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The Potential Impact of an
International Human Rights Law
Clinic on Issues of Access to Justice
in Africa

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Summary

This paper will begin on the premise that international human rights law provides an efficient framework and a good forum to address issues of social and economic justice in a comprehensive and holistic manner, in the first place. Secondly, that this immense potential is under utilised because international and regional forums are inaccessible to the people whom they have been set up to protect. Thirdly, that these institutions are inaccessible as a consequence of, among other things, a legal profession that is predominantly either unable or unwilling (or both) to explore such strategies even though they might be able to address issues at their root in many instances.

It will suggest that the establishment of an university based “International Human Rights Law Clinic” (IHRLC) which could be located in South Africa but one which will focus on the whole of Africa could impact substantially on the use of international and regional human rights instruments, norms and standards to increase access to justice to marginalised and under represented individuals and communities in Africa. This IHRLC could address the dual goals of providing legal and advocacy services to the beneficiary communities from Africa and training lawyers who operate mainly within domestic law clinics in Africa to work more effectively within domestic jurisdictions, regional and international forums. Finally, it is suggested that using clinical legal education could enhance this initiative, both with respect to the quality of learning and the impact on services rendered to the community.

While traditionally the term access to justice has been linked to access to legal representation in criminal cases, this paper will suggest that the strategy of developing a specialised focus on certain specific areas related to socio-economic development could increase the impact in that issues could be delved into at its root and comprehensive strategies applied to ensure that the impact is not only felt by the client or within the country, but rather that the ripple effect is felt with the region as a whole. Furthermore, it could deepen the learning experience and provide the basic skills and strategies required that could then be used in a variety of different specialised contexts.

The areas chosen for this discussion are Intellectual Property Rights, Human Rights and Sustainable Development and Access to Justice for people living with HIV/AIDS. Later on in the paper each of these areas will be discussed in detail, with both a contextual analysis and case study component. Ultimately, these chapters of the paper will conclude with opportunities that exist for the IHRLC to work within these fields.

This paper is structured to at first provide the reader with an understanding of the concept of clinical legal education and university based law clinics.

The paper begins with such an explanation to ensure that the reader appreciates the potential that such institutions have within the international and regional framework.

Thereafter, it proceeds to provide an overview of democracy, human rights, civil society and clinical legal education in Africa. In the following two chapters it goes on provide a contextual analysis of the two target areas of a) Access to Justice for People Living with HIV/AIDS and b) Intellectual Property, Human Rights and Sustainable Development.

In the next section, it looks at the international and regional system and outlines opportunities for non-governmental organisations and specifically for an IHRLC. Thereafter it looks at the constraints and challenges within the framework, with specific attention to the regional environment. It then moves on to suggest strategies that could be used, providing a list of steps that such an IHRLC could take in its work and concludes the argument after demonstrating the potential impact of such an institution.

Preface

The apartheid era in South Africa, difficult though it was, has shaped my outlook on the world and spread its influence through my work. It was a troubled time that in retrospect was also rich and rewarding, which left few untouched. As a lawyer and later when I ran a domestic university based law clinic, I attempted to instil awareness of socio-economic problems among law students who seemed, at times, oblivious to this historical reality. We tried to develop programmes to enable them to look beyond and more deeply into what they saw to attempt to understand why things are the way they are and how they can be changed to result in greater equity.

However, during that time, I myself was conscious of our limitations. I was aware that what we tried to address in South Africa had as its root cause greater contextual issues that were prevalent in Africa and in the world as a whole. Unfortunately though, at that stage, my own knowledge of how these systems work and how they could be used to ensure the kind of equity and justice we sought, was limited. It is for this reason that I chose to study international human rights law.

During my studies in international human rights law, I was always conscious of the cases, clients and issues we worked with in the domestic clinic I was a part of. I spent effort and time trying to reflect on more holistic strategies that could have been used to work out whether the international and regional system presented viable opportunities for more in depth intervention that would have greater impact both within South Africa, and within Africa as a whole.

I came to the conclusion, as will be seen in the body of this paper, that the international and regional human rights framework does indeed present these opportunities. I also considered how it would have been had we had the opportunity to work with real cases under supervision while studying. This led me to consider developing an International Human Rights Law Clinic. As the idea developed, it became more and more compelling. It is now being worked on as a project. It is important to pause and note at this stage that this would probably have remained only an idea had we (Dan Bengtsson and I) not begun to work on it as a team. It is now presented as a tangible product of my studies. This paper has been written concomitantly with the evolution of the thinking within the project itself to enable both processes to nurture each other.

We, in the project team, hope that this paper will not only help to document these ideas in an organised and analytical manner, but also, that it would assist other domestic law clinics, or provide activists who intend working in this field with a strategic tool to assist in the planning, conceptualisation and ultimately in the execution of a strategic approach to addressing issues of

access to justice and in finding equitable solutions to problems that have both domestic and international impact.

It has become clearer to me, now more than ever before, that the interdependence that exists within the international community, begins at this level, as none of this would have materialised without the participation, support and contributions of others. It is consequently a privilege to be able to acknowledge those that have contributed to this process. Firstly, Dan Bengtsson, without whose help and support this would only have been an idea and would not have evolved as it has into a viable project. His contribution within the project team and consequently to the thesis has been invaluable.

Secondly, the members of the board of the soon to be established organisation whose input during the process has helped shape the idea in a realistic and pragmatic manner, they are Prof Gudmunder Alfredsson, who despite a very busy schedule made time to consider the ideas in this thesis and provide meaningful input as it developed. From South Africa Jody Kollapen has invested time, effort and energy, Prof Thandabantu Nhlapo without whose energy this would not have been possible, Deputy Judge President, Pius Langa, whose support has added both confidence and weight to the idea in a manner that cannot fully be captured in these words. Professors Nico Steytler, Michelo Hansungule, Christoff Heyns, Mpazi Sinjela and Dennis Töllborg have also lent their support and providing input to shape the ideas in this paper.

Håkan Friman, Prof David Mcquoid Mason, Mr Kjell Persson, Mr Frederik Eklof, Per Sevastik, Thomas Kjellson and Ms Alice Brown who have been mentors, colleagues, friends and fellow travellers upon whom I could always rely. Finally, my family and friends have been a constant source of support and inspiration even though some are far away.

I thank all these individuals for their frank and open feedback and their support which made this process enjoyable and immensely rewarding in many different ways.

Abbreviations

ACHPR	African Commission for Human and Peoples’ Rights
AFCHPR	African Court for Human and Peoples’ Rights
ASSA	Actuarial Society of Southern Africa
AU	African Union
CAT	Convention against Torture
CC	Constitutional Court of the Republic of South Africa
CEDAW	Convention on the Elimination of Discrimination against Women
CEE	Central and Eastern Europe
CERD	Convention on the Elimination of Racial Discrimination
CLC	Campus Law Clinic
CLE	Clinical Legal Education
COMADRE	“Monsenor Oscar Aarnulfo Romero” Mothers Committee
CRC	Convention on Children’s Rights
CSIR	The Council for Scientific Research
FSU	Former Soviet Union
GC	Global Compact
GMO	Genetically Modified Organisms
GSP	General System of Preferences
HRC	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Social, Economic and Cultural Rights
ICJ	The International Commission of Jurists
IHRLC	International Human Rights Law Clinic
IHRLC-W	International Human Rights Law Clinic at American University in Washington
ILO	International Labour Organisation
IP	Intellectual Property
IPR	Intellectual Property Rights
LARC	Legal Assistance through Refugee Clinics
MDG	Millennium Development Goals
NEPAD	New Partnership for Africa’s Development

NGO	Non-Governmental Organisation
PILI	Public Interest Law Initiative
R&D	Research and Development
SADC	Southern African Development Community
SFN	Soros Foundation Network
SMME	Small Medium and Micro Enterprises
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNHCR	United Nations High Commission for Refugees
UNHCHR	United Nations High Commissioner for Human Rights
UPOV	International Convention for the Protection of New Varieties of Plants
WIMSA	Working Group of Indigenous Minorities in Southern Africa
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

1 Introduction

International human rights law establishes a framework of rights and obligations for states, private corporations, individuals and even non-governmental organizations. The framework has evolved over time to encompass areas ranging from basic civil and political rights, to later include social, economic and cultural rights and currently covers such controversial issues as the right to development and human rights and business. In 1993, at the World Conference on Human Rights held in Vienna, 171 states accepted the principle that all human rights are "universal, indivisible, interdependent and interrelated". Consequently, the debate that was steeped in cold war politics took a turn toward a more comprehensive view of human rights. It became clear that states had an obligation to take steps to progressively realize the social, economic and cultural rights and meet certain minimum core obligations to respect, protect and fulfil as defined by the Limburg Principles and Maastricht guidelines read together.

It is increasingly becoming clear that it is no longer tenable to draw a neat distinction between the nature of State obligations with regard to civil and political rights on the one hand, and economic, social and cultural rights on the other. United Nations human rights mechanisms have debunked the traditional view that civil and political rights entail only negative obligations, while economic, social and cultural rights give rise to the more complex issue of positive State obligations which require resources to be expended. The United Nations Human Rights Committee has interpreted certain rights guaranteed by the ICCPR as entailing positive obligations. This is clearly the case with regard to the right to life. In General Comment 6 (16) on article 6, the Committee interpreted the right to life in a broad manner that requires States parties to take positive action, e.g. to reduce infant mortality, to increase life expectancy and to take measures to eliminate malnutrition and epidemics¹.

As the arguments in the paper unfold, it will become increasingly clear that international human rights law is an evolving concept that is steadily moving toward building a global society that has greater respect for human rights and consequently a more stable and just society in which the gap between rich and poor can more readily be reduced and consequently more people are empowered to take greater control over decisions and processes that effect their lives.

Furthermore, it will become evident that there are indeed substantial mechanisms and strategies available to address issues both at the domestic

¹ See Preliminary report submitted by J. Oloka-Onyango and D. Udagama, in accordance with Sub-Commission resolution 1999/8 of the Economic and Social Council of the UN titled: *THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: Globalization and its impact on the full enjoyment of human rights*

level, based on the idea of domestication of international human rights law norms and standards, and on a regional and international level, based on international obligations themselves.

However, while this truth remains, it is also true that international human rights law still remains a field that is both inaccessible to the poor citizens in the developing world even though it has immense potential to address issues of social and economic justice with exactly the same group in mind as the main beneficiaries.

The arguments will demonstrate why, how and where appropriate interventions could be made within the international and regional human rights framework to make these norms and standards more accessible and meaningful in the lives of ordinary people within Africa.

2 Clinical Legal Education and University Based Law Clinics

At the outset it is necessary that the concepts of “university based law clinics” and “clinical legal education” be understood and appreciated. Clinical legal education is a multifaceted concept. For the purposes of this paper, the social justice dimension and the methodology are important.

2.1 Clinical Legal Education and Social Justice

Proponents of the social justice dimension of clinical legal education often refer to the “dual goals of hands-on training in lawyering skills and provision of access to justice for traditionally unrepresented clients”² These goals were being pursued jointly not only to provide client representation, but also to teach professional and ethical values to students. Students often learn the techniques and the need to pursue justice and fairness in resolving client problems. At the same time, they learn professional responsibility and competent representation of client interests.

From a jurisprudential perspective, this dimension is seen as one which promotes the idea that law and the study of law is not a neutral activity but is often tinged by politics and political convictions. Hence, a law teacher’s political views can result in the law being taught purely from a particular perspective. Clinical law teachers who adopt the social justice dimension often teach students how the law can be used as an instrument for social justice and change.

In addition, it must be noted that few traditional law courses explore social justice issues. Fewer still examine the social responsibility of lawyers to engage in pro bono work. However, those who are inclined to this perspective emphasise the importance of pro bono work and the lawyer’s role in changing the law as opposed to only applying the law as it is.

2.2 Clinical Legal Education as Teaching Methodology

Clinical education is also a method of teaching. “Among the principal aspects of that method are these features: students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problems in role; the students are required to interact with

² M. Martin Barry, J.C. Dubin and P.A. Joy: *Clinical Education for this Millennium: The Third Wave* at page 12

others in attempts to identify and solve the problems; and, perhaps most critically, the student performance is subjected to intensive critical review.”³

2.3 Examples

While other programmes such as Street Law, for instance use clinical legal education methodology, university based law clinics are the primary institutions that apply clinical legal education within a law faculty. Typically, they are either a part of or affiliated to a law faculty and have the following main goals:

- free legal services to indigent people who cannot afford private legal services; and
- practical legal training to law students and graduates to enable them to represent clients in an effective, efficient, ethical and socially conscious manner.

To understand the impact of such an institution more fully, a rather detailed description of the Campus Law Clinic (CLC) at the University of KwaZulu Natal, as it is now called, might assist.

2.3.1 The Campus Law Clinic

The CLC in Durban has four primary goals, as do most clinical programs. These goals have changed and evolved over time and will probably continue to do so. Currently, its stated goals are:

- To provide practical legal training to law students to enable them to serve clients in an effective, efficient, ethical, business minded and socially conscious manner;
- To provide training to law graduates from historically disadvantaged backgrounds to ensure that they are able to manage an effective, efficient, productive, ethical and socially conscious practice once they qualify;
- To provide legal services to indigent people who cannot afford to pay a private practitioner, thereby increasing access to justice to the poorest of the poor and creating a greater respect for the rule of law; and
- To promote and advocate for the public interest.⁴

³ *Report of the Committee on the Future of the In-House Clinic* as quoted in Martin Barry et al: *Clinical Education for this Millennium: The Third Wave* at pages 17-18

⁴ *Report of the Transition Process 2003*, CLC

The legal education component of the clinic is run in the classroom, in the clinic itself and in the community. In the classroom a detailed curriculum is carried out which aims to:

- Develop lawyering skills, both litigation and non-litigation, that are necessary in the practice of law.
- Increase awareness of the problems facing low-income communities and develop skills and strategies to meet these challenges.
- Develop reflective and self-critiquing skills that will enable continued growth as a public interest lawyer.⁵

These aims are achieved through the modules designed to teach the basic lawyering skills of interviewing, counselling, fact investigation, case analysis and planning, negotiation, legal drafting, litigation and advocacy. Each of these skills is taught in the classroom through simulations and problem solving in small group work. Thereafter, the skill is explored further in the specialized units. Once this process is completed in the classroom, students practice the skill with “live clients” in the clinic, under the supervision of an attorney. In other words, they interview and counsel clients and work on real case files.

The teaching in the clinic takes the form of small groups of four or five students in case review sessions where the supervisor guides students in the representation of clients. The students present their understanding of the case and its issues and then present their thinking about what should be done to assist the client. The supervisor and the other students then comment and discuss the appropriate strategy. Students then take their case files and perform the necessary drafting or take the next appropriate step.

As is evident above, the overall goals of clinical legal education are to teach law students the skills and values required to practice law in both the private and public sphere with a social conscience. To this end, the clinic explores a wide range of strategies that include small group seminars on issues to actual student participation in and observation of processes that demonstrate the consequences of power imbalances on the poor.⁶

In the first semester, students are at first exposed to a module titled: “Understanding the Terrain”. This entire week is structured to set the foundation for students to understand the social, political and economic context within which they work. At first they are asked provocative questions which they address in small groups where students from diverse backgrounds share ideas. Thereafter, they are taken on structured site visits to areas where they observe differences in for example the number and quality of storm water drainage, street lighting, schools, play grounds, roads, and various other facilities. When they return from the site visit, they are taken through a structured debriefing in class where they begin to

⁵ *Clinical Law Syllabus 2001, CLC*

⁶ *Ibid*

understand the contradictions and paradoxes within society and begin to place themselves as aspirant lawyers in a social change context. The clinic places great emphasis on this beginning as it lays the foundation for a particular attitude toward clients, issues and cases during the rest of the student's time at the clinic.⁷

Thereafter, and still within the above context, students are taught the lawyering skills such as interviewing, counselling, case planning and investigation, fact investigation, negotiation, mediation, case strategy and preparation, legislative advocacy and media advocacy.⁸

The last modules are designed to equip the students to become better public interest advocates. They are taught such skills as media advocacy and legislative advocacy. In these courses students are encouraged to think about other strategies that might be used to further the interest of the client and the public at large. They are also encouraged to identify gaps in the law and consider not only what the law is but also what the law ought to be.⁹

In the last semester they undertake public interest advocacy projects. These projects are designed jointly by students and staff at the clinic with the goal of addressing root causes of issues as opposed to dealing with only the symptoms. To some extent projects are proactive, where they study a particular area and recommend interventions in a particular field and in some instances students scan cases and issues already within the specialised project to develop more effective strategies to address them.

Finally, it is important to note that the CLC operates within the following specialised projects¹⁰:

- The KwaZulu Natal Land Legal Cluster;
- The Small Medium and Micro Enterprise Project;
- The Housing Project;
- The HIV/AIDS Project;
- The Children's Rights Project; and
- The Gender Project.

A description of each project is not necessary for the purposes of this paper. However, it is important to note that the impact of the work done within each project is seldom limited to the client served. However, it has not extended beyond the boundaries of South Africa in instances where it could have as will be seen in the case study on HIV/AIDS below.

⁷ Ibid

⁸ Ibid

⁹ See also P.Iya: *Fighting Africa's Poverty* at pages 17- 27

¹⁰ *Report of Transition Process 2003*, CLC

2.3.2 The International Human Rights Law Clinic at American University in Washington

This International Human Rights Law Clinic (IHRLC-W) is unique in the United States in that it provides students with full case responsibility for human rights litigation. There are however, a number of schools that have developed human rights programs in which students are given practical, supervised field experience. In the IHRLC-W, clients fall within two broad categories: 1) applicants for political asylum in the United States; and 2) victims of human rights abuses who seek redress in either the U.S. courts or before international human rights enforcement bodies.¹¹

An example of an asylum case handled in this clinic is a trial in Immigration Court in which the U.S Immigration Service sought to deport a young man from Honduras. Students represented the man in court and proved he was entitled to political asylum in the US because his left wing student activism at the largest university in Honduras led him to be targeted by security forces there. He fled the country after he and close family member received death threats and armed soldiers entered his apartment, held him on the floor at gunpoint and ransacked his belongings for “subversive materials”.¹²

An example of human rights litigation prepared by the clinic for presentation in an international forum is student preparation and filing of a complaint against the government of El Salvador before the Inter-American Human Rights Commission, the regional human rights enforcement body of the Organization of American States. The clinic prepared and filed a petition on behalf of an organization called COMADRE (“Monsenor Oscar Aarnulfo Romero” Mothers Committee), a non-governmental organization founded in 1977 to support mothers and families of persons who disappeared or were killed in El Salvador for political reasons. On March 1, 1996, the Commission found in favour of COMADRE.¹³

Their students also worked on other human rights projects involving legislative advocacy, such as analysing the potential legal consequences of U.S. ratification of the International Covenant on Economic, Social and Cultural Rights. Another example of administrative advocacy is the clinic’s presentation to an inter-agency body which makes recommendations to the President regarding trade by the US with certain countries under the General System of Preferences. Under the GSP review system, a country can have its favourable status removed if it is shown that it systematically violates internationally recognized workers’ human rights. In 1993 and 1994, students in this clinic presented petitions seeking review or removal of GSP

¹¹ R. Wilson: *Clinical Legal Education as a Means to Improve Access to Justice in Developing and Newly Democratic Countries*

¹² Ibid

¹³ Report No. 13/96, Case 10.948, El Salvador, March 1, 1996: *Annual Report of the Inter American Commission on Human Rights 1995* at page 101

status for El Salvador and Pakistan and appeared before the inter-agency body for oral presentation.¹⁴

This initiative is unique in its subject matter coverage but shares with all other clinics of that law school a common selection process, common pedagogical goals in the seminar which accompanies case work and a common basis for course credit toward graduation¹⁵.

2.4 Other initiatives

“A growing array of research demonstrates that legal services for disadvantaged populations contribute to the rule of law, good governance, human rights, empowerment of the poor, and poverty alleviation. Yet the development and human rights communities pay insufficient heed to a cost-effective set of tools for forging the future of legal services and legal systems across the globe: clinical legal education and similarly oriented efforts to engage law students and young lawyers in public service.”¹⁶

Furthermore, recent UNHCR initiative that launched refugee clinics in several CEE and FSU law schools represents a unique multilateral agency effort to serve a specific population while building a region-wide core of attorneys knowledgeable about and sympathetic to that population’s legal needs. As such, it is a particularly farsighted approach on the part of an organization charged with advancing the rights and interests of a disadvantaged group.¹⁷

“A seminal action in this endeavour was UNHCR’s establishment of a regional NGO, Legal Assistance through Refugee Clinics (LARC). LARC is based at the Hungarian Helsinki Committee, a human rights NGO, and operates in parts of CEE and the FSU. Supplementing its support from UNHCR, LARC receives funding from SFN (in keeping with its overall assistance for CLE) and other donors”¹⁸. It has collaborated with the Justice Initiative and PILI in a number of ways, including convening a regional workshop on refugee rights. A central thrust is to build the legal knowledge and skills of attorneys, professors, and students who represent and advise refugees. Some LARC-assisted clinics also arrange student internships with relevant agencies, which further serves to build both their capacities and contacts that can influence career directions. For example, the students at the University of Bialystok clinic’s refugee section rotate through internships at the Polish Helsinki Committee, the Ombudsman’s office, and UNHCR’s Warsaw mission¹⁹.

¹⁴ Ibid

¹⁵ Ibid

¹⁶ S. Golub: *Forging the Future: Engaging Law Students and Young Lawyers in Public Service, Human Rights and Poverty Alleviation*

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

There are initial indications that students continue this public service work after finishing their clinical stints. Data compiled by LARC indicate that nearly 100 students involved with UNHCR-supported asylum clinics across the region have remained engaged with the field after their clinical assignments ended. At this early stage, such findings simply may mean that they continue to work with asylum applicants and/or clinics while still students. But at least a few already have secured positions with NGOs, UNHCR or, as in Poland, the Batory Foundation, which is part of the SFN network.²⁰

LARC pursues an evolving range of additional activities. These include gender sensitivity training for lawyers working for refugee law clinics, a regular newsletter to update clinics on LARC activities and developments in the field, the production of a compilation of materials that can serve as the basis of an international refugee law course, consultancy services that assist partner law clinics with fundraising, and support for the clinics' development of refugee law libraries.²¹

Within Africa, the recent establishment of Africa Legal Aid²² based both in Maastricht and in Ghana is a step toward making international and human rights norms and principles more accessible to grassroots communities. According to its mission statement it “counsels individuals and groups on human rights matters, promotes human rights awareness, researches human rights conditions in African countries, publicizes human rights violations, pressurizes States to comply with their human rights obligations, analyses human rights legislation and treaties, and contributes towards the development of a human rights jurisprudence for Africa”²³.

A more detailed description of the African context follows in the next chapter.

²⁰ Ibid

²¹ Ibid

²² www.afla.unimaas.nl/en/about/index.html

²³ Ibid

3 Africa

Civil society in Africa is presented with a challenge to develop a culture of democracy in terms of which people are empowered to participate in development and transformation to build a society based on respect, dignity and social justice. However, the continent finds itself with varying degrees of repression of civil society on the one hand, governments that abuse power on the other and a growing critical mass of people across the continent who are committed to seeing sustainable development and growth in Africa²⁴.

Justice is a concept that is in some instances foreign, in other instances a means to justify intolerance, repression and abuse of the state power, and in yet others it represents the higher values that society aspires towards. Lawyers, law students, law faculties and the legal profession in general play a significant role in shaping these ideas, systems and institutions as in any other society. However, by and large, legal education appears to remain steeped in a tradition that maintains the status quo rather than challenging it.

In South Africa, the strength of civil society during the anti apartheid era, and post apartheid era represents the hallmark of the successful transition to democracy. The continual development of civil society during the current era also contributes to an accountable government whose powers are not unfettered. The constitutional systems and institutions supporting this democracy lay the foundation for this²⁵.

In relationship to access to justice and the development of a culture of public service among lawyers, clinical legal education has played a substantial role both internationally and in South Africa. Having started in the early 1970's in South Africa, the movement has grown to a level where 20 universities have in house live client clinics. The dual goals of clinical legal education of training law students and providing legal services to indigent client at no cost to them result in students who are by and large more inclined and willing to enter the public service and those that remain in the private sector do so with a greater awareness of the need for pro bono services²⁶.

Consequently, clinical legal education is a strong pillar in the development of a society based on principles of social and economic justice. In January 2002, Nigerian law professors gathered together to scrutinise their legal education system within the backdrop of access to justice²⁷. This gathering unanimously concluded that the introduction of clinical legal education in the law curriculum and consequently of law clinics was a critical component of the transformation of their legal education system. Further, Sierra Leone,

²⁴ See generally P. Iya: *Fighting Africa's Poverty*

²⁵ Ibid

²⁶ Ibid

²⁷ Papers presented at National Legal Education Forum of Nigeria January 2002, Lagos

Kenya, Ghana, Botswana, Namibia and Zimbabwe have either established one or two clinics or have a keen interest in introducing clinical legal education and law clinics into their faculties²⁸.

Furthermore, between June 23 and 28 2003 at least 60 delegates representing 20 different countries from all parts of Sub Saharan Africa participated in the First All Africa Colloquium on Clinical Legal Education. This colloquium was meant to be the first among many²⁹. It laid the foundation for strengthening relationships between established clinical programmes and developing programmes, a training programme and continual dialogue and development geared at ensuring the establishment of university based law clinics in all parts of Africa. While these clinics have now taken root in many parts of Africa, it has been noted that their potential is under-utilised due to their almost exclusive focus on individual cases without maximising the impact within the country or the region. One reason for this is inadequate training of clinic staff. It is consequently suggested that an initiative such as the one proposed in this paper could complement and build upon the processes described above by creating a forum where such lawyers could learn and at the same time represent real live clients.

It is also important to note that on 18 March 2004, the new Pan African Parliament was inaugurated and on 25 January 2004 the Protocol to the African Charter on Human and Peoples' Rights establishing an African Court on Human and Peoples' Rights came into force. Africa consequently now has a Pan African parliament and will soon have a court. Well trained judges together with well trained lawyers are essential to the development of the jurisprudence of the regional system³⁰.

The International Commission of Jurists (ICJ) have developed a programme geared at training lawyers and judges and providing lawyers in private practice with financial support and legal expertise, primarily from within Sweden, to domesticate international human rights norms and standards. Some non-governmental organisations within Africa have developed a track record for advocacy at a regional and international level and some of them focus on pro bono litigation before regional and international forums³¹.

At an international level, organisations such as Interights provide expert support and at times conduct litigation and training within the framework of international human rights law. Other non-governmental organisations focus on certain subjects or issues such as minority rights, women's rights and so forth³².

²⁸ See papers presented at First All Africa Colloquium June 2003, Durban.

²⁹ See *Planning Documents: First All Africa Colloquium* June 2003, Durban.

³⁰ See *Report of First All Africa Colloquium* November 2003

³¹ For more information about this programme see www.icj-kenya.org and www.africaninstitute.org

³² For information about this organization see www.interights.org

Within South Africa substantial effort has been invested by some organisations to develop an African perspective of international human rights. One such initiative is that of the Centre for Human Rights based at the University of Pretoria. Its efforts are geared primarily at the education of lawyers to build a critical mass of people who are competent and willing to use international and regional norms and standards both within their domestic jurisdictions and within the regional and international forums³³.

The IHRLC could complement these initiatives if it were to work primarily within the domestic law clinic movements that are slowly gaining momentum across the continent. Currently these institutions are situated close to the people they serve. However, they address issues on a case by case basis and have not developed a human rights and public interest focus even though many cases that they deal with could be approached from a perspective to ensure that the impact is felt within the country and within the continent as a whole.

This idea to establish an International Human Rights Law Clinic which would provide access to legal representation within the subject areas listed below is unique in its focus areas, the target groups it seeks to serve and in its methodology. While it remains one of many other initiatives within the continent, it fills a niche that is currently under- represented. Furthermore, while supporting private practitioners on a case by case basis is important, this methodology was seen to be flawed most major role players within the South African context and other Commonwealth countries such as England and Australia. The primary basis for this conclusion was that it is not cost effective and the individuals providing these services generally have a whole practice to maintain and seldom specialise in issues that are important to the indigent. In circumstances where practitioners became dependent on this kind of funding for their practices, many instances of abuse and fraud were recorded. It is further important to note that within South Africa, much effort and resources from donors including the Ford Foundation, Sida through the ICJ-Swedish, Mott Foundation and more recently the Canadian International Development Agency are directed at transforming the system from case by case funding to a system based on the establishment of legal clinics, or justice centres as they are called in South Africa. These types of changes also took place in England despite was much protest from the private bar.³⁴

It is this fundamental principle which distinguishes the IHRLC from other legal service provision initiatives within the region of Africa. At the heart of this concept is the idea of developing civil society institutions that are efficient and pursue the public interest and respect for the rule of law with diligence while avoiding the profit motive that drives most lawyers in private practice regardless of their personal preference.

³³ www.up.ac.za/chr

³⁴ For general information regarding legal aid see *Transformation of the Legal Aid Board of South Africa*

A further distinguishing feature is the areas of focus. It must be noted at the outset however, that while these focus areas are important, they most importantly provide a vehicle or entry point to domesticate international human rights norms and standards, and at the same time provide access to international and regional forums. It is suggested that unless issues are narrowed down, the efforts made could be diluted across many different types of issues and consequently the impact could also then be diluted. If, on the other hand, certain types of cases and clients are focussed on, it is likely that the impact would be felt more deeply as comprehensive strategies and the various mechanisms described below in chapters 6, 7 and 8 could be used. The focus areas ought to be dealt with in a manner whereby the main thrust is the promotion of the rule of law, good governance and respect for human rights.

4 Case Study: Non Discrimination and Equality Rights for People Living with HIV/AIDS

The HIV/AIDS pandemic has been compared to the plague and the tuberculosis epidemic of the yesteryear. Some lay people view the virus as “God’s act of retribution” others see it as a fiction of the apartheid legacy and yet others question its existence as such. Within this context those who are living with the virus are presented with the most serious challenge of all: to maintain their sense of human dignity while still fighting to beat the virus, keep breathing and enjoy their lives with a sense of human dignity and pride.

The comparison to the epidemics of the past is no coincidence. The isolation, ostracisation and stigma attached to those who suffered tuberculosis and the plague reached horrendous proportions for many reasons, the primary one being fear of the unknown. Fear that emerges from not knowing what this disease is, just watching how it plays itself out in the lives of those who live with it. As people watch, and realise that even doctors do not have a cure for it, their fear escalates and results in all sorts of behaviour directed at those who live with the pandemic.

Individuals and whole groups of people gather together to isolate and try to take away the humanity of those living with the virus. They have done so in many different ways: often by simply telling others. Society has unfortunately developed certain subtle and at times blatantly cruel methods which violate the persons right to privacy by telling others that the person is HIV positive, in the world of work or study or simply in the world of the person living with the virus without asking that person first. This has the net effect of isolation and consequently, the person is unable to live a normal and dignified life. The problem is even deeper in that certain institutions of state interpret their responsibility to the citizen in a manner that further isolates and discriminates against them in that they do not take the steps necessary to provide adequate treatment, care and support, especially for those who cannot afford to pay for their own services.

Business enterprises within society have taken it even further to suggest that if a person dies of the virus they will not be entitled to benefits such as life insurance. The isolation and stigma therefore now extends to the loved ones and dependants of the person.

4.1 Summary of Facts of the Case

This is a case where a client contributed toward the monthly premiums of a life insurance policy held in favour of her daughter. After her daughter died, the client claimed the benefits from the insurance company. The insurance company repudiated the claim on the basis of a clause in the insurance policy which excluded liability if “the assured’s death was in any way due to or arising directly or indirectly, entirely or partially from AIDS or HIV.”³⁵

While the case raises many issues, including the breach of confidentiality and privacy by the doctor who submitted the deceased’s death certificate to the insurance company, and issues of administrative justice in the manner in which the insurance company dealt with the issues, this paper will address only one issue, i.e. that relating to the exclusion clause which discriminates against people on the basis of their HIV status.

4.1.1 Background

The Actuarial Society of Southern Africa (ASSA) established an AIDS Committee in 1987 to “assist the actuarial profession and later the wider public in estimating the impact of the AIDS epidemic in South Africa.”³⁶ They realised early on that AIDS was to affect all aspects of life, including such diverse areas as science, politics, business and social welfare.

Frome suggests that “The annual testing of pregnant woman at South African antenatal clinics provides the best measure of the prevalence level of HIV in the general population in South Africa. In 1990, the prevalence level was under 1%, but by 1991 had risen to over 22%. These levels are not universally applicable to all sectors of the South African population, but do provide insight into the spread of the disease.”

He goes on to assess the statistics relevant to the life assurance industry and says that “it is estimated that the average term to death from infection with HIV is ten years, and that most of the people infected with HIV fall in the 20 to 45 year age range, where mortality levels are low. The result is an increased focus by life companies on HIV underwriting and HIV claim exclusions to protect against excess mortality on life policies sold.”³⁷

The ASSA has also produced a draft guideline on HIV Tests and Underwriting³⁸ where they examine the impact from the point of view of the insurer, existing policyholders, and prospective policyholders, HIV positive

³⁵ See insurance contract in case number: 31378/01, CLC

³⁶ E. Frome: *AIDS CPD*, ASSA AIDS Committee, January 2001, at page 1

³⁷ *Ibid*

³⁸ Underwriting is the process used by insurers to classify risks into homogenous groups

and negative policyholders. In summary, they suggest that the impact of HIV/AIDS on the life insurance industry could be managed by:

- underwriting at inception and declining cases on the basis of HIV positivity or some other criteria. AIDS claims from subsequent infection are admitted. This is the current most widespread new business practice; or
- excluding AIDS-related claims at claim stage, with or without initial underwriting. This is complicated by the difficulty of conclusively identifying and proving AIDS as a cause of death. Furthermore, this generates ill will and may be seen as unfair discrimination if other similar causes of death are not consistently treated.”³⁹

Despite these comments, the Life Officers’ Association decided en bloc to introduce the exclusion clause as their strategy of dealing with the HIV/AIDS pandemic. A typical clause contains these provisions:

“In the event of there being any claim under this policy following the life assured’s death, illness, accident, disorder, disability, or inability to carry out a remunerative occupation which in the opinion of (Company) is in any way due to or arising directly or indirectly, entirely or partially from AIDS or infection from any HIV, the sum assured and disability benefits under the policy (if more than the investment account) will be null and void and the claim amount will be restricted to the cash value in the investment account as determined by the actuary of (the Company), save that the full benefit may be paid if the HIV infection was:-

- contracted through the transfusion of blood or blood products, and/or
- contracted by lives assured who are registered with the SA Medical and Dental or Nursing Councils during the execution of their medical duties, and/or
- contracted by the lives assured who are members of the Police Force, Fire Service, or Defence Force or any recognised medical auxiliary body required to render assistance to infected casualties during the execution of their duties.

Provided that the AIDS exclusion clause is not applicable on savings plans without life cover.”⁴⁰

Consequently, as mentioned earlier the application of the clause to specific cases raises several issues, many of which are direct infringements of basic guarantees and protections. They include a violation of the right to privacy and human dignity, as this is often necessary to acquire the requisite proof to establish the cause of death, at times it involves a violation of basic principles of administrative justice.

³⁹ ASSA: *HIV Tests and Underwriting, Draft 8* at page 3

⁴⁰ See Case Number: 31378/01, CLC

In addition, a grave consequence of such a clause is the extent to which a person is discriminated against as a result of their HIV status. This paper will suggest strategies to address this issue directly and comprehensively within a domestic and international context.

4.1.2 Relevant Facts

As stated earlier, the client in this case contributed toward the premiums of a life insurance policy on the life of her daughter. The policy contained the clause cited above. Consequently, when the client applied for the benefits under the policy, the insurance company repudiated liability on the basis of the exclusion clause. Client was one of five other clients who approached the law clinic for assistance separately but all within a relatively short interval.⁴¹

The clinic obtained expert opinion where it was suggested that the conduct of the insurance company and the doctor constituted a violation of client's right to confidentiality and privacy and that the exclusion clause violated the client's right to equality entrenched in section 9 of the Constitution Act 108 of 1996. An application was made to the High Court of South Africa seeking several orders, inter alia, an order a) to set aside the insurance company's decision to repudiate the claim; and b) to set aside the exclusion clause.

Soon after the insurance company received the papers, they sent a "without prejudice" letter and a cheque in "full and final settlement" of the claim.

While the legal team were glad that the client will receive the amount due to her, and that the legal costs incurred will be recovered, they were disappointed at not being able to have a court decision on the issue. The team finally decided to develop the next case hoping that this time, they will have the chance to get a court decision.

4.2 Strategy Adopted and Principles Applied

At the outset, the legal team recognised that this case presents a huge challenge and had potentially significant consequences. The first steps were taken very cautiously as the team was mindful of the negative repercussions that might result from losing a case of such proportion. Consequently, the practice of the Constitutional Court was looked at to assess the risk that might follow each of the different angles that might be pursued.

Specifically regarding the constitutionality of the exclusion clause, the test set out in *Harksen v Lane NO* 1998 (1) SA 300 CC was applied. The first

⁴¹ Ibid

question is whether the impugned conduct differentiates between people or categories of people. Secondly, whether the conduct has a rational basis: is there a rational connection between the differentiation in question and a legitimate purpose that this exclusionary clause is designed to further or achieve? Thirdly, a differentiation which is rational may still constitute an unfair discrimination. In this regard, the first question is whether the differentiation amounts to discrimination. The Constitutional Court has stated that one is then forced to consider whether the ground upon which the differentiation occurs, is based on “attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.”⁴²

Finally, the court will then consider whether the discrimination is unfair. The following factors have been regarded as important in determining fairness: a) the position of the complainants in society and whether they have been victims of past patterns of discrimination; b) the nature of the discriminating action and the purpose sought to be achieved by it; c) the extent to which the rights of the complainant have been impaired and whether there has been an impairment of her fundamental dignity.⁴³

Du Plessis and Govender were of the opinion in this case that the full application of this test will result in the conclusion that the exclusion clause does in fact and in law constitute unfair discrimination.⁴⁴

They did however caution that the Constitutional Court has been circumspect in its orders as they have also taken into account practical consequences of their decisions as may be seen in the case of *Soobramoney v Minister of Health, KwaZulu Natal* where Chaskalson P held:

“..One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life. The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state to provide him with the treatment. But the state’s resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities and social security. These too are aspects of the right to

‘...human life: the right to as a human being, to be part of a broader community, to share in the experience of humanity.’

⁴² *Harksen v Lane NO 1998 (1) SA 300 CC* at paragraph 53

⁴³ M. du Plessis; *Memorandum in case 31378/01* at pages 10-13

⁴⁴ *Ibid*

The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.”⁴⁵

It is within this context that the legal team were concerned that the prospects of success in the case were not as high as they would like and the consequences of an adverse decision would impact widely on people living with HIV/AIDS. However, the entire team were satisfied with a focused litigation strategy using domestic constitutional and human rights law principles. However, even though media advocacy was contemplated, it was decided to follow the litigation route first and keep the case at a lower profile.

However, the receipt of the cheque in full and final settlement of the claim confirmed the team’s view that the insurance companies were afraid of an adverse decision and paid the claim out to avoid the precedent being set⁴⁶. It will be seen from the approach suggested below that the matter is not yet over; both in respect of this case, the other cases that the clinic has accepted on more especially on the principle of unfair discrimination against people living with HIV/AIDS.

4.3 Relevant International Human Rights Norms and Principles

It is difficult to establish a comprehensive body of legal principles that outline state obligations and the obligations of the private sector with respect to human rights and HIV/AIDS. The search inevitably throws up a wide spectrum of documents ranging from declarations, resolutions of the General Assembly, guidelines, reports, general comments and concluding observations with respect to state reports to treaty bodies such as CEDAW and CRC.

Clearly, each of these documents has a different status in international law, with treaties forming the most certain source of legal obligations. Moreover, since the main antagonist in this circumstance falls within the private sector, treaties obligations have a limited effect.

Despite the labyrinth, some clear strands of definition do emerge specifically with respect to those principles which deal with issues of unfair discrimination of people living with HIV/AIDS.

⁴⁵ Soobramoney v Minister of Health (KwaZulu Natal) 1998 (1) SA 765 CC

⁴⁶ See Case Number 31378/01, CLC

4.3.1 Non Discrimination in International Human Rights Law

The Universal Declaration of Human Rights lays the foundation in Article 7 in terms of which it says that; “All people are equal before the law and are entitled without any discrimination to equal protection of the law.” Thus laying the foundation for a vertical and horizontal application as will be discussed later⁴⁷.

The starting point with respect to the interpretation of non-discrimination is the Human Rights Committee’s General Comment 18 (37). It states at the outset that: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle relating to the protection of human rights.”⁴⁸

Furthermore, the Sub-Commission on Prevention of Discrimination and Protection of minorities, in its resolution 1994/29, confirmed that “discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards and that the term “or other status’ in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS.”⁴⁹

The Secretary General in his report to the UN Human Rights Commission goes on to suggest that international human rights treaty bodies, responsible for the supervision and monitoring of international human rights instruments are developing case law and jurisprudence which define the application of human rights of a general nature within the particular context of HIV/AIDS.⁵⁰

The Commission of Human Rights appointed a Special Rapporteur on discrimination against HIV-infected people, for a period of three years. He emphasised in his conclusions that discrimination against HIV infected people or people with AIDS is neither admissible under international human rights instruments nor justified as an appropriate means of policy for controlling the AIDS pandemic.

In addition, the Commission on Human Rights adopted several resolutions that address discrimination. While these resolutions do not bind states in the same manner as would a treaty, states are nevertheless called upon to report on these issues by the treaty bodies as mentioned earlier. Consequently, they

⁴⁷ G. Alfredsson and A. Eide (ed): *The Universal Declaration of Human Rights, A Common Standard of Achievement* at page 153 onwards

⁴⁸ See *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*

⁴⁹ See *Report of the Secretary General on International and Domestic Measures Taken to Protect Human Rights and Prevent Discrimination in the Context of HIV/AIDS*, at paragraph 22

⁵⁰ *Ibid*, paragraph 23

do impact upon states to that extent. Pursuant to these resolutions, it formulated a set of 12 guidelines for states.

4.3.2 Extracts from Guidelines and Comments

Guideline 5 requires states to “enact or strengthen anti-discrimination and other protective law that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research....and provide for speedy and effective administrative and civil remedies.”

The Commission on Human Rights requested the Secretary General to prepare a report on these guidelines for consideration at its fifty-third session. In his report, the Secretary General suggested that guideline 5 should be interpreted so as to mean that “exemption for superannuation and life insurance should only relate to reasonable actuarial data, so that HIV/AIDS is not treated differently from analogous medical conditions.⁵¹”

Guideline 10 requires states to ensure that their governments and the private sector develop codes of conduct that translate human rights principles into codes of professional responsibility and practice with accompanying mechanisms for implementation and enforcement. In this regard, the Secretary General suggested that states should “require or encourage professional groups ... and other private sector industries (e.g. law, insurance) to develop and enforce their own codes of conduct addressing human rights issues in the context of HIV/AIDS. Relevant issues would include confidentiality, informed consent to testing, reducing vulnerability and discrimination and practical remedies for breach or misconduct.

Guideline 11 requests states to establish monitoring and enforcement mechanisms to guarantee protection of HIV – related human right, including those of people living with HIV/AIDS, their families and communities.

4.3.3 ILO Code of Practice

In addition to the above (non-binding guidelines) is an ILO code of practice on HIV/AIDS and the world of work. The 32 page document begins with a set of key principles of which non-discrimination comes second to the recognition of HIV/AIDS as a workplace issue. They suggest that the stigmatisation and discriminatory⁵² practices inhibits efforts aimed at promoting HIV/AIDS prevention.

⁵¹ See *Report of the Secretary General on HIV/AIDS and Human Rights* at page 26

⁵² See *ILO Code of Practice on HIV/AIDS and the World of Work* at page 3

With specific regard to testing, they suggest that testing should be prohibited for insurance purposes. “Insurance companies should not require HIV testing before agreeing to provide coverage for a given workplace. They may base their cost and revenue estimates and their actuarial calculations on available epidemiological data for the general population.” In addition, they suggest that employers should not facilitate any testing for insurance purposes and all information that they already have should remain confidential.”⁵³

With respect to benefits and social security coverage, they suggest that governments, employers and worker’s organisations should ensure that people living with HIV/AIDS are treated “no less favourably” than workers with other serious illnesses, and that their families are not excluded from the full protection and benefits of social security programmes.⁵⁴

4.3.4 Lessons Learned from the Jurisprudence of the HRC

A cursory study of the jurisprudence of the HRC demonstrates the strategic advantage in addressing an issue from the angle of a violation of the right to equal treatment before the law and the basic principle of non discrimination which forms the cornerstone of international human rights law⁵⁵.

In the social security cases against the Netherlands⁵⁶, the authors of the communications adopted a strategy which said simply that while it might not be stated that everyone has an equal right to social security and that there should be no differentiation, it can certainly be argued that differentiation on the grounds of the status of “breadwinner” in the family effectively placed women at an unfair disadvantage and consequently, the HRC found the relevant provisions in the laws of the Netherlands to be in violation of Article 26 of the CCPR.⁵⁷

Similarly in a case of compensation with respect to restitution of private property post the Second World War dispossession of Jewish people and the further dispossession under the communist regime in Czechoslovakia were found to be in violation of article 26. A study of the case will demonstrate the effectiveness of the legal strategy in terms of which it was not the right to property that was argued, as there is no such right enshrined in the CCPR but rather the right to equal treatment before the law which resulted in the success in this instance.⁵⁸

⁵³ Ibid at page 15

⁵⁴ Ibid at page 17

⁵⁵ G. Alfredsson and A. Eide (ed): *The Universal Declaration of Human Rights, A Common Standard of Achievement*, pages 170-177

⁵⁶ Ibid at pages 170 - 174

⁵⁷ See *F.H Zwaan de Vries v the Netherlands*, Communication 182/1984

⁵⁸ See *Simunek et al v Czech Republic*, Communication 516/1992

It must be noted that while this is not a case that addresses the right to social security per se, the principles outlined are instructive nevertheless. The right claimed is indeed not the right to life insurance for families and care givers of people living with HIV/AIDS or the right of people living with HIV/AIDS to life insurance in and of itself. But rather the argument that is being developed is that the life insurance industry discriminates against people who are living with HIV/AIDS and their families and care givers against the provisions of Article 26 of the CCPR, Article 2 and specifically paragraph e) of the CEDAW, Article 2 of the CRC and Article 2 of the CERD⁵⁹.

4.3.5 Limitations and Restrictions

Under international human rights law, states may impose restrictions on some rights under narrowly defined circumstances. The Human Rights Committee stated in its General Comment on Non-Discrimination that: “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”⁶⁰

The test was outlined more clearly in the Secretary General’s report where he stated that: “In order for restrictions on human rights to be legitimate, the State must establish that the restriction is: a) Provided for and carried out in accordance with the law; b) Based on a legitimate interest; and c) Proportional to that interest and constituting the least intrusive and least restrictive measure available and actually achieving that interest in a democratic society.”⁶¹

4.3.6 Principles Applicable to Corporations (Private Sector)

As stated above, both domestic and international human rights law instruments include a level of horizontal application. Over and above that, at the level of what might be viewed as “extremely soft law” certain non binding guidelines have evolved to direct the conduct of business within a human rights framework. The rationale for these guidelines are found both in the realm of sound business practice impacting directly on the proverbial bottom line, and in the normative realm of philanthropy with a view to building a more just society. The United Nations High Commissioner for Human Rights listed eight benefits to companies that actively pursue respect for human rights principles. They are: 1) ensure compliance with local and international laws; 2) satisfy consumer concerns; 3) promote stable legal environment; 4) build corporate community goodwill; 5) aid in the selection

⁵⁹ See generally G. Melander and G. Alfredsson (ed): *The Raoul Wallenberg Compilation of Human Rights Instruments*

⁶⁰ See *General Comment 18(37)* at paragraph 13

⁶¹ See *Secretary General’s Report on HIV/AIDS and Human Rights* at page 12

of ethical, well-managed and reliable business partners; 6) aid in producing a predictable, stable and productive business enterprise; 7) keep markets open; and 8) increase worker productivity and retention.⁶²

There is a growing recognition within the corporate sector that in order for business to prosper a stable environment is required and for such a stable and predictable environment to emerge, respect for human rights is paramount⁶³. Consequently, at both a domestic and international level, several initiatives are underway to ensure public private partnership and co-operation⁶⁴.

However, despite these broad principles, and the specifically binding principle of non-discrimination, the profit factor often super cedes basic human rights principles. In the case described above, insurance companies came together and made a decision to adopt a blatantly discriminatory practice which will fail any limitation test both at an international and a domestic level.

The situation at an international level is even more dire as the practice differs from North to South. A cursory appraisal of the practice demonstrates a disparity in policy where for instance in the US companies develop products to assist those who are caring for someone who is terminally ill by ‘accelerating benefits’.⁶⁵ While in the South the main thrust is to exclude cover in cases of HIV/AIDS related illnesses and deaths.

In summary then, the principles of international human rights law that have been drawn out in this case relate to:

- the application and interpretation of non-discrimination to include non-discrimination on the basis on health status including HIV/AIDS status;
- discrimination in terms of international human rights law against people living with HIV/AIDS is not permissible ;
- State taking positive action by enacting laws and creating an environment within which non-discrimination principles outline above are respected, promoted, protected and enforced;
- States reporting on the extent to which they have achieved certain benchmarks within this context;
- States ensuring that the legal framework includes private sector adherence to the principle of non-discrimination, with sanctions for non-compliance; and
- International solidarity and acknowledgment of the racial, gender and economic consequences of discrimination and stigmatisation of people on the basis of their HIV/AIDS status.

⁶² See *Draft Universal Human Rights Guidelines for Companies* at page 2

⁶³ For more information about these initiative see links to business and human rights at www.rwi.lu.se

⁶⁴ Ibid

⁶⁵ See *CDC Fact Sheet Viatical Statements*, Federal Trade Commission at page 1

4.4 Alternative/Additional Strategies

The South African constitutional framework and jurisprudence, coupled with the activism of non-governmental organisations around HIV/AIDS creates a fertile environment for the domestication of international human rights law standards. While avoiding the details for the purpose of brevity, a quick scan of decisions of the Constitutional Court demonstrate the extent to which account is taken of international human rights norms and standards, particularly as it relates to socio-economic rights. A case in point is one which addresses the right to access to housing where the court examined the concepts developed in international law to determine the minimum core in casu⁶⁶.

4.4.1 Domestication of International and Regional Human Rights Standards

Consequently, a first additional strategy in this case will be to complement the argument on unfair discrimination by citing South Africa's obligations in terms not only of its Constitution, but also in terms of the several international human rights instruments that it has ratified. In this context, CCPR, CEDAW, CERD and CRC are of particular importance.

While not discussed particularly in the section above, South Africa's obligations under the regional instruments should also be cited, particularly relating to the rights of the child and the non-discrimination clauses under the ACHPR.

4.4.2 Regional Structures – Opportunities and Constraints

In view of the stage at which the case is currently, the use of the African Commission would be premature as the communication would likely to be declared inadmissible on the grounds of non-exhaustion of domestic remedies. Moreover, since the impact sought is at a global level in that the parent corporations that would be affected are based in the developed world, it is a particularly inappropriate forum.

Over and above the legal constraints the more important strategic political constraint of this forum is the policy of several African states regarding HIV/AIDS, the embarrassment factor that might arise from a decision against South Africa, might not be such as to encourage changes in policy and legal framework as South Africa's policy might fade when compared to some other countries in the region that adopt clear discriminatory practices.

⁶⁶ See *Grootboom and others v Government of RSA and others* 2000 (3) BCLR 277 C

It must be noted that for a strategy to succeed in international law, the use of “peer pressure” or the pressure to conform to international standards depends largely on the extent of embarrassment that a state might feel as a result of an adverse decision against them.

4.4.3 International Institutions – Opportunities and Constraints

It is at the international level, however, that certain concurrent opportunities seem to present themselves. Firstly, it is important to rule out the possibility of an individual complaint to the HRC as one of the main criteria for admissibility would not have been met, namely exhaustion of local remedies.

However, the state reporting obligations include observations relating to the human rights of people living with HIV/AIDS. Consequently, the team should investigate the time periods of forthcoming reports due by South Africa and ensure that shadow reports which cover the inadequate legal environment which allows for unfair discrimination by insurance companies of people living with HIV/AIDS and their families and care givers.

A further strategic approach that might be used is one before the CRC in terms of which AIDS orphans are seen to be the victims of this discriminatory practice. It has become an issue of international concern and is likely to be angle that will succeed in generating a great deal of goodwill within the international community. It must be noted however, that while this is not the circumstance of the case at hand, an analysis of the practice clearly results in this type of conclusion and the other cases ought to be studied to see whether children are cited as beneficiaries in insurance policies, and if not, such a test case might be well worth developing.

4.4.4 Advocacy Strategies Outside of Formal Legal Remedies

Unfortunately, the formal remedies are limited as described above. However, a great deal of pressure can be applied at the informal advocacy level.

In the first instance the Global Compact, ILO and UNAIDS convene world wide multi stakeholder dialogues on HIV/AIDS in the workplace. An example is the forum that was held on 12 – 13 May 2003 in Geneva⁶⁷. The legal team ought to have ensured that a statement was prepared and

⁶⁷ For information about this and other such gatherings see www.unglobalcompact.org

submitted to this forum which would set out the discriminatory practice of insurance companies, raising the systemic causes and the consequences.

In this regard, emphasis ought to be placed on the impact of such discriminatory practices on AIDS orphans as beneficiaries of life insurance policies. Even though this is not the circumstance in the current case, the practice could result in that category of the most vulnerable group in society being prevented from receiving the full benefits from policies that their parents might have taken in their interest. This was alluded to above.

This type of approach might form the foundation for an intensive advocacy initiative that addresses the larger issues raised by this case and not only the fact pattern of the case. A media advocacy component is essential to expose the practice and generate the ill will and consumer disgruntlement that are the ultimate push factors with business.

In addition, the State's neglect of this area should also be exposed as part of its generally limp policy as it relates to HIV/AIDS in the recent past.

The team should use the mechanisms developed to address the human rights standards and business practice issues both within South Africa and at a global level. For example, the Life Officer's Association should be addressed directly for an explanation of their policy thereby developing the much needed paper trail that could be used in the advocacy strategy. The parent companies, particularly Anglo American ought to also be addressed directly on the subject.

While this dialogue develops, the team should be researching alternatives as they have been developed in other countries to address the life insurance issue comprehensively and holistically (as Chaskalson P stated⁶⁸) but also in a non-discriminatory manner.

It must be noted that this issue raises substantial emotion and anger that fuels the energy behind a full frontal attack on the industry. However, as may be gleaned from the work around human rights and business at both a global and domestic level, it is through constructive dialogue that solutions are found. It is suggested that the team develop the negotiation power required through the advocacy strategies, to create a balance and an enabling environment for dialogue. However, once that playing field is levelled, the emphasis should be placed on the dialogue as it might lead to many other ancillary gains in the field of adherence to human rights principles by business within and outside of the context of HIV/AIDS.

⁶⁸ See Grootboom Case cited above under footnote 66

4.5 Preliminary Findings

HIV/AIDS presents a challenge which appears at first glance to be insurmountable. However, when taken in smaller pieces, when compared with similar “dread” diseases of the past, solutions are not as distant.

At a global level, though, the disparity in both the prevalence levels and the availability of treatment, care and support result in huge disparities. More importantly, they result in the solidification of racial and gender stereotypes. While not the subject of this paper, they emerge as part of the concluding remarks simply because the approach suggested by this paper is an approach that challenges such stereotypes and the manifestation in the huge imbalances of power, both economic and political.

The Campus Law Clinic, despite being a relatively small university based law clinic could have tapped into resources that exist at a domestic, regional and international level to increase the impact of its work. Currently, it is actively involved in HIV/AIDS networks within SA. However, it could have expanded that capacity to include international players. Unfortunately, it was unable to do so, despite having received opinions and documents detailing the strategic approach. Consequently, the finding is that as it is currently constituted and structured, it does not have the institutional capacity to achieve its full potential. With the support of the IHRLC suggested in this paper, it however could reach that potential by adopting a strategy that includes international and regional standards and that will hopefully benefit people living with HIV/AIDS and their families and care givers in the entire developing world where such disparities exist.

5 Intellectual Property, Sustainable Development and Human Rights

5.1 Schools of thought⁶⁹

The concept of intellectual property has become synonymous with development and progress. It has been suggested that the rate of economic progress and development is greatly influenced by the IP regime within a country. In other words an “effective” IP regime could result in increased growth and development, through technology transfer, foreign direct investment and building innovation within the country. This idea is premised upon the notion that the primary goal of an IP regime or framework is to promote innovation and ideas. It assumes that knowledge and ideas emerge out of an incentive based framework and if human beings know that they have better chances of being financially rewarded for good ideas, they will think them up, experiment and create. Consequently society will systematically evolve into a more efficient and economically developed institution. If each country had such a system in place, then one by one each will develop and ultimately the world we live in will so too evolve and develop exponentially.

The proponents of this school believe that one cause of the discrepancy between the developed and developing world is the lack of incentive in the developing world to protect and promote intellectual property.

On the other hand, a school of thought suggests that far from resulting in development, far from being driven by development priorities, IP systems are designed and implemented to benefit a small minority in the world. But they go further to suggest that the system is designed to promote rampant theft of ideas, processes and products that they have had little or nothing to add to. They go on to suggest that the IP regime has been created and designed by a small group of international companies with the backing of the big developed states to secure monopoly over knowledge, ideas, and consequently over both economic and natural resources the world over. This school views the open, free market system that currently exists as one which results in the wealth of the world being concentrated in the hands of a few large corporations at the expense of poor people both within developed states and within developing states.

⁶⁹ For a tabular analysis of the two schools see WIPO and UNHCHR: *Intellectual Property and Human Rights* at pages 85-86

5.2 The Middle Way

This paper will continue the discourse that has begun with the Human Rights Commission, the Economic and Social Council, UNDP and other international and national NGO's⁷⁰. It will seek to find a middle way. One which enhances development and works toward a system that creates opportunities for worldwide development. A movement away from dependency toward mutual interdependence where society recognises that the chain is only as strong as the weakest link.

This paper will assume knowledge of the content of certain aspects of the legal framework involved and instead present an analysis from a socio-political context. It will address the challenges presented and suggest strategies. While the village we live in is large and stratified along many economic, social and political lines, in view of the fact that the author of this paper is the director of a university based law clinic, it will also suggest strategies that might be implemented at that level of the village. The idea being to develop a critical mass of university based law clinics that help redress imbalances that have resulted and work toward a more equitable situation through advocacy and direct representation and through teaching law students in a socially relevant manner thus creating a cadre of lawyers committed to working toward social justice even within the field of intellectual property.

5.3 Case Study of the Campus Law Clinic

The section of the paper is structured in such a manner that actual cases of the Campus Law Clinic's Small Medium and Micro Enterprise Project are re-evaluated and new creative approaches are suggested to both enhance the IP regime, its implementation and social and economic development within the South African context.

The SMME project is meant to provide support to: the landless who have recently acquired land and commence using it for commercial purposes, homeless who have recently acquired homes but need to engage in business enterprises to enable them to meet monthly bond repayments, survivors of domestic violence whose only ticket out of the cycle of abuse is a small business that might give them the economic freedom to walk out of the trap they find themselves in, children at risk with the law who turn to crime out of economic desperation but who are enterprising and with some support could begin a micro business and break out of the intricate web of crime, children and adults who are managing households where HIV/AIDS has claimed the life of the breadwinners who could also work in micro

⁷⁰ See generally www.unhchr.ch and www.southcentre.org

enterprise to then support themselves and their families. In this manner, it would be integrated into the activities of the clinic⁷¹.

5.3.1 Background Information

During the first phases of this project, the primary clients were members of organisations of SMME's. They ran micro and survivalist enterprises from premises established by development bodies set up during the apartheid era. However, once the democratic government was appointed, all these institutions were in the process of transformation. The clinic represented two such organisations, namely, the KwaDabeka Tenants Association, comprised of some 20-25 entrepreneurs who operated their business from a hive in a township outside Durban, and the KwaZulu Natal SMME Association, that represented almost 700 entrepreneurs in the entire province who were in a similar position as the KwaDabeka tenants⁷².

These cases, threw up opportunities for learning and creative representation of clients. They started out as being simple issues of arrear rental cases, however, once the problem was investigated deeply, it emerged that the root causes were the policy and activities of the organisations set up to assist in SMME Development, i.e. the Small Business Development Corporation and the KwaZulu Finance Corporation. These institutions were slow to change and resisted change. They also appeared to be stuck in an inability to find creative solutions to the problems they were faced with.

Through negotiation and consequently dialogue, we were able to map out a solution that suited all of our needs. The arrear rental issues were written off and new approaches were developed to ensure that the entrepreneurs were able to do business and consequently afford to pay rent. It is in this context that one client's innovation, when reflected upon threw up both the opportunities and constraints within the IP framework as it relates to sustainable development.

The client decided to change his line of business after doing an assessment of the area, and instead used his small premises to screen videos at a fee. In other words he operated a make shift cinema. He sold sodas and hot dogs, set up some benches and welcomed children who returned from school and needed to be entertained while their parents worked. He also operated it on weekends, in view of the fact that there were no cinemas close enough to this township. Over and above that the cost of watching a movie at a cinema is unaffordable to the general community he serves. Consequently, he provided much needed entertainment, made a good living from it and infringed basic laws of copyright at the same time. In South Africa, though, his story was hailed as a success story and reported in the business section of the newspapers as a creative entrepreneur.

⁷¹ *Report of Transition Process 2003, CLC*

⁷² *Report of the SMME Project 2003, CLC*

Such examples led me to consider how the system could be used to assist people like this and thereby work toward sustainable development while at the same time developing greater respect for and adherence to key IP principles.

5.4 Background to IP in South Africa

South Africa was recently on the US' watch list. A list developed to monitor and take punitive measures against countries based on their respect of rights to trademarks and intellectual property. It has however been removed from that list as a result of some steps it has taken to prove that it does indeed take the issue of IPR's seriously.⁷³ These steps include being a signatory to the Paris Convention on Patents, Trademarks and Designs as well as to the Berne Convention on Copyright. In addition, its own Trademark Act 194 of 1993 broadens the types of marks which can be registered, increases the scope of infringement protection and strengthens the remedies in the event of infringement. There is a clearer recognition of trademarks as valuable commercial assets and relaxation of the registered user which existed.

In 1993, it also promulgated the Designs Act 195 which provides separate registration protection for novel and original aesthetic designs and functional designs which are new.⁷⁴ In addition, the new category of computer programmes is viewed as new and separate, and also enjoys copyright protection. Since, SA's trademark law has historically been based on the laws and procedures of the UK, similar principles are applied in SA. Foreign investors were particularly interested in the provision in the 1993 Act which introduced protection of famous foreign trademarks.

One of the issues that probably played a decisive role in the US decision to remove SA from its watch list is the recent decision of the Supreme Court of Appeals in the *Mc Donald's* case⁷⁵. In terms of Section 35 (3) of the 1993 Act, the proprietor of a trademark, which is entitled to protection under the Paris Convention as a well-known trademark, is entitled to restrain the use of a trademark which constitutes, or the essential part of which constitutes, a reproduction, imitation, or translation of the well-known trademark in relation to goods or services in respect of which the trademark is well-known and where the use is likely to cause deception or confusion.

It has been accepted that this section was intended to provide a practical solution to the problems of foreign business people whose marks are known in SA but who do not have a business there. The *Mc Donald's* case has clarified that for a mark to be held to be well known in SA, it must be shown that such a mark is well known to persons interested in the goods or

⁷³ See www.bisnetworld.net/bisnet/countries/southafrica18htm

⁷⁴ *Ibid*

⁷⁵ *McDonalds Corporation v Joburgers Drive-Inn Restaurants (Pty) Ltd & another* 1997 (1) SA 1 A

services to which the mark relates. Hence, it is necessary to show that sufficient persons know the trademark well enough to entitle it to protection against deception or confusion and that the degree of knowledge which is required is similar to that protected in the existing law.

In the past the complaint has been that while South Africa's laws and procedures conform with most industrialised nations, it falls short when it comes to implementation. However, according to a recent profile of the IPR in SA, it was noted that the country affords a good legislative framework and at the same time, its business community is making an honest commitment to moving away from misappropriation of foreign trademarks.

To this extent, South Africa might be seen as a fairly compliant country, deserving of foreign investment. However, it has also challenged certain principles of IP insofar as those principles impeded its plans to for instance eradicate poverty and more specifically provide treatment to those living with HIV/AIDS. A well known case that has been written about extensively relates to the pharmaceutical companies challenging the SA government, specifically the minister of health⁷⁶. This case was not only fought in the courts, but also in the streets and in boardrooms. The turning point was when the Treatment Action Campaign, a leading non-governmental organisation was allowed to participate as *amicus curiae* in the case despite the opposition from the pharmaceutical companies. Apart from well drafted and well developed legal strategy used in the court, the ngo organised people to protest in a manner similar to the anti apartheid struggle. All of the pressure combined, resulted in a withdrawal of the case by the pharmaceutical companies and an agreement to establish a joint working committee to draft regulations to govern the Medicines Act. Effectively, South Africa, inspired by the success stories of Brazil and India, fought and won the battle to provide affordable medicines to its people. It placed the interest of the public to affordable health care before the interests of the private sector to profit and reward for its inventive work. This approach has received accolades in the international community.

It is also important to note South Africa's strategic approach to negotiations related to the TRIPS agreement. An article in the Business report of August 2003, described the SA negotiating team's bold approach to ensure that not only its interests, but the interests of the developing world as a whole is taken into account when reaching agreement on keys issues of IP that have a direct impact on the potential of poorer countries to override patents and import essential generic medicines⁷⁷. In this instance, SA was not affected directly, as it already had a well developed policy and legislative framework to ensure that it was able to do this. In addition, it had its own well developed manufacturing capacity. However other countries, such as Lesotho, would not be in the same position and would benefit substantially

⁷⁶ *The Pharmaceuticals Manufacturing Association of SA and another v The President of RSA*, case no 4183/98, TPD. Relevant court documents can be found on www.tac.org.za

⁷⁷ Q. Way: *Trips deal may be struck this week*

if a deal was struck at Cancun, Mexico, to combat their own public health crisis.

It is within this context of a country that attempts to find a middle way between creating a sound policy and legislative environment to enable innovation and new inventors to be rewarded, while also ensuring that issues of poverty and sustainable development are not over-looked, that opportunities exist for allowing the IP system to evolve in a manner conducive to development and more importantly, in a manner that promotes sustainable development.

5.5 Intellectual Property and Sustainable Development

The Millennium Development goals recognise the importance of reducing poverty and hunger, improving health and education, and ensuring environmental sustainability. Accordingly, the international community has committed itself to reducing the proportion of people in poverty by half by 2015⁷⁸. How does the current IP regime or framework help or hinder this commitment.

The impact of the adverse consequences of globalization on the enjoyment of human rights is multidimensional; all aspects of human existence be they political, economic, social or cultural, are affected. The negative impact on one dimension of human rights, e.g. economic rights, necessarily has a domino effect on other rights. This reality reinforces the principle enunciated in the Vienna Declaration and Programme of Action (1993) that human rights are "universal, indivisible, interdependent and interrelated". International human rights obligations have to be viewed through the prism of this fundamental principle. The Charter of the United Nations recognizes the important linkages between the maintenance of international peace and security, the establishment of conditions of economic and social progress and development, and the promotion and protection of universal human rights. A singularly important development is the imposition by the Charter of a legal obligation on Member States to take joint and separate action in cooperation with the Organization to promote, *inter alia*, higher standards of living, full employment and conditions of economic and social progress and development, and universal respect for, and observance of, human rights. Action taken by Member States, either collectively or singly, to defeat this pledge is clearly a violation of the Charter, which under certain circumstances may amount to violations of principles of *jus cogens*.⁷⁹

⁷⁸ Report of the Commission on Intellectual Property Rights: *Integrating Intellectual Property Rights and Development* at page 1

⁷⁹ *Ibid*

The global IP architecture is comprised of multi lateral treaties, sub regional or regional treaties and bilateral treaties. All of these together make the framework within which IP rights are to be reviewed. At the multilateral level, by far the most controversial and at once most important treaty is agreement on Trade Related Aspects of Intellectual Property (TRIPS). In addition, at a multi lateral level three broad categories of treaties are of relevance in completing the IPR framework, viz, those designed to set standards, those designed to develop global protection systems and classification treaties. In the first category, treaties such as the Paris Convention for the Protection of Industrial Property of 1883, the 1886 Berne Convention for the Protection of Literary and Artistic Works and the 1961 Rome Convention for the Protection of performers, Producers of Phonograms and Broadcasting Organizations⁸⁰.

In the second category, 1970 Patent Cooperation Treaty and 1891 Madrid Agreement Concerning the International Registration of Trademarks facilitate filing or registering IPR's in more than one country. Finally, in the third category, an example of the 1971 Strasbourg Agreement Concerning the International Patent Classification “organises information concerning inventions, trademarks and industrial designs into indexed, manageable structures for easy retrieval.”⁸¹

A cursory glance at the trends in the IP protection patterns reveal a tendency to widen the scope of protectable subject matter, creation of new rights and greater standardisation with a move toward setting higher minimum standards.

The official goals of the TRIPS Agreement are found in Article 7 and states that: “the protection and enforcement of intellectual property should:

- Contribute to the promotion of technological innovation, and
- To the transfer and dissemination of technology, and be:
- to the mutual advantage of producers and users of technological knowledge;
- in a manner conducive to social and economic welfare
- to a balance of rights and obligations.

On the face of it then, the stated goal of the agreement is to promote social and economic development. However, critics suggest that the agreement in effect does the opposite as it places onerous conditions on developing countries that are unable to meet them in the current context. In fact some critics go as far as saying that the current IP regime as a whole can be compared to the colonial period where industrial sea faring nations through navigators plundered what are now developing countries.⁸² Then it was

⁸⁰ www.wipo.int/treaties/index.html

⁸¹ Ibid

⁸² V. Shiva: *Biopiracy, The Plunder of Nature and Knowledge*

land. Now it is through intellectual property, international trade and globalisation.

Between those two extremes there exists a middle ground which looks at the world as a whole that has resources and ideas that can be shared. It suggests that if some intervention is made to affect the balance of power and provide indigenous people in developing countries with socially responsible lawyers who are committed to ideas and values of social justice and who seek creative win-win solutions, through such schemes as benefit sharing, the system can work to realise that lofty goal of social and economic empowerment.

To return to the issue with this in mind of IPR's and sustainable development cut across each other or meet specifically in the following fields:

- Public Health, Education, Food Security, and Agriculture;
- Biotechnology;
- Information and Communication Technology;
- Technology Transfer and Foreign Direct Investment; and
- Traditional Knowledge.

5.5.1 Public Health, Education, Food Security and Agriculture

At the outset it must be stated that adequate access to these services is affected by a number of factors. IPR's are only one such issue. However, the adverse effects of the IP framework need to be addressed to ensure that they are remedied in a manner such that all stakeholders and beneficiaries needs are taken into account.

With that in mind, the current circumstance could result in a person dying because they could not afford a medicine today, that they could easily have bought yesterday, because TRIPS was enforced today. How is this possible? Pharmaceutical companies spend large sums of money on research and development seeking cures and remedies for many ailments. In recent times the major challenge being to address the HIV/AIDS pandemic. Once they develop a drug that could for instance prevent mother to child transmission of the virus or address symptomatic issues that arise, they register a patent and sell it to developing countries on a market related basis. These countries that are hit the hardest by the pandemic are not allowed to produce generic and cheaper versions of the drugs themselves and are often forced to buy them. However, some countries, such as Brazil, South Africa and India have challenged the status quo by introducing laws to enable them to get around this situation. In South Africa, the pharmaceutical companies challenged that law as was described earlier. However, under sever pressure from non governmental organisations and the media, they withdrew their challenge

and sought a negotiated settlement that would take the countries health care needs into account.

Furthermore, studies of R&D expenditure in this sector reveal that only 4.3 % is spent on health problems that affect the poor⁸³.

As regards education, while it deals more with copyright issues than industrial property, for the purposes of demonstrating the link between IP and sustainable development some mention is necessary here. Developing countries are often dependant on foreign publications and publishing houses. One method that has been used to get around the high prices of materials has been to couch the unauthorised copying that takes place within the realm of copyright law that allows such activity, within certain limits, if it is for educational or non commercial purposes (fair use or fair dealing) However, it is feared that as copyright laws are becoming tighter, these concessions might be lost.

A more basic need in developing countries is food. Poverty levels have a direct bearing both the developing countries capacity to produce food and on its capacity to ensure that food is affordable to satisfy basic nutritional requirements. The connection with IP relates to plant breeding, plant breeder's rights and farmer's rights. The nub of the issue is whether through the application and enforcement of the International Convention for the Protection of New Varieties of Plants (UPOV), basic food security might be undermined. It has been suggested that this might happen first by encouraging the cultivation of a narrow range of genetically uniform crops including non-food cash crops resulting in possibly nutritionally poor diets and crops being more vulnerable to outbreaks of devastating diseases. In addition, if farmers are unable to acquire seeds without payment to breeders, they are likely to become further impoverished. At the grass roots level prevention of the swapping of seed across the fence, and instead requiring farmers to pay plant breeders for the seeds will adversely affect strategies developed to co-exist that have grown over many years.

One consequence of TRIPS is that WTO member states, including developing countries must provide IP protection for plant varieties either in the form of patent protection or through an effective method developed in that country (*sui generis*).⁸⁴

5.5.2 Biotechnology

There are many moral and ethical issues involved in the debates surrounding the developments in biotechnology. The United States Office of

⁸³ World Health Organisation (1996) *Investing in Health Research and Development: Report of the Committee on health research relating to future intervention options*, WHO Geneva

⁸⁴ See Article 27 of the TRIPS Agreement

Technological Assessment (1989) defines biotechnology as including any technique that “uses living organisms (or part of organisms) to make or modify products, to improve plants or animals, or to develop micro organisms for specific use.”

To merely touch some of the issues, involved the case of Anand Chakravarty is a good starting point. He was granted a patent on the grounds that the micro organism was not a product of nature, but his invention and therefore patentable. Vandana Shiva describes the process he followed as simply taking three kinds of bacteria and transplanting them into a fourth. As he explained, he simply shuffled the genes, changing bacteria that already existed. She suggests that it was on very slippery grounds that the US Supreme Court confirmed the grant of the patent, as even the inventor acknowledged that he did not create new life but simply shifted genes⁸⁵.

Shiva goes on to say that when property rights to life-forms are claimed, it is on the basis of their being new, novel, not occurring in nature. But when it comes time for the “owners” to take responsibility for the consequences of releasing genetically modified organisms (GMO’s), suddenly the life forms are not new. They are natural, and hence safe. The issue of bio safety is treated as unnecessary⁸⁶.

From the brief account above, it is clear that the ethical issue of who creates life forms and whether these are in fact new life forms created by human power on the one hand, and on the other, if they are new life forms whether it is the prerogative of human beings to tamper in this field have all be suggested as being against basic human morality. In fact even the Dalai Lama has commented and suggested that he considers the idea of developing banks of cloned human beings to be used for organ replacement as appalling⁸⁷. Strong words from a usually very tolerant man.

More to the point of this essay, however, the implications for sustainable development lie more in the ecological impact of GMO’s on the lives of the poor. Furthermore, according to a study by the Swedish International Development Agency, developing countries have been divided into three categories regarding their scientific capabilities. The strong South includes such countries as India, Brazil, China and Mexico as they are moving into high technology fields. The medium South includes Indonesia, Argentina and Malaysia. The rest of the south belong to the category defined as weak and consequently are heavily dependant on the developed countries ‘as they were before colonialism’ as stated by M. R. Bhagavan of the Swedish International Development Cooperation Agency, Sida.

Consequently, advances in this field widen the gap between North and South and entrench the cycle of dependency.

⁸⁵ V. Shiva: *Biopiracy: The plunder of Nature and Knowledge* at page 19

⁸⁶ Ibid

⁸⁷ T. Gyatso, (His Holiness the Dalai Lama), *Ancient Wisdom, Modern World: Ethics for the New Millennium*, at pages 160-162

5.5.3 Information and Communication Technology

The internet provides access to information and knowledge at extremely low costs. However, access to it is limited in the developing world. Even though, as stated above, access to books and journals is also severely restricted due to inadequate resources on the one hand and unaffordable prices on the other. If access to the internet was facilitated through publishers, including on line publishers and soft ware companies reviewing pricing policy, the knowledge gap could be reduced and furthermore, unauthorised copying might be reduced. The extension of free online access initiatives for developing countries to cover all academic journals is a good example of what could be done.

These suggestions are made due to the fact that very little innovation in this field takes place in most developing countries. Hence more attention is placed on access than innovation in this section.

The London based Commission on Intellectual Property Rights (the Commission) produced a report in September 2002 titled *Integration Intellectual Property Rights and Development Policy*. In it they suggest that developing countries and their donor partners should review policies for procurement of computer software, with a view to ensuring that options for using low cost and or open source software products are properly considered and their costs and benefits carefully evaluated. Further, they suggest that in order that software can be adapted to local needs, developing countries should ensure that their national copyright laws permit the reverse engineering of computer software programmes in ways that are consistent with relevant international treaties which they have signed⁸⁸.

Finally, they suggest that internet users in developing countries should be entitled to fair use rights such as making and distributing printed copies from electronic sources I reasonable numbers for educational and research purposes. They suggest an even more robust approach to suppliers who attempt to restrict fair use rights by contract provisions associated with the distribution of digital material, that such clauses should be treated as void.⁸⁹

Clearly, then there is close nexus between information technology and education. Read together, it is then evident that strong negotiation is required to ensure that fair use rights are not sacrificed and on the contrary are enforced in a robust manner.

⁸⁸ Commission on Intellectual Property: *Integrating Intellectual Property Rights and Development Policy*, at page 13

⁸⁹ *Ibid* at page 14

5.5.4 Traditional Knowledge

It is within this realm that most critics of intellectual property rights place their arguments against the entire framework as being simply a legal justification for bio-piracy and another form of colonisation. In fact even an article in the Economist opens its section on traditional knowledge thus: The most glaring conflict between rich and poor over intellectual property comes from the misappropriation of “traditional knowledge” – such as ancient herbal remedies that find their way into high priced western pharmaceuticals without the consent of, or compensation to, the people who have used them from generations⁹⁰.

The Commission suggests that there are several reasons for protecting and promoting traditional knowledge including the erosion of traditional lifestyles and cultures through external pressures, misappropriation, the preservation of biodiversity and the promotion of its use for development purposes. While some wish to conserve traditional knowledge, and protect it against commercial exploitation, others wish to ensure that it is exploited in an equitable manner for the benefit of its holders⁹¹.

The fact that traditional knowledge plays an important part in the global economy is a clear. However, it is virtually impossible to determine the monetary contribution it makes. One of the reasons for this is because traditional knowledge is often an essential component in the development of other products and also because most products derived from traditional knowledge do not enter the market place anyway. Moreover, the spiritual and cultural value cannot be estimated in monetary terms.

The situation is further complicated insofar as the ethos of sharing and communal ownership are the dominant modes of relationship to property among traditional societies. This was true of land and was unfortunately construed as there being no owner. Similarly, this is also true in the field of intellectual property where the subject of ownership is even less tangible. The process could be described as IP regulators and courts dealing with disputes hardly ever having any heed of customary law nor seeing any reason why they should do so. It is common knowledge that traditional knowledge that has been kept secret is generally treated as being the intellectual property of nobody in most countries. Therefore it can be freely used by anybody who acquires it. This has led to accusations of rampant misappropriation, a more polite word for theft.

How do such situations present themselves and how have they been dealt with in South Africa? An interesting presentation by Victoria Geingos and Mathambo Ngakaeaja representing the Working Group of Indigenous Minorities in Southern Africa (WIMSA) at the Second South-South Biopiracy Summit, refers to the case of traditional knowledge of the San. In

⁹⁰ www.economist.com, *Patently Problematic*, 12 September 2002

⁹¹ Commission on Intellectual Property: *Integrating Intellectual Property Rights and Development Policy*, at page 10

this situation a succulent called *Hoodia gordinia*⁹² had been collected for centuries by the SAN. In 2001, WIMSA discovered that the Council for Scientific Research (CSIR) based in Pretoria, SA had identified the active ingredient of *Hoodia*, registered the research on the *Hoodia* for patenting and submitted their findings to a pharmaceutical company without first consulting the San. With the assistance of their legal representative, the San entered into negotiations with CSIR as a result of which a memorandum of understanding has been produced which reflects a firm commitment to benefit sharing. It is cited as the first of its kind⁹³.

The Commission referred to above, has also made other tangible recommendations regarding traditional knowledge including but not limited to the strategy of ensuring that geographical sources of genetic resources from which the invention is derived are disclosed by law. Further, that patent officers pass such information on to the country concerned or to WIPO. With respect to geographical indications they suggest that organisations such as UNCTAD conduct further research to assess the benefits and costs to developing countries of the existing provisions under TRIPS, what role they might play in development and the costs and benefits of various proposals to extend geographical indications and establish a multilateral register⁹⁴.

Clearly the challenges posed in ensuring equitable treatment of traditional knowledge are vast. They range from issues of policy and the development of systems, whether they are sui generis or patent and copyright systems to afford greater protection, respect to holders of traditional knowledge while at the same time promoting it to ensure that all of humanity is able to benefit from the innovative ideas that are borne out of traditional knowledge. The challenges extend to such practical issues as establishing databases to catalogue traditional knowledge and making it mandatory for patent examiners to consult these databases across the globe.

At a more grassroots level, the question arises as to what remedies are available to traditional and indigenous communities when they suspect an infringement and misappropriation? Furthermore, most often traditional communities are unaware of infringements, how can they be informed and advised about them and offered options to address the issue? If they chose to challenge an infringement, who could assist them as the costs involved usually render such a challenge unaffordable and consequently a non starter?

⁹² This substance was used as a nutritional supplement to aide children who ate too much to eat less, to treat allergic reactions to eyes, severe stomach pain, and obese members of tribes used it to help them slim down.

⁹³ Paper presented at Second South-South Biopiracy Summit, 22-23 August 2002, Johannesburg, South Africa.

⁹⁴ Commission on Intellectual Property: *Integrating Intellectual Property Rights and Development Policy*, at page 12

5.6 Opportunities for University Based Law Clinics in South Africa

The first question is perhaps, how do the institutions and mechanisms of the United Nations address these issues? While the Charter based institutions have for instance commissioned studies, passed resolutions and established the link between international trade, globalisation and human rights, the treaty based bodies have been less proactive in this field. The most noteworthy intervention is that of the Committee on Economic Social and Cultural Rights. However, other treaty based bodies such as CEDAW, CERD, CRC and the HRC could play a more decisive role. They might need to be encouraged by NGO interventions and consequently develop a jurisprudence that is more dynamic in addressing these issues. Furthermore, UN specialised agencies such as United Nations Conference on Trade and Development (UNCTAD), the International Labour Organization (ILO) and the United Nations Development Programme (UNDP) are forums that are actively engaged in developing strategies to analyse and address these issues holistically.

While opportunities exist within the international framework, the client communities remain voiceless as these institutions are inaccessible to them. How then can the jurisprudence and policy develop with the clear and visible influence of these communities and their voices?

What then can be done to redress these imbalances and work toward greater equity? The institutions of university based law clinics are one such method. This paper suggests that if such an institution was established to focus specifically on IP, and have as its beneficiaries indigenous communities and small and micro enterprises, some steps will be taken to change that balance of power.

In tangible terms an institution that trains law students, graduates, and professionals while at the same time providing legal representation to those who cannot afford private lawyers could help in this field by, for instance, negotiating licence concessions for an entrepreneur as described above who screens videos in a make shift cinema, and then assist others in a similar situation. Further, it could represent indigenous communities whose traditional knowledge is being misappropriated to negotiate benefit sharing schemes. In fact it could go so far as assisting in the production of databases as it lays the foundation for this type of work and thereby assist in the process of ensuring that patent officers consult these databases before even registering patents on products.

Ultimately, these are low level grass roots interventions that slowly work toward changing the balance of power. Unfortunately, it is at this level that the injustice is felt most deeply and yet very little if any resources are directed there. Through the education and training component, a cadre of lawyers will emerge who are more committed to this type of work and could

enter the market with a greater ability and skill to represent such community's interests.

In summary then this type of institution could:

- Develop lawyers and professionals who practice IP within a social justice framework;
- Provide representation to communities to negotiate deals to ensure more equitable solutions where benefit sharing is the centre fold; and
- Place IPR's within a human rights and development orientated practice at a grassroots level.

The question that then arises is how this strategy could be implemented. It is suggested that South Africa as a country has modelled its democracy on power sharing and negotiation. During the early years of its new democracy it operated what was called a government of national unity which was a compromise solution reached to slowly work toward a transformed society based on equity and justice. These principles undermine a lot of the work of civil society and consequently it as a country provides a good starting context from which to grow. Consequently the tangible suggestion is that an Intellectual Property Clinic, that focuses on low income communities be established in South Africa to begin with and then grow from there. This pilot project could throw up lessons and ideas to refine the concept as it unfolds in other parts of the developing world.

Through partnerships at an international level among donors and international non-governmental organisations, such an institution could muster up the resources and skills to deliver a professional, competent service at low or no cost to low income communities thus making the type of challenge described above possible.

5.7 Preliminary Findings

The narrative above demonstrates the link between IP and sustainable development; it also throws up some of the challenges and possible points of intervention at macro policy level, both global and domestic. While analysing conditions at a global level, the paper focused more pointedly on the grassroots level interventions. It began on the premise that the divide between rich and poor results in power imbalances both within a country itself and then more broadly at the level of the global community between the north and south. Further, while substantial resources and interventions are made at the macro policy level, to directly affect and change the balance of power in ways that address the needs of people at grassroots level, that some grassroots intervention is necessary, beginning with university based law clinics that focus on providing legal services to people who cannot afford private lawyers in the field of intellectual property and human rights.

6 Opportunities

This section of the paper is intended to demonstrate the immense opportunity presented by the international and regional mechanisms. It at first focuses on what non-governmental organisations have done within Europe and Africa, thereafter it looks specifically at the regional system within Africa and how in its practice it creates space for creative strategies to address injustices and human rights abuses within the continent.

Thereafter, a general discussion on types of interventions that could be made by an IHRLC is followed by more specific attention to the specialised areas discussed above.

Finally a table is presented which provides, at a quick glance, the various international and regional mechanisms and how they could be used to address issues comprehensively.

6.1 Non-Governmental Organisational Interventions within Europe

It is nevertheless widely used in the developed world and more especially in Europe. For example, Amnesty International intervened in the case of *Chahal v UK* (1996) where a Sikh activist averred that he faced a real risk of being tortured or killed if he were deported to India. The government on the other hand argued that he had been involved in terrorist activities and was a risk to the national security of the United Kingdom.⁹⁵ It was found that the “principle applicant would be at risk of a violation of article 3 if returned to his country of origin, India”⁹⁶.

Also within the European context, a group of non-governmental organisations sometimes combined forces in their attempt to address issues, apply pressure and strengthen both their case and the chances of success. Examples of such collaboration are between Article 19 and Interights in the case of *Ott-Preminger-Institut v Austria* (1994). This case involved a satirical film found to be blasphemous. They also collaborated in the case of *Goodwin v UK* (1996) which concerned the right of journalists to protect their sources of information.⁹⁷

⁹⁵ E. Rekosh, K.A. Buchko, and V. Terzineva (ed): *Pursuing the Public Interest* at pages 153-154

⁹⁶ G.S. Goodwin-Gill: *The Refugee in International Law* at page 321

⁹⁷ See Rekosh et al at page 154

6.2 Non-Governmental Organisation Interventions in Africa

In Africa, the vast majority of communications before the ACHPR were either initiated by non-governmental organisations or was enhanced due to the participation of non-governmental organisations. To look specifically at the cases brought against Nigeria, almost all of the cases have been filed by non-governmental organisations. They have brought complaints on behalf of individual victims, as well as *actio popularis* complaints against specific laws for example.

One author suggests that “the NGO:s are also important for the Commission because they provide the Commission with cases to settle and thereby provide the Commission with the opportunity of building up its case law concerning the Charter. If there were no NGO:s, African or international, providing the Commission with communications, there would be very few cases before the Commission at all, and thus there would have been very few decisions by the Commission where it interprets and develops the provisions of the Charter. So far, one could say that the Commission is dependent on the NGO:s for its protective activities.”⁹⁸

6.3 Actio Popularis

More specifically, within the African regional system the established practice of the ACHPR to accept communications without the specific citation of one or more concrete victim as admissible, if all other requirements are met, provides non-governmental organisations with a wide window of opportunity to raise issues proactively. In some cases, only a segment of the communication constitutes an *actio popularis*, and in others the entire communication concerns an *actio popularis* i.e. where there is no concrete victim involved at all.

For example, in the case of the *Civil Liberties Organisation v Nigeria*, the complainant argued that the suspension by government of the Nigerian constitution, the ousting of the jurisdiction of the courts to review the legality of governmental decrees, and the nullification by government of any domestic effect of the Charter in Nigeria amounted to violations of Articles 7 and 26 of the Charter. The complaint was accepted as such by the Commission, despite no specific concrete victim being cited.⁹⁹

Indeed, Nigeria was eventually found guilty of the alleged violations which were described as “serious irregularities” by the ACHPR without any further specification as to the article in the Charter for which the irregularity

⁹⁸ I. Österdahl: *Implementing Human Rights in Africa* at page 163

⁹⁹ *Ibid* at pages 101-102

constituted a violation. There was no mention of any specified victims at all in the communication or in the decision itself.¹⁰⁰

6.4 Types of Activities that Non-Governmental Organisations could Undertake

It is important to note that non-governmental organisations have the opportunity to do at least the following within international and regional forums:

- Document particular violations;
- Monitor state compliance with recommendations of the international or regional body;
- Publish and disseminate educational materials about the standards of the mechanism;
- Conduct training workshops for state officials, legal professionals and activists about the developments within these bodies;
- Develop media strategies to publicise standards of the body; and
- Raise legal arguments domestically based on principles established by the international mechanism.¹⁰¹

Moreover, well developed legal arguments before the judicial and quasi judicial mechanisms could help shape the jurisprudence and consequently the practice of these institutions. In addition, through focused advocacy strategies, non-governmental organisations such as the one suggested could press for higher standards within these bodies.

6.5 Application within the Specialised Areas Proposed

Looking specifically at the focus areas suggested above, viz. access to justice for people living with HIV/AIDS and intellectual property, human rights and sustainable development, it is suggested that if an IHRLC were to, for instance, take up cases within the categories described below, it is likely to impact deeply within these fields and increase the potential for the balance of power to shift toward the under represented and indigent sections of the international community.

¹⁰⁰ Ibid at pages 101 –102

¹⁰¹ Rekosh et al at page 180

Intellectual Property, Human Rights and Sustainable Development

On a general level, cases should be sought where IP Rights, human rights and sustainable development cut across each other, for example conflicts with the right to health, education and food security on the one hand and economic and political development on the other. The following are some of the types of cases/issues that could be raised:

- Protection and equitable treatment of traditional knowledge within the IP framework;
- Access to affordable medication in respect of treatable poverty related diseases;
- Access to information and communication technology, specifically affordable software products for schools, libraries and other public educational facilities; and
- Representation of small and micro enterprises to implement IP Rights and ensure equitable use of the IPR system for economic growth and development.

Access to Justice for people living with HIV/AIDS

Non-discrimination and equality rights cover a wide spectrum of scenarios. While not limited to the list below, it is suggested that the following cases/issues could be dealt with:

- Discrimination in the workplace;
- Compulsory testing for insurance purposes;
- Discrimination with respect to insurance benefits and social security;
- Discrimination in housing allocation;
- Discrimination within the political framework;
- Discrimination in schools and within the education system broadly;
- Access to treatment, care and support;
- Discrimination in respect of child headed households and AIDS orphans, both in respect of the state and the private sector not fulfilling treaty obligations through inadequate responses to the challenge, and in respect of performing actions which discriminate against children living with HIV/AIDS and orphaned as a result of HIV/AIDS, for example, the private sector's refusal to pay out on life insurance policies where the beneficiaries are AIDS orphans, or shutting down of homes established to care and support AIDS orphans; and
- Prevention and addressing situations of torture, cruel, inhuman and degrading treatment of people living with HIV/AIDS.

6.6 International and Regional Mechanisms

What follows is a brief overview of some of the mechanisms that could be used within the international and regional arena and some ideas regarding types of activities that may be undertaken.

The legal team within the IHRLC will need to analyse the case and the relevant options and depending on the speed at which it needs a decision, or the type of outcome required it might choose one or more of the institutions listed below. In making this decision, the team should be mindful of the fact that it is not permitted as a general principle to use several mechanisms at the same time. Although, if a judicial or quasi-judicial mechanism is selected, the principle mentioned above does not preclude the team from engaging in advocacy strategies in the political arena concomitantly. In fact, it is recommended below that such an approach be pursued to ensure maximum impact.

ACTIVITY	AFRICA				UNITED NATIONS									
	<i>Judicial and Quasi Judicial Mechanisms</i>		<i>Political Mechanisms</i>		<i>Charter-based Mechanisms</i>		<i>Treaty-based Mechanisms</i>						<i>Office of Secretary General</i>	
	ACHPR	AFCHPR	AU	NEPAD	1503	Rapporteur	ICCPR	ICESCR	CERD	CEDAW	CAT	CRC	GC	MDG
File Shadow Reports	X		X	X		X	X	X	X	X	X	X	X	X
Attend meetings/hearings	X	X	X	X			X	X	X	X	X	X	X	X
Meet during on-site visits						X				X	X			
Individual Complaints	X	X					X		X	X	X			
File <i>amicus briefs</i>	X	X					X		X	X	X			
File collective complaints	X	X												
Pure <i>Actio Popularis</i>	X													

7 Constraints

While the international and regional framework provides many opportunities, a realistic analysis throws up challenges that a public interest advocate or a human rights activist might encounter. Looked at from different perspectives, the range of constraints are vast. However, for the purposes of this paper, the following have been identified as particularly relevant. Where possible, they will be analysed to throw up methods for overcoming them.

7.1 The “Clawback” Clauses

Emerging from Anglo-Saxon literature, “clawback” clauses entitle a state to restrict the granted rights to the extent permitted by domestic law. This is a strategy used by many states within the international and regional community to on the one hand become a party to basic human rights treaties, while on the other hand entering a reservation in some instances, or as in the case of the African Charter, ensuring that each right carries with it these limitations.

Consequently, in the African Charter, no human right carries an absolute guarantee. Some analysts suggest that this was the compromise necessary to ensure that all countries within the region became parties to the Charter. This compromise has the potential to render the Charter and the mechanisms established for its enforcement powerless.¹⁰²

However, when seized with the issue, the ACHPR took a firm stand. In the case of *Amnesty International v Zambia (1999)*. In this case Zambia invoked the limitation clause attached to the right of every individual to leave and return to his country under Article 12 (2), which reads as follows: “This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health and morality.”¹⁰³

The Commission found as follows:

“The Commission is of the view that the ‘claw-back’ clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. Secondly, the rules of natural justice must apply. Among these are the *audi alteram partem* rule, the right to be heard, the right to access to the Court. The Court in Zambia, in Banda’s case, failed to examine the basis of administrative action and

¹⁰² F. Ouguerouz: *The African Charter in Human and Peoples’ Rights*, at page 429

¹⁰³ *Ibid* at page 95

as such, it has not been proved that the deportees were indeed a danger to law and order. In any event the suggestion that they were ‘likely’ to be a danger was vague and not proved. It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the State to prove that it is justified to resort to the limitation clause. The Commission should act bearing in mind the provisions of Articles 61 and 62 of the Charter.”¹⁰⁴

This stance not only demonstrates the Commissions determine to interpret the clause flexibly and places the onus on the state to prove that it is justified to invoke the limitation.

Consequently, while this threatened the effectiveness of the ACHPR, their stance has minimised that threat and still provides human rights activists with a forum to address issues of human rights violations.

7.2 Enforcement of Decisions

As a general principle, enforcement of decisions before international and regional forums has posed substantial challenges. Mostly because even if the tribunal itself, judicial or quasi judicial, considers its decisions binding, unless the state parties respect the decision and in practice implement them, enforcement is primarily through diplomatic intervention, embarrassment and other informal sanctions and activism that could be engaged in.

However, within regional systems, such as the European Court of Human Rights, the threat of sanctions has laid the foundation for greater respect for and enforcement of decisions. It is expected that since the African Court of Human Rights also has this possibility through the mechanism of the African Union, such an outcome might well find itself materialising within this regional system as well.

While the above is acknowledged as a general principle, it must also be noted that ACHPR seems to look upon itself as a constitutional court, as suggested by one scholar. She makes this statement based on her study of decisions of the ACHPR. She argues that even though the Commission considers its decisions binding, they are not formally binding as it is not possible to execute it in the state concerned unless that state agrees to execute the decision voluntarily.¹⁰⁵

The ACHPR has used the state reporting mechanism to check on whether concerned states are complying with or have complied with their decisions.¹⁰⁶

¹⁰⁴ Ibid at pages 95-96

¹⁰⁵ I. Österdahl: *Implementing Human Rights in Africa* at page 54

¹⁰⁶ Ibid at page 26

The challenge that emerges for non-governmental organisations in this regard is to ensure that their intervention goes beyond the handing down of a decision, to monitoring compliance with it and if necessary, developing advocacy strategies including media advocacy to apply pressure on states concerned to enforce these decisions.

8 Specific Strategies that could be Used

What follows is by no means a suggested chronological list or a comprehensive and complete list. Instead, it is a random list in the form of a brainstorm upon which a legal team ought to build and strategise, giving priority to some aspects over others as the circumstances dictate.

- Once a statement is obtained from the client, analyse it to identify the systemic issues that emerge, looking specifically for issues that impact on a class of people;
- Identify the domestic legal principles that govern the issues;
- Identify the regional and international legal principles that govern;
- See which relevant conventions have been ratified by the state;
- Look for whether the state has made any reservations or declarations limiting the application of the relevant treaties;
- Identify the monitoring and complaints mechanisms established under the relevant treaties and select the most appropriate one for the case. This might vary from case to case depending on various factors, including the speed at which a decision is sought and the level at which a decision is sought.
- Look for remedies both formal legal remedies that involve the development of jurisprudence within domestic courts, regional and international fora, including treaty bodies and charter bodies, and non-formal remedies;
- Try to marry the two to ensure that the balance swings in favour of addressing the root cause at its root and not only the symptoms;
- In implementing the chosen strategy, harness support among fraternal organisations at a domestic, regional and international level. To the extent possible try to participate in electronic networks that facilitate this process.
- Use these networks and partnerships to maximise the impact at a domestic and global level.
- Create a database of networks within the subject area;
- Ensure that the research includes comparative approaches between North and South, paying attention to the power imbalances that exist and how the issue works within that framework.
- Look for the gaps to adjust those power imbalances;
- Develop arguments that make good business sense as well as work toward adjusting the imbalances.

The essential idea behind this list is an analysis that seeks to identify legal, political and economic issues and remedies comprehensively.

Once a favourable decision has been handed down, the IHRLC should develop a proactive strategy to monitor compliance. As discussed earlier,

enforcement can be a challenge within this field. Consequently, it is incumbent upon the team to ensure that it does not stop at the stage of having obtained a decision, but instead moves beyond that phase to secure enforcement. In this regard the following suggestions might assist such a team:

- Once a decision has been handed down, reassemble the team to analyse the implications of the decision both in respect of the client, issue, concerned state party, and its wider implications for the region, and the international community;
- Make a decision on priorities that need to be focused on based on the analysis, addressing specifically the extent to which compliance with the decision might or might not be likely within the state party concerned;
- In the event of this being found to be unlikely, develop a strategy with network partners within the state party concerned, the region and the international community to apply pressure on it to comply with the decision;
- Try to ensure that a journalist or the media is represented on the team to assist in developing the media advocacy component;
- Where there are community clients involved or a class or category of community members are directly affected by the decision, attempt to ensure that at least representatives are consulted both during the implementation of the legal strategy and at this stage of the process;
- If necessary work with these groups to mobilise support and build a campaign that might take to the streets if necessary;
- If diplomatic intervention is required, develop working relationships with officials within the political structures of the African Union, NEPAD and other relevant sub-regional bodies such as SADC for instance, to assist in bringing pressure to bear on the state party concerned;
- Ensure also that if the decision has far reaching implications that affect a large category or persons that these implications are summarised, simplified, published and disseminated among these groups; and
- Finally, in the event of an adverse decision, these steps could still be taken to determine how the issue can be raised and dealt with in another way, if necessary.

9 Conclusion

While the paper demonstrates the immense potential created by the international and regional human rights institutions, unfortunately, the poor and marginalised societies the world over are unable to access these institutions as it is unaffordable and lawyers are reluctant or unable to use them effectively.

It is consequently concluded that the establishment of an IHRLC in Africa that uses clinical legal education and operates within certain targeted areas could work toward changing the situation described above and a new cadre of lawyers who are both willing and passionate in their advocacy of client interests at a domestic and international level could consequently emerge.

Ultimately, this could result in international human rights norms and standards being more tangibly felt at the grassroots level. Moreover, it could result in the system within Africa being one which is based on the rule of law with the soon to be established African Court of Human and People's Rights laying the foundation through its jurisprudence for a culture of tolerance based on respect and promotion of internationally recognised human rights norms and standards.

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