

Unique in international human rights law: Article 20(2) and the right to resist in the African Charter on Human and Peoples' Rights

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Summary

This article analyses article 20(2) of the African Charter on Human and Peoples' Rights codifying the human right to resist, a unique provision without equivalent in other international treaties, affirming that '[c]olonised or oppressed peoples' have a right 'to free themselves from the bonds of domination by resorting to any means recognised by the international community'. It proposes a two-part test which assesses the grounds for a claim under article 20(2) based on 'oppression' and the scope of consequently permissible means separately, incorporating a consideration of necessity and proportionality. Applying the primary 'grounds' test, positive findings are possible in more than foreign invasion and occupation cases. Peoples facing massive violations amounting to crimes against humanity or genocide, coups d'état or other unconstitutional rule could qualify. Provided all other required conditions are convincingly established, minority peoples facing systematic discrimination and exclusion could also qualify, as could majorities or minorities in situations of foreign economic domination amounting to an interference with the right to self-determination. Systematic violations of economic and social rights of either a majority or a minority people could also produce a valid claim to a right to resist economic 'oppression'. Regarding the secondary 'means' test, adjudicators are constrained by the lack of clear

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permissions in established customary law on the right to employ armed force to resist domestic oppression. For otherwise illegal means short of armed force – those peaceful and other means that are at the illegal end of the spectrum of tactics and therefore not generally authorised due to ordinary limitations under the lex generalis – the gaps in the law resulting from both ‘constructive ambiguity’ and limited findings in the universal system may provide greater latitude. These create openings for fresh African construction, particularly as to exceptionally authorised peaceful but otherwise illegal means.

1 Introduction

Three decades ago, the African Charter on Human and Peoples’ Rights (African Charter) was the first international human rights treaty to codify the right to resist, in article 20(2). It states that ‘[c]olonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community’.¹ Today this provision continues to enjoy a unique status in international law as the sole express right to resist ‘oppression’. However, despite the description of the right to resist as the ‘supreme’ human right by one of the foremost authorities of the discipline,² specialists have to date largely neglected article 20(2), and consequently its interpretation remains challenging in view of the ongoing lack of a clear evaluative framework. It is precisely because it represents a significant departure from the approach of other main human rights treaties, but also because the right to resist remains generally ignored or misunderstood by international lawyers and advocates, that article 20(2) deserves further exploration and discussion.

Far from being obsolete in the post-colonial and post-apartheid era, the many contemporary African conflicts, in particular the recent popular revolts in North African states that are parties to the African Charter, make clarification of the application and scope of article 20(2) more relevant and more urgent than ever. Moreover, the advent of a new recommendation to the United Nations (UN) Human Rights Council for inclusion of an express provision on the right to resist oppression within the context of a proposed UN declaration on the right of peoples to peace³ provides a fresh opportunity for timely international leadership by Africans on this important human rights concept.

1 Art 20(2) African Charter on Human and Peoples’ Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3/Rev.5 (1982); reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

2 H Lauterpacht *International law and human rights* (1950) 116.

3 UN Human Rights Council ‘Progress report of the Human Rights Council Advisory Committee on the right of peoples to peace’ 1 April 2011, UN Doc A/HRC/17/39 (2011) 9-10 paras 35-37.

After providing a brief background on the pedigree, content and status in positive law of the human right to resist, this article reviews the unique elements of article 20(2) as well as its ambiguities. It identifies obstacles to its interpretation and highlights the major legal questions that the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights and later the African Court of Justice, Human and Peoples' Rights (African Court) will have to address as the jurisprudence of article 20(2) develops, suggesting an approach in the form of a two-part test. It argues that this provision of the African Charter poses a necessary challenge to the otherwise predominant Western 'doctrine of disavowal' of the right to resist,⁴ which holds that, as such, this right either does not, cannot or should not exist, and that, regardless of context, only a lesser right to peaceful assembly and protest constitutes a lawful human rights defence. In this way the Charter contains the framework for a significant advancement not only for human rights in Africa, but potentially well beyond its borders. While acknowledging the associated challenges, it concludes by setting out a series of opportunities for human rights and human security presented by article 20(2), highlighting its possible utility in contemporary conditions.

2 Background: The human right to resist

Article 20(2) of the African Charter may be unique, but it does not exist in a vacuum. Rather, it is a significant progressive legal development that should be understood in its proper context as to the right's pedigree, content and status in positive law.

2.1 Pedigree

The idea that human beings have a lawful right to resist various forms of what we now understand as human rights violations is ancient, intercultural, pan-ideological, and profoundly constitutional. It shares a common conceptual origin with human rights itself.⁵ Its antecedent norms can be found in Athenian and Roman, Confucian and Islamic laws and doctrines, as well as in a distinctive African tradition.⁶

4 See S Murphy 'The "right to resist" reconsidered' in DP Keane & Y McDermott (eds) *The challenge of human rights: Past, present and future* (forthcoming 2012).

5 Lauterpacht (n 2 above) 73-126 326.

6 Eg the Athenian doctrine of tyrannicide, found in Solon's Law and in the Decrees of Eucrates and Demophantus, transposed into Roman law; see JF McGlew *Tyranny and political culture in ancient Greece* (1993) 88 185-187; O Jászi & JD Lewis *Against the tyrant: The tradition and theory of tyrannicide* (1957); the Confucian doctrine of tyrannicide according to Mencius; see *Mencius* (trans) DC Lau (2003) bk 1 pt B:8, bk II pt B:14, bk VII pt A: 31 and CS Lo 'Human rights in the Chinese tradition' in UNESCO 'Human rights: Comments and interpretations' (July 1948) UNESCO Doc PHS/3(rev) 25 185-186; and the Islamic doctrine of *jihad* in *The Qur'an* trans

Its philosophical basis has been advocated on opposite sides of the ideological divide, from liberal democratic to Marxist theory.⁷ Its compatibility with the rule of law both internationally and domestically is confirmed by the earliest proponents of international law⁸ and its codification in the Magna Carta.⁹ Indeed, the 'right to resist oppression' was well-established enough as a legal concept to be included in both the Humphrey and Cassin drafts of the Universal Declaration of Human Rights (Universal Declaration).¹⁰

2.2 Content

Despite its impressive pedigree, the right to resist remains controversial. There is no agreement among contemporary legal scholars that it even exists, and no consensus on its definition even among its advocates. Elements of a definition advanced by Honoré provide the following useful fundamentals: that given certain conditions, there is an exceptional individual and collective human right to commit otherwise unlawful acts as a means to resist unlawful use or other abuse of power.¹¹ The right to resist is therefore a secondary right that engages only as a consequence of primary right violations, and it is a 'self-help' form of remedy or method of enforcement of guarantees.¹² It concerns a broad

MAS Abdel Haleem (2004) 4:75 with explanation at xxii. Likewise, in pre-colonial Africa, Ashanti kings were 'ritually warned against dictatorship and abuse of office' according to UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 15. See also CH Heyns 'A "struggle" approach to human rights' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 28 on the analogous traditional norms in African customary law.

- 7 Eg Locke's 'doctrine of the lawfulness of resisting all unlawful exercises of power'; J Locke *Two treatises of government* P Haslett (ed) (1988), esp 'Of tyranny' and 'Of the dissolution of government' *Second treatise* ch XIX 415 para 226; ch XIX 427-428 para 243; ch XVIII 402-403 paras 206-207.
- 8 Eg H Grotius *The law of war and peace: Selections from De jure belli ac pacis* (trans) WSM Knight (1939) bk I ch IV paras i3, vii4, viii4; bk II ch XXV para viii2; E de Vattel *The law of nations: Or, principles of the law of nature applied to the conduct and affairs of nations and sovereigns* trans CG Fenwick (1916) bk I ch IV para 54.
- 9 *Magna Carta* (1215) clause 61.
- 10 'Draft outline of an International Bill of Human Rights (prepared by the Division of Human Rights of the Secretariat)' 1947 *UN Yearbook of Human Rights* 484 (Humphrey draft) art 29; 'Suggestions submitted by the Republic of France for articles of the International Declaration of Human Rights' 1947 *UN Yearbook of Human Rights* 495-498 (Cassin draft) art 25.
- 11 T Honoré 'The right to rebel' (1988) 8 *Oxford Journal of Legal Studies* 34 35-36.
- 12 A Eide 'The right to oppose violations of human rights: Basis, conditions and limitations' in UNESCO *Violations of human rights: Possible rights of recourse and forms of resistance* (1984) 44-53; TV Minh 'Political and juridical sanctions against violations of human rights' UNESCO (above) 157 163; C Tomuschat 'The right of resistance and human rights,' UNESCO (above) 20 24; Honoré (n 11 above) 38-40.

spectrum of illegal means from the peaceful to the forceful.¹³ Thus, related sub-rights to opposition, disobedience, rebellion and revolution – while narrower and related to more specific acts or conditions – may be included under its umbrella, in the manner of the right to a fair trial with its various elements. However, in order to be consistent with international human rights law, the right must be limited and conditional and the objectives and conduct of the resistance must be human rights compliant in order to be lawful.¹⁴

More recently, the UN Human Rights Council Advisory Committee advanced this formulation:¹⁵

- 1 All peoples and individuals have the right to resist and oppose oppressive colonial or alien domination that constitutes a flagrant violation of their human rights, including the right of peoples to self-determination, in accordance with international law.
- 2 All individuals have the right to oppose war crimes, genocide, aggression, apartheid and crimes against humanity, [or] violations of other universally recognised human rights ...

If ultimately agreed by the UN Human Rights Council,¹⁶ this would represent the most detailed statement of how the right is understood in the universal system, even though as a declaration the instrument itself would not be binding on states.

2.3 Status in positive law

Despite the controversy over its existence, the right to resist is not purely theoretical. Rather, it has a basis in both constitutional and international positive law. However, its international codification is weak compared to its domestic codification. Its recognition and protection in international human rights law is notably thin compared to that afforded many other fundamental rights, and what protections do exist reflect a north-south divide in perspective as to whether the right is legitimate.¹⁷

13 Eide (n 12 above) 54; Minh (n 12 above) 161-162; Tomuschat (n 12 above) 25; RE Schwartz 'Chaos, oppression, and rebellion: The use of self-help to secure individual rights under international law' (1994) 12 *Boston University International Law Journal* 255 256-257.

14 Eide (n 12 above) 34-35 54-58 60-63; Tomuschat (n 12 above) 19 27 30; JJ Paust 'The human right to participate in armed revolution and related forms of social violence: testing the limits of permissibility' (1983) 32 *Emory Law Journal* 545 569; A Kaufmann 'Small scale right to resist' (1985-1986) 21 *New England Law Review* 571 574; Honoré (n 11 above) 43 52; Schwartz (n 13 above) 265-269 273-276 278-284.

15 n 3 above, 10 sec D 'proposed standards'.

16 UN Human Rights Council 'Resolution on Promotion of the Right of Peoples to Peace' 10 June 2011 UN Doc A/HRC/17/L.23 (2011) paras 14-17 deferred substantive consideration of the proposed draft text until 2012.

17 Murphy (n 4 above).

2.3.1 Constitutional law

The right to resist has been codified in numerous constitutions, using a variety of formulations as to its scope, in four distinct ‘waves’: republican, anti-fascist, anti-colonial and anti-soviet.¹⁸ It remains to be seen whether there will be a fifth wave, post-‘Arab Awakening’. A significant number of the set are in African post-colonial constitutions.¹⁹ Like others of the post-colonial subset, these tend to be anti-invasion and anti-*coup* provisions conferring a relatively narrow right to resist unconstitutional seizure of power,²⁰ often using a ‘right and duty’ model or in some cases a more oblique absolutism from the obligation of obedience. However, a few of the African formulations and many in the other three subsets provide a more general right to resist human rights violations where alternative remedies are not otherwise available.²¹

2.3.2 Customary international law

The right to resist is also recognised to some extent in customary international law, although its scope is unclear. The Universal Declaration, which to some extent codifies or at least provides evidence of customary international law, contains in paragraph 3 of its Preamble a reference to resistance as an outcome of tyranny, oppression and human rights violations.²² While some commentators maintain that this acknowledges a customary right to resist oppression, its preambular placement and indirect formulation are ostensibly those of a non-right, not a right, and indeed the express right proposals debated in the drafting process

18 As above.

19 According to Heyns & Kaguongo, as of 2006, 16 African constitutions protected this right, as follows: Benin (arts 19 & 66); Burkina Faso (art 167); Cameroon (Preamble); Cape Verde (art 19); Chad (Preamble); Congo (art 10); Democratic Republic of Congo (art 28); The Gambia (art 6); Ghana (art 3); Guinea (art 19); Mali (art 121); Mozambique (art 80); Niger (art 13); Rwanda (art 48); Togo (arts 21, 45 & 150); and Uganda (arts 3(5) & (6)). C Heyns & W Kaguongo ‘Constitutional human rights law in Africa’ (2006) 22 *South African Journal on Human Rights* 673 678 fn 20. It is not, however, clear that the Cameroon and Guinea provisions cited above should be included in this list. In addition, the correct provision numbers for the Constitution of the Republic of Uganda are as in n 20 below. In subsequent developments, at the time of writing the Transitional Constitution of the Republic of South Sudan (2011) contains a duty-only provision at art 4(3) modified from the Interim Constitution of Southern Sudan (2005)’s binary right/duty to resist at art 4(2). The Constitution of the Republic of Kenya (2010) does not contain such a provision.

20 Eg Constitution of the Republic of Honduras (1982) art 3; Constitution of the Republic of Uganda (1995) arts 3(4) & 3(5).

21 Eg American Declaration of Independence (1776) Preamble para 2; Constitution of the Portuguese Republic (1976) art 21; Constitution of the Republic of Cape Verde (1992) art 19; Constitution of Slovakia (1992) art 32.

22 ‘Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’ Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III) UN Doc A/810 71 (1948) (Universal Declaration) Preamble para 3.

were ultimately withdrawn without a vote.²³ So the position of the right to resist in the Universal Declaration is ambiguous at best.

Elsewhere, UN General Assembly Resolution 2625, which also provides evidence of customary international law, enshrines the principle that a people, when forcibly deprived of its right to self-determination, has a right to international assistance in its resistance and thus contains an implied right to resist.²⁴ It is now considered settled that this applies to peoples resisting foreign invasion and occupation, colonisation and racist regimes,²⁵ otherwise known as situations demanding 'external self-determination'.²⁶ However, while there may well be room within the letter of the law,²⁷ it is far less clear whether the same right also applies to peoples resisting undemocratic, unconstitutional, tyrannical, or otherwise oppressive, corrupt or unresponsive domestic regimes, as situations demanding 'internal self-determination'.²⁸

2.3.3 Treaty law

The apparent ambiguities of the Universal Declaration and UN General Assembly Resolution 2625 are not clarified by the treaties of the universal system, where there is still no express provision on the right to resist, but neither is there a clear prohibition. Some have advanced theories of constructive ambiguity, maintaining that the International Bill of Rights contains an implied or latent right to resist derived from common article 1 on the right to self-determination in the International Covenant on Civil and Political Rights (ICCPR) and International Cov-

23 See the accounts in J Morsink 'The philosophy of the Universal Declaration' (1984) 6 *Human Rights Quarterly* 309 322-325; J Morsink *The Universal Declaration of Human Rights: Origins, drafting and intent* (1999) 308-312.

24 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) UN Doc A/5217 (1970) 121 (UNGA Res 2625). See principle 1 para 7; principle 3 para 3; and especially principle 5 paras 5 & 7.

25 Conclusions affirming the right to resist appear in the respective reports of the former UN Secretary-General Kofi Annan, Special Rapporteur on Palestine, Richard Falk, and Judge Richard Goldstone. Report of the UN Secretary-General to the UN General Assembly 'In larger freedom: Towards development, security and human rights for all' 21 March 2005, UN Doc A/59/2005 26 para B91; UN Human Rights Council 'Human rights situation in Palestine and other Occupied Arab Territories: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967' 11 February 2009, UN Doc A/HRC/10/20 18 paras 40-41; UN Human Rights Council 'Human rights situation in Palestine and other Occupied Arab Territories: Report of the United Nations fact finding mission on the Gaza conflict' 15 September 2009, UN Doc A/HRC/12/48 520 pt 5 XXX A para 1672.

26 See discussion in F Ougurgouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 230-236.

27 Specifically at principle 5 para 7 (n 24 above).

28 See discussion in Ougurgouz (n 26 above) 230-236.

enant on Economic, Social and Cultural Rights (ICESCR),²⁹ when read together with article 25 on the right to political participation and the right to an effective remedy at article 2(3)(a) of ICCPR.³⁰ While such theories may or may not be viable, they have not been tested at the UN Human Rights Committee or International Court of Justice so should at least not be ruled out.

Meanwhile, the regional human rights systems take divergent approaches. Whereas a clear doctrine of disavowal of the right to resist is discernible in the European and Inter-American systems, which do not recognise the right to resist,³¹ the African Charter in contrast is the first international human rights instrument to actually codify it in an express provision. Article 20 firstly affirms in subsection (1) that all 'peoples' have 'the unquestionable and inalienable right to self-determination' including the right to 'freely determine their political status and ... pursue their economic and social development according to the policy they have freely chosen'.³² In this context, as set out above, article 20(2) of the African Charter effectively asserts a collective right to resistance not only against colonisation, but also other unspecified forms of oppression.³³ Article 20(3) goes even further, providing that '[a]ll peoples shall have the right to the assistance of the states parties ... in their liberation struggle against foreign domination, be it political, economic or cultural'.³⁴ This is one of only two such provisions on the right to resist in international human rights treaty law, the other being a narrower 'right to resist foreign occupation', now codified as article 2(4) of the newly-operative Arab Charter on Human Rights.³⁵ It is clear

29 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976 GA Res 2200A (XXI) UN Doc A/6316 (1966) (ICCPR) art 1; International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966 entered into force 3 January 1976, GA Res 2200A (XXI) UN Doc A/6316 (1966) art 1.

30 'Every citizen shall have the right and the opportunity, without [discrimination] and without unreasonable restrictions ... [t]o take part in the conduct of public affairs, directly or through freely chosen representatives ... [t]o vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.' ICCPR (n 29 above) art 25; 'Each State Party to the present Covenant undertakes ... [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.' ICCPR (n 29 above) art 2(3)(a). See M Nowak *UN Covenant on Civil and Political Rights – CCPR commentary* (1993) 23 para 34; A Rosas 'Article 21' in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights: A common standard of achievement* (1999) 432 434 441-442 449 451.

31 Murphy (n 4 above).

32 Art 20(1) African Charter.

33 Art 20(2) African Charter.

34 Art 20(3) African Charter.

35 Art 2(4) Arab Charter on Human Rights, League of Arab States adopted 22 May 2004, entered into force 15 March 2008.

that these African and Arab provisions were adopted principally as a reflection of profound regional commitment to prevent recurrences of gross human rights violations related to colonisation as well as to stop those ongoing at time of adoption, including in particular the apartheid regime in South Africa and the occupation of Palestine, and perhaps also to honour the contribution of the African and Arab national liberation movements to the regional advancement of human rights. It is equally clear that the European and Inter-American approaches instead break with or draw a line under their common revolutionary republican, and their respective anti-fascist and anti-colonial resistance pasts, despite the comparable contribution made by these movements to the advancement of human rights in these regions.

Thus, while it draws on a long and distinguished tradition, and furthermore sits compatibly with the African constitutional landscape, article 20(2) remains unique in international law as a consequence of its specific elements. These same features also give rise to certain obstacles to interpretation and a series of as yet unresolved legal questions, as set out below.

3 Article 20(2): Unique elements, obstacles to interpretation or unresolved legal questions and a possible test

Since the UN Human Rights Council has now been formally advised that the right to resist oppression should be included in a proposed UN declaration on the right of peoples to peace,³⁶ the time is opportune not only to examine what this right really means in the African context, but also for the African Union (AU), African Commission and African Court in particular to develop and clarify their views on article 20(2), make them known and thus have a further influence on the development of international human rights law in this area.

3.1 Unique elements

There are two important elements to the right to resist in article 20(2) of the African Charter that distinguish it from the express, or for that matter implied, rights to resist elsewhere in international law. Firstly, as noted above, article 20(2) does not limit the right to 'colonised' or 'occupied' peoples or those living under 'racist regimes' only, but specifically and clearly extends it to all 'oppressed' peoples in Africa, which is a much broader formulation. In this sense, it is closer to the tradi-

³⁶ UN Human Rights Council Advisory Committee 'Progress report on the right of peoples to peace' 22 December 2010 UN Doc/A/HRC/AC/6/CRP.3 para 22(d).

tional 'right to resist oppression and tyranny'³⁷ that is absent from the other international and regional treaties and upon which customary international law is presently unclear. Secondly, article 20(2) provides that those engaged in resistance have just recourse to 'any means'. This is also broader than the apparently exclusively peaceful means authorised by the European and Inter-American regional systems and at least favoured by the UN system human rights treaties. However, such means must be 'recognised by the international community'. This has the positive effect of ensuring that the right is exercised in a manner generally consistent with international human rights law, international humanitarian law and international criminal law as they stand at any given time. Unfortunately, it also makes the entire provision dependent on the status of the right to resist elsewhere, and thus impossible to interpret from the Charter alone.

These two elements ensure that article 20(2) is not obsolete in a contemporary context that has changed dramatically in some ways since the provision was originally drafted and agreed upon in the early 1980s. Rather, in the post-colonial, post-apartheid era it continues to apply not only to cases of foreign intervention in other forms, but also to the now widespread 'internal self-determination' questions that plague both majorities and minorities in many African countries. This has been emphasised by Ouguerouz, the one commentator who has treated the issue in detail.³⁸ Indeed, the account of the Secretary-General of the Organisation for African Unity (OAU) at the time of drafting confirms that the African Charter as a whole was intended not only to ensure against recurrence of colonisation or other forms of foreign domination and to bolster the fight against the aggressive apartheid regime, but also to address the proliferation of post-colonial human rights violating regimes and African dictatorships.³⁹

3.2 Impact of the dependent formula on interpretation

The African Charter provisions generally provide ample room for dynamic interpretation, both as a matter of intent and net effect of the simplicity bordering on vagueness of their framing and also because the 'incomplete and cursory' *travaux préparatoires* provide little or no interpretive guidance.⁴⁰ While there are undoubted potential

37 The phrase used in art 25 of the Cassin Draft of the Universal Declaration; see n 10 above.

38 Ouguerouz (n 26 above) 203-269, especially 261-269.

39 E Kodjo 'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 271 272-274 281-282.

40 F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 315-316 325. Viljoen compiles and compares the few available records on the substantive provisions as research complementary to BG Ramcharan 'The *travaux préparatoires* of the African Commission on Human and Peoples' Rights' (1992) 13 *Human Rights Law Journal* 307. See also NS Rembe *The system of protection of human rights under the African Charter on Human and Peoples' Rights: Problems and prospects* (1991) 4-5.

interpretative advantages to these ambiguities, the available latitude is not unlimited.

In the case of article 20(2) determinations, the adjudicators may be constrained by the interpretive obstacle imposed by its dependent formula as to authorised means of resistance, which must be considered in every individual case. To decode this they will need in the first instance to abide by articles 60 and 61 of the African Charter as to applicable principles, standards and sources of interpretation.⁴¹ Even if, in the opinion of the adjudicators, means additional to those authorised by these sources of international law would be justified on particular grounds, such as necessity, as a consequence of contextual conditions and thresholds met, it would appear that they would not have the discretion to make a recommendation or judgment to this effect. On this one particular point, article 20(2) is not remotely ambiguous. Even if the net effect of the formulation is positive, as it ensures that the interpretation of the provision can continue to keep stride with developments elsewhere in public international law over time, this is potentially problematic in the short term because the law elsewhere remains mostly vague.

Particularly as regards mid-spectrum cases – where the means employed are neither entirely peaceful nor involve armed force (that is, physical confrontation or property destruction without munitions) – and ‘internal’ self-determination cases involving violations by and resistance to domestic regimes, the African Commission, African Court and others will be at a disadvantage and may not be able to take a fully definitive position until normative and legal clarification takes place outside the African system. In the meantime, as discussed further below, despite the interpretive obstacle created by the dependent formula, there may still be sufficient flexibility to enable determinations not only on situations involving forcible deprivation of ‘external’ self-determination rights, but also those where exclusively peaceful means are used even if these are otherwise ‘illegal’, such as civil disobedience. So the dependent formula does not completely paralyse the application of the provision. However, there are still a number of other basic

41 Art 60 African Charter: ‘The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.’ Art 61 African Charter: ‘The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.’

unresolved legal questions with the potential to further shape interpretation, as follows.

3.3 Scope of potential restrictions internal to the African Charter

Apart from the constraints imposed by the dependent formulation, the African Commission, African Court and others will need to take account of other restrictions internal to the African Charter in their analysis. These vary in their potential scope and impact.

Firstly, like all other Charter provisions, article 20(2) is not subject to derogation in times of emergency. This is particularly important because the right to resist oppression in particular can be most urgently needed under such conditions and any state right of derogation would essentially amount to a direct negation of this right. Moreover, unlike the other political rights provisions, article 20(2) is not subject to any additional internal 'claw-back' clause provided all its elements are met, including the restriction requiring international authorisation of the means employed. This is crucial for the same reason. However, two other separate provisions of the African Charter may effectively impose limitations on article 20(2) in the form of possibly, though not inherently, conflicting rights.

Article 27(2) requires exercise of this right 'with due regard' not only to the rights of others, but also collective security and common interest, although the African Commission to date has insisted that any limitations deriving from this clause must be necessary and proportionate and also not negate the right in question.⁴² This leaves adjudicators room for thoughtful construction and balancing or weighting of competing rights and other considerations.

The possible article 27(2) restriction becomes particularly relevant in view of potential limitations on the right deriving from the article 23 right to peace,⁴³ including the article 23(2) prohibitions on subversion against another state.⁴⁴ Indeed, the African Commission has already found violations of article 23 linked to actions contrary to customary law on the right to self-determination and the prohibition on intervention in the form of UN General Assembly Resolutions 2625 and 3314⁴⁵ and the UN and OAU

42 *Nigeria Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 65-70.

43 Art 23(1) African Charter: 'All peoples shall have the right to national and international peace and security.'

44 Art 23(2) African Charter: 'For the purpose of strengthening peace, solidarity and friendly relations, states parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum ... shall not engage in subversive activities against his country of origin or any other state party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present Charter.'

45 Definition of Aggression UNGA Res 3314 (XXIX) (17 December 1974) UN Doc A/9619 and Corr 1.

Charters,⁴⁶ in the form of unauthorised state interference in civil conflict by illegal support for local anti-government rebels.⁴⁷ This indicates that the African Commission is unlikely to endorse or otherwise permit the exercise or proposed exercise of the right to resist in article 20(2) or the right to assistance in article 20(3) in any manner contrary to established customary international law relevant to article 23.⁴⁸ However, potential article 23 limitations, including those based on article 23(2), should be treated with caution. Ouguergouz warns against the potential for misconstruction of the African Charter through an oversimplified understanding of the right to peace because it actually ‘does not condemn all use of violence which [under general principles of international law] ... remains legitimate in situations of self-defence and whenever a people seeks to escape from servitude or oppression’, therefore article 23(2) must be read ‘in the light of article 20(2)’ and not the reverse.⁴⁹ Another point to consider is that the reference to ‘national’ peace in article 23(1) means that ‘both the people of a state taken as a whole, and its different ... components taken individually, have the right to peace and security domestically’.⁵⁰ Again, this must be construed in a manner consistent with the long-established legal concept of respect for human rights in general and especially self-determination rights as a precondition to peace, as reflected in the Universal Declaration’s Preamble and article 28 on the right to a human rights-compliant social and international order.⁵¹ In other words, a well-regulated and responsibly-exercised right to resist could even under certain conditions actually be necessary for the realisation of the right to peace in the medium to longer term, or else the only available form of effective remedy for violations of this right in the short term. The African colonial experience clearly demonstrates this. Equally, its post-colonial history is replete with examples of the opposite: the dangers of unregulated and thus undifferentiated resort to

46 Charter of the United Nations adopted 26 June 1945, entered into force 24 October 1945, as amended by UNGA Res 1991 (XVIII) of 17 December 1963 entered into force 31 August 1965, 557 *UN Treaty Series* 143; 2101 of 20 December 1965 entered into force 12 June 1968, 638 *UN Treaty Series* 308; and 2847 (XXVI) of 20 December 1971 entered into force 24 September 1973, 892 *UN Treaty Series* 119 (UN Charter) art 2(4); Charter of the Organisation of African Unity entered into force 13 September 1963, 479 *UN Treaty Series* 39 (OAU Charter) art 3.

47 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) paras 76-77.

48 In addition, Umozurike has noted a general preference for reconciliatory approaches rooted in African traditions of dispute settlement, which are also bound to influence recommendations, even in the event of positive findings on art 20(2). See Umozurike (n 6 above) 92.

49 Ouguergouz (n 26 above) 345, esp fn 1211.

50 Ouguergouz (n 26 above) 353. That the art 23 right to peace is effectively a right of peoples against states is emphasised in C Baldwin & C Morel ‘Group rights’ in M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008) 279-282.

51 Ouguergouz (n 26 above) 334-335.

force by rebel groups and tragic outcomes arising from claims to a right to resist that would be invalid under the African Charter's framework. So, while articles 27(2) and 23 will need to be taken into account in the adjudication of any future article 20(2) claims and particularly any article 20(3) claims consequently arising, it is not the case that these two articles inherently trump article 20(2) claimants. Significantly, as stated above, this view is apparently shared by the UN Human Rights Council's Advisory Committee.

3.4 Implications of the 'Katanga test', the *Jawara* findings and remaining ambiguities post-*Gunme*

Since the right to resist is a secondary right akin to the right to an effective remedy, article 20(2) could be litigated in at least two ways. The issue could be raised concurrently with or as part of a broader case regarding violations of primary rights, seeking affirmation that other forms of remedy are not available or unlikely to succeed, thereby authorising resort to the exceptional secondary right for the purposes of primary rights enforcement. On a practical level, a finding validating a claim to this secondary right could act as a deterrent to a regime, a form of 'cease and desist' with a view to encouraging de-escalation, negotiation or other positive engagement on the part of a state. Alternatively, a consecutive complaint could be raised regarding a violation of the secondary right itself, separate from but following findings on the primary violation, concerning the validity of specific laws or prosecutions, or challenging obstructions or failures to assist by other states. Despite these possibilities, article 20(2) has not yet been the direct subject of a complaint to the African Commission, nor the African Court.⁵² Nevertheless, recent African Commission case law sheds some light in the form of three key cases that include substantive findings directly relevant to some of the legal questions that will eventually be raised by article 20(2). These are *Katangese Peoples' Congress v Zaire* (*Katanga case*),⁵³ *Jawara v The*

52 At the time of writing, decisions of the African Commission on individual communications were only available up to the 28th Activity Report covering the period to July 2010.

53 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995). The African Commission found no merit in the claim to a right to self-determination of the 'Katangese people' under art 20(1) and an alleged consequent right to recognition of the claimant organisation as a national liberation movement and to assistance in their secession bid under art 20(3), as the claimant failed to adduce any evidence of the status of the Katangese as a 'people' within the meaning of the African Charter, and to provide further evidence establishing their exclusion from the political process.

*Gambia (Jawara case)*⁵⁴ and *Gunme and Others v Cameroon (Gunme case)*,⁵⁵ which contains the first direct reference to article 20(2).

The chief significance of the *Gunme* case for consideration of article 20(2) claims is that it addresses the first hurdle in determining who is potentially able to avail of the article 20(2) right: Who, by definition, is a 'people' for the purposes of Charter rights? While acknowledging that the concept is not defined elsewhere under international law and that the African Commission has not previously defined the term,⁵⁶ the Commission holds that collective rights in general – therefore potentially including the article 20(2) right to resist – can at least in theory be exercised by 'a people bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities or other bonds'.⁵⁷ Importantly, a claim to be a 'people' need not require manifestation of all, but rather only some of the 'identified attributes', and a people need not necessarily be ethnically or otherwise anthropologically distinct to qualify.⁵⁸ Thus, the Commission has adopted a very broad and inclusive definition as regards potentially qualifying subgroups, particularly by way of ideological and economic identity and the totally open category of 'affinities or other bonds'. In addition, the Commission holds that the principles of sovereignty and territorial integrity do not provide states with an absolute shield from such claims. Instead, states have an obligation to address them, using African or other international dispute resolution mechanisms if necessary.⁵⁹

Gunme also establishes a form of necessity condition relevant to article 20(2) by way of affirming the *Katanga* case requirement of a prior or concomitant finding of a violation of the article 13 right to political participation.⁶⁰ This supplements similar findings in which the Commission has proactively linked article 13 violations to a people's overarching right to self-determination, for example when election

54 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000). In considering this claim taken by an ousted head of state, the African Commission held that a military *coup d'état* constitutes a 'grave' violation of the right to self-determination under art 20(1), and that such conditions preclude availability of an effective remedy through the courts.

55 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009). While the African Commission found that the Southern Cameroonians have a valid claim to self-determination as a 'people' based upon their distinct identity, it found no violation of their right to self-determination because no violation of their right to political participation within the unitary state had been established.

56 *Gunme* (n 55 above) paras 169 & 174.

57 *Gunme* (n 55 above) para 171.

58 *Gunme* (n 55 above) para 178.

59 *Gunme* (n 55 above) para 181.

60 *Katangese Peoples' Congress v Zaire* (n 53 above) para 6. Art 13 reads '(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives, in accordance with the provisions of the law ... (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

results are ignored or annulled.⁶¹ According to the Commission, this nexus applies not only to the whole people of a state, but also to minority peoples facing exclusion from article 13 rights. Provided the stringent additional *Katanga* test can be met, the exercise of self-determination by a distinct people within the context of a unitary state may be warranted. That is, there must be 'concrete evidence of violations of human rights to the point that the territorial integrity of the state party should be called to question ...'⁶² While the African Commission finds that it cannot 'condone or encourage secession, as a form of self-determination',⁶³ it emphasises that 'secession is not the sole avenue open ... to exercise the right'.⁶⁴ It thus affirms its position set out in the *Katanga* case that 'independence, self-government, local government, federalism, confederalism, unitarism or any form of relations that accords with the wishes of the people' are acceptable and may also be 'fully cognisant of other recognised principles such as sovereignty and territorial integrity'.⁶⁵ Hence it would appear that article 20 claims generally cannot be adjudicated independently of article 13. A finding of violation of article 13 is therefore a probable second prerequisite, together with a prior finding that the group in question constitutes a 'people' within the meaning of the African Charter. Provided that these are in place, article 20(2) rights clearly can apply to both whole peoples of a state and minority peoples opposing violations of the right to self-determination.

There is another possibly important but strange finding in *Gunme* regarding the correct sequence of judicial determination: '[W]hen a complainant seeks to invoke article 20 ... it must [first] satisfy the Commission that the two conditions under article 20(2), namely, oppression and domination have been met.'⁶⁶ Yet article 20(2) is apparently neither raised by the claimant nor discussed at all prior to this paragraph, nor are the legal content nor tests for 'oppression' and 'domination' elsewhere defined by the Commission. Indeed, it may not even be that 'domination' is a separate test in article 20(2) in the way that 'foreign domination' clearly is for application of article 20(3). The Commission's logic and reasoning here are not clear. Particularly since it is technically possible to make an article 20(1) claim without making any further claim as to rights under articles 20(2) or 20(3), surely it must be the inverse. Rather, an affirmative article 20(1) finding

61 *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) paras 51-53.

62 *Gunme* (n 55 above) paras 194 & 199-200, citing *Katangese Peoples' Congress v Zaire* (n 53 above) para 6.

63 *Gunme* (n 55 above) para 190.

64 *Gunme* (n 55 above) para 191.

65 *Gunme* (n 55 above) para 188, citing *Katangese Peoples' Congress v Zaire* (n 53 above) para 4.

66 *Gunme* (n 55 above) para 197.

that the complainants are in fact a ‘people’ denied the right to self-determination as a consequence of the denial of article 13 rights must precede consideration of an article 20(2) claim, which would require the meeting of a separate test for ‘oppression’, in addition to a further test for whether the means employed or proposed to be employed are internationally lawful at the time of consideration. This should be formally clarified.

The African Commission’s earlier finding in *Jawara* also sets a particularly relevant precedent, although it does not address article 20(2) directly even by way of reference. The complaint concerned a military *coup* and subsequent abuse of power by the military regime, including the abolition of the Bill of Rights by military decree and the banning of all democratic political activity. The Commission finds that seizure of power by military *coup*, even where no violence is involved, is a ‘grave violation’ of article 20(1).⁶⁷ Having found that in this context there is no effective remedy available through the courts,⁶⁸ the Commission restates the principle of ‘available, effective and sufficient remedy’ which requires that ‘the petitioner can pursue it without impediment ... [it] offers a prospect of success, and ... is capable of redressing the complaint’.⁶⁹ Indeed, the Commission’s established position is that ‘a remedy that has no prospect of success does not constitute an effective remedy’.⁷⁰ A complainant should not be expected to pursue a remedy through the courts where a regime has little regard for the judiciary and where through severe repression a regime causes ‘generalised fear’.⁷¹ In a future case, either of these two findings – that undemocratic seizure of power constitutes a grave violation of the right to self-determination, or that conditions of repression may be sufficient to negate any prospect of effective remedy through the courts implying that any effective remedy at domestic level may only be had through non-judicial means – would surely provide grounds for a further finding of a valid right to resist oppression under article 20(2), even if the authorised means could only be determined by looking elsewhere in international law.

These three cases together represent a skeletal framework covering both majority and minority claims – with *Jawara* as the leading majority claim case and *Gunme* now providing the principal precedent minority claim case, affirming and extending the *Katanga* case. However, two major legal questions remain that need to be resolved to guide any future article 20(2) determinations: What is ‘oppression’ within the framework of the Charter and what are currently ‘recognised means’ within the international community according to the applicable law? Finally, in light of all of the above, what might be an appropriate test

67 *Jawara v The Gambia* (n 54 above) paras 72-73.

68 *Jawara v The Gambia* (n 54 above) paras 28-40.

69 *Jawara v The Gambia* (n 54 above) paras 31-32.

70 *Jawara v The Gambia* (n 54 above) para 38.

71 *Jawara v The Gambia* (n 54 above) paras 34-37 & 40.

to determine which classes of claimants actually engaging in various forms of resistance in Africa today are potentially protected in their actions by article 20(2)?

3.5 What is 'oppression' within the framework of the African Charter?

The principal issue now requiring clarification with respect to article 20(2) is exactly what legally constitutes 'oppression', because there will be no Charter right to resist human rights violations that does not meet this threshold. This is a matter upon which even Ouguergouz declines to speculate.⁷² Since there is no right to resist 'oppression' specifically, there is also no precedent elsewhere in international human rights treaty law, or indeed apparently in international customary law, upon which to rely. Therefore it may well be that interpretive guidance from a basic but otherwise authoritative conceptual definition provides an appropriate starting point. This is in keeping with Viljoen's observation that in the absence of reliable detailed *travaux*, the African Commission has tended to rely on a 'textual' approach to construction in the first instance.⁷³ In this regard, note that since there is no appreciable difference in meaning between (at least the English and French) versions of the provision, textual variation is not a source of clarification.⁷⁴

Neither the *Max Planck encyclopedia of public international law* nor the *Oxford concise dictionary of law* contains a definition of 'oppression'. However, the *Oxford dictionary of English* defines it as 'prolonged cruel or unjust treatment or exercise of authority',⁷⁵ and the *Oxford dictionary of law enforcement* defines it as 'the exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc; the imposition of unjust or unreasonable burdens, including practices such as 'torture, inhuman or degrading treatment and the use or threat of violence'.⁷⁶ The definition of 'oppression' from *Black's law dictionary* is 'the act or an instance of unjustly exercising authority or power'.⁷⁷ At an individual level and for the purpose of potential prosecution, it is 'an offence consisting in the abuse of discretionary authority by a public officer who has an improper motive, as a result of which a person is injured ...'.⁷⁸ Likewise, in the Butterworths definition, taken from *Halsbury's laws*, 'a public officer commits the common law offence of oppression if while exercising his

72 Ouguergouz (n 26 above) 208 fn 694.

73 Viljoen (n 40 above) 325-326.

74 The French version reads: 'Les peuples colonisés ou opprimés ont le droit de se libérer de leur état de domination en recourant à tous moyens reconnus par le Communauté internationale.'

75 A Stevenson (ed) *Oxford dictionary of English* (2010).

76 M Kennedy (ed) *The Oxford dictionary of law enforcement* (2007).

77 BA Garner (ed) *Black's law dictionary* (1999) 1121.

78 Garner (n 77 above).

office, he inflicts upon any person from an improper motive any bodily harm, imprisonment or injury...'⁷⁹ In the latter two definitions, acts of extortion are excluded as they are considered 'more serious'.

It becomes clear from any of the above definitions that 'oppression' is a broad rather than narrow concept, related to misrule and misuse of authority and likely involving violations of one or more of the other substantive rights in the African Charter. Surely, to graduate the violation from its individual instance to the 'oppression' form, engaging not merely individual rights but the rights of a people as a whole for the purposes of article 20(2), such violations must be at least systematic and serious. It may or may not be necessary to reach the level of 'gross' violation, however, particularly since 'any authorised means' does not inherently equal 'forceful means'. Instead, the means authorised may be calibrated based in part on proportionality, drawing from other sources of law as per articles 60 and 61. 'Prolonged' conduct, as suggested by the standard dictionary definition above, is not actually a requirement contained in any of the three legal definitions. Indeed, the right would have little protective value in practice were this so. As article 20(2) determinations do not involve individual prosecution, provided the above elements are met, such oppressive conduct need not be that of a public official, but could also be that of another legal person exercising 'power or authority' in an abusive way that systematically deprives a people of any of its Charter rights.

Once 'oppression' has been established, then the dependent formula engages. This requires the identification of established permissions and limitations on means recognised elsewhere in international law.

3.6 What are 'recognised means' in the international community?

In theory, the first element of article 20(2) contains the prospect of a significant advance in human rights by providing the first and only express recognition of the right to resist 'oppression' in international law – an achievement the drafters of the Universal Declaration could not manage to agree upon. However, the second element, regarding 'recognised means', reduces the chances for making the right meaningful in practice. Accordingly, while this Charter right to resist is seemingly broad with respect to qualification for rights holders, there is much less room to make distinctive African choices regarding its exercise.

Precisely because the African Commission, African Court and others will have to work within whatever standards of international law pertain at the time, and in doing so rely on the interpretive sources authorised under articles 60 and 61, this currently also means dealing with significant legal gaps and ambiguities as to permissible means. Importantly, however, means protected as standard individual political

⁷⁹ JB Saunders (ed) *Words and phrases legally defined* (1989) 281.

rights elsewhere in the African Charter and in universal international human rights law – the *lex generalis* or ordinary law – are not at issue here, because they are already otherwise catered for, and article 20(2) is not required to protect them. Rather, article 20(2) concerns the *lex specialis* or special law applying under the exceptional circumstances of oppression of a people.⁸⁰

As set out above, customary law in the form of UN General Assembly Resolution 2625 is thought to provide the closest thing to a settled case on authorised means beyond those protected under ordinary law. That is, those peoples facing forcible deprivation of their right to self-determination in the form of colonialism, foreign invasion or occupation or rule by a racist regime have the right to resist using any means, including forceful means. However, these must be employed in a manner consistent with the frameworks established in the areas of international human rights law, international humanitarian law and international criminal law, in particular Additional Protocol I to the Geneva Conventions and the Rome Statute of the International Criminal Court, which do not recognise or confer the right to resist itself, but rather govern its exercise. As they focus mostly on prohibited forceful means, these instruments provide important legal clarity delimiting actions that cannot be authorised despite a right to resist and will not be recognised as lawful under any circumstances, even if the resort to forceful means as such is permitted elsewhere in law. These are actions amounting to grave breaches, war crimes, crimes against humanity and genocide.

Yet some analysts question whether this interpretation of exclusive application of the customary law to situations of forcible deprivation of ‘external’ self-determination should really be as rigid as others maintain. Ouguergouz and Cassese, for example, both suggest that there may also be some room for applicability of the UN General Assembly Resolution 2625 authorisation to forcible deprivation of ‘internal’ self-determination, either by a people as a whole or by a minority people.⁸¹ If so, this would open up significant flexibility for the African Commission, African Court and others in considering this question with respect to article 20(2). The admitted impediment to this, however, is not the letter of the legal principles as stated in the resolution, but that it is unlikely that this broader application has yet reached the status of acceptance in customary law.⁸²

As a consequence of the above, UN Security Council Resolutions 1970 and 1973 on Libya and any subsequent resolutions relating to similar situations may also have some implications for the interpretation

80 Ouguergouz (n 26 above) 208 fn 694.

81 See the discussion in Ouguergouz (n 26 above) 227-241; A Cassese *Self-determination of peoples: A legal reappraisal* (1995) 150-155 108-120 takes the more conservative approach, limiting the application to racial and religious groups constituting a minority ‘people’.

82 Ouguergouz (n 26 above) 235 242-243.

of authorised means under article 20(2) insofar as they constitute an authoritative interpretation of the UN Charter and represent a significant development in the practice of the UN Security Council, and thereby contribute to the evolution of international law. While they do not contain any express provisions in this regard, they arguably constitute an instance of implicit recognition of the right to resist tyranny and oppression in their notable and unusual failure to equally condemn the use of force by the Libyan rebels, while at the same time authorising a spectrum of sanctions against the Libyan state for its use of force in suppressing the rebellion.⁸³ That said, the failure to reach consensus on Resolution 1973 authorising member state force against the regime for the purpose of civilian protection, and the subsequent failure by the Security Council to secure comparable resolutions with respect to similar contemporaneous situations of oppression in nearby states, shows that there probably has not yet been a definite change in the customary international law on a people's right to resist forcible deprivation of the right to internal self-determination, at least as regards the law on assistance. However, insofar as they may provide early evidence of a nascent modification in, or expansion of, customary international law now in the process of formation, such developments bear watching. Moreover, the Libyan case provides a prime example of why proceeding to provide UN or other UN-authorised regional assistance to a resistance movement without any clear adjudicatory framework as to the initial claim is fundamentally problematic. If anything, the Libyan example underscores the positive regulatory potential in the development of article 20(2) as an opportunity to establish coherent law not only for the AU, but which could also contribute constructively to the future clarification of universal norms in this regard. For now, the issue of the position of customary international law with respect to the employment of force to resist forcible deprivation of the right to internal self-determination is a legal question that demands examination and confirmation or potentially fresh assessment upon each instance of consideration by the African Commission, African Court or other adjudicators or analysts.

For otherwise illegal means short of armed force – those peaceful and other means that are at the illegal end of the spectrum of tactics and therefore not generally authorised due to ordinary limitations under the *lex generalis* – the gaps in the law resulting from the 'constructive ambiguity' in ICCPR and the Universal Declaration outlined above may provide the African Commission and African Court with some greater

83 The issue of the right to resist was never openly aired nor directly stated. However, the resolutions themselves contain implicit recognitions, as did the contributions of certain Security Council members during the debates; see UN Security Council UNSC Resolution 1970 26 February 2011, UN Doc S/Res/1970 (2011); UNSC Resolution 1973 17 March 2011, UN Doc S/Res/1973 (2011); UNSC Verbatim Record 26 February 2011, UN Doc S/PV.6491; UNSC Verbatim Record 17 March 2011, UN Doc S/PV.6498.

latitude. The unexplored and underexamined issues in the universal system can provide openings for fresh African construction, particularly as to exceptionally authorised peaceful but otherwise illegal means. However, in doing so, those limitations already established by the rather conservative case law of the UN Human Rights Committee (Human Rights Committee) with respect to the related provisions governing expression and assembly will also need careful consideration.

It is well established that under ICCPR, in addition to the actions amounting to ‘assembly’ protected by article 21,⁸⁴ other symbolic and direct political actions may also attract the protection of article 19⁸⁵ as a form of political ‘expression’.⁸⁶ However, to qualify they must not only be ‘peaceful’ in nature, but also must not pose a threat to public order as this could render lawful otherwise unlawful restrictions on the right, based on state necessity.⁸⁷ In fact, it is the Human Rights Committee’s position that if the acts themselves are generally criminalised, even entirely non-violent protest may fall beyond the scope of protection, especially if the actions interfere directly with the rights of, or present a danger to others, regardless of the motivation behind the actions.⁸⁸ Apparently the Human Rights Committee is of the view that this basis for stripping protection otherwise afforded to ‘peaceful’ action can apply even if both the criminal acts and the consequent infringements of the competing rights involved are minor, as for example with sign defacement.⁸⁹ The approach to application of the article 21 protections on freedom of assembly, the *lex specialis* of freedom of expression through action,⁹⁰ is similar. Even assemblies that commence peacefully can ‘lose

84 Art 21 ICCPR: ‘The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.’

85 Art 19(2) ICCPR: ‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds ... through any ... media of his choice.’ Art 19(3) ICCPR: ‘The exercise of [this right] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.’

86 Communication 412/1990, *Kivenmaa v Finland* UN HR Committee 10 June 1994, UN Doc C/50/D/412 paras 6.2 & 9.3.

87 Communication 628/1995, *Tae Hoon Park v Republic of Korea* UNHR Committee 3 November 1998, UN Doc C/64/D/628/1995 paras 2.4, 9.3 & 10.3.

88 Nowak (n 30 above) 439 445.

89 Communication 384/1989, *GB v France*, UNHR Committee 1 November 1991, UN Doc C/43/D/348/1989 para 5.2; Communication 347/1988, *SG v France*, UNHR Committee 1 November 1991, UN Doc C/43/D/347/1988.

90 Nowak (n 30 above) 477 485–487. See also JP Humphrey ‘Political and related rights’ in T Meron (ed) *Human rights in international law: Legal and policy issues* (1984) 188, cited and concurred with in the dissenting opinion of Kurt Herndl in *Kivenmaa v Finland* (n 86 above) dissenting opinion of Kurt Herndl paras 3.1–3.5.

their peaceful character' and thereby fall outside the scope of protection particularly as a consequence of reactive or otherwise unplanned use of force by demonstrators against people or property, even if minor and not involving arms.⁹¹ All such non-peaceful assemblies may thus be lawfully 'prohibited, broken up or made subject to other sanctions' within the limits of ICCPR 'without [the state] having to observe the [ordinary] requirements for interference'.⁹² Thus, the Human Rights Committee to date has not shown any tolerance of illegal non-peaceful means of resistance.

Illegal but peaceful physical occupations or blockades, on the other hand, may qualify for protection according to Nowak, although such actions and other peaceful assemblies may also be restricted in accordance with law, provided that state necessity for any of the legitimate purposes under article 21 can be shown.⁹³ This includes the 'rights of others' limitation, which under articles 19 and 21 extends beyond protection of fundamental ICCPR rights to other lesser rights, such as private property rights.⁹⁴ This consideration may partially explain the Human Rights Committee's conservative approach. However, in the specific context of oppression of a people, African adjudicators may elect not to accord these the same weight as the competing fundamental rights of peoples. This would be justified, as the Human Rights Committee is considering these rights in a treaty instrument without a clear law of exception in the form of an express right to resist equivalent to the African Charter. Its approach should therefore not be unduly restrictive on the interpretation of article 20(2) of the African Charter, so long as the reasoning is generally consistent with that of the Human Rights Committee.

Therefore, the basic requirement of general international human rights law appears to be that, under normal conditions at least, resistance actions must be peaceful. At such time as actions employ force of any kind but also under certain circumstances where they are peaceful but otherwise illegal, at present they probably fall outside the scope of protection of the general law. Particularly on peaceful but otherwise illegal means, however, the African Commission or Court could come to a different conclusion that still respects the overarching framework of the law, but only if it can be established that the balance of competing rights favours the fundamental rights of the claimants in a clear context of oppression where no other effective remedy exists, with the possible additional requirement that the actions taken in resistance are both necessary and proportionate to remedy the violations resisted by

91 Nowak (n 30 above) 487.

92 Nowak (n 30 above) 487-488.

93 As above.

94 Nowak (n 30 above) 494.

such means.⁹⁵ Quite possibly this is also true regarding illegal non-peaceful means short of armed force, in exceptional cases.

At present, the African Commission arguably has room for this departure because the Human Rights Committee still has not addressed what should be the most fundamental consideration in calibrating what means should be authorised and protected. That is, the Human Rights Committee's case law has not generally examined the context in which illegal protest actions take place. Its reasoning also usually does not include an examination of whether alternative equally or comparably effective modes of remedy are available – or in other words, the necessity of a particular and otherwise prohibited form of action. This surely is the crux for human rights defenders, but the article 19 and 21 jurisprudence is deficient in this regard. In one case, the poor quality of submissions effectively prevented the Human Rights Committee from properly examining this issue,⁹⁶ but on other occasions it has avoided doing so.⁹⁷ Indeed, in an instance where a participant in a detention centre hunger strike claimed this action as a 'legitimate expression of the right to protest' and the state counterclaimed that such actions are not protected by article 19, the Human Rights Committee flatly refused to address itself to this issue or to consider whether in the context alternative effective means were available.⁹⁸ Since the Human Rights Committee has not considered whether context has a bearing on the construction of these rights, it remains to be determined whether such a narrow approach is reasonable and appropriate to be applied under conditions of oppression. This is where there may be space for the African Commission and the African Court, in particular, to engage in some important independent reasoning that still takes proper account of the positions outlined above. If it falls to examine this issue, General Comment 10 on article 19, in which the Human Rights Committee accepted that restrictions on the exercise of freedom of expression through actions 'may not put in jeopardy the right itself',⁹⁹ should provide the ultimate guiding principle that is also consistent with the general approach already taken by the African Commission in other areas.

As for other sources of law and legal interpretation, the African Commission and African Court will also want to take into account

95 On necessity and proportionality in relation to the right to resist, see Eide (n 12 above) 54-56 60-63; Tomuschat (n 12 above) 19 27 30; Paust (n 14 above) 569; Kaufmann (n 14 above) 574; Schwartz (n 13 above) 265-269 273-276 278-284.

96 Communication 386/1989 *Koné v Senegal*, UNHR Committee 27 October 1994, UN Doc C/52/D/386/1989 paras 2.1, 2.3, 3, 6.8, 7.4, 7.7 & 8.5.

97 Communication 518/1992, *Sohn v Republic of Korea*, UNHR Committee 3 August 1995, UN Doc C/54/D/518/1992 paras 7.1-7.2, 8.1, 9.1, 9.3 & 10.2.

98 Communication 1014/2001, *Baban v Australia*, UNHR Committee 18 September 2003, UN Doc C/78/D/1014/2001 paras 3.4, 4.5 & 6.7.

99 General Comment 10 Freedom of Expression (art 19) UNHR Committee, UN Doc A/29/06/83 (1983) para 4.

the potential implications of relevant developments happening at the UN level. Arguably, the consensus on UN Security Council Resolution 1970, with its seemingly implicit authorisation of a self-help right to use force to resist tyranny and other forms of oppression as well as massive human rights violations amounting to crimes against humanity, opens up previously unavailable legal space for justifiable reconsideration of an evolutive construction of the net effect of articles 1, 2(3)(a) and 25 of ICCPR as authorising a right to resist, as well as the interpretive guidance to be provided by paragraph 3 of the Preamble of the Universal Declaration, as per the theories advanced by Rosas and others outlined above. The aforementioned view of the UN Human Rights Council Advisory Committee and the ultimate position of the Council itself on the right to resist various forms of human rights violations may also need to be considered by commissioners and judges in their analysis.

3.7 Who are the protected and possibly protected groups?

As a consequence of the above, it is possible to establish general categories of 'peoples' facing a variety of situations of 'oppression' deriving from other human rights violations within the meaning of the African Charter that could activate a secondary right under article 20(2). Where such a right would engage, further analysis is required, not only as to what means would be authorised under the Charter, but also the consequent implications. For example, in some instances article 20(2) could provide a defence against prosecution, or even invalidate certain laws either generally or in their specific application. In other instances, a positive article 20(2) finding would give rise to a state duty under article 20(3), thereby validating and mandating compliance with requests for assistance and in certain instances possibly obliging the AU or individual state parties to request the additional assistance of third parties thus authorised under international law, such as the UN Security Council.

Logically it should be both possible and foreseeable that a claim under article 20(1) could be considered separately and need not necessarily be tied to a prior assessment of the additional article 20(2) criteria, if a right to resist under article 20(2) is for whatever reason not raised as an issue by the claimant. Importantly, just as not all claimants who qualify for self-determination rights under article 20(1) will also qualify for the further right to resist under article 20(2), not all claimants who qualify under article 20(2) will also qualify for the further right to assistance from other African states under article 20(3) because it is restricted to those resisting 'foreign domination'. Therefore, most of those resisting oppression by a domestic power probably do not share this additional sub-right. A prior positive finding on article 20(1) and article 20(2) claims would be necessary but not sufficient to validate any separate or concurrent claim for assistance made under article 20(3), which would need to be subject to a separate assessment last in the sequence, to ensure among

other things that the 'foreign political, economic or cultural domination' criterion is also met.

Drawing on the constructions the African Commission has thus far established in the *Katanga*, *Jawara* and *Gunme* cases, and taking account of the additional aspects outlined above, the basic form of a two-part article 20(2) test emerges. Part one of the test concerns the first element, and would establish whether a complainant has sufficient grounds for the claim to a right to resist based on oppression. Part two of the test concerns the second element, and would assess the scope of means of resistance authorised under international law in the individual case at hand.

The primary 'element one' test has four prongs. First, does the claim to a right to resist involve a 'people' under article 20(1) as defined by the African Commission in the *Gunme* case? If this cannot be established, then the claim falls. Second, is such a people denied its right to political or economic self-determination and democratic means of political or economic change, particularly by way of exclusion from democratic political participation and representation rights under article 13(1), as set out in the *Katanga* case? Note that the appropriate form for ultimately exercising those self-determination rights may not be relevant to determine at the stage of adjudicating whether the claim to a right could be valid. Third, can conditions constituting 'oppression' be established: Is there a pattern of abuse of power or authority involving primary rights violations against the people that are at least serious, if not grave or massive, as well as systematic? Or is the form of rule complained of inherently oppressive insofar as it is unconstitutional, corrupt, or otherwise the consequence of an undemocratic seizure of power with or without violence? Fourth, do such people also have no prospect of any other 'available, effective and sufficient' remedy, for reasons that may include repression or undemocratic seizure of power or unconstitutional rule, or control or corruption of the judicial system, as established in the *Jawara* case? In other words, the sequence after the first hurdle is in the form of a three-step necessity test.

If the answer to all of the above is affirmative, this could justify a finding that the claimants in question have a right to resist under article 20(2), provided that the objectives of the resistance are compatible with the African Charter's broader human rights framework and thereby do not fall afoul of the article 27(2) requirement of due regard for the rights of others. In addition to the obvious cases of post-colonial foreign invasion and occupation, such situations could certainly include either whole peoples of a state or minority peoples facing massive violations amounting to crimes against humanity or genocide, as well as situations of *coups d'état* or other forms of unconstitutional rule. The right could also apply to minority peoples facing situations of systematic discrimination and exclusion warranting secession or lesser forms of self-governance, provided that the conditions complained of are convincingly established, bearing in mind the African Commission's

understandable reluctance to make positive determinations in any cases based on thin evidence and its preference for internal self-determination solutions. The right could also engage for those resisting situations of foreign economic domination amounting to an interference with the right to self-determination, provided that such conditions could be established in a way that satisfies the African Commission or African Court. It also cannot be discounted that certain situations of systematic violations of economic and social rights of either a whole people of a state or of a minority people could give rise to a valid claim to a right to resist if all the other conditions are also met and if the level of abuse of power involved amounts to economic 'oppression'.

If there is significant potential in the proposed primary test for article 20(2) to vindicate the rights of the most vulnerable and their human rights defenders, at least in theory, the necessary secondary 'element two' test that will give such a right meaning in practice is bound to disappoint many claimants and frustrate adjudicators due to the restrictions inherent in the dependent formula. As outlined above, complete interpretation of this provision requires clarification elsewhere in international law. As it stands, the right of peoples to use force in resistance is largely confined in contemporary cases to those resisting foreign invasion and occupation involving the use of state force, although it may in some instances also extend to those resisting 'racist regimes' whose rule is established or maintained through the use of force if the stringent tests for this can be met. Such instances should be relatively few. There is at least theoretical scope within the letter of UN General Assembly Resolution 2625 to extend the right to use force in resistance to undemocratic domestic regimes that rule by force. However, as has recently been demonstrated by UN Security Council Resolution 1973 and the selective application of this principle in practice, it has not yet crystallised into customary law – despite its powerful largely Western proponents. Unfortunately, for as long as it persists, this situation would surely fetter the ability of the African Commission or Court to make more generous determinations in this regard that might otherwise be advantageous to the human rights defenders and populations at stake in resolving the human rights violations they face. At present, therefore, all other claimants will in the secondary test probably be restricted to peaceful means of resistance, though it may be possible to apply further necessity as well as proportionality tests to specific actions in specific situations in a more progressive manner than the UN Human Rights Committee has in its limited jurisprudence on freedom of expression and assembly under the universal system. The African Commission or African Court certainly has sufficient room to lead the way in re-interpreting the scope of permissible peaceful means where a right to resist is proven, for example to include exceptions for otherwise illegal acts related to non-violent civil disobedience. If so, even if it cannot go further at present, this would be an important contribution to progress in international human rights law, would respect the legacy

of past African human rights defenders, and go some distance to meet the needs of those currently at the frontlines.

4 Conclusion

As set out above, in article 20(2) the African Charter contains the framework for an advancement in human rights of significance domestically, regionally and internationally. At the regional level, if developed responsibly, article 20(2) has as yet untapped potential to ensure an effective remedy to Africa's most vulnerable, using an empowerment model to both complement and help regulate the emerging doctrine and practice of 'responsibility to protect', and to reinforce the evolving AU emphasis on democratisation through a human security-oriented model of deterrence to those who would abuse power or rule by force. This would also have significance at the international level. In the context of the current debate at the UN Human Rights Council, a reasoned interpretation and application of article 20(2) could assist the momentum by demonstrating how the existing African right to resist may link with a strong commitment to the African right to peace. Moreover, coherent African Charter jurisprudence could assist domestic African courts seeking to interpret and apply their own constitutional provisions on the right to resist in a manner that complies with the requirements of the African human rights system. In those countries without a constitutional right to resist, article 20(2) determinations could help establish the lawfulness of laws intended to restrict certain forms of political dissent activity, where such actions would not be otherwise protected by the freedom of expression, association and assembly provisions of the ordinary law. For example, specific proceedings in relation to sedition or treason or even the laws themselves depending on their framing could be shown to be fundamentally incompatible,¹⁰⁰ or else require interpretation or amendment to provide a defence if it can be shown that the accused was acting within internationally lawful means, as part of a people resisting oppression or other domination within the meaning of the African Charter. Indeed, the African Commission and Court are mandated to provide guidance to member states in this regard.¹⁰¹

Realising these opportunities requires an end to avoidance of the issue of article 20(2) rights at both international and African levels and

¹⁰⁰ It is unfortunate that the complainant's submissions under art 20(1) in *Courson v Equitorial Guinea*, challenging a prosecution for high treason allegedly on the basis of political opinion manifest in participation in an election boycott, relying in part on art 20(1), failed to adduce evidence sufficient to enable the African Commission to consider this question and the claim was therefore dismissed. *Courson v Equitorial Guinea* (2000) AHRLR 93 (ACHPR 1997) paras 17-19.

¹⁰¹ Art 45 African Charter; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples Rights 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) arts 3-5.

inter-institutionally within the AU. The case of the Libyan uprising of 2011 is a prime example of this. Despite Libya's Charter obligations as a state party and the consequent rights of the Libyan people under article 20(2) to resist when the relevant conditions are met, of the main UN and AU bodies who have dealt with the situation to date – the UN Security Council, the UN Human Rights Council, the AU Peace and Security Council, the African Commission and the African Court – none have yet openly examined, much less directly concluded on this obviously relevant question, at least in their public statements and findings.¹⁰²

The challenges posed by this right and this provision should not be minimised, but its requirements also cannot be ignored. According to article 3(h) of the Constitutive Act of the African Union, all relevant AU instruments must be interpreted in a manner that respects the fundamental Charter rights and therefore must take account of the article 20(2) exception.¹⁰³ That is, subsequent law and indeed other apparently or potentially conflicting provisions must be construed in light of article 20(2), not the reverse. This remains the case unless and until an express amendment voids or makes an exception to article 20(2). Therefore, clarification of the article 20(2) right is essential, not optional. Among those requiring coherent interpretation are article 4(p) of the Constitutive Act of the AU, the OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, and the African Charter on Democracy, Elections and Governance, once this instrument has entered into force.¹⁰⁴ While these

102 See eg AU Peace and Security Council Communiqué 23 February 2011, AU Doc PSC/PR/COMM (CCXLI); African Commission on Human and Peoples' Rights 'Resolution on the human rights situation in the Great Socialist Republic of the Libyan Arab Jamahiriya' 1 March 2011, AU Doc ACHPR/Res/181 (EXT.OS/IX) (2011); Libya AU Peace and Security Council Communiqué 10 March 2011, AU Doc PSC/PR/COMM.2 (CCXLV) ('AU roadmap for resolution to the Libyan crisis'); *African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya* (App 004/2011) Order for Provisional Measures (ACTHPR 25 March 2011); AU Peace and Security Council Communiqué (26 April 2011) AU Doc PSC/MIN/COMM.2 (CCLXXV) and AU Peace and Security Council 'Report of the chairperson of the commission on the activities of the AU high level *ad hoc* committee on the situation in Libya' (26 April 2011) AU Doc PSC/PR/2 (CCLXXV); UN Human Rights Council 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44.

103 Art 3(h) Constitutive Act of the African Union, entered into force 26 May 2001, OAU Doc CAB/LEG/23.15: 'The objectives of the Union shall be to ... promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments ...'

104 Art 4(p) Constitutive Act of the African Union: 'The Union shall function in accordance with the following principles [including] ... condemnation and rejection of unconstitutional changes of government.' OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (2000) OAU Doc AHG/Decl.5 (XXXVI); and African Union, art 3.1 African Charter on Democracy, Elections and Governance 30 January 2007, http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf (accessed 15 June 2011).

appear to take no account of the exceptional article 20(2) right and consequent obligation, that is not to say they could not be interpreted compatibly in practice.

In addition, it is obviously crucial to guard against the politicisation or selective application of article 20(2), in particular by the AU political organs, including the Peace and Security Council, which would serve to undermine this right. Greater constructive engagement with its regulatory potential by legal academics and advocates will provide the best prevention in this regard.

For all of these reasons, African human rights defenders deserve further development of the African Charter right to resist: as a mode of implementation and enforcement of the body of human rights, as an effective remedy against violations, as a deterrent to violator regimes within human security frameworks, and as a complement or alternative to the 'responsibility to protect'. Notwithstanding that the African human rights system at the 30 year mark is not yet functioning optimally as a consequence of under-resourcing and under-use, among other issues, this series of further opportunities in the current context now present an imperative to consolidate and build on the distinctly African contribution to the development of international human rights law and the scope of its protections through considered jurisprudential leadership on the right to resist in article 20(2).