Our documents on Good Governance, Rule of Law and Human Rights in Tanzania are very articulate. They leave no, or little room for misinterpretation. I have endeavoured to define what good governance means or what it is all about. I will not repeat it here.

It is necessary however, to know that good governance can never be attained without adherence to the rule of law. The term "rule of law" or "supremacy of law" as it is referred to by others, is a doctrine of law under which every person is subject to the ordinary law within the jurisdiction. Since independence, Government after Government has declared the resolve to govern subject to the rule of law.

After the mutiny in 1964, Mwalimu Nyerere said this when commenting on the lenient sentences meted out to members of the Army who had mutinied:

> There has been some considerable criticism of the very lenient sentences passed on the fourteen soldiers convicted of conspiracy and taking part in the mutiny of the Tanganyika Rifles in January of this year. The Government wishes to make it clear that it shares the feeling that the penalties imposed by the decision of the High Court Judge and the two Army Officers bore no relation to the seriousness of the offences and the damage which was done to our country. Despite this criticism, the Government does not intend to vary the sentences imposed in these cases. *To interfere with the Court's decision would be to do exactly that thing for which the nation condemns the soldiers – it would be to abrogate the rule of law.* The soldiers knew that there were laws about the way they should behave and that there was

[15] Benjamin William Mkapa: "Foreword", in *The Tanzania Development Vision 2025*.

Accessed from LHRC Constitutional Database

> machinery to deal with any grievances they had. By leading a mutiny the convicted soldiers invited people to break the peace and to abandon law. We saw something of the results of the absence of law in the succeeding hours. The rule of law is the basis on which rest the freedom and equality of our citizens. It must remain the foundation of our State. We must not allow even our disgust with the mutineers to overcome our principles.[16]

That resolve and will continued in the "second phase" Government. President Ali Hassan Mwinyi when addressing Judges and Principal Resident Magistrates in Arusha on 27th August, 1986 stated:-

> First, as a new President of our country, I thought it would be appropriate for me to take this opportunity to reiterate my commitment to the rule of law. *I wish to assure you and the general public that the second phase Government will always strive to conduct its activities in accordance with the laws of this country.* We will in particular preserve and protect the Constitution of the United Republic of Tanzania which is the Supreme Law of this country.[17]

The "third phase" government of President Benjamin William Mkapa did not relent. At the opening of the Court of Appeal Silver Jubilee, he said:-

> Tanzania has been a firm believer and upholder of the concept of separation of powers, which entails independence of the judiciary and the rule of law. We have continued to do so since independence, and I take this opportunity, unequivocally, to restate this guiding principle in the administration of justice, and the promotion of good governance in our country.[18]

On 30th December 2005, when addressing Parliament for the first time since coming to power, President Jakaya Mrisho Kikwete had this to say on the Rule of Law:

---

[16] NYERERE, Julius K., *Freedom and Unity: A Selection from Writings and Speeches 1952-1965,* Dar es Salaam: Oxford University Press, 1966, at pp. 298-299. Mwalimu is also quoted in MARTIN, Robert, *Personal Freedom and the Law in Tanzania: A Study of Socialist State Administration*, Nairobi: Oxford University Press, 1974, pp. 58-59.

[17] This speech is quoted by Mwalusanya, J. in *Ngwegwe s/o Sangija and 3 Others v. Republic,* High Court of Tanzania at Mwanza, Criminal Appeal No. 72 of 1987 (Unreported).

[18] See MKAPA, Benjamin William, "The Legal System Should be more Accessible and Affordable to More Tanzanians," in PETER, Chris Maina and Helen Kijo-Bisimba (eds.), *Law and Justice in Tanzania: A Quarter Century of the Court of Appeal*, Dar es Salaam: Mkuki na Nyota Publishers and Legal and Human Rights Centre, 2007, p. 33.

Accessed from LHRC Constitutional Database

> *Serikali ya Awamu ya Nne, itatimiza ipasavyo wajibu wake wa utawala na maendeleo na itaendesha dola kwa misingi ya utawala bora na uwajibikaji na uwazi, Utawala wa Sheria, unaoheshimu na kulinda haki za binadamu na haki za raia wote. Serikali ya Awamu ya Nne, itaendeleza mapambano dhidi ya rushwa bila woga wala kuoneana muhali.*[19]
>
> [The fourth phase government will do its duty to govern according to the principles of accountability, good governance and the rule of law which guarantees human rights and the rights of all people. The fourth phase government will continue the fight against corruption without fear or favour]

Despite such weighty pronouncements on the rule of law from all the Heads of State in the country since independence, there have been problems on implementation. Mwalimu ruled in an era of post-colonial Tanzania. The issue, as in most African countries that gained independence at that time, was what came first, *"democracy or economic prosperity."*

As in Ghana under Kwame Nkrumah, the argument was that an authoritarian one-party system will bring rapid prosperity by controlling all dissent and freedoms.[20] This explains the various laws and policies introduced after independence including the enactment of the dreaded Preventive Detention Act 1962,[21] the ruthless villagization programme,[22] the sacking of Primary Court Magistrates by the Head of State,[23] the Kassim Hanga issue,[24] to mention but a

Accessed from LHRC Constitutional Database

---

19 Hansard of 30/12/2005.

20 On Ghana under Nkrumah see *inter alia*, MOHAN, Jitendra, "Nkrumah and Nkrumahism," *The Socialist Register*, London: Merlin Press, 1967, p. 191.

21 Chapter 490 of the Revised Laws of Tanzania Mainland. Under this law the President could detain a person without giving any reasons. This law has been a subject of litigation in many cases. See for instance *Ahmed Janmohamed Dhirani v. Republic*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 28 of 1976, Reported in 1979 LRT No. 1, Maganga, J.; and *Ally Yusuf Mpore v. Republic*, High Court of Tanzania at Dar es Salaam, Miscellaneous Criminal Cause No. 2 of 1977 (Unreported), Samatta, Ag. J.

22 On this operation the late Justice of Appeal Nassor Mnzavas says: "We all know that operation vijiji was implemented with high-handedness. Objections were not allowed. The role of those affected by operation vijiji 1974 was not to reason why. Theirs was but to comply, the irrationality of the operation notwithstanding." This was in the case of *Mohamed Hassan Hole v. Keya Jumanne Ramadhan*, Court of Appeal of Tanzania at Dodoma, Civil Appeal No. 19 of 1992 (Unreported). See also MWAPACHU, Juma V., "Operation Planned Villages in Rural Tanzania: A Revolutionary Strategy for Development," in COULSON, Andrew (ed.), *African Socialism in Practice: The Tanzanian Experience*, Nottingham: Spokesman, 1979, p. 114.

23 This was in relation to a judicial decision made in relation to the case of *R. v. Kasella Bantu and Others* (1969) H.C.D. No. 170 before it reached the High Court.

24 Kassim Hanga was a Zanzibari politician who fell out with Mwalimu. He was paraded at Mnazi Mmoja and given a thorough dressing.

few. But that was then. Mwalimu's honesty in what he did and believed is a great mitigating factor.

President Mwinyi took over power in 1985. The Bill of Rights had become part of our Constitution in 1984. However, the justiciability of the provisions of the basic rights and freedoms in the courts of law was suspended for three years through the Constitution (Consequential, Transitional and Temporary Provisions) Act, wherein Section 5 (2) had this to say:-

> Notwithstanding the amendment of the Constitution and, in particular, the justiciability of the provisions relating to basic rights, freedoms and duties, no existing law or any other provision in any existing law may, *until after three years from the date of the commencement of the Act*, be construed by any court in the United Republic as being unconstitutional or otherwise inconsistent with any provision the Constitution.[25]

The Bill of Rights eventually became operational in 1988[26] and thereafter cases of violations of rights began to flow into the courts of law and particularly the High Court.[27]

As the wind of change gathered momentum, demands for mutlipartism became open and telling. These were bolstered in February 1990 when the then CCM Chairman, Mwalimu Nyerere, declared that it was not a sin discussing multi-party system in Tanzania.[28] The determination of the people was so immense that, coupled with Mwalimu's position, the Government opted to buy more time by constituting the Nyalali Commission on multi party politics.[29] In its report, among other things, it indentified all the laws (40 of them) in our statutes books which were offending the fundamental rights and freedoms of the people and good governance and made specific proposals on each of them.[30]

---

[25] Act No. 16 of 1984.

[26] The decision of the government of the United Republic of Tanzania to allow the Bill of Rights to become operational although little had been done to change the laws so as to "put the house in order" is explained by the then Attorney-General and Minister for Justice Hon. Mr. Justice Lubuva. See LUBUVA, Damian Z., "Reflections on Tanzanian Bill of Rights," Volume 14 No. 2 *Commonwealth Law Bulletin*, 1988, p. 853.

[27] The first volley came in the form of the case from Musoma - *Chumchua s/o Marwa v. Officer i/c of Musoma Prison and Another*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1988 before Mwalusanya, J.

[28] See "Nyerere Calls for Multi-Party System," *Daily Nation* (Kenya) 23rd February, 1990, p. 1.

[29] See "Team on Political Debate Formed," *Sunday News* (Tanzania), 24th February, 1991, p. 1; and "One Year for Multi-Party Fact Finding," *Daily News* (Tanzania) 28th February, 1991, p. 1.

[30] See GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA, *The Report and Recommendations of the Presidential Commission on Single Party or Multiparty System in Tanzania, 1991 on the Democratic System in Tanzania*, Dar es Salaam: Dar es Salaam University Press, 1992.

Accessed from LHRC Constitutional Database

Some were to be completely repealed and others amended.[31] I think not enough has been done to those offending laws.

### *A. Taking the Law in Own Hands*

A notable assault on the rule of law and human rights during this period was the emergence of vigilante groups known as "*sungusungu*". These groups were being supported by the government of the day.[32] But they committed so many atrocities that they seriously tarnished the image of the government. In the case of *Misperesi K. Maingu v. Hamisi Mtongori and 9 Others*,[33] Justice Mwalusanya said:

> Our Bill of Rights, introduced in our Constitution vide Constitution (Fifth) (Amendment) Act, 1984, is very specific that no one can be restricted his liberty or deprived of his property except by due process of the law. Article 13 of the Bill of Rights stipulates "the right to equal protection of the law" and in sub-Section three it is provided in clear terms that:
>
> The rights of an individual and of the community shall be protected by the courts of law and other organs of the government, in accordance with the law.
>
> The traditional army is not an organ of the government established by law, but it operates outside the Rule of Law. Therefore those who encourage the activities of the traditional army outside the Rule of Law are obviously undermining the Constitution.

Accessed from LHRC Constitutional Database

---

[31] On the work of the Nyalali Commission see among others, TAMBILA, Kapepwa I., "The Transition to Multiparty Democracy in Tanzania: Some History and Missed Opportunities," Volume 28 No. 4 *Verfassung und Recht in Übersee*, 1995, p. 468; and PETER, Chris Maina, "Determining the Pace of Change: The Law on Pluralism in Tanzania," in OLOKA-ONYANGO, Joseph et al (eds.), *Law and the Struggle for Democracy in East Africa*, Nairobi: Claripress, 1996, p. 511.

[32] On Sungusungu generally see ABRAHAMS, Ray G., "Sungusungu: Village Vigilante Groups in Tanzania," Volume 86 No. 343 *African Affairs*, 1987, p. 179; CAMPBELL, Horace, "Popular Resistance in Tanzania: Lessons from the Sungusungu," Volume 14 No. 4 *Africa Development*, 1989, p. 5; BUKURURA, Sufian H., "Sungusungu and the Banishment of Suspected Witches in Kahama," in ABRAHAMS, Ray G. (ed.), *Witchraft in Contemporary Tanzania*, Cambridge: African Studies Centre of the University of Cambridge, 1994, p. 61; BUKURURA, Sufian H., "The Maintenance of Order in Rural Tanzania: The Case of Sungusungu," No. 34 *Journal of Legal Pluralism and Unofficial Law*, 1994, p. 1; and MASANJA, Patrick, "Some Notes On Sungusungu Movement," in FORSTER, Peter G. and Sam Maghimbi (eds.), *The Tanzanian Peasantry: Economy in Crisis*, Aldershot: Avebury, 1992, p. 203.

[33] High Court of Tanzania at Mwanza, Civil Case No. 16 of 1988 (Unreported).

> The courts as the citadel of justice will not countenance such a move. In the event I find that the activities of the defendants are unlawful and therefore they are liable in damages.

The “third phase” government of President Mkapa prioritized on improving the economy which had hit rock bottom. Liberalization and privatization hit top gear. A notable incidence on disregard for the rule of law was when the President ordered the release of attached vehicles belonging to Hai District Council, an attachment which had been ordered by a court of law. No one is ever happy with a bad decision. Due process required the matter be corrected by a Higher Court, not by the Head of State. The other was the Kisanga Committee saga.[34]

### *B. Commission on Human Rights and Good Governance*

Reading the Ministry’s 1997/98 budget, the Minister for Justice and Constitutional Affairs, Hon. Bakari Mwapachu, told Parliament that the Government of the United Republic of Tanzania had decided to establish an institution for the promotion and protection of human rights.

This decision of the government was not easily arrived at. A lot of lobbying was done not only by Human Rights activists in Tanzania, but also by other interested bodies, including the United Nations Association.

The Act establishing the Commission (Act No. 7 of 2001) was assented to on 2nd May, 2001 and came into effect on 1st July 2001. It applies to both parts of the Union. Section 15 (2) of the Act has this to say:-

> 15 (2) after conducting an investigation – under the Act, the Commission shall have power to
>
> (a) Where appropriate, promote negotiation and compromise between the parties concerned; or
>
> (b) Causing (sic) the complaint and the findings of the Commission to be reported to the appropriate authority or person having

Accessed from LHRC Constitutional Database

[34] This relates to the Committee appointed to conduct hearings of the people on the White Paper (Government Notice No. 1 of 1998) prepared by the Government of the United Republic of Tanzania on issues it had selected as important for debate by the people. When the Committee under the chairmanship of Hon. Mr. Justice Kisanga of the Court of Appeal of Tanzania submitted its report, it was trashed by President Mkapa at a meeting with Dar es Salaam elders. On this controversy see PETER, Chris Maina and Nayla Ahmed Sultan, “The Constitution, Structure of the State and Constitutional Development in the United Republic of Tanzania and Zanzibar,” in PETER, Chris Maina and Immi Sikand (eds.), *Zanzibar: The Development of the Constitution,* Zanzibar: Zanzibar Legal Services Centre, 2011, p. 16 at p. 55.

control over the person in respect to whose act or conduct an investigation has been carried out by the Commissioner; or

(c) Recommending (sic) to the relevant person or authority such measures, or requiring that authority to take such measures, as will provide an effective settlement, remedy or redress.

And Section 17 (1) says:-

> The decisions of the Commission shall have the status of a recommendation to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out.

And then Section 28 has this to say:-

28 (1) Where after making an investigation under this Act, the Commission is of the view that the decision, recommendation, act or omission that was the subject matter of the investigation:-

(a) Amounts to breach of any of the fundamental rights and freedoms provided in the Constitution or in any international instrument to which the United Republic is a party.
(b) Appears to have been contrary to law; or
(c) Was unreasonable, unjust, oppressive, discriminatory or was in accordance with a rule of law or a provision of any Act or a practice that is unreasonable, unjust, oppressive, or discriminatory; or
(d) Was based wholly or partly on a mistake, of law or fact; or
(e) Was based on irrelevant grounds or made for an improper purpose; or
(f) Was made in the exercise of a discretionary power and reasons should have been given for the decision, the Commission shall report its decision, recommendation and the reasons for it to the appropriate authority concerned.

(2) The appropriate authority shall, within such time, not exceeding three months from the date of recommendation as the Commission prescribes, make a report to the Commission with details of any action taken by such authority to redress the impugned fundamental rights or acts of maladministration.

(3) if within the prescribed time after the report is made no action is taken which seems to the Commission to be adequate and appropriate, the Commission may, after considering the comments, if any, made by or on behalf of the department, authority or person against whom the complaint was made either, bring an action before any court or recommend to any competent authority to bring an action and seek such remedy

Accessed from LHRC Constitutional Database

as may be appropriate for the enforcement of the recommendations of the Commission.

(4) The provisions of this Section shall not be construed as precluding the Commission from resolving any complaint or rectifying any act or omission emanating from a violation of any fundamental right or acts of maladministration in any other manner including mediation, conciliation or negotiation.

Reading the two subsections together gives a clear impression that the Commission has no teeth and an inquiry undertaken by the Commission may elongate the finalization of the matter more than if the complainant had gone directly to court.

The *Nyamuma Case* is an example.[35] After the Commission had done thorough investigations and after forwarding its findings/recommendations to the Government, there were expectations that those findings and recommendations would be respected. However, that was not to be. The Attorney General wrote to the Chairman of the Commission, Justice Kisanga, saying the Government had conducted its own "independent" investigations and found that there were no human rights violations committed by the District Commissioner and the Officer Commanding District.

The Commission then invoked the provisions of Section 28 (3) of the Act and recommended the Legal and Human Rights Centre to go to the High Court. They went to the High Court which said it had no jurisdiction. They successfully appealed to the Court of Appeal, which ordered the matter to be referred to the High Court before another judge, to be considered on merit.

The Court of Appeal found that the Minister had not complied with the provisions of Section 38 of the Act which says:-

> The Minister may make regulations for the better carrying into effect the provisions of this Act.

And then went on:-

> But are we going to wring our hands in desperation because there are no such rules? We think not. The action taken by the appellants and the complaints was perfectly in order and the High Court was properly moved. Let us point out here and now that s. 28 (3) of the Act is not a novel provision.

---

[35] On a longer treatment of this case see BUCHANAN, Ruth; Helen Kijo-Bisimba; and Kerry Rittich, "The Evictions at Nyamuma, Tanzania: Structural Constraints and Alternative Pathways in the Struggles over Land," in WHITE, Lucie E. and Jeremy Perelman (eds.), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, Stanford, California: Stanford University Press, 2011, Chapter Three; and LEGAL AND HUMAN RIGHTS CENTRE, *The Human Calamity of the Evictions at Nyamuma – Serengeti: Legal and Human Rights Implications,* Dar es Salaam: LHRC, 2006.

Accessed from LHRC Constitutional Database

> There is s. 17 (1) of the Arbitration Act, Cap 15 which provides that:
>
> (1) An award on a submission on being filed in the court in accordance with Act shall, unless the court remits it to the reconsideration of the arbitrators or umpire or sets it aside, be enforceable as if it were a decree of the court.

Awards are enforceable by courts without there being a requirement to file a suit.

And finally ordered:-

> We order that the matter be remitted to the High Court before another judge to be considered on merit. We also order that the complainants, that is the 135 persons, should be joined as applicants.

The words "to be considered on merit" appear to be likely to confuse. But since earlier on the Court had found that the High Court erred when it said:-

> I endorse the view that what is meant by a court action for enforcement of Commission recommendation is not simply execution but trial.

"Considering on merit" would mean the High Court had only to satisfy itself that the Commission had conducted an investigation within the meaning of the Act. The Court quoted with approval the approach taken by Farkye, J. of the Ghana High Court in *Commission on Human Rights and Administrative Justice (No. 4) vs. Minerals Commission (No. 1)*[36] where the learned Judge had referred to *Black's Judicial Dictionary* (4th ed) in getting the meaning of the word "investigation" in the Ghana Act which meant:-

> ... to follow up step by step by patient inquiry or observation.

Once again, case law has cleared an ambiguity in an act which the Government wanted to invoke to deny people justice. As the Government is the most frequent tortfeasor of all, that approach is not surprising.

## IV. Emergence of Impunity and Disregard of the Law

### *A. The Legislature*

The Legislature is a creature of the Constitution as one of the three pillars of Government. Members of Parliament are the representatives of the people and Parliament is supposed to be the mouthpiece of the people. The people of this country speak and/or air their views through their elected representatives. The

[36] [1994-2000] CHRAJ 248.

Accessed from LHRC Constitutional Database

power and authority of the state is derived from the people under Article 8 (1) (a) which says:-

> *wananchi ndio msingi wa mamlaka yote, na Serikali itapata madaraka na mamlaka yake kutoka kwa wananchi kwa mujibu wa Katiba hii.*
>
> [Sovereignty resides in the people and it is from the people that the Government through this Constitution shall derive all its power and authority.]

The power of the second part of Parliament (The National Assembly) is derived from Article 63 (2) of the Constitution which says:

> *sehemu ya pili ya Bunge itakuwa ndicho chombo kikuu cha Jamhuri ya Muungano ambacho kitakuwa na madaraka, **kwa niaba ya wananchi**, kusimamia na kuishauri Serikali ya Jamhuri ya Muungano na vyombo vyake vyote katika utekelezaji wa majukumu yake kwa mujibu wa Katiba hii.*
>
> [The second part of Parliament shall be the principal organ of the United Republic which shall have the authority **on behalf of the people** to oversee and advise the Government of the United Republic and all its organs in the discharge of their respective responsibilities in accordance with this Constitution.]

I have emphasized the words ***"kwa niaba ya wananchi"*** as I have a feeling, and it has been exhibited, that our honourable members of Parliament have wrongfully, by their actions, interpreted the phrase to mean **"kwa niaba ya vyama vyao" [*on behalf of their parties*].** In its behavior, the House has been a big disappointment. The stronger the opposition, the more divided the House becomes, even on matters of national importance. Members of Parliament often debate, argue and vote purely along party lines and not from common sense or national interest. Because of this, some members of Parliament have been heard saying politics should be banned in universities. You wonder if they are serious. The subject of Political Science is still taught in universities. Most of our political leaders including our President, practised politics at the University, a place which nurtures our future leaders. Saying today that politics should not be practised in Universities is as unrealistic as it is ridiculous.

There has also been clear incidences of biased leadership of Parliament. Rulings are made based on party affiliation. There have been double standards in handling misdemeanors in violation of the House Rules. The issue of Hon. Zitto Kabwe and Adam Malima is a case in point. They committed the same offense – one was suspended (opposition) and the other warned (ruling party).[37]

[37] On the background to this double standard by the former speaker of Parliament of the United Republic of Tanzania see "Mengi to File Complaint over MP's Remarks," *The East African*n

Accessed from LHRC Constitutional Database

Sometimes, I wonder when I hear the Hon. Speaker of the House saying "I am never partisan when I make rulings in the House," do they believe we take them seriously? And given the present practise where the Speaker is from the ruling party, would such a statement be viewed as credible by right thinking members of society? I think not. The Speaker is expected to do all he can, rightly or wrongly, to make the ruling party win. And if the party that sponsored the Speaker thinks he is not helpful, they may simply remove him like they did the immediate past Speaker. A new condition for one to qualify for contesting the post of Speaker was introduced by CCM. This time around, the candidate to vie for the post must first and foremost be a woman. The incumbent, being a man, was automatically locked out.

The Speaker is an automatic member of the Central Committee and the National Executive Committee of CCM. He is expected to attend party caucuses to strategize and push the party agenda in Parliament. Still, in order to show the country and the International Community that he is serving everyone, he must try to balance. It is an impossible task. The precarious position may sometimes make him decide unjustly against his own party. We are all aware, justice must not only be done, it must be seen to be done. This impossible position of the Speaker will, perhaps, be addressed properly in the new Constitution.

A new culture is also emerging in the house, that of refusing to abide by the House Rules. This, in my opinion, is being triggered by unfair rulings and/or emotional rulings and/or outright arrogance. The people watching are left in awe! This has lowered the esteem of the House in the eyes of the public. Surely trading insults when the microphones are on is a show of disrespect to the people, who are the source of power.

In a case of bipartisan agreement MPs have voted for themselves exclusive salaries, allowances and fringe benefits which are well out of proportion in the eyes of the public, the very poor people they represent. This has been done without due regard to the rules of natural justice and conflict of interest. Thus the public view MPs not as their representatives but as greedy individuals who are in the House only to line their pockets and enrich themselves. The new Constitution must provide that any proposal to adjust salaries or allowances upwards can only take effect with the next Parliament.

### *B. The Executive*

The Executive branch of the State is a creature of Chapter Two of the Constitution. It comprises the President, the Vice President and the Prime Minister and Ministers who constitute the Cabinet. Under our Constitution, the Chief Legal Adviser to the Government (the Attorney General) is also part of the Executive. Surprisingly, he is also a Member of Parliament. I am not sure as to

---

(Nairobi), 19th October, 2006; and "Tanzanian Parliament Clears Media Magnet of 'Misusing' Own TV," *BBC Monitoring International Reports*, 9th February, 2002.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

how he navigates through the two distinct roles, but I am very sure that the two roles ***ipso facto*** affect his core function as the first law officer of the State.

What is sad is that the Executive has been in the forefront in the violation of fundamental human rights and freedoms. And with the entrenchment of multiparty politics, the violation is getting out of control. The bone of contention centres on the excessive use of the coercive institutions under its control and in particular, the police. There have been unlawful arrests, torture and indefinite detentions in custody without recourse to due process.

The following are but a few examples:-

(i) Relatives of suspects, or their spouses have been arrested to coerce appearance of the real suspect. This is clearly unlawful.

(ii) Section 55 of the Criminal Procedure Act has this to say:-

> (1) A person shall, while under restraint, be treated with humanity and with respect for human dignity.
>
> (2) No person shall, while under restraint, be subjected to cruel, inhuman or degrading treatment.
>
> (3) Where a person under restraint-
>
> (a) Makes a request to a police officer to be provided with medical treatment, advice or assistance in respect of an illness or an injury; or
>
> (b) Appears to the police officer to require medical treatment, advice or assistance in respect of illness or injury,
>
> The police officer shall forthwith take such reasonable action as is necessary to ensure that the person is provided with medical treatment, advice or assistance.

But is appears that the law has now been reversed. Suspects are beaten, maimed and killed in police cells, and unless relatives make noise (like they did in Zombe's case) things are covered up and no inquiry is carried out to establish the cause of death or if it is, it is usually very unreliable. Police cells have turned into torture chambers. Suspects are held under very inhuman conditions. It is hard to think Tanzania has got this far.

(iii). Section 64 of the same Act says this:-

> S. 64 (1) Without prejudice to the provisions of any other written law for the time being in force relating to the grant of bail by police officers, a person brought under the custody of a police officer on reasonable suspicion of having committed an offence shall be released immediately, where:

(a). the police officer who arrested him believes that the person has in fact committed no offence or has no reasonable grounds on which to continue holding that person in custody;

(b). the police officer who arrested him believes that he arrested the wrong person; or

(c). after twenty-four hours after the person was arrested, no formal charge has been laid against that person unless the police officer in question reasonably believes that the offense suspected to have been committed is a serious one.

(2) Where a formal charge has been laid against any person under the custody of the police, a police officer in charge of a police station may, upon that person executing a bond, with or without sureties, to appear before a court if so required, release the person where:

(a) the person, though subject to prosecution, was arrested without warrant;

(b) after due inquiry, insufficient evidence in his opinion is disclosed upon which to proceed with the charge;

(c) the offence, though arrestable, is not of a serious nature; or

(d) it appears that further inquires must be carried out, and they cannot be completed within a reasonably short time.

(3) Where the person arrested is under the age of fifteen years, that person may be released after his parent, guardian, relative or any other reliable person has entered into a recognizance on his behalf.

(4) Notwithstanding any other written law for the time being in force relating to the grant of bail by police officers, no fee or duty shall be chargeable upon bail bonds in criminal cases, recognizance to prosecute or to give evidence or recognizance for person appearance or otherwise issued or taken by police officer.

(5) Every police officer arresting a person reasonably suspected of committing any offence shall inform that person of his right to bail under this Section.

And Section 67 has this to say:-

S. 67 (1) Where a police officer refuses to grant bail he shall record in writing the reasons for so refusing.

Accessed from LHRC Constitutional Database

(2) Where a police officer refuses, under Section 64, to grant bail to a person charged with an offense or grants bail but the person is unable or unwilling to comply, or arrange for another person to comply, with any of the conditions subject to which bail was granted, the person shall be brought before a magistrate to be dealt with according to law as soon as it is practicable to do so and not later than the first sitting of a court at a place to which it is practicable to take the person for the purpose.

(3) A person who is waiting in custody to be brought before a magistrate in accordance with subsection (2) may, at any time, request a police officer for facilities to make an application to a magistrate for bail and, if he does so, the police officer shall, within twenty four hours, or within such reasonable time as it is practicable after he makes the request, bring him before a magistrate.

These two Sections have ceased to have effect. Suspects are held in police cells for days and weeks without charge with the words:

> Tunamshikilia; anasaidia upelelezi; tunachunguza; n.k. [We are holding him, he is assisting investigations, we are investigating etc.]

One is tempted to ask: Has the Criminal Procedure Act, 1985 been repealed?

### (i) Unleashing the Field Force Unit on the People

The act of unleashing the notorious Field Force Unit (FFU) whenever there is perceived trouble has, in many incidences, the effect of fuelling more trouble. When you put people into psychological apprehension, you harden them. The FFU actually enjoy beating up people and injuring them. The beating is indiscriminate and chaotic. The result is more chaos, injury, death and destruction of property. The scenes that we see do not portend well for the future.

It is important for the law enforcement agents to be aware of what Article 13 (6) (d) and (e) of the Constitution says:-

13(6) *kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba-*

(d) *Kwa ajili ya kuhifadhi haki ya usawa wa binadamu, heshima ya mtu itatunzwa katika shughuli zote zinazohusu upelelezi na uendeshaji wa mambo ya jinai na katika shughuli nyinginezo*

Accessed from LHRC Constitutional Database

*ambazo mtu anakuwa chini ya ulinzi bila uhuru, au katika kuhakikisha utekelezaji wa adhabu;*

(e) *Ni marufuku kwa mtu kuteswa, kuadhibiwa kinyama au kupewa adhabu zinazomtweza au kumdhalilisha.*

[13(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely

(d) For the purposes of preserving the right or equality of human beings, human dignity shall be protected in all activities pertaining to criminal investigations and processes, and in any other matters for which a person is restrained, or in the execution of sentences;

(e). No person shall be subjected to torture or inhuman or degrading punishment or treatment.]

Accessed from LHRC Constitutional Database

What we hear and read about arrests, protracted detentions, beatings etc., by police are giving our Country a bad name. They are acts that are against human rights. In Igunga, I was very touched when I saw a defenseless woman being literally thrown into a police landrover by FFU policemen. So you ask, where is our country going? We now notice that any small demand by the people is met with maximum brutality. Lawful gatherings, meetings and demonstrations are carefully watched and attacked, sometimes without notice. A society that lives in fear can never be free.

In a recent *Guardian* newspaper the lead news was about the death of Muammar Gaddafi. The Article starts by saying:

> Tanzania has been saddened by the killing of former Libyan leader Muammar Gaddafi in Sirte on Thursday …

The Article went on to quote Foreign Affairs and International Co-operation Minister Bernard Membe as saying, *inter alia*:

> Tanzania doesn't have a tradition of celebrating the death of a person even if he was a criminal.[38]

I would have agreed with the Minister if he had said so in the 70s and 80s, and not now. If you see what is taking place in our daily lives, you cannot agree with that statement. One way of showing that as a country we do not celebrate when anybody dies is first to take responsibility, second to conduct quick and independent investigations on the cause of death and third, to punish the perpetrators of that death. This is what was happening during the "first phase" government of Mwalimu and part of the second phase government of Ali Hassan

---

[38] *The Guardian* (Tanzania), October, 2011.

Mwinyi. The case of *Godfrey James Ihuya v. R.*;[39] *R. v. Kigadye and Others*[40] and the *Kilombero Massacre of 1986*[41] are but clear examples. To show the gravity of the offense in relation to loss of life, Ministers had to resign and other perpetrators if not jailed were retired. In Mwanza, one person died, in Maswa ten people died and in Kilombero three people died.

Things have changed tremendously now; extra judicial killings happen without any feeling of remorse. There is even an air of rejoicing, satisfaction or endorsement. A vivid example is the killing of Imran Kombe under the belief that the police had gunned down one "White," a notorious car jacker in Moshi. It is common to read in the papers **"**police gun down five bandits; police kill a gang of four after a fierce fire exchange; the gangster died while being rushed to hospital", etc." Some time back, two policemen were killed at a police station somewhere in Southern Tanzania. After a few days, the IGP went on the news:-

Accessed from LHRC Constitutional Database

---

[39] [1980] TLR 197 In this case, the Regional Police and Commander and the Regional Security Officer for Mwanza Region and other senior officers from the Police and Security Services were charged with the murder of one Masanga Mabula Mazengenuka but were convicted of the lesser offense of manslaughter and sentenced to seven (7) years imprisonment. On appeal to the Court of Appeal of Tanzania, their sentences were enhanced to 14 years. The Court of Appeal agreed with the observation of the trial judge:- *"The accused persons did in the commission of the offense show an aggressive and abandoned defiance of the standards of conduct which this country triesy to uphold and preserve. This is without doubt the worst case of manslaughter I have ever encountered in my long period on the bench."* And added "*In implementing that directive they departed from all norms of investigation known and acceptable in a civilized society. They embarked on acts of savagery and indecency. This grossly contravened and undermined the National Ethic and Beliefs of our country which are based on respect for human dignity and liberty to life. Such ghastly and revolting conduct of the appellants cannot be countenanced by the Courts."*

[40] In *Republic v. Elias Kigadye and 7 Others*, [High Court of Tanzania at Shinyanga (Mwanza Registry), Criminal Sessions Case No. 85 of 1980] the 1st accused was Regional Security Officer for Shinyanga, the second accused (Ernest Saidi) was the Regional Commander for Shinyanga, the third accused (Salvatory Gangata) was the Police Officers for the Intelligence and Security Service headquarters in Dar es Salaam. Jerome Benedict Kalindanga, Dismas Kinong'o Swalee Ally Kitumbo and Abbas Saleh Tunguja were Regional Crimes Officers for Shinyanga, Kigoma and Coast Regions respectively. They were charged with two counts of murder of Twiga Nindwa @ Dudube on 16th March, 1976, and one Kang'ombe Kaliji Kang'wina on 18th March, 1976. They were convicted of the lesser offense of manslaughter and sentenced to 5 and 8 years imprisonment respectively. In sentencing the accused, Lugakingira J. (as he then was) said *"By all counts the beating was the severest, the most frightful ever witnessed. I concede that it was most disgraceful. I concede it was even barbarous."*

[41] This was an incident in Kilombero where Field Force Police opened fire on defenceless citizens killing three in cold blood and injuring many others. An inquiry headed by Justice Buxton D. Chipeta was formed. The report has not been made public to date. However the Regional Crimes Office for Morogoro one Hamidu Mbwezeleni was relieved of his duties and the Regional Commissioner one Chrisant Mzindakaya was transferred to Kigoma. See PETER, Chris Maina, *Human Rights in Tanzania: Selected Cases and Materials*, Cologne: Rudiger Koppe Verlag, 1997, p. 721.

> The people who killed the police, ten of them (or six?) were all found and were all killed during this arresting exercise (*na waliuwawa wote katika harakati za kuwakamata!*)

So that file was closed. I have been following up on news of the police exchanging fire with alleged robbers. In all the incidences wherer the alleged robbers were killed, no police or police property was scratched by even a stray bullet.

### (ii) CHADEMA's Demonstration in Arusha

At a customary New Year reception at State House for diplomats accredited to Tanzania early this year, President Jakaya Kikwete said the government was very sorry at what happened in Arusha during Chadema's demonstration and said it will not happen again. We know that people died in Arusha. The official version of the Government, which was also communicated to Parliament by the Prime Minister, was the one given by the police, who were one of the main players there. Their report on what happened can never be credible. So we have people killed, we have no credible report on how they were killed.

According to the report by the Legal and Human Rights Centre, 2010, in that year alone (2010) 52 people were killed in the hands of the police and other security agents. Ten of these people were killed by the police around Barrick Gold fields in Nyamango. And according to that report the people killed by security agents since 2008 total 72. What is more disturbing is that these deaths are swept under the carpet.

What is worrying is when we as a nation through our government take these incidences casually or act politically. We get used to them and even think it should be our way of life. We as a peace-loving nation, *"Taifa lenye umoja na mshikamano,"* cannot let things go that way without condemnation.

The police are answerable to the people, not to the Government. Article 8 (1) of the Constitution has this to say:-

> 8(1). *Jamhuri ya Muungano wa Tanzania ni Nchi inayofuata misingi ya demokrasia na haki ya kijamii na kwa hiyo:*
>
> *(a) Wananchi ndio msingi wa mamlaka yote, na Serikali itapata madaraka na mamlaka yake yote kutoka kwa wananchi kwa mujibu wa Katiba hii;*
> *(b) Lengo kuu la Serikali litakuwa ni ustawi wa wananchi;*
> *(c) Serikali itawajibika kwa wananchi*
> *(d) Wananchi watashiriki katika shughuli za Serikali yao kwa mujibu wa masharti ya Katiba hii.*
>
> [8(1)The United Republic of Tanzania is a state which adheres to principles of democracy and social justice and accordingly:

Accessed from LHRC Constitutional Database

(a) Sovereignty resides in the people and it is from the people that the Government through this Constitution shall derive all its power and authority;
(b) The primary objective of the Government shall be the welfare of the people;
(c) The Government shall be accountable to the people; and
(d) The people shall participate in the affairs of their Government in accordance with the provisions of this Constitution.]

This Article, when read together with Article 14 *(supra)* places the duty to protect life on the police on behalf of the people. They are answerable to the Government of the day which represents the people who have voted it into power. Under Section 7 (i) (b) and Section 8 of the Criminal Procedure Act, Cap 20 [RE 2002], every unnatural death and any death occurring in custody shall be inquired into under the Cap 24 [RE 2002]. And if that person has been buried it is only a "coroner" not the police, who can order exhumation of the body. But what is taking place is a clear indication that the Inquest Act Cap. 23 [R.E. 2002] has been totally ignored, as if it has ceased to exist.

It is not that the police do not know what they are doing; the majority are doing a good job. But when impunity sets in and is left unchecked, the whole force is tarnished.

Accessed from LHRC Constitutional Database

### *C. The Judiciary*

The Judiciary is the cradle of justice. With democratization and the removal of the party from the centre of people's lives, the meeting of those in dispute or seeking justice has been the judiciary. At the top of the Judiciary is the Court of Appeal, the Court of last resort. The Court should try as hard as possible to stop us from saying:-

*Et tu Brute?* Then fall Caesar[42]

The judgment of the Court in Mtikila II was, with respect, a serious let down. I have been reading that judgment over and over and every time I read it, I believe that the Court of Appeal was not itself when it wrote it. I am convinced the Court succumbed to outer pressure. I cannot imagine nor believe that seven Judges of the Court of Appeal were unanimous in every respect of reasoning, the law, the English and all. It is sad to imagine that Judgment will be left to stand. And I hope that it will stand alone as an example of a situation where the highest Court of this land failed its people.

As my Lord Chief Justice Barnabas Samatta said in his paper:

[42] *Julius Caesar* – a play by William Shakespeare published in 1599. See HUMPHREYS, Arthur (ed.), *Julius Caesar*, Oxford: Oxford University Press, 1999, p. 1.

> Maintenance of administrative harmony between the Judiciary and the other two pillars of the State is unquestionably a very useful thing in the governance of a country, but the desire to achieve that relationship cannot be permitted to stand in the way of justice. Total or unqualified harmony between the three pillars would unavoidably have its victims: justice, democracy and rule of law. That kind of relationship would not serve the supreme interest of the people.[43]

And again:

> Unyielding courage of judges is a priceless asset of any country. There is no substitute for it. Judges must not hesitate to make decisions they consider *just* however unpopular those decisions are likely to be to Parliament, the Executive or political parties, including the ruling party, and regardless of their impact on the relations between the Judiciary and the other pillars of the State.[44]

Unlike the Speaker of the National Assembly, who may and can be swayed by the party that sponsored him and can even be removed by that party, judges have no reason to fear. Judges are answerable to the Constitution of the United Republic of Tanzania. They have security of tenure and can only be removed through a special procedure (Article 110A and 120A of the Constitution). They are clothed with enough immunity that should give them support to act independently and objectively.

We are however encouraged that that the Court is moving away from allowing itself to be dictated by technicalities. It is now endeavoring to do substantive justice (see Rule 2 of the Court of Appeal Rules).[45] But I am sure their Lordships in the Court of Appeal are aware that democracy and human rights can only thrive in this Country when the Court is above politics and above politicians. It is extremely difficult, but if they all pull together, nothing can split them. I say this because there is emerging a problem of the judiciary internalizing the State, the government in power and the political elite and thus deciding legal matters on political expedience. The lower Courts look to the Court of Appeal for guidance and support. If the Court of Appeal wobbles for any reason, the Judiciary will fall. It is good for our Judiciary to keep on reminding itself of Principles 1.3 and 1.4 of the Bangalore Principles which say:-

---

[43] See "Judicial Protection of Democratic Values: Judgement of the Court of Appeal on Independent Candidates," in SHIVJI, Issa and Hamudi Majamba (eds.), *Rule of Law vs. Rulers of Law: Justice Barnabas Albert Samatta's Road to Justice*, Dar es Salaam: Mkuki na Nyota Publishers, 2011, p. 233.

[44] Ibid.

[45] See, for instance, how this rule has been applied to meet the ends of justice, in the case of *Farid Ahmed v. Scania Tanzania Ltd.,* CAT Civil Appeal No. 98 of 2005 (unreported).

Accessed from LHRC Constitutional Database

1.3 – a judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 – In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.[46]

The problem of corruption in the lower Courts has attained cancerous proportions. Magistrates in District Courts and Courts of Resident Magistrates are the future judges of the High Court and finally Court of Appeal. This cancer is bound to metastase and will thereby get to the Court of Appeal if it is not treated with finality in the lower Courts.

Many of the judges are not being strict with errant advocates who play around with the rights of their clients and who twist justice through technicalities. I am not certain they feel safe when advocates charged of a crime in the lower Courts appear before them, or when advocates with track records of suspicion appear before them.

Let me also say this. Failure to perform one's own official duties is also an act of lawlessness. A judge or magistrate who does not hear cases or who does not write judgments performs lawlessly. In order to strengthen the judiciary, I propose that the new Constitution should provide for Acting Judges for at least two years. Likewise, magistrates should be on probation for at least three years. This may weed out bad elements who are morally or medically unfit to perform the tough and demanding duty of adjudication.

### *D. The Media*

The media in its various forms [print and electronic] is an important part of every democratic society. It is supposed to promote respect for human rights and allow or facilitate the public to access information and in so doing enjoy one of their fundamental rights, i.e., the right to freedom of information which is guaranteed under both international human rights legal instruments and the Constitution of the United Republic of Tanzania (Article 18).

The strategic position which the media occupies in the society makes it very powerful and it is therefore not surprising that it refers to itself as the Fourth pillar of the State (after the Executive, Judiciary and the Legislature).

However, with the growth of relative media freedom in Tanzania, the public has witnessed a rise in the abuse of this freedom, particularly by the print media. Stories are fabricated – particularly against prominent members of the public. Imaginary interviews – all concocted by editors and their staff - are

[46] The Bangalore Principles of Judicial Conduct, 2002.

Accessed from LHRC Constitutional Database

printed with impunity, thus permanently injuring the reputation of the persons concerned.

The father of the Nation Mwalimu Julius K. Nyerere said this about the media:

> So, I may add, is the responsibility of the media to report accurately and intelligently what is being done by government leaders and leaders of other political, economic, civic, or social organizations. Unfortunately it is clear from experience in Tanzania, as well as in other countries, that unlimited press freedom and private ownership of the media is far from being a guarantee of accurate – much less intelligent – reporting and analysis. It appears that sensationalism and triviality are more profitable to the owners – and they are certainly easier to write – than are straight reporting of the facts which affect the future of the country and its people.

Those words were very true, and actually the situation has gotten worse today. Although the Media Council of Tanzania (MCT) is doing its best to put direction to the profession, the going is quite tough. The annual reports on the State of the Media gives a true account of what is happening in the country. In one report, it is stated:-

> The so called brown envelope syndrome is still a disturbing element in news gathering as it has become habitual for some journalists to expect 'something' or in Kiswahili – 'kitu kidogo' or 'mshiko.[47]

And then continues:-

> veteran journalist and editor at Raia Mwema newspaper Johnson Mbwambo explains the problem of soliciting gifts as corruption, but not unique to journalists and in the media. He says it is a reflection of the moral decay in our society.
>
> He recalls during his days as a young reporter when he was earning a very small salary, but was contented and that he and his colleagues did not dare solicit extra coins in the form of '*mshiko*'.

It is surprising that today when many reporters and editors earn higher salaries and even own private cars, the "brown envelope syndrome" has become even more entrenched.[48]

---

[47] NYERERE, Julius K., *Our Leadership and the Destiny of Tanzania*, Harare: African Publishing Group, 1995, pp. 3-4.

[48] State of the Media report 2010, p. 12.

Accessed from LHRC Constitutional Database

The list of cases being handled by the self-regulatory authority of the media – the MCT's Ethics Committee - is alarming. Former Prime Ministers, Ministers and other members of the public have approached the Council for redress. Examples are cases of Cleopa Msuya, Frederick Sumaye and Mohamed Seif Khatib.[49] There is need to think of the possibility of pursuing individual journalists who write libellous news and join them with the Publisher and Printer. The media also often helps to justify extra judicial killings by stating that they have been carried out by angry mobs. This is serious lawlessness which requires serious attention.

### *E. Violence by the Members of the Public*

I said above that the compartmentalization of the upbringing of our children is the modern but very faulty trend. Our children grow unprotected from bad elements in the surrounding society. The socialization process, a central component for the upbringing of children, is generally misguided, inconsistent and incomplete. The outcome is that the shell that is built around these children's animal self is weak. As if that is not bad enough, we, the majority of parents, do not know our children properly, though we pretend to know them. When these children grow up they find an even more hostile world of desperation, a very tough and hopeless future. They get a lot of pressure from the effects of climatic change and changes of the society. They are jobless. Yet, they have been promised *"maisha bora kwa kila Mtanzania."* [a prosperous life for every Tanzanian]. As members of the public they start accumulating serious grievances against the government of the day, whose party made them a lot of promises during election campaigns, promises which have not been met. Their welbeing continues to decline. They are never listened to and thus they get desperate.

The result has been to turn their anger on each other. This has led to the emergence of the ***mob violence*** – sometimes wrongly referred to as ***"mob justice"***. Members of the public will pick stones, sticks, iron bars etc. to rush and "finish" the alleged "thief" or "robber" without even asking what he/she stole and from whom. As long as someone shouts "thief," that is sufficient to execute the culprit.

In so doing, the public violates the right to life of the person concerned without any thought of due process. If the person survives, he/she suffers permanently both physically and psychologically. Many people have suffered seriously and many more have died from this, and at times from vendettas with some people wanting to settle personal scores. The public is turned into killing machines without suspecting. The existence of a large portion of the urban

---

49 These cases and many others are digested in MEDIA COUNCIL OF TANZANIA, *10 Years of Promoting Media Ethics and Accountability: Conciliation Cases 1997 – 2007*, Dar es Salaam: MCT, 2008. See also MEDIA COUNCIL OF TANZANIA, *Self Regulate or Perish: The History of the Media Council of Tanzania up to 2009*, Dar es Salaam: MCT, 2010.

Accessed from LHRC Constitutional Database

population not gainfully engaged contributes to the mobs that kill so easily and without justification.

And now, a new trend of lawlessness is emerging. Mobs attack police stations demanding that a suspect be surrendered to them for lynching. When the police refuse, the mobs burn down the police stations and/or lynch the police officers manning the stations. Villagers block highways demanding the construction of road humps whenever one of their own is fatally run over by a speeding vehicle. If you knock down some careless pedestrian in some parts of the country, you had better drive fast to a police station because your car may end up in ashes. This is against traffic regulations because it has the effect of destroying evidence, but it is the safer alternative. Villagers run fast to the scene of an accident not to help the injured, but to rob them of their property. I am told that others may even chop off your hand to facilitate the removal of your watch. These appalling incidences are on the increase. I am not sure the authorities have found a solution yet.

The killing or chopping off of limbs of people with albinism is yet more emerging evidence of the degeneration of our social values. This crime puts us on the international limelight of shame, not because of the crime alone, but also because of the belief associated with it. Social anthropologists had better seriously look into why these criminals are doing what they are doing. May be our law enforcing agents are under so much pressure that they have no time to dig into the real cause of these ghastly incidences.

The phenomenon of killing people with albinism appears to have come to a head in recent times. But it has been there for a long time, like the killing of children born with other disabilities.

We should not also forget the almost prehistoric "culture" of killing elderly men and women on witchcraft suspicions. That we are experiencing more chilling crimes of albino killings does not mean that the murder of old people suspected of witchcraft has ceased or diminished. It is very much alive and more intense. In the same manner we have been fighting against FGM, we should also approach these two vices more scientifically and psychologically, and not merely by criminal proceedings. Since the practice appears to be fuelled, at least partly, by certain beliefs in witchcraft, law enforcement alone cannot be the answer. It is important that a more holistic approach be devised with the cooperation of all concerned in order to tackle the root of the problem, namely, utterly misguided beliefs in certain people's minds that propel them to commit such serious crimes against fellow humans.

All said, as a peace loving country, we need to know the reasons for all these crimes. We should find scientific reasons for scientific solutions. Unemployment is one of those reasons. But is it the only reason? We need to decide and find the cause and then move forward. Mwalimu Nyerere once said:

Accessed from LHRC Constitutional Database

> And failure to decide is itself a decision; quite frequently refusing (or being unable) to make a decision is worse than making the one which time will prove to have been wrong! For absence of any decision leads to confusion and opens the door to exploitation by crooks.[50]

Without deciding to find the reasons for this social decadence, we shall find ourselves peddling backwards. This is bad for a country that prides itself in adherence to the principles of good governance, rule of law and respect of fundamental human rights.

There is also the thinking on the part of the public that the police and other law enforcement agents are not serious about cases reported and hence the need for the public to take the law into their own hands. However, these decisions might also arise from ignorance of the law and legal procedures.

## V. A Look at the Future

I am not a prophet of doom, but I think the future is worrying. A people in desperation can hardly improve. The greater majority of the population of Tanzania comprises the youth. With a shaky and free falling currency, it is extremely difficult to reverse the wheel. We are not winning on corruption. Our human rights record is not improving very much. I think the challenge is on the Commission for Human Rights and Good Governance, the Legal and Human Rights Centre and all Civil Society Organizations to double efforts; more so now that we witness the opposition growing and putting the ruling party in fright. When we start seeing members of parliament of the ruling party attending campaign rallies with handguns, then we should know all is not well. I do not know what would have happened if that person was from the opposition.

The police force has issued a book urging people to abide by the law without being forced to do so. I have no problem with that. But the police should be the first to obey the law. They should fight corruption among their ranks. They should follow the law when they arrest suspects. As I said above, they should not stand by and watch the commission of crimes. They should not be trigger happy. And people should see these efforts. People can then listen and understand what the police are saying. Otherwise I am not sure such a book can bring the desired results.

We should try Mwalimu's vision. Social services and industrial ventures should be introduced in the rural areas so as to make them attractive to the youth. The Urban migration is suffocating the cities and towns. These places turn into time bombs. Our leaders should act and act fast.

---

[50] NYERERE, Julius K., *Our Leadership and the Destiny of Tanzania*, Harare: African Publishing Group, 1995, pp. 16-17.

Accessed from LHRC Constitutional Database

## VI. Conclusion

This is a discussion paper, not a thesis. These are my candid personal views.[51] I still believe we are a very young democracy and as such complacency is dangerous. All of us need to realize that a culture of impunity will destroy all that we are cerebrating. And as we move towards what are turning to be very competitive elections, we should know that our destiny lies in Tanzania. All of us are better placed, in our own ways, to frown at what is developing to be a culture of lawlessness in our country and suggest ways out.

Accessed from LHRC Constitutional Database

[51] These views are also expressed in MIHAYO, Thomas, "Budding Culture of Impunity in Tanzania – Failure to Check the Killing/Chopping off Limbs of People with Albinism," *The African on Saturday* (Tanzania), 24th December, 2011, p. 8.

# THE RATIONALE BEHIND SEPARATING THE INVESTIGATIVE ASPECTS OF THE CRIMINAL JUSTICE FROM PROSECUTION IN TANZANIA

*Eliezer Mbuki Feleshi*[1]

I. Introduction
II. The Paradigm Shift of Prosecutorial Ideologies and Methodologies
III. Rationale behind Separating the Investigative Aspects from Prosecution in Tanzania
IV. The Scaling Up of the Prosecutions Service in Tanzania
V. Strengthening the Legal and Institutional Framework
VI. The Prosecution-Led Investigations as a Best Practice
VII. Conclusion

Accessed from LHRC Constitutional Database

## I. Introduction

This paper sets out to discuss the rationale behind the process of separating the investigative aspects of criminal justice from prosecution in Tanzania. Thus, it naturally builds on the mandate exercised by directors of public prosecution in the country. It is important to observe at the outset, that the directors of public prosecution in both Tanzania Mainland and Tanzania Zanzibar are constitutionally mandated to discharge powers and functions provided for by Article 4 and 59B of the Constitution of the United Republic of Tanzania,[2] 5A and 56A of the Constitution of Zanzibar[3], and within the confines of specific legislations enacted by the Parliament of the United Republic of Tanzania and the House of Representative Zanzibar respectively, to govern their operations in both sides of the Union.[4] Perhaps it is equally important to underscore that whatever is happening in Tanzania today and in her neighboring countries is part of the reforms taking place in the international criminal justice administration systems worldwide.

---

[1] The Director of Public Prosecutions of the United Republic of Tanzania, Dar es Salaam, Tanzania.

[2] Cap. 2. R.E. 2002.

[3] Constitution of Zanzibar, 1984 as amended from time to time.

[4] Sections 2 and 4 of the National Prosecutions Act, Cap. 430 of the Laws of Tanzania and Sections 2 and 4 of the Office of the Director of Public Prosecutions Act, 2010 (Act No. 2 of 2010).

## II. The Paradigm Shift of Prosecutorial Ideologies and Methodologies

Since crime is a human act violating criminal law[5] and it is a product of the society,[6] there is a need to have it analyzed in a scientific way. Such analysis is always carried out against the society itself, for it is the society that produces criminals and criminalizes acts. It is against that background that the prosecution service delivered to the society becomes public good.[7] How investigative and prosecution authorities bring equitable outcomes depends on the applicable investigative and prosecution ideologies and methodologies.

Under our criminal justice system a decision as to whether a case should be brought before a court for prosecutorial purposes or not is the fundamental function of prosecuting authorities which currently are the Tanzania National Prosecutions Service (NPS)[8] for the Tanzania Mainland and the Office of the Director of Public Prosecutions Zanzibar[9] for Tanzania Zanzibar. However, the respective roles and the powers that are exercised by every prosecutor and investigator in complementing their common objectives has been a matter of great variation just as it happens across different criminal justice systems worldwide.

In the inquisitorial system the distinction between investigation and prosecution is more blurred than in common law systems. Generally, prosecutors under the inquisitorial system are responsible for the whole pre-trial stage, including investigations. There are a number of variations among different inquisitorial systems as far as the extent of prosecutors' powers is concerned. Nevertheless, in most of them, the prosecuting authority is empowered to instruct the instigation of investigations, to give instructions on the scope of investigations, personally to investigate criminal cases, to participate in investigations and to decide on the type of investigations.[10]

Accessed from LHRC Constitutional Database

---

5 BARLOW, Hugh D. *Introduction to Criminology* (3rd Edition), Boston Toronto: Little Brown and Company, 1984, p. 5.

6 SHAIDI, L.P., "Explaining Crime and Social Control in Tanzania Mainland; A Historical Socio-economic perspective," A Thesis submitted for the Degree of Doctor of Philosophy in the University of Dar es Salaam, Tanzania,1985, p. 433 and in FELESHI, E.M., "Contribution of Criminal Intelligence in the War against Crime in Tanzania Mainland", A Thesis submitted for the Degree of Doctor of Philosophy in the University of Dar es Salaam, Tanzania,2011, p. 28.

7 A society will always enact law with a certain purpose whilst looking for equitable prosecution service against offenders.

8 Article 59B of the Constitution of the United Republic of Tanzania, 1977 (as amended) and Section 9 of the National Prosecutions Service Act, 2008 (Act No. 1 of 2008).

9 Article 56A of the Constitution of Zanzibar, 1984 and Sections 7 and 9 of the Office of the Director of Public Prosecutions Act, 2010 (Act No. 2 of 2010).

10 TAK, J.P., 'The prosecution service in control of police investigation policy? A European comparison'- unpublished talk at the Conference *The Growing Importance of the Public Prosecution Service: Best European Practices in the Face of Heightened Crime*

In an attempt to attain their prosecutions objectives, most criminal investigative and prosecuting authorities have changed their ideologies and methodologies from practicing a hundred percent adversarial or inquisitorial systems into adversarial-cum inquisitorial and vice versa. Through this practice, most of common law countries which for years did not have a direct line of authority between the police and the prosecution service and where the police enjoyed a considerable independence in the execution of their duties, are now accommodating prosecution-led investigations. Unlike in the inquisitorial system, it was affirmed in the common law system that the responsibility for investigations lay exclusively in the hands of the police who finally conducted the prosecutions of offenders.

Modern public prosecution services have been created to relieve the police from conducting the prosecution of offenders. In addition to countries like Ireland, Australia, New Zealand, Canada and other common law countries, where prosecutors had no formal role in the pre-trial stage apart from that of advising the police whenever the latter wished to consult them, a substantial number of other countries, Tanzania included, have moved ahead and introduced prosecution-led investigation. The current practice is providing a remedy to the old practice that was complained of by researchers, scholars and academicians who criticized the absence of a prosecutor's power to exert a form of control in the investigative stage. They argued that the failure to give the prosecutor control over investigations meant that the control over prosecutions actually stayed with the police.[11] They held that:

> Independent decision-making, which is what is required of the prosecutor, is impossible so long as he remains dependent upon the police for the relevant information. In deciding whether to involve the prosecutor before a charge is made or in deciding what and how much information the prosecutor should be given, the police will be guided by their law enforcement concerns which are not necessarily the same as those of the prosecutor.[12]

The new methodology empowers prosecutors to guide, coordinate or even take part in the investigations of some reported serious cases. This practice however, does not mean to interfere with investigators' core functions of detecting, preventing and controlling crime. However, it is important to note that for those who believe in prosecution-led investigation, their standpoint is that since the ultimate goal of both the investigation and the prosecution is to fight

---

*Rates* organized by the Georg-August University Gottingen, Germany, 6th – 8th October, 2005, at p. 4.

[11] See LIDSTONE, K., 'The Reformed Prosecution Process in England: A Radical Reform?' *Criminal Law Journal*, 1987, p. 296 and FIONDA, J., *Public Prosecutors and Discretion: A Comparative Study*, Oxford: Clarendon Press, 1995.

[12] Ibid. at p. 311.

Accessed from LHRC Constitutional Database

crime, it is important for them to share and firm up the investigation plan and get all material evidence collected with a view to affirming the prosecution's case. In addition, the practice ensures strong teamwork and prevents abuse of powers amongst the investigators and prosecutors to avoid sham trials.

Those opposing the prosecution-led investigation attack the methodology and argue that by guiding, coordinating or participating in investigations prosecutors do cause unwarranted interference with investigators' core functions. They become investigators and then prosecute the cases they happened to deal with at the investigation stage. This practice, according to them, affects the impartiality the prosecutors, who are ministers of justice, are duty bond to uphold.

However, despite the criticism that exists, it is more or less unanymously now agreed that prosecution-led investigation, that is adoption of adversarial-cum inquisitorial and vice versa, suits the ultimate aim held by all crime fighters which is to fight crime by all means and make society a safer and secure place for everyone to live and enjoy his fundamental rights. The ideology and methodology behind prosecution-led investigation are equitable as long as they are compliant with the celebrated modern policing ideologies and methodogies which are built on intelligence-led policing and intelligence-led investigations.

There is enormous evidence that intelligence-led policing and prosecution-led investigations have been successfully practiced in both developed and developing countries. Developed countries such as the United States of America and the United Kindom[13] have recent tangible results drawn from the experience they have on the fight against terrorism. The special undertaking carried out by FBI and CIA in the USA under intelligence-led policing and intelligence-led investigations for example, demonstrate how the US, despite spending fifteen years, finally managed to trace and kill Osama bin Laden at Abbottabad Pakistan on 2nd May, 2011.[14] Tanzania Mainland on her side, has the practical experience of prosecution-led investigation through the investigations that were carried out by the National Special Task Force in 2008 and 2010 on illicit dealings that concerned the Bank of Tanzania External Payment Arrears Account (BOT-EPA), M/S Richmond Development Company LLC and M/S Development Enterpreneourship for Community Initiatives (DECI). Those investigations resulted in prosecutable cases.[15]

---

13 FELESHI, E.M., "Contribution of Criminal Intelligence in the War against Crime in Tanzania Mainland," op.cit., pp. 196-207.

14 W.W.W.-http://fromtheleft.wordpress.com/2011/05/07/the-cost-of-catching-killing-osama-bin-laden-3-trillion/. [FBI, CIA and other US security organs took 15 years to catch and kill Osama bin Laden after spending at least $3 trillion that is counting the disruptions he brought to US domestic economy, the wars in Iraq and Afghanistan and the increased security triggered by the terrorist attacks he funded.]

15 FELESHI, E.M., "Contribution of Criminal Intelligence in the War against Crime in Tanzania Mainland', op.cit., pp. 250-256.

Accessed from LHRC Constitutional Database

## III. Rationale behind Separating the Investigative Aspects from Prosecution in Tanzania

The paradigm shift of prosecutorial ideologies and methodologies discussed above has not spared the Tanzania criminal justice system. The rationale behind separating the investigative aspects from prosecutorial functions in Tanzania is not for any other purpose but that of ensuring that objectivity, when making a decision on whether to charge or not, is addressed. In the 1970s, England substituted her prosecution system, which Tanzania had inherited in 1961, with the Scottish system.[16]

In the 1970s, Tanzania, after studying the system in England and other judicial and prosecution systems, established that since a decision to prosecute or not must be reached objectively, there was no way that members of the criminal investigation department who carried out investigation or supervised the collection of evidence, could make such an objective decision. It was therefore affirmatively established that that practice was not in the interest of the community, justice and the investigative organs themselves, because objectivity, one of the pillars of justice, cannot be guaranteed even if the investigator is an honest officer.[17] In order to separate the investigative functions from prosecution it was recommended that a nation-wide prosecutions department be established and the police be left to concentrate on the prevention and detection of crime. The Msekwa Commission made the following observation:

> We are mindful for the extra cost that may be involved in the establishment of the department we propose but, we are satisfied that the result of such expenses will be in the best interest of everyone in our community. Improvement of the administration of justice should not, in our view, be held up because of financial considerations alone.[18]

In view of the foregoing, it is important to observe that the legislations governing the prosecuting authorities in the United Republic, as cited earlier, were subjected to review in order to embrace the intended legal and institutional framework adjustments. The increasing demand reflected the anxiety to establish a prosecution system that is more responsive to the rule of law, just as was repeatedly covered by other idioms cherished by scholars, legal practitioners and national leaders. In mid-1990s, it was observed again that since one of the crucial areas of the administration of justice is the prosecution of criminals and a country's system of criminal justice is a critical aspect of the rule of law, Tanzania's transition to a liberal, democratic system would be meaningless

Accessed from LHRC Constitutional Database

---

[16] See "The Prosecution Process in England and Wales," the majority report of the Criminal Justice Committee of Justice. See Criminal Law Review, 1970, p. 668.

[17] The Judicial System Review Commission (Msekwa Commission), *Report*, Dar es Salaam: Government Printer, 1977, p. 89.

[18] Ibid.P.92

Accessed from LHRC Constitutional Database

unless the constitutional principles underpinning such a system were reflected in the administration of criminal justice. It was therefore considered that the Office of the Director of Public Prosecutions (DPP) should be so structured as to assure the incumbent the independence and institutional capacity to adhere to basic constitutional tenets in the conduct of proceedings and in the supervision of a unified and civilianized national system of prosecution.[19]

The bilateral accord concluded between the Chama cha Mapinduzi and the Revolutionary Government of Zanzibar in the early 1990s and the opposition side championed by the Civic United Front, together with other factors, accelerated the constitutionalization process of the isles' prosecution office in 1995.[20] The situation in Tanzania Mainland was a bit different. The prosecution office was constitutionalized in 2005. That process considerably accommodated the recommendations which were given a few decades earlier by the Musekwa Commission (1977) and the Bomani Legal Task Force (1996), respectively.[21] The constitutionalization of the country's prosecuting authorities was important in promoting the rule of law and ensuring the observance of good governance within the confines of specific legislations enacted by the respective legislative bodies.[22]

## IV. The Scaling Up of the Prosecutions Service in Tanzania

Prior to 2008 questions concerning relations between the police and public prosecution service during criminal investigation in Tanzania Mainland were settled in a more or less informal way. There were no clear provisions in the existing legislation, which provided for the role of public prosecutors in criminal investigations[23]. The powers and functions of the Director of Public Prosecutions were provided for under Part V of The Criminal Procedure Act (Act No. 9 of 1985).[24]

---

19 Attorney General's Office, "Legal Sector Report: Financial and Legal Management Upgrading Project (FILMUP)," Legal Sector Component, 1996, p. 92.

20 The main contention by the opposition was that the havocs which succeeded the 1995 first multiparty General Election in the isles was partly a result of the weak set up of the prosecution service and other state machineries.

21 Attorney General's Office, FILMUP Report, op.cit.

22 Sections 2, 4, 8, 9-17 of the National Prosecutions Act, Cap. 430 of the laws of Tanzania and Sections 2,4,7,9,13 and 16 of the Office of the Director of Public Prosecutions Act, No. 2 of 2010

23 In fact under Section 95 of the Criminal Procedure Act (Act No. 9 of 1989) police officers could be appointed as public prosecutors and over the years police officers were both investigators as well as public prosecutors. Section 245(5) of the Act that empowers the DPP or his appointee to direct for further investigation on particular areas did not mean that prosecutors could coordinate or take part in serious investigation.

24 CAP 20 R.E 2002.

## V. Strengthening the Legal and Institutional Framework

The 14th constitutional amendment made to the Constitution of the United Republic in 2005 restored the office of the DPP in the constitution. That was a necessary step in strengthening the country's legal and institutional framework. The constitution mandated the DPP to exercise his powers as may be prescribed by any law enacted or to be enacted by Parliament.[25] A few years later, Parliament enacted the National Prosecutions Service Act (NPSA)[26] which became operational from 9th June, 2008.[27] In line with what happened in Tanzania Mainland, the House of Representatives Zanzibar enacted the Office of the Director of Public Prosecutions Act, No. 2 of 2010.[28]

Unlike the Criminal Procedure Act whose main objective is to provide provisions for the procedure to be followed in the investigation of crime and the conduct of criminal trials and other related purposes, [29] the objective of the NPSA, which is in line with Article 59B (5) of the constitution, is extended to making provisions for the establishment of the National Prosecutions Service, to provide for the organization, management, monitoring, **supervision of prosecution and coordination of investigation** with a view to promoting and enhancing dispensation of criminal justice, and to provide for related matters.

Under the NSPA the Director of Public Prosecutions is the head of operations in the NPS in relation of both the prosecutions and coordination of investigation duties conducted by the investigative organs.[30] Incidentally, the Office of the Director of Public Prosecutions Act[31] is not silent. The Act empowered the Director of Public Prosecutions Zanzibar, to coordinate criminal investigations under the relevant law applicable in Zanzibar.[32]

The necessary adjustments made to the legal and institutional framework paved the way to the gradual take-over of prosecutions of criminal cases by directors of public prosecutions in subordinate courts on both sides of the union. The implementation of civilianization of the prosecution service was, from the

Accessed from LHRC Constitutional Database

---

[25] Articles 59B(1)-(5) of the Constitution of the United Republic of Tanzania, (Cap. 2 R.E. 2002).

[26] Act, No. 1 of 2008, Cap.430 of the Laws of Tanzania. The Bill to enact the NPSA was drafted in 2007 and was passed by the National Assembly on 30th January, 2008.

[27] The NPSA was assented on 4th April, 2008 and became operational through GN No. 90/2008.

[28] The objective of the Act was to make provisions for institutional establishment and operation of the Office of the Director of Public Prosecutions and matters related thereto.

[29] See the objective of the Criminal Procedure Act, (Cap. 20 R.E. 2002).

[30] Sections 2 and 4(3) of the NPSA (*supra*).

[31] No. 2 of 2010.

[32] Sections 13(1) of the Office of the Director of Public Prosecutions Act, 2010 (Act No. 2 of 2010).

outset, to be expanded down to ward and shehia levels depending on the material resources mobilized.[33]

## VI. Prosecution-Led Investigation as a Best Practice

The introduction of prosecution-led investigation under the NPSA and the Office of the Director of Public Prosecutions Zanzibar, as discussed above, cannot in itself address all the challenges facing the law enforcement agencies involved in the administration of criminal justice. The state pillars[34] have recently ensured the country's legal and institutional frameworks of continued efforts to update the relevant laws in order to address the new horizons of crime and the means devised by criminals to fulfil their unlawful purposes. The formation of the Financial Intelligence Unit and National Task Force[35] for combating financial and other serious organized crimes in Tanzania Mainland and the amendments of the Evidence Act[36] and Anti-Money Laundering Act[37] and other penal legislation were intended to address the new challenges.

Prosecution-led investigation of high profile cases in Tanzania Mainland have throughout procured the involvement of most experienced prosecutors who coordinate, guide and advise on investigations. This includes the cases which were investigated by the National Task Force in relation to EPA[38], albino killings and money laundering cases, just to mention a few. Their complexes constrained the NPS to embark into a systematic capacity building programme arranged beforehand for her prosecutors. The training, which involved more than 250 attorneys, was on a wide range of emerging areas such as corruption, fraud, forensics, cyber crime, transnational and organized crime, money laundering, international cooperation, mutual legal assistance, and extradition, to mention just a few.[39]

Accessed from LHRC Constitutional Database

---

33 Whereas only 95 state attorneys were serving in the NPS by early January, 2008, the number had increased to 310 in early January, 2011. Such development has happened in Zanzibar where operational offices have been established in Pemba and a few other regions which initially depended on police prosecutors.

34 The Executive, the Judiciary and the Parliament.

35 Formed by investigative, intelligence and other security organs under the Tanzania Police Force. Other organs include the TPDF, Tanzania Prisons Service, NPS, Tanzania Intelligence and Security Service.

36 Cap. 6 R.E. 2002 [Through Written Laws (Miscellaneous Amendments) Act No 2 of 2007 and No.3 of 2011 courts now can admit electronic evidence and allow presentation of evidence through video conference and teleconference.]

37 No. 12 of 2006.

38 This refers to about Tsh. 133 billion that was fraudulently swindled from the Bank of Tanzania External Payment Arrears Account in 2005 and 2006.

39 Various partners such as DFID, Institute for Security Studies and Legal Sector Working Group have supported the NPS to conduct such mentoring programmes.

The application of the intelligence-led policing and prosecution-led investigation in these cases, a result of the current modern technological challenges, has demonstrated optimal achievements. Up to early February 2012, of the nine cases prosecuted by the NPS in the High Court of Tanzania concerning the albino killings, eight were finalized with conviction. That earned the NPS 89% success.[40] The five appeals that were already determined by the Court of Appeal against the Republic between June 2010 and February 2012 on albino killings were dismissed. That earned the NPS 100% success. Among the five appeals, the Court of Appeal of Tanzania in *Joseph Lugata v. the Republic*[41] and *Mboje Mawe and 3 Others v. the Republic*[42] for the first time gave decisions based on evidence of DeoxyriboNucleic Acid (DNA) profiling in criminal cases.

## VII. Conclusion

This paper has demonstrated that the decision by Tanzania to separate the investigative aspects of criminal justice from prosecution is advantageous. Tanzania has strengthened her legal and institutional frameworks and moved her criminal justice machinery closer to the people. It has introduced prosecution-led investigation to cope with intelligence-led investigation. The recent practice has proved beneficial to stakeholders whose common objective is to fight crime and create a safe and secure place for all mankind. However, the new practice has shown a need to mobilize more material resources for Tanzania to realize better results from robust prosecutions offices.

Accessed from LHRC Constitutional Database

[40] The cases are: 1. High Court Criminal Session Case No. 24/2009 *Republic v. Masumbuko Matata @ Madata & 2 Others*. All were convicted and they lost their appeal in the Court of Appeal. 2. High Court Criminal Session Case No. 26/2009 *Republic v. Joseph Lugata and Others*. All were convicted and they lost their appeal in the Court of Appeal. 3. High Court Criminal Session Case No. 25/2009 *Republic v. Mboje Mawe & 3 Others*. All were convicted and their appeal is still pending in the Court of Appeal of Tanzania. 4. High Court Criminal Session Case No. 42/2009 *Republic v. Kazimili Mashauri & Another*. The High Court (Mwanza) convicted the 1st accused and acquitted the 2nd accused. The 1st accused's appeal is still pending in the Court of Appeal. 5. High Court Criminal Session Case No. 23/2009 *Republic v. Masumbuko Madata @ Matata @ Sumbu, Charles Kalamuyi (Zungu) & Merdadi Maziku (Machunda) - Kahama*. They were convicted and their appeal is still pending in the Court of Appeal of Tanzania. 6. High Court Criminal Session Case No. … High Court of Tanzania (Tanga). Accused was convicted and sentenced to 7 years imprisonment for attempted murder. 7. High Court Criminal Session Case No.64/2008 *Republic v. Zacharia Petro*, the High Court of Tanzania (Bukoba). Accused was convicted and sentenced to 7 years imprisonment for attempted murder. 8. High Court Criminal Session Case No. 36/2009 *Republic v. George Joston*, the High Court (Bukoba) acquitted the accused of attempted murder. 9. High Court Criminal Session Case No. 22/2009 *Republic v. Mwigulu Madata @ Sabi & Another*, High Court (Tabora) sitting at Shinyanga. All accused were convicted of murder. Their appeal is still pending in the Court of Appeal of Tanzania.

[41] Criminal Appeal No. 317 0f 2009 [Unreported].

[42] Criminal Appeal No. 86 0f 2010 [Unreported].

Accessed from LHRC Constitutional Database

# FOREIGN INVESTORS AND PRIVATISATION IN TANZANIA

*Stella Nyagonchera Machoke*[1]

I. Introduction
II. The Main Arguments
III. Limitations
IV. Biwater v. Tanzania
  A. Background
  B. Donor Condition to Privatise the Water Sector in Tanzania
V. BITS and ICSID Arbitration
  A. Expropriation
  B. Expropriation v. Breach of Contract
  C. Investor Conduct
  D. Conclusion
VI. Assessment of Damages and Causation
  A. *Biwater v. Tanzania*: Causation
  B. Water Concessions
VII Privatisation
VIII. Overall Conclusion and Recommendations

Accessed from LHRC Constitutional Database

## I. Introduction

Privatisation of public services such as water and sanitation has led to several investment disputes. Most of these cases, largely from developing countries in Latin America and Africa,[2] have drawn the attention of the international community due to the issues arising being of public interest. This paper discusses the International Centre for Settlement of Investment Disputes (ICSID) award in a dispute on a water-privatisation project in the city of Dar es Salaam, the United Republic of Tanzania, that was unsuccessful as far as compensation for loss is concerned.[3]

Tanzania is among the 50 poorest countries in the world,[4] being among the Heavily Indebted Poor Countries (HIPC). In 2003 the country received funding from the World Bank to improve its water and sanitation sector on condition of privatising it. The scheme failed, leading to the collapse of Dar es

---

[1] State Attorney, Ministry of Constitutional Affairs and Justice, Dar es Salaam, Tanzania.

[2] For instance *Compañía de Aguas del Aconquija, S A and Vivendi Universal (France) v. Argentine Republic*, ICSID Case No ARB/97/3; *Aguas del Tunari S A (Spain) v. Republic of Bolivia*, ICSID Case No ARB/02/03; *Waste Management Inc(U S) v. Mexico*, ICSID Case No ARB(AF)/98/2.

[3] *Biwater Gauff (Tanzania) Ltd (U K) v. United Republic of Tanzania*, ICSID Case No ARB/05/22 (Award) (24 July 2008) [hereinafter *Biwater v Tanzania*].

[4] http://www.infoplease.com/ipa/A0908763.html

Salaam's water services, and the investor appealing to the International Centre for the Settlement of Investment Disputes (ICSID) for arbitration after its investment was expropriated by the state.

There has been some expression of lack of confidence in the World Bank because it has the mandate of promoting foreign investment while its subsidiary, the ICSID, is responsible for arbitration of investment disputes between Contracting States and nationals of other Contracting States in its affiliate. The headquarters of the World Bank in Washington DC also houses the ICSID.[5] This situation has raised concern about a conflict of interest for ICSID between the Bank's mandate and its own requirement for impartiality. The World Bank acts as a depository for the instruments of the Bank as stated under Article 73 of the Convention.[6] This is another aspect as to why the World Bank is seen to have a conflict of interest with ICSID.

This paper examines private foreign investment, privatisation and the ICSID award on *Biwater v Tanzania* as a case study.

Accessed from LHRC Constitutional Database

## II. The Main Arguments

The ICSID Tribunal in *Biwater v. Tanzania* held that Tanzania had violated Article 2(2) and Article 5(1) of the Bilateral Investment Treaty (BIT) between the United Kingdom and Tanzania by expropriating the property of the claimant. Compensation was not, however, awarded to the claimant on the grounds that the claimant had not made any profits, and the value of the investment was zero, at the date of the expropriation.[7] Apart from the decision on the violation of the BIT, the case has raised issues around privatisation of public sector institutions as a condition for funding. This paper discusses whether water can be treated as a commodity. The decision of the Tribunal in *Biwater v Tanzania* did not consider the human right to water, but dealt only with the investment and expropriation issues raised by the claimant. The main foucs of this paper is on the consequences of private investment in public services, using *Biwater v. Tanzania* as a case study.

## III. Limitations

This paper is not intended to be comprehensive on the issue of jurisdiction of the ICSID and its transparency in involving third parties. Jurisdiction is only briefly stated for the purpose of defining the term 'investment' under the ICSID Convention, which is regarded as a multilateral agreement. This paper does not address issues related to the direct application of international human rights law

---

5 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18 1965 [ICSID Convention], Arts 1 and 2.

6 Ibid, Article 73.

7 *Biwater v. Tanzania (supra)*, para 801.

to business. It relies upon the decision of the ICSID Tribunal in *Biwater v. Tanzania.*

## IV. Biwater v. Tanzania

### *A. Background*

*Biwater v. Tanzania* was an investment dispute between a British project company, held jointly by a British and a German company, and the Republic of Tanzania over a concession to operate the water and sewerage services of Tanzania's city of Dar es Salaam. Tanzania's water situation was said by the World Bank to be "precarious," as water was not equally available in all regions of the country, and the tariffs charged to users of water were too low to fund capital expenditure.[8] The sewerage condition was said to be even worse.[9] Privatisation of the water sector in Tanzania led to the dispute between Biwater Gauff (Tanzania) Limited, the claimant, and the United Republic of Tanzania, the respondent. BGT claimed expropriation, unfair and inequitable treatment, unreasonable and discriminatory measures, and lack of full protection and security.[10] Tanzania had seized City Water's offices and assets, deported City Water staff, withdrawn BGT's VAT exemption and publicly repudiated the lease contract. On reaching its decision the Tribunal found that Tanzania had violated the Tanzania-UK BIT but would not award damages as BGT's investment at the time of expropriation was zero.

### *B. Donor Condition to Privatise the Water Sector in Tanzania*

In 2003 Tanzania was awarded by the World Bank, African Development Bank and European Investment Bank funding to the amount of USD140,000,000 for the purpose of repairing, upgrading and expanding the Dar es Salaam water and sewerage infrastructure.[11] The bank funding came with the condition that Tanzania had to privatise its water sector and appoint a private operating company to manage, conduct some of the works,[12] and operate the water and sewerage systems.[13] The total cost of the Project was USD 164,600,000. The shortfall was therefore to be funded jointly by Tanzania and the private operating company.

---

[8] Ibid., paras 96, 149.

[9] Ibid.

[10] Ibid, para 814. The Award shows that Tanzania violated The UK-Tanzania BIT on Fair and Equitable treatment standard in Article 2(2) of the BIT; unreasonable and discriminatory conduct under Article 2 (2); and expropriation under Article 5 of the BIT.

[11] Ibid., para 102.

[12] Ibid, para 112.

[13] Ibid., para 96.

Accessed from LHRC Constitutional Database

In order to fulfil this condition, in July 2002 a bidding process was launched by Tanzania to find a private operator of water and sewerage services. There were three pre-qualified bidders. The joint venture of Biwater International Limited (Biwater), a British corporation, and the German HP Gauff Ingenieure GmbH and C KG-JBG (Gauff) became the preferred bidder, and won the concession for the water and sanitation sector for Dar es Salaam city for a period of ten years.[14] Super Doll Trailer Company (T) Limited (STM) was the minor shareholder, and the operating company known as City Water Services Limited (City Water),[15] was incorporated on 17 December 2002.[16] For the purpose of the investment, on 8 January 2003 Biwater and Gauff incorporated jointly Biwater Gauff (Tanzania) (BGT) as a British corporation.[17]

## V. BITS and ICSID Arbitration

### *A. Expropriation*

Accessed from LHRC Constitutional Database

After the failure of Tanzania to abide by the lease contract and BGT's failure to deliver services under the operating company City Water, two disputes were raised by BGT. First, BGT sued Tanzania in the UK under the United Nations Commission on International Trade Law Rules (UNCITRAL) on the grounds that Tanzania had violated the terms of its contract with BGT.[18] The second claim was filed at the World Bank-administered ICSID Tribunal, where BGT relied on the terms of a Tanzania-UK BIT. The ICSID Tribunal held that Tanzania had committed an indirect expropriation of BGT's investment through a sequence of several actions.[19] In the course of exercising its sovereign authority Tanzania violated its treaty obligations by openly repudiating the legal contract with BGT instead of following the contractually prescribed course for termination of the Project Contracts. A legal expropriation must be for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and against compensation.[20]

The sovereign wresting of control of property by States is not, however, an automatic justification for compensation. The owner, or in this case the investor, must show that there has been deprivation of fundamental rights of

---

[14] Ibid., paras 112, 119, the other two pre-qualified bidders were Générale des Eaux (France) and Saur International (France).

[15] Ibid, paras 5, 120, 121. Under Tanzanian laws a minimum of 20 per cent of the shares in the operating company were to be held by a local Tanzanian company.

[16] Ibid., para 119.

[17] Ibid, para 120.

[18] http://www.wdm.org.uk/resources/briefings/water/greatexpectations25072008.pdf , also see *Biwater v Tanzania*, above n 2, paras 476-478.

[19] *Biwater v. Tanzania*, op. cit., paras 455, 456, 491-518, 519.

[20] Ibid, para 394; Tanzania-UK BIT Article 5 (1); United Nations General Assembly resolution 1803 (XVII) of 14th December, 1962 "Permanent Sovereignty over Natural Resources."

ownership and that the deprivation is not short-lived, thus making the interest of the State less important than the measures and the impact it has had on the investor.[21] In *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*,[22] the ICSID Tribunal held that the investor must be deprived of control of the investment including its everyday management, suffer interference of administration, and be deprived of its property and/or control in whole or in part. [23]

On 17th May, 2005, the Minister of Water in Tanzania publicly declared that City Water's operations and staff were under the management of DAWASA and DAWASCO.[24] This meant occupation of the claimant's facilities and change of management control.[25] City Water managers were apprehended and deported under instructions from the respondent.[26]

The claimant submitted to the Tribunal that the interest of BGT in the Lease Contract constituted an asset, and thus an investment under the BIT. BGT's submission that an asset is an investment is supported in other BITs, for example the Germany-Guyana BIT which defines an investment as including every kind of asset.[27] In *Wena Hotels Ltd v. Arab Republic of Egypt* the Tribunal held that "[i]t is also well established that an expropriation is not limited to tangible property rights."[28] The North American Free Trade Agreement (NAFTA) arbitral Tribunal's position is that "the restrictive notion of property as a material "thing" is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing."[29]

BGT's investment was expropriated by measures taken by Tanzania when the Lease Contract was repudiated.[30] It was also the claimant's position that the respondent had instructed the Tanzania Revenue Authority (TRA) to cancel City Water's Value Added Tax (VAT) relief on purchases.[31]

Accessed from LHRC Constitutional Database

---

[21] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the Government of the Republic of Iran* (1984) 6 Iran-US C T R 219.

[22] *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey,* ICSID Case No ARB/02/5, Award of 19th January, 2007, [hereinafter, *PSEG Global Inc v. Turkey*].

[23] Ibid, para 278.

[24] *Biwater v. Tanzania,* op. cit. para 409.

[25] Ibid, paras 408-410.

[26] Ibid., para 421.

[27] Germany-Guyana BIT, 1989, Article 1.

[28] *Wena Hotels Ltd v. Arab Republic of Egypt*, Award, 8th December, 2000, 6 ICSID Reports 68, para 98.

[29] *Methanex v. United States of America*, North American Free Trade Agreement (NAFTA) Arbitral Tribunal, Final Award on Jurisdiction and Merits, 3 August 2005, IV D para 17.

[30] *Biwater v Tanzania,* op. cit para 399.

[31] Ibid, paras 407,418.

### *B. Expropriation v. Breach of Contract*

Under the International Law Commission (ILC) Articles on State responsibility, breach of contract by itself does not create a responsibility on the part of a state under international law unless there is a further breach, for instance a denial of justice by the courts of the national jurisdiction of a given State to the other contracting party.[32] *Waste Management, Inc v. United Mexican States* found that:[33]

> [t]he mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts.

The difference between ordinary breach of contract and expropriation of contract rights is described in the *Jalapa Railroad* case, where it was held that:[34]

> In the circumstances, the issue for determination is whether the breach of contract alleged to have resulted from the nullification of clause twelve of the contract was an ordinary one involving no international responsibility or whether said breach was effected arbitrarily by means of a governmental power illegal under international law. The 1931 decree of the same Legislature, was clearly not an ordinary breach of contract. Here the Government of Veracruz stepped out of the role of contracting party and sought to escape vital obligations under its contract by exercising its superior governmental power. Such action under international law has been held to be a confiscatory breach of contract.

In *Impregilo SPA v. Pakistan*, the Tribunal held that:[35]

> [i]n order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority

---

[32] Crawford Special Rapporteur *Responsibility of States for Internationally Wrongful Acts:Text and Draft Articles with Commentaries thereto* in Report of the International Law Commission of its fifty-third session (23 April-1 June and 2 July- 10 August 2001), Official Records of the General Assembly Fifty-sixth Session, Supplement No 10 UN Doc A/54/10.

[33] *Waste Management, Inc* v. *United Mexican States*, ICSID Case No ARB (AF)/00/3, Award, 30 April 2004, para 174.

[34] *Jalapa Railroad and Power Company*, American-Mexican Claims Commission, 1948.

[35] *Impregilo SPA v. Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005 para. 260.

Accessed from LHRC Constitutional Database

> ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT.

In *Biwater v. Tanzania* the arbitral Tribunal was of the view that, since the Republic of Tanzania was also a shareholder in DAWASA, then the claimant should have expected that it could expropriate as a private shareholder and not necessarily using its powers as a government.[36] The Tribunal further distinguished the intervention by Tanzania by the characterization of some of its acts as using its governmental authority and public prerogatives. The character of these acts was not that of a private shareholder.[37] The Tribunal's decision held that the conduct of the respondent in terms of the cumulative effect of a series of individual and connected acts amounted to creeping expropriation.[38]

### *C. Investor Conduct*

The part an investor plays during a concession period, or any other time of investment, is important in the event the investor brings a claim before an arbitral tribunal in which damages is one of the matters. Recent arbitral decisions have examined the conduct of investors in rejecting their claims or limiting the responsibility of host States.[39]

Investors must refrain from unconscionable conduct. Claims brought to an arbitral tribunal by investors, therefore, will include the behaviour of the claimant as a matter of interest to the host State,[40] especially when public services like water are concerned. In *Azinian v Mexico,* for instance, it was also held that:[41]

> It is a fact of life everywhere that individuals may be disappointed in their dealings with national authorities and disappointed yet again when national courts reject their complaints... NAFTA was not intended to provide investors with blanket protection from this kind of disappointment and nothing in its terms provides so.

Accessed from LHRC Constitutional Database

[36] *Biwater v. Tanzania,* op. cit, paras 460-465.

[37] Ibid, paras 451-460.

[38] *Biwater v. Tanzania,* op. cit., paras 541-456.

[39] MUCHLINSKI, Peter, *"Caveat Investor?" The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard* (Paper Presented at the British Institute of International and Comparative Law Investment Treaty Forum Seminar, London, 9th September, 2005), p. 4.

[40] Ibid, 8.

[41] *Robert Azinian et al v. United Mexican States*, ICSID Case No ARB(AF)/97/2, Final Award, 1st November, 1999, para 83.

Accessed from LHRC Constitutional Database

Muchlinski states that conduct of the investor can be used to outweigh conduct of the host State in determining the wrongful act.[42] In the *Biwater v Tanzania* dispute the claimant, among other things, submitted a very low bid, possibly expecting to renegotiate in the future. The poor business decision making and mismanagement was partially responsible for BGT investment being worthless at the time Tanzania violated the BIT, which resulted in no damages being awarded for the respondent's illegal act.

Investment agreements are not insurance policies against business gone bad or mismanagement. The investor is supposed to be aware of the risks involved[43] and is responsible for its actions during the entire investment period.[44] In bringing a claim for compensation, however, BGT was seeking redress for loss incurred due to its own mismanagement by claiming that Tanzania was responsible for its loss by expropriating the claimant's investment. The Tribunal saw through this ruse and refused to award damages, thereby holding BGT responsible for its own actions.

### *D. Conclusion*

The Tribunal decided that the Republic of Tanzania, as a State and not a contractual party, had expropriated BGT's investment as embodied in the Lease Contract. At the time of the expropriation, however, the termination of the Lease Contract was inevitable because loss had already been caused by BGT, and damages had already been caused by the claimant. Thus, no monetary value was attached to the expropriated investment.[45] The respondent had called in the performance bond, cancelled the VAT waiver, and deported City Water's expatriate staff. In the Tribunal's opinion, the cumulative effect of the series of acts amounted to an unlawful expropriation of BGT's rights in the Lease Contract and in the project by the Republic because BGT's rights, although due to expire a short time thereafter under the contract's notices of termination, were still legally valid.[46]

## VI. Assessment of Damages and Causation

The debate between the majority and the dissenting opinion in *Biwater v. Tanzania* on the assessment of damages is based on the formulation of damages

---

[42] MUCHLINSKI, Peter, *"Caveat Investor?" The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard,* op. cit., p., 15.

[43] *Maffezini v. Spain*, Case No ARB/97/7, Award of 13 November 2000, 16 ICSID Rev-FILJ 248 (2001), para 64; discussed in MUCHLINSKI, Peter, *"Caveat Investor?" The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard,* op. cit., at p. 19.

[44] *Methanex Corporation v. United States of America*, Under Chapter 11 of NAFTA and UNCITRAL Rules, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae*, 15th January, 2001, Part IV ch D, para 9-10.

[45] *Ibid*, para 485.

[46] *Biwater v. Tanzania*, op. cit., paras 516-518.

as far as the test of causation is concerned.[47] In *Judicial Remedies in International Law*[48] Gray states that in the history of arbitral practice in international law, arbitrators have discretion as far as quantification of damages is concerned.[49] The measures on damages depend on the degree of "the fault of the tortfeasor, by statutory limits on liability and by special rules of assessment for the different areas of liability."[50] This reasoning concurs with the opinion of the *Biwater* majority as they considered the faults of the parties in the dispute and concluded that the claimant had already caused economic loss to its own investment and, by the time the Republic of Tanzania terminated the lease contract, there was no economic value to the investment.[51] It is further stated that; "the question of damages concerns the extent and measurement of liability."[52] Gray asserts that the power and the mandate of a tribunal in awarding remedies affect the amount of damages awarded to the claimant.[53] The concept of full compensation raises questions such as:[54]

- For which consequences of an unlawful act should the claimant be compensated?
- On whose injury is the amount of damages based?
- For whose act are damages given?

In the case of *Biwater v. Tanzania*, the response to the first and the third questions is that the claimant sought compensation for the unlawful acts of the Republic of Tanzania.

Second, the amount of damages is based on the injury suffered by the claimant which the tribunal held was zero at the time of expropriation. The majority accepted that the respondent did violate the UK-Tanzania BIT, but there was no harm or injury caused to the claimant.[55] The Tribunal further stated that the interference of the claimant's rights was not to be quantified in financial terms.

Gray and Muchlinski seem to have the same view on the role of a claimant before an arbitral tribunal, assessment of damages, and the role of the claimant in causing loss. Gray states that claimants "should not act unreasonably and unnecessarily" to increase the extent of loss suffered. Otherwise, there is no

[47] Ibid., para 784.

[48] GRAY, Christine, *Judicial Remedies in International Law,* New York: Oxford University Press, 1987, pp. 23 and 10.

[49] Ibid.

[50] Ibid., p. 10.

[51] *Biwater v. Tanzania,* op. cit., paras 201-228, 446, 448, 461,464-467.

[52] GRAY, Christine, *Judicial Remedies in International Law,* op. cit.

[53] Ibid, pp. 11-12.

[54] Ibid., pp. 18-19.

[55] *Biwater v. Tanzania*, op. cit., paras 464, 465.

Accessed from LHRC Constitutional Database

option but to settle for less compensation.[56] As for the part of the claimant, BGT, its acts did lead to total loss of compensation as there was no economic value in what was left of City Water. Muchlinski has similarly shown that investors need to be very cautious in their investments because arbitral decisions show that BITs cannot be used in order to benefit from bad business decisions or mismanagement.[57]

### A. *Biwater v. Tanzania*: *Causation*

The Tribunal stated that there is a requirement for a causal link to loss sustained by the claimant in order for compensation to be made.[58] A distinction was made between causation and damages, and the Tribunal held that the respondent had caused injury to City Water but that there was no evidence to prove that there was any monetary value associated with the injury suffered. Consequently the Tribunal stated that the monetary value of the injury to the claimant was zero.[59] The Tribunal was of the opinion that "taking" is not necessarily an ingredient for cause of action of the unlawful act, but rather it should be considered in context when the claim for compensation is made.[60] The finding by the majority was that it was important to emphasize that it was insufficient merely to show a "taking", or unfair or inequitable conduct. There must have been an injury caused to ground a claim for compensation.[61]

#### *(i) Majority Decision*

The majority of the Tribunal, Bernard Hanotiau and Toby Landau, agreed that Tanzania's acts constituted expropriation of BGT's investment. Tanzania had breached its treaty obligations, but the claimant had failed to establish a causal link between the breach and the decrease in value of the investment. The majority found that Tanzania's actions were neither the proximate cause nor the cause in fact of City Water's economic failure, and that all of the compensable damage to BGT's investment had occurred prior to Tanzania's violations of the BIT, which occurred between 13 May 2005 and 1 June 2005.[62] The Tribunal proceeded to demonstrate that, at the time Tanzania committed the acts in violation of the BIT, City Water was already worth nothing due to BGT's

Accessed from LHRC Constitutional Database

[56] GRAY, Christine, *Judicial Remedies in International Law,* op. cit, p. 24.

[57] See MUCHLINSKI, Peter, *"Caveat Investor?" The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard,* op. cit.; and *Mafezzini v. Spain,* op. cit.

[58] *Biwater v. Tanzania,* op. cit., para 779.

[59] Ibid, para 801.

[60] Ibid., para 781.

[61] Ibid, para 804.

[62] Ibid., para 798.

mismanagement.[63] Causal link between the respondent's wrongful act and the injury suffered by the claimant is paramount in awarding damages for loss.

*(ii) Dissenting Opinion*

Gary Born disagreed with the Tribunal majority's conclusion that BGT had failed to establish a causal link between Tanzania's actions and BGT's injury.[64] It is the opinion of the dissenting arbitrator that the respondent did cause injury to BGT.[65] According to Born's partial dissent, since BGT had made a broad plea for relief, it had requested legal redress for all types of injury recognized under the BIT.[66] Thus, the violation of the BIT by Tanzania did amount to compensable injury to the claimant, and there was a causal link between act and injury.[67] One of the ways Tanzania had injured the claimant was by depriving it of the enjoyment of its investment before the contractually determined termination of the Project Contracts.[68] The acts of expropriation and unfair and inequitable treatment and other wrongful acts by the respondent were legally cognisable injuries under the Treaty.[69] Mr Born concurred, however, in the decision that the claimant should receive no compensation on the ground of failure by BGT to demonstrate compensable and quantifiable monetary damages or loss.[70]

It is stated in the dissenting opinion that it is not acceptable to separate the concepts of the unlawful conduct and injury: the "wrongful seizure clearly caused injury to City Water by depriving it prematurely of the use and enjoyment of its property." While, according to the majority, Tanzania's conduct did not cause any injury, notwithstanding its unlawful nature,[71] according to the dissenting opinion the appropriate focus with respect to causation was the quantum of damage attributable to the injury that the Republic caused to BGT rather than establishment of injury per se.[72]

***B. Water Concessions***

Cossy states that in a concession, investors control investments under licence or contract while having special rights to operate an investment in a given

---

63 Ibid., paras 464,486,518,797,798,801,806.

64 *Biwater Gauff (Tanzania) Ltd (U K) v. United Republic of Tanzania*, ICSID Case No ARB/05/22 (Concurring and Dissenting Opinion) (18th July, 2008) hereinafter referred to as *Biwater v. Tanzania* Dissent, paras 15, 16, 17.

65 Ibid., para 17

66 Ibid.

67 Ibid.

68 Ibid., para 17.

69 Ibid.

70 Ibid., paras 17, 19, 22.

71 *Biwater v. Tanzania,* op. cit., para 803.

72 *Biwater v. Tanzania* Dissent, op. cit., para 18.

Accessed from LHRC Constitutional Database

jurisdiction for a given period. In water concessions there are also responsibilities for investors, for example maintenance and improvement of the water facilities. She states that in concession contracts "[t]here is no purchase of a service from the government; on the contrary, the authorities generally levy a fee on the concessionaire in exchange for the right granted by the concession."[73] Water concessions give investors rights to supply water and sewerage on behalf of the government or public corporation, while the profits yielded from charging the recipients ideally means returns to the government and investors. For most developing nations, however, this has not proved to be the case.

There are also management contracts, which provide the investor or other private entities with limited responsibilities, for example the fixing of leaks, meter reading and billing or laboratory services.[74]

BITs and concessions are therefore important for both the investor and the general public as they include guidelines under which claims can be brought under national and international law. Investors, however, require guidelines as well as protections, as water is a necessity in life and not simply a commodity.

Water, food, clothing and shelter fall under the same category of basic human needs but, in recent years, free water has been advocated for whereas food and clothing are generally considered commodities. Private investment in water is not a well-received idea among many nations and human rights activists for this reason.

## VII Privatisation

Reasons for privatisation vary, especially between developed and developing countries. Cossy states that reasons for privatisation are stringent public budgets, increases in the demand for water and sanitation services, and the requirement for efficiency in technology in responding to strict environmental regulations.[75]

In most developing nations, however, pressure from donor institutions is the main reason for privatisation of public utilities in particular. In order to get funds or debt relief, poor nations have no option but to submit to the conditions imposed by the lenders.

The International Financing Institutions (IFIs), like the Word Bank and the International Monetary Fund (IMF), are regarded as having been the force behind privatisation in developing countries, as in Tanzania where funding for water services was conditional on privatisation. Developed nations enjoy more liberal terms. Section 220 of the European Commission Treaty, as discussed by Leigh Hancher, provides for treaty rules to remain neutral when it comes to

[73] COSSY, Mireille, "Water Services at the WTO," in BROWN, Edith *et al* (eds.), *Fresh Water and International Economic Law,* Oxford: Oxford University Press, 2005, pp. 117 and 130.

[74] Ibid.

[75] Ibid., p. 117.

Accessed from LHRC Constitutional Database

national systems of property rights.[76] Thus European nations are not under pressure from monetary institutions to transfer their public sectors into the hands of investors.[77]

Privatisation can be viewed from two perspectives. A narrow definition means the switch of ownership of services from the public to the private sector. Seen from a wider perspective, however, privatisation could be regarded as eliminating public monopolies and inviting competition in providing services to the people by including the private sector.[78] Because the private sector is motivated by market forces, it can be seen to be meeting the expectations of those who require the services. Conversely, however, investors are normally regarded as more interested in gaining profit than providing a reliable, cost-effective service.

According to McCaffrey, the world at large, including the United Nations (UN), has an interest in the privatisation of water. Under the Economic Social and Cultural (ESC) Committee, the human right to water is not threatened by privatisation because privatisation does not necessarily mean that the right to water is being violated. In 1989 the British government, for instance, privatised its water and sewerage utilities while retaining ownership of the infrastructure.[79] In England and Wales both the utility and infrastructure are fully privatised with the government holding the power of regulation.[80] The privatisation of public utilities like water is not necessarily absolute, therefore, because investors do not always have full mandate over privatised water systems. Governments can continue to hold regulatory authority and control.

There are two main types of private sector participation in water supply and sanitation, sometimes known as the French Model and the British Model. The French Model is preferred due to the fact that states get the power to "retain the ownership of the facility and contract out certain tasks to a private company." The French Model is also known as Public-Private Partnerships (PPPs).[81]

In the French Model, the assets are publicly owned, whereas under the British model, assets of the project and the operation of the assets are fully privatised,. The British model is said to be practised mainly in England and

Accessed from LHRC Constitutional Database

---

[76] HANCHER, Leigh, "Privatisation of Drinking Water in Europe," in BRANS, Edward H. P. et al (eds.), *The Scarcity of Water: Extending Legal and Policy Responses,* London: Kluwer Law International, 1997, pp. 277, 279.

[77] Ibid., p. 279.

[78] TUERK, Elisabeth et al, "GATS and its Impact on Private Sector Participation in Water Services," in BROWN, Edith *et al* (eds.), *Fresh Water and International Economic Law,* op. cit., p. 143 at 150.

[79] McCAFFREY, Stephen C., "The Human Right to Water" BROWN, Edith *et al* (eds.), *Fresh Water and International Economic Law,* op. cit., p. 93 at pp. 96-97.

[80] http://www.enviromentprobe.org/EnviroProbe/Pubs/ev542.html.

[81] COSSY, Mireille, "Water Services at the WTO," op. cit., p. 129.

Wales though the system is still public in Scotland and Northern Ireland.[82] The French Model is regarded as the most common one as assets are kept public and service operations are privatised.[83]

There are three major types of privatisation in the French Model. First there is the management contract, where the private operating company is responsible only for running the system, in exchange for a fee. Secondly there is the Lease Contract, whereby assets are leased to the private operating company. Thirdly there is concession, under which the private operating company operates the whole system, including planning and financing investment.[84] Concession contracts go on for 10 years or more. Tanzania followed the French Model in privatising its water sector while Chile followed the British Model.

Smets[85] shows that the right to water does not mean that water must be free, and that there is "no direct relation with the type of management of water utilities."

In my opinion, however, the right to water has a very close relationship to the type of management attributed to it. Most developing countries which have undergone privatisation of their water sector have, like Tanzania, been left with little or no control under the conditions imposed by the lending institutions. Tanzania discovered that it was caught in a conflict of interest between the agreements they had entered into for the protection of private investments and their obligation to the people of making sure fresh water is supplied to them. Further, the regulatory measures found in BITs and concessions aim to protect investors against the risks involved in doing business in unstable political climates, mostly found in developing countries.

Some of the water projects in developing nations are by nature very demanding; if due diligence is not undertaken by the investor, as was the case with BGT, the investment is likely to fail and lose its value. The ICSID decision in *Biwater v. Tanzania* not to award damages to the claimant even though the respondent was in breach of the UK-Tanzania BIT was because the investment was already worthless before the breach occurred.[86] This should encourage potential investors to commission a fully-researched survey before investing in a nation. Even though BITs aim to ameliorate the risks for investors, the *Biwater* decision shows that they are not shields or insurance policies against bad business decisions.

Accessed from LHRC Constitutional Database

---

82 LOBINA, Emanuele and David Hall, *UK Water Privatisation - a briefing,* London: Public Services International Research Unit, 2001) at http://www.cela.ca/files/uploads/UKWater.pdf.

83 COSSY, Mireille, "Water Services at the WTO," op. cit., p. 134.

84 COSSY, Mireille, "Water Services at the WTO," op. cit., pp. 129-134

85 SMETS, Henri, "Economics of Water Services and the Right to Water," in BROWN, Edith *et al* (eds.), *Fresh Water and International Economic Law,* op. cit., pp. 174, 174-180, 179-181.

86 *Biwater v. Tanzania*, op. cit, paras 446, 448, 461, 465, 798, 799, 801.

While investors need to be very mindful of the risks involved, especially in poor and developing nations, public interest is also a much larger issue in developing nations than developed. As was held in *Methanex v USA*,[87] there are substantive issues extending far beyond those of interest in arbitral disputes. Private management of water provision is risky not only for the investor, but also for the customer. If the company fails, as it did in Tanzania, it is the people who are denied their right to water. In Tanzania's case it was the IFIs' condition that a private operating company should govern the water and sanitation project in Dar es Salaam.

## VIII. Overall Conclusion and Recommendations

Water supply and sanitation is both a human right and subject to private investment. Promotion of foreign investment through privatisation under the World Bank is the main element of its development strategies, and is an economic activity. As such, foreign investment has a direct bearing on the economic and social welfare of both the investor and the people in which the investment is made.

The World Bank lends funds to developing countries to improve services on condition of privatisation. The investor in Tanzania, BGT, rushed into the investment opportunity provided by the World Bank without researching the requirements of the project with the result that their expectations were unrealistic. Tanzania found itself caught between its moral and legal obligation to its people and the legal protection of the investor in the BIT to which it was a party. As a consequence of BGT's mismanagement, Tanzania expropriated its property and detained and deported its staff. BGT then brought a claim before the ICSID tribunal.

The decision of the tribunal is clear on one thing - BITs are not meant to be an insurance policy against investors' miscalculations and/or fiscal mismanagement. The Tribunal found that BGT had acted in such a way that its investment was worthless at the time Tanzania expropriated it and therefore, while Tanzania was in breach of international law, neither declaratory relief nor compensation would be granted BGT.

IFIs should seriously consider the individual circumstances of the countries requesting funds, and tailor their conditions to accommodate the reality of the state in question. Privatisation is clearly not a guarantee of success for infrastructure projects, especially in poor countries where unstable economic and political systems make conditions increasingly difficult. Flexibility in lending conditions would increase the chances for success and reduce the number of disputes coming before arbitral tribunals.

---

[87] *Methanex Corporation v. United States of America*, op. cit., para 49.

Accessed from LHRC Constitutional Database

The water and sanitation service in the Dar es Salaam city and in Tanzania as a whole is still a problem. The expropriation of the invsestment from the claimant has not made much of a difference to the daily taxpayer and there are a lot of isues from the social to the political levels. *Biwater v. Tanzania* should really open the eyes of investors expecting to get huge profits from projects wich even the state itself is having problems to deal with.

Accessed from LHRC Constitutional Database

# SOCIAL SCURITY FOR THE EXCLUDED IN THE UNITED REPUBLIC OF TANZANIA: LEGISLATIVE AND NEW POLICY DIRECTIONS

*Tulia Ackson*[1]

I. Introduction
II. The Excluded in Tanzania
III. Options for Covering the Excluded
A. Extending Coverage of the Existing Social Security Schemes
B. Establishing Special Departments under the Current Social Security Schemes
C. Establishing Specialised Schemes for the Excluded
IV. Conclusion

Accessed from LHRC Constitutional Database

## I. Introduction

Tanzania's Development Vision 2025 and Zanzibar Vision 2020 aim to achieve quality and good life for all, good governance and the rule of law, and to build a strong and resilient economy.[2] To this end, the Government of Tanzania in 2005 adopted the National Strategy for Growth and Reduction of Poverty (NSGRP) of 2005-2010 (for Tanzania Mainland) and Zanzibar Strategy for Growth and Reduction of Poverty (ZSGRP) of 2005-2010. The strategies aim, among other things, to ensure growth and reduction of income poverty and enhancement of quality of life and social wellbeing. The NSGRP and ZSGRP endeavor to curb the alarming income poverty, underemployment and unemployment.[3]

Irrespective of the well framed policy objectives, poverty is still endemic in Tanzania.[4] It is this state of affairs which prompts consideration of alternative solutions to the plight of the poor. Such alternatives include the extension of social security provisioning to the excluded majority who, as the said policies state, are the elderly, the unemployed, the underemployed and those working in the informal sector; these are excluded from social protection and are therefore

---

[1] Senior Lecturer in Law, School of Law, University of Dar es Salaam, Tanzania.

[2] United Republic of Tanzania, *National Development Vision 2025,* available at www.tanzania.go.tz/vision.htm accessed on 8 January 2012 and the Revolutionary Government of Zanzibar, *Zanzibar Vision 2020,* available at http://www.tzdpg.or.tz/uploads/media/Zanzibar_Vision_2020.pdf.

[3] United Republic of Tanzania, *National Strategy for Growth and Reduction of Poverty of 2005-2010,* The NSGRP was reviewed and the NSGRP II 2010/11 – 2014/15 was adopted. Similarly Zanzibar reviewed its ZSGRP 2005 – 2010 and saw the adoption of ZSGRP 2011 – 2015.

[4] ILO, *Global Extension of Social Security, available at* http://www.ilo.org/gimi/gess/ShowCountryProfile.do?cid=215&aid=2 accessed on 8 June 2010. Social security coverage for both Tanzania Mainland and Zanzibar is approximately 3.4% of the population (3.3% for Tanzania Mainland and 6.6% for Zanzibar).

poor.[5] This is in line with the National Social Security Policy of 2003 which acknowledges the fact that many Tanzanians are excluded from the ambit of existing social security provisioning and are therefore threatened by abject poverty. In fact, poverty is a threat to even the few - about 6 percent of the labour force -, who are covered by the existing social security schemes as the benefits offered are too little to relieve them from want and destitution when they face social risks.[6]

As such, this paper argues that extension of social security coverage to the excluded majority is one of the options which should be considered if the fight against poverty is to succeed in Tanzania. The chapter therefore discusses the alternatives for extending coverage to the excluded specifying those working in the informal sector with limited reference to other excluded categories such as the elderly and the unemployed.

## II. The Excluded in Tanzania

Accessed from LHRC Constitutional Database

As earlier indicated, social security institutions in Tanzania cover about 6 percent of the total labour force which currently stands at about 21 million out of the total population of about 42 million.[7] As such, the majority of the working people are not covered by the existing social security schemes let alone the other vulnerable groups such as the elderly and the disabled. This is caused by factors such as the restrictive legislation defining the personal scope of coverage for each of the social security schemes in Tanzania.

To begin with, the Defense Forces Scheme, established under the Defense Forces (Service Pensions and Gratuities) Regulations of 1966, covers only army men and women. All civilians working in the army are covered by the relevant schemes which cover civilians such as the NSSF and ZSSF.[8]

The National Social Security Fund (NSSF), which is established under the *National Social Security Fund Act* of 1997, covers employees in the private sector, government ministries and departments employing non-pensionable employees, parastatal organizations employing non-pensionable employees, and

---

[5] United Republic of Tanzania, *National Strategy for Growth and Reduction of Poverty of 2005-2010,* at p. 16. It should be noted, however, that Section 19 of Act No. 2 of 2005 of the laws of Zanzibar categorically states that the self employed may join ZSSF after fulfilling the criteria set by the Board and after approval by the Minister responsible for finance matters.

[6] See Para 3.4 of the National Social Security Policy of 2003. Although the said Policy is for Tanzania Mainland, the same issues exist in Zanzibar.

[7] CIA WORLD FACTBOOK, available at http://www.theodora.com/wfbcurrent/tanzania/tanzania_people.html accessed on 8 June 2010. See also World Bank, *World Development Indicators*, 2010, available at http://www.google.com/publicdata accessed on 8th June, 2010.

[8] Other laws governing provision of social security in the Army include the Defense Forces (Short Service Commissioned Officers) (Service Pensions and Gratuities) Regulations of 1968 (Regulation 20 of GN No. 52 of 1968).

ministers of religion, the self-employed, or any other employed person not covered by any other social security scheme. Temporary employees and the majority of those in the informal sector are excluded.[9] However, Section 8(1) of the *National Social Security Fund Act* of 1997 empowers the Minister to declare any category of temporary employees as registrable under the NSSF. Also, the NSSF, although minimally, has been registering informal sector workers who apply to join the scheme.[10]

The *Parastatal Pensions Act* of 1978 establishes the Parastatal Pensions Fund (PPF) and covers employees in all parastatal organizations and public institutions. It also covers all private companies in which the government owns shares, private companies that are not covered by any other social security fund and all parastatal organizations that have been restructured through privatization, sale, or liquidation. Additionally, non-pensionable employees in the parastatal organizations are also covered by the PPF.[11]

The *Public Service Retirement Benefits Act* of 1999 establishes the Public Service Pensions Fund (PSPF) which caters for permanent and pensionable employees in the central government and executive agencies.[12] The statute categorically excludes all employees in the central government who are non-pensionable and employed on contractual terms.[13] Those excluded, as earlier indicated, are covered by the NSSF.

Similarly, the National Health Insurance Fund (NHIF), established under the *National Health Insurance Fund Act* of 1999, covers civil servants, employees in executive agencies and government parastatals.[14] The law excludes employees in local government, the defense forces, the police and prisons, and those covered by the NSSF.[15]

The fifth equally restricted membership scheme is the Political Service Retirement Benefits Scheme (PSRB) which is established by the *Political Service Retirement Benefits Act* of 1999. PSRB, as the name suggests, covers specified political leaders including the President, Vice President, Prime

Accessed from LHRC Constitutional Database

---

[9] See Section 8 of Act No. 28 of 1997. For more details see ACKSON, T. and Rutinwa, B. R., Volume 5 *International Encyclopaedia of Laws, Social Security Law*, Supplement 72 Council of Europe and Tanzania, 2010 and ACKSON, T., *Social Security Law and Policy Reform in Tanzania with Reflections from the South African Experience,* Saarbrücken, Germany: LAP Lambert Academic Publishing, 2009.

[10] See "*NSSF Establishes Pension for the Informal Sector,"* Tanzanian *Sunday News* (Tanzania), 15th June, 2008, (translation supplied).

[11] See Section 5 of Act No. 14 of 1978 as amended by Section 4 of the *Parastatal Pensions (Amendment) Act* of 2001 (Act No. 25 of 2001).

[12] See Sections 2 and 5 of Act No. 2 of 1999.

[13] Ibid.

[14] See Sections 2 and 14 of Act No. 8 of 1999.

[15] See Section 2 of Act No. 8 of 1999.

Minister, ministers, deputy ministers, Speaker of the National Assembly, deputy speaker, members of parliament, Regional and District Commissioners.[16]

Similarly, the Government Employees' Provident Fund (GEPF), which is established under the *Provident Fund (Government Employees) Act,* cap 51, caters for non-pensionable employees of the central government who are not covered by any other pensionable government social security schemes.[17] Thus, the GEPF covers the prisons and the police, operational employees who are categorized as such by the central government such as drivers, those working on specific projects, and those on contracts who either fall under the government or under private undertakings.

The *Workmen's Compensation Ordinance* of 1949 primarily provides for compensation of workers when the latter sustain injuries in the course of performing duties related to their employment contract. It covers those who work under a contract of service or apprenticeship.[18] It excludes those not employed to perform manual labor and whose earnings exceed a specified amount, casual employees, out-workers, tributers, members of the employee's family, and any other class of persons that the President may declare to be excluded.[19]

Conversely, the *Local Authorities Pensions Fund Act* of 2006, which establishes the Local Authorities Pensions Fund (LAPF), covers almost all categories of workers including those in the local government authorities, the Local Government Loans Board, the Local Authorities Pensions Fund, any institution owned by a local government authority, and any institution that elects to contribute to the LAPF.[20] Also, LAPF covers self-employed and temporary employees.[21] This means that the informal sector workers may become LAPF members even where they do not have permanent employment, establishments or businesses.

Correspondingly, the Community Health Funds (CHFs), established under the *Community Health Fund Act* of 2001, cover all households in the specific area where a community health fund would be established by the respective local authority.[22] Thus both the informal and formal sector workers may become members to the CHFs.

Accessed from LHRC Constitutional Database

---

16 See Section 4 of Act No. 3 of 1999.

17 See Section 4 of Cap 51 R.E 2002 and Section 3 of the *Provident Fund (Government Employees) Ordinance (Amendment) Act* of 1965, Act No. 52.

18 See Section 2(1) of Cap 263 R.E 2002.

19 See Section 2 of Cap 263 R.E 2002.

20 See Section 2 of Act No. 9 of 2006.

21 See Section 2 and 3 of Act No. 9 of 2006.

22 See Sections 2 and 7 of Act No. 1 of 2001.

As for Zanzibar, there is only one social security scheme covering all workers, both in the public and private sectors, - the Zanzibar Social Security Fund (ZSSF).[23] ZSSF was established under the *Zanzibar Social Security Fund Act* of 2005 to cater for virtually all categories of workers provided that they have an employer and receive remuneration.[24] This is evidenced by who is considered an employer by the said law which enlists "any person, public authority, company, association, agent or representative whether citizen or non-citizen who enters into a contract of service with an employee for the payment of salary."[25] Also, ZSSF covers self-employed persons who choose to become members voluntarily. As is the case with the *National Social Security Fund Act* of 1997, the *Zanzibar Social Security Fund Act* of 2005 also empowers the Minister responsible for finance matters to declare certain categories of workers as employees and therefore eligible to become members of ZSSF.

Also, as is the case with Tanzania Mainland's *Political Service Retirement Benefits Act* of 1999, political leaders in Zanzibar are covered by different laws and schemes as stated by the *Pension (Political Appointees) Act* of 1990 and the *Specified State Leaders Retirement Benefit Act* of 1988[26] While the latter covers the President of Zanzibar and the First and Second Vice Presidents of Zanzibar, the former covers Political Appointees embracing a Member of the Revolutionary Council, Minister, Deputy Minister, Speaker of the House of Representatives, Mayor of the Zanzibar Municipal Council, Regional Commissioner, and District Commissioner.

From the foregoing, it is evident that the informal sector workers, who include street vendors, hawkers, undeclared domestic workers, petty traders, subsistence farmers and barter traders, are largely excluded from the ambit of the social security legislative framework.[27] Although the NSSF, ZSSF, PPF and LAPF to some extent cover the informal sector, the number of informal sector workers in these schemes is negligible. For instance, among the 367,948 members of NSSF, which boasts the highest coverage level, only 2,000 are workers from the informal sector.[28] This is due to several challenges relating to coverage of the informal sector.

Accessed from LHRC Constitutional Database

---

[23] It should be noted that workers who work for the United Republic of Tanzania are not covered by the ZSSF since there are other schemes which cover them.

[24] See Section 2 of Act No. 2 of 2005 of the laws of Zanzibar

[25] *Ibid.*

[26] Acts Nos. 1 and 4 respectively as amended by Act No. 7 of 1995 of the laws of Zanzibar.

[27] See Bernabe, S., *Informal Employment in Countries in Transition: A Conceptual Framework,* CASE paper 56, Centre for Analysis of Social Exclusion, London School of Economics, April, 2002. Accessed through http://euroscience.org/WGROUPS/YSC/BISCHENBERprep-session4c.pdf, on 18 October 2005, at p. 8.

[28] Olivier, M.P. and E. Kaseke, *Tanzania Employment-Based Social Security Reform Proposals (Draft Report), Report of the Technical Committee on Social Security: Report to the Tanzanian Labor Law Reform Task Force*, Labor Law Reform Phase II, April 2005, at p. 10. See also Dau, R. K., *Extending Social Security Coverage: Social Security Coverage through Micro-*

First, with the exception of the Defense Forces Scheme for the United Republic of Tanzania which is non-contributory and exclusive to the Army men and women, the PSRB and CHFs for Tanzania Mainland, which are sustained through the consolidated fund and contributions from the members matched by the Government respectively, and the schemes for the Political Appointees and Specified State Leaders for Zanzibar which are non-contributory and therefore sustained through state funds, the rest of the schemes require contributions from both the employer and employee. This means that all the social security schemes - NSSF, ZSSF, PPF, LAPF, PSPF, NHIF and GEPF - require contributions to be made by both the employer and employee for one to qualify for benefits. The challenge is that workers in the informal sector do not necessarily have employers and are therefore unable to contribute "double" portions on behalf of their "non-existent" employer and themselves.[29] Even in cases where such employers exist the contribution challenge still remains. On the one hand, the employers are unwilling to make contributions to a social security fund because those contributions increase their labor costs. Also, since there is no law that compels such employers in the informal sector to make such contributions on behalf of their employees, there is neither a carrot nor a stick to induce them to register with social security schemes.

On the other hand, workers in the informal sector are reluctant to allow the employer to deduct monies for contributions to the social security scheme as they would receive lower pay.[30] Thus, employees would rather keep their already low salaries than make contributions to the social security funds which evidently are concerned with futuristic risks such as old age and invalidity pension. These risks are not necessarily a priority in the informal sector. Moreover, workers in the informal sector know that the existing schemes are unable to provide adequate benefits to their members when they face social

*insurance Schemes in Tanzania,* A paper presented at the Meeting of Directors of Social Security Organizations in English speaking Africa, organised by the International Social Security Association, held in Banjul, the Gambia, 7-9 October 2003, at p. 6.

[29] See VAN GINNEKEN, "Overcoming Social Exclusion," in VAN GINNEKEN, W. (ed), *Social Security for the Excluded Majority: Case studies of Developing Countries,* ILO, Geneva, 1999, pp. 1-36, at p. 11. See also *"Special Supplement for Social Security Funds,"* Tanzanian *RAI*, 23-29 March 2006, where it is stated that "a voluntary member is required to pay 20% of his/her earnings" as opposed to an employee who will share the contributions with his/her employer, say 10 percent from the employer and 10 per cent from the employee's salary. See further MESA-LAGO, C., *The extension of social security coverage, the labor market and the lessons to be learned from Latin America: The example of healthcare,* Paper presented at the 5th International Research Conference on Social Security: Warsaw, 5-7 March 2007; Conference theme: Social security and the labour market: A mismatch?, at p. 3 and SANKARAN, K., "Protecting the Workers in the Informal Economy: The Role of Labour Law," in DAVIDOV, G. and Langille, B., (eds), *Boundaries and Frontiers of Labour Law,* Hart Publishing, Oxford and Portland, Oregon, 2006, pp. 205 – 220, at p. 219.

[30] See Ackson, 2009, chapter 4 for more details on adequacy of social security benefits in Tanzania.

Accessed from LHRC Constitutional Database

risks.[31] This also discourages the informal sector workers from committing funds to schemes which will not be beneficial to them. However, this is not to say that there are no employees willing to join the existing social security schemes.

Second, social security institutions in Tanzania presuppose the employer-employee relationship for their members, which makes it difficult for members from the informal sector who do not necessarily have employers.[32] At times, workers in the informal sector may be working on their own account or under somebody who they do not consider to be an employer such as a relative. Occasionally, even employers in formal establishments hire informal sector workers so as to minimise the labor costs as the latter would not qualify for social security contributions. Related to the issue of "double", lack of employment relationship discourages the informal sector workers from joining the existing schemes on account of the heavy financial burden which they will have to bear. This is based on the fact that where there is no clear employer-employee relationship, the "pseudo" employer may not be compelled to make social security contributions for the employee.

Third, irregularity, uncertainty and seasonality of income in the informal sector also foster exclusion from the existing social security schemes.[33]This is because uncertainty and unreliability of income may impair their membership, contributions and qualifications for benefits of those that are willing to join the schemes. For instance, for a member to qualify for invalidity pension and maternity benefits under the NSSF, they must have contributed for a minimum of 36 months out of which 12 months' contributions must have been made within the immediate past 36 months before the occurrence of the social risk.[34] Thus, irrespective of being a member to the NSSF, an informal sector worker may not qualify for the benefits on account of irregular contributions. Also, unreliable income of the informal sector complicates the enforcement of compliance by the existing social security schemes in which case the income

---

[31] *Ibid.*

[32] Dau, *op cit,* at p. 5. See also Olivier and Kaseke, *Report to the Tanzanian Labour Law Reform Task Force* 2005, *op cit,* at p. 25. See further Mouton, P., *Social Security in Africa*: *Trends, Problems and Prospects*, International Labour Office, Geneva, 1975, at p. 10.

[33] VAN GINNEKEN, "Overcoming Social Exclusion," in Van Ginneken, 1999, *op cit,* at p. 11. See also RIAZI, M. and Mahdavi, M., *Establishment of the rural insurance fund in Iran: Formation trend, problems and challenges,* Paper presented at the 5th International Research Conference on Social Security: Warsaw, 5 – 7 March 2007; Conference theme: Social security and the labour market: A mismatch?, at p. 3. See further PIENKOS, A., *Investigating informal employment and its implications for closing the coverage gap in Trinidad and Tobago,* Paper presented at the 5th International Research Conference on Social Security: Warsaw, 5-7 March 2007; Conference theme: Social security and the labour market: A mismatch?, at p. 18.

[34] See Sections 28(1)(c) and 44 of Act No. 28 of 1997 and

Accessed from LHRC Constitutional Database

being sought from the informal sector workers may actually be less than the administrative expenses incurred by the social security schemes.[35]

Fourth, considerable differences exist between what the social security institutions offer and what the informal sector workers want: while the latter are concerned with immediate needs, the former concentrates on what the informal sector considers as futuristic concerns. For instance, the existing social security institutions provide for long term benefits such as retirement, invalidity and survivors' pensions which are not necessarily a priority for the informal sector workers who, depending on the nature of their undertakings, are largely concerned with loan and credit facilities, sponsorship for vocational training, basic education for children, crop insurance, reliable market for their products, housing loans, working tools and medical care.[36]

Inadequate benefits offered by the existing schemes is another reason which falters extension of social security coverage to the informal sector. There have been concerns and complaints raised by the beneficiaries on the inadequacy of benefits offered by the existing schemes.[37] For instance, the minimum retirement pension for a member of the NSSF, PSPF, and PPF is TZS 80,000 (51USD), TZS 20,000 (12USD) and TZS 50,000 (32USD) respectively.[38] Although the current minimum wage is about TZS 80,000 (51USD) for most of the formal sector establishments, the actual living costs for an average Tanzanian family of five people, in 2004, required about TZS 180,000 and by 2007, about TZS 315,000 (203USD).[39] As such, informal sector workers do not consider their counterparts covered by the social security schemes as being adequately protected against social risks and are thus discouraged to join the existing schemes. This constitutes the fifth challenge related to extension of social security coverage.

The sixth challenge facing extension of social security coverage to workers in the informal sector is that they are unaware of the core functions and

Accessed from LHRC Constitutional Database

---

[35] See MESA-LAGO, C., *Changing Social Security in Latin America: Towards alleviating the social costs of economic reform,* Lynne Rienner Publishers, Boulder, Colorado and London, 1994, as referred to by VAN GINNEKEN, "Overcoming Social Exclusion," in Van Ginneken, 1999, *op cit,* at p. 8.

[36] See VAN GINNEKEN, "Overcoming Social Exclusion," in Van Ginneken, 1999, *op cit,* at p. 11 and NSSF, *The study on the extension of social security to the informal sector, case study of agriculture, fishery, mining and SMEs,* Study Report, 2001. See also ILO, *Introduction to Social Security,* 1989, *op cit,* at pp. 16-17 and Sankaran, *op cit,* at p. 220.

[37] For more details on adequacy of social security benefits in Tanzania see ACKSON, 2009, *op cit,* chapter four.

[38] Mean exchange rate for February 2012, USD1 to TZS1550.

[39] See KANYWANYI, J.L., *National Social Security in Tanzania; Why, for Whom, by Whom, for What?, A General Socio-Economic Review of the Policy, Law and Practice from Colonialism to Ujamaa and Beyond,* A Paper presented in March 2005 at the University of Dar es Salaam in Honor of *Mwalimu* J.K. Nyerere, at p. 64. See also "TUCTA await salary hike, call off strike" Tanzanian *Daily News,* Tuesday, 12 June 2010.

operations of social security schemes. This is the case even for members of the existing social security institutions who are unaware of what social security means and their respective entitlements as members.[40] The issue is, if the few members under the schemes are not aware of social security issues, what about the excluded? It is therefore unlikely that they would join such schemes.

Irrespective of the mounting challenges, the informal sector, which accommodates the majority of workers in Tanzania, and is always on the verge of poverty, ought to be protected against social risks which tend to ensnare them with poverty. As earlier indicated, this is in line with the Government's commitment to fight poverty in Tanzania. Thus, social security provisioning to the informal sector has to be prioritised if the fight against poverty is to succeed.

## III. Options for Covering the Excluded

Considering that social security provisioning for the informal sector is a key to relieving want and destitution among the majority of Tanzania's labour force when they face social risk, how can it be done?

### *A. Extending Coverage of the Existing Social Security Schemes*

As earlier indicated, some of the existing social security institutions like the NSSF, ZSSF, LAPF and PPF have already opened doors for the informal sector to join. Building on their experience, such schemes should broaden their awareness programmes so that the informal sector workers may make informed decisions about joining the existing schemes and the attendant benefits they will be entitled to. This is based on the fact that the existing schemes have sufficient administrative capacity and experience to deal with social security matters and the same experience may be used for the informal sector workers.

Secondly, the solidarity principle – which, among other things, embraces redistribution of income between the high income earners and low income earners – may be easily leveraged under this option. Most workers in the informal economy have low income thresholds and this would mean that their benefit levels would be very low, thus discouraging them from joining the existing schemes. With redistribution, contributions of those in the formal sector, which are comparatively higher and moe reliable than those of their counterparts, will help to raise the levels of benefits to the minimum level provided by the respective scheme.

Thirdly, as we have seen, Tanzania Mainland has a number of social security schemes which have led to unequal treatment between workers in Tanzania as they are subjected to different laws stipulating different conditions

[40] Ackson, 2009, *op cit,* at p. 99.

Accessed from LHRC Constitutional Database

for entitlement to benefits.[41] Thus, allowing the informal sector workers to join the existing social security schemes would minimize fragmentation of social security institutions as the current ones have been in existence and can accommodate the excluded. Zanzibar has made strides on the issue of fragmentation since there is only one scheme to cater for the working population. This option would be different from the option of establishing different social security schemes for informal sector workers, which is discussed below.

It is suggested therefore, that as one of the options for extending coverage to the excluded majority, the existing schemes covering the informal sector should continue to do so and the ones that do not should emulate the others. This, however, requires legislative amendments to embrace informal sector workers in the existing social security schemes.

Nonetheless, how are the existing schemes going to deal with the irregularities, uncertainties and unreliability of contributions from the workers in the informal sector? The second option may be used:

### *B. Establishing Special Departments under the Current Social Security Schemes*

Considering that extension of social security coverage to the informal sector is inevitable, a number of options have to be considered. While the first one envisages the existing social security institutions extending to the informal sector and embracing the latter alongside formal sector members, this option caters for informal sector workers who fall outside the pre-determined criteria and conditions set by the existing schemes. In particular, the option of establishing specific departments for the informal sector in the existing schemes seeks to address the difficulties associated with the inflexibility of conditions set by law for the existing schemes.

Flexibility under the current legislative scheme may be difficult since the rules are set and very clear on the responsibilities of members and the scheme. Establishment of special departments for the informal sector workers would allow flexibility in terms of the number and kinds of risks an informal sector worker would like to be protected against and the scheme would have to devise special packages for such informal sector workers. This would go in line with the contribution arrangements which would have to be equally flexible to accommodate the unreliability of income from the informal sector workers. It is believed that this may increase even the number of informal sector workers joining the existing schemes since the special department would be able to provide tailor-made packages for members from the informal sector.

[41] For more details on conditions relating to entitlement of benefits under different schemes in Tanzania, see ACKSON, 2009, *op cit,* chapter three.

Accessed from LHRC Constitutional Database

Special departments would be able to deal with peculiarities of the informal sector income and such members would be able to contribute as they got income or even in smaller amounts daily, weekly or in longer than a month for all previous accumulations. This would address the issues relating to irregularity, uncertainty and seasonality of income in the informal sector. Thus, informal sector workers would be motivated to join the "flexible" arrangements under the existing schemes.

However, there is a looming challenge - contributions for want of services. Although primarily every member to a social security contributes in order to get the benefits, insurance principles dictate that the risks against which a member is protected against are uncertain, with the exception of old age. There is danger in the suggested flexibility relating to contributions: some members from the informal sector could register and not make contributions in time because the flexible arrangement would accommodate the irregularity of their incomes. This may lead to some unscrupulous members to use this excuse to contribute the accumulations at the time when they face the risk. For instance, a member may not be eager to contribute for invalidity coverage and health insurance while they are able to work, but may be keen to contribute when the danger of inability to work is imminent. As such, some informal sector workers may make contributions at the time when they need the services which would jeopardise the stability of the social security institution.

Accessed from LHRC Constitutional Database

This challenge could be addressed through administrative measures such that while maintaining flexibility for members from the informal sector, rules and regulations must be followed. Close follow up on the claims made by such members would determine whether they deserved the benefits they are claiming or not. Also, this challenge may be in respect of only a few informal sector members and social security institutions should be able to deal with this challenge. This would discourage other members from making contributions only when the services were needed and misusing the flexible arrangement.

Therefore, there are some workers in the informal sector that may be covered under the existing social security institutions parallel with their counterparts from the formal sector. It has been argued that other workers would need more flexibility, in terms of contributions and the benefits, for them to be able to join the existing social security schemes. The social security institutions will have to devise mechanisms to accommodate these workers, including the possibility of establishing special departments. The issue is, what about those who may not fit in the two arrangements above?

### *C. Establishing Specialized Schemes for the Excluded*

Although some of the existing schemes have open door policies towards the informal sector, as we have seen, they have not managed to attract many members and coverage in the informal sector is still very low as exclusion stands at over 94 per cent of the labour force. This calls for alternative methods of

expanding social security coverage in the informal sector, such as establishing specialized schemes for the informal sector workers.

Firstly, the informal sector workers are not homogenous and neither are their needs and priorities. Specialized schemes would be more focused on the needs and priorities of specific groups in the informal sector.[42] This would require the establishment of multiple schemes for various categories of workers in the informal sector. For instance, street vendors, hawkers and petty traders could have their own scheme while pastoralists and peasants would have a different scheme. This is based on the fact that the social risks and the priorities for different categories of workers in the informal sector vary greatly. Using the examples given, the first category is a large group in the urban areas and the other is predominantly rural and would be more concerned with crop/cattle insurance and reliable markets for their products. The urban-based workers would be more interested in, among other things, sponsorship for vocational training and housing loans. The two categories, however, may have common interests with regards to loan and credit facilities for improving their undertakings, basic education for children, working tools and medical care. This being the case, separate schemes may work better for these categories of informal sector workers since their main concerns and risks are different.

Secondly, specialized schemes for specific categories of workers would be more flexible and accommodative of the peculiarities of each category of workers. For instance, where a scheme is for rural informal sector workers and provides for crop and cattle insurance, contributions may not necessarily be monthly; it may be seasonal to cater for the time when peasants would be harvesting and therefore could make once-off contributions. This would be the same for pastoralists who would prefer making contributions during the breeding season when they would want to sell some of their stock. In a way, the contributions need not necessarily be made every month as is the case for the existing social security schemes. Also, such schemes would not require the members to contribute on behalf on the non-existent employers. Thus, the suggested specialized schemes may be ideal for the informal sector in the event that they are unable to join the existing schemes.

Thirdly, there have been concerns about the delay in payment of benefits to the beneficiaries under the existing social security schemes on account of, among other reasons, inaccessibility of some remote areas of Tanzania. Since the specialized schemes for the informal sector will be close to the category of workers they cover, it is argued that the beneficiaries will be timely served when

Accessed from LHRC Constitutional Database

[42] See ACKSON, T., "Extension of social security coverage to the rural population in Tanzania: Lessons from India and Iran" *Journal of African and International Law,* Vol. Vol 2 No. 1, 2009, pp. 51 – 70 See also VAN GINNEKEN, W. "Overcoming Social Exclusion," in Van Ginneken, W. (ed), *Social Security for the Excluded Majority: Case studies of Developing Countries,* Geneva, ILO, 1999, pp. 1-36, at p. 3.

they face social risks. This would motivate the informal sector workers to join the specialized schemes which deal with their social risks in a timely manner.

All these arguments are informed by the successful experience of some attempts to cover those in the informal sector through provision of what are considered as priorities in the informal sector such as health insurance. One of the examples is the earlier noted community health funds established in the Igunga Community Health Fund, Mkuranga Community Health Fund, Bukombe Community Health Fund, Misungwi Community Health Fund, Maswa Community Health Fund and Rungwe Community Health Fund, among others.[43] The informal sector workers in the said districts have joined the schemes for mainly three reasons.

Firstly, they only have to contribute once in a year and then receive medical care throughout the year for the same contribution which ranges between TZS 5,000 and 15,000 per annum (about USD 3 and USD 10). Secondly, members of the community health funds do not have to contribute on behalf of the "non-existent employer" as is the case with the existing schemes. The Government of Tanzania matches all contributions made by the members to CHFs. For instance, where a member contributes TZS 10,000, the government will pay the same amount on behalf of the member. Thirdly, medical care is considered one of the highest priorities in the informal sector. The informal sector workers therefore have responded positively to the community health fund and even those in the formal sector who are inadequately protected against health related risks opt to contribute to community health funds.

The UMASIDA health care programme in Dar es Salaam which covers the informal sector is another example.[44] Although this health insurance scheme requires members to make monthly contributions, it does not require them to make "double contributions" as required by the existing social security schemes. As such, members can afford to insure themselves and their families against social risks related to health. As is the case with CHFs, the positive response is grounded in the fact that health care is a priority in the informal sector. However, the Government does not match the contributions made by members of the UMASIDA.

Accessed from LHRC Constitutional Database

---

[43] For a detailed analysis of the community health funds in Tanzania see Mtei, G. and Mulligan, J.A., *Community Health Funds in Tanzania: A Literature Review,* 2007, available at http://www.crehs.lshtm.ac.uk/downloads/publications/Community%20health%20funds%20in%20Tanzania.pdf, accessed on 8 June 2010.

[44] UMASIDA is an acronym for a mutual society for health care in the informal sector in Dar es Salaam. It is a health insurance institution for the informal sector and it provides health care and medical insurance to its members. See KIWARA, A.D., "Health Insurance for the Informal Sector in the United Republic of Tanzania" in VAN GINNEKEN, W. (ed), *Social Security for the Excluded Majority: Case studies of Developing Countries,* ILO, Geneva, 1999, pp. 117-143. See also STEINWACHS, L., *Extending health protection in Tanzania: Networking between health financing mechanisms,* International Labour Organisation, Geneva, 2002, pp. 22-23.

In line with the foregoing and with the Government's zeal to reduce income poverty and enhance the quality of life of Tanzanians, it is submitted that the Government should match the contributions which would be made to the suggested specialized schemes for the informal sector workers. As is the case with the CHFs, this will act as an incentive for the informal sector workers to make contributions to protect themselves against alarming poverty they face social risks.[45] This should also be the case where some informal sector workers would join the existing social security schemes.

However, there is one main challenge, multiplicity of social security schemes covering the informal sector. The existing social security schemes, particularly those operating in Tanzania Mainland, are equally fragmented and uncoordinated to the extent that where a member moves from one social security scheme to another, they lose their social security benefits acquired under the previous scheme.[46] Specialized schemes catering for specific categories of informal sector workers make fragmentation inevitable. This may be prejudicial to members who, because of the nature of their work, are not necessarily permanently engaged in one occupation. In light of this, it may be necessary to devise ways to deal with fragmentation of the schemes.

Social security schemes established for the informal sector workers would have to coordinate their membership and possibly levels of contributions. To begin with, a social security scheme covering a certain category of workers would have to be the same for the entire country just as is the case with the existing social security schemes covering those in the formal sector. This would help workers in the informal sector who move from one place to another in search of better conditions of work and business. As such, related categories of the informal sector workers would be covered by a single scheme. This would ensure that their mobility was not impaired, nor their access to the benefits. In this case, levels of contributions will have to be the same so as to create uniformity in terms of benefit levels and sustainability based on affordability.

At another level, social security schemes in the informal sector would have to be coordinated so as to deal with the mobility of the informal sector workers. This means that different social security schemes covering different categories of informal sector workers would have to work closely together so that their members would not be prejudiced when they change their occupations

---

[45] Coverage by the CHFs is expected to rise as many people are becoming aware of them and because health is considered as a top priority by most of the excluded categories. A similar programme is run in Iran and the government matches contributions by the rural residents. See RIAZI AND MAHDAVI, *op cit,* at p. 6. See further ETMINAN, E. and Chaker-ol-Hosseini, K., *Social protection for informal workers: Iranian Experience,* Paper presented at the 5th International Research Conference on Social Security: Warsaw, 5 – 7 March 2007; Conference theme: Social security and the labour market: A mismatch?, at pp. 13-14. See also MESA-LAGO, 2007, *op cit,* at p. 11.

[46] For more details on fragmentation of social security schemes in Tanzania, see ACKSON, 2009, chapter six.

Accessed from LHRC Constitutional Database

or businesses. This could be dealt with in two ways: Firstly, members may be permanently attached to the scheme they first registered with irrespective of change of residence, occupation and place of business. Secondly, members would be allowed to join the schemes which cater for their respective occupation. With the latter option, social security schemes will have to transfer the acquired rights to the scheme the members would have joined.

As indicated earlier, the formal sector is shrinking and the informal sector expanding by embracing those from the formal sector and the new labor market entrants. It is therefore suggested that coordination between the specialized social security schemes for the informal sector and those for the formal sector should be established. Coordination between the informal and formal social security schemes would ensure that when formal sector workers move to the informal sector and vice versa, they would still be protected against the social risks ensnaring them into poverty. Thus, on the one hand, there should be coordination mechanisms between social security schemes in the informal sector, and on the other, there should be coordination between the formal social security schemes and those covering the informal sector. This is one of the ways which will ensure that workers in Tanzania, particularly those in the informal sector, are protected against poverty and are guaranteed high quality of life which is envisaged by the NSGRP and ZSGRP and the Tanzania Vision 2025 and Zanzibar Vision 2020.

The importance of coordination of social security schemes covering the formal and informal sector workers is underscored by the fact that the social security schemes covering the formal sector workers take into account periods of insurance for one to qualify for social security benefits while some of them even put an age limit for joining such schemes. For instance, for one to qualify for retirement benefits under the NSSF, PPF, and ZSSF they must have contributed for not less than 15, 10 and 5 years respectively.[47] This means that a person who moves from the informal sector to the formal sector, who may not be able to contribute for 180 months under NSSF or 120 months under PPF, would not qualify for retirement pension and would therefore be "potentially" poor. Thus, the fight against poverty should aim at ensuring that workers are protected against social risks irrespective of whether they work in the formal or informal sector and whether they have ever moved from formal to informal sector and vice versa.

As for age, although all the schemes provide retirement benefits at the age of 60 which is the compulsory retirement age or at 55 for voluntary retirement, PPF does not allow a person who has reached the age of 40 to join the scheme despite the fact that such a member may be able to contribute for 20 years before they reach 60.[48] As such, an informal sector worker who has worked for some

---

[47] See Sections 27 of Act No. 28 of 1997, 24 and 26 of Act No. 14 of 1978, and 31(1)(a) of Zanzibar Social Security Act, 2005 respectively.

[48] See Section 5(a) of Act No. 14 of 1978.

Accessed from LHRC Constitutional Database

time in the sector and has secured a job in the formal sector but is over 40 years old may not join PPF.

Therefore, if coordination mechanisms are not put in place, an informal sector worker who secures a formal sector job may not be able to qualify for benefits which are tied to the period of insurance in the schemes covering the formal sector. This is even more daunting for PPF-bound establishments in which case the informal cum formal sector worker who is over 40 years of age is barred from joining the scheme and therefore ineligible for its benefits.

Together with establishing social security schemes for the informal sector workers, it is equally important to establish coordination mechanisms for such schemes at the level of the informal and formal sectors. It is through coordination that the workers will be protected against the ensnaring poverty and be guaranteed high quality life even in the event they face social risks.

## IV. Conclusion

The law establishing the existing social security schemes is restrictive in terms of who can join the schemes and the attendant conditions for qualifying for benefits which may not be met by those in the informal sector because of the precariousness of their activities. This has led to what may be termed as "legalised exclusion" of the informal sector from the ambit of most of the existing schemes.

Exclusion has subjected workers in the informal sector to risks of poverty which the Tanzania Vision 2025 and Zanzibar Vision 2020, and the NSGRP and ZSGRP respectively aim to eradicate. On account of the foregoing, this paper suggests that enhancement of social security provisioning for the informal sector workers should be considered as a priority if the fight against poverty is to succeed. Although this paper recognises the existence of measures to fight poverty, it argues that the levels of poverty are still very high in the country. This paper argues that other strategies, such as extension of social security coverage to the excluded, should be considered.

In view of the suggestion on extension of social security coverage to the informal sector, the paper has advanced three options: extending the coverage of the existing schemes to cover the informal sector as well; designating special departments under the existing schemes to cater for the informal sector; and establishing specialized schemes for the informal sector. The paper argues that the options discussed are not necessarily exclusive of each other but may complement each other.

Accessed from LHRC Constitutional Database

# THE RIGHTS OF A CHILD IN TANZANIA: RECENT DEVELOPMENTS IN THE LAW

*Helen Kijo-Bisimba*[1]

I. Introduction
II. The Right of a Child: A Historical Development
III. Implementation of the International and Regional Human Rights Instruments
IV. Domestication of International Treaties
V. Tanzania and the Rights of the Child
VI. The Law of the Child: Recent Developments in Tanzania
  A. Definition of a Child
  B. The Best Interests of the Child
  C. Non Discrimination
  D. Right of the Child to Expression
  E. Recognition of the Inherent Right to Life; Survival and Development
  F. Consideration of the Child's Evolving Capacities
  G. The Duty of a Child
VII Conclusion

Accessed from LHRC Constitutional Database

## I. Introduction

There has been notable progress in relation to child laws in Tanzania since the formation of a working group by the Law Reform Commission in July 1986, long before the adoption of the Convention on the Rights of Child (CRC). The group was supposed to review child laws which were scattered in different laws of Tanzania. Although there were these early developments it has taken the United Republic of Tanzania (URT) eighteen years after ratifying the Convention on the Rights of the Child (CRC) and six years after ratifying the African Charter on the Rights and Welfare of the Child (ACRWC) to enact a law of the child. Two years later, Zanzibar also enacted a law on the rights of the child. A lot of questions were raised as to why the country was not coming up with a law of the child[2]. There also had been various calls from children's rights

---

[1] The Executive Director, Legal and Human Rights Centre, Dar es Salaam, Tanzania.

[2] It is interesting to note that efforts regarding review of children laws by the Law Reform Commission followed several steps such as the presentation of a report in 1991 commonly known as the *Tenga Report*. This report was published in 1994 and was reviewed by a committee formed by the Ministry of Community Development, Women and Children in 1998. See MAMDANI, M. *et al*, *Influencing Policy for Children in Tanzania: Lessons from*

advocates and other groups in Tanzania for a single law for children in Tanzania as the many laws in place did not address children issues sufficiently. The concluding remarks of the United Nations Committee on the rights of the child after the United Republic of Tanzania (URT) presented its second periodic report to the Committee inquired as to when the country was going to enact a unified law for children[3].The response indicated the need for the country to consult before a law could be enacted. In 2008 the same inquiry was made by the same CRC committee portraying the urgency for a law for children's rights and it was expressed by the CRC committee expert Madam Agnes Akasua Aidoo[4] that 'While recognizing that the legal reform took time, the children of Tanzania could not wait'.[5] Legislation to cater for the right of the child was also expected as an obligation under international law after Tanzania had ratified the Convention on the Rights of the Child (CRC).[6] It came as a surprise when in November 2009 a law was enacted and signed in December before the wide consultations asserted by the Tanzanian delegation to the CRC committee in 2008 had been made.[7]

It is therefore important to discuss these developments by examining the enacted Law of the Child Act, 2009 number 21 of 2009 [8]followed in 2011 by the enactment of Children Law by the Government of Zanzibar[9]. Without embarking on the reasons for the length in the process towards the enactment of the laws,[10] the discussion in this article will be on the new developments in relation to the principles set by the international and regional children rights instruments so as to determine how the new development has been influenced by such principles.

Accessed from LHRC Constitutional Database

*Education, Legislation and Social Protection*, (REPOA Special Paper 09.30), Dar es Salaam: REPOA, 1990. It is also found in http://www.crin.org/docs/specialReportLP.pdf.

3 Committee on the Rights of the Child, (CRC/C/70/add.26), (20th October, 2004) *Consideration of Reports Submitted by States Parties under Article 44 of the Convention; Second Periodic Reports of States Parties due 2004, United Republic of Tanzania,* [Online] http://www.unhchr.ch/tbs/doc.nsf.

4 She was the Rapporteur for the report of Tanzania on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

5 Committee on the Rights of the child, examining the reports of Tanzania on the Optional Protocols of the CRC 29th September, 2008, Press release[online] http://www.unhchr.ch/huricane/huricane.nsf.view01 (accessed 6/10/2008)

6 MAKARAMBA, Robert V., *We owe the Child the Best: Children Rights in Tanzania,* Dar es Salaam: Friedrich Ebert Stiftung, 1997.

7 In April 2009 a paper prepared through REPOA was asking why there was little progress in enacting a child law while other laws such as the Sexual Offences Special Provisions Act 1998was enacted fast. Several months after this report the process started for the enactment of the law. MAMDANI, M. *et al*, *Influencing Policy for Children in Tanzania: Lessons from Education, Legislation and Social Protection*, op. cit.

8 For the purpose of this presentation it will be cited as TLCA, 2009.

9 In this work the law will be cited as the ZLCA, 2011.

10 Such discussions can be found in MAMDANI, M. *et al*, *Influencing Policy for Children in Tanzania: Lessons from Education, Legislation and Social Protection*, op. cit.

Examination will be made of the CRC and ACRWC and whether the principles enshrined therein provide guidance to the member states on implementing the instruments through legislation.

The two pieces of legislation are thus evaluated in relation to the principles set under the CRC and the African Charter on the Rights and Welfare of the child (ACRWC) of 1990.[11] What has to be understood also is the arrangement between Tanzania (Mainland) and Zanzibar with a federal face making it possible to enact two laws on children issues for each part of the union.

## II. The Right of a Child: Historical Development

This section discusses the general development of the rights of a child so as to link the developments in the law with the historical trends since the Tanzania laws of the child are said to give effect to international and regional conventions on the rights of the child.[12]

There are assertions that the 'rights of a child' concept is a comparatively recent venture of the international human rights law.[13] This is a debatable assertion due to the fact that the declaration on the rights of the child was adopted in 1924 by the League of Nations[14] prior to the Universal Declaration of Human Rights 1948. A second Declaration of the Rights of the Child was later adopted in 1959.[15] The two declarations, although not binding to the parties, provided the basis for the concept of the right of a child and the future developments of the binding child right instrument. The 1924 Geneva Declaration had several principles which state that: The child must be given the means requisite for its normal development, both materially and spiritually; the child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured; the child must be the first to receive relief in times of distress; and must be protected against every form of exploitation; and the child must be brought up in the consciousness that talents

Accessed from LHRC Constitutional Database

[11] The African Charter on the Rights and Welfare of the Child was adopted by the twenty sixth session of the Assembly of Heads of State and Government of the Organization of African Unity, Addis Ababa, Ethiopia in July 1990. See the African Union web site http://africa-union.org/root/au/Documents/Treaties/treaties.htm also available at http://www.unhcr.org/refworld/docid/3ae6b38.html.

[12] See the long title of the TCLA 2009 and the purpose of the enactment of the ZLCA in the 2010 Bill for the enactment of the ZLCA 2011.

[13] http://www.pambazuka.org/en/category/comment/82030.

[14] The Declaration is commonly known as the Geneva Declaration and was adopted on 26th September, 1924 [O.J Spec.Supp.21, at 43 (1924)] The text can be found in UN Documents: Gathering a Body of Global Agreements, (http://www.un-documents.net/gdrc1924.htm).

[15] This declaration was adopted by the United Nations General Assembly (UNGA Res: 1386 XIV). 14 U.N GAOR Supp. (No. 16) at 19U.N Doc.A/4354 [online] URL (http://www.undemocracy.com/A-RES1386 (XIV)pdf).

must be devoted to service of fellow men. The principles were guided by the recognition that 'mankind owes to the child the best it has to give'[16]. The 1959 declaration, said to be the conceptual parent of the CRC, had ten principles which added to the conceptualisation of the rights of the child.[17] This declaration is noted as "the first international document to exclusively focus on children as direct possessors of rights"[18] and the earlier declaration, though said to perceive children as recipients of treatment and not holders of rights,[19] provided the groundwork for an imminent international standard in the field of children's rights.

It is however true that when it came to the adoption of binding international instruments the Convention on the Rights of the Child (CRC) was preceded by other human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR)[20] adopted in 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[21] also of 1966 as well as the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) of 1979[22]. The CRC adopted in 1989 is the first international human rights treaty to deal comprehensively with the rights of a specific group of people. Although the ICCPR and the ICESR had some provisions related to children they only covered some specific issues. In the ICESR, Article 10 covers family protection, Article 12 adequate standard of living and Article 13 is on education while under the ICCPR Article 6(5) prohibits the death sentence for crimes committed by children under 18 years and Articles 10, 14, 17, 18, 23 and 24 are on juvenile justice, family privacy, freedom of thought and protection from discrimination. There was thus the necessity to have an instrument which has emphasis on particular circumstances of children in an all-embracing document, setting out comprehensively distinct measures for children's protection. The CRC also emphasises the indivisibility and interdependency of all human rights as it covers the whole range of economic, social, cultural, political and civil rights in a single document.

The CRC further provides for specific rights of the child such as the right to adoption (Article 21) the right to identity (Article 7 and 8) and family reunification (Article 10.) The CRC also provides for the protection of a child

Accessed from LHRC Constitutional Database

---

16 See the Preamble of the Geneva Declaration, 1924.

17 VAN BUEREN, Geraldine, *The International Law on the Rights of the Child*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1998.

18 NCUBE, W., *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, Dartmouth, Ashgate, 1998.

19 VAN BUEREN, Geraldine, *The International Law on the Rights of the Child*, op. cit. p. 7.

20 International Covenant on Civil and Political Rights, 1966, United Nations General Assembly Resolution 2200 A of 16th December, 1966.

21 International Covenant on Economic, Social and Cultural Rights, 1966, United Nations General Assembly Resolution 2200 A of 16th December, 1966.

22 Convention on the Elimination of All Forms of Discrimination Against Women, United Nations General Assembly Resolution 34/180 of 18th December, 1979.

from economic exploitation (Article 32) from drug abuse (Article 33) sexual exploitation (Article 34) while care of children with disabilities is provided for under Article 23 and the rights of the child to self express is provided for under Articles 12 and 13.

The Committee on the CRC is an organ for the implementation of the Convention and it underlines the interrelatedness of the provisions of the CRC and recognises five general principles under Articles 2, 3, 5, 6, and 12[23] which are guidance to States Parties in the implementation of the rights of the child. The 'best interest' of the child under Article 3 addresses the issue of paramount attention to be taken in all issues concerning a child. This came as a new principle in international law although it had gained prominence in domestic law[24].This general principle is also one of the two interpretation principles, the second being the principle under Article 5.[25] Non-discrimination in the enjoyment of the rights by all children is the second principle provided for under Article 2. Recognition of the inherent right to life which ensures survival and development of the child is the third principle provided for under Article 6. The Right of the child to expression on matters affecting the child and such views of the child, to be given due weight in accordance with the age and maturity of the child is the fourth principle provided under Article 12 while the fifth principle is appropriate guidance in application of rights under Article 5 (which is the second principle of interpretation) requiring consideration to be taken of the evolving capacities of the child in the exercise of the rights by the child.

The CRC is a widely ratified instrument with only two State Parties which have yet to ratify it: Somalia and the United States of America.[26] This notwithstanding, there had been arguments related to non-participation of some developing countries such as African countries during the negotiations of the CRC. This has led to the African States adopting a specific charter on the Rights

Accessed from LHRC Constitutional Database

[23] Four General principles under Articles 2, 3, 6 and 12 of the CRC are commonly mentioned although the fifth one under Article 5 has also been noted. In the Fact Sheet No 10 of the Office of the High Commissioner for Human Rights, the four General Principles are addressed under a title 'Universal and forward-looking Principles.'

[24] See FOTTRELL, Deirdre (ed.), *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child*, The Hague and Boston: Kluwer Law International, 2000; VAN BUEREN, Geraldine., *The International Law on the Rights of the Child*, op. cit, p. 45. Presumably the domestic laws mentioned are Western laws as it has been argued that the 'best interests principle is a creature of Western Law.' See KAIME, Thoko, *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective,* Pretoria: University Law Press, 2009 quoting ALSTON, Philip and Bridget Gilmour-Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Value*s,, United Kingdom: International Child Development Centre and UNICEF, 1996.

[25] VAN BUEREN, Geraldine, *The International Law on the Rights of the Child*, op. cit., p. 45.

[26] See the Office of the High Commissioner for Human Rights, 'Status of Ratifications and Signatures of Human rights treaties' [online] http:www2.ohchr.org/English/law.

and Welfare of the African Child.[27] The Charter considers issues specific to the African context and situation such as African culture, traditions and values.[28] It addresses harmful traditional practices and compels States to take appropriate measures to eliminate such practices.[29] The ACRWC further provides for the child's responsibilities and duties towards the family, society and the State.[30]This is an African conception of community's responsibility and duties. The African children are expected to work for the cohesion of the family and to respect parents and elders at all times.[31] Some of the principles and rights enshrined in the CRC have been given pre-eminence in the ACRWC. These are such as the 'best interest' principle which is articulated by the use of Article 'the' making it 'the' primary consideration and not 'a' primary consideration required by the CRC. The ACRWC has enshrined the CRC universal principles with an African cultural seasoning. It has been observed that the ACRWC adopts a comparable, but somewhat higher standard than the CRC[32]. Both instruments are applicable internationally (CRC) and regionally (ACRWC) by the Member States who are obliged to implement the principles and substantive laws enshrined therein.

Accessed from LHRC Constitutional Database

## III. Implementation of the International and Regional Human Rights Instruments

State Parties to the international instruments have an obligation after ratification of an instrument to ensure the rights provided for in the instrument form part of their domestic laws. Article 4 of the CRC provides:

> State Parties shall undertake all appropriate legislative, administrative, and other measures of the implementation of the rights recognised in the present Convention.

Article 1 of the ACRWC provides for the obligation of States Parties:

> Member States of the Organisation of African Unity Parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional

[27] The African Charter on the Rights and Welfare of the Child was adopted by the Organisation of African Unity on the 11th July, 1990, CAB/LEG/24.9/49(1990) about 8 months after the adoption of the UN Convention of the Rights of the Child, 1989. Available at http://www.unhcr.org/refworld/docod/3ae6b38c18.html

[28] See VAN BUEREN, Geraldine, *The International Law on the Rights of the Child*, op. cit, p. 24.

[29] Article 21 of the ACRWC.

[30] Article 31 of the ACRWC.

[31] Article 31(a) of the ACRWC.

[32] MURRAY, Rachel, *Human Rights in Africa: From the OAU to the African Union*, Cambridge: Cambridge University Press, 2004, p. 167.

> processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

The States parties are therefore under an obligation to implement the Convention and the Charter. This has to be done through domestication of these rights in accordance with international treaty law. In reality this has not been the case as many countries ratify the instruments and they do not proceed to domesticate it as required. As we shall observe later this is the case of Tanzania.

## IV. Domestication of International Treaties

After a country has ratified a treaty what follows is for such a treaty to be implemented by the state party. This however depends on whether the treaty has already come into force. For a treaty to come into force it has to have a certain number of ratifications provided for under the treaty. For example the CRC came into force in September 1990[33] after it received the required twenty instruments of ratification from State Parties[34]. The ACRWC which was adopted in 1990 came into force nine years later on 29th November 1999 as it had not received the required number of instruments of ratification which is fifteen instruments from Member States.[35]

Tanzania ratified the CRC on 10th June 1991 and ratified the ACRWC on 16th March 2003.[36] The Zanzibar government demonstrated the CRC to the House of Representatives on 3rd September 1991 indicating its acceptance in Zanzibar.

After ratification a state party is expected to implement the rights. There is however a procedure to follow to make the rights enshrined in the treaty, part of the laws of the ratifying state. The procedure depends on the treaty practice of a country. There are practices which follow one of the theories of relationship between the international law and national law known as dualism and monism traditions. Under monism the international ratification by a state of a treaty binds that state automatically as the international law need not be converted into national law. The dualism practice entails another procedure for the enactment of a domestic law to implement the ratified treaty. Under this practice the international law and the national law are separated and hence the need to translate the international law into domestic law. Dualism is a common law

Accessed from LHRC Constitutional Database

---

[33] The Office of the High Commissioner for Human Rights, 'Status of Ratifications and Signatures of Human rights Treaties' [online] http:www2.ohchr.org/English/law.

[34] This is per Article 49(1) of the CRC [online] http://www2.ohchr.org/english/law/pdf/crc.pdf.

[35] This is per Article 47 (3) of the ACRWCA, also see KULEANA and UNICEF, *About Children's Rights*, Mwanza and Dar es Salaam: Maximillan Aidan, 1999.

[36] According to the list of countries which have signed and ratified/acceded the ACRWC [online] http://www.africa-union.org/root/au/documents/treaties/list/African Charter on the Rights and Welfare of the Child.pdf.

treaty practice which Tanzania follows. Hence the ratification of the CRC in 1991 and the ACRW in 2003 did not accord the Tanzanian children the rights provided for under the Convention before translations of the instruments into Tanzanian domestic law. This is the reason for the various calls requesting Tanzania to domesticate the CRC. It took Tanzania eighteen years to enact a law to implement the CRC and twenty years for Zanzibar to do the same.

## V. Tanzania and the Rights of the Child

Tanzania is a unitary republic[37] composed of Tanzania mainland and the Zanzibar Revolutionary Government per Article 4(1) of the URT Constitution. The arrangement between mainland Tanzania (Tanganyika) and the Island of Zanzibar resembles a federal arrangement since the two parts enact separate laws.

The Constitution of the URT 1977 creates two jurisdictions each with its own government.[38] These are the government of the United Republic of Tanzania and the Revolutionary Government of Zanzibar. Under its first schedule the Constitution of the URT further clarifies Union matters and non union matters. The list of twenty-two union matters includes immigration and foreign policy[39].

Under the foreign policy the URT is a member of the United Nations and has become a party to several international treaties which extend international obligations to the Republic.

The URT has signed and ratified most of the international human rights conventions such as the mentioned ICCPR 1966, the ICESCR 1966, the CERD 1965, the CEDAW 1979, the CRC 1989 and its two optional protocols[40]. It also has ratified regional treaties such as the African Charter on Human and People's Rights 1981 and the ACRWC 1990. There has been discussion regarding domestication of the international conventions such as the CRC and the ACRWC. The Tanzania Human rights reports produced by the Legal and Human Rights Centre and the Zanzibar Legal Services Centre has a chapter in which it monitors the implementation of the country's international and regional

Accessed from LHRC Constitutional Database

---

[37] Article 1 of the 1977 Constitution.

[38] Article 4 of the Constitution of United Republic of Tanzania also found on line gateway of the URT.

[39] See the First schedule to the URT Constitution 1977.

[40] The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by the UN General Assembly Resolution A/RES/54/263 of 25th May, 2000. The second is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted by the UN General Assembly resolution A/RES/54/263 of 25th May, 2000.

obligations through the human rights treaties.[41] Before the enactment of the TLCA 2009 the reports had been showing the non-compliance of the URT with its treaty obligations, specifically the domestication of the international instruments. The child policy 1996 revised in 2008 had specific policy for the enactment of children laws which came into effect several months after the revision in 2008.

## VI. The Law of the Child: Recent Developments in Tanzania

The United Republic of Tanzania moved beyond the ratification of the CRC and the ACRWC by enacting a national law to incorporate these international and regional treaties into national law in November 2009.[42] The same happened in Zanzibar when on the 25th of August 2011 Dr. Ali Mohammed Shein, the President of Zanzibar signed into law a comprehensive Children's Rights Law.[43]

The Laws of Children in the URT and Zanzibar are meant to implement the URT regional and international obligations found in the ratified Convention and the Charter on the rights of the child. This is stated in the long title of the TLCA 2009:

> An Act to provide for the reform and consolidation of laws relating to children, to stipulate rights of the child and to promote and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child ...

The two pieces of legislation were welcomed with enthusiasm as a new development in the national law towards the protection of children's rights. It was noted that at last the TLCA implemented various obligations under regional and international conventions on the rights of the child to which Tanzania is a party.[44]

In the process of the enactment of these laws some institutions collected children's views during the discussion of the Bills. For example in 2009 the Global Network of Religion for Children (GNRC) brought together 100 children

41 LEGAL AND HUMAN RIGHTS CENTRE and ZANZIBAR LEGAL SERVICES CENTRE, *Tanzania Human Rights Report 2008: Incorporating a specific Part on Zanzibar*, Dar es Salaam and Zanzibar: LHRC and ZLSC, 2009.

42 This is the Law of the Child Act, 2009 (Act No. 21 of 2009). See the United Republic of Tanzania Act supplement, Gazetted under Volume 90 No. 52 *Official Gazette of the United Republic of Tanzania*, 2009.

43 KEENAN, Shane, Children's ACT Provides New Tools for Protecting Child Rights in Zanzibar (*sic*) 2011 [online] http://www.loc.gov/lawweb/servlet/lloc news?disp3 l205402791 text.

44 The conventions include the CRC, ACRWC, the optional protocol on the sale of children, prostitution, and child pornography; and the optional protocol on involvement of children in armed conflict.

Accessed from LHRC Constitutional Database

and young people from children's peace clubs who discussed the bill and prepared a position paper which was presented to the parliamentary standing committee - Community Development.[45] In 2010 when the Children's Bill of Zanzibar was being discussed workshops were held involving different stakeholders - 514 children were consulted as part of development in the spirit of encouraging child participation.[46] This is a very good development given the fact that children constitute over 40% of the total population of Tanzania and in 54% in Zanzibar.[47] This trend is also in line with the provisions of the CRC which provides for child participation especially on issues affecting their lives[48]. Observation from the children's participation indicated the views expressed by children that it was important to have a law protecting children's rights.[49] 82% of the participating children in Zanzibar were of the view that children must participate in decisions affecting their lives while 92% mentioned that the State has a responsibility to protect children who are vulnerable and in need of care and protection.[50] The paper which was prepared by the children peace clubs in Dar es Salaam had noted that the bill was in a form and language that most children do not understand which impedes the extent to which they could debate and provide input to the Bill.[51]

The laws were signed by the President of the United Republic of Tanzania on 20th December 2009 for the TLCA and on the 25th of September 2011 by the President of Zanzibar for the 2011 Law of the Child in Zanzibar. The following sections discuss the contents of the laws in anticipation of their implementation and practice for the protection of the Right of the Child in Tanzania and specifically in Zanzibar. Examination is also on how such laws have taken into consideration the principles enshrined in the international and regional instruments given the long time it took to enact them.

### *A. Definition of a Child*

The conundrum observed before the enactment of the Laws of the child in 2009 and 2011 is the definition of a child. There were several laws which dealt with children matters in Tanzania mainland and in Zanzibar[52]. It was not clear who a child is under the laws since every law defined a child differently. For example

---

45 Global Network of Religions for Children (GNRC) Position Paper by Children under the auspices of GNRC Peace Clubs in Dar es Salaam, 2009. [Online] http://www.mcdgc.go.tz/data/postinpapergnrc.pdf.

46 http//www.pambazuka.org/en/category 25th December, 2009.

47 UNITED REPUBLIC OF TANZANIA, Population and Housing Census (Volume II), 2002.

48 According to Articles 12 and 13 of the CRC.

49 See http//www.pambazuka.org/en/category 25th December, 2009.

50 Ibid.

51 Global Network of Religions for Children (GNRC) Position Paper by Children under the auspices of GNRC Peace Clubs in Dar es Salaam, op. cit.

52 The laws included the Children and Young Persons Act, Affiliation Act, Adoption Act etc.

Accessed from LHRC Constitutional Database

the Adoption Act defined a child as a person below the age of 21, the Interpretation of Laws and General Clauses Act, 1972 (Act no 30 of 1972, the Age of Majority Act (Cap412), The Citizenship Act (Cap 452), Birth Registration Act (Cap 108) all assign the age of majority as 18 years, while other Laws such as The Children and Young Persons Act, Cap13 (currently repealed) defined a child as a person below the age of twelve and the Employment and Labour Relations Act, 2004 defines a child as a person under the age of fourteen; however, in relation to employment in hazardous sectors a child means a person under the age of eighteen (Section 4). The issue of the definition of a child could not have been cured by the provisions of the CRC as it also had controversy during its negotiations to the extent of leaving a deliberately vague definition[53]. The CRC under its Article 1 provides that:

> A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

This definition provides leeway in how a child could be defined by a State which can determine the age of majority differently from the age provided for by the Convention. It is not clear who exactly a child is if each State can determine the age of majority it prefers. This however is said to be a compromise reached during negotiations since some States wanted the age to be lowered while others wanted the age to be raised.[54] Another contention on the definition of a child by the CRC is the issue of when childhood begins. The drafters of the CRC deliberately abstained from stating under Article 1 when life begins.[55] This is attributed to the differences between States Parties, some of whom observe life as beginning at conception and those that see life as beginning at birth. This is said to have led to a compromise suggested by Morocco to put emphasis on the end of childhood rather than its beginning.[56] In this case the CRC could not have helped much in solving the Tanzanian controversy of the definition of the child. The ACRWC on the other hand has a definite definition of the child which is stated under its Article 2 that:

> ... a child means every human being below the age of 18 years.

This definition is clearer compared to that of the CRC although it also does not answer the question as to when childhood begins, which however might

---

[53] GUILLOD, O., "Swiss Law and the United Nation Convention on the Rights of the Child," in FREEMAN, Michael, *Children's Rights: A Comparative Perspective,* Aldershot, Hants, England: Dartmouth Publishing Company, 1996, p. 225.

[54] VAN BUEREN, Geraldine, *The International Law on the Rights of the Child*, op. cit, p. XVIII

[55] GRAHN-FARLEY, M. (2008) "Neutral Law and Eurocentric Law Making: Post-colonial Analysis of the UN Convention on the Rights of the Child," Volume 34 Number 1 *Brooklyn Journal of International Law*, 2008, p. 15.

[56] Ibid.

Accessed from LHRC Constitutional Database

not be an issue in the African context since traditionally unborn children are not discussed.

The Law of the Child Act, 2009 seems to have adopted the ACRW definition as it defines a child under its Section 4(1) as a person below the age of eighteen years. Section 2 of the Children Law, 2011 of Zanzibar also defines a child in the same way - ‘a person who is below eighteen years old is a child’. These definitions have somehow cleared the contradictions and vagueness of the past laws related to children.

### *B. The Best Interest of the Child*

As noted earlier, the best interest of the child is one of the principles of the CRC which provides a basic premise in the implementation of the provisions on the rights of the child. The scope covers the obligation that a state has to ensure that the interests of children are paramount in all the decisions which affect them. This principle guides the way in which decisions regarding children are made. This is a legally binding principle which the States Parties have to abide by.

The best interest of the child principle is provided for under Section 4(2) of the TLCA and under Section 3 of the ZLCA. The Tanzania law follows the ACRWC, stating in Section 4(2) of the TLCA that:

> The best interest of the child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies.

The Zanzibar law goes further to elaborate the criteria for deciding the best interest of the child. In deciding the best interest of the child twelve criteria are provided under Section 4 of the ZLCA, includingfirst, consideration has to be taken on the personal relationship between a child and her/his parent or parents/guardians, a child and any other person who provides care for the child or any person who is responsible in that area.

The second consideration is in relation to the behavior of adults or any parents related to a child and application of parental obligation and the rights of the child. Third consideration is the capacity of parents or any other person to provide care and other necessities for the child including psycho-social needs. Fourth includes any effects which might arise in the child in case of changes in the environment as well as effects which might occur if she/he is separated from one or both parents; any relative or siblings or anyone who provides care and has been living with the child. Other considerations are such as observing specific problems and costs in communication which might seriously affect the rights of the child to maintain direct communication with parents or any other person on a regular basis. The needs of the child are yet another criterion, specifically the need to remain with parents and the family including the extended family and not to be removed from his/her home area. Disability is yet another criterion and

Accessed from LHRC Constitutional Database

it is to be considered for the best interest of the child. These and the other criteria portray a serious undertaking on the part of the ZLCA to deal with the principle of the best interest of the child.

### *C. Non-Discrimination*

The non-discrimination principle is an established human rights principle under international law. This principle is central to the achievement of rights provided for in any of the international human rights instruments. For children's rights it has been observed that there has not been enough attention paid to the principle since there is discrimination experienced by children in different ways which has gone unnoticed. The Committee on the CRC has identified this principle as a general principle of fundamental importance for the whole Convention. The States Parties are therefore obliged to take measures to prevent discrimination through various means, one being legislation.

Article 5 (1) of the TLCA provides for the right of a child to live free from any discrimination. This is the same as Article 6(1) of the ZLCA. Article 5(2) of the TLCA and Article 4(2) of the ZLCA prohibit discrimination against a child on different grounds. The TLCA mentions gender, race, age, religion, language, political opinion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status and refugee or other status. The same is mentioned under the ZLCA with additions such as no child shall be discriminated on grounds of parents or guardian and on health grounds, including HIV/AIDS status.

Accessed from LHRC Constitutional Database

### *D. Right of the Child to Expression*

What has been noted in the text of the CRC as novel, controversial and most extraordinary [57]or even radical in application to children,[58] is the extension of the civil and political rights to children (Participation /Empowerment rights). These rights are provided for under Articles 12-17 and Article 12 is specifically identified as the most significant in the Convention.[59] It provides for the right of a child 'who is capable of forming his/her view,' to be able to exercise the right to express such views 'in all matters affecting the child.'[60] The other Articles in this category include the rights to freedom of association and freedom of assembly,[61] the right to privacy,[62] freedom of thought, conscience and religion.[63]

---

[57] FORTIN, Jane, *Children's Rights and the Developing Law,* New York: Cambridge University Press, 2009.

[58] See FOTTRELL, Deirdre (ed.), *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child*, op. cit., p. 5.

[59] FORTIN, Jane, *Children's Rights and the Developing Law,* op. cit., p. 42.

[60] CRC, Article 12 (1).

[61] CRC, Article 15).

[62] CRC, Article 16.

Due to the nature of these rights (providing power to children) there have been notable struggles in understanding and accepting some of the rights in this category by member states, resulting in many reservations, with Article 14[64] being cited as having the largest number of reservations.[65] This situation indicates a struggle by State Parties in understanding or accepting the rights of the child within the philosophical and jurisdictional articulation of rights with the main issue being whether children can be rights holders. This struggle continues even after it has been generally accepted through the CRC that children are rights holders, as manifested in the way the CRC is being implemented by the State Parties.

Articles 11 of the TLCA provides for the right of a child to opinion, and that no person shall deprive a child capable of forming views, the right to express an opinion, to be listened to and to participate in decisions which affect his/her well being. The ZLCA under its Section 5 provides that, depending on the age, maturity and the level of a child's development and depending on whether a child is capable of participating in any matter which affects him /her the child shall have the right to participate as is appropriate and her/his views haves to be listened to as is deemed fit. The ZLCA further provides under its Section 10(4) that a child who is sixteen years old may have the right to obtain important information related to health care and health development including information about HIV/AIDs.

Under Section 10(1), the Zanzibar Law of the Child encourages parents, guardians and any person or authority taking care of a child to take appropriate steps in accordance with their means to support children on their rights to participate in games, arts, leisure and any traditional or arts activities appropriate to the child's age. The two legislations are silent on the right of the child to freedom of thought, conscience and religion although Tanzania has ratified the CRC without any reservation. This evidences the struggle the States party has in wholly accepting the children's rights to empowerment.

### *E. Recognition of the Inherent Right to Life, Survival and Development*

The Law of the Child Act 2009 does not expressly provide the right to life for a child as a state obligation and responsibility but that right - under Part II of the Act entitled Right of a Child – is provided as a parental duty and responsibility and it states, under Section 9(1) that:

> A child shall have the right to life, dignity, respect, leisure, liberty health, … education and shelter from his parents.

---

[63] CRC, Article 14.

[64] Article 14 of the CRC provides the right of the child to freedom of thought, conscience and religion. See CRC Text in VAN BUEREN, Geraldine (ed.) *International Documents on Children*, The Hague: Martinus Nijhoff Publishers, 1993.

[65] FORTIN, Jane, *Children's Rights and the Developing Law,* op. cit., 45.

Accessed from LHRC Constitutional Database

This section seems to exonerate the state from protecting this right by pushing it to the parents of the child. This section does not follow Article 6 of the CRC which provides for the child's inherent right to life and obliges state parties to ensure to the maximum extent possible the survival and development of the child.

The Law of the Child 2011 under Section 12(1) has an express provision for the right to life but this is not a right which the government takes responsibility for. The Section is entitled Duties and Parents Responsibility, and continues to provide that parents or any other person who has responsibility towards a child shall have the duty to ensure that the child has the right to life, dignity, respect, liberty, health, education, protection, shelter and any other important aspect in the development of the child physically, mentally, spiritually, ethically and socially.

To further the children's right to life and survival, the ZLCA Act Section 10(1) and (2) resembles Section 8(1) of the TLCA although they are provided for under different titles. The ZLCA Section is entitled the Right to be Provided with Life Necessities (and it puts the obligation for such necessities under parents who, under Section 10(2), are obliged to provide for their child in accordance with their means. The government may help/support the parents depending on its national means and capacity or in collaboration with private institutions on a special program related to nutrition, clothing, shelter and immunization (Section 10(3)). The TLCA (Section 8 (1)) is entitled Duty to Maintain a Child and it provides for the duty of a parent, guardian or any other person endowed with a child's custody to maintain such a child. The duty specifically provides for the right of a child to food, shelter, clothing, medical care/immunization, education and guidance as well as liberty. This again has put all the responsibility on parents and the State does not feature at all, not even in supporting the parents in case they do not have the means, as is the case with ZLCA.

The wording of the two laws also has some differences with the Zanzibar law using adjectives such as 'quality food' (Section 10/11(a) and not just food as provided under Section 8(1) (a) of the 2009 Act, and 'appropriate clothing in 'Section 10(1)(c) and not just clothing (Section 8(1)(c) TLCA). The TLCA provides for education and guidance 8(1) (e) while the Zanzibar law provides for education including religious education. It can be safely said that the right to life provided for in the two Laws of the child in Tanzania mainland and Zanzibar depends on the parents' and guardians' will. The legal responsibility of the State and the Government are not expressly pointed out in the law. This is contrary to the CRC as well as ACRWC which expressly put the obligation on the State Parties.

Accessed from LHRC Constitutional Database

### *F. Consideration of the Child's Evolving Capacities*

This principle is not mentioned in most of the literature but it has been discussed by the CRC committee and some scholars.[66] The CRC Committee in its General Comment Number 4 (CRC/GC/2003/4) of July, 2003 notes Articles 2, 5 and 3 as fundamental principles. The General Comment 4 is specifically on Adolescent Health and Development in the Context of the Convention on the Rights of the Child which then gives the issue of 'evolving capacity' due weight, as promulgated in Article 5 of the CRC. Fottrell[67] mentions 'five key principles that form a backdrop against which all actions of the State are to be measured'. The fifth principle is the consideration of 'evolving capacity' of a child. This is also one of the two principles of interpretation which makes it important for the Sate Parties to implement through its legislation and practice.

The ZLCA 2011 obligates a parent/guardian to ensure observance of the child's best interest all the time, and to guide the child in implementing his/her rights under the law or any other law or contract by way which is in accordance with the evolving capacity of the child - (Section 12(2)( a) (b). There is no apparent Section in the TLCA in relation to this principle.

### *G. The Duty of a Child*

The ACRWC provides for the duty and responsibility of the child. This, as already mentioned above, is said to be in accordance with African Community traditions and is not provided for in the CRC. The same duty and responsibility of a child is provided for under both the 2009 and 2011 Acts. Section 15 of the former Act provides for the child's duty and responsibility to work for the cohesion of the family (a) to respect his parents, guardians, superiors and elders at all times and assist them in case of need, (b) to serve his community and nation by placing his physical and intellectual abilities at its service in accordance with his age and maturity, (c) to preserve and strengthen social and national cohesion, (d) as well as preserve and strengthen the positive cultural values of his community and the nation in general in relation to other members of the community or nation. (e) The same duties and responsibilities are provided for under Section 17 (ad) of the ZLCA. Under this section the Zanzibar law makes a proviso to consider carefully the age, maturity and level of the child's development and capacity in accordance with this law. This shows the adherence by Tanzania of the Articles under ACRWC which are specific to the African situation and not mentioned in the CRC.

## VII Conclusion

The discussion under this article is mainly on the rights of the child as a concept which has developed over time and has been accepted and adopted by

[66] See FOTTRELL, Deirdre (ed.), *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child*, The Hague and Boston: Kluwer Law International, 2000, p. 4.

[67] Ibid.

Accessed from LHRC Constitutional Database

international and regional human rights instruments specific to children. Tanzania being a member state of the United Nations is also a party to most of the international human rights instruments including the specific children's rights instruments. Although it took almost two decades before Tanzania could domesticate the Convention on the right of the child it finally enacted a single law for the protection of children in 2009. Given the special arrangement between Tanzania mainland and Zanzibar the Zanzibar Revolutionary Government also enacted a single law for the protection of the child. What has been noted is the fact that both laws have been guided by the General principles of the CRC and the ACRW with some exceptions. The non-discrimination and best interest principles are well articulated in both Acts while the right to life is not that clear since the obligation is not directed to the State but to parents and guardians. While the Zanzibar law provides for the right to life necessity the Tanzania Act provides for the duty and responsibility of parents to ensure the right of their child to life. This provision does not show how the State – the URT - accepts its obligation to protect the right of the child to life. The right of the child to expression is found under the TLCA and ZLCA only in part, with the rights to self consciousness and religion being omitted. It is not clear whether this was an oversight or it was omitted on purpose. This omission seems to water down the whole law. There is also an omission, in both laws, of the rights to privacy, freedom of thought, conscience and religion. The nature of these rights is to provide power to children and there are notable struggles in understanding and accepting some of the rights under this category by member states. Other countries have specifically ratified the CRC with reservations but Tanzania did not make any reservations to the CRC or the ACRWC which means it is expected to provide for all the rights accorded under the Convention and the Charter.

Notwithstanding these shortfalls, the Law of the Child Act 2009 and the Law of the Child 2010 are a positive move towards the realization of children's rights. It is however important for the state to take its responsibility towards the realization of the rights as an acceptance of its international obligation after the ratification of the Convention on the Rights of the Child and its optional protocols as well as the African Charter on the Right and Welfare of the Child.

The inclusion of the duty and responsibility of a child is a welcome innovation which however needs to be guided lest it is used to abuse the child. Also, the right of the child to expression has been noted as a new, most remarkable and most significant aspect of the convention.[68].

Both laws are still very new with not much jurisprudential practice which means it is necessary to wait and see, and where necessary to review the Sections which seem troublesome in the realization of children's rights.

---

[68] FORTIN, Jane, *Children's Rights and the Developing Law,* op. cit., 42.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# Articles on Zanzibar

Accessed from LHRC Constitutional Database

# CHALLENGES FACING THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 AND THE 10TH AMENDMENT TO THE ZANZIBAR CONSTITUTION, 1984[1]

*Abubakar Khamis Bakary*[2]

I. Introduction
II. The Articles of the Union
III Breaching of the *Grundnorm*
IV. Constitution of the United Republic Problems and Challenges
V. The Constitution of the United Republic of Tanzania, Zanzibar and the East African Integration
VI. 10th Amendment of the Zanzibar Constitution of 2010
VII. Challenges of our Constitutions and our Future
VIII. By the Way of Conclusion

> There is no doubt that Zanzibaris are sick and tired of the present set-up of the Union … (Tanganyika) is found of raising the question whether Zanzibar can stand on its own as an independent state. Zanzibar will not be the smallest state in the world – there are several dozens of states which are smaller. Seychelles, Comoros, a number of West Indian and Pacific islands etc … We have already gone through 30 years of such a shaky association. We either arrive at a mutually acceptable new formula of a Union, or party ways in an amicable way.
>
> Abdul Sheriff[3]

## I. Introduction

The political atmosphere in Tanzania today is highly charged because of the ongoing constitutional debate. Demand for a review of the United Republic of Tanzania's Constitution is high on the political agenda. I am not sure if it rekindles the emotion of the Zanzibaris in the eighties, and the group of 55 from Tanganyika for the claim of their beloved Tanganyika, or if it is intended to

---

1 A public lecture held at Zanzibar University Campus, Tunguu, Zanzibar on 22nd February, 2011.

2 Minister of Constitutional Affairs and Justice, Revolutionary Government of Zanzibar, Tanzania. The views expressed in this paper are entirely those of the author who takes responsibility and they do not reflect the views of either the Ministry or the Revolutionary Government of Zanzibar.

3 In a paper titled "Zanzibar's Fate in the Union: History of the Union," presented at a seminar on the Tanzanian Union held in Copenhagen, Denmark in April, 1995 at pp. 6-7.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

undermine the autonomy and identity of Zanzibar, which the 10th amendment of the Zanzibar Constitution has clearly spelt out. Article one of the Zanzibar Constitution sets its own jurisdiction - Zanzibar is a state which has united with (another) state of Tanganyika to form the United Republic of Tanzania as set out under Art 2 of the said Constitution. And the states were, for Nyerere himself was quoted in as saying that:

> If the mass of the people of Zanzibar should, without external manipulation, and for some reason of their own, decide that the union was prejudicial to their existence, I could not bomb them into submission … The union would have ceased to exist when the consent of its constituent member was withdrawn.[4]

Again, the Constitution of the URT provides for a dual mandate of the Union Government. On the one hand it has wide jurisdiction over all union matters; on the other it has unlimited jurisdiction over union matters within mainland Tanzania.

In the integration process of East Africa, it is obvious that Zanzibar is not a member and there is no member of the East African co-operation called Zanzibar. However, Zanzibar features prominently in the United Republic (a member of EAC). The question now remains on how Zanzibar is represented for non-Union Matters.

The Constitution of the URT is silent on this. Despite the challenges which the URT Constitution has, the whole country has not been stable on the question of constitutional review. It needs commitment to reform. The Government, the people, political parties and civil society should accept the challenges and the need for reform and should commit themselves to it.

The challenges facing the URT's Constitution and the 10th amendment of the Zanzibar Constitution seem to me too wide a subject. It is not possible to cover them in the short space provided, but I will try.

## II. The Articles of Union

A report by the Kampala-based East African civil society organisation - Kituo Cha Katiba - observes:

> There is great uncertainty as to what structure was envisaged by the Articles of Union: Did the Articles envisage a unitary, federal, confederal or an associated arrangement? Most agree that the Union is neither of these. They describe it as being sui-generis. It is united in some aspects and not in others.

---

4 An article in the *London Observer* of 20th April, 1968 quoted in OTHMAN, Haroub and Chris Maina Peter (eds.) *Zanzibar and the Union Question,* Zanzibar: Zanzibar Legal Services Centre, 2006, at p. 74.

> Some cite this very "uniqueness" as reasons not to disturb or question it.[5]

On 22nd April, 1964 Presidents Abeid Amani Karume and Julius Kambarage Nyerere signed the Articles of Union. This constituted a supreme basic law or the *Grundnorm* of the United Republic. If the provisions of the Articles conflict with the provision of the Constitution, then the provisions of the Articles will, according to the basic principle of the law, prevail.

The Articles of Union show clearly that the people's consent was not sought and it is therefore doubtful if Tanganyikans or Zanzibaris consented to the Union. The late Zanzibar Attorney General, Wolfgang Dourado, was excluded in drafting the Articles. Instead the then Tanganyika Attorney General Ronald Brown and his Chief Parliamentary Draftsman P. R. N. Fifoot drafted the Articles in consultation with a Ugandan lawyer Dan Wadada Nabudere who was acting for and on behalf of Zanzibar. This by itself signifies something fishy in the deal.

Even after the Articles had been signed, there appears to be an oddity as regards ratification. Article (viii) of the Articles of Union provided that the Articles shall be subject to the enactment of laws by the Parliament of Tanganyika and by the Revolutionary Council of Zanzibar in conjunction with the cabinet of Ministers thereof ratifying the same. This Article (viii) implies that:

(a) There should have been an enactment by the Parliament of Tanganyika to approve the Articles and that the Revolutionary Council should also, in the same spirit, enact a Decree to approve the Articles.

(b) These laws should then have been ratified by the Cabinet of Ministers and the Revolutionary Council.

The requirement of this provision was not followed, and no law ratifying the Articles of Union exists on the statute Books of Zanzibar. Mere discussion on the subject matter by the Revolutionary Council and the fact that the Revolutionary Council approved the discussion does not in any way legalize the wrong procedure. Thus it was only in Tanganyika, as per Tanganyika Government L.N 243 of 1964, that ratification was legally made.

A study of the Articles of Union indicates that there are three jurisdictions within the Union, namely the Legislature and Executive for Zanzibar over non union matters for Zanzibar, the Parliament and Executive for the United Republic for eleven matters referred to as union matters, and the Parliament and the Executive of the United Republic for matters other than union matters for

[5] See JJUUKO, Frederick and Godfrey Muriuki (eds.), *Federation within Federation: The Tanzania Union Experience and the East African Integration Process*, Kampala: Kituo Cha Katiba and Fountain Publishers, 2010, p. 23.

Accessed from LHRC Constitutional Database

Tanganyika. This clearly paints a true picture on the structure of the union as a "Federation" just as Article (iii)(a) and Article (iv) of the Articles of Union suggest.

Under Article (vii) of the Articles of Union a commission to make proposals for a constitution for the United Republic was to be appointed by the President of the United Republic in agreement with the Vice President who was the President of Zanzibar. This commission was never appointed. In addition, a constituent Assembly composed of representatives from Tanganyika and from Zanzibar was to be summoned within one year of the commencement of the Union for purposes of considering the proposals of the commission and adopting a constitution of the United Republic. The commission was never summoned. All these acts show a clear violation and contravention of the Articles of Union. This leads to the conclusion that the present constitution of the United Republic is legally questionable as it has violated the basic requirement of the *Grundnorm* i.e. the Articles of Union.

Article (iv) reserved eleven (11) items exclusively to the Parliament of the United Republic as matters relating to Union issues while Article (iii)(b) specifically mentioned the existence of the post of Vice President who shall be the head of the Executive in Zanzibar and the principal assistant for the President of the United Republic in the discharge of his executive functions in relation to Zanzibar.

The enactment of Act No. 18/65 intended to extend a one year period for the summoning of a Constituent Assembly to such a time as shall be opportune. The opportune time never came!

The Articles of Union seem to have no principles of constitutionalism and this has led to a number of problems both of interpretation and application.

The adoption of the interim Constitution of 1965 as a Union Constitution without taking into consideration the interest of the two united sovereign states has also led to problems.

The vague reference to *"Tanzania Bara"* instead of Tanganyika is also a problem. Since Tanzania is a creature of Tanganyika and Zanzibar, Tanzania Bara therefore means (Tanganyika and Zanzibar Bara) and this is nonsense and poses another interpretation problem.

Articles of the Union are the foundation stone of our unity, the basic law of the land which has given birth to the constitution of the United Republic of Tanzania and the Constitution of Zanzibar.

It is important to note that a similar arrangement was in force in 1603 between England and Scotland and was later renegotiated in 1705 and 1707. It was decided by the High court of England in the case of *MacCormak Vs. The*

Accessed from LHRC Constitutional Database

*Lord Advocate*[6] that even the Parliament had no power to disturb the Articles of the Union, because that was a *grundnorm* or basic law which it had its own way and procedure of amending its provisions.

The Articles are also a treaty, which the heads of the then two independent states had signed. According to the law of treaties, ratification by all parties (countries) to the treaty must be done. Tanganyika ratified the Articles, while Zanzibar did not. This is another vivid challenge of our Constitution.

## III Breaching of the *Grundnorm*

Former Chief Justice of Zanzibar Ali Haji Pandu argues:

> The Articles of Union (as a Grundnorm) should be above the Constitution or any other law of the country because this is a basic document creating through a Treaty, a United Republic. To the contrary, the Constitution and other laws of the United Republic are not totally guided by the Articles nor do they reflect its spirits.

By acquiescence, I would argue that the Articles of Union between the then Republic of Tanganyika and the Peoples Republic of Zanzibar have been assented toquietly. The status of the Articles of Union would thus become a constitutional instrument or basic law of the URT. And from this, as Shivji rightly puts it, "all other norms and rules pertaining to the Union derive their legal authority and validity.[7]

The supremacy of the Articles is very clear and no other body could alter or amend them. Even the Parliament of Tanzania could not temper with them. Thus the constitution of the United Republic which is a creature of the Articles of Union could not in any way be supreme over the Articles nor could it amend any clause of the Article.

The first breach of the Article came under Sec.8 of the Acts of Union.[8] This Act gave power to the President of the United Republic to make Decrees and such transitional, consequential and temporary provisions in respect of any matter set out in the Decree.

Secondly the Tanganyika Constitution was elevated to be the Union Constitution during the interim period and the President had power to give order under Article (v)(b) of the Articles, for the extension to Zanzibar of any law

6 (1953) Scottish Law Times (SLT) 255, 261 and 262.

7 SHIVJI, Issa G., *The Legal Foundation of the Union*, Dar es Salaam: Dar es Salaam University Press, 1990.

8 Act No. 22/64 of the United Republic of Tanzania – The Union of Tanganyika and Zanzibar Act, See also Section 5 of the same Act.

Accessed from LHRC Constitutional Database

relating to any of the specified union matters. Thus the President used this scapegoat:

(a) to legalize and transform the whole government of Tanganyika to be the government of the United Republic[9]

(b) Section 3(1) of the same Decree provided that every person who previously held office in the service of the Republic of Tanganyika shall be deemed to be in the corresponding office in the service of the United Republic.

(c) Section 6 gave power to the High Court of Tanganyika to be and to act as High Court of the United Republic.

What actually was intended here was to convert all Tanganyikans into the service of the United Republic irrespective of whether their offices fell under union matters or not.

The list of union matters has been rising greatly. Act No. 43/65 declared the Interim Constitution of Tanzania, which Constitution was never passed by a Constituent Assembly. Changes brought about by the Union were re-enacted in this Constitution. Between 1965 and 1976, the Interim Constitution was amended several times, increasing the number of Union matters to sixteen (16). When a permanent Constitution was made in 1977, the Union items went up to 22.

This was purposely intended to constrict the autonomy of Zanzibar. All these amendments were contrary to the provisions of the Articles of Union; and yet, as Shivji has put it, "*[ ]did not then become a constitutional issue*". Indeed President Salmin Amour, as he then was, had declared openly that Zanzibar recognizes only the original eleven Union matters as listed in the Articles of Union. And here again Shivji corroborates Salmin Amours' position when he says that:

> if such additions and amendments of the Union Matters were held to be lawful, Zanzibar's autonomy would be rendered an empty shell.[10]

In 1994 the most fatal blow to the Articles of Union was made. Article (III)(b) of the Treaty (Articles) provides that:

> [T]he offices of two Vice Presidents one of whom (being a person normally resident in Zanzibar) shall be the Head of the aforesaid executive in and for Zanzibar, and shall be the principal assistant to the President of the United Republic in

Accessed from LHRC Constitutional Database

---

9 The Transition Provision Decree Sections 6(3) and 8 issued as Government Notice No. 245/of 1964.

10 SHIVJI, Issa G., *The Legal Foundation of the Union*, op. cit., p. 89.

> the discharge of his executive functions in relation to Zanzibar.

This ensured the President of Zanzibar a permanent place in the Union Government as one of its two Vice Presidents. However the 11th Constitutional Amendment of the Constitution of the United Republic abolished this special status of the President of Zanzibar and now the Zanzibar President is treated just like a Cabinet Minister.[11] This is indeed a gross violation of the Articles of Union.

## IV. Constitution of the United Republic: Problems and Challenges

Chief Justice John Marshall of the US underlines that:

> Our constitution … is a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.[12]

Strict interpretation of this definition indicates that a constitution is a landmark which shows its people the way forward. In it there are hopes and aspirations and it also has its letter of the law and its spirit. It is the fountain of justice and defines clearly the three organs of the state. The constitution, says Justice Sowar, is a living organism capable of growth and development.[13]

It is important for us to see how far the Constitution of the United Republic captures that spirit. What are the challenges which face the said Constitution and what are the remedies, if any?

Briefly, the 1977 constitution of URT expressly provides for a separate government of Zanzibar. There is also the government of the United Republic, which is empowered to act with respect to all Union matters in and for Mainland Tanzania. The dual role of the Union government has led to tensions and contradictions. The most vulnerable areas contributing to these contradictions relate to allocation of revenue, a special Constitutional Court, the Court of Appeal for Tanzania, the list of Union matters and the legislative process.

There is a Consolidated Fund for the United Republic into which all revenues or other moneys for purposes of the government of the United Republic are paid. The clear and unambiguous interpretation of these provisions indicates that the Fund is to be used for Union matters only, which Union matters have been listed under the First Schedule of the Constitution.

Mainland Tanzania does not have its own Consolidated Fund for matters other than Union matters and which relate to Mainland Tanzania only. Zanzibar,

---

[11] Articles 54(1) of the Constitution of the United Republic.

[12] John Marshal, the then Chief Justice of USA in *McCulloch v. Maryland* – 4 Wheat 316 US (1819).

[13] As per Justice Sowar in *Tuffor v. AG of Ghana*, 1980, AG 637, 674.

Accessed from LHRC Constitutional Database

on the other hand, has its own Consolidated Fund for non-Union matters relating to Zanzibar. Thus another outcry for Zanzibar, and rightly so, is that all expenditure in respect of non-Union matters in Mainland Tanzania should not be met by the Consolidated Fund of the United Republic.

Secondly, there is a joint Finance Account of the United Republic which shall be paid all moneys contributed by the two governments in such proportions as shall be provided for by the Joint Finance Commission. Thus constitutionally, it is only the government of the United Republic and that of Zanzibar which are bound to contribute for the servicing and maintenance of the Union. Mainland Tanzania does not contribute anything and in fact is not bound under the Constitution to do so.

The Constitution also established a Joint Finance Commission consisting of not more than seven members who are appointed by the President. Here there is no guarantee that the composition shall be of equal members from both sides of the Union. This general power of appointment given to the Union President to appoint members to any Union institution has been questioned by the Zanzibaris over many issues. However, the Joint Finance Commission is supposed to work in pursuance of the provisions of the Act of Parliament of the United Republic, yet there is no guarantee that Zanzibar's interest will be safeguarded. In order to remove these anomalies, it is suggested that the Constitution of the United Republic be amended to incorporate provisions for allocation and distribution of revenue between the Government of the United Republic, the Government of Zanzibar and the Government of Mainland Tanzania. And this again would prove the necessity for the establishment of three governments, as will be suggested shortly.

Accessed from LHRC Constitutional Database

The question of a Special Constitutional Court is another problem which besets the Union. Although the establishment of the Court is provided for in both Constitutions, it is however not indicated that the Court shall be a Union matter; and since the Court is not provided for under the list of Union matters, its existence as a Union matter is therefore constitutionally questionable. The Special Constitutional Court's jurisdiction is to hear and make reconciliatory decisions in respect of any dispute submitted before it, which relates to the interpretation of the constitutions of the United Republic and the Revolutionary Government of Zanzibar. The provision therefore excludes other kinds of legal disputes that relate to Union matters. It should also be pointed out that the provision provides no solution if the dispute is between Mainland Tanzania and Zanzibar. This is another riddle to the Constitution.

Again, the Court shall consist of members of whom one half shall be appointed by the Government of Zanzibar and the other half by the Government of the URT. This composition is also questionable in cases where the dispute is between the URT and Zanzibar as here it is obvious that Mainland Tanzania alone would be safeguarding the interests of the United Republic. The quorum of the Court provides yet another problem. The quorum shall be all its members

and if any member is absent, a temporary member should be appointed by the government which had previously appointed the person who is temporarily absent.

The determination of each issue before the court shall be by two thirds of the votes from each side. This even distribution of votes is likely, in my opinion, to lead to a deadlock if the members from each part take a firm stand on the issue at hand, especially when such an issue will have a direct effect on either Zanzibar or Mainland Tanzania. Faced with this situation, the court would be rendered inoperative. To avoid this situation and ensure the proper functioning of the court, it is proposed that the Constitution be amended so that the composition of the court is in the odd number; hopefully those appointed will discharge their functions impartially without fear or favor.

Mention should also be made of the composition of the Court of Appeal. Initially no judge from Zanzibar was on the bench until 1987 when one Zanzibari was appointed to the bench, joined by a second in 1989. Secondly, the Chief Justice of Mainland Tanzania as the Head of the Judiciary in Mainland Tanzania sits in the Court of Appeal as the head of the Court while the Chief Justice of Zanzibar is not even a member of the Court of Appeal.

The list of union matters has also been a source of controversy and disagreement between the Government of the United Republic and the Revolutionary Government of Zanzibar. It is argued that the list has constantly been growing without the consent of Zanzibaris themselves, and that other matters included in the list tend to restrict the autonomy of the Zanzibar Government. As a result of these contentions, some of the interpretations given to the items in the list of Union matters by the Union Government are heavily opposed by the Zanzibaris.

The House of Representatives does not have power to introduce legislation on Union matters. This is the function of the Union Parliament, which also has power to enact Laws relating to Tanzania Mainland. A Bill for an Act to enact or alter any law relating to Union matters shall not be passed by the Parliament unless it is supported by the votes of not less than two thirds of all members of Parliament hailing from Tanzania Mainland and not less than two thirds of all Members of Parliament hailing from Zanzibar. However the Act shall not extend to Zanzibar unless it is passed in accordance with the requirement of Section 98(1)(b) of the Constitution of the United Republic and that the Act is laid before the House of Representatives. The source of conflict here is with regard to matters relating to the executive authority of the Government of Zanzibar, the High Court of Zanzibar and the total number of members of Parliament hailing from Zanzibar.

It is clear that the alteration of these matters would require the concurrence of two thirds of Members of Parliament from each side. However, Zanzibaris argue that since the executive authority of the Government of Zanzibar and the High Court of Zanzibar are not Union matters, then these

Accessed from LHRC Constitutional Database

matters should be left entirely to Zanzibaris themselves. In other words, this is clearly the province of the House of Representatives and not the Parliament of the United Republic and any attempt on the part of Parliament of the United Republic to legislate on these issues would be unconstitutional.

On the other hand, item eight of the Schedule provides that the alteration of the total number of Members of Parliament hailing from Tanzania Zanzibar may be altered only if there is a concurrence vote of two thirds of Members of Parliament hailing from Mainland Tanzania and two thirds of Members of Parliament hailing from Tanzania Zanzibar. It is clear that the alteration for the total number of Members of Parliament hailing from Mainland Tanzania does not require this entrenched process, and a simple majority would suffice to either increase or decrease the Members of Parliament. It is not difficult also to obtain the required simple majority votes since Members of Parliament from Mainland Tanzania exceed those of Zanzibar by a large number. However, it is obvious that it will be difficult to increase the number of Members of Parliament hailing from Zanzibar since it may become impossible to get the required two-thirds majority of Members of Parliament hailing from Mainland Tanzania. The solution therefore would be to entrench the requirement for Mainland Tanzania similar to the Members of Parliament hailing from Zanzibar.

Section 98(1)(a) provides another Schedule of the legislation the alteration of which requires the concurrence of two thirds of all Members of Parliament. This schedule includes the Citizenship Act, Chapter 512 of 1961 and the Act of Union between Tanganyika and Zanzibar. These are Union matters, and in my opinion they should require the concurrence of two thirds of Members of Parliament from each side, otherwise it will be again easy for the Members of Parliament hailing from Mainland Tanzania to alter these Acts without the general consent of the people of Zanzibar through their elected representatives.

All these matters would practically require clarification by the Special Constitutional Court although regrettably it has never been convened. In 1984 however, the President of Zanzibar was determined to call for the Special Constitutional Court to determine these itching constitutional problems between Zanzibar and the United Republic. It is indeed sad to note that the Party frustrated his efforts and he was forced to resign from the CCM Party and the Government. Again in 1988 the former Chief Minister of Zanzibar, some members of his Cabinet and other officials tried to point out these problems on various occasions, which led to their dismissal from the CCM Party, the House of Representatives and the Government. The reasons advanced by the Party in both cases were that they were trying to undermine the Union. Zanzibaris were indeed paying the price of having one political party which was supreme over all other matters.[14]

---

[14] For a detailed analysis on this topic – see "The Union and the Zanzibar Constitutions," by Abubakar Khamis Bakary in OTHMAN, Haroub and Chris Maina Peter (eds.) *Zanzibar and the Union Question,* op. cit. pp. 1 to 33.

Accessed from LHRC Constitutional Database

## V. The Constitution of the United Republic of Tanzania, Zanzibar and East African Integration

The structure of the Union as stipulated in the URT'sConstitution has so many challenges and this structure as it interfaces with the East African integration process creates another fatal blow to the existence of Zanzibar.

My personal view is that the URT should have first resolved its internal problems on the question of the Union rather than complicate issues by having the East African integration process. Let us first resolve our present problems within the union by considering the following important issues before joining the federation.

(a) What powers has Zanzibar got for non-union matters which are now part of the East African co-operation integration process?

(b) Constitutionally the United Republic has no jurisdiction for non=union matters relating to Zanzibar, so how and under what provisions does the United Republic exercise these powers when discussing issue under EA Integration process?

(c) How is Zanzibar going to be represented in institutions such as the East African Legislative Assembly SADC, OIC, CAF and FIFA?

If you go through Article 4(3) of the constitution of the United Republic and the schedule to that Article, only 22 items have been listed as union matters, all questionable by many Zanzibaris. The rest of the items, which fall under non-union matters, have all been placed as matters to be dealt with under the East African Treaty. This indirectly provides that these matters shall fall under the umbrella of the United Republic, which is going to represent Zanzibar before all East African Federation meetings. Such matters include, but are not limited to:

(a) Article 24 of the Treaty on the appointment of Judges of the East African Court of Appeal. Zanzibar has to pray for the pleasure of the President of the United Republic only;

(b) Article 48 of the Treaty on the nomination and or election of East African Members of the Legislative Assembly, who are all elected by the Union Parliament;

(c) Article 76 of the treaty on the establishment of the Common Market;

(d) Article 79 of the treaty on the development of industries;

(e) Development of infrastructure as outlined under chapter 15 of the Treaty;

(f) Article 102 on Education;

Accessed from LHRC Constitutional Database

(g) Article 105 on food and security, Article 107 on livestock, Article 108 on the control of livestock;

(h) Article 117 on the environment; and

(i) Article 118 on health; 119 on culture and many others.

All the above mentioned items are not union matters, but it is required that these be now under the umbrella of the United Republic whenever discussion is taking place before any sitting of the East Africa Co-operation. In this respect, the Constitution of the United Republic and the Treaty for the establishment of the East African Federation have all contributed to increase the volatile situation between Mainland Tanzania and Zanzibar - Zanzibar's autonomy and identity are now on the wane and the larger and more populous Tanganyika is swallowing Zanzibar and poor Zanzibaris. This is another big challenge for the Constitution of the United Republic, which must be rectified.

Accessed from LHRC Constitutional Database

## VI. 10th Amendment of the Zanzibar Constitution of 2010

Very recently we had the 10th amendment of the Zanzibar Constitution. This was a result of a private member's motion from Mgogoni Constituency Member of the House, Hon. Abubakar Khamis Bakary who tabled his proposals for the said amendments before the House. After a heated debate, all members of the House unanimously agreed and approved the proposed amendments. The proposed amendments include, but are not limited to:

(a) Article 1 and 2, which state categorically that Zanzibar is a state and that it is one of the two independent states which united to form the United Republic of Tanzania;

(b) Article 9(3) which establishes the Government of National Unity;

(c) The Introduction of the posts of two Vice Presidents under Article 39(1) of the Constitution, the 1st Vice President being a person proposed by the party which had won a second position in the presidential election.

(d) Article 42(2) which establishes the cabinet of the Revolutionary Council in terms of proportional representation of the number of seats each party has obtained during the general election.

(e) The appointment of Regional Commissioners (RCs) by the President of Zanzibar and not as it was before by the President of the United Republic in consultation with the President of Zanzibar.

(f) That the RCs would not be members of the House of Representatives now, thus making them mere civil servants, removing from their shoulders the political role they had before.

The other most important amendment is the introduction of a referendum clause in Article 80(A)(2), and that nothing under Articles 1, 2, 3, 4, 5, 9, 11 up to 25A, 26, 28, 39, up to 48, 80A and 121(1) and 123 shall be amended, revised or deleted unless a referendum is called for for that purpose. These entrenched provisions are aimed at consolidating the Government of National Unity.

It is thus obvious that the challenges which the Constitution of the United Republic faces especially those under Chapter Four are grave. First, this chapter does not convey the same meaning as that provided for under the Zanzibar Constitution. Secondly, according to this amendment, the main opposition party in Zanzibar, CUF, is part of the Government and takes part in all Government decisions while the same CUF in Mainland Tanzania is not part of the Government and still remains one of the main opposition parties. It seems to be difficult to consolidate this idea, but a constitutional change of the URT's constitution can address this situation.

Presently, there are 10 amendments in the Zanzibar Constitution while that of the URT has 14. In all these amendments some Articles have been deleted. Article 10, 67(9), (10), (11), (12), 80 and 82 of the Constitution of the URT and Article 98, 102A, 103 of the Zanzibar Constitution have been deleted. There are also dormant provisions which cannot be used, such as Articles 125 to 128 on the Constitutional Court. All these factors necessitate a complete re-writing of the Constitution of the United Republic.

In a nutshell, what is needed here is to have a new Constitution to replace the present constitution which is full of patches and ambiguities.

Accessed from LHRC Constitutional Database

## VII. Challenges of our Constitutions and our Future

There is a lot of dissatisfaction with the Union in its present form. This is particularly the case on the issue of Zanzibar Nationalism and the loss of both its identity and sovereignty. Nobody would want the union to break up, but Zanzibaris demand a just union, a Union for the benefit of both *"Wazanzibari"* and *"Watanganyika."* This therefore demands for a Constitutional change or reform and a complete re-writing of the Constitution.

The Constitution of the United Republic does not provide room to accommodate Zanzibar as a member of the East African Community, thus making Zanzibar ineffectively represented especially for non-Union matters. As we have seen in many cases, the Union Government takes up all non-Uunion matters relating to East African integration without Zanzibar being consulted or considered. This again reminds us in the United Republic of the need to have urgent constitutional reforms.

Another reason for a new Constitution is that since the Union in 1964, there have been no substantial changes except a few amendments introduced by the ruling party to suit their interests. One cannot over-emphasize the many political changes which have taken place, let alone the changes from a single

party to multipartism. And in this respect, we have to know what we need in the new constitution so that we really have our own ideas embedded in it. The idea is to have a home-grown constitution which is flexible and capable of conveying both the letter and the spirit, and the hopes and aspirations of the people of the United Republic.

## VIII. By Way of Conclusion

Without any question, the manner and the implications of the union between Tanganyika and Zanzibar is the most misunderstood aspect of Tanzania political development. It may not matter very much when foreigners get confused. But unfortunately there are many times when Tanzanians themselves appear to misunderstand it.

People get confused because they do not want to know that Zanzibar enjoyed and is still enjoying sovereignty over non-Uunion matters. Zanzibar is different to Tanga, Kilimanjaro or Arusha even if its population is much smaller than those regions. Zanzibar was and still is a state.

There are problems associated with the Union and there are others associated with respect to Union questions related to the East African integration process. The Parliament of Tanzania, for example, or the National Electoral Commission, are not union issues, nor do they appear on the list of Union matters as per the first schedule under Article 4 of the Constitution. When Parliament sits, almost 98% of the issues discussed are related to Tanzania Mainland. Higher Education, ports and harbors are all supposed to be Union matters, but alas, only Dar es Salaam, Mtwara and Tanga Ports are being developed by the Union Government while Zanzibar ports of Unguja and Pemba are left to the Revolutionary Government of Zanzibar.

One would assume that the employees of the State University of Zanzibar, for example, would get their salaries and other remunerations from the Government of the United Republic because higher education is a union matter, but the United Republic stood firm only in questioning its establishment because that falls under the Union umbrella.

SADC once wrote a letter to the Zanzibar authority to stop collecting a 2% levy on the pretext that the community has withdrawn that tax. Zanzibar stood firm on the grounds that it was not part of the negotiating team and the mere fact that the URT had taken part does not legalize its participation on behalf of Zanzibar for non-Union matters.

The fact that there is no constitutional authority for the Government of the United Republic to act for and on behalf of or to act as government of Tanganyika since the formation of the Union in 1977 is very valid. This may be the reason why a group of 55 demanded for the revival of the government of Tanganyika.

Accessed from LHRC Constitutional Database

All in all, what we may conclude from this brief discussion is that there must be a review of the the Union structure, the list of Union matters and other benefits of both the constituent members. In this regard there must be a review of the Articles of Union and the Constitution itself so that a new constitution is enacted. The ways of doing this are many, and include a referendum and a constitutional review commission.

The 10th amendment of the Zanzibar Constitution has tried to salvage the sinking Zanzibar Government. It is however not too late, but extra efforts should be exerted in order to pull it up from the sea bed. A new constitution for the United Republic of Tanzania will have that strength.

There is also the question of the East African integration process. We cannot leave Zanzibar outside. Zanzibar should take part in the negotiations, especially on those issues which are not Union matters. To avoid clashes on this aspect, the structure of the Union should automatically change to federation. This will give equality to all the partners.

The idea as of now is East African integration which is geared towards a political federation with one president for the East African countries. To do this, Tanzania has to surrender its sovereignty. But this can only be done if Article 98(1)(b) is adhered to. This Article under schedule II of the Constitution, item one thereof, would require both two thirds majority of the Members of Parliament hailing from Tanzania Mainland and two thirds of the Members of Parliament from Zanzibar for a constitutional decision. Are Zanzibaris willing to do so? Definitely, as a true Mzanzibari, I would not be willing to support that.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# UNION AND CONSTITUTIONAL REVIEW IN TANZANIA[1]

*Ibrahim Mzee Ibrahim*[2]

I Introduction
II. Milestones in the History of the Union Constitution
III. The Process of Constitutional Review under the Constitutional Review Act
IV. Major Issues for Debate
V. Actors and Philosophical Underpinning

## I Introduction

The United Republic of Tanzania is now forty-eight years old.[3] The Union has been a popular subject of discussion and debate and has attracted both praise and criticism. In this paper, we intend to discuss the Union in the context of the current discourse on the constitutional review in the country. Our main focus will be on milestones in the history of the Union constitution, the process of constitutional review under the Constitutional Review Act (Cap 83 of the Laws, Revised Edition of 2012), major issues that are likely to be the crux of the present constitutional review debates, and actors and the philosophical underpinning for constitutional review.

There is a divergence of views and interpretations relating to the motive for the Union. In the first place, proponents of African unity view the Union as a first step towards African cooperation, unity and Pan-Africanism in general.[4] Secondly, western writers have documented that the Union was a product of neo-colonial politics of the cold war by super powers (USA and USSR) in the 1960s.[5] Thirdly, the Union has also been perceived as a result of political expediency and pragmatic considerations of the main political actors in

[1] A Public lecture organized by Ford Foundation and Zanzibar Legal Services Centre at Eacrotanal Hall Zanzibar on 13th June, 2012 to mark the 50th Anniversary of the establishment of the Ford Foundation Office for Eastern Africa.

[2] The Director of Public Prosecutions of Zanzibar.

[3] The Articles of the Union were signed in Zanzibar on the 22nd April, 1964. The United Republic of Tanganyika and Zanzibar came into being on the 26th April, 1964. It was the Union between the former Republic of Tanganyika and the former Peoples Republic of Zanzibar. By Section 2 of the Act No. 61 of 1964 its name was officially changed and it came to be known as the United Republic of Tanzania.

[4] NYERERE, Julius Kambarage, "The Union of Tanganyika and Zanzibar," *Freedom and Unity: A Selection from Writings and Speeches 1952 – 1965,* Dar es Salaam: Oxford University Press, 1966.

[5] WILSON, Amrit, 1989, *US Foreign Policy and Revolution: The Creation of Tanzania,* London: Pluto Express, 1989. See also HUNTER, Helen-Louise, 2010, *Zanzibar: The Hundred Days Revolution,* Santa Barbara, California: ABC – CLIO, 2010.

Accessed from LHRC Constitutional Database

Tanganyika and Zanzibar.[6] Fourthly, the Union has been cited by some people as an attempt of one African country to swallow and colonize another African country.[7]

To some legal scholars, the Union has raised some complex questions with no available answers. Srivastava has called them "Riddles"[8] whereas Othman Masoud Othman described them as "Questions without Answers in the Union".[9] While legal scholars were wondering about the complex questions in the Union, the Revolutionary Government of Zanzibar (RGZ) realized that there were two categories of the specific problems of the Union: (i) Problems of the system and lack of transparency. (ii) Constitutional problems.[10]

## II. Milestones in the History of the Union Constitution

Constitution can be broadly defined as "a framework of rules defining the functions, composition and inter-relationships of the institutions of government, and the rights and duties of the governed. These rules describe the location, distribution, exercise and limitation of political power among the instruments of the state…".[11] If we take this definition to be correct and apply the same to the union of Tanganyika and Zanzibar it can be confidently asserted that the bedrock of the Union constitution is to be found in the Articles of Union that were signed by two presidents on the 22nd of April 1964 and supposedly ratified by two respective legislatures[12] and added as schedules to the respective Union laws

Accessed from LHRC Constitutional Database

[6] SHIVJI, Issa G., *Pan- Africanism or Pragmatism? Lessons of Tanganyika- Zanzibar Union,* Dar es Salaam: Mkuki na Nyota Publishers, 2008.

[7] JJUUKO, Frederick and Godfrey Muriuki (eds.), *Federation Within Federation: The Tanzania Union Experience and the East African Integration Process*, Kampala: Kituo Cha Katiba and Fountain Publishers, 2010, p. 74. See also, GHASSANY, H., *Kwaheri Ukoloni, Kwaheri Uhuru! Zanzibar na Mapinduzi ya Afrabia,* Washington DC., 2010; and SALIM, Y.S., *Zanzibar Dola, Taifa na Nchi Huru,* Copenhagen: Zanzibar Centre of Human and Democratic Rights, 1994.

[8] SRIVASTAVA, B.P., "The Constitution of the United Republic of Tanzania 1977 – Some Salient Features, Some Riddles," Volumes 11 - 14 *Eastern African Law Review,* 1978 – 81, pp. 73 – 127.

[9] OTHMAN, Masoud Othman, *Masuala Yasiyo na Majibu Katika Muungano,* paper presented to the Zanzibar Law Society Special Conference on the 41st Anniversary of the Union, Bwawani Hotel, Zanzibar, 23rd April 2005.

[10] SERIKALI YA MAPINDUZI YA ZANZIBAR, *Muhtasari wa Ripoti ya Baraza la Mapinduzi Juu ya Matatizo na Kero za Muungano na Taratibu za Kuyaondoa,* Afisi ya Waziri Kiongozi, Mpiga Chapa wa Serikali, Zanzibar – Tanzania, 2004.

[11] LORD HAILSHAM OF ST. MARYLEBONE, Volume 8 *Halsbury's Laws of England* (4th Edition), London: Butterworths, 1974, p. 521.

[12] On the side of Tanganyika the union was ratified by the Parliament of Tanganyika via Act No. 22 of 1964. On the side of Zanzibar, no evidence of ratification has been found to date; instead, there is an affidavit of Mr. Salim Rashid who at the time of the formation of the union was the Secretary of the Revolutionary Council and who recently made deposition that there was no ratification, and there is also the statement of the late Honourable Wolfgang Dourado who was the Zanzibar Attorney General during the creation of the union and who later on

(Acts of the Union). According to Shivji, "the Acts of Union are a constitutional instrument."[13]

The first Union constitution therefore was the Constitution of Tanganyika as modified by Presidential Decrees[14] by virtue of the powers vested in the President of the United Republic under the Articles and Acts of the Union. Simply, the President made the constitution.

The appointment of a Constitutional Commission and the summoning of a Constituent Assembly were delayed for unknown reasons. That was contrary to the stipulation of the Articles and Acts of the Union. By using its powers of amending the constitution, the ordinary Parliament of Tanzania passed the Interim Constitution through Act No. 43 of 1965. Under the Interim Constitution of 1965 Tanzania became a one-party state, a decision made by the National Executive Committee (NEC) of TANU. The TANU Constitution was made a schedule to the 1965 Interim Constitution. Chris Maina Peter has commented that "It is not clear why then it was decided to append the Constitution of one party only – TANU and exclude that of ASP while in fact the two parties existed simultaneously in the country".[15] The 1965 Interim Constitution survived for twelve years.

The permanent constitution was adopted in 1977. Legally, the provisions of the Articles and Acts of the Union were technically followed because the Constitutional Commission was appointed and the Constituent Assembly was summoned. However, from the point of view of political legitimacy it is questionable.[16] The twenty members (ten from each part of the Union) of the Constitutional Commission were appointed on the 16th March, 1977 and they were gazetted on 25th March, 1977 through Government Notice No. 38. The appointed members of the Constitutional Commission are the same ones who constituted the committee for the merger of TANU and ASP and the birth of CCM. Again, on the same 16th March, 1977 the President of the United Republic of Tanzania, through Government Notice No. 39 published on the 25th March, 1977, appointed members of the then existing parliament to become members of the Constituent Assembly that would meet on 25th April, 1977. The Bill for the new constitution was published on 18th April, 1977 and when the Constituent

Accessed from LHRC Constitutional Database

emphatically declared that there was no ratification in Zanzibar. See DOURADO, Wolfgang, "The Consolidation of the Union: A Basic Re – Appraisal," paper presented to the Tanganyika Law Society Seminar, 27th – 29th July, 1983. However, there was the General Notice No. 243 in the *Tanganyika Gazette* of 1st May, 1964 which published the ratification law of Zanzibar purported to have been passed by the Revolutionary Council of Zanzibar.

[13] SHIVJI, Issa G., *The Legal Foundations of the Union,* op. cit.

[14] For instance, The Transitional Provisions Decree, 1964, published on 1st of May 1964 as Government Notice No. 245. Also, The Interim Constitution Decree, 1964, published on 1st of May 1964 as Government Notice No. 246.

[15] PETER, Chris Maina, *The Constitution – Making in Tanzania: The Role of the People in the Process,* Dar es Salaam: University of Dar es Salaam, 2000, p. 9.

[16] SHIVJI, Issa G., *The Legal Foundations of the Union,* op. cit., p. 63.

Assembly met a week later it was adopted in less than three hours. The total membership of the Constituent Assembly was 207, of whom only 45 were from Zanzibar. Hence the members from Zanzibar were more or less one-fifth of the total membership in the Constituent Assembly.[17]

The 1977 Constitution has been in force for 35 years now and it has been amended fourteen times. In relation to the constitutional amendments, it would be remembered that heated debates on the Union took place in 1983 when NEC of CCM presented proposals for amendments to the Constitution of the URT which included the famous Part IV of the NEC proposals on the Consolidation of the Union. Honourable Juma Abdalla Machano, a member of the House of Representatives moved a private motion in the House of Representatives to remind the party (CCM) that any amendments to be made in the Union Constitution had to guarantee and respect Zanzibar's autonomy. Furthermore, opinions were expressed through the media by someone under the pseudo name of *"Kiroboto"* advocating for a federation of three governments. Also, Aboud Jumbe's letter that was surreptitiously stolen from Zanzibar State House and sent to President Nyerere advocated a federation of three governments.[18] Moreover, Wolfgang Dourado's paper which we have already cited above that was presented to the Tanganyika Law Society seminar also questioned the legality and legitimacy of the Union and it advocated a federation of three governments as well. The 1983 constitutional debates led to the so-called pollution of the political atmosphere and the early resignation of Honorable Aboud Jumbe in January 1984 from the Zanzibar presidency and CCM vice-chairmanship. After the re-introduction of multi-party politics in the mid 1990s another amendment which generated a lot of discussion in Zanzibar was the separation of the Zanzibar presidency from the Vice-presidency of Tanzania. On the other hand, in Tanzania Mainland there was a landmark move of Members of Parliament popularly known as G 55 demanding the creation of a Government of Tanganyika so as to have a federal set-up of three governments.

There are different opinions regarding the status of the Articles and Acts of the Union after the adoption of the 1977 Constitution. Shivji, for instance, is of the view that they still constitute the *Grundnorm* of the Union from which all other norms and rules pertaining to the Union derive their legal authority and validity and in case of conflict they prevail over the 1977 Constitution.[19] Others, for example Sitta, hold the opinion that Articles and Acts of the Union are spent and it is the 1977 Constitution that prevails.[20]

---

[17] FIMBO, G.M., *Tujadili Katiba Yetu: Katiba ya Jamhuri ya Muungano wa Tanzania ya Mwaka 1977,* Dar es Salaam: Dar es Salaam University Press, 2007, pp. 16 & 17.

[18] JUMBE, Aboud, *The Partner – ship: Tanganyika Zanzibar Union, 30 Turbulent Years,* Dar es Salaam: Amana Publishers, 1994.

[19] SHIVJI, Issa G., *The Legal Foundations of the Union,* op. cit.

[20] SITTA, Samuel J., *Marekebisho ya Katiba ya Jamhuri ya Muungano wa Tanzania*, 1995.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

## III. The Process of Constitutional Review under the Constitutional Review Act

Act No. 8 of 2011 as amended by Act No. 2 of 2012 provides the scheme of the current constitutional review process. It includes, among other things, the appointment of a Constitutional Commission and its secretariat, terms of reference for the commission, a mechanism for the public to express their opinions on new constitution, the drafting of a new constitution and preparation of a report by the commission, a mechanism for scrutiny of a Draft Constitution Bill, the appointment of a Constituent Assembly and its secretariat, and the validation of the newly proposed constitution by a referendum.[21]

The Constitutional Review Act was passed by Parliament using its legislative capacity as an ordinary law under Article 64 of the 1977 Constitution. It was not passed by using Parliament's constituent capacity under Article 98 of the 1977 Constitution because it did not amend any provision of the existing 1977 Constitution. The 1977 Constitution does not provide for a procedure for adopting a new constitution; it only details procedure for amending the existing 1977 Constitution. The question may be raised - is it jurisprudentially sound for a legislature to enact an ordinary law providing for the adoption of a new constitution and the abolition of the current one?

There has been a progressive step in the modality of appointing the members of the Constitutional Commission. Members of civil societies and the public at large had the opportunity for the first time at least to propose names of persons whom they thought suitable.

The functions of the Constitutional Commission are listed in sub-section 9 (1) of the Constitutional Review Act as being to: (a) co-ordinate and collect public opinions; (b) examine and analyze the consistency and compatibility of the constitutional provisions in relation to the sovereignty of the people, political systems, democracy, rule of law and good governance; (c) make recommendations on each term of reference; and (d) prepare and submit a report. In my opinion, paragraph (b) is vague and ambiguous. It is not clear which constitutional provisions shall be examined -of the existing 1977 Constitution or those of the newly proposed constitution or any constitutional provisions in general at a theoretical level? However, if we read the Kiswahili version, which is also authentic according to sub-Section 38 (4) of the same Act, the likely interpretation in my view is the third alternative indicated above. We are not quite sure which interpretation the Constitutional Commission will adopt. Apart from the general functions specified in Section 9, the detailed functions of the Commission have been provided under Section 17 of the Act.

Under sub-section 9 (2) the Commission is required to adhere to national values and ethos and to safeguard and promote, *inter alia*, the existence of the

[21] Section 4 of the Act No 8 of 2011 as amended.

United Republic and the existence of the Revolutionary Government of Zanzibar. As regards the existence of the Revolutionary Government of Zanzibar there is support in the 1984 Zanzibar Constitution. Section 26 (1) of the 1984 Zanzibar Constitution provides that "Kutakuwa na Rais wa Zanzibar ambaye atakuwa Mkuu wa Nchi ya Zanzibar, Kiongozi Mkuu wa Serikali ya Mapinduzi na Mwenyekiti wa Baraza la Mapinduzi". Section 80A (2) (d) of the 1984 Zanzibar Constitution has entrenched the above cited Section 26 of the same constitution so that it cannot be amended even by the House of Representatives without a referendum. Therefore, the Constitutional Review Act was legally correct to invoke safeguards and promotion of the existence of the Revolutionary Government of Zanzibar. Regarding the existence of the United Republic, we find similar support in neither the 1977 Union Constitution nor the 1984 Zanzibar Constitution. On the contrary, the 1977 Union Constitution provides that among the matters that can be voted for by two-thirds majority of each part of the Union is the existence of the United Republic.[22] In these circumstances, it can be submitted that the safeguard imposed by the Constitutional Review Act relating to the existence of the United Republic is at best unnecessary and at worst unconstitutional.

History repeats itself. The composition of the upcoming Constituent Assembly is almost identical to the one that adopted the 1977 Tanzania Constitution except for two things: First, the Constituent Assembly this time includes all 82 members of the House of Representatives of Zanzibar[23] (in 1977 there was no House of Representatives in Zanzibar, the House was established in 1980). Second, the Constituent Assembly also this time involves one hundred and sixty-six presidential appointees from civil society[24] (at least one-third from Zanzibar)[25]. The commonalities between the 1977 Constituent Assembly and the upcoming Constituent Assembly are the following: Both are appointed by the President and they are not directly elected for constitution-making. The number of members in the Constituent Assembly from the two parts of the Union is not equal. The only safeguard is that the provisions of the proposed Constitution shall be passed by two thirds majority of Members from Tanzania Mainland and two thirds majority of Members from Zanzibar.[26] It is strange that equality between nations is ignored within two mutual partners of the Union of Tanzania but it is highly respected and preserved in the Partner States of EAC. Of approximately 600 members of the Constituent Assembly, members from Zanzibar will be more or less only one third. In 1977 members from Zanzibar were more or less one-fifth of the total membership. Again, in 1977 and in the current constitutional review process, equality in numbers was and is observed

[22] Item no. 1 in the Second List of the Second Schedule to the 1977 Tanzania Constitution.

[23] Section 22 (1) (b) of the Act No 8 of 2011 as amended.

[24] Section 22 (1) (c) of the Act No. 8 of 2011 as amended.

[25] Section 22 (2) of the Act No. 8 of 2011 as amended.

[26] Section 26 (2) of the Act No. 8 of 2011 as amended.

Accessed from LHRC Constitutional Database

in the creation of the Constitutional Commission for preparation of drafts but it is not adhered to with regard to the composition of the Constituent Assembly which passes the proposed Constitution. The Chairman of the Constituent Assembly is elected amongst its members by simple majority.[27] Who are the majority in the Constituent Assembly? Definitely, members from Tanzania Mainland; but as usual, don't worry, the Vice-chairman must be from the other part of the United Republic.[28]

Section 21 of the Constitutional Review Act creates offences and punishments. It is an offence to obstruct, hinder or prevent any member of the Commission or Secretariat from performing their functions, or to obstruct, hinder or prevent any person or group from giving public opinion to the Commission. Also, inciting for any of those activities is an offence. Impersonation of a member of the Commission or Secretariat is also an offence. Additionally, carrying on the activity of coordinating and collecting public opinion contrary to this Act or conducting awareness programs on constitutional review contrary to this Act are offences created by the Act. The line of demarcation between the constitutional right of freedom of expression and the limitation posed by the Act must be clearly drawn and observed, otherwise, the Act may be impugned for unconstitutionality. The requirement of notification to the Commission or other public authorities before conducting any public awareness programme for constitutional review under Section 17 of the Act can be a source of problem and encumbrance for civil societies and individuals who may wish to conduct such programs.

Accessed from LHRC Constitutional Database

The requirement that the proposed Constitution must be submitted for referendum is a great step forward towards greater democratization in the country. Zanzibar has a law which provides for referendum but Tanzania Mainland has not. Whether the Parliament of Tanzania is going to enact a referendum law for Tanzania Mainland only or for the whole of Tanzania remains to be decided.

## IV. Major Issues for Debate

First of all, it seems that the debate on the structure of the Union will occupy a great part of people's time in the processes of constitutional review. Should the country continue with the two government system and its uniqueness? Should it adopt a unitary government, a federation or confederation? The gist of the issue is the demand for equal distribution of powers between two parts of the Union and the demand for devolution of powers from central government to local governments.

Another contentious issue is the presidential system with the highest degree of separation of powers versus the parliamentary system with some

[27] Section 23 (3) of the Act No. 8 of 2011 as amended.

[28] Section 23 (2) of the Act No. 8 of 2011 as amended.

Accessed from LHRC Constitutional Database

fusion of powers between the legislature and the executive. Should ministers continue to be appointed from among the members of the legislature?

The so-called imperial presidency is also likely to be an important subject of discussion -whether the enormous powers of the President of the United Republic should be retained or reduced.

The idea of rotation of the United Republic Presidency between the two parts of the Union can also be argued. On the other hand, there may be a debate on whether the President is to be elected by simple majority or by obtaining more than fifty percent of valid votes.

The role and status of the President of Zanzibar in the Union is also a likely subject of discussion.

The list of Union matters is likely to be re-negotiated. Even the formula for adding new items or removing items that are no longer required can be a subject matter for debate.

There is likelihood that the representation of Zanzibar in the Union cabinet which makes policy decisions on Union matters will be examined. The discussion may reconsider the number, scope, and role of Zanzibaris in the Union cabinet.

The structure and composition of Parliament may lead to an interesting debate. There are some people who have started talking of a bicameral parliament. Also, at least for Zanzibar there has been a serious demand for equal representation of the two parts of the Union in Parliament.

The civil service of the United Republic of Tanzania and how people from both parts of the Union can make use equally of the available employment opportunities in the Union government is up for debate, as is, the right of Zanzibaris to be appointed to take leadership posts in Union institutions such as National Electoral Commission, Secretariat of the Union Cabinet, Secretariat of the National Assembly.

Revenue, expenditure, grants, loans and the Union joint jccount can also be a central focus of public opinion.[29] The majority in Zanzibar are not comfortable with the 4.5% share given to Zanzibar as regards grants and loans.

The proposals for reforms in the electoral system may come up, e.g. first past the post versus proportional representation, necessity or redundancy of special seats for women, term limit for Members of Parliament, the right of constituents to recall their MP before the expiry of his or her term, the possibility of having private candidates, and the continuation of membership in Parliament despite expulsion from a political party.

---

[29] See Jamhuri ya Muungano wa Tanzania, *Taarifa Fupi ya Utekelezaji wa Kazi za Tume ya Pamoja ya Fedha,* Tume ya Pamoja ya Fedha, Machi 2011.

Women's rights, gender issues, and the rights of people with special needs and human rights issues in general are likely also to be the focus of discussion.

The procedure for dealing with non-Union matters for Zanzibar in the international organizations can also be among key issues for discussion.

## V. Actors and Philosophical Underpinning

Constitution-making is normally supposed to be a purely civilian exercise through which citizens are expected to effectively exercise and make use of their fundamental democratic right to self determination. Participation in the process is the right of every citizen. The main actors in constitution-making are the people themselves. The whole process will be futile and a sham if it is monopolized or hijacked by any person or groups of persons. Government, political parties, civil societies and private individuals have their roles to play in the process of constitutional review. During the debates for constitutional making or review, differences of opinion may become obvious but they should be settled by a democratic discussion, criticism, persuasion and education, and not by coercion or repression.[30]

In modern times, political power is no longer justified by charisma or tradition but by legal rational rules. Since the constitution is a power map of a state, its justification and legitimacy must be based on legal rational rules of today's politics, namely, democracy and justice. The constitutional review process and its new proposed constitution are therefore expected to bring and entrench more democracy and justice for both parts of the United Republic of Tanzania.

Accessed from LHRC Constitutional Database

[30] See Mao Tse-Tung, 1967, *Quotations From Chairman Mao Tse-Tung*, Peking: Foreign Languages Press, p. 52.

Accessed from LHRC Constitutional Database

# A CONCISE REVIEW OF THE ZANZIBAR COURT SYSTEM SINCE THE REVOLUTION IN 1964

*Augustino S.L. Ramadhani*[1]

I. Introduction
II. The Pre-Revolution Court System
III. The Court System after the Revolution
  A. The High Court Decree, 1964
  B. The Courts Decree, 1966
  C. The Peoples' Courts Decree, 1969
  D. The Peoples' Court (Amendment) Decree, 1978
  E. The Constitution of the Revolutionary Government of Zanzibar, 1979
IV. The Current Judicial System
V. Conclusion

Accessed from LHRC Constitutional Database

## I. Introduction

The Court System of Zanzibar, in its various stages of history, has been unique in the East African Region and calls for a detailed study and recording which I have started doing for some time now. This outline of the structure of the Court System, from the time of the Revolution of 12th January, 1964 to date, is a small part of the whole but will bear witness to the uniqueness I talk about. However, for this outline to be meaningful, I have to preface it with a synopsis of the Judicial System before the Revolution.

## II. The Pre-Revolution Court System

Islam came to Zanzibar in very early ages. There are ruins of a mosque in Kizimkazi which date back to Al Hijra 500 equivalent to 1107 AD. It is obvious that Islamic Law has been applied since that period of time alongside the customary judicial system during the traditional rulers of, for example, Mwinyi Mkuu of Dunga and Mkamandume of Pemba. There were also Kadhis of some sort applying Islamic Law.

So, when Seyyid Said bin Sultan el Busaid came to Zanzibar in 1832, he certainly found Kadhis in place and all that he did was to institutionalise the Kadhi Courts. The Omani Arabs are Ibadhis while the majority of Zanzibaris are Sunni of the Shafi School. During the sultanate Zanzibar had both Ibadhi and a

---

[1] Former Chief Justice of Zanzibar and former Chief Justice of the United Republic of Tanzania. Currently Judge of the African Court of Human and Peoples' Rights; and Vice-Chairman, Tanzania Constitutional Review Commission, Dar es Salaam, Tanzania.

Shafi Kadhis. According to Islamic Law a Kadhi administers the law of his school and not that of the parties. Thus the two Kadhis belonging to the two schools allowed parties to go to a Kadhi of their school.

Then Europeans came to Zanzibar and that complicated the judicial system as the Sultan granted judicial functions to these powers. Consular jurisdictions were established starting with the USA in 1833 and Great Britain in 1839. Thus with the granting of extra-territorial jurisdiction, Zanzibar had two types of Courts: the Sultan's Courts and Consular Courts.

The Berlin Conference of 1885, among other things, partitioned Africa among the European Powers. The Sultan was left with Zanzibar and some other possessions but became suspicious of the German activity and so asked for protection. Zanzibar became a British Protectorate in 1890. The British Consular Court got pronounced jurisdiction vis-à-vis that of the other Consular Courts. In 1892 the Sultan went further and delegated to the British Agent and the Consul General his jurisdiction in all cases in Zanzibar in which the plaintiff or the complainant was a British subject and the defendant or the accused person was the Sultan's subject. That became His Highness Court of Delegated Jurisdiction and comprised the Consul-General assisted by a Kadhi. The composition later changed to Judges of the British Court assisted by a Kadhi or two Kadhis. There was no right of appeal from that Court.

Accessed from LHRC Constitutional Database

The British Consular Court was abolished in 1897 and Her Britannic Majesty's Court (HBMC) was established consisting of a Judge and an Assistant Judge. In criminal matters Zanzibar was deemed to be a District of the Bombay Presidency. The Judge of the British Court was deemed to be a Session Judge of the Bombay Presidency while the Assistant Judge was taken to be the Magistrate of that District. Appeals from HBMC went to the High Court of Bombay. That was the case until the establishment of the Court of Appeal for Eastern Africa in 1902.

On the side of the Sultan's Courts, Zanzibar was divided into four districts each with a District Court presided by a Wali. Appeals went to the Sultan. In 1898 Kadhis' and Assistant Kadhis' Courts were created.

However, a year later there was a complete reorganization of the Sultan's courts. At the top there was an appellate court styled the Supreme Court which was presided by the Sultan assisted by two Kadhis and where necessary by a Judge of the Delegated Court. Below that court was the Court of Zanzibar and Pemba with two Kadhis and a judge of the Delegated Court where necessary. Subordinate to that were District Courts presided over by Walis and under these were the Assistant Kadhis' Courts. Thus there were four tiers of courts. In 1908 the composition of the Supreme Court was changed by replacing the Sultan with a Judge of the British Court.

Meanwhile other European Powers surrendered their exterritorial jurisdictions to the British Court. In 1923 the distinction between the Sultan and

the British Court was maintained but the personnel at the top were all of the British Court. There was His Highness the Sultan's Court for Zanzibar or in short the Zanzibar Court and His Britannic Majesty's Court for Zanzibar or the British Court. Under these two there were subordinate courts: Resident Magistrate Courts of First, Second and Third Classes alongside the Kadhi Courts. Below the R. M's Courts were Mudir Courts.

The Courts' Decree, 1963[2], brought about a major change. There was a High Court as established by the Constitution of the State of Zanzibar, 1963[3], (hereinafter referred to simply as the Constitution). In fact the Constitution did not establish a High Court. Under the High Court there were subordinate courts as enumerated under Section 6 of the Courts' Decree which were the same as under the 1923 Decree.

## III. The Court System after the Revolution

### *A. The High Court Decree, 1964*[4]

After the Revolution the court system described above was continued under the Existing Laws Decree, 1964[5]. That Decree defined "existing laws" to mean:

> ... all laws in force in the Republic immediately before the 11th January, 1964, except the Constitution of the State of Zanzibar, 1963.[6]

Since the High Court was deemed to have been established by the Constitution (which did not do so) the Revolutionary Council was quick to promulgate the High Court Decree, 1964.[7] It was provided that the High Court was a superior court of record and had all the powers of such a court. Under the High Court there were the same subordinate courts as were under The Courts Decree, 1963. That system continued until 1966.

### *B. The Courts Decree, 1966*[8]

With the Revolution a number of qualified persons left the country, including almost all lawyers. The Revolutionary Government therefore borrowed some judicial officers from Mainland Tanzania. These included the first Acting Chief Justice Augustine Saidi[9] and then Justice Mark Kimicha. Others like Marko

---

[2] Decree No. 22 of 1963.

[3] Decree No. 10 of 1963.

[4] Presidential Decree No. 2 of 1964.

[5] Presidential Decree No. 1 of 1964.

[6] Section 2.

[7] Presidential Decree No. 2 of 1964.

[8] Decree No 3 of 1966.

[9] He later became the first Tanzanian Chief Justice.

Accessed from LHRC Constitutional Database

Kisse, Raphael B. Maganga, Dan P. Mapigano, Lameck M. Mfalila, Eustice Katiti, Nathaniel Mushi, and Julius Lipiki came as Registrars of the High Court or Resident Magistrates.

These brought into Zanzibar the Judicial System operating in Tanzania Mainland and hence the enactment of the Courts Decree, 1966. The High Court continued as under the High Court Decree, 1964. The new Decree made possible the restructuring of the subordinate courts. There were District Courts and below them were Primary Courts. There were also Kadhis' Courts and Juvenile Courts. District Courts were presided either by Resident Magistrates (RM), who were lawyers, or by District Magistrates who had Diplomas in Law.

There was no Zanzibari DM and steps were taken to send two persons, Zubeir Mzee and Ramsa Mbarouk, to the Institute of Public Administration of the University College of Dar es Salaam to undergo a nine month Diploma in Law course and be appointed District Magistrates.

Six persons were sent to the Mzumbe Local Government Institute to undergo Certificate in Law course which qualified them to be Primary Court Magistrates. Two of these were Taratibu Abama and Khamis Ally.

Appeals laid from Primary Courts to the District Courts then to the High Court and eventually to the East African Court of Appeal (EACA). Appeals from the Kadhi Courts and Juvenile Courts went directly to the High Court and had the possibility of landing in the EACA.

During this time the High Court consisted of only the Acting Chief Justice and the Registrar. There was no other High Court Judge.

This system was in place until 1969 when a revolutionary change overhauled the Judicial System.

### *C. The Peoples' Courts Decree, 1969*[10]

In the Peoples' Court System there was the Supreme Council which was set up a bit later in 1970 by the Supreme Council Decree, 1970[11]. Below it was the High Court as set by the High Court Decree, 1964.

At the lowest level were the Peoples' Courts each comprising a chairman and two other members, all appointed by the President. The two other members were to act like assessors and their opinions were not supposed to be binding but that was not so in practice. There was no qualification requirement for the appointment of the chair or the members but allegiance of these persons to the ruling party, the Afro-Shirazi Party (ASP), usually dictated those appointments.

[10] Decree No. 11 of 1969.

[11] Decree No. 4 of 1970.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

The Peoples' Courts had jurisdiction to try all criminal cases except homicide which were tried by the High Court. Advocates were not allowed. However, trials were prosecuted by policemen. The courts were not bound to follow any rules of evidence and procedure but were required to formulate their own rules which were not put in place. However, as the prosecutors were policemen, the Criminal Procedure Decree[12] was used.

Briefly, an accused person was brought to the court, charges were read to him and if he understood them he was asked to plead. If the accused person pleaded guilty, the prosecution gave a summary of the facts and the court proceeded to mete out punishment after mitigation.

If the plea was not guilty the prosecution produced witnesses who gave evidence under oath. There was examination-in-chief by the prosecutor, cross examination by the accused person, re-examination by the prosecution and questions from the court. The accused person was given a choice of keeping quiet or defending himself on oath or without oath. If the accused person gave evidence on oath he was cross-examined by the prosecution and examined by the court. Any defence witnesses were heard and subjected to the same process as were the prosecution witnesses. The court gave its verdict and proceeded to give appropriate punishment after mitigation. Appeals laid to the High Court and then to the Supreme Council.

Apart from the appellate jurisdiction, the High Court had original jurisdiction in cases of homicide and treason. The High Court was composed of the Chief Justice, two Deputy Chief Justices and a Registrar. The first Chief Justice, Ali Haji Pandu, 1969/77, was a law graduate of Yugoslavia, while the second, Abdulwahid Borafia, 1978/9, was a Moscow law graduate. However, the two Deputies, Sheikh Mohammed and Sheikh Ali Sharif, had no legal qualifications. Sheikh Mohammed was sent to the Permanent Commission of Enquiry and that was the end of his court assignment. Sheikh Ali Sharif retired in 1978 and was replaced as Deputy Chief Justice of Pemba by this author.

The trial procedure was the same as in the Peoples' Courts but after the closure of the hearing the Chief Justice took the proceedings to the Supreme Council. He explained the factual and legal positions to the Supreme Council which gave its verdict which had to be confirmed by the Revolutionary Council. The Revolutionary Council could recommend to the Supreme Council to reconsider its verdict giving its reasons for so doing. The verdict of the Supreme Council was then communicated to the Chief Justice who delivered it to the accused person and passed sentence accordingly.

The Supreme Council consisted of the chairman and eleven other, members all appointed by the President; their only qualification was their allegiance to ASP. Two functions were provided for the Supreme Council by the Decree - first, to hear appeals from the judgments of the High Court, and second,

[12] Cap 12 (Revised Laws 1958).

to decide on matters of public importance referred to it by the President. But as already explained above, there was a third function, not mentioned in the Decree, of giving verdicts to cases heard by the High Court.

Let me also point out that the High Court of Zanzibar is recognized by Article 114 of the Constitution of the United Republic of Tanzania, 1977. Not only so, but the continued existence or not or the alteration of the provisions of the Constitution, 1977, regarding the High Court of Zanzibar requires the support of a vote of not less than two thirds majority of all Members of Parliament of both Mainland Tanzania and Zanzibar.[13]

### *D. The Peoples' Court (Amendment) Decree, 1978*[14]

In January, 1978, Mr. Abdulwahid Borafia, a law lecturer at the University of Dar es Salaam, was appointed the second Chief Justice of Zanzibar. In the previous year, 1977, Mr. Damian Z. Lubuva, who was the Deputy Attorney General of Tanzania, was appointed the Attorney General of Zanzibar. The two came up with the idea of reforming the judicial system and so promulgated the amendment decree which provided for four types of court and prescribed pecuniary and punitive jurisdictions for each court.

This decree created Peoples' Area Courts in designated areas. The composition of each such court was a chairman and two members all appointed by the President. There was no academic qualification imposed. In criminal matters these courts dealt with cases where sentences did not exceed six months custody in Education Centres, that is, prisons as re-named, or a fine not exceeding six hundred shillings (Shs. 600/=). In civil cases the jurisdiction was limited to suits in which the value of the subject matter did not exceed two thousand shillings (shs. 2,000/=). Appeals from these courts were supposed to go to the District Peoples' Courts, but no such courts were set.

The District Peoples' Courts had the same composition as previously and in criminal matters their jurisdiction was over all offences except murder, manslaughter, attempted murder, and treason. For these offences the District Court conducted preliminary inquiries then committed the matters to the High Court. Civil jurisdiction was limited to suits where the value of the subject matter did not exceed ten thousand shillings (Shs. 10,000/=). These courts were also to hear appeals from the Area Courts.

Parallel to the District Courts were Kadhis' Courts. Kadhis were appointed by the President and they had only civil jurisdiction on matters of personal status between Moslems, such as marriage, divorce, guardianship, custody, Wakfs, inheritances and maintenance. Appeals went to the High Court.

---

13 Article 98(1)(b) and List Two of Second Schedule of the Constitution of the United Republic of Tanzania, 1977.

14 Decree No. 1 of 1978.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

The High Court was still under the High Court Decree, 1964, but in 1978 the Criminal Procedure Decree was amended to give back teeth to the High Court to try and determine cases rather than merely report to the Supreme Council.

The Supreme Council was reduced to the chairman and six members. It heard appeals from the decisions of the High Court on murder, manslaughter, attempted murder and treason. Others criminal cases triable by the High Court in its original jurisdiction and all civil cases were not appealable to the Supreme Council but ended in the High Court. Also, appeals from decisions which emanated from the District Peoples' Courts ended up in the High Court and there were no second appeals.

However, the non-judicial role of the Supreme Council of consultation on any matter of public importance referred to it by the President remained, but for the determination to be binding it had to be endorsed by the President. I am not aware of any such matter that had been so referred in the seven years of the existence of the Supreme Council while I was involved with the Zanzibar legal system.

### *E. The Constitution of the Revolutionary Government of Zanzibar, 1979*

In 1979 President Aboud Jumbe Mwinyi came up with the first constitution of the Revolutionary Government since the Revolution of 1964. One major effect of the 1979 Constitution of Zanzibar was to prescribe two qualifications for the appointment of Judges of the High Court - a Judge has to have a law degree or equivalent legal qualifications from recognized universities and must have had legal practice for at least five years. However, the President could waive the minimum practice requirement.

This author was sworn in as the third Chief Justice of Zanzibar on 8$^{th}$ January, 1980, and within a short time was able to recruit the assistance of Mr. Hamis Msumi, who then was the Senior Deputy Registrar of the Court of Appeal, to be another Judge of the High Court of Zanzibar. This was made possible by the good will of the Chief Justice Francis Lucas Nyalali.

## IV. The Current Judicial System

In 1984 Aboud Jumbe Mwinyi resigned from all his posts and Ali Hassan Mwinyi took over as the President and the Chairman of the Revolutionary Council assisted by Seif Sharif Hamad as the Chief Minister. The Attorney General was Abubakar Bakary while this author was the Chief Justice. These together made drastic changes in the judicial system by completely abandoning the Peoples' Court System and reinstating the system which obtained before 1969 and which was more or less like that practiced on the Mainland but with some remarkable differences.

Three different Acts were enacted by the House of Representatives. The first one was the Magistrates' Courts Act, 1984,[15] followed by the High Court Act, 1984[16], and the Kadhis' Courts Act, 1984.[17]

The Magistrates' Courts Act created four subordinate courts. The lowest rung is the Primary Court. These courts are presided by persons who have Certificates in Law and because of that ten persons, including the first woman, Janet Sekihola, were sent to Mzumbe for that course. That was made possible by the Judiciary of Tanzania, Chief Justice Francis L. Nyalali, and the then Director of Primary Courts, Mr. Kisanji who paid for their expenses.

Above Primary Courts are District Courts situated in each political district and conducted by Diploma in Law holders. Two such persons were sent to Mzumbe for the course. The District Magistrates also preside over Juvenile Courts. Then in the hierarchy there followed Regional Courts supervised by law graduates. We intentionally called them regional courts and resisted calling them Resident Magistrates' Courts as done on the Mainland. For one thing all magistrates are resident, but also that nomenclature makes sense to people since there is a political unit called a region and none called a resident.

Above the RM Courts is the High Court whose qualification requirements were already spelt out in the 1979 Constitution. However, the 1984 Constitution raised the practice requirement from five to seven years and removed the discretion of the President to dispense with that requirement.

Appeals went from Primary Courts to District Courts, Regional Magistrates' Courts, the High Court and finally to the Court of Appeal of Tanzania. For the first time in the history of the United Republic the top echelon of the Judiciary, that is, The Court of Appeal, was for the entire Republic and as a result there had to be a Justice of Appeal emanating from Zanzibar and that was Ali Mohammed Ali Omar. However, the Court of Appeal has neither the jurisdiction to construe the Zanzibar Constitution[18] nor hear appeals emanating from Kadhis' Courts.[19]

Since Zanzibar has four tiers of courts below the Court of Appeal the question arose - which appeals from which court would require a certificate of point of law? The Rules of Court of Appeal themselves contributed to the confusion since they talked of a third appeal as requiring certificates of point of law[20] while the Appellate Jurisdiction Act, 1979, provided differently[21]. There

[15] Act No. 1 of 1984.

[16] Act No. 2 of 1984.

[17] Act No. 3 of 1984.

[18] Article 99(a) of Constitution of Zanzibar, 1984.

[19] Article 99(b) of the Constitution of Zanzibar, 1984.

[20] Rule 89(2).

Accessed from LHRC Constitutional Database

were two contradicting decisions of the Court of Appeal on that issue. One decided that appeals from the Primary Courts require certificate and another decided that appeals from the District Court would require certificate of point of law. So, a full bench of the Court of Appeal decided that appeals from judgments of District Courts in their original jurisdiction, and not of the Primary Courts, require certificate of point of law in the case of Zanzibar.[22]

The practice by advocates was reinstated after it had been prohibited for fifteen years since 1969. The Chief Justice was of the opinion that the re-establishment of advocates should have a befitting occasion. So, when the Court of Appeal came to hear its first four appeals, all of murder, the last advocate to close his chambers and leave Zanzibar, Ismail Lakha, was invited and he graciously agreed to represent all the appellants in the four appeals. Otherwise this author is highly indebted to the services of Advocate Julius Lipiki.

The Kadhis' Courts also underwent a major restructuring and have been made more meaningful with a hierarchy of appeal system. There are District Kadhis' Courts alongside the District Courts. Then for the first time the Chief Kadhi was elevated above the other Kadhis not only administratively but in judicial authority. The positions of two Deputy Chief Kadhis have been created, one for Zanzibar and another for Pemba. There is also a Chief Kadhis' Court, one in Zanzibar and another in Pemba, which can be presided by the Chief Kadhi himself or by the Deputy Chief Kadhi.

All Kadhis' Courts are prohibited from applying Islamic Rules of evidence or procedure. Appeals from the District Kadhis' Courts went to the Chief Kadhis' Court and from there to the High Court where a judge sits with four sheikhs and the decision is by majority.

## V. Conclusion

Someone by the name of Fitzgerald, who I think was in the Justice Division of Zanzibar long ago, published a booklet titled *Dual Jurisdiction*. He referred to the parallel existence of His Britannic Majesty's Court and that of His Highness the Sultan's Courts. Indeed, at that time there were two types of court files each indicating in which particular court it would be used.

I submit that Zanzibar even to this date is still a Dual Jurisdiction. There are the Zanzibar Courts from the High Court downwards to the Primary Courts alongside with the Kadhis' Courts, and then the United Republic Court, that is, the Court of Appeal. There was a brief spell of fifteen years from 1969 to 1984 with the Peoples' Courts, when that dual jurisdiction seemingly stopped to exist.

---

[21] Section 5 (2) (c) provides: "No appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act, 1963, unless the High Court certifies that a point of law is involved in the decision or order."

[22] *Ali Vuai v. Suwedi Mzee Suwedi*, Civil Appeal No. 72 of 1998. The Court also recommended a need to recast Section 5(2)(c) of the Appellate Jurisdiction Act and Rule 89(2).

Accessed from LHRC Constitutional Database

I say that the dual jurisdiction seemingly stopped to exist because in strict construction of the Decree the Peoples' Courts were the subordinate Court under the Supreme Council but the High Court was not. I say so because the Peoples' Courts Decree, 1969, repealed the Courts Decree, 1966, but allowed the High Court to continue to exist as provided by the High Court Decree, 1964, which was not repealed by the 1969 Decree.

Section 2(1) of the Peoples' Courts Decree, 1969, provides as follows:

> There is hereby established at the places mentioned in the Schedule to this Decree, a Peoples' Court (hereinafter referred to as the Court).

Then the Schedule gave a list of various localities. Thus there were specifically designated Peoples' Courts by location. In addition Section 3(1) provided the composition of the Court to "consist of a Chairman and two members to be appointed by the President." The High Court was not thus composed.

I was told by the Zanzibar lawyers when I became the Deputy Attorney General in January, 1978, that the entire judicial system was the Peoples' Court. That might have been the philosophy of those in power then but it was not thus articulated in the Decree. So, there was the High Court and also the Peoples' Courts.

There was another misapprehension of the 1969 Decree. It was provided that the Courts "shall not be bound by any rules of procedure or evidence contained in any existing laws". In my opinion the emphasis should be on the phrase "shall not be bound". I submit that the Courts were not prohibited from using rules of procedure and evidence. Indeed the Criminal Procedure Decree was constantly being amended up to Decree No 8 of 1980, for example.

But after all was said and done supervising the Peoples' Courts System was taxing. Most of the Chairmen and Members were not literate and so proceedings were recorded by court clerks. It is highly disputable how dependable those records were. Fortunately, and as is normally the case, first appeals are by way of rehearing.

Accessed from LHRC Constitutional Database

# SHIP'S REGISTRATION IN ZANZIBAR: AN ASSESSMENT OF THE LAW AND PRACTICE

*Ibrahim Mbiu Bendera*[1]

I. Introduction
II. Importance of Ship Registration
III. Maritime Law in Zanzibar Prior to the Revolution
IV. Maritime Law after the Revolution and the Union
V. The Constitutional Implications on Ship Registration
VI. Ships Nationality
VII. Impact of Foreign Ship Registration by Zanzibar
VIII. Conclusion and Recommendations

Accessed from LHRC Constitutional Database

## I. Introduction

Zanzibar is a state within the United Republic of Tanzania with its own territory covering both land and sea areas.[2] Maritime law is a subject of immense importance to Zanzibar, mainly because of its geographical position. Zanzibar comprises several islands in the Indian Ocean, including Unguja and Pemba, which are the largest and most habitable, with several other small islets. There is no Zanzibar land mass which is not surrounded wholly by the sea, hence it can be said that its social, economic and cultural fabric is directly or indirectly dependent upon the Indian Ocean and therefore maritime law.[3]

To the common Zanzibari, the Indian Ocean is of paramount importance. It can be said that most of them have direct connection to the sea; it is the sea which is the main source of food, a source of income,[4] the backbone transport system providing connection within the state itself (i.e. between the islands), and with the outside world; and it is the main tourist attraction.[5]

---

[1] Advocate of the High Court of Tanzania; and Executive Partner at M & B Law Chambers, Dar es Salaam, Tanzania. He is a past Vice President of TLS, the Bar Association of Mainland Tanzania.

[2] The United Republic of Tanzania is a sovereign state while Zanzibar is a non-sovereign state within the United Republic of Tanzania. See Articles 1 & 2 of the Constitution of the United Republic of Tanzania 1977 (as amended) and Articles 1 & 2 of The Constitution of Zanzibar 1984 (2010 edition).

[3] On 10th September, 2011 more than 230 people died after the *MV Spice Islander* capsized and sunk en-route to Pemba from Zanzibar.

[4] Fisheries and sea weed production.

[5] In 2011 Zanzibar welcomed 175,063 tourists bringing in US $ 104.3 Million.

Maritime law is that branch of law concerned with ships and shipping.[6] The subject covers the law governing many aspects of ships and shipping practices made up partly by international public law and partly by international private law.[7] The connection of maritime law to international public law clearly indicates that the subject cannot be adequately covered without touching on the issue of the sovereignty of Zanzibar over maritime matters covered under international maritime law.[8]

From mid-19th century to present times maritime law has evolved with the technological improvement in sea-going ships. In modern times, international public law concerned with the seas has been codified and it is this codification that has caused the distinction between the law of the sea and maritime law to be treading on a very fine line indeed. The subject of the former and its connection to the latter are both embodied in the United Nations Convention on the Law of the Sea, 1982 (abbreviated UNCLOS), a convention which outlines the demarcation of maritime areas, allows utilization of marine resources by coastal states and also stipulates the rights of a sovereign state to issue a flag to its ship and its control over the laws applicable to that vessel.[9]

In this paper we attempt to assess the regulatory framework on ships' registration in the development of maritime law in Zanzibar, within its historical context, and its impact on the United Republic of Tanzania (URT) at the international level. By historical context we imply the assessment of laws bwhiley locating their cause and effect to the society.[10] We briefly look at the law and practice prior to the Revolution, after the Revolution and the Union with Tanganyika,[11] and the current prevailing regulatory regime.

Accessed from LHRC Constitutional Database

[6] Volume 28 *Encyclopaedia Britannica*, Macropaedia, 1993, p. 895.

[7] O'CONNELL, D.P., *The International Law of the Sea*, Oxford: Oxford University Press, 1982, p 746.

[8] For more details on this subject see BENDERA, Ibrahim Mbiu, "A Critical Study on Zanzibar's Sovereignty Over Maritime Law," a course work paper submitted for partial fulfillment of LLM, School of Law, University of Dar es salaam, 2005.

[9] Article 90 of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) states "Every State, whether coastal or land locked, has the right to sail ships flying its flag on the High Seas." Articles 91; 92 and 94 of UNCLOS provides for ship's nationality, status of ships and duties of the flag state.

[10] I fully subscribe to the observation made in SHIVJI, Issa G. (ed.), *Law State and Working Class in Tanzania*, , Dakar: CODESRIA, 1985, p 1, where it is stated that: "What goes under the name of legal history is actually recounting of successive laws locating their cause and effect within their inner contradictions of law itself."

[11] The period after the revolution and the Union is barely 3 months and 14 days.

## II. Importance of Ship Registration

At the centre of maritime law is the marine vessel, simply known as the ship.[12] Since the invention of marine vessels, making it possible for humankind to sail to far off lands, ships have been at the centre of the development of maritime law globally.[13]

Nagendra Singh[14] highlights the importance of ship registration in public international law as follows:

> The registration of the ship determines the law and the flag so vital to the maintenance of law and order on board the vessel while navigating on the high seas, as well as for purposes of private and public international law, since the law of the flag is the governing law in respect of several matters such as contracts, mortgages and maritime liens, jurisdiction, etc.[15]

In the past it was the tool which ushered in colonialism and imperialism; today shipping forms the backbone of World trade.[16] It is also the mode of transport that has enabled several poor countries in the Third World to become the front runners in the global economy of the 21st century.[17]

Ship registration can be divided into two main categories. The first comprises ships which ply solely within the limits of a Coastal State or within a certain area or zone, e.g. the East African area; and the second are those ships which ply in the high seas or in shipping parlance, foreign going ships.

At the local level, that is within the United Republic of Tanzania, maritime transportation is not a Union matter. Hence it can be said that Zanzibar has the right to register ships which will fly their flag.[18] However, at the high seas level things are different. There law and order are based on the concept of

Accessed from LHRC Constitutional Database

---

[12] For the connection between ships and sovereign States see also BENDERA, Ibrahim Mbiu, "Admiralty Jurisdiction in Tanzania: The Law and Practice, " Volume 2 *Journal of Tanganyika Law Society*, 2010, p. 45-47

[13] The concept of ship's nationality for example has been termed as the pinnacle of the regulations covering the high seas.

[14] SINGH, N., *Essays in Maritime International Law and Organization*, Andhra University, 1966.

[15] Ibid, p. 5

[16] The World fleet of propelled sea going merchant ships of not less than 100 GT was 103,392 by December 2010. Actual goods loaded on ships reached 7.8 billion tonnes in 2009. See International Maritime Organization web site www.imo/knowledgecentre/shipsandshippingfactsandfigures.org

[17] Emerging economies - countries like China, Singapore, South Korea etc (also referred to as Asian tigers) - are at the zenith of maritime prowess.

[18] Zanzibar has its own flag, as provided under the Zanzibar Flag Act, 2004 (Act No. 12 of 2004).

ship nationality. This concept affords sovereign States the right to afford nationality to its ships which in turn affords jurisdiction of the flag state over that ship.[19] The power that a sovereign state has over its ships, including the application of its laws on board, is referred to as Flag State Control.

At the international level, the flag state is the responsible entity answerable to the international community on all matters regarding international law, including those matters concerning ships carrying its flag. The responsibility of the flag states is usually outlined in various international conventions, United Nations Security Council Resolutions and other treaties which cover maritime safety,[20] maritime transportation[21] and conduct of State nations.[22]

## III. Maritime Law in Zanzibar Prior to the Revolution

Since time immemorial, Zanzibar has been a key maritime centre for the whole of the East and Central African region, attracting sea vessels from all over the World.[23] Trade with Asia, Middle East and Europe has been recorded for eons prior to the coming of the Omani Sultanate[24] in the late seventeenth century which was also facilitated by sea going vessels.[25] Unfortunately not much research has been done which can easily establish the customary maritime law which evolved in Zanzibar during those times and its contribution to the maritime legal regime in Zanzibar today.

However, much of the contemporary legal regime covering maritime law, especially the laws governing ship registration in Zanzibar can be traced to the time when Zanzibar adopted the British maritime laws and practices, in the year 1890 after she became a British Protectorate.[26]

Accessed from LHRC Constitutional Database

---

[19] SHAW, M. N., *International Law,* Cambridge University Press, 2003, 5th Ed., pg 545.

[20] The International Maritime Organization (IMO); and International Labor Organization (ILO).

[21] United Nations Conference on Trade and Development (UNCTAD); and World Trade Organization (WTO).

[22] UN Security Council Resolutions which are binding on all member states especially sanctions affecting ships, shipping and international trade imposed on certain states due to various threats to international peace. Sanctions against apartheid South Africa for example.

[23] For an elaborate description of Zanzibar at this period see OGOT, B.A. and Kieran J. A., *Zamani*, Nairobi: East African Publishing House and & Longman, 1968, pp. 100-118.

[24] Zanzibar was part of dominions of the Sultan of Oman until 2nd April 1861 when Zanzibar was detached from Oman after the Canning award. See Volume 17 *Encyclopaedia Britannica*, Macropaedia, 1993, p. 809.

[25] The most common vessel used was the Arab dhow, said to have first appeared around 500 BC. These vessels were primarily used along the coasts of the Arabian Peninsula, India and East Africa.

[26] The process to Anglicize Zanzibar laws can be said to have commenced with the Anglo-German Treaty of 1st July, 1890, popularly known as the Heligoland-Zanzibar Treaty. This is the treaty which Germany agreed to allow Zanzibar to become a British protectorate. Article XI reads as follows:

During that time, the Zanzibar Sultanate was administered by the British through the Foreign Office until 1913 when the administration was transferred to the Colonial Office. It was during this period that many British statutes dealing with, or having bearing to maritime law found application in Zanzibar vide various Orders in Council.[27]

The most prominent British maritime law legislation applicable to all British possessions (including Zanzibar) during this period dealing with ship registration was the British Merchant Shipping Act, 1894[28] (herein abbreviated MSA 1894).[29] For example, the powers conferred on the British Monarchy under Section 88 of this Act and the Foreign Jurisdiction Act, 1890[30] were used to declare Zanzibar a port of registry by the enactment of the Zanzibar Maritime Order in Council, 1926.[31]

The MSA 1894 Act was enacted with the main objects of consolidating enactments relating to Merchant shipping in the UK[32] at that time and to consolidate British economic hegemony in international trade in all its dominions. The Act was fully adhered to[33] where ships registered in Zanzibar were British ships.[34] The official to supervise was the British Resident having

---

Great Britain shall bring to bear fruit her influence on the Sultan of Zanzibar to facilitate an amicable agreement by which the Sultan unconditionally cedes to Germany the Island of Mafia and its territories on the mainland (including dependencies) that are referred to in the existing concessions of the German East Africa Company. It is understood that His Highness shall receive fair compensation for the loss of revenue resulting from this cessation.

Germany agrees to recognize the British protectorate over the remaining territories of the Sultan of Zanzibar, including the islands of Zanzibar and Pemba. Germany will recognize the British protectorate over the territories of the Sultan of Witu and the adjacent territory extending to Kismayo, from which the German protectorate will be withdrawn. It is understood that, if the cessation of the German coast has not been made before Great Britain assumes its protectorate over Zanzibar, her Majesty's government, upon establishment of said protectorate, shall use all its influence to induce the Sultan to make the cessation as soon as possible in return for fair compensation. (emphasis mine)

[27] Zanzibar Orders in Council 1881, 1884, 1897, 1814, 1916, 1924 and 1926.

[28] 57 & 58 VICT. c. 60.

[29] This Act ceased to apply in the Mainland Tanzania following the repeal of the East African Merchant Shipping Act, 1966. See MAHALU, C.R, *Public International Law & Shipping Practices: The East African Aspirations*, Baden-Baden: Nomos Verlagsgesellschaft, 1984, p. 7.

[30] 53-4 V. c. 37

[31] Statutory Rules and Orders, 1926, No. 826. See also Volume 6 *Halsbury's Laws,* under 'Statutory Instruments.'

[32] From the Navigation Acts of 1660 onwards.

[33] See Ships Register opened on 10th April 1946 kept at the Zanzibar Ports Authority

[34] Full reference to this Act with commentary is found in THOMAS, M., & Steel D., *TEMPERLY Merchant Shipping Acts,* (7th Edition), London: Stevens & Sons, 1976.

Accessed from LHRC Constitutional Database

been conferred powers held by Commissioner for Customs as provided under Section 89.[35]

## IV. Maritime Law after the Revolution and the Union

The Zanzibar Revolution which occurred on the eve of 12th January 1964 was promptly followed with the union with Tanganyika on 26th April 1964, barely three and a half months later.

After the revolution, the Legislative Powers Decree of 1964 was enacted. This statute provided for the continuation of the existing laws, including British laws, to be read with such modifications, adaptations, qualifications and exceptions as necessary. This made the UK MSA 1894 to continue to apply in the Isles, fifty years after its enactment in the UK.

The Union between Tanganyika and Zanzibar is based on the Articles of Union[36] which have been identified as an international treaty between two sovereign states.[37] This treaty listed the original number of Union matters to be eleven,[38] a number which increased as time went by to the current "contentious" list of twenty-two matters.[39] Unfortunately, unlike air transportation which is a Union matter listed in the Constitution of 1977,[40] maritime transport matters which are also based on international law were not in the list of Union matters, although Harbours[41] is included up to the present day.

As in Zanzibar, and despite all the countries gaining their independence, the MSA 1894 continued to apply in all the East African States. Efforts were made in 1966 to codify the law under the auspices of the East African Common Services with the enactment of the East African Merchant Shipping Act, 1966[42]. Under this Act all East African States in the Common Services intended to be

Accessed from LHRC Constitutional Database

---

35 This in turn was performed by the Harbour Mater on behalf of the British Resident.

36 Schedule to Act No. 22 of 1964.

37 JUMBE, Aboud, *The Partner – ship: Tanganyika Zanzibar Union, 30 Turbulent Years,* Dar es Salaam: Amana Publishers, 1994, p. 7. See also SEATON, Earle and Sosthenes T. Maliti, Tanzania Treaty Practice, Nairobi: Oxfrod University Press, 1973.

38 Act No. 22 of 1964 Section 5(1)(a). The listed matters were: The Constitution and Government of the United Republic; External affairs; Defense; Police; Emergency powers; Citizenship; Immigration; External Trade & Borrowing; The Public Service of the United Republic; Income tax, corporation tax, customs and excise duties; and Harbours, Civil aviation, Posts and telegraphs.

39 First Schedule to the Constitution 1977. This is mentioned twice, under item 11 matters relating to civil aviation and under item 17 Civil Aviation. This is an unnecessary repetition.

40 The Constitution of the United Republic of Tanzania, 1977 (as amended) - 2008 Edition.

41 Although Habours is listed as a Union Matter, both sides of the Union pursue independent port administrations. The Tanzania Harbours Authority Act, 1977 (Act No. 12 of 1977) governs port matters on the Mainland while Zanzibar Ports Corporation Act, 1997 (Act No. 1 of 1997) governs ports matters in the Isles.

42 The East African Merchant Shipping Act 1966 (Act No. 4 of 1966).

equally covered. As stated earlier, this Act continued to recognize the UK MSA 1894 as an Act which was applicable in all the community states, Zanzibar included.[43]

However, with the coming of the East African Community in 1967 to replace the East African Common Services, it was recommended that matters of ship nationality, the cornerstone in the MSA 1894, should not be under the Community. Instead, it should be left under the respective national sovereignty.[44]

The URT repealed the East African Merchant Shipping Act, 1966 and went ahead to enact the Merchant Shipping Act, 1967.[45] This Act was finally repealed in 2003 with the enactment of the Merchant Shipping Act, 2003.[46] Both these Acts were not made to be applicable to Zanzibar,[47] hence Zanzibar registered ships are not recognized in the United Republic of Tanzania laws. In Zanzibar it is the MSA 1894 which continued to be the main law governing maritime matters, although in practice the Act was obsolete because it was overtaken by many international conventions governing ships.[48]

Although the Tanzanian Acts were not applicable to Zanzibar, on the ground things were different. The people responsible for maritime law superintendence in Zanzibar chose to use the MSA 1967[49] as guidance in shipping law instead of the obsolete MSA 1894, with modifications suitable to the Zanzibar environment. Zanzibar continued to register ships and issue its own certificates of registry and also registered seafarers without showing on the certificates under which law they were issued.[50]

One such registration certificate was given full recognition by a foreign court. This was in the case of *Ecotec (Zanzibar) Limited v. The Owners of Motor Vessel "Ukombozi" and "Mapinduzi.*[51] In this case the Claimant (Ecotec)

Accessed from LHRC Constitutional Database

---

[43] ibid

[44] This was recommended by the Phillips Commission for the establishing of the East African Community.

[45] Cap 165 R. E. 2002.

[46] Act no. 21 of 2003.

[47] For an Act of Parliament to be applicable in Zanzibar Article 64(4) must be adhered to. In enacting these Acts the Constitutional requirement was not fulfilled hence the statutes do not apply in Zanzibar.

[48] The MSA 1894 was amended by the Maritime Conventions Act 1911 (1 & 2 Geo. 5, c.57) to incorporate international conventions unifying international maritime law on division of loss in collision and matters of salvage. From 1914 after the sinking of the MV Titanic, the international legal regime covering maritime law safety developed rapidly.

[49] This Act domesticated several international conventions (plus revisions) which are: International Regulations for Preventing Collision at Sea, 1960; International Convention respecting Load Lines, 1930; and many ILO Conventions regarding seafarers.

[50] By 31st October 2005 Zanzibar had registered 51 ships while the United Republic had 57 ships under its registry.

[51] Admiralty Cause No. 15 of 2003, High Court of Kenya at Mombasa (Unreported).

arrested two ships at Mombasa, namely Ukombozi and Mapinduzi, on the basis of a breach of agreement between it and the Government of Zanzibar pending determination of arbitration proceedings in London. According to the claimant both ships belonged to the Government of Zanzibar and the Ukombozi was purported to be under mortgage.

On the other hand, the applicants, the Zanzibar Shipping Corporation (ZSC), made the application requesting the Court to set aside the warrant of arrest and set both ships free because the vessels belonged to it and not the Zanzibar Government and the purported mortgage was not proper because it was not issued by the ZSC. The Court held that the two ships belonged to the ZSC and not the Revolutionary Government of Zanzibar (RGZ), for the reason that the certificate of registry issued by Zanzibar clearly shows that the ships do not belong to the Government of Zanzibar.[52] Hence a Kenyan Court gave full recognition to a Zanzibar certificate issued in Zanzibar outside the laws of the United Republic of Tanzania (URT). It is our observation that in the absence of a law passed by the United Republic of Tanzania which recognises ships registered in Zanzibar, this trend is likely to continue.

The MSA 1894 was ultimately repealed in Zanzibar by the Maritime Transportation Act, 2006,[53] the basic law regulating maritime transport and ship registration in Zanzibar today.

## V. The Constitutional Implications on Ship Registration

The constitution of a state has been termed as its fundamental law; it is the main source of law which all other laws are obliged to abide to. In Tanzania, a law which is inconsistent with the Constitution faces the threat of being declared void by a competent court.[54] This is the position for all laws, including maritime law, hence the need to traverse the constitutional implications on the law governing ships registration.

The reason for interpreting the constitutional provisions as they relate to the subject at hand is to show where sovereign rights lie over issuance of ship nationality for Tanzanian ships sailing in and outside the territory of the URT. Municipal laws governing maritime law should therefore emanate from or have legitimacy in accordance with the constitutional requirements.

It is the constitution which also determines where sovereign rights lie in the utilization of sea-wealth resources within the union, between the centre

Accessed from LHRC Constitutional Database

---

[52] The certificate did not cite any law and was under a normal Zanzibar Government letterhead with the following words: THIS IS TO CERTIFY THAT THE ZANZIBAR SHIPPING MASTER HAS REGISTERED THE ABOVE MENTIONED VESSEL IN THE PORT OF ZANZIBAR (THE UNITED REPUBLIC OF TANZANIA), AND ATTACHED BELOW ARE THE PARTICULARS OF THE SAID VESSEL WHOSE OWNER IS ...

[53] Act No. 5 of 2006, Section 492(1)(b).

[54] Article 30 of the Constitution of the United Republic of Tanzania, 1977.

(URT) and the individual state (Zanzibar). As mentioned earlier, we will confine ourselves to the registration of ships. This does not in any way mean that the subject of jurisdiction over marine resources is not important; on the contrary, the subject of regulations covering utilization of marine resources is of utmost importance but space and time does not permit us to cover it adequately.[55]

Unlike other federal or union constitutions in other parts of the World,[56] the Constitution of the URT, 1977 (as amended)[57] (herein referred to as the Constitution 1977) does not explicitly address the issues of maritime law.[58] The word "maritime" is not to be found anywhere in the Constitution 1977.[59] We however notice the phrase "territorial waters" in both the Constitution 1977 and the Zanzibar Constitution 1984 (as amended, hereinafter the Constitution 1984). The Constitution 1977 states as follows:

1. *Tanzania ni nchi moja na ni Jamhuri ya Muungano.*

2(1) *Eneo la Jamhuri ya Muungano ni eneo lote la Tanzania Bara na eneo lote la Tanzania Zanzibar, na ni pamoja na sehemu yake ya bahari ambayo Tanzania inapakana nayo.*

We know that we are obliged to use the Kiswahili version because in interpreting the Constitution of the URT that is the version which is supreme.[60] However, the English version[61] can guide us on the definitions of some words. The English version translates the two Articles above mentioned as follows:

1. Tanzania is *one State* and is *a sovereign* United Republic.

2(1). The territory of the United Republic consists of the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes territorial waters.

Accessed from LHRC Constitutional Database

---

[55] the author is aware of the public debate following the application by URT seeking extension of the EEZ at the United Nations Law of the Sea Commission.

[56] Constitutions of USA, Nigeria, Canada and the Republic of South Africa explicitly provide that maritime & shipping matters are under the prerogative of the Union or Federal Government. In Nigeria, the National Maritime Authority is a Federal Government establishment as provided in the National Shipping Policy Decree, 1987, (Supplement to Official Gazette Extraordinary No. 26. Volume 74 of 11th May 1987 - Part A): For the British it is the Merchant Shipping Act, 1995 supervising registration of ships in UK.

[57] Cap 2 R. E. 2002 (as amended), 2008 Edition.

[58] In the UK for example the Merchant Shipping Act 1995 applies to the UK as a whole. Maritime law matters do not fall under Scotland, Wales, England or Northern Ireland. The USA, Nigeria, Canada and the Republic of South Africa all being federal states, put maritime matters under the ambit of the federal government.

[59] Matters concerning Harbours, air transportation, posts and telecommunications are listed in the First Schedule but not maritime matters.

[60] *Daudi Pete v. Republic* [1993] T.L.R. 22 at p. 33.

[61] Article 1.

Accessed from LHRC Constitutional Database

When one looks at the two versions you will notice that the phrase *"nchi moja"* in the Kiswahili version is interpreted as *"one State and is a sovereign"* in the English version. One cannot fail to observe that the word "*sovereign"* is conspicuously absent in the Kiswahili version. *The English - Swahili Dictionary*[62] defines the English word *sovereign* to mean *"dola huru"*; this phrase is missing in the Kiswahili version of the Constitution.

On the other hand, the Constitution of Zanzibar 1984 (as amended)[63] defines Zanzibar as follows:

*1. Zanzibar ni Nchi ambayo eneo la mipaka yake ni eneo lote la Visiwa vya Unguja na Pemba pamoja na visiwa vidogo vilivyoizunguka na bahari yake ambayo kabla ya Muungano wa Tanganyika na Zanzibar ikiitwa Jamhuri ya Watu wa Zanzibar.*

*2. Zanzibar ni miongoni mwa Nchi mbili zinazounda Jamhuri ya Muungano wa Tanzania*

Before the amendment by the Constitution Amendment Act,[64]the two Articles read as follows:

1. Zanzibar is an integral part of the United Republic of Tanzania.

2. (1) The area of Zanzibar consists of the whole area of the Islands of Unguja and Pemba and all small Islands surrounding them and includes the territorial waters that before the Union formed the then People's Republic of Zanzibar.

The import of the new Article 2 in the Constitution 1984 is very clear; that Zanzibar is not sovereign; it is one part amongst two parts of the United Republic of Tanzania. That the amendment referred to Zanzibar as "Nchi" or in English "State" does not make Zanzibar a sovereign State.[65] On the contrary, by declaring that Zanzibar is amongst the States forming the United Republic of Tanzania it is a clear manifestation that it is not a sovereign State so as to give a nationality to its own ships sailing in the high seas.

On the other hand, although the Kiswahili word for sovereign is not in Article 1 of the Constitution 1977, it is obvious that the United Republic of Tanzania is a sovereign State, because it does not form a part of any other power

---

[62] Dar es Salaam: Taasisi ya Uchunguzi wa Kiswahili (TUKI) (2nd Edition), 2000.

[63] 2010 Edition

[64] Zanzibar Act No. 9 of 2010

[65] In the case of *SMZ v. Machano Khamis Ali & 17 Others* [2002] T.L.R. 338 the Court of Appeal held that Zanzibar is not a State. The position has changed with the amendment to the Zanzibar Constitution

above it.[66] As we shall see later, the UNCLOS 1982 of which Tanzania is signatory only allows sovereign States to afford nationality over its ships.

The issue of state sovereignty was aptly decided by the Court of Appeal in the case of *SMZ v. Machano Khamis Ali & 17 Others*[67] where it was held that Zanzibar, in the sense under international law, just like its sister Tanganyika, is neither a state nor sovereign; the State and the sovereign at international law is the URT. Although this case was decided before Constitutional changes were made to the Zanzibar Constitution,[68] the changes (as explained above) do not preclude that Zanzibar is not a sovereign state. The Court of Appeal decision was based on the international aspect of sovereignty which is in concordance to the international law position.

We are aware that within the URT sovereignty over certain matters are exclusively within the jurisdiction of Zanzibar and not Tanganyika.[69] This has been explicitly explained by the Constitution 1977 in relation to the Executive, the Legislature and the Courts for Zanzibar.[70] This limited autonomy does not allow Zanzibar to give nationality to ships sailing outside the URT unless the Union government allows it to do so in its laws governing registration of ships.

Accessed from LHRC Constitutional Database

## VI. Ships Nationality

Maritime law as stated earlier is concerned with ships, hence matters governing ships nationality lie at its heart. Meyers sees the issue of ships nationality to be at the centre of the entire system of the law of the sea.[71] Gidel observed that the nationality of ships is the basis on which the juridical order of the high seas is organised.[72]

As indicated above, our Constitution 1977 recognises harbors and civil aviation as Union matters but it is silent on maritime matters, regardless of the fact that in accordance with international law, the obligation of conferring nationality to ships rests with the URT, the sovereign State. Article 91 and 92 of

---

[66] Article 1 of the Montevideo Convention on Rights and Duties of States, 1933. A state under international law must have the following qualities: a permanent population; a defined territory; a government; and capacity to enter into relations with other states.

[67] [2002] TLR 338.

[68] Act No. 9 of 2010.

[69] Tanganyika has surrendered total sovereignty to the Union. See Articles of the Union.

[70] Chapter IV & V of the Constitution, 1977,

[71] MEYERS, H., *The Nationality of Ships*, The Hague: Martinus Nijhoff, 1967, preface.

[72] as quoted in BRIGGS, H.W. (ed.), *The Law of Nations*, New York, 2nd Ed, 1953, p. 330.

the United Nations Convention on the Law of the Sea (UNCLOS), 1982[73] states as follows:

Article 91: Nationality of ships

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 92: Status of ships:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Under international law, the State means sovereign State which in our case is the URT, the party to this Convention.[74]

The domestication of the UNCLOS into our municipal laws was done via the Territorial Sea and Exclusive Economic Zone Act,[75] Act No 3 of 1989. The preamble to this Act states four main objects, namely:

(a). It provides for the implementation of the Law of the Sea Convention;

(b). Establishes the territorial sea

(c). Establishes the EEZ

Accessed from LHRC Constitutional Database

---

[73] The UNCLOS 1982 was characterised as "A Constitution for the Oceans" by Hon. T.B. Koh of Singapore, the President of the 3rd UNCLOS Conference at Montego Bay, Jamaica in December, 1982.

[74] Tanzania signed the Convention on 10th February, 1982 and Ratification was made on 30th September, 1985.

[75] Cap 238 R. E. 2002.

(d). Provides for the exercise of Sovereign Rights of the United republic over exploration, exploitation, conservation, and management, of the resources of the sea and related matters.

It is provided in the Act that the Minister means the minister for foreign affairs.[76]

In the URT, the statute governing ship registration is The Merchant Shipping Act, 2003.[77] Under this Act, a Tanzanian ship is defined to be the ship registered under it at a port in the United Republic.[78] It further states that a ship shall be a Tanzanian ship only if it is registered under the Act[79] and that the right to fly a Tanzanian ship is to those ships which have either been registered or licensed in accordance to the MSA 2003.[80]

In Zanzibar, the basic law governing ship registration is the Maritime Transportation Act, 2006 (abbreviated MTA) which was passed by the House of the Representatives on 4th of April 2006 and was assented to by the President of Zanzibar on 9th June 2006. In addition to the Act, the Maritime Transport (Regulation and Licensing of Vessel) Regulations, 2007 were enacted (herein referred to as Regulations).[81] This clearly shows that ships registered in Zanzibar are not Tanzanian ships per see because they are not registered in accordance to the MSA 2003.

Two issues arise which are very crucial in the registration of ships in Zanzibar as regards the international maritime law norms. The issues are first, the definition of a ship and second, the territorial application of the Act itself.

The preamble to the MTA provides that it is "An Act to provide for the registration of ships, safety and security of shipping and the protection of marine environment and other matters related thereto." The registration of ships is the crux of the statute which gives the definition of a "Tanzania Zanzibar Ship".[82] It is apparent that a State known as Tanzania Zanzibar does not exist in international law. The Zanzibar Constitution 1984 does not refer to such a State nor does the Constitution 1977 have such a State. In the former we have Zanzibar[83] while in the latter there is an area of Tanzania Zanzibar but not a Sovereign State known as such.[84]

---

[76] Ibid, Section 2.

[77] Act No. 21 of 2003.

[78] Section 2(1).

[79] Section 12.

[80] Section 83(1) MSA 2003.

[81] Legal Supplement (Part II) to the Revolutionary Government of Zanzibar Gazette Volume CXVI No. 6203 of 27$^{th}$ April, 2007.

[82] Section 2(1).

[83] It is Zanzibar which has a flag as provided in Act No. 12 of 2004.

[84] Article 2(1) of the Constitution of the United Republic of Tanzania, 1977 (as amended).

Accessed from LHRC Constitutional Database

The application of the MTA is also provided, in that the Act applies to Tanzania Zanzibar Registered ships "wherever they may be",[85] and it applies to all other ships while in any port in Zanzibar or place within Zanzibar.[86] To implement this task, the law provides that the President of Zanzibar appoint a Director General[87] who is responsible for Maritime Safety Administration and also appoint the Registrar of ships.

The Minister has been given powers under Section 7(10) of the MTA to appoint any person of any nationality or corporation as a proper officer under the Act who has the duties of Deputy Registrar. This task has been elaborated under the Regulations,[88] where he is referred to as a Government Representative. One of the requirements when a person applies for this post is to submit a detailed proposal on how he will promote the Tanzania Zanzibar International Register of Shipping and the expansion of the Tanzania Zanzibar fleet.[89]

Under the Regulations, two ships registries are established in Zanzibar. The first is the Tanzania Zanzibar International Register of Shipping, which is for the registration of ships operating on international voyages (meaning high seas). The Government Representative who is also a Deputy Registrar administers this registry abroad. The second is the Tanzania Zanzibar Register of Shipping for the registration of ships operating within Tanzania and the East African zone.

What is wrong with this position of the MTA? According to international law, specifically maritime law as deriving from the UNCLOS and the laws governing ship registration in the United Republic of Tanzania, it is clear that the power to issue nationality of a ship plying in the high seas, i.e. beyond the waters under jurisdiction of the United Republic, lies in the sovereign State. In our union the United Republic of Tanzania is the sovereign State, not Zanzibar. This implies that ships plying in the high seas while registered under the MTA 2006 under the Zanzibar International Registry are not recognized as Tanzanian ships.

There is no problem in Zanzibar registering ships plying within the United Republic of Tanzania. This is not the case when the MTA also applies to ships registered in Zanzibar "wherever they may be," that is, in the high seas or foreign ports outside Tanzania. Thus, two registries have been established by MTA, namely a Tanzania Zanzibar International Registry for ships plying in the

---

85 Section 3(1)(a).

86 Section 3(1)(b).

87 Sec 7(1) of MTA 2006 as amended by the Zanzibar Maritime Authority Act, 2009 (Act No. 3 of 2009).

88 Regulation 4.

89 Regulation 4(3).

Accessed from LHRC Constitutional Database

high seas beyond Tanzanian waters and a Tanzania Zanzibar Register of Shipping, for coastal ships.[90]

Under the MSA 2003, there is only one register[91] for all ships in Tanzania, although the register may consist of separate books to distinguish the purposes of the ships.

The establishment of an international registry in Zanzibar goes contrary to the position held by the URT concerning flags of convenience. These are the ships registered in a state contravening the UNCLOS 1982 where the flag state has no direct control over the ships flying their flags. Article 94 (1) of the UNCLOS 1982 mandates every state to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. This implies Flag States must have legal and social ties to its ships. The question here is - how much control does the United Republic of Tanzania, the flag state, have over these ships registered in Zanzibar? Legally the answer is none.

Information from the Maritime Authority in Zanzibar confirms that the Zanzibar International Registry is now fully functional with nearly 300 ships currently being registered outside Tanzania.[92] Most of these ships have never sailed into any Tanzanian port including Zanzibar but they conveniently fly the flag of Tanzania, without being registered as Tanzanian ships under MSA 2003.

## VII. Impact of Foreign Ship Registration by Zanzibar

The issue of Zanzibar registering foreign ships flying the Tanzanian flag outside the ship registration processes of the United Republic can bring dire consequences to the nation. One vivid example is the embarrassing international row currently brewing, pitting the URT on the one hand and both the United States of America and the European Union on the other concerning allegations that Iranian tanker ships are flying the Tanzanian flag in violation of international law.[93]

The incidence emanates from the fact that Iran has failed to comply with various IAEA[94] Board of Governors directives under nuclear non-proliferation treaties,[95] hence the Security Council of the United Nations passed several

---

[90] Section 8(1) (a) & (b).

[91] Section 20(1) provides that there shall be a register of ships for all registrations of ships in Tanzania.

[92] Interview with the previous Director General for Zanzibar Maritime Authority.

[93] See *The Citizen On Sunday* newspaper (Tanzania), dated 1st July 2012, No. 401 with the headline "Dar faces US sanctions over Iranian Ships.2 Also see *The East African* dated July 9-15, 2012, No. 923 with the story headed "Iran EAC relations sour after US threatens sanctions".

[94] The International Atomic Energy Agency established in 1957 as an agency under the United Nations.

[95] Especially IAEA Board of Governors Resolutions GOV/2006/14 and GOV/2009/82.

Accessed from LHRC Constitutional Database

Resolutions imposing sanctions on Iran as a way of compelling the country to stop its uranium enriching process.[96] Of particular importance to the subject at hand is Resolution 1929 of 2010 which under paragraphs 19 and 20 provides as follows:

> 19. Decides that the measures specified in paragraphs 12, 13, 14 and 15 of resolution 1737 (2006) shall also apply to the entities of the Islamic Republic of Iran Shipping Lines (IRISL) as specified in Annex III and to any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means, or determined by the Council or the Committee to have assisted them in evading the sanctions of, or in violating the provisions of, resolutions 1737 (2006), 1747 (2007), 1803 (2008) or this resolution.
>
> 20. Requests all Member States to communicate to the Committee any information available on transfers or activity by Iran Air's cargo division or vessels owned or operated by the Islamic Republic of Iran Shipping Lines (IRISL) to other companies that may have been undertaken in order to evade the sanctions of, or in violation of the provisions of, resolutions 1737 (2006), 1747 (2007), 1803 (2008) or this resolution, including renaming or re-registering of aircraft, vessels or ships, and requests the Committee to make that information widely available.

The Security Council resolutions from which these paragraphs are taken bar member states from directly or indirectly engaging in transporting certain items, including oil, from Iran.[97] It is worth noting that some member states including the USA have enacted laws enforceable in the jurisdiction to implement the sanctions.

A member of the USA House of Representatives[98] has publicly accused the URT of registering ten large Iranian tankers[99] used to carry Iranian oil in

[96] UN SC Resolutions include Res. 1696 of 2006; Res. 1737 of 2006; Res. 1747 of 2007; Res. 1803 of 2008; Res. 1835 of 2008 and Res. 1929 of 2010.

[97] As a result of the sanctions, Iran's oil exports have been crippled and more than 17 Iranian supertankers are now idle, used as storage facilities. See article titled "Iran just can't stop pumping oil" in the *Daily News* (Tanzania) of Thursday 12th July, 2012 at p. 22.

[98] Howard Berman, a member of the USA House of Representatives.

[99] The Zanzibar registered tankers are: MT Daisy (GT 81,479); MT Justice (GT 164,241); MT Magnolia (GT 81,479); MT Courage (163660); MT Freedom (GT 163,660); MT Valour (GT 160,930); MT Leadership (GT 164,241); (ships previously from Malta flag); And MT Companion (GT 164,241); MT Camellia (GT 81,479); and MT Lantana (GT 81,479) (ships previously from Cyprus flag).

Accessed from LHRC Constitutional Database

defiance of the sanctions. If these allegations are true, the USA and the EU member States may impose sanctions on Tanzania too.

## VIII. Conclusion and Recommendations

We have seen in this paper that ships are the most important subject in the regulation of maritime law in the World. The international maritime law regime governing ships recognises the United Republic of Tanzania as the sovereign State capable of registering ships plying in the high seas. This means once a ship is registered in Tanzania it ought to be given protection by Tanzania and the laws of Tanzania apply on board when the ship is in the high seas.

However, as can be seen, Zanzibar has enacted laws which confer upon itself the powers to register foreign going ships despite the fact that it is not a sovereign state under the international law ambit. These foreign going ships are registered abroad, without the involvement of Tanzanian Embassies or Consulates. This action has been taken by Zanzibar without the process being recognized by the laws of the URT. This means that the URT does not have effective flag state control over Zanzibar registered foreign going ships as is required under the UNCLOS.

It is therefore recommended that the authorities from both sides of the Union urgently address the matter rather than wait until it brings condemnation from the international community for the failure of the URT as the flag state to adhere to international law obligations over ships registered by Zanzibar.

To address the issue, the URT can take one of the several available options. The first is of amending the MSA 2003 so as to recognize the current statutory provision under the Zanzibar MTA so as to afford protection and recognition to Zanzibar registered foreign going ships; the second is to make efforts to run the international register in cooperation with Zanzibar so that effective control over the ships by URT can be obtained; the third is to deny Zanzibar the power it has usurped by preventing her from using the Tanzanian flag to fly on such ships.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# CIVIL ACCOUNTABILITY: A LEGAL REFLECTION BEHIND THE MV SPICE ISLANDER I

*Mohamed Makame*[1]

I. Introduction

II. The Spice Islander I

III. Emergency Response

IV. Review of Maritime Liability over Passengers

V. Statutory Limitation of Liability

VI. Unveil Limitation Liability

VII. Possible Grounds for Accountability

A. The Ship was Unfit and Improper for Use

B. Overloadingd

C. Improper Inspection and Follow Up

D. Warnings and Precautions from Passengers Ignored

E. Insufficient Life Support Appliances and Rescue Plan

VIII. What Should be the Way Ahead

IX. The Government and Due Diligence

X. Conclusion

## I. Introduction

Many were shocked by the capsize and sinking of *MV Spice Islander I* which occurred on 10th September, 2011 and claimed hundreds of lives. The news spread through both national and international media. The disaster was the first of its kind in Zanzibar's marine history. The loss was very high, although there is no accurate figure of the full loss. Estimates suggest that more than a half of the passengers on board lost their lives. The rescue work was extremely difficult

---

[1] Academic staff, Zanzibar University (ZU), holds LL.B (Law & Shariah) from ZU, Zanzibar, and Master of Comparative Laws from International Islamic University Malaysia (IIUM). Also an Advocate of the High Court of Zanzibar.

Accessed from LHRC Constitutional Database

as the sunken vessel was over 360 metres deep in the sea.[2] Fortunately, hundreds of passengers were rescued.

Following that incident this work aims at viewing some legal concerns and reflections behind the accident. It is intended to share some views and see the practice of other countries, particularly the Commonwealth, on how they legally deal with similar cases. It exposes the legal framework of maritime control, responsibility and liability. Although the incident is long past, the author is of the opinion that a lot more action can still be taken, not only disciplinary or criminal, but also on civil remedies against the owner of the ship[3] and the government authorities mandated to take care of marine security and control. This paper argues that the victims have to be compensated not merely as a way of condolencing but also as damages for their legal rights arising from the loss suffered.

This article considers *MV. Spice Islander I* as a ship within the scope of the definition given by the relevant statute. According to Section 2 of the Maritime Transport Act No. 5 of 2006, (herein referred to as MTA, 2006), a "ship" includes every description of vessel used in navigation. The Spice Islander was also a "passenger ship" as covered under the MTA.[4]

## II. About the Spice Islander I

The *Spice Islander I* was an 836 GRT Ro-Ro ferry built in Greece in 1967 as a "Cargo Ferry" and named Marianna for an unknown owner. According to the information retrieved from "World Shipping Database" this ship was then registered by the International Maritime Organization (IMO) with the registration number 8329907.[5] It was later sold to Theologos P. Naftiliaki of

Accessed from LHRC Constitutional Database

[2] Guardian Reporter, South African divers fail to reach sunk *MV Spice Islander*, IPP Media, 15th September, 2011, http://www.ippmedia.com/frontend/index.php?l=33355>, (accessed on 15th September, 2011). The report says: "Efforts to reach the sunken *MV Spice Islander* lying 360 metres deep in the water at Nungwi proved futile yesterday after divers discovered that the equipment they had could only go down 54 metres."

[3] See infra note 6 on p. 3.

[4] Section 2 of the Act defines "passenger ship" as a ship which is constructed for, or which is habitually or on any particular occasion used for, carrying more than twelve passengers and includes a ship that is provided for the transport or entertainment of lodgers at any institution, hotel, boarding house, guest house or other establishment. Where a "passenger" means any person carried on a ship except:-

(a) a person employed or engaged in any capacity on the business of the ship;

(b) a person on board the ship either in pursuance of the obligation laid upon the master to carry shipwrecked, distressed or other persons, or by reason of any circumstance that neither the master nor the owner nor the charterer, if any, could have prevented or forestalled; a child under one year of age.

[5] See www.worldshippingdatabase.com.

Piraeus, Greece. In 1988, Marianna was sold to Apostolos Shipping and renamed Apostolos P. Later on it was sold to Saronikos Ferries and placed in service on the Piraeus - Aegina - Angistri route. In 2005, Apostolos P was registered to Hellenic Seaways. Two years later, in 2007, it was sold to Makame Hasnuu, Zanzibar, Tanzania and renamed *MV Spice Islander I*.[6]

On 28th April, 2007 the *MV Spice Islander I* was registered for a period of five years as per Section 46(1) (b) of The Maritime Transport (Registration and Licensing of Vessels) Regulations, 2007.[7] It also had a Passenger Certificate issued in pursuant to Section 199 (a) of MTA, 2006 that allowed the ship to carry 650 passengers and 500 tons of cargo.[8] It also possessed a Certificate of Safe Manning that mentioned the ranks of 10 crews along with their qualifications as required by Section 138 (2) of the Maritime Transport (Registration and Licensing of Vessels) Regulations, 2007. The MV *Spice Islander I* continued its business for four years when, at around 1:00am, (EAT) on 10th September, 2011 it sank between Zanzibar and Pemba at Nungwi deep sea. The incident claimed hundreds of lives and with many more injured.[9]

Accessed from LHRC Constitutional Database

---

[6] From Wikipedia, the free encyclopedia, <http://en.wikipedia.org/wiki/MV_Spice_Islander_I>, (accessed on 10th September, 2011).

[7] The Maritime Transport (Registration and Licensing of Vessels) Regulations, 2007 made under Section 51, 54 and 55 of MTA, 2006.

[8] The ship was 60.00 metres (196.85 ft) long, with a beam of 11.40 metres (37.4 ft). She was assessed at 836 GRT, 663 NRT, 225 DWT. The ship was propelled by two Poyaud 12VUD25 diesel engines, of 1,560 horsepower (1,160 kW). According to the passenger certificate issued in 2009, 2010 and 2011 the number of pesserngers was reduced from 650 to 600. The reason of reducing the number of passengers was mentioned as insufficient equipment in the ship considering that it takes a large number of infants. See report p. 18.

[9] It was reported that the Regional Commissioner of Pemba North, Dadi Faki Dadi, told the First Vice President of Zanzibar, Maalim Seif Sharif Hamad on 13th September, 2011 said that the Region had lost about 1,600 people in the accident. The Pemba South Region lost 175 of whom 27 were from Mkoani District and 148 from Chake Chake District. When 619 survivors and 204 identified and buried are added, together with 5 other bodies found in Mombasa, of the total figure approximates 3,000 passengers. It is also believed that the whereabouts of more than 2,000 are not known. Cf. Elias Msuya and Jackson Odoyo "MV Spice Islanders ilibeba abiria 3,000," *Mwananchi*, Wednesday, 14th September, 2011 20: 39 <http://www.mwananchi.co.tz/component/content/article/37-tanzania-top-news-story/15443-mv-spice-islanders-ilipakiza-abiria-3000.html> (accessed on 15th September, 2011). Hence, if it is proved that the death toll from this case is 2000, with respect to the whole population of Zanzibar, 1,061,764, the rate of death would be 0.19%.

## III. Emergency Response

The tragedy of *Spice Islander I* atracted a lot of public attention both locally and internationally. There were calls for assistance and humanitarian aid and concern was expressed on the causes of the accident and the action to be taken. Divers were sent out to sea in search of survivors. Private Diving Companies and local fishermen volunteered their boats, dhows and other diving support equipment to rescue people who would manage to swim their way out of the boat. The Revolutionary Government of Zanzibar set up a centre for people involved in the tragedy and called upon reserves from Zanzibar to join the effort. It also called for foreign support from other African countries such as South Africa and Kenya to bolster rescue work. On 11th September, three days of mourning were declared for the dead. An inquiry into the sinking was announced. The Zanzibar Minister of State promised that the government would take stern measures against those found responsible for the tragedy, in accordance with the country's laws and regulations.

A few days later, the President of Zanzibar and Chairman of the Revolutionary Council, exercsising the powers bestowed on him by Article 51 of the Zanzibar Constitution, 1984 and Section 2 and 3 of the Commission of Enquiry Decree Cap. 33 of the Laws of Zanzibar, appointed a Commission of Enquiry of ten members to investigate the incidence.[10] On 27th September, the Commission was sworn in to begin the task. Among the 14 terms of reference,[11] were to identify those who were responsible for the incidence, whether directly or indirectly; to identify the disciplinary measures to be taken against those found responsible; and to identify any other appropriate steps to be taken among stakeholders of marine vessels in avoiding the occurrence of another tragedy.[12]

After the enquiry, the Commission produced its report (*Ripoti Ya Tume ya Kuchunguza Ajali ya Kuzama M.V. Spice Islander I*), herein referred to as "the report", which produced several recommendations. Among the actions proposed to be taken include the prosecution of several relevant authorities and the shareholders of the company owning the ship. The rest of the proposed actions as given by the Commission were disciplinary.[13] Disciplinary actions were proposed for those who were both directly and indirectly involved in the case.

---

[10] The Commission was chaired by a High Court Judge, Abdulhakim Amiri Issa, while Shaaban Ramadhan Abdallah, an expert in marine law from the Office of the Director of Public Prosecutions was the Commission's Secretary.

[11] See Report at p. 2 – 3.

[12] It can be noted that none of these terms of reference, specifically mention the remedy to be awarded to the victims or dependents. Hence, it can be argued that the major focus of the government was disciplinary and criminal rather than relief to the victims. There were no terms of reference that focused on ascertaining the amount of property lost or the injuries suffered by the passengers and their dependents.

[13] See report at p. 75-95.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

Furthermore, the Commission recommended the strengthening of marine transport. Finally, it recommended amendments to the maritime laws.

On the other hand, the Commission recommended payment of damages to the victims based on the provision of law which relates to insurance cover against risk, loss or damage to a third party. The insurance covered according to Section 57 of MTA is third party insurance which is mandatory for every Tanzania Zanzibar ship. Subsection 2 of the same Section further requires every Tanzania Zanzibar ship to carry insurance cover in respect of every passenger on board. The limits of liability for death or personal injury recommended in the MTA are found in Sections 398 and 399. The calculations made by the Commission with regard to the above provisions indicate that every victim should be paid not more than 10,342 USD.[14]

Looking at the proposed actions it can be noted that there is no mention of the tortuous liabilities which can be invoked by the affected parties in claiming for damages. Although the Commission tried to analyze and recommend some damages to be paid to the affected parties, this assessment was made in reference to the statutory provision which demands for third party insurance. The rest are disciplinary and criminal actions.

The damage caused by the incident was enormous and affected a large population of Zanzibar. The extent was so serious that everyone in Zanzibar knew someone who had been affected by this event that caused a tidal wave of sorrow. Therefore, they were touched personally by the great pain of enormous loss. What gave many people a great relief and brought speedy restoration of the situation was the belief that all of this had been "written" by Allah (*Qadar*).[15] That means that the great tragedies and triumphs of our time have all been arranged, and we are merely actors in the great human drama written and directed by Allah. It can be argued, however, that this point of view would hold water only in the circumstances where it was indeed an "act of God"[16] and the incidence was not caused by gross, inexplicable and avoidable negligence.[17]

---

[14] See the report at p. 93.

[15] *Qadar* means predestination, fate or destiny. In Islam it is necessary to believe that God knows the fate of all creatures. It also believed that people's lives and actions are determined by God (to some extent). Most of Muslims believe in mixture of both fate and free-will for all creatures.

[16] For more information see NIAZI, Liquat Ali Khan, *Islamic Law of Tort*, Lahore: Research Cell Dayal Singh Library Nisbat Road, 1985, at p. 356.

[17] The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care and skill. In law the happening is only regarded as accident if it is done out of the ordinary course of things, something so unusual as not to be looked for by a person of ordinary prudence.

Based on the Islamic jurisprudential point of view (*fiqh*), Muslim jurists from the earliest times, have made a distinction between those aspects of the law regulating the relationship of a believer with God, '*ibadah*, (ritual acts) and those regulating the relationship with others and with the society *muamalat*, (social transactions). While the primary perspective of Islamic law in '*ibadah* is eschatological, the latter, *muamalat*, is sociological, dealing with issues of social interaction and attached responsibility. On that brief, since the issue at hand is a transaction between humans (*muamalat*) it is not wrong for the affected parties to claim for the damage suffered (*diyyah*).

In this case there are obvious elements of negligence that calls for accountability on the part of those who thought it was fine to overload the ship with humans and heavy cargo. The concept of negligence is also known to Islamic law contrary to the view of Schacht.[18] The neighbor principle is well established in *Quran* when Allah says:

> And worship God and do not ascribe divinity, in any way, to aught beside him. And do good onto your parents, and near of kin, and onto orphans, and the needy, and the neighbor among your own people, and the neighbor who is stranger, and the friend by your side, and the wayfarer …

This verse is marked as proof that even in Islamic faith a person is not allowed by his act of negligence to cause harm to others. In addition, it has also been reported by Bukhari and Muslim that "whoever believes in God and the Last Day, let him do good unto his neighbor."[19] This also strengthens the requirement of due diligence and caution regarding any action that a person wishes to take. Thus it can be argued that the sinking of *Spice Islander I* could have been avoided if due diligence had been observed. Since the passengers, within the scope of the principle of negligence, were to be carried safely with due care, we hereby urge for the civil accountably of those who were involved.

## IV. Review of Maritime Liability over Passengers

The current legal regime in Zanzibar in connection with marine carrier's liability towards passengers, whether on cruise ships plying international waters or local tour and pleasure craft sailing on inland waters, is based on principles transformed from common law to statutory law. This has also constituted a response to the international demand for uniformity of acceptable standards. According to those principles, anyone can be held accountable for an act which causes harm to another regardless of whether there was a contract between them

[18] SCHACHT, Joseph, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1982, p. 182.

[19] ASAD, Muhamad, *The Message of the Qur-an* (Translated & Explained), Gibralter: Dar Al-Andalus, 1980, at p 110.

Accessed from LHRC Constitutional Database

or not.[20] Some of these principles have been modified by contract and in some cases the statutory laws have been modified to suit the demand of particular circumstances.

As is well established, with respect to personal safety at common law, the duty owed by the carrier was to exercise due care to carry a passenger safely.[21] This means that the carrier is required to exercise all vigilance to see that whatever is required for the safety of passengers is in fit and proper order, though there is no absolute warranty of seaworthiness that is found in contracts for the carriage of goods. Due care and skill must be exercised to provide a vessel and all services on board to be free from defects which can be guarded against. It is even submitted that a passenger ship owner should have a higher duty of care to individuals than a landowner, depending on the type of danger involved.[22]

The common law rule against awarding of damages to dependents for the wrongful death of a person also invites some concerns in the *Spice Islander I* case. Reference can also be made to the rule which emphasizes that the recoverable damages are not those caused to the deceased but rather those caused to the dependants.[23] These damages can be awarded proportionate to the injury resulting to the dependants from the death. Hence, it covers the loss of guidance, care, and companionship which are non-pecuniary in character but

Accessed from LHRC Constitutional Database

---

[20] This principle, on other hand, considers a formalization of the social contract, the implicit responsibilities held by individuals towards others within society. It is not a requirement that a duty of care be defined by law, though it will often develop through the jurisprudence of common law.

[21] In law of tort, which originally is not codified, a duty of care means a legal obligation imposed on an individual requiring that they adhere to a standard of reasonable care while performing any acts that could foreseeably harm others. It is the first element that must be established to proceed with an action in negligence. The claimant must be able to show a duty of care imposed by law which the defendant has breached. In turn, breaching a duty may subject an individual to liability. Moreover, the duty of care may be *imposed by operation of law* between individuals with no *current* direct relationship (familial or contractual or otherwise), but eventually become related in some manner, as defined by common law.

[22] *Kalendare-va v. Discovery Cruise Line P'ship*, 798 So. 2d 804 (Fla. Dist. Ct. App. 2001). It was held in this case that the extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to passengers will determine how high a degree of care is reasonable in a particular case. When a ship-owner owes a higher duty, it is an application of the rule that reasonable care includes a carrier's duty to warn passengers of dangers that are not apparent and obvious. Thus, the court held that the question of whether defendants should have known of the danger to passengers should have gone to the jury.

[23] Thus, in case of death, damages as are proportioned to the injury resulting from the death to the dependants respectively for whom and for whose benefit the action is brought may be awarded.

have nevertheless been deemed recoverable as damages to the dependants.[24] These damages are not expressly referred to in any of the provisions of the MTA, of 2006.[25]

The present legal regime governing the liability of ship operators towards their passengers in Zanzibar is relatively static. This has been the effect of transformation from simple terms of common law to a statutory regime. Thus, the MTA has modified and codified only some of the common law principles but does not cover the whole notion in its totality. Hence, this legislation can barely qualify as a statutory framework of registration of ships, safety and security of shipping and the protection of marine environment along with other related matters.[26]

In that respect, the MTA reflects the presumption of liability available to a claimant where the ship sinks even in formidable circumstances which causes the loss of life and property. To make it clear, a claimant has been given the burden of proving fault or neglect of the carrier or his servant or agent acting within the scope of their employment,[27] even though the ship may be totally lost and no evidence is available to demonstrate the state of seaworthiness of the ship or to establish the cause of loss. Therefore, the claimant cannot recover any loss

Accessed from LHRC Constitutional Database

---

[24] See *Ordon Estate v. Grail*, 140 D.L.R. (4th) 52, 1997 AMC 418 (Ont. Ct. App. 1996). This decision was issued in connection with five actions involving loss of life and personal injuries arising from various pleasure boating accidents on provincial inland waters. The actions were joined together and heard by a special panel of the Ontario Court of Appeal. The decision raises important issues pertaining to the nature and scope of Canadian maritime law and the extent to which provincial legislation can supplement that body of law. Leave to appeal to the Supreme Court of Canada has been granted.

[25] The analysis of damage and recommendations given by the report did not consider these facts.

[26] The Maritime Transport Act, 2006 is a compendium of provisions dealing with all matters of a marine nature, including ship registration (part iii), restriction on trading (part iv), national character and flag (part v), proprietary interests in registered ships (part vi), engagement and welfare of seafarers (part vii), prevention of collisions and safety of navigation (part viii), safety of life at sea (part ix), load lines (part x), carriage of bulk cargoes and dangerous cargoes (part xi), maritime security on ships and port facilities under safety convention and international ship and port facility security code (part xii), maritime security at high seas (piracy) under the United Nations Convention on the Law of the Sea 1982 (part xiii), prevention of pollution from ships (part xiv), liability for oil pollution (part xv), compensation fund (part xvi), unsafe ships (part xvii), control of foreign ships while in Zanzibar (part xviii), wreck and salvage (part xix), control of, and returns as to persons on ships (part xx), liability of ship owners and other carriage of passengers and luggage by sea (part xxi), limitation and division of liability for maritime claims (part xxii), indemnity and powers of enforcement officers (part xxiii), inquiries and investigations into marine casualties (part xxiv), and legal proceedings (part xxv).

[27] Section 394 (1) of Act No. 5 of 2006.

if he fails to prove that the incident which caused the loss or damage occurred in the course of the carriage, and thus there was fault or neglect on the part of the carrier or of his servants or agents acting within the scope of their employment.[28]

However, the same Section invokes the presumption of fault or neglect on the part of the carrier or his servant or agent acting within the scope of their employment if the death of or personal injury to the passenger, or the loss of or damage to cabin luggage arose from or in connection with the shipwreck, collision, stranding, explosion of fire, or defect in the ship. This presumption remains to be as good as evidence unless there is proof to the contrary.[29] Thus, in connection with the incidence of *Spice Islander I*, the law presumes that a carrier, along with its servants and agents, had acted under the course of fault or negligently conducted their business unless it is proved otherwise. Apparently, the presumption suits the case as the Section gives the benefits to the victims and dependents of the *Spice Islander I* to claim for the loss so incurred.

In addition, this Section goes further to extend the presumption of fault or neglect on the part of the carrier or his servants or agents acting within the scope of their employment in respect of loss of or damage to luggage other than cabin luggage, irrespective of the nature of the incident which caused the loss or damage. Again this provides opportunities for the recovery of the loss to the victims, unless there is proof to the contrary.

Accessed from LHRC Constitutional Database

## V. Statutory Limitation of Liability

The possible obstacle to recover damages, even in instances where the passenger is successful in maintaining an action for loss or personal injury against the carrier by establishing its fault, imposed by the statute, is the carrier's limitation of liability defense. This defense has been applied mostly by the ship owners to limit or get rid of the liability caused by their faults or negligent acts or of their servants and agents.[30] In Zanzibar, limitation of liability given by MTA covers, *inter alia*, claims in respect of loss of life or personal injury or loss of or damage to property, including damage to harbor works, basins and waterways and aids to navigation occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom.[31] The Acts also include the claims in respect of the raising, removal, destruction or

---

[28] Ibid 394 (2) (a) and (b).

[29] Ibid 394 (3).

[30] This is mostly applied by ship owners, and in many cases is written on the back of the ticket. For example, one Tanzanian shipping corporation writes on their ticket that "This ticket is issued to the terms and conditions contained herein and limits of liability of the carrier for deaths, personal injuries and in respect of loss of or damage to baggage remaining as stipulated herein …"

[31] See Section 418 (1) (a) of the Act No. 6, 2006.

rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.[32]

In countries where the maritime cases are significantly higher than in Zanzibar, the limitation of liability regime does not discriminate between commercial and non-commercial vessels, and there is no question that pleasure craft owners can, in appropriate circumstances, take advantage of limitation.[33] Little effort will be required to extend the limitation privilege to personal watercraft, as has already been done in the United States with respect to jet skis.[34] The burden of proof, however, is on the ship owner to demonstrate that the ship meets the standard of conduct required to avail itself of the privilege. The law limits liability only for things a ship owner cannot control, such as the negligent actions of an officer on another side of the world. It also limits liability for unseaworthy conditions of which the owner could not reasonably know. It is asserted that limitation of liability was born of a desire to encourage maritime commerce, but in many situations it has become an anachronism or, according to some commentators, an instrument of tort reform.[35]

Limitation of liability was invoked in the loss of the Titanic, which in April 1912 struck an iceberg and sank, taking more than 1,500 lives. In the wrongful death and injury lawsuits that followed, Supreme Court Justice, Oliver Wendell Holmes, held that the Titanic's British owner should be allowed to limit liability to the ship's post casualty value, which amounted to about $92,000 for a cluster of its remaining lifeboats.[36]

Although the reported cases dealing with a carrier's liability toward its passengers are not common in Zanzibar, perhaps as a result of disclaimers and exemption clauses or even ignorance, a succinct body of legal principles has nevertheless emerged in respect of the duty of care cast upon the carrier. Some of these principles merely reiterate the law in respect of common carriers of passengers. Carriers by water are obliged to exercise the same degree of care as that required of any other class of carriers. It is only the contrary when, for instance, the risk of apparent danger is assumed by the passenger, based on the doctrine of "*volenti non fit injuria*."[37] Thus, like many other common law

---

[32] Ibid 418 (1) (d).

[33] See *Whitbread v. Walley* [1990] 3 S.C.R. 1273. The case is discussed further in DION," The Canadian Approach to Limiting the Liability of Pleasure Craft Owners," Volume 24 *Journal of Maritime Law and Commerce*, 1993, p. 561.

[34] See *Keys Jet Ski, Inc. v. Kays* [1990] 893 F .2d 1225, 1990 AMC 609 (11th Cir. 1990).

[35] AKPINAR, Tim, "Defeating Limitation of Liability in Maritime Law An Anachronistic Law Can Still Prevent Fair Recovery for Plaintiffs Who Suffer Losses on the Waves," *JTLATRIAL*, February, 2006, at 44.

[36] *Oceanic Steam Navigation Co. v. Mellor* [1914] 233 U.S. 718; see also *Titanic Case* [1913] 209 F. 501, 502 (S.D.N.Y. 1913).

[37] In *Woolfson v. Canada Steamship Lines* [1930] 36 R.L.N. 368, the court found that the carrier was not liable for failure to carry safety devices for preventing passengers from

Accessed from LHRC Constitutional Database

countries,[38] Section 394 of MTA implies that a carrier in Zanzibar is not an insurer of the safety of its passengers. Even if the care required is of a high degree, there is no strict liability for injury to a passenger. Instead, liability will only arise if the act is one done in the course and scope of employment of a person doing the wrongful act or, alternatively, if the carrier has been negligent in respect of the matter.

## VI. Unveil Limitation of Liability

To defeat limitation of liability, either as a complaint or an affirmative defense, the plaintiff counsel must demonstrate the vessel owner's privity and knowledge of negligent operations or dangerous conditions that resulted in the loss. This can include the owner's knowledge that personnel failed to follow prudent practices or standard operating procedures.[39] Thus, the investigation would have to be made to see whether they failed to comply with necessary training, properly qualify officers and crew for standing watch, properly verify backgrounds of crew members, or take action after learning of alcohol or drug abuse.[40] In the case in hand, the report given by the Commission of enquiry reveals that several of the crew of the *Spice Islander I* were underqualified contrary to the standard required by the certificate of safe manning.[41] There is also a belief that the vessel indicated all signs that it was not safe for sailing and was heavily overloaded.

An excellent example is demonstrated in a Fifth Circuit case, where two work boats collided in fog on the Mississippi River in Louisiana.[42] The captain of the defendant's vessel had not used a lookout or turned on his running lights. Although the vessel had radar, the captain had not been aboard the day it was installed and was not trained in its use (other than being given a manual to read on his own). Because the vessel had been running at full speed, engine noise

falling out of the upper berths. See also *McLachlin v. Canadian Pac. Ry*. [1948] 64 C.R.T.C. 125.

[38] *Barrett v. The Ship "Arcadia,"* 76 D.L.R. (3d) 535, 540 (dismissing a passenger's suit because the steward's attack on the passenger was neither caused by the carrier's negligence nor was it within the scope of the steward's employment). That ordinary negligence will serve to create liability is made clear by *Whitehead v. North Vancouver* [1939] 1 W.W.R. 369. In that case a ferry owner failed to put up a barrier at the end of a ramp in a ferry ship, thereby causing the death of an intending passenger. Negligence, not surprisingly, was found to exist on the part of the ferry owner. Similarly, in *Anderson v. Harrison* [1977] 4 B.C.L.R. 320, passengers were held to be entitled to damages for the personal injuries they suffered when they were flung down a stairway. According to the court, the master should have warned the passengers of the possible dangers associated with docking.

[39] AKPINAR, Tim, "Defeating Limitation of Liability in Maritime Law," op. cit. at 46.

[40] Ibid.

[41] See Report at p. 10.

[42] *Trico Marine Assets, Inc. v. Diamond B. Marine Servs., Inc*., [2003] 332 F.3d 779, 783-84 (5th Cir. 2003).

Accessed from LHRC Constitutional Database

made it difficult to hear the radio or fog signals of other vessels. The Fifth Circuit affirmed the District Court's decision to deny limitation of liability. It found several failures that attributed privity and knowledge of unseaworthiness to the vessel owner, including failure to use a lookout, to train the captain in the use of radar, to evaluate the vessel's unseaworthiness, which became relevant with the engine noise, to inspect vessel logs, to employ a safety manager, and to provide safety training and safety manuals.[43]

In another example, from a federal district court case, deck hands on a passenger ferry were preparing the vessel for debarkation shortly after docking. A gate became dislodged from its track and fell on one of the deck hands, fracturing his hip and three foot bones. [44] The court held that the deck hand's own negligence, together with the negligence of another deck hand, had contributed to his injuries. But the court also found the ferry to be unseaworthy and denied limitation of liability. It was submitted that if the gate had been equipped with a locking device, it would have opened fully and locked in place rather than being knocked off its tracks. The court noted that such a device was called for in the vessel plans and that the owner installed one after the deckhand was injured, showing that this safety measure was economical and feasible.

## VII. Possible Grounds for Accountability

Apart from the freedom of contract that prevails in Zanzibar, considering all possible accountable persons from exempting themselves from liability for their own negligence is curtailment of others' rights. Again, imposing restrictive limits on the scope of their liability and thus making passengers on board ferries and cruise ships to travel at their own risk would definitely defeat justice, even if most tickets contain exemption clauses to the effect that passengers in terminals or on board vessels assume all risk of loss, personal injury, and death even if caused by the negligence of the carrier or its servants. This however, does not totally restrict the liability of the wrongdoers if they are found to have caused the damage. Several reasons can be attributed to the incident of *Spice Islander I* with regards to the fault and negligence of the carrier, servants, agents and even state authorities.

### *A. The Ship Unfit and Improper for Use*

There is a significant possibility that the ship was not suitable for sailing. The historical background above indicates that it had been manufactured nearly five decades earlier, yet it was still allowed to operate carrying hundreds of

[43] Id. at 790.

[44] See In *re Parish of Plaquemines as Owner of the M/V Pointe-A-La-Hache* [2002] 231 F. Supp. 2d 506 (E.D. La. 2002), for Exoneration from or Limitation of Liability.

Accessed from LHRC Constitutional Database

passengers and cargo for a long distance and long duration.[45] There are also reports that it had encountered engine problems in 2005.[46] Investigation reveals that the the ship capsized after losing engine power. There is no speculation that the ship sank because of a storm or any other act of *force majeure.*

### *B. Heavy Overloading*

There is every reason to believe that the *Spice Islander I* was heavily overloaded when proceeding on its journey. Given its capacity of carrying 600 passengers and 45 crew, the number of survivors and those found dead were almost double the original capacity, even if the ship owner claims that there were only 601 passengers on board. On the other hand, some potential passengers were reported to have refused to board when it was leaving Dar es Salaam, claiming that the ship was overloaded.[47] This proves a fault and negligence act on the part of the carrier, servants and agents.[48]

There are no accurate records given by the ship owner on the exact number of passengers and amount of cargo on board on the day of the accident.[49] Even the ticket records are doubtful. Some tickets were sold by unauthorized agents, contrary to Section 127(1) (i) of the Maritime Transport (Safety of Small Vessels Engaged on coastal Trade) Regulations, 2008.[50] But there is also proof

Accessed from LHRC Constitutional Database

[45] The investigation reveals that the year of manufacture found in the documents submitted to the Registrar for registration was seven years prior (1967 instead of 1974) to the exact year of manufacturing as shown in the World Shipping Database" (www.worldshippingdatabase.com). See the Report at p. 43.

[46] On 25 September 2007, *Spice Islander I* was off the coast of Somalia when she experienced engine problems due to contaminated fuel. After the alarm had been raised via Kenya, USS *Stout* from Combined Task Force 150 was sent to her aid. The ship was on a voyage from Oman to Tanzania and was not carrying any passengers. USS *James E. Williams* also responded. *Stout* provided the ship with 7,800 US gallons (30,000 l; 6,500 imp gal) of fuel and supplied ten crew with food and water. After its engines were restarted, it resumed the voyage to Tanzania. Source *Wikipedia*.

[47] Said by survivor Abdullah Said. See *Ship Sinks off Tanzania, 370 Missing or Dead*. Associated Press, Stone Town, Tanzania, Sat, 09/10/2011 3:36 PM, World, <http://www.thejakartapost.com/news/2011/09/10/ship-sinks-tanzania-370-missing-or-dead.html>, (accessed on 11th September, 2011).

[48] The decision of House of Lords in *Donoghue v. Stevenson* [1932] All ER 1 said: "Negligence is a distinct tort." Thus, the decision settled that negligence as a tort or civil wrong stood by itself and that it could be actionable in any circumstances in which one person suffered personal injury or physical property damage as a direct, close and foreseeable result of the act or omission of another. Litigants do not have to rely on special relationships to prove their cases nor is negligence a dependent component of other torts.

[49] See *the Report* at. p. 14.

[50] The Maritime Transport (Safety of Small Vessels Engaged in Coastal Trade) Regulations, 20008 made under Section 190, 191, 485 and 491 of MTA, 2006.

Accessed from LHRC Constitutional Database

that some passengers boarded without tickets.[51] On the other hand, there are no records showing the amount of cargo on board, but the evidence given by survivors indicates that the ship had heavy cargo.

The statistics collected by the Commission show that on 9th September, 2011 *MV. Spice Islander I* carried 2,470 persons - among them 2,431 passengers, 11 crew and 28 children under one year. This number was four times higher than the number of passengers allowed (600),[52] let alone the amount of cargo on board which was also believed to be grossly heavy though no exact figures were given. This is clear evidence that both the owners of the ship (Visiwani and Al-Ghubra Companies) and the master of the boat are responsible for letting the vessel carry more than the number of passengers allowed.

### *C. Improper Inspection and Follow Up*

The survey and inspection of the ship is indicated not to have been made properly; otherwise a reasonable decision would have been taken to save the situation. If the ship owner had exercised proper care in discovering conditions that rendered the vessel unseaworthy, took account of the ship's records and advice of the surveyors and inspectors, the tragedy would not have occurred. Since inspections revealed there were several defects in the ship, the owner cannot argue that he or she did not have knowledge of these defects. The Report revealed that there were technical defects of *Spice Islander I* as pointed out by the inspector from the Surface and Marine Transport Authority (SUMATRA) and brought to the knowledge of the Surveyor of *Spice Islander I* in Zanzibar. These were ignored.[53] The investigation by the Commission shows that *Spice Islander I* had technical defects since July, 2011 and was unfit for use. It was probably these defects that caused the ship to submerge from the rear.[54]

Additionally, the report also shows that the certificate of registration was issued without appropriate written formal application in accordance to rule 15 (1). By the time the certificate was issued the applicant was no longer the real owner of the ship, contrary to rule 25. It is also claimed that *Spice Islander I* was given a longer period of provisional registration than what is required by rule 28 (3) (a) that provides for only three months of registration.[55] Furthermore, even permanent registration of the ship was found to be contrary to the provision of law. As such there was no certificate of seaworthiness. Hence, one can argue that the government officials responsible for maritime transport had contributed a lot to the tragedy.

---

[51] See the *Report* at p. 54.

[52] Ibid., p. 62.

[53] Ibid., p. 27.

[54] Ibid., p. 70.

[55] Ibid., pp. 43-45.

### *D. Ignoring Warnings and Precautions from Passengers*

It has been reported in interviews by several media outlets that passengers feared the boat was overloaded and some disembarked before it left port. "A few of the passengers managed to get off the ship after noticing that it was tilting," said Aze Faki Chande, who Reuters News Agency said lost her two children and sister. Another woman was reported to claim that "we also tried to disembark, but the ship's crew quickly removed the ladder and started sailing towards Pemba." The BBC's East Africa correspondent Will Ross in Nairobi said carrying too many passengers or heavy cargo is a common cause of accidents whether on sea or land in many parts of Africa.[56]

There were early signs that the the ship would sink, but no serious action was taken. Even when the situation became almost impossible to control, the Captain did not make any effort to send the information to relevant authorities, his responsibility under Section 167 (1) of MTA.[57] Instead the passengers were left to their own devices and assistance from their loved ones, friends and well-wishers.

### *E. Insufficient Life Support Appliances and Rescue Plan*

This is another area in which the blame should be laid on the responsible person. There is a proof that the *Spice Islander I* did not have life support appliances such as life jackets and even emergency rescue boats. It would seem that the owner along with the relevant authorities responsible did not take proper action to ensure that the vessel was fully installed with safety equipments. This also included giving instructions to passengers on how to apply rescue resources available on board in case of an emergency.

This indicates that there was no rescue plan set for saving the lives of the passengers on board. The passengers began calling family and friends from their cell phones. Those who managed to swim their way out of the boat, grabbed anything they could such as mattresses, fridges and tanks to float their way to safety. One helicopter pilot Captain Neels van Eijk, who was an eye witness to the suffering of the passengers stated:

> We found the survivors holding on to mattresses and fridges and anything that could float. By then, there were a few boats

---

[56] <http://www.bbc.co.uk/news/world-africa-14869596>, 11 September 2011. Last updated at 03:18 GMT *Zanzibar mourns ferry disaster victims*, (accessed on 11th September, 2011).

[57] Section 167 (1) provides "The master of any Tanzania Zanzibar ship upon encountering any of the dangers to navigation specified in subsection (2) of this Section shall send information accordingly by any means of communication at his disposal to the appropriate shore based authorities and such information shall be repeated to ships in the vicinity as practicable."

Accessed from LHRC Constitutional Database

> that had made their way out. They were looking for survivors, but although the sea wasn't so rough, the waves were high so it was difficult for them to spot them. We flew to the boats and guided them to the survivors so that they could pick them up. There were also quite a few bodies in the water.[58]

This situation definitely suggests negligence on the part of the responsible persons. It was held in the English case of *Davis v. Stena Line Ltd* that the failure of the captain to prepare a careful and detailed rescue plan or to have a rescue plan available was negligence. The captain's rescue plan was so hopeless and risky both to X and to the safety of the ferry and its crew that it bordered on negligence. There was a strong possibility that X would have been rescued alive if the other vessel had been asked to launch its fast rescue boat but the captain had been negligent in failing to make such a request.[59]

## VIII. What Should Be the Way Forward?

The loss of property and hundreds of lives in the *Spice Islander I* saga constitutes the violation of people's rights, which have to be protected anywhere by any means. It would not be proper to see this violation go unpunished. The lives of Zanzibaris are the same as those of other nationals. It would be not only illogical but also immoral that the rights of a passenger depend on the type of transportation used, the legislation in force where the accident took place, and the place where he tries to enforce his rights.

In a case which became a landmark in maritime law, Lord Denning expressed his reservations in words that left no doubt about his feelings. The case, and perhaps more importantly the clause at issue, have become affectionately known as the "Himalaya clause" because it involved an exemption clause in a passenger ticket issued for the good ship Himalaya. In particular, Lord Denning said:

> I am much more shocked by the extreme width of this exemption clause which exempts the company from all liability whatsoever to the passenger. It exempts the company from liability for any acts, defaults or negligence of their servants under any circumstances whatsoever, which includes, I suppose, their wilful misconduct. And this exemption is imposed on the passenger by a ticket which is

[58] 2011 By wendyzachary, *Ship carrying 600 passengers sinks near Zanzibar Island, Tanzania,* ALL VOICES, Zanzibar: Tanzania, September 10, <http://www.allvoices.com/contributed-news/10299740/content/75752207-women-carry-goods-in-stone-town-in-the-zanzibar-archipelago>, (accessed on 12th September, 2011).

[59] *Davis v. Stena Line Ltd* [2005] EWHC 420 (QB).

Accessed from LHRC Constitutional Database

> said to constitute a contract but which she has no real opportunity of accepting or rejecting. It is a standard printed form upon which the company insist and from which they would not depart, I suppose, in favour of any individual passenger. The effect of it is that, if the passenger is to travel at all, she must travel at her own risk.[60]

The British Maritime Law Association has reviewed the inconsistencies pertaining to the treatment of passengers, and in a report has concluded that as the 20th century drew to a close no civilised nation should permit the continued existence of rules that deny passengers on board ship fair compensation for death and personal injury judged by the normal domestic principles and levels of damage of that nation where the death or personal injury has been brought about by the fault of the ship's operator.[61]

That suggests that any responsible person or institution would have to face the due process of law. It would not be enough to accept regrets and condolences or receiving some amount of contribution from humanitarians. Since we know that the incident was caused by default and negligent acts of some person, I am of the opinion that the responsible persons should be made accountabile. We have learned from not taking any action in the case of *MV Fatih*;[62] now let us learn by taking action.

## IX. The Government and Due Diligence

Most people believe that the operations of all vessels on the sea are done under the control of governmental bodies which are given the mandate to monitor and regulate all activities including safety precautions. We do not anticipate these incidents to happen if due diligence and responsible work of these bodies were actually performed.[63] It is well established that the Minister, in addition to other

[60] *Adler v. Dickson* [1954] 2 Ll. L.R. 267, 270 (C.A.).

[61] *Steel Ships Are Different: The Case for Limitation of Liability*, [1995] LMCLQ 77, 81.

[62] Over 50 people were feared dead after a cargo vessel in which they were travelling from Dar es Salaam capsized off Zanzibar's Malindi port on Friday night. The fatal maritime accident occurred a little over one week after the nation somberly marked the 13th Anniversary of the sinking of mv Bukoba near Mwanza port in 1996, in which nearly 1,000 lives were lost. See Mwinyi Sadallah, IPP Media, 31st May, 2009, <http://www.ippmedia.com/frontend/?l=2800> (Accessed on 14th September, 2011).

[63] A particular maritime administration has got many roles and responsibilities to play related to its general duty in controlling shipping and other maritime activities. Among the most important are the following;

(i) Registration of Ships and Seafarers, (ii) Certification of Seafarers , (iii) Ships' Surveys and Inspections, (iv) Casualty Investigations, (v) Co-operation, (vi) International Activities. See Shaaban Abdalla, *Maritime Law and Legislation in the Context of Administration of Maritime Affairs: A Case Study of Zanzibar in Comparison with the Territories under the Sovereignty of British Crown,* (Master Thesis, Lund University, Spring 2009) at 19.

Accessed from LHRC Constitutional Database

powers conferred on him under MTA, is responsible for the general administration of all matters relating to maritime control.[64] This includes, also, the issue and control of Passenger Ship Safety Certificates, Cargo Ship Safety Certificates, Cargo Ship Safety Radio Certificates, Cargo Ship Safety Equipment Certificates, Cargo Ship Safety Construction Certificates and Exemption Certificates as prescribed by the Safety Convention.[65] It is the Minister who prescribes the form and compliance of those certificates. It includes; (a) the limits (if any) beyond which the ship is not fit to ply; (b) the number of passengers which the ship is fit to carry; (c) any condition with which the ship has to comply.[66] Hence we would like to see the words of the statute actively followed.

This also concerns the matters of procedures and regulations for sea going vessels as observed under international safety standards.[67] It also relates with the surveys and certification and the general requirement for Tanzania Zanzibar ships and all other ships while in Zanzibar to comply with the ISM Code.[68] In providing effective measures towards the observance of rules as to the safety of life at sea, this part provides that any ship that fails to comply with them should be detained.[69] The fact that the authorities and other rescue teams play an active role in helping the victims does not absolve them of accountability and some measure of blame.

If the vessel was not fit for operation why was it still allowed to operate and maintain its registration certificate?[70] The Registrar had the power to cancel the registration of the vessel, if he found that it did not meet the conditions stipulated in the statute, so as to protect the security and safety of the passengers and their properties. In addition, the Surveyor, at all reasonable times, is given power to inspect any ship for the purpose of ensuring that it is in compliance with the Safety Convention, the Load Line Convention, Collision Regulations and the relevant regulations made under this Act. We have to ask ourselves whether all these happened to minimize the magnitude of the incident. These bodies and authorities will also have to be responsible in providing compensation to the injured parties.

Accessed from LHRC Constitutional Database

[64] Section 4 of Act No. 5, 2006.
[65] Ibid Section 200 (1).
[66] Ibid Section 200 (2) (a) – (c).
[67] Sections 187-191.
[68] Sections 192-196.
[69] Section 213.
[70] Section 20 (10) of Act No. 5, 2006 requires the ship to be surveyed even before registration takes place. It states: "Every ship shall before registration be surveyed by a surveyor of ships and her tonnage ascertained in accordance with the tonnage regulations made under this Act, and the surveyor shall grant his certificate specifying the ship's tonnage and build, and such other particulars descriptive of the identity of the ship as may for the time being be required by the Director and such certificate shall be delivered to the Registrar of Ships before registration."

In a country where the rule of law is maintained and the safety of the passengers is protected, anything happening by the wrongful act of the government or its agent makes them accountable. A USA case can of *Brown v. United States*,[71] can be given as an example in this regard. Plaintiffs filed a suit against the government for damages under the Death on the High Seas Act (DOHSA), 46 U.S.C.S. Section761 – 768. Plaintiffs contended that the government was liable for the deaths by drowning of three lobster fishermen because of its failure to properly maintain a computerized weather buoy. The court awarded damages to the plaintiffs in their suit against the government.[72] In an opinion issued on 21st December, 1984, this court narrowly applied traditional tort principles to a unique factual setting in holding the government liable, because of its failure to properly maintain a computerized weather buoy, for the drowning deaths of three lobster fishermen.[73]

## X. Conclusion

We need to bear in mind that while we are still working and earning there are men and women who are in deep sorrow and leading desperate lives. Some have lost their parents, children, spouses and other close relatives and friends. Among them are orphans with no one to offer assistance. There are many more who have lost the guidance, care, and companionship from amongst the deceased. I would urge this to be legally considered with a sense of humanity. This should be done as early as possible before the expiry of the time limitations. The discussion above provides every possible opportunity for making the responsible accountable and granting compensation to the victims and dependents. Mere condolences and small financial assistance are not sufficient. The sinking of *Spice Islander I* should be considered as a tort issue. The legal firms, centres and associations should think of the mechanism for helping the hopeless victims and dependents to recover some damages for the loss of their loved ones and their properties.

Accessed from LHRC Constitutional Database

[71] 599 F. Supp. 877 (D. Mass. 1984).

[72] *Honour Brown, Individually and as Personal Representative of Cary Brown and as Administratix of the estate of Gary Brown, et al.*, v. *United States of America*, CA No. 81-168-T (and related cases) United States District Court For The District Of Massachusetts 615 F. Supp. 391; 1985 U.S. Dist. LEXIS 16927; 1986 AMC 1487 August 12, 1985. The court awarded damages for the plaintiffs and held that under DOHSA the plaintiffs were entitled to (1) fair and just compensation for the pecuniary loss sustained including loss of support; (2) monetary compensation for lost services; (3) loss of the value of the nurture, training, education, and guidance that a child would have received; and, (4) reasonable compensation for pain and suffering.

[73] This suit against the United States was permitted by the Suits in Admiralty Act, 46 U.S.C. § 741-742 (1982), which provides in pertinent part: In cases where if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States … 46 U.S.C. Section 742.

Accessed from LHRC Constitutional Database

# Shorter Articles

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# THE UNION OF TANZANIA MAINLAND AND ZANZIBAR: CHALLENGES AND PROSPECTS

*Lilian Melkizedeki Kimaro*[1]

I. Introduction
II. Background
  A. Practical Problem and Key Issues Underlying the Problem
  B. Objective of the Study
III. Approach
IV. The Union of Tanzania Mainland and Zanzibar
  A. Legality of the Union
  B. Articles of the Union
  C. The Status of Zanzibar
V. Conclusions and Recommendations
  A. Conclusions
  B. Recommendations

## I. Introduction

Africa has been a continent plagued by conflicts over the years. In the past two decades alone, Africa has witnessed over 20 conflicts, making the continent a war zone. As a testimony to this reality, Africa is currently hosting 8 UN peacekeeping operations, and the continent constitutes over 60% of the agenda of the UN Security Council. There are many causes of conflicts in Africa. These include ethnic and religious extremism, exclusionary definitions of citizenship, misallocation of and competition for natural resources, border conflicts, shortcomings in governance and disrespect of constitutions, as well as subversion by outside actors. To these should be added the emerging trend of election-related conflicts.

Conflicts have seriously undermined Africa's efforts to ensure long-term stability, prosperity and peace for its people. The real figures and costs of many conflicts in Africa are difficult to come by. What is certain is the enormous cost to the lives of ordinary Africans, with estimates placing the figures from between 8.5 million and 12 million (DFID Regional Factsheet, 2008; The Millennium Development Goals Report, 2005). Nine million people more have become refugees or are internally displaced. In monetary terms, African conflicts are estimated to have cost approximately US$300 billion since the end

[1] Foreign Service Officer, Ministry of Foreign Affair and International Co-operation, Dar es Salaam, Tanzania.

of the Cold War in 1990 (Oxfam, 2007). The majority of these monies are spent on buying arms and ammunition. Other indirect costs of conflicts include the destruction of infrastructure such as roads, bridges, harbors and industries.

The picture of peace and security on the African continent, however, is not all that gloomy and negative. Indeed, significant progress has been made in addressing and resolving some of the most violent and intractable conflicts on the African continent. Many of the civil wars in Africa have ended, whereas others may be described as latent or showing fragile peace. To this end, the continent witnessed processes towards reconciliation and post-conflict reconstruction in Liberia, Sierra Leone, and Southern Sudan and Burundi. In Sudan, peace was a result of the signing of the Comprehensive Peace Agreement and the establishment of the Government of South Sudan as an autonomous state. Mozambique, Angola, and Rwanda have all witnessed peace and have embarked on post-conflict reconstruction. All these achievements are in no small measure of the efforts and active contribution of African actors themselves, specifically the African Union (AU), its subsidiary organizations such as SADC, ECOWAS, EAC and others - including individual countries involved in mediation efforts.

The URT has not been left behind in all these peaceful processes. Apart from opening its borders to absorb millions of desperate civilian war refugees, it always plays a leading role in frantic attempts to bring a peaceful end to various conflicts.

Tanzania is a stable and peaceful country within the sub-region. To this end, the problems and challenges in Zanzibar should not be left unresolved in order to avoid ruining the reputation of beautiful Tanzania.

## II. Background

United Republic of Tanzania is a unitary republic, which was formed out of the union of two sovereign states, Tanganyika and Zanzibar. Tanganyika got its independence on 9th December 1961, while Zanzibar gained independence on 10th December 1963. On 26th April 1964, the first two Presidents of Tanganyika and Zanzibar Mwalimu Julius Kambarage Nyerere and Sheikh Abeid Karume, respectively, adopted the Articles of Union establishing the United Republic of Tanganyika and Zanzibar (later to become the United Republic of Tanzania). Tanganyika was a colony and part of German East Africa from the 1880s to 1919, when, under the League of Nations, it became a British mandate and later a United Nations trustee territory still under the British until independence in 1961. Zanzibar was settled as a trading hub, subsequently controlled by the Portuguese; the Sultanate of Oman, and then as a British protectorate at the end of the 19th Century until independence in 1963.

Accessed from LHRC Constitutional Database

### *A. Practical Problem and Key Issues Underlying the Problem*

The issue of Zanzibar's status in its relationship with the mainland has dominated debate in Zanzibar during the last few months. The issue was originally raised by a Deputy Minister in the Zanzibar Government speaking in the Zanzibar House of Representatives in 2010 and giving the impression that he considered Zanzibar to be a country in its own right while being part of the United Republic of Tanzania.

Zanzibar could not be a sovereign state within the United Republic; it had lost that status in 1964 when it becames part of the Union.

Another argument is that the current set-up reduced the Zanzibar President virtually to the level of an officer in local government because he has no authority in the Union Government.

Contemporary government of the URT consists of the Union Government and the ZRG. It is a unitary republic based on multiparty parliamentary democracy.

All state authority in the URT is exercised and controlled by the Government of the URT and the ZRG. Each central government has three organs: the Executive, the Judiciary; and the Legislature that have powers over the conduct of public affairs. In addition, local government authorities assist each central government.

The government of the United Republic of Tanzania has authority over all Union matters in the United Republic and over all other matters concerning Mainland Tanzania and the Revolutionary Government of Zanzibar has authority in Tanzania Zanzibar over all matters which are not Union matters. The following is the current status of the structure of the Union and functions of the top five Government officials. Until 2010, the top five Executives of the United Republic have comprised the President, the Vice-President, the President of Zanzibar, the Prime Minister and the Chief Minister from Zanzibar.[2]

Under this structure the President of the United Republic is the Head of State, the Head of Government and Commander-in-Chief of the Armed Forces. He is also the leader of the Executive of the United Republic of Tanzania.

The Vice President is the principal assistant to the President in respect of all matters in the United Republic generally and in particular is responsible for assisting the President in:

[2] Following the formation of the Government of National Unity in Zanzibar in 2010 by the two main political parties Chama Cha Mapinduzi (CCM) and Civic United Front (CUF), the 10th Amendment to the Constitution of Zanzibar of 1984 abolished the office of the Chief Minister and replaced it with two Vice Presidents shared between the two parties.

Accessed from LHRC Constitutional Database

(i) Making a follow-up on the day-to-day implementation of Union matters;

(ii) Performing all duties assigned to him by the President; and

(iii) Performing all duties and functions of the office of the President when the President is out of office or out of the country.

The President of Zanzibar on the other hand, is the Head of the Executive for Zanzibar, Head of the ZRG and the Chairman of the ZRG.

The Prime Minister of the United Republic is the leader of Government business in the National Assembly and has authority over the control, supervision and execution of the day-to-day functions and affairs of the Government of the United Republic of Tanzania. S/he also undertakes any matter or matters that the President directs to be done.

Before the constitutional amendments in 1992, the sole legal party Chama cha Mapinduzi (CCM) nominated the president. The two vice presidents whom he appointed assisted him: one was the Prime Minister and the other was the President of Zanzibar. As of 1995, the President was assisted by a Vice President, Prime Minister, and cabinet. If the President of Tanzania came from Mainland Tanzania, the Vice President must be from Zanzibar and *vice-versa*.

### *B. Objective of the Work*

The main objective of this work is to examine some challenges relating to the Union between Tanzania Mainland and Zanzibar and see how to resolve the controversy as to the precise status of Zanzibar in the Union and international arena.

The Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania is working closely with the African Union (AU) and other African countries to build capacity in conflict prevention, regional security and peace-building skills.

Currently, Tanzania belongs to the East African Community (EAC), a regional co-operation organization that has defined its integration milestone with a focus on formation of a political federation. In the area of regional cooperation, specifically East African Community, this study would assist us to know how Zanzibar will feature in the coming Federation.

What preparations have been put in place to accommodate Zanzibar without creating discontent among Zanzibaris regarding their county's status in the Federation?

Accessed from LHRC Constitutional Database

## III. Approach

In the process, I would build a case to the Ministry to initiate round-tables. The participants would be a number of experts on the matter, interested politicians, representatives of interested civil societies and Government representatives drawn from both Tanzania mainland and Tanzania Zanzibar. The principal researcher will prepare the agenda reflecting matters of concern as presented in the hypotheses. The meetings will be chaired by a person proposed by the Ministry. Minutes would be taken to serve as primary data. This will complement the secondary data retrieved from historical documents and other relevant publications.

Analysis of data will be done and a draft will be prepared. The said draft would be distributed to all members of staff of the Legal Affairs Units and some from Regional Cooperation Department to explore it for their comments. The research report shall be submitted to the Permanent Secretary of the Ministry for appropriate action.

Accessed from LHRC Constitutional Database

## IV. The Union of Tanzania Mainland and Zanzibar

Since the formation of the Union there have been a number of challenges. There are issues of legal basis of the Union, Articles of the Union, the loss of sovereignty and the how Zanzibar is to be treated internationally . Issues have also risen in respect of sharing the benefits and costs of the Union government including the sharing of revenues and foreign aid, just to mentiona few. The Union was formed in the wake of a coup d'état that had earlier taken place in Zanzibar which had shortly received its independence. The circumstances in which the Union was formed raised a lot of questions, many of which are still unanswered and some have been the centre of continuing debate and controversy in Tanzania.

### *A. Legality of the Union*

A lot of questions continue to be raised on the legal basis of the Union. The issue is whether the two Presidents had the power to enter into such a Union agreement on their own without peoples' participation. The question still remains why the Zanzibar's Attorney General, who is the principal legal advisor to the government, was not consulted while that of Tanganyika is said to have been asked to draft the Union Agreement secretly.

On the other hand one can say that what the two Presidents did was right. Under both the 1962 Republic of Tanganyika Constitution and Zanzibar Presidential Decree No. 5; the two Presidents had the powers to enter into international agreements on behalf of their governments. Another important legal step is that the Union Agreement was ratified by both the Tanganyika Parliament and the Zanzibar Revolutionary Council. When the Articles of Union

were ratified by the two legislative bodies, there was no further requirement in law to make them enforceable.

### *B. Articles of the Union*

The agreement signed on 22nd April, 1964 is also known as "Articles of Union". They provide for matters that would be under the Union arrangement and the existence of two governments, one for the whole Republic for all Union matters and for non-Union matters in Tanzania Mainland, and one for Zanzibar in all matters that are non-Union. The said Articles have been given different interpretations and characterized as federal, quasi-federal or an interim arrangement towards one government. Originally there were 11 items under the Union; the list has now expanded to 23. The Union Agreement entered into in 1964 had the following agreed provisions that:

The Republic of Tanganyika and the Peoples' Republic of Zanzibar shall be united in one Sovereign Republic and the United Republic shall be governed in accordance with the provisions of Articles. The following were agreed to be the Union matters:

> (a) The Constitution and Government of the United Republic; (b) External Affairs; (c) Defence; (d) Police; (e) Emergency Powers; (f) Citizenship; (g) Immigration; (h) External Trade and Borrowing; (i) The Public Service of the United Republic; (j) Income Tax, Corporation Tax, Customs and Excise; (k) Harbors, Civil Aviation, Posts and Telegraphs.

It was also agreed that the first President of the United Republic would be Mwalimu Julius K. Nyerere, the President of the Republic of Tanganyika, and Sheikh Abeid Karume, the President of the Peoples' Republic of Zanzibar would be the first Vice-President who would also head Zanzibar.

Following the expansion of Union matters to 23, there are some questions which have been raised on the validity of such an expansion.

### *C. The Status of Zanzibar*

There are some arguments that the Union created a single state with two authorities, but one having a limited geographical jurisdiction. In that case some have argued that Tanganyika has been enlarged and Zanzibar has been denied the capacity to be an international actor.

Accessed from LHRC Constitutional Database

## V. Conclusions and Recommendations

### A. Conclusions

In concluding, there have been historical links between Tanganyika and Zanzibar long before the coming of the colonialists. Colonialism did not stop such interactions from continuing. The Union of Tanzania Mainland and Zanzibar is a fact. Despite a lot of challenges, it has brought stability and peace in the region and brought people much closer together. Tanzanians accept the Union and would like it to continue.

The problems and challenges faced now are the result of its formation, structure and management. Many of these problems remain unresolved and are the basis for the grievances on many aspects including legality, the two government structure, the expansion of the list of Union matters, the threat to Zanzibar's identity and international dealing and the loss of the Tanganyika identity. The majority of people in both Tanzania Mainland and Zanzibar would like to see changes in all these aspects in order to have a just and equitable Union which represents the interests of both sides of the Union.

### B. Recommendations

This study therefore recommended the following:

(i). To have a review of the Union in terms of its structure and management and corrective measures to be taken to sustain and strengthen the Union.

(ii). Political leaders to have strong political will in addressing and resolving complaints.

(iii). Tanzania to look at the East African integration process as an opportunity and occasion to address and resolve these complaints together with other East Africans.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# THE SUBMISSION FOR EXTENSION OF THE CONTINENTAL SHELF BY THE UNITED REPUBLIC OF TANZANIA TO THE UNITED NATIONS AND THE REACTION OF ZANZIBAR

*Charles Riziki Majinge*[1]

I. Introduction
II. Continental shelf in international law of the sea
III. Tanzania`s application to the United Nations
IV. Zanzibar legal status in the Union
V. Legal Implication of the Opposition to the Submission of Tanzania
VI. Conclusion

Accessed from LHRC Constitutional Database

## I. Introduction

For the past five years the United Republic of Tanzania (URT) has been working on its submission to the United Nations for the request to expand its continental shelf and Exclusive Economic Zone (EEZ). This submission was made in accordance with the Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS) which allows countries to apply for extension of their continental shelf in accordance with the provisions of UNCLOS. The law of the Sea regime provides a mechanism to achieve this objective. It establishes the Commission on the Limits of the Continental Shelf which is tasked with receiving submissions from member states and making determination in accordance with the Convention. Worth noting is that the Convention allows states to challenge any submission made by member states to the Commission.

However, the submission by Tanzania to the United Nations made at the end of 2011 has elicited opposition not from other states that are legally empowered to challenge its application in accordance with the existing legal regime of the law of the sea, but rather from Zanzibar, a part of the URT. It is this reaction by Zanzibar that provides a compelling need for an in depth inquiry into the legal basis for this opposition. While the reaction was not an official statement issued by the Revolutionary Government of Zanzibar (RGZ), the fact that the opposition to the Union Government submission was initiated by the legislator whose party is part of the government of national unity merits this inquiry. It is also worth noting that the opposition to this submission was debated in the Zanzibar House of Representatives, an organ with the mandate for legislation on laws concerning Zanzibar. This opposition raises some serious legal issues relating both to the legal aspects of the Union between Tanganyika

[1] Doctoral Candidate, London School of Economics, London, the United Kingdom.

and Zanzibar and Zanzibar's sovereign status in international law. The objective of this article is not to examine the merits of the submission made by the Government of the URT to the Commission. Rather it intends to examine the reasons underpinning Zanzibar's opposition to this submission and clarify whether Zanzibar can successfully challenge positions taken by the Union Government in international affairs on its own especially on matters that may affect or have a direct impact on Zanzibar.

## II. Continental Shelf in International Law of the Sea

One can rightly contend that claims to the continental shelf extension concern directly issues relating to laws governing state sovereignty on land and sea. Worth noting is the fact that the doctrine of continental shelf developed in international law for the purpose of resource exploitation. While before the 1945 Truman Declaration, the doctrine of continental shelf existed, it was not a codified doctrine; rather it was reflected in the gradual extension of coastal states' sovereign rights to exploit seabed and subsoil resources. The modern concept of the continental shelf in international law of the sea can be traced to the 1945 Proclamation by President Harry Truman of the United States. In this Proclamation, President Truman declared that 'having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the seabed and subsoil of the continental shelf beneath the high seas but contiguous to the Coast of the United States as appertaining to the United States, subject to its jurisdiction and control.'

Accessed from LHRC Constitutional Database

In a subsequent Proclamation issued in respect to coastal fisheries he stated that 'in view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States.' From reading these proclamations it is clear that these claims were also motivated by post WWII social and economic needs. It was in the quest to address economic challenges in the post war period that states embarked on claims to expand their sovereign rights on sea resources they deemed crucial for their economic progress.

Consequently, after the Truman Declaration, other states made declarations reaffirming their sovereign claims to vast areas of water and seabed on the basis of sovereignty and economic needs. For example in June 1947, Chile became the first country to claim 200 nautical miles (nm) when it proclaimed national sovereignty over the continental shelf off its coasts and

islands and over the seas above the shelf to a distance of 200 nm. Subsequently Peru proclaimed its sovereignty on its 200 nm in August of the same year. Examining the reasons that underpinned these declarations by both countries it is evident that both were motivated by the desire to promote their commercial interests in the adjacent seas. For example Chile wanted to protect its new offshore whaling operations while Peru was keen to protect fishing in its shore from neighbors as well as from other states from afar. What is evident is that the motives for the expansion of continental shelf from the beginning were predicated on the need to protect sovereign interests that underlie such areas.

The 1958 Convention on the Continental Shelf was the first international instrument codifying the continental shelf claims by states. This Convention was significant in different aspects but chiefly, it recognized the fact that coastal states had legitimate claims on their continental shelf. It also took steps to clarify what constituted continental shelf. The latter aspect was important because due to technological advancements, states were making unilateral claims that solely advanced their economic interests without due regard to the interests of other states especially landlocked countries. Article 1 of the Convention provided that the term 'continental shelf' is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admit of the exploitation of the natural resources of the said areas. The Convention further vested coastal states with exclusive sovereign rights in the continental shelf, rights that are not to be dependent on any occupation or any express proclamation. Worth noting is that the Convention provided that rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas or that of airspace above those waters.

The Convention also provided for rights and obligations for the coastal states. For example, while coastal states may take reasonable measures for exploration of the continental shelf and exploitation of its natural resources, they may not impede the laying or maintenance of submarine cables on the continental shelf or cause unjustifiable interference with navigation or conservation of the living resources of the sea. However, the right of coastal states to exploit the sub-soil by means of tunnelling irrespective of the depth of water above soil was to be guaranteed under the Convention. It is clear from the Convention that natural resources over which coastal states have exclusive rights are mineral and other non- living resources, together with living organisms that, at their harvestable stage, are either fixed to the seabed or are unable to move except in constant contact with it. Indeed the jurisdiction of the coastal states over their continental shelf is reaffirmed by the *International Court of Justice* in its decision on the *North Sea Continental Shelf cases.* In these cases the Court noted that 'the rights of the coastal states in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land

Accessed from LHRC Constitutional Database

and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.'

What we see in this Convention is that while it reaffirms the rights of the coastal states to explore and exploit their natural resources within their continental shelf, this right was not to be exercised in prejudice to the rights of other states. Yet, it is worth noting that the 1958 Convention did not address concerns of different countries especially in the global South who felt that exploration and exploitation of resources in the continental shelf by coastal states would grow as sophistication of technology improved. This exploitation would directly counter the international law regime which recognized that deep seabed resources are the common heritage of mankind. It is in the quest to address these concerns that the international community embarked on a long and protracted process to negotiate the Law of the Sea Convention (LSC).

The negotiations and adoption of the LSC was significant in the sense that it addressed most issues that were left untouched by the 1958 Convention. The Convention provides an in depth clarification of the continental shelf that a state can claim for itself.

In Article 76 of the Convention, coastal states are entitled to 200 nautical miles continental shelf from the baseline from which the breadth of the territorial sea is measured, where the outer edge of the continental margin does not extend up to that distance. To establish an outer limit of the continental shelf, coastal states are given two options. They may delineate lines by reference to the outermost fixed points at each of which the thickness of the sedimentary rocks is at least one per cent of the shortest distance from the point to the foot of the continental slope. Alternatively, they may also delineate by reference to a fixed point not more than 60 nautical miles from the foot of a continental slope. However, Article 76 (5) provides that the lines adopted may not exceed 350 nm from territorial sea baseline or 100nm from 2500 metre isobaths.

A question worth posing is, why did countries propose 200 nm as the breadth of the continental shelf and not 100 or 300 nm? The explanation offered by the Kenyan Chief negotiator during the negotiations of the Convention may be instructive. Prof. Felix Njenga stated that

> the existence of 200 nm territorial claims by certain countries did play a part in the establishment of the 200 nm. The so called 3 mile territorial sea rule had by this time more or less become obsolete. If a new proposal had to have any chance of success, it had to take into consideration the existing realities. One of these realities was the 200 mile territorial sea claimed by some Latin American countries and later by some African countries, including Somalia and Sierra Leone. To expect that any nation would accept a roll-back from adopted national position particularly when such position

Accessed from LHRC Constitutional Database

> had been enshrined in its constitution, as in the case of Honduras, would be to expect the impossible. It was therefore the view of the proponents of the EEZ, that the 200 mile limit offered the best chance for an acceptable international limit for national jurisdiction.

On the rights and duties of coastal and other states in the continental shelf, the LSC essentially reiterates the provisions reflected in the 1958 Convention on the Continental Shelf. However it is worth noting that the LSC is comprehensive and covers a wide range of areas unlike the 1958 Convention which was a short document comprising fifteen Articles. The Convention grants the coastal state the right to exercise over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. It also states that the fact that a state has not explored these resources does not mean that other states may exploit them without express consent of the concerned states. In other words, the sovereign rights of coastal states in the continental shelf are exclusive and it is entirely up to these states to exploit these resources or allow other states to undertake this exploration and exploitation.

The LSC also grants costal states other rights in addition to exclusive rights to explore and exploit natural resources. For example, they have exclusive rights to authorize and regulate drilling on the continental shelf for all purposes (Article 81). Under Article 82 coastal states with outer continental shelf beyond 200 nautical miles are required to make contributions in kind to the International Sea Bed Authority in respect of mineral resources exploitation beyond this area. It is also worth noting that the Convention makes a provision for the delimitation of the continental shelf between states with an opposite or adjacent coast. Specifically the provision states that the delimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution (Article 83).

The Law of the Sea Convention makes provision for the Exclusive Economic Zones (EEZ) over which states may exercise sovereign rights. It elaborates the EEZ as an area beyond and adjacent to the territorial sea, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of this Convention. The Convention allows coastal states sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. The Convention, while guaranteeing freedom of navigation on the high seas, prohibits any state to subject any part of the high seas to its sovereignty.

Accessed from LHRC Constitutional Database

Perhaps to address concerns of land-locked countries and reaffirm the legal regime of the common heritage of mankind, the Convention makes provision for the rights and duties of other states both coastal and land locked. Article 58 provides that 'in the exclusive economic zone, all States, whether coastal or land-locked, enjoy, the freedoms referred to in Article 87 of navigation and over flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention'. While exercising their rights in accordance with the Convention, states 'shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part'.

It is also worth noting that the LSC provides a detailed and comprehensive dispute settlement regime unlike the 1958 Convention on the Continental Shelf. The Convention further provides an exception to the dispute settlement for safeguarding sovereign rights of coastal states. The Convention makes it clear that coastal states are not obliged to submit disputes relating to the exercise of their sovereign rights guaranteed under the Convention to any form of mandatory dispute settlement mechanism. For example, the coastal state retains its exclusive powers to determine allowable catch and allocation of surpluses to other states. Reading the legal regime governing continental shelf both under the 1958 Convention and the 1982 Law of the Sea Convention, two things are clear - the coastal states have exclusive sovereign rights for exploration and exploitation of natural resources found within their continental shelf. However, the Convention is categorical that in no way can these rights be exercised to affect the legal status of superjacent waters or of the air space above those waters.

Accessed from LHRC Constitutional Database

## III. Tanzania's Application to the United Nations

Having discussed the legal status of the continental shelf in the international law of the sea, and established that coastal states have exclusive rights on the exploration and exploitation of natural resources found therein, this section will attempt to examine the legal status of the United Republic of Tanzania's submission to the United Nations for the expansion of its continental shelf beyond the current 200 nautical miles. Under what legal framework can this expansion be justified? A further question worth asking is how does the existing legal regime on the law of the sea address potential disputes among states on territorial claims? However, before answering these questions, it is worth explaining albeit briefly, how the submission process by the Tanzania Government was undertaken.

In June 2008 the government of the United Republic of Tanzania and the government of Norway signed an Agreement titled *'proposed project plan and budget for the Tanzania Continental Shelf Delineation Project'*. The Agreement identifies the goal of the project as to 'delineate the outer limits of Tanzania`s continental shelf outside the Exclusive Economic Zone (EEZ), so as to claim the right to explore and exploit non-living and mineral resources on the seabed and sub soil of the extended continental shelf adjacent to the EEZ in accordance with the United Nations Convention on the Law of the Sea Article 76'. The Agreement further outlines the purpose of the project as to 'assist in the process of collecting, compiling, processing and analysing hydrographical and geophysical data to be presented to the United Nations as evidence in support of Tanzania`s claim that her continental shelf stretches beyond the 200 nautical miles of the current EEZ'. The Ministry of Lands, Housing and Human Settlement of Tanzania was charged with the day to day running and coordination of the project. In April 2011, the Government of Tanzania through its Ministry of Foreign Affairs wrote a letter to the UN Secretary General requesting a five month extension for its submission on 13th November 2011.

Tanzania is the signatory to the LSC which it ratified on 30th September 1985. The submission of Tanzania to the United Nations for expansion of its continental shelf was made in the general legal framework provided for under the LSC. Under Article 76 of the Convention, the continental shelf comprises the seabed and subsoil that extends beyond the territorial sea to 200 nautical miles from the territorial sea baseline. A coastal state wishing to establish a continental shelf beyond 200 nm must submit data to a body established by the Convention which has authority to determine whether the information the state submitted is consistent with the requirement set out in Article 76 of the Convention. It is therefore on this basis that Tanzania made its submission.

The body established under the Convention to make this determination is the Commission on the Limits of the Continental Shelf (CLCS). The Commission consists of 21 members elected by the State parties to the Convention who perform their functions in their individual capacity. The primary functions of the Commission are spelt out in Article 3 of Annex II. The Commission is tasked 'to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea' and 'to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a)'. Yet, it is important to point out that while the Commission has a dual role, it has neither a mandate to determine continental shelf boundaries between coastal states nor to settle disputes among them. This is because the decisions of the Commission are only binding for the submitting states.

Accessed from LHRC Constitutional Database

Perhaps a question worth posing is, what are the conditions for states to submit their requests for the expansion of their continental shelf? This aspect is crucial in order to clarify concerns of Zanzibar on the submission itself. The Annex requires states that want to extend their continental shelf beyond 200 nm to 'submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State'. It is important to clarify how submissions to the Commission are made to examine whether the state is under obligation to undertake consultation before it makes its submission to the Commission. Ideally states, before making submission to the Commission, are required to consult each other (states opposite and adjacent) to ensure that neither can make claims which may jeopardize the application made by the other. Worth noting however is that Article 76 (10) reaffirms that the implementation of the entire Article 76 by one state does not affect the rights of other states in case where the delimitation of the continental shelf between the states concerned is at issue.

The implication of the above provision is that finality, permanence and binding nature of the determination of the continental shelf undertaken under Article 76 (8) and (9) cannot be invoked against another state where the delimitation of the continental shelf is at issue. Indeed, in its preliminary information submitted to the Commission, the government of Tanzania noted that it had made extensive consultation with both the government of Kenya and the Government of Seychelles and the latter indicated to the Tanzanian government that they had no objection to the submission made by Tanzania. Tanzania likewise informed the Commission that it has no objection to the submission made by the government of Kenya and Seychelles 'including maritime areas of potential overlap with Tanzania continental shelf'. However, Tanzania invoked the protection guaranteed by Article 76 (10) that such considerations and recommendations will be without prejudice to future delimitation.

Before submission, the Rules of Procedure of the Commission on the Limits on the Continental Shelf impose an obligation on the submitting state. For example in case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes related to the submission, the submitting state must inform the Commission and assure it 'to the extent possible' that the submission will not prejudice matters relating to the delimitation of boundaries between states. In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute. The Rules of the Commission further state that 'the submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or

Accessed from LHRC Constitutional Database

maritime dispute'. What is notable in these rules is the requirement that the Commission not consider and qualify submissions where a land or maritime dispute exists unless all parties to the dispute have given their prior consent. Interestingly, if the state making its submission disagrees with the recommendations made by the Commission, it may offer a revised submission to the Commission 'within a reasonable time'. The implication here is clear - the submitting state can never lose, rather it may offer as many submissions as it wishes until one produces the desired recommendations. If such recommendations do not prejudice any other state boundary interests they become final and binding.

It is the wording of Article 76 and the requirements provided for in the Rules of Procedure regarding the submission itself that are relevant to the current inquiry. However, answering these questions will depend on whether Zanzibar is a sovereign state recognized under international law capable of entering into international contracts and agreements. It is therefore essential to clarify albeit briefly on the legal status of the Union between Tanganyika and Zanzibar before examining the merit of the arguments made by some Zanzibaris on the validity of submission made by the Union Government for expansion of the continental shelf of Tanzania.

Accessed from LHRC Constitutional Database

## IV. Zanzibar's Legal Status in the Union

The 1977 Constitution of Tanzania as amended from time to time, provides that 'Tanzania is one state and is a sovereign United Republic' (Article 1). The Constitution also defines the territory of Tanzania to include 'the whole of the area of mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters'. While the United Republic of Tanzania is a product of the Union between two sovereign states, this Union is based on specific areas agreed upon by the parties. These areas, otherwise known as the Articles of Union, are the legal basis upon which the constitutional structure of Tanzania is based. The Articles of the Union were ratified by the Tanganyika parliament by passing the Union of Tanganyika and Zanzibar Act of 1964, and in the same way the Zanzibar Revolutionary Council passed the Union of Zanzibar and Tanganyika Law. This formally sealed the Union of the two countries to form Tanzania.

Areas of cooperation provided for in the Articles of Union can be added to or modified upon mutual desire and agreement by the parties. Specifically, the original areas upon which the Union government had jurisdiction included; the Constitution and Government of the United Republic, external affairs, defense, police, emergency powers, immigration, external trade and borrowing, public service, income tax and harbors, civil aviation, postal services and telegraphs. Progressively, several areas have been added to the original eleven matters, including higher education, political parties, the human rights commission,

industrial licensing and statistics, the Court of Appeal of the United Republic of Tanzania, currency and coinage and mineral and oil resources.

Perhaps the question of whether Zanzibar is a sovereign State or not was effectively addressed by the Court of Appeal of Tanzania, when it gave its ruling to the effect that Zanzibar is not a sovereign State capable of being overthrown. This was in the case of *SMZ v. Machano Khamis Ali & 17 Others.*[2] The brief facts of the case are as follows: Machano and 17 other Zanzibaris were charged with treason under Section 26 of the Penal Decree (Cap. 13) of Zanzibar. The charge alleged that these persons, by words and deeds, intended and devised means of treason in order to overthrow the Revolutionary Government of Zanzibar and to remove from authority the President of the Revolutionary Government of Zanzibar. The decision of the Court of Appeal is instructive on the question as to whether Zanzibar is a state or not. The Court stated:

(a) on an indictment for treason, the following matters have to be proved, that the act was treasonable, that the act is against a sovereign state, and that the act was done by person who owes allegiance to the sovereign or state;

(b) for a state to exist, there must be a people, a country in which people have settled down, a government i.e. a person or persons who are the representatives of the people who rule according to the law of the land, and that government must be sovereign;

(c) sovereignty has dual aspects of internally relating to the power to make and enforce laws and externally to freedom from outside control. The United Republic of Tanzania is one country and one State. *The international persons called Tanganyika and Zanzibar ceased to exist as from April 26, 1964 because of the Articles of Union and surrendered their treaty making powers to a new international person called the United Republic of Tanzania.* A nation cannot indefinitely surrender the treaty making power to another, and at the same time retain its existence as a sovereign state *(emphasis mine)*;

(d) the court further opined that subversion and treason are cognate offences as they are both about the overthrow or the revolting against authority. They both securely fall within security, which by virtue of item 3 of the First Schedule is a Union matter;

(e) as such Zanzibar was not a sovereign state capable of being overthrown.

From this judgment, the Court of Appeal made it clear that Zanzibar was not a sovereign state capable of being overthrown by military coup. The implication of this case was twofold - firstly it laid to rest claims which had been

[2] [2002] TLR 338.

Accessed from LHRC Constitutional Database

advanced by some Zanzibaris on different occasions arguing that Zanzibar was an independent state capable of addressing matters which concerned her even if such matters fell within the realm of the Articles of Union. Secondly, this case reaffirmed and concretized the undisputed role of the Union government as the sole entity with powers to conduct foreign affairs on behalf of both Zanzibar and Tanganyika. For example, from this judgment it is clear that Zanzibar cannot attempt to join international or regional organizations such as the United Nations or the East African Community as it had argued previously precisely because it surrendered treaty-making powers to the Union government.

While claims have been made on of Zanzibar's right to deal with its own issues especially those with a direct impact on its interests, these claims are qualified with the requirement that these matters must fall outside the ambit of the Articles of Union which stipulate matters that fall under the exclusive jurisdiction of the Union government. Indeed, foreign affairs is one of those issues. While Zanzibar enjoys autonomy to decide on matters that directly impact her, this autonomy does not mean that Zanzibar can make determination regarding its territory precisely because territorial matters concern the very basis of the existence of the United Republic of Tanzania. Claiming that Zanzibar can challenge the submission made by the United Republic to the Commission clearly avoids the question whether Zanzibar is a state as provided and understood in international law.

Accessed from LHRC Constitutional Database

## V. Legal Implication of the Opposition to the Submission of Tanzania

What is the legal implication of the opposition made by some Zanzibaris on this submission? Clearly, the only way that Zanzibar can address its concerns regarding the submission made by Tanzania is through the Union government which the current Revolutionary Government happens to be part of. For example, it can raise these issues in the framework of resource sharing between the parties. While Rule 5 of the Rules of Procedure of the Commission are explicit to the effect that the Commission cannot 'consider a submission where a maritime dispute exists unless all concerned state parties to the dispute have given their consent', it is doubtful whether this scenario would be applicable to Zanzibar. This argument is predicated on the fact that there is no existing territorial dispute between the parties precisely because Zanzibar is part of the Union and it is only Tanzania that is recognized under international law as a sovereign state. Put differently, it is only Tanzania that can legally represent the interests of Tanganyika and Zanzibar in international affairs as agreed in 1964 when both states ceased to exist and surrendered their sovereignty to the new state of the United Republic of Tanzania.

Admittedly, in some quarters arguments have been made to the effect that 'Zanzibar exists' and it is only 'Tanganyika' that ceased to exist. This argument is premised on the understanding that Zanzibar is a state with its own legislature, executive and judiciary. However, this argument does not stand up to in-depth

scrutiny. It is clear that while Zanzibar enjoys limited autonomy to legislate on specific issues, these issues are explicitly required to be outside those under the jurisdiction of the Union Government. In fact, the legality of the legislation adopted by the House of Representatives depends on the requirement that they should be consistent with the Union Constitution. And whenever there is a contradiction with the Union Constitution, such law is void to the extent of such inconsistency. It is because of this explicit constitutional requirement that this article contends that Zanzibar cannot legally seek to address issues that are outside the purview of its powers provided for under the Constitution.

While the Law of the Sea Convention (LSC) and the subsequent Rules of Procedure require a submitting state to report any existing dispute between her and any other state, it is also doubtful whether this provision can apply in the current situation in Tanzania. Since Zanzibar is not a state in the sense ascribed to the word in international law, it cannot legitimately claim that its interests are not represented by the Union Government without challenging the validity of the foundation of the Union itself. This aspect is relevant precisely because unless Zanzibar can challenge the powers of the Union Government to act on its behalf, it cannot purport to challenge actions undertaken by the Union Government as a successor state. And even if the Zanzibar government wanted to challenge such a position, the rightful channel to do so would have been a constitution of the United Republic of Tanzania which provides a mechanism to address any 'constitution question' between Zanzibar and the Union Government.

The opposition to the submission has also been premised on the fact that the Zanzibar Government has requested the Union Government to remove oil and other seabed resources from the list of items provided for under the jurisdiction of the Union government. Essentially this would mean that Zanzibar has an exclusive right to apply for extension of its continental shelf to explore and exploit these resources as provided for under the LSC and the international law of the sea regime in general. However, endorsing this line of reasoning would provide a narrow interpretation to the entire question of the right of coastal states to exercise sovereign rights on natural resources found within its continental shelf. This argument is made in light of the fact that while exploitation of natural resources is central to the expansion of the continental shelf, this is not the only reason that underpins such expansion. There are varied considerations such as national and international peace and security which directly require the URT to deal with foreign organizations and governments. These issues cannot be dealt with by Zanzibar without violating the existing constitution framework underpinning the Union.

Perhaps a question worth posing is whether Zanzibar can make a joint submission with the Union Government to the Commission on the extension of the Continental shelf. While the Rules of Procedure discussed in this article allow for such arrangement it is doubtful whether Zanzibar has the powers to do so. This argument is based on the fact that the joint submissions may be undertaken by two independent and sovereign states. As such, while Tanzania is

Accessed from LHRC Constitutional Database

an independent and sovereign state, Zanzibar is not. This provision would have been applicable only if Zanzibar was a state party recognized under international law. Indeed, one can rightly argue that Tanzania can make a joint submission with Kenya or Seychelles because these are sovereign and adjacent states that share maritime boundaries with Tanzania. The same situation does not apply to Zanzibar.

It is also worth asking whether the determination by the Commission of the submission made by the URT can have an impact on the subsequent delimitation that may be undertaken between states with opposite or adjacent coasts. Admittedly, the Convention and the Rules of Procedure are clear to the effect that any determination made by the Commission cannot prejudice delimitation undertaken by states on their own. In fact one can argue that Article 76 (10) protects the interests of non-submitting states in that the decisions made by the Commission cannot be relied upon by submitting states when challenged by another state on the status of a boundary between them. However, the implementation of this provision in the context of Tanzania is not legally feasible due to the fact that while Zanzibar enjoys its autonomy in non-Union matters, it cannot deal with matters under the jurisdiction of the Union Government.

## VI. Conclusion

This article has attempted to clarify the legal position of the opposition by some Zanzibar legislators to the submission made by the United Republic of Tanzania to the United Nations on the expansion of its continental shelf. The discussion has reaffirmed that Zanzibar is not a state recognized under international law capable of entering into international agreements. This argument is reflected in the decision of Tanzania's Court of Appeal discussed in this article. While the international law of the sea regime allows states to make submissions to the Commission for expansion of their continental shelf, this submission must be made in accordance with the requirements provided for under the Rules of Procedure of the Commission. One of the requirements identified in this discussion is that states making submissios must inform the Commission of any existing dispute between opposite and adjacent states. However, it has been pointed out that this requirement does not apply to Tanzania precisely because there is no territorial dispute in the country - the territory of Tanzania is well defined in the Constitution to include the whole of Tanzania mainland and Tanzania Zanzibar with its territorial waters.

Zanzibar's argument that its claim is based on its desire to exploit natural resources such as oil or seabed minerals, resources which it claims to be outside the purview of the Union Government, does not stand up to scrutiny either. It is the Union Government which has the primary responsibility to protect the territory of Tanzania against any external threat. As such, while the expansion of the continental shelf will surely carry the potential of natural resources which

Accessed from LHRC Constitutional Database

might benefit Tanzania including Zanzibar, understanding this expansion purely in the prism of natural resources underestimates the larger picture of foreign relations which underpins this expansion. It is this reality which provides a compelling need for Zanzibar to pursue concerns it might have against this submission within the channels provided for in the Union Constitution. It is evident that the concerns underpinning this opposition are premised on the question of resource sharing rather than territorial claims or a question of international law. And these concerns can be addressed within the Union structures rather than international bodies where Zanzibar does not enjoy a legal personality.

While this article was not intended to examine the legal merit of Tanzania's submission to the UN Commission on the Limits of the Continental Shelf, it has nevertheless demonstrated that this submission has been made by the URT in accordance with its rights as a state party to the LSC. The article has further established that as a part of the Union, Zanzibar has no legal power to challenge the submission made by the Union Government before an international body like the Commission on the Limits of the Continental Shelf precisely because it is the Union Government that is recognized under international law as the successor state to the interests of both Tanganyika and Zanzibar. While there may be disagreement between the Union Government and Revolutionary Government of Zanzibar on the proper and equitable distribution of burdens and benefits in the existing legal framework of the Union, it is only through the dispute resolution channels envisaged under the 1977 Constitution (as subsequently amended from time to time) that these disagreements between the parties can be amicably resolved.

Accessed from LHRC Constitutional Database

# Book Reviews

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# BOOK REVIEWS[1]

OTHMAN, Haroub Miraji: Book Review - BURGESS, Guy Thomas (ed.), *Race, Revolution and the Struggle for Human Rights in Zanzibar: Memoirs of Ali Sultan Issa and Seif Sharif Hamad,* Athens: Ohio University Press, 2009, pp. 333.

I. Introduction – Importance of Memoirs
II. Ali Sultan Issa
III. Maalim Seif Sharif Hamad
IV. Conclusion

## I. Introduction – Importance of Memoirs

First of all let me congratulate Comrade Ali Sultan Issa and Maalim Seif Sharif Hamad for the publication of their Memoirs, and to thank Thomas Burgess for the wonderful job of putting the two gentlemen's reflections on paper. It is unfortunate that the idea of our leading personalities in education, politics, the arts, etc., of putting down on paper their experiences and reflections has not yet taken root in our society. Very few Zanzibaris have published their memoirs. If I am not mistaken, so far it is only Ali Muhsin Barwani, Thabit Kombo Jecha, John Okello and Maulid Mshangama who have had their stories told. One gets glimpses of Abdulrazak Gurna's life from his novels; and Shafi Adam Shafi in *'Haini'* shows us his life in prison. It is encouraging, though, that he is now coming out with an autobiographical novel, the draft of which I had the privilege of reading, which traces his life from his student days at Beit el Ras.

Abdulrahman Babu was offered a fellowship to go to SAPES in Harare to write his memoirs, but on the way there he stopped in Dar es Salaam, got himself ensnared with the NCCR-Mageuzi elections campaign and that was the end of the story. Said Natepe has revealed that he has written the story of his involvement with the 1964 Zanzibar Revolution, and that the draft is enclosed in his pillow, to be published after his death. But this is unfair, because those others who were also involved or affected by the Revolution might not be there to authenticate his story's accuracy.

## II. Ali Sultan Issa

Ali Sultan Issa has been an icon of our independence struggle, and even though he was not physically in the country when the Revolution took place, he was one

[1] This review was read by the its author on the day of the launch of the book in Zanzibar on on Saturday, 27th June, 2009. This review was originally published in PETER, Chris Maina and Saida Yahya-Othman, *Haroub Othman: Farewell to the Chairman*, Zanzibar: Zanzibar Legal Services Centre, 2009, p. 353.

Accessed from LHRC Constitutional Database

of those who played an active role in laying down the intellectual and political basis for the Revolution. It is difficult to talk or write on the political history of these islands in the period from the 1950s to the 1980s without mentioning Al Sultan Issa.

Ali was the first Zanzibari to have crossed what was known then as the 'Iron Curtain', that is the countries of socialism, having participated in the World Youth Festival held in Moscow in 1957. He later visited China, Vietnam and Czechoslovakia. He was the first Zanzibari to have visited socialist Cuba. During his many visits to the socialist countries, he met and was able to interact with giants such as Mao Tse-tung, Ho Chi Minh, Fidel Castro and Che Guevara. He spent years in Egypt and thus met Gamal Abdel Nasser. These were personalities who not only transformed their societies but had a great influence on the world stage in the second half of the 20th Century.

While living in Britain in the 1950s, Ali joined the Communist Party of Great Britain, being one of three Zanzibaris to do so, the other two being Dr Ahmed Rashid and Jamal Ramadhan Nassib. Upon his return to Zanzibar he got involved with the trade union movement and the Zanzibar Nationalist Party. He and his life-long friend, Comrade Abdulrahman Babu, were very much instrumental in networking the ZNP with the outside world, having opened a ZNP office in Cairo and later in Havana.

The ZNP was a broad 'church' that included people from different classes, backgrounds and identities. What united all of them was their rejection of British colonialism. Within the organisation there were also people, to quote Amilcar Cabral, who knew where the struggle for political independence ended and the struggle for social liberation began. Ali Sultan belonged to this school of thought which believed that the struggle was two-phased - that is, the attainment of political independence first, to be followed by the construction of socialism.

Within the ZNP, things did not work out the way Ali Sultan and his friends had expected. With the imprisonment of Abdulrahman Babu, the ZNP General-Secretary, by the colonial government, the political scene lost its chief organiser of the party and the architect of its Leftist leanings. This gave room for the Conservative elements within the organisation to consolidate themselves; and by the time Babu was released from prison, the battle lines had already been drawn for the capture of the party's soul. The Conservatives brought matters to a head by expelling Ali Sultan from the party, and the leftist elements decided to walk out of the party and formed their own political party, the Umma Party.

In both the oral and written political history of Zanzibar this stage has never been fully explained or analysed. One would expect that the people who were involved, like Ali Sultan, would inform us of the issues that were at stake and the positions of the major personalities. Instead we are only getting a general statement that it was a struggle between the Progressives and Conservatives. We are not told why people like Maulid Mshangama, in whose house the Umma Party was launched, never resigned from the ZNP to join the Umma Party; or

Accessed from LHRC Constitutional Database

why Dr Ahmed Idarous, who ideologically was very close to the Leftists, decided to remain with the Conservatives. These two were members of the National Assembly, and if they had resigned from the ruling alliance, it would have very much affected the workings of the government and might even have changed the course of history.

Zanzibar's road to independence was a bumpy one. Independence was attained on 10th December 1963, with the Sultan as a Head of State. On 12th January 1964 a radical revolution took place which not only overthrew the ZNP/ZPPP coalition government, but immediately abolished the monarchy. What surprised many people outside the islands was how there could occur a 'sudden' revolution barely one month after the attainment of 'flag independence'. The first action of the revolutionary government was to abrogate the Independence Constitution of 1963 and proclaim a 'Constitutional Decree' (Decree No. 5 of 1964). The Revolutionary Council became a legislative, executive and judicial organ. The Afro-Shirazi Party was declared the sole political party, and the thin line separating the state from the party was removed.

The Zanzibar Revolution has been consistently described as a racial one and as a culmination of the struggle between the minority Arabs and the African majority. But that is only half the truth, and a distorted half truth at that. If we accept Lenin's definition that every political struggle is a class struggle, we can see that behind the so-called 'racial revolution' there was a class war. The point about pre-revolution Zanzibar is that racial differentiations were parallel with class divisions. As one scholar has remarked, the revolt appeared to be a classic one, having been staged 'in an area where political, economic, and social conditions favoured its institution and guaranteed its success'. And as Michael Lofchie stated in his book, *Zanzibar: Background to Revolution*, published in 1965, the Revolution set as its objective, 'to infuse the society with radical socialist methods stressing class and national solidarity rather than race.'

All records indicate that the Umma Party was not involved in the planning of the Revolution, but according to Babu the comrades intervened to broaden 'into a serious social revolution with far-reaching political, social and economic objectives'. But would not their role be much more enhanced if they maintained the independent existence of their political party?

Ali has been an enthusiastic defender of the Revolution and served it with no questions asked until he was devoured by it. But were there no mistakes that both the Revolution and he himself had committed that needed explanation? One heard harrowing stories of the education system at the time when Ali was the Minister of Education. Seif Shariff, in *his* story, strongly blames Ali Sultan for the decline of the education standards. Why has Ali not offered us an account of his performance during this period?

While I fully commend Ali Sultan for opening his heart to us all, there are two major criticisms I have to make. Ali has witnessed all the major developments that have taken place in these islands in the last sixty years, some

Accessed from LHRC Constitutional Database

of which he had taken active part in either promoting or implementing. Yet he offers us no analysis of all those developments or the rationale for the decisions that he and his colleagues had taken. The second criticism is that while it is true we want to understand Ali as a whole person, his background, his ideas and biases, I do not think any of us wanted to know what was happening in his bedroom.

## III. Maalim Seif Sharif Hamad

And now to Maalim Seif. I had once jokingly remarked to former Zanzibar President Aboud Jumbe that Seif Sharif was his creation, and quoted to him the Swahili saying, 'ugonjwa wa kujitakia mtu haambiwi pole'. Unlike a number of us of his generation who during our student days were involved in political discussions and debates, Seif, as a student at Beit el Ras, was apolitical. Interestingly, during the 1985 elections this was used both for and against him: there were some of his former schoolmates now turned political rivalries who said the man was a newcomer in politics and therefore was not fit to lead; and there were those who said that that was a plus for him because he was untainted by past partisan politics.

Accessed from LHRC Constitutional Database

Seif Sharif Hamad completed his studies at the University of Dar es Salaam with a first class honours degree. The University, under the Staff Development Programme wanted to retain him to pursue postgraduate studies and join the teaching staff, but Aboud Jumbe would not agree to this, and Seif had to return to Zanzibar. Soon Jumbe took him as his Personal Assistant and thereafter as his Minister for Education. These were interesting times in the life of Zanzibar and Jumbe - and this has been testified by Seif Sharif. Feeling that he would not succeed Nyerere as president of Tanzania, Jumbe stirred up Zanzibar nationalism. While there were in fact genuine grievances in Zanzibar against the Union, what Jumbe tried to do was to use Zanzibar nationalism for his own political ends.

Seif narrates in full what happened in Dodoma, but he does not tell us how he and Ali Haji Pandu, the late Shaaban Mloo, Khatib Hassan and others with different backgrounds managed to band together and conspire with no knowledge of either Jumbe or the security system. Seif had undergone a tortuous period; others such as Kwame Nkrumah, Jawaharlal Nehru and Nelson Mandela had moved from prison to State House. Seif was taken from a state of power to prison.

Unlike Ali Sultan, who has now retired from active politics, Seif Sharif has still a long life in active politics. It is not an exaggeration to say that Seif is an important factor in these islands and Tanzania in general. He commands respect and the following of hundreds of thousands of Zanzibaris. In the pages of this book he sets out his views on the revolution, the Union and the future of Zanzibar. The idyllic picture he portrays of pre-revolution Zanzibar differs from the experiences that some of us faced. The revolution was inevitable. Seif

maintains that the ZNP- ZPPP alliance could have wooed Abeid Karume and thus avoid the revolution. However, according to Jumbe this was tried after the January 1961 elections when Karume instructed Jumbe and Saleh Sadallah to go to Pemba and persuade Mohamed Shamte to form a coalition government with ASP. The result, as we all know, was that the ZPPP itself split into two. Two members went to join the ZNP alliance and one member joined the ASP. Even after the July 1963 election, Othman Sharif and Hasnu Makame went to talk to Shamte to try and form a coalition government of three parties, but Mohamed Shamte insisted that they joined the ZNP-ZPPP as individual members and not as a block, and therefore this also did not work out.

What I am saying therefore, is that the revolution was really inevitable given the circumstances and conditions which were then prevailing. It was difficult to see a peaceful and constitutional path to majority rule in these islands. The other point is that of the question of the Union, which Seif maintains was a conspiracy of Nyerere. This of course is an issue which all of us have been discussing, and there is a lot of literature on the issue.

There is also the question which I know is very passionately discussed in these islands, and this is the legitimacy of the Union. Seif maintains that, when he was Chief Minister, he went through all files and failed to see any document testifying that the Revolutionary Council did meet to ratify the Union.

This issue has been thoroughly discussed in my own writings and in those of Professor Issa Shivji and Professor Chris Maina Peter, among others. What I usually like to tell people who question the legitimacy of the Union in the sense that it was not discussed that we have people like Hassan Moyo, Khamis Abdallah Ameir, Ramadhani Haji, Said Natepe and there is another fifth guy who is still alive - Hamid Ameir I think. We have all these people who are still alive - why don't we invite them for a re-discussion so that they can really tell us whether these things were discussed or not. What I know from my own sources, and one of them is here, is that the document was brought to the Revolutionary Council. Salim Rashid who now denies this, that same Salim Rashid was given the document and read it to the Revolutionary Council and it was discussed. In fact one of my sources went further to say, that apart from the Revolutionary Council, the document was discussed first by the Committee of 14 of which he was a member. That is an issue that we can discuss and of course as I said I know there is a lot of debate on these issues.

## IV. Conclusion

My last point is that I want again to thank the main architects of this work, Maalim Seif Sharif and Comrade Ali Sultan for this accomplishment. I would want to encourage others to do the same. I had been talking to my good friend Salim Ahmed Salim for the last I don't know how many years that he should sit down and write his own memoirs, and, I am repeating it here. Thomas has offered himself to help all those who want to do that and I have offered Salim

Accessed from LHRC Constitutional Database

my services if he decides to do that. But most important is that in addition, some of us can also help people other than the politicians to put down their memoirs. There are people in the society that need their stories to be told; people like Iddi Abdallah Farhan, Bakari Abeid - unfortunately, I am told is very sick he would not be able to do that - people who have contributed not only in politics but also in the arts, in education and in other important fields. *They* also need to tell their stories.

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# Recent Developments in the Law in Zanzibar

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# RECENT DEVELOPMENTS IN THE LAW IN ZANZIBAR

## Statutes Enacted by the Zanzibar House of Representatives in the Calender Year 2011[1]

(a) Zanzibar Standards Act, 2011 (Act No. 1 of 2011).

(b) Public Service Act, 2011(Act No. 2 of 2011).

(c) Zanzibar Higher Education Loans Board Act, 2011(Act No. 3 of 2011).

(d) Secured Transactions of Movable Properties Act, 2011 (Act No. 4 of 2011).

(e) Zanzibar Food Security and Nutrition Act, 2011 (Act No. 5 of 2011).

(f) Children's Act, 2011 (Act No. 6 of 2011).

(g) Appropriation Act, 2011 (Act No. 7 of 2011).

(h) Zanzibar Airports Authority Act, 2011 (Act No. 8 of 2011).

(i) Zanzibar Aerodromes Act, 2011 (Act No. 9 of 2011).

(j) Establishment of the Chief Government Chemist Laboratory Act, 2011 (Act No. 10 of 2011).

(k) Zanzibar State Trading Corporation Act, 2011 (Act No. 11 of 2011).

(l) Written Laws (Miscellaneous Amendment) Act, 2011 (Act No. 12 of 2011).

[1] The editors would like to sincerely thank Hon. Pandu Ameir Kificho, the Speaker of the Zanzibar House of Representatives and Hon. Yahya Khamis Hamad, the Clerk of the House for assistance in accessing the materials for this part of the Yearbook.

Accessed from LHRC Constitutional Database

# Glossary
# Table of Cases
# Selected Publications on or about Zanzibar

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

## GLOSSARY

| | |
|---|---|
| *a la carte* | according to the menu. |
| *ab initio* | from the beginning. |
| *ad hoc* | for this - for the particular end or case at hand without consideration of wider application. |
| *Al Hijra* | the migration or journey of the Islamic prophet Muhammad and his followers from Mecca to Medina between June 21st and July 2nd in 622 AD. |
| *Al Qaeda* | "The Base" a is a global militant Islamist organization founded by Osama bin Laden around 1988. |
| *amicus curiae* | a friend of the court; a person who is not engaged in the case, but who brings to the court's attention a point which has apparently been overlooked. |
| *dola huru* | A free State. |
| *et al* | Used similarly to *et cetera* ("and the rest"), to stand for a list of names. |
| *Et tu Brute?* | 'You too, Brutus?' also "And you, Brutus?". |
| *Etcetera* | and the rest. |
| *ex post facto* | After the event; by a subsequent act; retrospectively; an *ex post facto* statute has a retrospective effect; a law with retrospective application; signifies something done so as to affect another thing that was committed before. |
| *fiqh* | Science of material law. |
| *force majeure* | "superior force" or "chance occurrence or unavoidable accident" or an extraordinary event or circumstance beyond the control of the parties. |
| *Grundnorm* | "basic norm" or "fundamental norm." on which all other norms are based (Hans Kelsen in Pure Theory of Law in Jurisprudence). |
| *ibadah* | ritual acts and those regulating relationship with other and with the society. |
| *Ibid.* | (*ib.* or *Ibidem*) just the same; in the same place; from the same source; in the same case. |
| *in forma pauperis* | "in the character or manner of a pauper." Someone who is without the funds to pursue the normal costs of a case. It also refers to the permission given by a court to an indigent to initiate a legal action without having |

Accessed from LHRC Constitutional Database

| | |
|---|---|
| | to pay for court fees or costs due to his or her lack of financial resources. |
| *inter alia* | among other things. |
| *ipso facto* | by the fact itself; by the nature of the case; by the very act; by this very act; the fact itself shows; by the mere fact. |
| *Ishi Salama* | Live safely – an advertisement for sale of Condoms |
| *Kadhi* | *A Judge in an Islamic court known as Kadhi's Courts.* |
| *Kiroboto* | Literally, flea. |
| *litimus test* | In Chemistry it is *the* use of litmus paper or solution to test the acidity or alkalinity of a solution. A **litmus test** is a question asked of a potential candidate for high office, the answer to which would determine whether the nominating official would proceed with the appointment or nomination. Here it is used as a metaphor. |
| *maisha bora kwa kila Mtanzania* | Prosperous life for every Tanzanian. |
| *Muafaka* | Understanding. |
| *muamalaht* | social transactions. |
| *Mudir Courts* | Municipal Islamic courts headed by a Judge. |
| *ne bis in idem* rule | The rule that protects both an accused person and the Court: an accused person from being prosecuted twice; and the Court from dissipating its limited resources where justice has already been done. |
| *Pambazuka* | Sunrise. |
| *proprio motu* | investigations, which is the third trigger mechanism under the Individul Criminal Court (ICC) Statute of 1998. |
| *Qadar* | means predestination, fate or destiny. In Islam it is necessary to believe that God knows the fate of all creatures. It also believed that people's lives and actions are determined by God (to some extent). Most of Muslims believe in mixture of both fate and free-will for all creatures. |
| *Quo Vadis* | "Where are you going?" |
| *sine qua non* | an indispensable and essential action, condition, or ingredient. Also "a condition without which it could not be," or "but for ..." or "without which there is nothing." |

Accessed from LHRC Constitutional Database

| | |
|---|---|
| *Sungusungu* | A form of people's militia. Sometimes referred to as *Wasalama* in Tanzania. |
| *Supra* | above; higher than; prior to; often used to refer the reader to a previous part of a book, an article or judgment. |
| *vis-a vis* | in relation to; compared with. |
| *volenti non fit injuria* | "to a willing person, injury is not done." This is a *common law* doctrine which states that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party. |
| *Wakfs* | an *inalienable* religious endowment in *Islamic law,* typically donating a building or plot of land or even cash for *Muslim* religious or charitable purposes. |
| *Watanganyika* | People of Tanganyika (Tanzania Mainland). |
| *Wazanzibari* | People of Zanzibar (Tanzania Zanzibar). |

Accessed from LHRC Constitutional Database

Accessed from LHRC Constitutional Database

# TABLE OF CASES

## Tanzanian Cases

*Ahmed Janmohamed Dhirani v. Republic*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 28 of 1976, Reported in 1979 LRT No. 1.

*Ali Vuai v. Suwedi Mzee Suwedi*, Civil Appeal No. 72 of 1998.

*Ally Yusuf Mpore v. Republic*, High Court of Tanzania at Dar es Salaam, Miscellaneous Criminal Cause No. 2 of 1977 (Unreported).

*Christopher Mtikila v. Attorney General of the Republic of Tanzania and Another*, East African Court of Justice at Arusha, Reference No. 2 of 2007.

*Chumchua s/o Marwa v. Officer i/c of Musoma Prison and Another*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1988.

*Daudi Pete v. Republic* [1993] TLR. 22.

*Farid Ahmed v. Scania Tanzania Ltd.,* CAT Civil Appeal No.98 of 2005 (Unreported).

*Godfrey James Ihuya v. R.* [1980] TLR 197.

*Joseph Lugata v. the Republic* Criminal Appeal No. 317 0f 2009 (Unreported).

*Mboje Mawe and 3 Others v. The Republic* Criminal Appeal No. 86 0f 2010 (Unreported ).

*Misperesi K. Maingu v. Hamisi Mtongori and 9 Others*, High Court of Tanzania at Mwanza, Civil Case No. 16 of 1988 (Unreported).

*Mohamed Hassan Hole v. Keya Jumanne Ramadhan*, Court of Appeal of Tanzania at Dodoma, Civil Appeal No. 19 of 1992 (Unreported).

*Ngwegwe s/o Sangija and 3 Others v. Republic,* High Court of Tanzania at Mwanza, Criminal Appeal No. 72 of 1987 (Unreported).

*R. v. Kasella Bantu and Others* (1969), H.C.D. No. 170.

*Republic v. Elias Kigadye and 7 Others*, [High Court of Tanzania at Shinyanga (Mwanza Registry), Criminal Sessions Case No. 85 of 1980].

*Republic v. George Joston,* HC Cr.Session Case No.36/2009.

*Republic v. Joseph Lugata and Others*, High Court, Criminal Session Case No. 26/2009.

*Republic v. Kazimili Mashauri & Another*, HC Cr. Session Case No. 42/2009.

*Republic v. Masumbuko Madata @ Matata @ Sumbu, Charles Kalamuyi (Zungu) & Merdadi Maziku (Machunda)*-Kahama, HC Cr.Session Case No. 23/2009.

*Republic v. Mboje Mawe & 3 Others,* HC Cr.Session Case No. 25/2009.

*Republic v. Mbushuu @ Dominic Mnyaroje and Another,* [1994] 2 LRC 335.

Accessed from LHRC Constitutional Database

*Republic v. Zacharia Petro,* HC Cr.Session Case No.64/2008 (Bukoba).

*Republic v. Mwigulu Madata @ Sabi & Another*, HC Cr.Session Case No. 22/2009 HC (Tabora) sitting at Shinyanga.

*SMZ v. Machano Khamis Ali & 17 Others* [2002] TLR 338.

## FOREIGN CASES

*Adler v. Dickson* [1954] 2 Ll. L.R. 267, 270 (C.A.).

*Anderson v. Harrison* [1977] 4 B.C.L.R. 320.

*Bandhua Mukti Morcha v. Union of India* (1984) 3SCC 161, 163.

*Barrett v. The Ship "Arcadia"*, 76 D.L.R. (3d) 535, 540.

*Brown v. United States*, 599 F. Supp. 877 (D. Mass. 1984).

*Davis v. Stena Line Ltd* [2005] EWHC 420 (QB).

*Donoghue v. Stevenson* [1932] All ER Rep 1.

*Ecotec (Zanzibar) Limited v. The Owners of Motor Vessel "Ukombozi" And "Mapinduzi* Admiralty Cause No. 15 of 2003, High Court of Kenya at Mombasa (Unreported).

*Francis Carolie Mullin v. Administrator Union Territory of Delh*i (1981) SCC 608, 610-619.

*Honour Brown, Individually and as Personal Representative of Cary Brown and as Administratix of the estate of Gary Brown, et al.*, v. *United States of America*, CA No. 81-168-T (and related cases) United States District Court For The District of Massachusetts 615 F. Supp. 391; 1985 U.S. Dist. LEXIS 16927; 1986 AMC 1487 August 12, 1985.

*Kalendare-va v. Discovery Cruise Line P'ship*, 798 So. 2d 804 (Fla. Dist. Ct. App. 2001). Canada.

*Kartar Sigh v. State of Punjab* (1994) 3 S.C. C. 569.

*Lybeorpoulous v. Svilan*, Kernot and District Court of SA [Case No SCCIV-01-703 (2001) SASC 254, 2 August 2001].

*Mac Cormak v. The Lord Advocate* (1953) Scottish Law Times (SLT) 255.

*Mohini Jain v. State of Karnataka*, A.I.R (1992) S.C 1858.

*Oceanic Steam Navigation Co. v. Mellor* [1914] 233 U.S. 718.

*Ogla Tellis v. Bombay Municipal Corporatio*n (1985) 3 SCC, P. 545.

*Titanic Case* [1913] 209 F. 501, 502 (S.D.N.Y. 1913).

*Trico Marine Assets, Inc. v. Diamond B. Marine Servs., Inc.*, [2003] 332 F.3d 779, 783-84 (5th Cir. 2003).

*Tuffor v. AG of Ghana* (1980, AG 637.

*Unnikrishnan v. State of A.P* (1993)1 SCC 645.

*Whitbread v. Walley* [1990] 3 S.C.R. 1273.

Accessed from LHRC Constitutional Database

*Whitehead v. North Vancouver* [1939] 1 W.W.R. 369.

*Woolfson v. Canada Steamship Lines* [1930] 36 R.L.N. 368.

## DECISIONS OF INTERNATIONAL AND ARBITRATION TRIBUNALS

*Aguas del Tunari S A (Spain) v. Republic of Bolivia*, ICSID Case No ARB/02/03.

*Alberto Capitao v. Tanzania;* Communication No. 53/1991.

*Alike v. Kenya* (Companion case on behalf of the Nubian adults before the African Commission on Human and Peoples' Rights).

*Amnesty International (Consolidated with others) v. Sudan,* Communication 48/90.

*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgement, ICJ Report 2005, p. 168.

*Association Perla Salivanagu dela au Burundi v. Tanzania* Communication No. 157/1996

*Biwater Gauff (Tanzania) Ltd (UK) v. United Republic of Tanzania*, ICSID Case No ARB/05/22 (Award) (24 July 2008).

*Civic United Front (CUF) v. Tanzania* Communication Mo. 14/2007.

*Commission on Human Rights and Administrative Justice (No. 4) v. Minerals Commission* (No. 1) [1994-2000] CHRAJ 248.

*Compañía de Aguas del Aconquija, S A and Vivendi Universal (France) v. Argentine Republic*, ICSID Case No ARB/97/3.

*D.R. Congo v. Burundi, Rwanda and Uganda* Communication 227/99.

*East African Law Society & 4 Others v. The Attorney General of the Republic of Kenya and 3 Others,* the East African Court of Justice at Arusha, Reference No. 3 of 2007.

*F. Nahimana and Others v. Prosecutor*, Case No ICTR-99-52-A, para. 1074, Appeal Judgment, 28 Nov. 2007.

*Impregil SPA v. Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005.

*Jalapa Railroad and Power Company*, American-Mexican Claims Commission, 1948.

*Keys Jet Ski, Inc. v. Kays* [1990] 893 F.2d 1225, 1990 AMC 609 (11th Cir. 1990).

*Lawyers Committee for Human Rights (On behalf of Self Hamad) v. Tanzania* Communication No. 66/1992.

*Maffezini v. Spain*, Case No ARB/97/7, Award of 13 November 2000, 16 ICSID Rev-FILJ 248 (2001).

*McCulloch v. Maryland,* – 4 Wheat 316 (US1819).

Accessed from LHRC Constitutional Database

*McLachlin v. Canadian Pac. Ry*. [1948] 64 C.R.T.C. 125.

*Methanex v. United States of America*, North American Free Trade Agreement (NAFTA) Arbitral Tribunal, Final Award on Jurisdiction and Merits, 3rd August, 2005.

*Modern Holdings (EA) limited v. Kenya Ports Authority*, East African Court of Justice at Arusha, Reference No. 1 of 2008.

*Nubian Children in Kenya v. Kenya*. Communication 002/2009.

*Nubian Minors v. Kenya* Nubian Children in Kenya. Communication 002/2009 of 25 March 2011.

*Ordon Estate v. Grail*, 140 D.L.R. (4th) 52, 1997 AMC 418 (Ont. Ct. App. 1996). Canada.

*Prof. Peter Anyang' Nyong'o and 10 Others v. Attorney General of Kenya and Others*, East African Court of Justice at Arusha, Application No. 1 of 2006.

*Prosecutor v. Akayesu,* Judgement (TC), Case No.ICTR-96-4-T, September, 1998.

*Prosecutor v. Charles Ghanky Taylor,* Judgement, Case No.SCSL-03-01-T (18 May 2012).

*Prosecutor v. Joseph Kony, Vincent Otti, Okot Odiahambo and Dominic Ongwen,* Indictment, (Case No. ICC-02/04-01/05).

*Prosecutor v. Ntakirutimana and Ntakirutimana,* Judgement (TC), February 21, 2003.

*Prosecutor v. Omar Hassan Al Bashir,* Case No. ICC-02/05-01/09.

*Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06, Trial Chamber I, Judgment, 14th March, 2012.

*PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey,* ICSID Case No ARB/02/5, Award of 19th January, 2007.

*Re Parish of Plaquemines as Owner of the M/V Pointe-A-La-Hache* [2002] 231 F. Supp. 2d 506 (E.D. La. 2002).

*Robert Azinian et al v. United Mexican States*, ICSID Case No ARB (AF)/97/2, Final Award, 1 November 1999.

*Sir Dawda K. Jawara v. The Gambia*, in Communications 147/95 and 146/96.

*Social and Economic Rights Action Centre and Another v. Nigeria,* Communication 155/96.

*Southern African Human Rights NGO Network and Others v. Tanzania* Communication No. 333/2006.

*Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA* Consulting Engineers of Iran, The Government of the Republic of Iran (1984) 6 Iran-US C T R 219.

Accessed from LHRC Constitutional Database

*Union Inter Africane des Droits de l'Homme, et al v. Angola,* Communication 159/96.

*Waste Management Inc (U S) v. Mexico*, ICSID Case No ARB(AF)/98/2.

*Waste Management, Inc* v *United Mexican States*, ICSID Case No ARB (AF)/00/3, Award, 30th April, 2004.

*Wena Hotels Ltd v Arab Republic of Egypt*, Award, 8th December, 2000, 6 ICSID Reports 68.

*Women's Legal Aid Committee v. Tanzania* Communication No. 243/2001.

Accessed from LHRC Constitutional Database

## SELECTED PUBLICATIONS ON OR ABOUT ZANZIBAR

### BOOKS

AL BARWANI, Ali Muhsin, *Conflicts and Harmony in Zanzibar – Memoirs,* Dubai, 2002.

BAKARI, Mohamed A., *The Democratisation Process in Zanzibar: A Retarded Transition*, Hamburg: Institute of African Affairs, 2001.

BURGESS, G. Thomas (ed.), *Race, Revolution and the Struggle for Human Rights in Zanzibar: Memoirs of Ali Sultan Issa and Seif Sharif Hamad,* Athens: Ohio University Press, 2009.

CIVIC UNITED FRONT, *On Resolving the Political Crisis in Zanzibar*, Zanzibar: Multi-Colour Printers Ltd., October, 2001.

FAIR, Laura, *Pastimes & Politics: Culture, Community, and Identity in Post-Abolition Urban Zanzibar, 1890-1945*, Athens and Oxford: Ohio University Press and JamesCurrey, 2001.

JJUUKO, Frederick and Godfrey Muriuki (eds.) *Federation Within Federation: The Tanzania Union Experience and the East African Integration Process*, Kampala: Kituo Cha Katiba and Fountain Publishers, 2010.

JUMBE, Aboud, *Conjecture vs Truth*, Zanzibar, 2004.

JUMBE, Aboud, *The Partner – ship: Tanganyika Zanzibar Union, 30 Turbulent Years,* Dar es Salaam: Amana Publishers, 1994.

LEGAL AND HUMAN RIGHTS CENTRE and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2010*, Dar es Salaam and Zanzibar: LHRC and ZLSC, 2011.

LOIMEIER, Roman, *Between Social Skills and Marketable Skills: The Politics of Islamic Education in 20th Century Zanzibar*, Leiden: Brill, 2009.

LUTUN, Anne and Ismail Kaaya, *Study on Kadhi's Court and Its Implications to Human Rights in Tanzania*, Dar es Salaam: Legal and Human Rights Centre, 2007.

MAJAMBA, Hamudi Ismail, *Perspective on the Kadhi's Courts in Zanzibar*, Zanzibar: Zanzibar Legal Services Centre, 2008.

MALIYAMKONO, T.L. (ed.), *The Political Plight of Zanzibar*, Dar es Salaam: Tema Publishing Company Ltd., 2000.

MASHAMBA, J. Clement, *Human Rights in Pemba: Reflections on the Pemba 2003 By-Elections*, Dar es Salaam: National Organisation for Legal Assistance, 2006.

MAZRUI, Ali A., *Comparative Democracy and Cultural Wisdom: Africanity, Islam and the West*, Zanzibar: Zanzibar Legal Services Centre, 2008.

Accessed from LHRC Constitutional Database

OLOKA-ONYANGO, Joseph and Maria Nassali (eds.), *Constitutionalism and Political Stability in Zanzibar: The Search for a New Vision*, Kampala: Kituo Cha Katiba, 2003.

OTHMAN, Haroub (ed.) *Babu: I Saw the Future and it Works – Essays Celebrating the Life of Comrade Abdulrahman Mohamed Babu 1924-1996*, Dar es Salaam: E & D Limited, 2001.

OTHMAN, Haroub and Chris Maina Peter, *Legal Aid Perspectives*, ZLSC, Zanzibar: Zanzibar Legal Services Centre, 2003.

OTHMAN, Haroub, *Deepening Democracy: Civic Education Programme for Zanzibar* (with Khalfan H. Khalfan), Dar es Salaam: United Nations Development Programme, 2006.

OTHMAN, Haroub, *Zanzibar's Political History: The Past Haunting the Present?* Dar es Salaam: Institute of Development Studies, 1993.

PETER, Chris Maina and Haroub Othman (eds.), *Zanzibar and the Union Question*, Zanzibar: Zanzibar Legal Services Centre, 2006.

PETER, Chris Maina and Immi Sikand (eds.), *Zanzibar: The Development of the Constitution*, Zanzibar: Zanzibar Legal Services Centre, 2011.

PETER, Chris Maina and Immi Sikand, *The Judiciary in Zanzibar*, Zanzibar: Zanzibar Legal Services Centre, 2006.

PETER, Chris Maina and Saida Yahya-Othman (ed.), *Haroub Othman: Farewell to the Chairman*, Zanzibar: Zanzibar Legal Services Centre, 2009.

PETER, Chris Maina, *Mufti Act of Zanzibar: The Fundamental Rights and Freedoms of Muslims on the Isles*, Zanzibar: ZLSC Publications Series (No. 6), 2008.

PETTERSON, Don, *Revolution in Zanzibar: An America's Cold War Tale*, Boulder Colorado: Westview Press, 2002.

REVOLUTIONARY GOVERNMENT OF ZANZIBAR, *Zanzibar Politics: A Proper Perspective*, Zanzibar: Government Printer, 2000.

SHIVJI, Issa G., *Pan- Africanism or Pragmatism? Lessons of Tanganyika-Zanzibar Union,* Dar es Salaam: Mkuki na Nyota Publishers, 2008.

SHIVJI, Issa G., *The Legal Foundation of the Union*, Dar es Salaam: Dar es Salaam University Press, 1990.

Accessed from LHRC Constitutional Database

## ARTICLES

ANGLIN, D., "Zanzibar: Political Impasse and Commonwealth Mediation," Volume 18 No. 1 *Journal of Contemporary African Studies*, 2000.

BAKARI, Mohamed A., "The Union Between Tanganyika and Zanzibar Revisited," in ENGEL, Ulf et al (eds.), *Tanzania Revisited: Political Stability, Aid Dependency and Development Constraints*, Hamburg: Institute of African Affairs, 2000, p. 133.

BAKARY, Abubakar Khamis, "The Union and the Zanzibar Constitutions," in PETER, Cris Maina and Haroub Othman (eds), *Zanzibar and the Union Question*, Zanzibar: Zanzibar Legal Services Centre, 2006, p. 1.

BANG, Anne K., "Intellectuals and Civil Servants: Early 20th Century Zanzibar 'Ulamaa' and the Colonial State," in AMORETTI, Biancamaria Scarcia (ed.), *Islam in East Africa: New Sources*, Rome: Herder, 2001, p. 59.

CAMERON, Greg, "Narratives of Democracy and Dominance in Zanzibar," in LARSEN, Kjersti (ed.), *Knowledge Renewal and Religion: Repositioning and Changing Ideological and Material Circumstances among the Swahili on the East African Coast*, Uppsala: Nordiska Afrikainstitutet, 2009, p. 151.

DEAN Erin, "The Backbone of the Village: Gender, Development, and Traditional Authority in Rural Zanzibar," Volume 31 No. 1 *Journal of Contemporary African Studies*, 2003, p. 18.

HASSAN, Ali Ali, "The State and Accession of Individual to Fundamental Rights and Freedoms in Zanzibar," in OTHMAN, Haroub and Chris Maina Peter (eds.), *Perspectives on Legal Aid and Access to Justice in Zanzibar*, Zanzibar: Zanzibar Legal Services Centre, 2003, p. 62.

KILLIAN, Bernadetta, "The State and Identity Politics in Zanzibar: Challenges to Democratic Consolidation in Tanzania", Volume 6 No. 2 *African Identities*, 2008, p. 99.

LOIMEIER, Roman, "Coming to Terms with 'Popular Culture': The 'Ulama' and the State in Zanzibar," in LOIMEIR, Roman and Rudiger Seesemann (eds.), *The Global Worlds of the Swahili: Interfaces of Islam, Identity and Space in 19$^{th}$ and 20$^{th}$ Century East Africa*, Munster: LIT Verlag, 2006.

MAKULILO, Alexander B., "The Zanzibar Election Commission and its Feckless Independence," Volume 28 No. 1 *Journal of Third World Studies*, 2011, p. 263.

MUKANGARA, Daudi, "Race, Ethnicity, Religion and Politics in Zanzibar," in MALIYAMKONO, T.L. (ed.), *The Political Plight of Zanzibar*, Dar es Salaam: TEMA Publishers Company Ltd., 2000.

Accessed from LHRC Constitutional Database

OTHMAN, Haroub, "The Union between Tanganyika and Zanzibar – Tanzania: The Withering away of the Union," in PETER, Chris Maina and Saida Yahya-Othman, (eds.), *Haroub Othman: Farewell to the Chairman*, Zanzibar: Zanzibar Legal Services Centre, 2009.

OTHMAN, Masoud Othman, "The Zanzibar Judicial System," in PETER, Chris Maina and Immi Sikand (eds.), The Judiciary in Zanzibar, Zanzibar: Zanzibar Legal Services Centre, 2006.

PETER, Chris Maina, "Mufti Act of Zanzibar and the Fundamental Rights and Freedoms of Moslims in the Isles," in ELLIESIE, Hatem (ed.), *Islam and Human Rights* [Volume 26 Leipziger Beitrage zur Orientforshung], Frankfurt Am Main: Peter Lang, 2010, p. 173.

Accessed from LHRC Constitutional Database