

The Constitutional Rights of War Veterans: A Comparative Perspective from Southern Africa Development Community

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THE CONSTITUTIONAL RIGHTS OF WAR VETERANS: A COMPARATIVE PERSPECTIVE FROM SOUTHERN AFRICA DEVELOPMENT COMMUNITY

By Sarah L. Bosha *

*Our people have displayed great strength, courage and fortitude in the face of war and hardship, but they have been traumatised and cycles of resentment and revenge have been created. Trauma healing is an immediate priority. The Church, by its nature and mission, is a sign of reconciliation, and South Sudanese have demonstrated a remarkable ability to reconcile, both through traditional mechanisms and in the Church-led 'People to People Peace Process'. Reconciliation within South Sudan will be essential in building a new nation, addressing the grievances and pain of many individuals and ethnic groups who feel they have been mistreated even by the state or those who misuse the powers entrusted to them.***

EXECUTIVE SUMMARY

War veterans and ex-combatants are a special feature of post-conflict liberation struggles in Africa and must be handled with care by newly independent states. Worldwide, there are examples of how countries have dealt with this special group, with only a few seeking to include their rights in their constitutional provisions. This approach is fairly novel and has its own pros and cons. The advantages are:

- It can placate those seeking recognition at a national level for the role they played in liberating society.
- It can prevent a rushed and costly response to security threats by war veterans to the stability of the country in the future.
- It can provide a sense of inclusion in the new political dispensation, as many war veterans derive their identity and relevance from the war. When they view themselves as forgotten and discarded by society, the natural instinct is to return to an identity (that of a liberation guerilla) that is not consonant with peace and a new society.
- It keeps war veterans on the radar of the emerging new post-conflict state. Many governments have forgotten their war veterans only to remember them when they pose a threat to the national security.

The cons are:

- It can hamper reintegration as it appears to create a clique that is outside of the communities in which they live, by virtue of the selective special treatment bestowed upon the group.
- It can create a welfare-dependent group in society that is unable to sustain their own livelihood. If the welfare ceases to be available or become inadequate, war veterans often become a security threat (for example in Zimbabwe).

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**Sudan Catholic Bishops Conference, "The Church God Wants Us To Be," Message from the October 2011 Plenary Assembly.

Should South Sudan decide to recognize the rights of war veterans, it has three options:

- Through a constitutional right only.
- By an act of parliament or law bestowing rights, as with South Africa and Namibia.
- Or both, a constitutional right and enabling law detailing the manner in which rights are to be enforced, such as in the cases of Zimbabwe and Mozambique.

When including the rights of war veterans in a constitution, certain considerations are at play:

- The question of which type of war veterans will receive special rights. It may be feasible to only have special rights for the physically and mentally disabled, their widows and orphans (until legal adulthood).
- The danger of creating welfare-dependent war veterans.
- The maximum available resources the country can devote to the upholding of such rights.

In essence, it is prudent to promise only what the nation can deliver and recognize its economic limitations in the provision of rights to war veterans as a developing country with a commitment to a growing population. It is also important to consider the provision of these rights for a specified time period as part of a wider effort to reintegrate war veterans, with the end goal of making these individuals self-sustaining members of society able to be part of developing and contributing to South Sudan.

BACKGROUND

The African sub-continent has experienced the selective use of guerrilla war as a means for achieving political and socioeconomic changes, and South Sudan is no exception.¹ Participation in a protracted armed conflict means that lives, careers, education and personal development and advancement are put on hold. When the war ends, war veterans must return to pick up the pieces from where they left off. It is this challenge that makes policy formulation for war veterans difficult. Many war veterans have very high and unrealistic expectations of what they “deserve” such as free education, housing and lifelong pensions, because of what they fought for and believe they sacrificed.² The South Sudan Transitional Constitution (TC) in its preamble makes mention of the sacrifices of the war veterans and reads, “Remembering and inspired by the selfless sacrifices of our martyrs, heroes and heroines.”

War veterans can be a force for peace or destabilization in a post conflict society.³ In Zimbabwe, war veterans have been instruments of violence in all of the country’s major elections: 1980, 2000 and 2008. Due to the largely failed reintegration, many of the disenfranchised war veterans were finding life in Zimbabwe difficult, particularly after the restructuring of the economy in the 1990’s. Thus the war veterans embarked on violent seizure of white owned commercial farms in 2000 causing violence and a collapse of the agriculture industry and economy. After the Supreme Court ruled that the fast-track land reform was unconstitutional and should be halted, war veterans threatened judges with violence, leading to the resignation of the Chief Justice Anthony Gubbay.⁴

The Catholic Development Commission (CADEC), a development and social services arm of the Catholic Church in Zimbabwe, paid 75% tuition for two years for ex-combatants who furthered their education at technical or vocational colleges and between 1982 and 1987 funded seventy-seven ex-combatants.⁵ In Zimbabwe shortly after the war, many war veterans were allocated farms on which to form cooperatives for farming and self-sustenance. Religious organizations such as Christian Care provided food for newly resettled war veterans on the farms.⁶

The importance of a comprehensive and effective demobilization, disarmament, reinsertion and reintegration (DDRR) program should not be overlooked. DDRR often occurs in stages and is defined as follows:

- (i) Disarmament: the collection, documentation and disposal of arms and ammunition from ex-combatants before transferring them to civilian status upon release.
- (ii) Demobilization: the confinement of soldiers to barracks in order to conduct a census and other registration and documentation activities. It is the formal and controlled discharge of active combatants from armed forces or other armed groups.⁷
- (iii) Reinsertion: a form of short-term (often up to 1 year) transitional assistance to help cover the basic needs of ex-combatants and their families and can include transitional safety allowances, food, clothes, shelter, medical services, short-term education, training, employment and tools.⁸
- (iv) Reintegration: a process that often includes the provision of training/rehabilitation programs to enable them and their families to become productive civilians.⁹

The goals of DDRR should be clear from the onset and direct the manner in which DDRR is carried out. Whilst it is clear that disarmament and demobilization have the primary goal of ensuring security and defusing possible future outbreaks of violence, it may also be used to build up a national armed force that is representative of the major forces involved in the armed conflict, and foster unity in the wake of a protracted armed conflict. The United Nations has stated: "Through a process of removing weapons from the hands of combatants, taking the combatants out of military structures and helping them to integrate socially and economically into society, DDRR seeks to support ex-combatants so that they can become active participants in the peace process."¹⁰

DDRR need not follow the sequential order of disarmament, demobilization followed by reintegration and this was the case in Zimbabwe.¹¹ DDRR in Zimbabwe began with demobilization which was the encampment process and thereafter disarmament was embarked upon, followed by reintegration.

DISCUSSION

Keeping in mind the potential security threat disgruntled war veterans can pose, it is clear that a society such as South Sudan cannot ignore them in its policies and legislation.¹² The question becomes whether a nation will address this group in its constitution or relevant legislation, in both, or in some other manner. There are some advantages to recognizing war veterans as a special group in a country's constitution, legislation or governmental programs:

- It can provide recognition at a national level for the role war veterans played in liberating society. In Zimbabwe, war veterans received some form of satisfaction from the War Veterans Act passed in 2000 in response to their protests regarding the need for welfare.¹³ In South Africa in 2009 the government¹⁴ set up a Ministry of Defence and Military Veterans.
- It can prevent a rushed and costly response to security threats by war veterans to the stability of the country in the future. For example, in Zimbabwe in reaction to the war veterans' protests, large sums of unbudgeted funds were disbursed – leading to economic collapse.
- It can provide a sense of inclusion in the new political dispensation as many war veterans derive their identity and relevance from the war and when they view themselves as forgotten and discarded by society, the natural instinct is to return to an identity (that of a liberation guerilla) that is not consonant with peace and a new society.
- It keeps war veterans on the radar of the emerging new post-conflict state. Many governments have forgotten their war veterans only to remember them when they pose a threat to the national security.

On the other hand, identifying war veterans as a special group also has its disadvantages, such as:

- It hampers reintegration as it appears to create a clique that is outside of the communities in which they live, by virtue of the selective special treatment bestowed upon the group.
- It can create a welfare dependent group in society that is unable to sustain their own livelihood. If the welfare ceases to be available or becomes inadequate, war veterans often become a security threat (for example in Zimbabwe).

As illustrated by experience to date, a country has at least three options in addressing the rights of war veterans:

- Through a constitutional right.
- By an act of parliament or law bestowing rights, as with South Africa and Namibia.
- Or both, a constitutional right and enabling law detailing the manner in which rights are to be enforced, such as in Zimbabwe and Mozambique.

In general, where rights of war veterans have been included in constitutional provisions, these have tended to be economic, social and cultural rights (ESCR) centered on access to health-care and welfare such as pensions. Under international law, a state has the obligation to progressive realization of ESCR (as opposed to civil and political rights which are immediately binding and to be enforced by a state). The UN defines progressive realization as “...the obligation to take appropriate measures towards the full realization of economic, social and cultural rights to the maximum of [their] available resources” and adds that this means a state’s compliance with its obligation to take appropriate measures is assessed in the light of the resources—financial and others—available to it.¹⁵

To understand the options for addressing the rights of war veterans, a comparative look at the constitutions of three countries that have transitioned from civil war to post-conflict societies is

instructive. Zimbabwe, Angola and Mozambique endured civil conflicts of nearly two decades and had thousands of war veterans to be reintegrated and have addressed the issue of war veterans in their constitutions as illustrated below. Firstly, the legislative provisions of South Africa and Namibia will be highlighted.

South Africa

South Africa addressed the issue of war veterans in its Military Veterans Act of 2011.¹⁶ South Africa chose to define war veterans as military veterans

- (i) who gave military service to any of the military organisations, statutory and non-statutory;
- (ii) which were involved on all sides of South Africa's Liberation War from 1960 to 1994; and served in the Union Defence Force before 1961; or
- (iii) became a member of the new South African National Defence Force after 1994.

Thus opposing forces to the national liberation movements pre-independence are included in this Act.

The war veterans and their dependants are eligible for the following benefits under section 5 of the Military Veterans Act:

- (1) The benefits relating to a military veteran are the following:
 - (a) Compensation to military veterans who sustained disabling injuries or severe psychological and neuro-psychiatric trauma or who suffer from a terminal disease resulting from their participation in military activities;
 - (b) dedicated counselling and treatment to military veterans who suffer from serious mental illness, post-traumatic stress disorder or related conditions;
 - (c) honouring and memorialising fallen military veterans;
 - (d) education, training and skills development;
 - (e) facilitation of employment placement;
 - (f) facilitation of or advice on business opportunities;
 - (g) subsidisation or provisioning of public transport;
 - (h) pension;
 - (i) access to health care;
 - (j) housing; and
 - (k) burial support.
- (2) Subsection (J)(b), (d) and (h) also applies to a dependant of a military veteran.

Section 5(2) of the Military Veterans Act points out that these benefits are subject to available resources and any regulation that may be prescribed.

Namibia

Namibia promulgated the Veterans Act of 2008¹⁷ for the following purposes as stated in the preamble of the Act:

- (i) For the provision of assistance to veterans and dependants of veterans;
- (ii) To provide for the registration of veterans and dependants of living or deceased veterans;
- (iii) To provide for the establishment of projects for the benefit of and assistance to veterans and dependants of veterans;
- (iv) To provide for the integration of pension benefits of veterans;
- (v) To provide for the constitution and functions of the Veterans Board and Veterans Appeal Board.

The Act defines a veteran to mean a person who:

- (a) Was a member of the liberation forces;
- (b) Consistently and persistently participated or engaged in any political, diplomatic or under-ground activity in furtherance of the liberation struggle; or
- (c) Owing to his or her participation in the liberation struggle was convicted, whether in Namibia or elsewhere, of any offence closely connected to the struggle and sentenced to imprisonment; but does not include a person who during the war deserted the liberation struggle unless that person subsequently rejoined the struggle.

The war referred to “means the armed struggle waged in Namibia and other countries by the liberation forces against the colonial forces, and which struggle resulted in the attainment of the independence of Namibia on 21 March 1990.” From the use of the phrases “liberation struggle” and the definition of war against colonial forces, the beneficiaries of this Act do not include the colonial opposing combatants, as does the South African example.

The Act establishes a Veterans Fund managed by a Veterans Board and the object of the Fund is in terms of section 5 “... to provide assistance in terms of this Act or any other law to veterans or dependants of veterans or payment for projects beneficial to veterans or dependants of veterans in accordance with the provisions of this Act or any other law.” A veteran may apply for assistance from the fund in terms of Section 31 of the Act in a prescribed format. In terms of Section 32, the veteran (and where applicable dependants) will receive the amount they are eligible to in terms of the Act. Such a system clearly has its advantages for creating a paper trail which allows transparency in the use of funds for veterans, but may mean delays in disbursements due to bureaucracy.

As discussed below, certain countries chose to include constitutional protection for war veterans and in some cases added legislation for the operation of these protections within the national legal system.

Zimbabwe

Zimbabwe’s 1980 Lancaster House constitution made no mention of war veterans. However, the country adopted the newest constitution in Africa in January 2013, which addresses the rights of war veterans. Chapter 2 of the Constitution on national objectives has its primary object as guiding the State (including institutions and agencies) on the implementation and formulation of

laws and policies.¹⁸ Article 23¹⁹ states that the State, all institutions and agencies of government must accord due respect, honor and recognition to war veterans. It also identifies and defines war veterans in the context of Zimbabwe's history as:

- (i) Those who fought the liberation war, and
- (ii) Those who assisted the fighters, and
- (iii) Those imprisoned, detained or restricted for political reasons during the war.

What Article 23 means is that those classified as war veterans are identified as a distinct group comprising three categories of persons – firstly those involved in active combat, secondly those who rendered assistance to active combatants and finally political prisoners who were supporters of the liberation struggle. Only these three categories are right holders in terms of Article 23 and Article 84, which specifically addresses war veterans. The importance of identifying war veterans is that the state can better plan for war veterans, and minimize the possibility of bogus ex-combatants reaping benefits to which they are not entitled. Article 23 places an obligation on the state and its various institutions to "...accord due respect, honor and recognition to the war veterans of the liberation struggle..." The use of abstract words such as honor and recognition in relation to rights creates ambiguity and such terms should ordinarily be defined in the constitution so that one legal meaning is ascribed and applied to them in the enforcement of the rights.

The constitution also states in Article 23(2) that "The state must take reasonable measures including legislative measures, for the welfare and economic empowerment of war veterans of the liberation struggle."

Article 23(2) makes it obligatory for the state to ensure implementation of measures for the welfare and economic empowerment of war veterans. The action the state must take includes the drafting of legislation and is likely to include policy measures to improve the welfare of war veterans. The phrase "reasonable measures" is not defined, therefore it would be difficult to determine the threshold of reasonableness in assessing compliance with this right. The constitution should have rather made use of the more internationally-accepted terminology applied to ESCR of a state meeting its obligations, "within its maximum available resources."²⁰ Not only would this bring legal clarity to the provision, but would make it easier to enforce by courts of law. The provision should also state that any measures to be taken in relation to welfare and economic empowerment will be implemented progressively as per the international law standards.²¹

Article 84 states that war veterans are entitled to "recognition" and to welfare including pensions and access to basic healthcare. It reads:

- (1) Veterans of the liberation struggle, that is to say-
 - (a) Those who fought in the War of Liberation;
 - (b) Those who assisted the fighters in the War of Liberation; and
 - (c) Those who were imprisoned, detained or restricted for political reasons during the liberation struggle; are entitled to due recognition for their contribution to the

liberation of Zimbabwe and to suitable welfare such as pensions and access to basic healthcare.

(2) An act of Parliament must confer on veterans of the liberation struggle the entitlements due to them under subsection (1).

The term “suitable welfare” may also be an indicator that the welfare will be tailored according to the type of war veteran as defined by Article 84(1). In addition Article 84(2) shows that the rights due to war veterans must be detailed through an act of parliament. The justiciability of the rights in Article 84 is guaranteed by Article 46, which states that a Court, tribunal, forum or body must give full effect to the rights and freedoms enshrined in chapter 4 of the Constitution. War veterans can assert the rights in Article 84 (rights to welfare and basic healthcare) in courts, tribunals or other relevant bodies as individuals, acting on behalf of others, as part of a group or class, or acting as an association. It is unclear whether access to basic healthcare encompasses a different class of right for a war veteran than for an ordinary citizen and the extent to which the right to welfare can extend (other than the stated right to receive a pension).

The current constitutional provisions make no mention of the dependants or orphans of war veterans as beneficiaries of the rights in Article 23 and Article 84. In the new constitution, Zimbabwe has departed from supporting the dependants of war veterans, as was the case in the War Veterans Act. The War Veterans Act of 2000 establishes schemes for the provision of assistance to war veterans and their dependants, provides for the establishment of a fund to finance such assistance, and provides for the constitution and functions of the War Veterans Board.²² The Act will have to be amended to comply with Article 2(1) of the Zimbabwe Constitution, which invalidates any law or provision that is inconsistent with any of its (the Constitution) provisions.

Whilst a noble idea to include the rights of war veterans in recognition of their sacrifice toward equality in Zimbabwe, there may be some challenges to this approach:

- A constitutional provision protecting the right of war veterans to receive welfare and access to basic healthcare can be economically unsustainable and hamper efforts to reintegrate this special group into society as independent self-sustaining citizens. For example in Zimbabwe, war veterans received funds from the DDDR program in 1980-1985 for their welfare as they reintegrated into society. Many also received funds to start businesses and various projects from the government; others instead used their demobilization money for alcohol, radios and clothes and were soon penniless.²³ This was largely due to a lack of training on financial management by the government and led to destitution among war veterans. In 1997, the war veterans used violence and threats of violence to the ruling party of the day to have their demands for even more financial disbursements met, and approximately 50,000 of them received gratuities of a once off payment of Z\$50,000 and Z\$2,000 monthly pensions for life.²⁴ And in 2013, war veterans are once again demanding financial assistance for their survival.
- The current constitutional provision of article 84 poses the same challenges highlighted above where the potential of turning war veterans into perpetual welfare-dependent individuals hampers their long term reintegration into society, and can have negative

repercussions on the economy. The 1997 disbursements led to an economic meltdown with the Zimbabwe dollar losing half its value overnight in November 1997.²⁵

- Constitutional provisions that are war veteran-centered in terms of unlimited welfare can also engender feelings of resentment from civilians who may hold the view that they also have the right to government assistance. Such resentment alienates war veterans from ordinary people. The Zimbabwean experience illustrates this – where the “War Veterans Pension and Benefit Scheme” elevated war veterans to a level where society viewed them as a special clique resulting in resentment and alienation, as the broader community bore the brunt of the economic meltdown.²⁶
- The use of phrases such as the “right to recognition” of a war veteran is an elusive term that cannot be legally defined, which makes the fulfillment of a duty to uphold this right difficult and the ability to have it protected impossible. The use of such unclear language should be avoided as its true meaning and significance in the Bill of Rights (if any) can only be understood by a Court’s interpretation and that is if one is able to construct a violation of that right. The language is more political than legal and thus should be confined to the preamble, particularly considering that the rights in the Bill of Rights are to be determined by Courts, tribunals and other such relevant bodies. Clarity of the nature of the right being provided is important to ensure clarity in implementation and protection of the right.

Angola

In the Constitution of Angola, under Chapter III on economic, social and cultural rights and duties, Article 84 protects the rights of war veterans as follows:

- (1) Combatants of the national independence struggle, the country’s veterans, those disabled during the course of military or paramilitary service and the minor children and surviving spouses of combatants killed in action, shall enjoy a special status and the protection of the state and society, under the terms of the Constitution and the law.
- (2) The state shall be responsible for promoting policies to ensure the social, economic and cultural integration of the citizens referred to in the previous point, as well as protecting, honouring and preserving the historic achievements in which they played a leading role.²⁷

Article 84 means that war veterans have rights that are immediately recognizable under the constitution and the law. The war veterans cover two classes of persons, those who participated in the war of liberation from colonial rule (combatants of national independence struggle) and those who took part in the ensuing civil war (military or paramilitary service combatants). In addition, it appears the second class of war veterans that are entitled to receive support are those disabled. The third class of beneficiaries is the minor children and surviving spouses of deceased combatants – ostensibly of either the liberation struggle or the civil war. Again the definition of the right holders is made clear in the text of the provision as with the Zimbabwean example.

The Angolan government has been criticized for failing to live up to its promises. In July 2012, war veterans protested the failure to pay their pensions and other benefits by the State.²⁸ They threatened to disrupt forthcoming elections in August of the same year, and the government

embarked on a widely condemned crackdown in order to restore stability and defuse the threat to the national security. As a testament to the costly nature of offering welfare to war veterans and their dependents for an unlimited period of time, in 2013 the army's social scheme budget for approximately 43,133 war veterans pensions rose to \$104 million up from \$64 million in 2012.²⁹ This emphasizes the importance that a state only make commitments in its constitution which it is able to meet – thus the value of including the terminology of progressive realization of the rights of war veterans within that particular state's maximum available resources.

Mozambique

Mozambique, which also experienced a lengthy civil conflict, has made provision for war veterans in its constitution. Closer to the Angolan experience, the Mozambique constitution identifies particularly the disabled, orphans of war veterans and other dependents, something that the Zimbabwe constitution does not clearly articulate. Article 15 and 16 are instructive on the issue of war veterans and state respectively:

Article 15

- (1) The Republic of Mozambique shall acknowledge and esteem the sacrifices made by those who gave their lives to the national liberation struggle and to the defence of the country's sovereignty and democracy.
- (2) The State shall ensure the special protection of those who were disabled in the national liberation struggle, as well as the orphans and other dependants of those who died in this cause.
- (3) The Law shall determine how the rights established in this article are to be made effective.

The Article recognizes deceased war veterans as deserving "acknowledgement and esteem" for their sacrifices and in 15(2) the state has an obligation to the orphans and dependents of the deceased. Only the disabled war veterans are to be afforded special protection as there is no mention of able-bodied surviving war veterans in Article 15. The "special protection" is to be given effect by laws passed by the state as per Article 15(3). Therefore the general constitutional "special protection" of the disabled war veterans, orphans and dependants will be clearly laid out in the law(s).

Article 16 further emphasizes the government's intent to only offer protection to disabled war veterans, orphans and direct dependents and reads:

- (1) The State shall ensure special protection to those who were disabled during the armed conflict that ended with the signing of the General Peace Agreement in 1992, as well as the orphans and other direct dependants.
- (2) The State shall likewise protect those who have been disabled in the performance of public service or a humanitarian act.
- (3) The Law shall determine how the rights established in this article are to be made effective.

Unlike the Zimbabwean and Angolan approach, the Mozambican constitutional approach is to offer special protection only to the disabled war veterans – as opposed to war veterans in general. This kind of approach appears more practical than offering special protection to all war veterans regardless of whether they have a sustainable livelihood, high-ranking government post or the ability to be gainfully employed. However, the Mozambican approach may also wrongly assume that the able-bodied war veteran should easily reintegrate without any government assistance and is not in the same position of vulnerability as the disabled war veteran. The nature of war means that veterans suffer both physical and mental damage – and mental illness is also a significant challenge many face when attempting to reintegrate into societies and become self-sustaining civilians.

Welfare Rights of War Veterans

One of the challenges of providing welfare benefits to war veterans and their dependants is that for developing economies such as that of South Sudan, it can prove to be unsustainable and problematic – the welfare must constantly change in line with the rate of inflation. Zimbabwe is a prime example of this as it is reported that war veterans are again (in 2013) seeking lump sum disbursements and stakes in the diamond mining sector. It is reported that “The war veterans also blasted Finance Minister Tendai Biti’s Treasury for failing to look after their families, especially their children’s school fees, medical needs, money for income-generating projects and reburials of their deceased.” The war veterans stated that most members were suffering and not able to fend for themselves or their families, arguing that the benefits they sought were a right not a privilege.³⁰

This argument raised by Zimbabwean war veterans shows the challenge with framing welfare benefits in the language of rights for a developing country, particularly where there is no limitation to this right based on maximum available resources. Arguably, there can be no argument that disabled war veterans, and widows and direct minor dependents of deceased war veterans would require welfare support due to their inability – depending on the degree of disability – to fend for themselves. However the same cannot be said for healthy war veterans who can and should receive temporary welfare benefits or one-off reparations as they transition into self-sustaining citizens.

The Right to Basic Healthcare

Lessons on enforceability can therefore be drawn from comparative jurisdictions to raise some possible challenges and expectations not only for Zimbabwe but even for South Sudan, should a right to health care be provided for war veterans in the new constitution.

The South African Constitutional Court (SA ConCourt) has the richest jurisprudence in Africa on the ESCR rights and dealt with the right to health in the Soobramoney case,³¹ where the appellant alleged a violation of Article 27 of the South African Constitution (which provides for universal access to healthcare services).³² Soobramoney was a terminally ill person who required expensive dialysis treatment for a kidney ailment. In this case, the treatment would not cure Soobramoney, but would only extend his life for a short period of time; the hospital in question refused Soobramoney treatment on the basis that it was too expensive to offer it to him

considering he would only live a short while. The SA ConCourt found there was no violation of the right to access health services and that the hospital had acted reasonably and applied its guidelines rationally and fairly. The practice of Constitutional Courts with regards ESCR is to construe their violation in the context of available resources, such that where there are no available resources despite a violation, a state cannot be held liable for failing to provide the right in question. The SA ConCourt stated that, “What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”³³ In the Grootboom case,³⁴ the SA ConCourt further found that with respect to ESCR, the pertinent question to determine a violation was to ask whether the sState had done all it could reasonably do in the circumstances.

From the Grootboom and Soobramoney cases, the drafting of any right to health or other ESCR and welfare should consider including the proviso that such rights are dependant upon a state’s available resources. Generally, in determining whether or not there has been a violation of ESCR in any constitution particularly for a developing African country, the key question of available resources will be important to answer the question of whether the state had done all it could reasonably do in the circumstances.

General Comment 14³⁵ then becomes relevant in determining the indicators for a state’s compliance with the right to healthcare as described by the Council for Economic, Social and Cultural Rights. A state’s obligations are identified as:

- “Respect” the right to health by, inter alia, refraining from denying or limiting equal access for all persons;
- “Protect” includes, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; and
- “Fulfill” requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health.

A state therefore would be expected not to regress from whatever rights to healthcare it offers when the new constitution comes into play. If by the Permanent Constitution (PC) or legislation South Sudan provides free healthcare to ex-combatants and their dependents, and also gives welfare assistance, it should not take retrogressive steps in the future regarding these rights. ESCR are progressive and therefore it is advisable to offer an improvement in its welfare and health related services to ex-combatants.

The Danger of the Welfare War Veteran

The three cases above highlight the following issues to bear in mind when drafting constitutional or other provisions guaranteeing the rights of war veterans:

- The provision should be drafted according to international standards stated in the International Covenant on Economic Social and Cultural Rights.
- The State should consider whether the rights for the war veterans will have a temporary and permanent nature, bearing in mind the need to avoid creating welfare dependant group unable to sustain itself.
- The provision should be couched in terms that take into account the budgetary constraints that face many developing post-conflict countries.

In all three countries and others such as Namibia, war veterans have protested the need for more welfare years after they began to receive the pensions due to rising costs of living. In Mozambique, war veterans protested demanding an increase in their pensions³⁶ in 2013, as did war veterans in Zimbabwe in 2013. This illustrates the utility of the “out-clause” of providing ESCR progressively within the maximum available resources of a state.

CONCLUSION

There is experience in the region for creating a constitutional right to an affirmative action policy aimed at addressing issues important for the reintegration of war veterans so that they may effectively become self-sustaining members of society. A welfare approach in the constitution, such as is the case in the above case studies, runs the risk of hampering reintegration and may lead to a sense of entitlement by war veterans – culminating in a recourse to violent tactics when expectations are not met. To identify them as a special group is problematic in that it creates an elite group that may, as in the case of Zimbabwe, come to be resented by the general society. If South Sudan chooses to give some constitutional recognition to the rights of war veterans, the following should be considered:

1. It is important to identify which class of persons qualifies as war veterans as per the Zimbabwean Constitution in article 23. This definition is often very context-specific, addressing the nature of the war and its main actors.
2. It is important to consider articulating the resource availability limitation of the assistance and to emphasize the temporary nature of the measure so as to compel war veterans to fully integrate into society and seek to pursue self-sustaining livelihoods.
3. The rights should be stated clearly with the details of implementation and scope appearing in the enabling legislation, so as to fully articulate programs and policies by the state to give effect to the constitutional rights of war veterans and their dependants.
4. Ambiguous words such as “honoring” and “recognition” appearing in operative language in constitutional provisions may be difficult to give effect to when the state, society and individuals attempt to comply with their duties and obligations in the constitution. This author would suggest that in such situations the “honoring” and “recognition” be in a preamble and should take the form of a once off action such as the building of a

monument such as the Heroes Acres in Zimbabwe or the awarding of various war medals.

5. It is important to identify who qualifies as a war veteran that needs to be protected by the constitution or legislation. This can only be determined by the nature of the conflict and the different types of persons directly involved in the war.
6. It may be prudent to consider the experience of other African countries in implementing programs affecting war veterans (in addition to a commission to appoint a minister in charge of Veteran Affairs to oversee the work of the Demobilization, Disarmament and Re-integration Commission created in Part Nine, Chapter VII of the South Sudan TC). Mozambique has a Ministry of Veterans Affairs; in 2009 South Africa saw the need to create a Ministry of Defence and War Veterans which was also tasked with the concerns of war veterans.³⁷ Angola also has a Ministry of Former Combatants and War Veterans.³⁸ Zimbabwean war veterans have demanded the creation of a ministry to deal with their concerns.³⁹
7. Any ESCR for able bodied war veterans should be applicable to those in need of assistance and should be seen as a temporary measure pending full reintegration to normal civilian life of these individuals. As the examples above have shown, it is highly unsustainable to maintain war veterans for their natural lives and can be damaging to a developing nation's economy.
8. If the Angolan and Mozambican constitutional approach is taken, the question arises as to what point the benefits for dependents and orphans of the war veterans will either cease or expire. In general, there is a need to consider the question of sustainability of such an undertaking particularly when considering the economic viability of such an approach of providing welfare and/or healthcare services. It would mean the state's welfare assistance would have to be adjusted every so often to keep up with rates of inflation.⁴⁰ It is worth considering placing a time limit in the constitutional provision or by legislation to ensure that there is a foreseeable limit to the timeframe of expenditure for dependents and orphans.

¹Femi Otubanjo, "African Guerillas and Indigenous Governments", *Journal of Conflict Studies*, 1981, 36. Accessed on July 5, 2013 at: <http://journals.hil.unb.ca/index.php/JCS/article/view/14522/15591>.

²Norma J. Kriger, *Guerrilla Veterans in Post-War Zimbabwe Symbolic and Violent Politics, 1980 – 1987* (Cambridge University Press; 2003), 88.

³Gwinyai Dzinesa, "Angola: War Vets' Protests a Chilling Reminder of a Regional Cancer", (Institute of Security Studies, July 2012). Accessed on July 15, 2013 at: <http://allafrica.com/stories/201207190363.html>.

⁴Id, 202.

⁵Norma J. Kriger, *Guerrilla Veterans in Post-War Zimbabwe Symbolic and Violent Politics, 1980 – 1987* (Cambridge University Press; 2003), 163.

⁶Id, 147.

⁷United Nations Integrated Disarmament, Demobilization and Reintegration Standards, December 2006, 6. Accessed on June 18, 2013 at: http://pksoi.army.mil/doctrine_concepts/documents/UN%20Guidelines/IDDRS.pdf

⁸Id, 1.

⁹World Bank, "Demobilisation and Reintegration of Military Personnel in Africa: The Evidence from Seven Case Studies", Report No. IDP-130, October 1993, 4. Accessed on June 18, 2013 at: <http://siteresources.worldbank.org/INTCPR/882635-1120216203830/20626336/IDP0130.pdf>

¹⁰United Nations Integrated Disarmament, Demobilization and Reintegration Standards, December 2006, 2. Accessed on June 18, 2013 at: http://pksoi.army.mil/doctrine_concepts/documents/UN%20Guidelines/IDDRS.pdf.

¹¹Lars Waldorf, "Linking DDR and Transitional Justice", in *Disarming the Past Transitional Justice and Ex-combatants*, ed. Ana Cutter Patel, Pablo de Greiff & Lars Waldorf, (Social Science Research Council; 2009), 19.

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- ¹²Gwinyai Dzinesa, “Angola: War Vets’ Protests a Chilling Reminder of a Regional Cancer”, (Institute of Security Studies, July 2012). Accessed on July 15, 2013 at: <http://allafrica.com/stories/201207190363.html>.
- ¹³Republic of Zimbabwe, War Veterans Act (Chapter 11:15). Accessed on July 5, 2013 at: http://www.parlzim.gov.zw/attachments/article/97/WAR_VETERANS_ACT_11_15.pdf.
- ¹⁴Gwinyai Dzinesa, “Angolan War Vets’ Protests a Chilling Reminder of a Regional Cancer”, (Institute of Security Studies; July 19, 2012). Accessed on July 11, 2013 at: <http://www.issafrica.org/iss-today/angolan-war-vets-protests-a-chilling-reminder-of-a-regional-cancer>.
- ¹⁵Office of the United Nations High Commissioner for Human Rights, “Frequently Asked Questions on Economic, Social and Cultural Rights: Fact Sheet Number 33”, para. 7, 13. Accessed on July 11, 2013 at: <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.
- ¹⁶Government of South Africa, Military Veterans Act No. 18 of 2011. Accessed on July 2, 2013 at: <http://www.info.gov.za/view/DownloadFileAction?id=156051>.
- ¹⁷Government of Namibia, Veterans Act No. 2 of 2008. Accessed on July 2, 2013 at: http://www.parliament.gov.na/acts_documents/113_veteran_act_2_of_2008.pdf.
- ¹⁸Constitution of the Republic of Zimbabwe, January 2013. Accessed on July 2, 2013 at: <http://www.swradioafrica.com/Documents/Final%20draft%20Constitution%2025%20January%202013.pdf>. Article 8 (1), “The objectives set out in this Chapter guide the state and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and prosperous, happy and fulfilling lives. (2) Regard must be had to the objectives set out in this Chapter when interpreting the states obligations under this Constitution and any other laws”.
- ¹⁹Constitution of the Republic of Zimbabwe, January 2013. Accessed on July 2, 2013 at: <http://www.swradioafrica.com/Documents/Final%20draft%20Constitution%2025%20January%202013.pdf>. Article 23 (1) The State and all institutions and agencies of government at every level must accord due respect, honour and recognition to veterans of the liberation struggle, that is to say—
- (a) those who fought in the War of Liberation;
 - (b) those who assisted the fighters in the War of Liberation; and
 - (c) those who were imprisoned, detained or restricted for political reasons during the liberation struggle. (2) The State must take reasonable measures, including legislative measures, for the welfare and economic empowerment of veterans of the liberation struggle.”
- ²⁰UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, United Nations, Treaty Series, vol. 993, p. 3. Accessed on July 17, 2013 at: <http://www.refworld.org/docid/3ae6b36c0.html>. Article 2(1) reads, “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”
- ²¹Id.
- ²²The War Veterans Act 2008, Act No. 4051, preamble. Accessed on July 9, 2013 at: http://www.parliament.gov.na/acts_documents/113_veteran_act_2_of_2008.pdf
- ²³Dzinesa, 102 - 103.
- ²⁴Paul Themba Nyathi, “Reintegration of ex-combatants into Zimbabwean Society” in *Zimbabwe Injustice and Political Reconciliation*, ed. Brian Raftopolous and Tyrone Savage (Weaver Press, 2004), 71.
- ²⁵Id.
- ²⁶Dzinesa, 140.
- ²⁷Constitution of Republic of Angola, January 21, 2010. Accessed on July 1, 2013 at: http://www.wipo.int/wipolex/en/text.jsp?file_id=196467.
- ²⁸Human Rights Watch, “Angola: Protesters Detained, Disappeared” <http://www.hrw.org/news/2012/07/05/angola-protesters-detained-disappeared>.
- ²⁹Arnaldo Vierra, “Angolan army wants war veterans’ pension slashed”, (*African Review*; January 28, 2013). Accessed on July 8, 2013 at: <http://www.africareview.com/News/Angolan-army-wants-war-veterans-pension-reduced/-/979180/1677564/-/egd5j/-/index.html>.
- ³⁰Chengetayi Zvauya, “\$1 Billion for War Veterans in Zimbabwe”, (*Nehanda Radio*, February 19, 2013). Accessed on July 9, 2013 at: <http://nehandaradio.com/2013/02/19/1-billion-for-war-veterans-in-zimbabwe/>.

³¹*Soobramoney v Minister of Health KwaZulu Natal* 1997 (12) BCLR 1696. Accessed on July 8, 2013 at: <http://www.saflii.org/za/cases/ZACC/1997/17.pdf>.

³²Constitution of the Republic of South Africa, 8 May 1996. Accessed on July 3, 2013 at: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/South%20African%20Constitution.pdf>. Article 27 (1) reads, “Everyone has the right to have access to -

(a) health care services, including reproductive health care;

³³*Soobramoney v Minister of Health KwaZulu Natal* 1997 (12) BCLR 1696, 7, para. 11. Accessed on July 8, 2013 at: <http://www.saflii.org/za/cases/ZACC/1997/17.pdf>.

³⁴*The Government of South Africa et al v Irene Grootboom & Ors*, Constitutional Court of South Africa, CCT 11/00, October 4, 2000. Accessed on July 16, 2013 at: http://www.law-lib.utoronto.ca/diana/TAC_case_study/Grootboom.pdf.

³⁵The Human Rights Committee of the Office of the United Nations High Commissioner for Human Rights publishes its interpretation of the content of human rights provisions, in the form of General Comments on thematic issues. The General Comments are not binding per se but offer important in interpreting and determining the scope of human rights provisions found in important international treaties.

³⁶Mmegi online, “Mozambique police tear gas war veterans in Maputo protest”, Issue Vol 30, No. 39, March 14, 2013. Accessed on July 16, 2013 at:

<http://www.mmegi.bw/index.php?sid=1&aid=1773&dir=2013/March/Thursday14>.

³⁷Gwinyai Dzinesa, “Opinion & Analysis: Neglect of war veterans poses threat to the region”, (The New Age Online, July 16, 2013). Accessed on July 16, 2013 at:

http://www.thenewage.co.za/blogdetail.aspx?mid=186&blog_id=2484.

³⁸All Africa, “Angola: Former Combatants Ministry Stimulated By Executive Guidelines”, January 4, 2012. Accessed on July 16, 2013 at: <http://allafrica.com/stories/201201050652.html>.

³⁹Janet Shoko, “Zimbabwe war veterans demand compensation”, (*The Africa Report*, February 20, 2013). Accessed on July 16, 2013 at: <http://www.theafricareport.com/Southern-Africa/zimbabwe-war-veterans-demand-compensation.html>.

⁴⁰Institute for Security Studies, “Angola: war veterans threaten to disrupt the upcoming elections if they do not receive their pensions”, July 13, 2012. Accessed on July 8, 2013 at:

<http://www.issafrika.org/publications/publication-archives/cpra-daily-briefing/angola-war-veterans-threaten-to-disrupt-the-upcoming-elections-if-they-do-not-receive-their-pensions>.