

Editorial

As the last issue of 2009 is published, a new editorial team, comprising four co-editors, takes the helm of the *African Human Rights Law Journal*. Another change is that the Dean of the Faculty of Law at the University of Pretoria, Professor Christof Heyns, previously serving as co-editor, now chairs the international editorial advisory board. We trust that his appointment to this position will usher in an era of increased involvement of the advisory board in the activities of the *Journal*.

In this issue of the *Journal* a wide range of thematic concerns is covered. Two topics are particularly prominent: the AU and SADC Protocols on women's rights, and the death penalty.

Forere and Stone compare the SADC Protocol on Gender and Development (SADC Women's Protocol) to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). They answer the question as to whether these two treaties create duplications or whether they are mutually reinforcing and thus complementary. Departing from the current situation in which the 27 state parties to the African Women's Protocol have failed to fulfil their reporting obligations under the Protocol, a meeting was co-organised by the African Commission on Human and Peoples' Rights to discuss the need for reporting guidelines under the AU Protocol and to adopt a draft set of guidelines. Biegon analyses the process that gave rise to the meeting and comments on the resulting draft guidelines.

Although some African states have abolished capital punishment and a number of them are *de facto* abolitionist, the death penalty remains on the statute books in the majority of African states. The potential role of the judiciary in the abolition process has been observed in South Africa. Landmark judicial decisions in two other countries, Tanzania and Uganda, are discussed in this issue.

The decision of the SADC Tribunal in the *Campbell* case, and the subsequent reaction thereto, represent a continuation of the *Journal's* engagement with human rights-related development in sub-regional economic communities in Africa. A few articles in this edition of the *Journal* cover themes not often given exposure in African scholarly writing, particularly those dealing with HIV experimentation and language rights.

The 46th session of the African Commission was held from 11 to 23 November 2009 at the seat of the Secretariat in Banjul, The Gambia. In the months preceding the session it was reported by the media that the Gambian President had threatened to cause harm to members of civil society critical of his government. His remarks emanated from the criticism of the human rights situation in The Gambia by non-governmental organisations (NGOs), particularly in respect to freedom of expression. The judgment of the Court of Justice of the Economic Community of West African States (ECOWAS) in the case of *Manneh v The Gambia* provided fuel to the fire. In the *Manneh* case the ECOWAS Court found The Gambia responsible for the disappearance of Chief Manneh, a journalist, and ordered the government to investigate his disappearance and to ensure his release. Holding an extraordinary session in October 2009, the African Commission adopted a resolution calling on the AU to intervene to ensure the safety of the African Commission and members of civil society. The Resolution reads as follows:

RESOLUTION ON THE DETERIORATING HUMAN RIGHTS SITUATION IN THE REPUBLIC OF THE GAMBIA

The African Commission on Human and Peoples' Rights (African Commission), meeting at its 7th extraordinary session in Dakar, Senegal, from 5 to 11 October 2009;

Conscious that the African Charter on Human and Peoples' Rights guarantees the basic rights and freedoms enshrined therein, and confers the African Commission with the mandate to monitor, promote and protect human and peoples' rights on the continent;

Recalling its Resolution No. ACHPR/Res 13 (XVI) 1994 adopted at its 16th ordinary session held in Banjul, The Gambia, from 25 October to 3 November 1994; Resolution No ACHPR/Res 17(VII) 1995 adopted at its 17th ordinary session held in Lome, Togo, from 13 to 22 March 1995, and Resolution No ACHPR/Res 134(XXXIV) 2008 adopted at its 44th ordinary session held in Abuja, Nigeria, from 10 to 24 November 2008; all of which relate to the human rights situation in the Republic of The Gambia;

Considering that the African Commission has on several occasions brought to the attention of the Government of the Republic of The Gambia, concerns on human rights violations in The Gambia, in particular the right to life and the right to freedom of expression. These concerns relate to the alleged murder, unlawful arrest and detention, harassment, intimidation, prosecutions and disappearances of journalists and human rights defenders deemed to be critical of the government;

Deeply concerned by allegations that on 21 September 2009, HE President Sheikh Professor Alhaji Dr Yahya AJJ Jammeh allegedly stated in a national television broadcast that he would kill anyone, especially human rights defenders and their supporters, whom he considered to be sabotaging or destabilising his government;

Considering that the alleged threats undermine the safety and security of members and staff of the African Commission, and human rights defenders who participate in the activities of the African Commission, including in the 46th ordinary session scheduled to take place from 11 to 25 November 2009 in Banjul, The Gambia, whose agenda will address the human rights situation in Africa;

Convinced that the alleged statement calls into question the commitment of the Republic of The Gambia to the fundamental principles and objectives of the Constitutive Act of the African Union, the African Charter and other regional and international human rights instruments;

Recalling that the Headquarters Agreement between the African Union and the Republic of The Gambia on the establishment of the Headquarters of the African Commission on Human and Peoples' Rights in The Gambia guarantees the inviolability of the members and staff of the African Commission and participants in the activities organized by the African Commission:

(i) **CALLS** on the African Union to intervene with immediate effect to ensure that HE President Sheikh Professor Alhaji Dr Yahya AJJ Jammeh withdraws the threats made in his statement;

(ii) **FURTHER CALLS** on the African Union to ensure that the Republic of The Gambia guarantees the safety and security of the members and staff of the African Commission, human rights defenders, including journalists in The Gambia, and all participants in the activities of the African Commission taking place in The Gambia;

(iii) **REQUESTS** the African Union to authorise and provide extra-budgetary resources to the African Commission to ensure that the 46th ordinary session is convened and held in Addis Ababa, Ethiopia, or any other member state of the African Union, in the event that His Excellency the President of The Republic of The Gambia does not withdraw his threats and the government cannot guarantee the safety and security of the members and staff of the African Commission and the participants of the 46th ordinary session;

(iv) **REQUESTS** the African Union to consider relocating the Secretariat of the African Commission in the event that the human rights situation in the Republic of The Gambia does not improve;

(v) **URGES** the government of the Republic of The Gambia to implement the recommendations of its previous Resolutions, in particular, Resolution No ACHPR/Res 134(XXXIV) 2008, adopted during the 44th ordinary session held in Abuja, Nigeria, from 10 to 24 November 2008, and to investigate the disappearance and/or killing of prominent journalists Deyda Hydara and Ebrima Chief Manneh.

It should be noted that the possible relocation of the seat of the African Commission was also raised. This is not an easy step to take as the decision to relocate the seat must be taken by the AU Assembly of Heads of State and Government. Notwithstanding this, in our view the matter should be thoroughly discussed in light of the continuing deterioration of the human rights situation in The Gambia.

We note the election of three members of the African Commission for six-year terms: Commissioner Mohamed Béchir Khalfallah (from Tunisia); Commissioner Mohammed Fayek (from Egypt); and Commissioner Zainabo Kayitesi (from Rwanda) who has already served a two-year term on the Commission in the place of a member who failed to serve his full term.

The publication of this issue of the *Journal* coincides with the 10th anniversary of the LLM (Human Rights and Democratisation in Africa). Since its inception in 2000 this programme has seen close on 300 students graduate. A dynamic network of graduates is working on human rights issues on the continent. The financial assistance of the Raoul Wallenberg Institute, Lund, Sweden, in ensuring the publication of additional copies of this issue and in realising the event is gratefully acknowledged.

The editors convey their appreciation to the following independent reviewers, who so generously assisted in ensuring the high quality of the *Journal*: Aderomola Adeola, Jean Allain, Gina Bekker, Danny Bradlow, Pieter Cronje, Fernand de Varennes, Erika de Wet, Lilliana Trillo Diaz, Solomon Ebobrah, Babatunde Fagbayibo, Tarikua Getachew, Michelo Hansungule, Jacqui Gallinetti, Magnus Killander, Tshepo Madlingozi, Mtendeweka Mhango, Mmatsie Mooki, Jamil Mujuzi, Godfrey Musila, Charles Ngwena, Mwiza Nkhata, Dejo Olowu, Henry Onoria, Kate O'Regan, Edward Oyewo, Karen Stefiszyn, Mia Swart, Gus Waschefort and Adiam Woldeyohannes.

Errata

The editors have decided that *errata* to articles will in future be published in subsequent editorials.

Errata to Sisay Alemahu Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 273–293:

The published article failed to incorporate later additions by the author to the text on the judicial application of international human rights treaties ratified by Ethiopia (section 3.2) on pages 287 and 288. In explaining the contribution to the general trend of neglect by the non-publication of the full texts of the treaties in the official gazette of the country, the article refers to article 71(2) of the Ethiopian Constitution. According to article 71(2), the President of the country must proclaim international agreements approved by the House of Peoples' Representatives in the Negarit Gazeta. Proclamations stating that a certain international treaty is ratified have accordingly been issued. However, these proclamations do not reproduce the full text of the treaties and, significantly, there is no such proclamation with respect to a number of international human rights treaties, including ICESCR and ICCPR, for which ratification instruments have been deposited between 1991 and 1994. The author argues that article 71(2) of the Constitution applies to treaties ratified after 1995 (the year the

Constitution entered into force) and that the Presidential proclamation is a formality that does not affect the applicability and implementation of the treaties in question. In support of the latter argument, the author uses by way of analogy article 57 of the Ethiopian Constitution, which provides that if the nation's President fails to sign a law passed by parliament (and submitted for signature as required by the same article) within 15 days, that law will take effect without his signature. Failure to publish a ratified treaty in the official gazette, it is argued, would have the same effect. The argument that article 71(2) is a formal requirement that does not affect the application of treaties not published in the official gazette is made in support of the position that ratified treaties may be applied by federal courts irrespective of the publication of their full text in the Negarit Gazeta. The requirement of article 2 of the Federal Negarit Gazeta Establishment Proclamation that all laws of the federal government must be published in the gazette and that laws so published will be taken judicial notice of applies to 'federal laws' and not to ratified treaties, which are different.

Editors

Frans Viljoen

Editor-in-chief; Professor of Human Rights Law and Director, Centre for Human Rights, University of Pretoria, South Africa

Magnus Killander

Research co-ordinator, Centre for Human Rights, University of Pretoria