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African Law

GREGORY DE SOUSA* AND BETTY-ANN BRYCE**

A significant development affecting the continent of Africa occurred in 2002. The Organization of African Unity (OAU) was reconstituted and replaced with the African Union (AU), a body modeled after the European Union.¹ The objectives of the AU, as set forth in its Constitutive Act,² include achieving African unity, encouraging international cooperation, and achieving a better life for the peoples of Africa. The AU also adopted the New Partnership for Africa's Development (NEPAD), a multinational comprehensive economic and political reform program launched to attract and encourage private sector investment in essential infrastructure and overall development in Africa.³ The NEPAD was drafted by the governments of Algeria, Egypt, Nigeria, Senegal, and South Africa and is based on a "firm and shared conviction, that [African leaders] have a pressing duty to eradicate poverty

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1. See Amnesty Int'l Press Release, *African Union: A New Opportunity for the Promotion and Protection of Citizens' Rights* (June 28, 2002), at <http://web.amnesty.org>.

2. See Department of Foreign Affairs, *Constitutive Act of the African Union*, available at <http://www.dfa.gov.za/for-relations/multilateral/treaties/auact.htm> (last updated June 5, 2001).

3. NEPAD, *What is NEPAD—The New Partnership for Africa's Development?* available at http://www.avmedia.at/cgi-script/csNews/news_upload/NEPAD_2dCORE_2dDOCUMENTS_2edb.AA0010102.pdf (last visited Mar. 18, 2003).

and to place their countries, both individually and collectively, on a path of sustainable growth and development."⁴

Another significant development that merits mention (even though it relates to an earlier Treaty entered into by a group of Francophone African countries) is the publication, in English, of *Business Law in Africa: OHADA and the Harmonization Process*, authored by four lawyers from Eversheds, an international law firm, in close collaboration with two African legal experts.⁵ OHADA (the French acronym for the Organization for the Harmonization of Business Law in Africa) has created a substantial body of uniform law which is applicable in its sixteen member countries.⁶

Other African countries also made changes by enacting laws, the constitutionality and effectiveness of which may well be tested in the near future. Rwanda introduced the *Gacaca* court system,⁷ and President Joseph Kabila of the Democratic Republic of Congo (DRC) abolished the Military Order Court.⁸ Namibia introduced a Communal Land Act that allocates more land ownership rights to women.⁹ Mozambique established the Constitutional Council.¹⁰ Kenya, Niger, and Uganda enacted new media laws—potentially troubling from the perspective of freedom of the press. Appended hereunder are some of the laws enacted across the continent in 2002.

I. Angola

In April, the National Assembly enacted a general amnesty law for all infractions of military discipline and crimes against state security forces committed during the conflict.¹¹ The Amnesty Law afforded pardons to all those who surrendered to the authorities within forty-five days starting from the date the law became effective.¹²

In May, the Angolan Cabinet Council Standing Commission (Cabinet) approved the social reintegration of demobilized soldiers under a specialized program that includes training and professional conversion, support for the establishment of family-owned businesses,

4. See Amnesty Int'l Press Release, *Africa: Human Rights Must be at the Heart of the New Partnership for Africa's Development* (Mar. 27, 2002), at <http://web.amnesty.org>.

5. FRED R. LAWSON ET AL., *BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS* (London ed., Kogan Page 2002).

6. OHADA, the Organization for the Harmonization of Business Law in Africa, was established in 1993 with the objective of creating a standard for business law in a number of French-speaking African countries. The organization was established in the belief that a sound system of business law would be a prerequisite to the economic integration of these countries and a spur to greater foreign investment. OHADA law is practiced in the following sixteen countries at present, with more expected to join the organization in the future: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo. *Id.*

7. Johns Hopkins Bloomberg School of Public Health, *Africa: Rwanda Gacaca*, available at <http://www.jhuucp.org/africa/rwanda/gacaca.shtml> (last visited Mar. 13, 2003).

8. allAfrica.com, *Kabila to End Military Court*, available at <http://allafrica.com/stories/200211210377.html> (last visited Mar. 13, 2003).

9. allAfrica.com, *Gender and the Law Scorecard*, available at <http://allafrica.com/stories/200212200148.html> (last visited Mar. 13, 2003).

10. allAfrica.com, *Assembly Passes Bill on Constitutional Council*, available at <http://allafrica.com/stories/200210310283.html> (last visited Mar. 13, 2003).

11. Human Rights Watch, *World Report 2003 Africa: Angola* (Jan. 2003), available at <http://www.hrw.org/wr2k3/africa1.html> [hereinafter *WR 2003*].

12. Angola News Index, *Parliament Unanimously Passes Amnesty Law* (Apr. 3, 2002), at <http://www.angola.org>.

creation of jobs and community resettlement, and development of populations for the demobilized soldiers.¹³ Also in May, the Cabinet approved bills on national security, state secrets, and access to administrative documents. "The documents are meant to secure the fundamental principles of security activity and monitoring mechanisms without affecting the rights and freedoms of the citizens."¹⁴

In June, the Angolan Council of Ministers approved a decree regulating the law on national health system bases for the functioning of sanitary units in the country. The act provides for the management and provision of health services, in which the national territory is split into health areas with reference health centers equipped to provide primary assistance.¹⁵ "The Cabinet also approved a decree under which a few sanitary institutions have been transformed into public institutes."¹⁶

In July, Angola ratified the Mine Ban Treaty.¹⁷ The Cabinet also approved programs which call for better and increased basic services in the northern provinces of Malanje, Uije, Zaire, and Kwanza Norte.¹⁸ These provinces will each receive disbursements of \$20 million in the next two years.¹⁹ In July, the Commission approved emergency measures to reduce the effects of drought in the Southern Cunene province.²⁰ "The measures include an authorization to local governments to buy cereals and cisterns to supply water to populations."²¹

II. Democratic Republic of Congo (DRC)

In December, President Joseph Kabila of the Democratic Republic of Congo (DRC) promulgated a law abolishing the Cour d'ordre militaire (Military Order Court).²² "The court has been widely criticised by national and international human rights organisations."²³ President Kabila plans to restructure the military judicial system and introduce a normal military judicial structure.²⁴

III. Kenya

In May, Parliament passed an amendment to the Books and Newspapers Act. Under Kenyan Law, publishers are required to "register with the government, pay a libel insurance

13. See Angola News Index, *Cabinet Approves Demobilized Social Reintegration Programme* (May 23, 2002), at <http://www.angola.org>.

14. Angola News Index, *Law on National Security Adjusted* (May 9, 2002), at <http://www.angola.org>.

15. Angola News Index, *Law on Health System Bases Passed* (June 8, 2002), at <http://www.angola.org>.

16. *Id.*

17. *WR 2003*, *supra* note 11.

18. Angola News Index, *Standing Commission Passes Basic Services Supply Program* (July 6, 2002), at <http://www.angola.org>.

19. *Id.*

20. Angola News Index, *Government Adopts Measure to Fight Drought* (July 30, 2002), at <http://www.angola.org>.

21. *Id.*

22. See allafrica.com, *Kabila to End Military Order Court* (Nov. 21, 2002), at <http://allafrica.com>.

23. *Id.*

bond, and submit copies of every publication to a government registrar.”²⁵ The amendment raises the bond amount from \$128 to \$12,800.²⁶

IV. Mozambique

In March, the Mozambican parliament, the Assembly of the Republic (Assembly) passed the first reading of a government bill on mining. The bill requires that mining be in conformity with the country’s environmental legislation, as well as with “good mining practices, in order to minimise waste and the loss of natural resources, and to protect them against unnecessary damage.”²⁷ The Assembly passed the mining legislation in an effort to manage the changes that have occurred over the past decade, such as reduced discretionary powers in granting mining licenses and the advent of reconnaissance licenses.²⁸

In May, the Assembly “passed a bill simplifying and modernising the country’s tax system.”²⁹ Under the bill, the five existing taxes on company profits and personal incomes will be replaced by two taxes: a corporation tax on all company profits and a personal income tax. Corporation tax bands will be fixed at a maximum of 35 percent, and personal income tax at a rate between 10 percent and 35 percent.³⁰ In September 2002, the Assembly passed a set of electoral laws, after the opposition, Renamo-Electoral Union, abandoned all their demands.³¹

In December, the Assembly passed a bill to establish the Constitutional Council, which was called for in the 1990 Constitution, but never established.³² Until now, the Supreme Court had been overseeing the Council’s duties, which included striking down any unconstitutional laws, settling any competence conflicts between sovereign state bodies, and deciding the legality of referenda.³³

The Constitutional Council is the highest body in supervising elections. It must verify whether candidates for President of the Republic meet the legal requirements, make the final decision on any electoral complaints, and validate and declare the final results of elections.

V. Namibia

In April, the Communal Land Reform Act was passed by Parliament.³⁴ The Act “provides for two kinds of land tenure in communal areas: customary land tenure and leaseholds for

24. “Amnesty International has reported that the court does not meet international fair trial standards or allow appeals to a higher or independent jurisdiction.” *Id.*

25. Human Rights Watch, *Kenya: New Media Law Curbs Free Speech* (May 10, 2002), at <http://hrw.org/press/2002/05/kenya0510.htm>.

26. *Id.*

27. Mozambique News Agency AIM Reports, *Assembly Passes Mining Law* (Mar. 27, 2002), at <http://www.poptel.org.uk/mozambique-news/newsletter/aim228.html#story2>.

28. *Id.*

29. See Mozambique News Agency AIM Reports, *Bill Modernising Taxes Passed* (Apr. 24, 2002), at <http://www.poptel.org.uk/mozambique-news/newsletter/aim230.html#story5>.

30. *Id.*

31. See Mozambique News Agency AIM Reports, *Assembly of the Republic Passes Election Bills* (Sept. 25, 2002), at <http://www.poptel.org.uk/mozambique-news/newsletter/aim240.html#story1>.

32. Mozambique News Agency AIM Reports, *Bill on Constitutional Council Passed* (Dec. 16, 2002), at <http://www.poptel.org.uk/mozambique-news/newsletter/aim245.html#>.

33. *Id.*

34. See Max Hamata, *Amended Communal Land Bill Finally Passed*, *The Namibian* (Apr. 24, 2002), available at <http://www.namibian.com.na/2002/April/news/0258BA55F7.html>.

up to 99 years.³⁵ This Act also contains very important gender-related provisions. For example, the Act employs affirmative action to ensure that women sit on the Communal Land Boards, which are responsible for supervising the two types of land tenure rights.³⁶ Also, inheritance provisions allow widows to remain on the land where she and her husband lived before her husband died, and entitles her to keep the land even if she remarries.³⁷ In November, the Swapo Government formally adopted twenty-eight resolutions, which were based on the party's 1999 election promises.³⁸ In December, the Orphan and Vulnerable Children (OVC) Fund was established, which required the government to implement a tax increase for 2003–2004.³⁹

VI. Niger

In August, President Mamadou Tandja passed laws forbidding press reports that would harm national defense operations.⁴⁰ “The first edict declared a state of emergency in Diffa, while the second banned the propagation of information or allegations likely to be detrimental to the implementation of national defense operations.”⁴¹

VII. Nigeria

In March, the Supreme Court, in a landmark decision, effectively nullified some of the Independent National Electorate Commission's (INEC) guidelines. In its decision, the Supreme Court held that the INEC's guidelines dealing with political party registration violated provisions of the 1999 Constitution.⁴² “This is one judgment that was hailed in both legal and political circles as it excised the offending sections alleged to have been ‘smuggled’ into the Bill by the powers that be.”⁴³

VIII. Rwanda

In June, the Rwandese government launched a new court system, called *Gacaca*, to deal with the backlog of Hutu-Tutsi massacre cases.⁴⁴ Between April and July 1994 approximately seven million Rwandese were murdered by the Hutu majority in an effort to prevent the establishment of a multi-party system.⁴⁵ The *Gacaca* court system is named after and

35. See Dianne Hubbard, *Gender & The Law Scorecard*, The Namibian (Dec. 20, 2002), available at <http://www.namibian.com.na/2002/December/national/02A38623FA.html>.

36. *Id.*

37. *Id.*

38. See Tangeni Amupadhi, *The Cabinet Adopts Swapo Resolutions*, The Namibian (Nov. 28, 2002), available at <http://www.namibian.com.na/2002/November/national/029C68738D.html>.

39. See Christof Maletsky, *'Orphan Tax' on the cards*, The Namibian (Dec. 17, 2002), available at <http://www.namibian.com.na/2002/December/national/02A1AD14DD.html>.

40. The Namibian, *Niger Journalists Protest Post-Mutiny Decree Limiting Reporting Rights*, (Aug. 6, 2002), available at <http://www.namibian.com.na/2002/August/africa/027879FEC8.html>; see also The Namibian, *Niger Opposition to Challenge 'Illegal' Post-Mutiny Decrees* (Aug. 28, 2002), available at <http://www.namibian.com.na/2002/August/africa/027F744B28.html>.

41. *Id.*

42. allAfrica.com, *Notable Cases of 2002* (Dec. 31, 2002), at <http://allafrica.com>.

43. *Id.*

44. See Amnesty Int'l Online, *Rwanda, Gacaca: A Question of Justice* (Dec. 17, 2002), available at <http://web.amnesty.org>.

45. *Id.*

draws upon a customary system of community hearings used to resolve local disputes. Over 250,000 judges from eleven thousand jurisdictions will listen to witness accounts and determine the punishment for those individuals accused of participating in the genocide.⁴⁶

IX. South Africa

In January, new police guidelines were created, which dealt with the arrest and detention of undocumented migrants. Officers are now required to have "reasonable grounds" to arrest someone on suspicion of being illegally in the country.

In April, a new Prevention of Corruption Bill was published, followed by the passage of a new Immigration Act in May. The Immigration Act provides for the policing of borders by the defense force, a quota system for work permits, and the creation of special new immigration courts.⁴⁷ Also in May, South Africa's highest court ruled that the country's police may not shoot at fleeing, suspected, petty criminals, amending a section of the country's Criminal Procedure Act, which allowed police to use lethal force against suspected criminals.⁴⁸

In September, South Africa ratified the OAU Convention on the Prevention and Combating of Terrorism. Also in September, the Constitutional Court struck down as discriminatory a law preventing same-sex couples from adopting children.⁴⁹

X. Uganda

In May, "parliament adopted the highly contested Political Organizations Law, which retained current constitutional restrictions on political parties and added new ones."⁵⁰ According to the Human Rights Watch World Report 2003, this law prohibits "most activities normally associated with political parties, such as opening and operating branch offices, and holding delegates' conferences and rallies. Existing political parties would 'legally cease to exist' if they failed to register within six months of the law's entry into force."⁵¹

Parliament also passed the Anti-Terrorism Act in May,⁵² which carries a mandatory death sentence for those found to be terrorists. The Act broadly defines terrorism as the "use of violence or threat of violence with intent to promote or achieve political, religious, economic and cultural or social ends in an unlawful manner."⁵³

46. The Namibian, *Rwanda's Kagame Launches Nationwide Genocide Tribunals* (June 19, 2002), available at <http://www.namibian.com.na/2002/June/africa/0269AA7AE3.html>.

47. See Human Rights Watch, *World Report 2003: Africa, South Africa* (Jan. 2003), available at <http://www.hrw.org/wr2k3/africa11.html>.

48. See The Namibian, *Court Ruling Forbids South African Police to Shoot Fleeing Suspects* (May 22, 2002), available at <http://www.namibian.com.na/2002/May/africa/02612CB49A.html>.

49. *Id.*

50. See Human Rights Watch, *World Report 2003: Africa: Uganda* (Jan. 2003), available at <http://www.hrw.org/wr2k3/africa13.html>.

51. *Id.*

52. *Id.*

53. *Id.*