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Editorial

This issue of the *African Human Rights Law Journal* appears as an eventful year draws to a close.

The year 2016 was the African Union's 'African Year of Human Rights with a Particular Focus on the Rights of Women' and the year marked 30 years of the African human rights system, in the sense that the core treaty of that system, the African Charter on Human and Peoples' Rights (African Charter), entered into force 30 years ago, on 21 October 1986. Even though many challenges remain, there have been notable advances over these three decades. For one thing, the African Charter enjoys continent-wide acceptance – something the Inter-American system is still some distance away from achieving. The monitoring body of the African Charter, the African Commission on Human and Peoples' Rights (African Commission), has been engaged in significant norm elaboration. Included among the standard-setting supplements are resolutions (for example, those on fair trial rights and freedom of expression) and General Comments (for example, on articles 14(1)(d) and (e) of the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol)). The Charter, through the Commission and its special mechanisms, has also inspired laws adopted on access to information and the criminalisation of torture.

This year additionally marked 13 years since the entry into force of the African Women's Protocol. As evidence of its impact, one may cite changes in domestic law and practices, especially in areas such as land ownership, political participation and the criminalisation of harmful practices such as female genital mutilation.

It is also 15 years since the operationalisation of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). After some initial inertia, the Children's Committee has become a credible champion for children's rights at the supranational level. It has decided only three cases on their merits, but has issued numerous Concluding Observations after examining state reports.

Co-ordination between the AU's human rights organs has been a recurring problem. The fact that in this year, around October 2016, the first joint session was held between the African Children's

Committee and the African Commission, and that another such joint meeting is planned for 2017, in itself, is a great gain.

This year also signalled ten years of a functioning African Court on Human and Peoples' Rights (African Court). Although the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) entered into force already in 2004, it took two more years for the first judges to be elected. The jewels in the crown of the Court's first decade are the eight cases decided on their merits. In each of these cases, the Court found at least one violation of the African Charter: Four were instituted by way of direct individual access against Tanzania (*Mtikila v Tanzania; Thomas v Tanzania; Onyango v Tanzania;* and *Abubakari v Tanzania*); two were instituted through the same avenue against Burkina Faso (*Zongo v Burkina Faso;* and *Konaté v Burkina Faso*)*;* one reached the Court when a non-governmental organisation (NGO) directly approached the Court (*Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*)*;* and another was based on a referral by the African Commission after non-compliance with its provisional measure (*African Commission (Saif Al-Islam Kadhafi) v Lybia*). From the perspective of the dire human rights situation on our continent, eight merits decisions represent a very modest crop of cases. Nevertheless, in comparison to the early beginnings of other regional human rights systems, the record looks much more impressive.

Two cases of potential significance are pending before the Court. The one concerns the competence of NGOs to bring requests for advisory opinions to the Court; the other deals with the powers of the AU Executive Council to direct the African Commission to withdraw its decision to grant observer status to an NGO. The background to the latter case is as follows: When the African Commission reported in 2015 to the AU Executive Council that it had granted observer status to the NGO Coalition of African Lesbians (CAL), the Executive Council directed the Commission not only to withdraw the granting of observer status to that particular NGO, but also instructed the Commission to amend its Guidelines for Granting Observer Status to NGOs by aligning them to the imperative in the African Charter to protect the family.

The human rights-related celebrations within the AU are set to continue into next year, and the next decade. Since the African Commission was established in 1987, a year after the entry into force of the African Charter, its 30 years of existence round off another '30' in 2017. Also, in June 2016, the AU Assembly meeting in Kigali declared the ensuing ten years the decade of human rights. By adopting the Declaration by the Assembly on the Theme of Year 2016 (Assembly/AU/Decl1(XXVII)Rev1), the Assembly committed itself 'to enhancing efforts aimed at entrenching and reinforcing deeper understanding of the culture of human and peoples' rights, in particular, the rights of women and their promotion and popularisation amongst the African peoples'. The Assembly declared

the next ten years as the 'Human and Peoples' Rights Decade in Africa'.

In the Declaration, the Assembly also called on the AU Commission and AU human rights organs to 'identify modalities for the participation of African research institutes, universities, civil society and the media in promoting the culture of human rights in Africa, including the protection and promotion of the rights of women'. At the *Journal* we welcome this inclusive approach, and pledge our continued support to be an outlet for critical yet constructive discussions and exchanges on the African human rights system.

We also note that in the same Declaration, the AU Assembly called on the African Commission to 'ensure the independence and integrity of AU organs with a human rights mandate by providing adequate financing and *shielding them from undue external influence*' (our emphasis). Against a background of a 'push-back' against human rights at the levels of the Executive Council and Assembly, and in the absence of any official AU criticism regarding the withdrawal by Rwanda of its declaration accepting direct access to the Court, the apprehension is that these words may ring hollow and may be exposed as empty rhetoric in years to come. In addition, the region's attachment to the sovereignty of states, generally, and its resistance against supranational judicial oversight, specifically, are displayed by the failure by almost half of the AU membership (24 out of 54) to ratify the Court's Protocol, and the hesitance of those that have become party to the Court Protocol to accept direct individual access to the Court.

This apprehension causes one to view with caution the AU Assembly's invitation (in the same Declaration) to the African Commission and AU human rights organs to take the 'necessary steps' to establish the Pan-African Human Rights Institute (PAHRI), and the call on states to commit to host it.

A wide variety of topics are covered in this issue. Against the background of intensified criticism of the International Criminal Court (ICC), and South Africa's failure to arrest Sudanese President (and ICC accused) Al Bashir, Tladi provides an incisive analysis of the interpretation of international law by the South African Supreme Court of Appeal. Hailbronner adds her voice to the fledgling scholarly African-focused literature on the convergence and divergence between international human rights law and international humanitarian law. Chamberlain draws interesting links between the rights to protest and access to information. Attah criticises Nigeria's anti-terrorism laws for failing to effectively address the Boko Haram scourge in that country. Mujuzi's article examines the admission of evidence unconstitutionally obtained in Namibia. Abdukradeen-Mustapha draws on South Africa's experience with children's rights to inform the improved application of the Nigerian Child Rights Act. Swart and Hassan take an innovative, if controversial, comparative view of child marriage and child soldiers. Perez-Leon-Acevedo

considers the possibility of triggering article 4(h) of the AU Constitutive Act in two situations in Africa – Darfur (Sudan) and Libya – in light of the Pretoria Principles. Roesch traces the reception and 'implantation' of the principle of free, prior and informed consent into African soil, as a means of curbing land grabbing.

As is the custom, this issue contains a review of human rights developments within the AU during 2015. A recent decision of the Zimbabwean Constitutional Court, dealing with women's equality, is also reviewed.

The editors wish to thank the independent reviewers mentioned below, who so generously assisted in ensuring the consistent quality of the *Journal*: Jegede Ademola; Dane Ally; Usang Assim; Fareda Banda; Gina Bekker; Japhet Biegon; Danny Bradlow; Wium de Villiers; Cristiano D'Orsi; John Dugard; Ebenezer Durojaye; Patrick Eba; Jake Effoduh; Charles Fombad; Balarabe aruna; Christof Heyns; Sharon Hofisi; Busingye Kabumba; Sheila Keetharuth; Juliet Kekimuli; Peter Knoope; Dino Kritsiotis; Duncan Munabi; Enyinna Nwauche; Lame Olebile; Marius Pieterse; Ally Possi; Thomas Probert; Jeremy Sarkin; Julia Sloth-Nielsen; Julie Stewart; Ann Strode; Dire Tladi; James Tsabora; Ben Twinomugisha; Manuel Ventura; Gus Waschefort; Stu Woolman; and Alexandra Xanthaki.

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Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga

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Summary

The South African Constitution is regarded as an international-law friendly constitution. Much has been written about the willingness of South African courts to refer to international law instruments when interpreting and applying South African law. Yet, the extent to which South African courts have applied recognised tools and methods for the identification and interpretation of international law has not similarly been considered. The recent case concerning South Africa's decision not to arrest the President of Sudan, Al Bashir, highlights the importance of a proper approach to the interpretation and identification of international law by South African courts. In this case, the Supreme Court of Appeal had to consider the complex interrelationships between two treaties, namely, the AU-South Africa host country agreement and the Rome Statute of the International Criminal Court, customary international law and a UN Security Council resolution. The objective of the article is not to determine the correctness or not of the decision. Rather, the article is aimed at assessing the Court's approach to the methodological questions of interpretation and identification of international law. The article,

* BLC LLB (Pretoria) LLM (Connecticut) PhD (Rotterdam); diretladi2012@gmail.com. The Constitutional Court was to hear an appeal in this matter on 22 November 2016. At the time of the finalisation of the article, it was unclear whether this hearing would proceed in light of the subsequent decision of the government of South Africa to withdraw from the Rome Statute and, consequently, withdraw its appeal. The author wishes to thank the anonymous reviewers for their helpful comments. Any flaws in the article, of course, remain his alone.

therefore, evaluates whether the rules of interpretation as contained in the Vienna Convention on the Law of Treaties have been applied by the Court in searching for the meaning of the instruments under consideration. It also assesses whether the relationship between the various sources of international law at play in the Al Bashir *matter is adequately considered.*

Key words: *treaty interpretation; Rome Statute; UN Security Council Resolution; Al Bashir; customary international law*

1 Introduction

The South African Constitution is reputed to be one of the most international law-friendly constitutions in the world. It provides, for example, that the interpretation of the Bill of Rights *must* take into consideration international law;[1] that when interpreting any legislation, any reasonable interpretation consistent with international law *must* be preferred over any other interpretation that is inconsistent with international law;[2] and that customary international law is law in the Republic except where it is in conflict with the Constitution or an Act of Parliament.[3]

These provisions would seem to require the interpretation and identification of international law by the judiciary. Yet, while much has been written about the role of international law in this international law-friendly constitutional framework,[4] very little has been written about *how* South African courts approach the actual identification and interpretation of international law. After all, to 'consider' international law, to prefer an interpretation of legislation that is consistent with international law, and to apply customary international law as law in South Africa, all presuppose that the rules of international law can be identified and interpreted. The recent decisions of the High Court and Supreme Court of Appeal (SCA), respectively, in relation to the non-arrest of Al Bashir illustrate the importance of careful attention to the

1 Sec 39(1)(b) Constitution of the Republic of South Africa, 1996 (my emphasis).

2 Sec 233 Constitution of the Republic of South Africa, 1996 (my emphasis).

3 Sec 232 Constitution of the Republic of South Africa, 1996 (my emphasis).

4 See, eg, H Strydom & K Hopkins 'International law' in S Woolman et al (eds) *Constitutional law of South Africa: Vol 2* (2013). See also N Botha 'Justice Sachs and the interpretation of international law by the Constitutional Court: Equity or expediency?' (2010) 25 *Southern African Public Law* 253; N Botha 'Rewriting the Constitution: The "strange alchemy" of Sachs indeed!' (2009) 34 *South African Yearbook of International Law* 253. A notable exception is N Botha 'Interpreting the International Child Abduction Act 72 of 1996' (2003) 28 *South African Yearbook of International Law* 330. See also D Tladi 'Interpretation of treaties in an international law-friendly framework: The case of South Africa' in HP Aust & G Nolte (eds) *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (2016).

methodology of identifying and interpreting international law.[5]

Over the last few months, much has been written about the continuing Al Bashir saga and, in particular, South Africa's failure to arrest him.[6] Of course, while the events of June 2015 caused a stir, it was not the first time that this drama had played itself out – there had been similar cases of non-arrest in the Democratic Republic of Congo (DRC), Malawi, Chad (twice), Kenya, Djibouti and Nigeria.[7] In fact, since the events of June 2015, this drama has been repeated twice: in Djibouti (for the second time) and in Uganda.[8]

I wish to focus not on the substantive question of whether there was a duty on South Africa to arrest Al Bashir under international and South African law, but rather on the methodological question concerning the way in which South African courts, in particular the SCA in the *Al Bashir* case, have approached the question of interpretation of international law or, in the case of customary international law, its identification. The *Al Bashir* cases have demonstrated the immense importance of a proper understanding of international law, given South Africa's international law-friendly constitutional framework. At issue in both the High Court and the SCA cases were the interpretation and identification of rules of international law in a complex network involving various inconsistent

5 *Southern African Litigation Centre v Minister of Justice and Constitutional Development & Others* 2015 (5) SA 1 (GP) (*SALC v Minister of Justice*); *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre* 2016 (4) BCLR 487 (SCA) (*Minister of Justice v SALC)*.

6 MJ Ventura 'Escape from Johannesburg? Sudanese President Al Bashir visits South Africa, and the implicit removal of head of state immunity by the UN Security Council in light of *Al Jedda'* (2015) 13 *Journal of International Criminal Justice* 995; D Tladi 'The duty on South Africa to arrest and surrender President Al Bashir under South African and international law: A perspective from international law' (2015) 13 *Journal of International Criminal Justice* 1027; E de Wet 'The implications of President Al Bashir's visit to South Africa for international and domestic law' (2015) 13 *Journal of International Criminal Justice* 1049. See also L Kohn 'The Bashir judgment raises the red flag about the rule of law and the judiciary' (2016) 133 *South African Law Journal* 246. See further JD van der Vyver 'The Al Bashir debacle' (2015) 15 *African Human Rights Law Journal* 559. See, particularly on *Minister of Justice v SALC* (n 5 above), D Akande 'The Bashir case: Has the South African Supreme Court abolished immunity for all heads of states?' *EJIL:TALK!* 29 March 2016.

7 These cases of non-arrest of Al Bashir have resulted in several decisions, including *Decision Pursuant to Article 87(7) on the Failure of Republic of Malawi to Comply with the Co-operation Request Issued by the Court With Respect to the Arrest and Surrender Omar Hassan Ahmed Al Bashir: The Prosecutor v Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011; *Décision Rendue en Application de l'article 87(7) de la Statut de Rome concernant le refus de la République du Tchad d'accédur aux demandes de coopération délivrées par la Cour Concernant l'arrestation et la Remise d'Omar Hassan Ahmad Al Bashir: L'Procureur v Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2001; *Decision on the Co-operation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court: The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014.

8 See para 8 of the 23rd Report of the Prosecutor of the International Law Criminal Court to the UN Security Council Pursuant to UN Security Council Resolution 1593 (2005).

treaty, customary and other obligations. Further complicating the application of this network of international law rules is the similarly complex network of domestic law rules giving effect to the international law rules. How these would be applied affects (and is affected by) the methodology used to identify the relevant rules of international law.

In light of this, the purpose of the article is to assess the use of recognised methods and doctrines for the interpretation of international law by the SCA in the matter involving the non-arrest of Al Bashir. The article is not concerned with whether there was, or was not, a duty to arrest. It concerns only the methodology applied by the Court when considering the international law materials before it. It is, therefore, not a general comment on the judgment, but rather an evaluation of the Court's methodological approach to the identification and interpretation of international law.

In the next section, a few comments are made about some of the methodological tools available for interpreting and identifying rules of international law. Section three provides a brief overview of the aspects of the judgment concerning the methodology of interpreting and identifying rules of international law. Section four provides an evaluation of the Court's methodological approach to the identification and interpretation of international law in the *Al Bashir* case. Finally, some concluding remarks are offered in section five.

Subsequent to the finalisation of the article, a number of developments occurred which, while beyond the scope of the article, are worth mentioning. First, on 19 October 2016, the government of South Africa decided to withdraw from the Rome Statute. The instrument of withdrawal, signed by the Minister of International Relations and Co-operation, was deposited with the Secretary-General of the United Nations (UN) on the same day. As a consequence, South Africa decided to withdraw its appeal on the Supreme Court of Appeal decision. This set off a strange course of events in which the government, having disagreed with the findings of the Supreme Court of Appeal, now presumably accepted the finding, while the respondent, having opposed the appeal, now sought the appeal to continue. To understand this strange turn of events requires an understanding of the nuances of the Supreme Court of Appeal decision which is very often missed in the popular media.

While, as a general matter, the Supreme Court of Appeal found in favour of the respondent, the Supreme Court of Appeal found for the government in one important respect. As will be shown below, the Court found that, under international law, there was a duty on South Africa to respect the immunities of Al Bashir and that there were no exceptions to this duty in customary international law. The implications of this hardly-noticed fact were that the government, in the conduct of foreign affairs, would, if necessary, be entitled to take action to avoid a conflict of obligations. This resulted in the counter-intuitive situation where the successful party sought to have the

appeal proceed and the unsuccessful party sought to prevent the appeal from proceeding.

The decision to withdraw from the Rome Statute has resulted in a challenge by the Democratic Alliance (DA) to the constitutionality of the right of the executive to withdraw from the Rome Statute. While these issues fall beyond the scope of the article, it is worth describing the issues raised in the challenge and to provide preliminary, albeit unsubstantiated, observations. Given their preliminary nature, these may be taken with a grain of salt.

First, the challenge is based on the role of parliament. In its founding affidavit, the DA alleged that, whatever the merits or demerits of the decision to withdraw from the Rome Statute, the executive ought to have sought parliamentary approval before submitting the instrument of withdrawal. This argument is based on the fact that parliamentary approval was required prior to ratification. The argument postulates that the same procedure is required for withdrawal. In the author's view, because parliament *approves* and does not *oblige* the ratification, parliamentary approval is not required. Nonetheless, given the fact that the Constitution is not explicit on the matter, the prudent approach would have been to secure parliamentary approval.

The challenge also raises substantive and complicated issues about the right of the executive to withdraw. These issues depend on matters that fall beyond the scope of the article, such as whether the decision negatively impacts on the fight against impunity and South Africa's values. For the purposes of the article, it suffices to state that the determination of these complex legal questions would require an assessment of whether, beyond the Rome Statute, mechanisms existed for advancing the values of the South African Constitution.

These and other interesting questions are not addressed in this methodologically-inclined article. Instead, the article purely focuses on the methodological question whether, in the *Al Bashir* case, the courts have paid attention to the rules of international law for the identification and interpretation of these rules.

2 Tools for the identification and interpretation of international law

2.1 How is international law to be identified and interpreted?

It is obviously not possible to comprehensively address the question of how international law is to be identified and interpreted. For this reason, only broad conceptual issues are addressed. Moreover, the analysis will be limited to the main sources of international law, namely, customary international law and treaty law. I have also opted to restrict the description to only those issues that were directly relevant for the judgment of the SCA. On account of these

parameters, otherwise important concepts are excluded, such as general principles of law and *jus cogens; jus cogens* is referred to only in passing.

Any student textbook on international law will tell one that customary international law is both formed and identified by two elements, namely, state practice, also called *usus*, and acceptance as law, or *opinio juris*.[9] This two-element approach, based on settled jurisprudence of the International Court of Justice (ICJ),[10] has been endorsed by the International Law Commission (Commission or ILC) in its consideration of the topic, entitled 'Identification of Customary International Law'.[11] The Commission's consideration of customary international law was occasioned precisely to offer guidance to, amongst others, domestic courts, which may not always be well versed in the intricacies of international law on how to identify and interpret customary international law.[12]

During its session in 2016, the ILC adopted a set of draft conclusions on first reading which sets out to provide a normative description of the methodological rules for the identification of customary international law.[13] A number of provisions are of particular relevance to the decision by the SCA in the *Al Bashir* case. The first relevant provision is Draft Conclusion 4, which provides that '[g]eneral practice means that it is primarily the practice of states that contributes to the formation, or expression of, rules of customary international law'.[14] The word 'primarily' is used because the Draft Conclusions recognise that 'in certain cases, the practice of international organisations', such as the UN, the African Union (AU)

9 See, eg, A Aust *Handbook of international law* (2005) 6-7; H Thirlway 'The sources of international law' in MD Evans *International law* (2014) 98; I Browlie *Principles of international law* (2003) 6; P Malanczuk *Akerhurst's modern introduction to international law* (1997) 39; J Dugard *International law: A South African perspective* (2005) 29.

10 See, eg, *North Sea Continental Shelf Cases (Germany/The Netherlands; Denmark/The Netherlands),* Judgment of 20 February 1969, *ICJ Reports* 1969 3, especially paras 70 *et seq*.

11 See *Report of the International Law Commission, 68th Session* (2 May-10 June and 4 July-12 August 2016), Supplement 10 (A/71/10) ch V, Identification of Customary International Law, Text of the Draft Conclusions on the Identification of Customary International Law adopted by the Commission on First Reading. Draft Conclusion 2, contained in Part Two titled 'Basic Approach', provides as follows: 'To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris)*.'

12 See M Wood *First Report of the Special Rapporteur on Formation and Evidence of Customary* (A/CN.4/663) 17 May 2013 para 13: 'In the view of the Special Rapporteur … the aim of the topic is to offer some guidance to those called upon to apply rules of customary international law on how to identify such rules in concrete cases. This includes, but is not limited to, judges in domestic courts, and judges and arbitrators in specialised international courts and tribunals.'

13 See Draft Conclusions on Customary International Law (n 11 above).

14 Draft Conclusion 4.

and the European Union (EU) may, as such, contribute 'to formation, or expression, of rules of customary international law'.[15] However, the views or 'conduct of other actors' are 'not practice' for the purposes of 'formation, expression, of the rules of customary international law'. Another provision that is of some significance in the assessment of the methodological approach to the sources of international law in the *Al Bashir* case is Draft Conclusion 7, listing the forms of state practice. According to Draft Conclusion 7, state practice may include diplomatic acts and correspondence; conduct in connection with resolutions; conduct in connection with treaties; and decisions of national courts.

It is important, however, that conduct in connection with a treaty should be approached with some caution. The Commission has determined, first, that the fact that a rule is found in a number of treaties (and other instruments) does not necessarily indicate that the treaty rule reflects a rule of customary international law.[16] More to the point, Draft Conclusion 11 sets out the possible relationships between customary international law as determined by the ICJ in the *North Sea Continental Shelf* cases, namely, that a treaty rule may codify an existing rule of customary international law; may lead to the crystallisation of a rule of customary international law; or may give rise to a general practice accepted as law.[17] In each case, however, the rule in question must be 'confirmed by practice'.[18] Moreover, it 'is important that states can be shown to engage in the practice not (solely) by virtue of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become customary international law'.[19]

Finally, on customary international law, it is worth noting the significance of court decisions. The Statute of the International Court of Justice already determines that decisions of courts are 'a subsidiary means for the determination of rules of law'. The ILC's Draft Conclusion identifies two roles for decisions of domestic courts. First, as noted above, decisions of national courts are a form of practice.[20] The value of domestic court decisions *as a form of practice* is not dependent on the quality of the reasoning or correctness of such decisions. In other words, even a court decision that is wholly inconsistent with customary international law is a form of practice and *may*, thus, contribute to the formation of a (new) rule of customary international law. Decisions of domestic courts, however, may also be

15 Draft Conclusion 4 para 1.

16 Draft Conclusion 11 para 2.

17 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports* 1969 44 para 62 *et seq.*

18 See para 1 of Commentary to Draft Conclusion 1 adopted by the Commission in August 2016 (on file with author).

19 As above.

20 See Draft Conclusion 7 para 2 of the Draft Conclusions on Customary International Law (n 11 above).

relevant in the identification of rules of customary as 'a subsidiary means for the determination' of rules of customary international law.[21] In this context, the value of the decision is significantly affected by 'the quality of the reasoning' and the 'reception of the decision'.[22]

Central to the determination of the rules of international law relevant to the adjudication of the *Al Bashir* case is the interpretation of the treaty rules. Unlike customary international law, the rules relating to treaties are the subject of a comprehensive treaty regime, namely, the Vienna Convention on the Law of Treaties. There are two aspects of this regime, both of which are accepted as reflecting customary international law, that are significant for the *Al Bashir* case. The first is that under international law, a treaty rule cannot affect the right of third states, that is, states that are not a party to the said treaty cannot be subject to obligations flowing from that treaty.[23] The second aspect, in a sense related to the first, is that international law contains a set of rules for addressing conflict between different treaties. These rules include, amongst others, the *lex posterior* rule (that a later treaty trumps an earlier treaty); and the *lex specialis* rule (that the more specific rule trumps the more general).[24] It is, however, important to understand the limits of these rules to resolve conflicts between treaties. The most important limit is that these rules can only be applicable if the respective treaties have the same parties. Therefore, the *lex posterior* rule cannot be applied where some parties to the earlier treaty are not parties to the later treaty, since to do that may have the result that the rights and obligations of states that are not parties to the later treaty are affected contrary to article 34 of the Vienna Convention.

The third, and perhaps the most important aspect of the regime, are the Vienna rules of interpretation. The Vienna rules of interpretation can be found in articles 31 and 32 of the Vienna Convention on the Law of Treaties. The primary rule, contained in article 31(1),[25] requires that a treaty 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

21 Draft Conclusion 13 para 2.

22 Para 1 of the Commentary to Draft Conclusion 13 (n 18 above).

23 See art 34 of the 1969 Vienna Convention on the Law of Treaties, which provides that '[a] treaty does not create either rights or obligations for a third state'. Similarly, art 26 of the Vienna Convention, which establishes the basis for the binding nature of a treaty, provides that '[e]very treaty in force is binding upon the parties to it …'

24 See generally *Report of the International Law Commission at its 58th Session, 2006,* Supplement 10 (A/61/10), Conclusions of the Work of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. See, in particular, Conclusion 2, paras 5-10 for the *lex specialis* rule and Conclusion 5, paras 24-30, for the *lex posterior* rule.

25 Compare Tladi (n 4 above) 145, fn 48, where the view is expressed that art 31(1) constitutes the primary rule and the other paragraphs of art 31 serve to contribute to the process of art 31(1). A contrary view, namely, that the other elements of art 31 have the same weight as the rule in art 31(1), is also presented but not supported.

treaty in their context and in the light of its object and purpose'. The general rule set forth in article 31(1) requires that these three elements, namely, ordinary meaning, context and object and purpose, be assessed in good faith. Unlike in domestic interpretation, all three elements are important and contribute equally to the interpretation of a text. In addition to these three elements, international law also requires that subsequent agreements of the parties relating to the interpretation of the treaty and subsequent practice which establish the agreement of the parties as to the interpretation 'shall be taken into account' in the interpretation of a treaty.[26] Subsequent agreement and subsequent practice are not supplementary means of interpretation. Rather, they are primary means and it is obligatory to take them into account in the interpretation of treaties. Where subsequent practice does not establish the agreement of the parties, it may nonetheless be considered as a supplementary means of interpretation under article 32 of the Vienna Convention.[27] The Vienna rules additionally provide that in the interpretation of treaty rules, other 'relevant rules of [applicable] international law' must be considered.[28]

It is worth referring to article 32 of the Vienna Convention which makes it plain that one of the purposes of treaty interpretation is to avoid 'manifestly absurd or unreasonable results'.[29] Article 32 similarly applies in cases where a treaty provision is ambiguous. In these cases – where the normal rules result in absurd or unreasonable interpretation or where the treaty provision is ambiguous – the Vienna Convention allows recourse to supplementary means of interpretation, including the preparatory works to the treaty and other subsequent practice that do not meet the requirements of article 31(3)(b) of the Vienna Convention.

Finally, a few words concerning the interpretation of United Nations Security Council (UNSC) resolutions are appropriate. The first point to make is that resolutions of the Security Council are not treaties. However, Security Council resolutions are international law texts that make (or at the very least contribute to the making of) law. Thus, while Security Council resolutions are not treaties, there is no *a priori* reason why the rules of interpretation applicable to treaties as contained in the Vienna Convention cannot be used. The ICJ has,

26 Arts 31(3)(a) & (b) Vienna Convention on the Law of Treaties.

27 See Draft Conclusion 4(3) of the International Law Commissions Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (A/CN.4/L.83).

28 Art 31(3)(c) Vienna Convention on the Law of Treaties.

29 Art 32 permits recourse to other means of interpretation when, *inter alia,* the normal means of interpreting a treaty leads to 'a result which is manifestly absurd or unreasonable'.

albeit cautiously, endorsed the principle of applying the Vienna rules to Security Council resolutions.[30] Although the Court proceeded to apply the means of interpretation in the Vienna rules,[31] it cautioned that the peculiarities of Security Council resolutions ought to be considered and that, because of these peculiarities, other factors have to be considered in the interpretation of Security Council resolutions.[32] The Court noted, in particular, that Security Council resolutions were 'issued by a single, collective body', were drafted through a very different process than that for the drafting of treaties, the product of vote under procedures under the UN Charter and may be binding on all states.[33] In truth, these differences, to the extent that they reveal anything peculiar about Security Council resolutions,[34] do not necessitate a different approach to interpretation. These peculiarities may be true of *how* a text comes into being, but that in itself does not make the elucidation of the text of a resolution any different from the elucidation of the text of a treaty. After all, it is not inconceivable that a treaty is drafted in similar fashion. This is not to say that there are no differences between resolutions and treaties that affect the interpretation process. These differences, however, to the extent that they exist, should be identified on the basis of an assessment of the Vienna rules.

2.2 Should South African courts apply the Vienna rules?

Having set out the basic rules applicable to the identification and interpretation of international law, it is important to say a word or two about whether South African courts are obliged to apply these rules. As a starting point, one ought to distinguish the case of the interpretation of international law rules, on the one hand, from the case of the interpretation of domestic legislation implementing an international law rule, on the other. Domestic legislation, even when implementing an international rule, remains domestic in nature and the rules applicable to their interpretation, save where the legislation itself provides otherwise, are domestic law rules of interpretation.

30 In *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion of 22 July 2010, 2010 *ICJ Reports* 403 para 94, the Court stated that the Vienna rules 'may provide guidance' in the interpretation of Security Council resolutions.

31 In the course of the interpretation of UN Security Council Resolution 1244 (1999), the Court in the *Kosovo Opinion* (n 30 above) relies on the means of interpretation in Vienna rules such as 'text' and 'object and purpose'. See eg para 98, where the Court refers to 'the *text* of Resolution 1244 (1999)', and para 100, where the Court refers to the 'object and purpose of the resolution'.

32 See *Kosovo Opinion* (n 30 above) para 94.

33 As above.

34 The 'peculiarities' referred to by the Court could just as easily apply to treaties. Eg, treaties themselves may be adopted by a vote; treaties may be adopted by a body such as the General Assembly; and treaties are the product of intense negotiations just as is the case with resolutions.

Therefore, the question of whether the Implementation of the Rome Statute of the International Criminal Court Act (Implementation Act)[35] and the Diplomatic Immunities and Privileges Act (Immunities Act),[36] both of which incorporate different treaty regimes, are to be interpreted in accordance with international law rules of interpretation, is to be determined with reference to domestic law. To the extent that the two legislative Acts are silent on their interpretation, domestic rules of interpretation are applicable. Any problem that may arise due to inconsistencies between the implementation and the international law rule ought to be avoided by the application of section 233 of the Constitution, which requires an interpreter to prefer reasonable interpretations that are consistent with international law over other interpretations. Different considerations, however, apply to the interpretation and identification of international law rules as such.

As a doctrinal matter, whether the rules of international law applicable to identification and interpretation are applicable or not is dependent on the domestic system. In South Africa, these rules can be found in the Constitution. According to section 232 of the Constitution, customary international law is law in South Africa. This means that, to the extent that the rules of identification and interpretation described above form part of customary international law, South African courts are obliged to apply these rules when identifying or interpreting international law. This is certainly the case with the Vienna rules of interpretation and the rules relevant to the identification of customary international law.

A related question is whether, as a normative question, South African courts *should* apply the international rules of interpretation and identification of international law when dealing with international law. The answer to this question should be a resounding 'yes'. To take treaty interpretation as an example, if the objective is to find the true objective meaning of the treaty, the application of a common set of agreed rules for treaty interpretation should facilitate this search. The idea that there is an objectively correct interpretation, even if arriving at it is difficult, in part explains the importance of having and applying common rules of interpretation. By the same token, it is meaningless to proclaim that customary international law is law in South Africa if the method of identification and, therefore, the likely content of those rules are different.

35 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

36 Diplomatic Immunities and Privileges Act 37 of 2001.

3 Identification and interpretation of international law in the *Al Bashir* case

The facts of the *Al Bashir* case are by now well known and will not be repeated here.[37] As in the High Court case, the SCA had to address a number of issues requiring the interpretation and identification of international law. The first and most obvious question pertained to the interpretation of the Rome Statute and, in particular, the provisions relating to immunities and co-operation. As is now well known, there is an inherent tension between articles 27 and 98 of the Rome Statute, and this tension is at the heart of the Al Bashir debate. While article 27 provides that no person, including sitting heads of state, enjoys immunity before the International Criminal Court (ICC), article 98 provides an exception to the duty to co-operate in the arrest and surrender of persons possessing immunity.[38] The second important question relating to the interpretation of international law relates to the host country agreement between South Africa and the AU for the hosting of the AU Summit (host country agreement).[39] The SCA also had to determine the content of the rules of customary international law relating to immunities. Finally, the *Al Bashir* cases required the interpretation of UN Security Council Resolution 1593 which had referred the situation in Darfur to the ICC.[40] For the convenience of the reader, I describe the Court's approach to each of these in the order used by the Court. Thus, I will first describe the Court's approach to the host country agreement. I shall then proceed to consider the Court's approach to the Rome Statute, in particular article 98, before addressing the Court's approach to customary international law. In fairness, the customary international law findings are intertwined with the Rome Statute findings since, in essence, customary international law is raised as a treaty exception under article 98.

37 See authorities cited in n 6.

38 The precise language of art 27(2) of the Rome Statute is: 'Immunities or special procedural rules which may attach to the official capacity of a person … shall not bar the Court from exercising its jurisdiction over such a person.' Art 98(2) provides that the 'Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to state or diplomatic immunity of a person or property of a third state unless the Court can first obtain the co-operation of that third state for the waiver of the immunity'.

39 Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organisation of the Meeting of the 30th ordinary session of the Permanent Representative Committee from 7 to 9 June 2015, the 27th ordinary session of the Executive Council from 10 to 12 June and the 25th ordinary session of the Assembly from 14 to 15 June (on file with author).

40 UN Security Council Resolution 1593 (2005).

3.1 Court's approach to the host country agreement

As a matter of international practice, international conferences organised under the auspices of international organisations are governed by host country agreements. Where the organisation is based in the territory of the state hosting the conference, such as, for example, AU meetings in Addis Ababa or UN meetings in New York or Geneva, a permanent host country agreement governs the conference. Accordingly, a host country agreement was concluded between South Africa and the AU. One of the arguments of the South African government in the *Al Bashir* case was that the host country agreement granted Al Bashir immunity from arrest and surrender. The SCA began its assessment of the government's argument as follows:[41]

> The High Court gave the argument short thrift. It said that on its own terms the hosting agreement conferred immunity on members or staff of the AU Commission and on delegates and other representatives of international organisations. This did not include member states or their representatives or delegates.

Therefore, in the view of the High Court, the relevant provisions of the host country agreement 'did not cover heads of state or representatives of states'.[42] The relevant sections only covered the AU itself and other international organisations.[43] The SCA, for its part, stated that there 'is little that can be added to that reasoning'.[44] Before delving into the reasoning of the SCA, it is useful to restate the contents of the relevant section of the host country agreement. Article VIII of the host country agreement provides, in part, that the[45]

> government shall accord the members of the Commission and staff members, the delegates and other representatives of inter-governmental organisations attending the meetings the privileges and immunities set forth in sections C and D, articles V and VI of the General Convention on the Privileges and Immunities of the OAU.

The SCA interpreted this provision as excluding Al Bashir from the scope of article VIII on several grounds. First, the Court found that a head of state was not a delegate but rather 'an embodiment of the state itself'.[46] Apparently this conclusion was based on the description of the Assembly on the website of the AU as the AU's 'supreme organ' and comprising of 'Heads of State and Government from all member states'.[47] According to the Court, because the AU is composed of members states, and the Assembly is its governing body, and heads of

41 *Minister of Justice v SALC* (n 5 above) para 41.
42 As above.
43 As above.
44 *Minister of Justice v SALC* (n 5 above) para 42.
45 Para 1 of art VIII of the Host Country Agreement.
46 *Minister of Justice v SALC* (n 5 above) para 44.
47 As above.

state constitute the Assembly, heads of state are, therefore, 'the embodiment of members states [and] not delegates from them'.[48] Moreover, the Court stated that 'there [was] no basis' for concluding that heads of state are included in the reference to 'delegates' in article VIII. Second, according to the Court, there was 'nothing to indicate that the AU was representing the heads of member states or their delegations in concluding' the host country agreement. The key phrase, according to the judgment, was 'delegates and other representatives of inter-governmental organisations'.[49] This, according to the Court, 'relates only to persons who are there because of their entitlements to be there on behalf of one or other inter-governmental organisation'.[50] Heads of state were, accordingly, not covered by the provision.

3.2 Court's approach to article 98 and customary international law

While the Court spent time describing the architecture of the Rome Statute, such as the jurisdictional provisions and the duty to co-operate under the Rome Statute, the main interpretative issue for the Court concerned the much-debated tension between articles 27 and 98.[51] The Court recognised that article 98 (and its relationship to article 27) had 'occasioned much debate'.[52] It then proceeded to give the two opposing views, namely, the view that article 98 'operates to protect party states from the obligation to co-operate' in cases involving, *inter alia,* heads of non-state parties.[53] The provision, therefore, 'provides a justification' for non-co-operation with respect to the arrest and surrender of Al Bashir.[54] The other view, the Court stated, was that the fact that the ICC's jurisdiction in the situation in Darfur was pursuant to a UN Security Council resolution that has the effect that 'article 27 is made applicable to the non-party state and, therefore, it is not open to it to rely on article 98'.[55] Having set out these two opposing views, the Court proceeded to conclude that the tension between articles 27 and 98 'has not as yet been

48 *Minister of Justice v SALC* (n 5 above) para 45.
49 *Minister of Justice v SALC* para 46.
50 As above.
51 See further on the debate, in addition to the sources cited in n 6, D Akande 'The legal nature of the Security Council referrals to the ICC and its impact on Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 333; P Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315; W Schabas 'Introductory remarks: Annual Ben Ferencz Session' (2012) 106 *American Society of International Law Proceedings* 305; D Tladi 'The ICC decisions in Malawi and Chad: On co-operation, immunities and article 98' (2013) 11 *Journal of International Criminal Justice* 199; D Tladi 'Immunity in the era of "criminalisation": The African Union, the ICC and international law' (2015) 58 *Japanese Yearbook of International Law* 17.
52 *Minister of Justice v SALC* (n 5 above) para 60.
53 As above.
54 As above.
55 As above.

authoritatively resolved'.[56] Specifically regarding the Security Council-related argument, the Court simply noted that the relevance of the Security Council referral was 'hotly contested by the commentators'.[57] The Court thus offered no resolution to the conflict. Finally, the Court determined that 'South Africa is bound by its obligations under the Rome Statute to co-operate with the ICC' to arrest persons under arrest warrants, such as Al Bashir.[58]

Having referred to the tension between articles 27 and 98, the Court considered the rule of customary international law relating to the immunity of sitting heads of state.[59] In particular, the Court considered 'the suggestion' that there was an exception under customary international law to immunity where Rome Statute crimes were concerned. In considering the question of whether there was an exception to the rule on sitting heads of state immunity, the Court referred to the *Arrest Warrant* case,[60] and decisions of national courts as gleaned from the literature.[61] The Court then drew a distinction between immunity before international courts – which has generally not applied – and immunity before foreign domestic authorities for the purposes of co-operation with the ICC.[62] Based on the views of 'a number of commentators', the Court noted that the fact that an individual does not have immunity before the ICC 'does not necessarily mean that a state is entitled to ignore head of state immunity when requested to co-operate with the ICC to bring such person before it'.[63] The Court, having considered decisions of the European Court of Human Rights,[64] concluded that there was no exception to the customary rule on immunity, both with respect to civil claims and criminal prosecution, even in connection with *jus cogens* crimes.[65]

56 As above.
57 *Minister of Justice v SALC* (n 5 above) 106.
58 *Minister of Justice v SALC* para 61.
59 *Minister of Justice v SALC* paras 66 *et seq.*
60 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment of 14 February 2002, *ICJ Reports* 2002 3.
61 In particular, the Court states that the principle that there is no exception as determined in the *Arrest Warrant* case 'has been widely accepted by national courts which have rejected attempts to implead sitting heads of state'. For this proposition, the Court refers to MA Tunks 'Diplomats or defendants? Defining the future of head of state and sovereign immunity' (2002) 52 *Duke Law Journal* 651; and T Weatherall '*Jus cogens* and sovereign immunity: Reconciling divergence in contemporary practice' (2015) 46 *Georgetown Journal of International Law* 1151.
62 *Minister of Justice v SALC* (n 5 above) para 69.
63 As above.
64 See, eg, *Al-Adsani v UK* (Application 35763/97), Judgment of 21 November 2001 of the European Court of Human Rights.
65 *Minister of Justice v SALC* (n 5 above) para 84.

At various places, the Court made it clear that it would rather have found that there was an exception under customary international law.[66] However, it found that its role did not permit it to go beyond existing customary international law, because its role was 'one of discerning the existing state of law' and that the '[d]evelopment of customary international law occurs in international courts and tribunals, in the content of international agreements and treaties and by its general acceptance' by states.[67] In the Court's view, while it may be tempting, it was not permissible for domestic courts to seek to expand the boundaries for customary international law – this, it stated, was the role of international courts.[68]

Having considered these international law issues, the Court made the following concluding remarks:[69]

> Ordinarily, that would mean that President Al Bashir was entitled to inviolability while in South Africa last June. But SALC argued that that the position was different as a result of the enactment of the Implementation Act.

Essentially, it seems to me, the Court did the analysis of international law merely for the sake of completeness.[70] The rules of international law, in the view of the Court, did not affect the outcome. The Court then proceeded to resolve the matter by resolving an apparent conflict between the Implementation Act and Immunities Act. The Court considered that[71]

> when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act, it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa co-operating with the ICC …

This conclusion, it appears, is irrespective of the position under international law.[72]

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66 *Minister of Justice v SALC,* eg, para 84, where the Court states that it must 'conclude with regret that it would go too far to say that there is no longer' immunity for *jus cogens* crimes.

67 *Minister of Justice v SALC* para 74.

68 As above.

69 *Minister of Justice v SALC* (n 5 above) para 85.

70 See Separate Opinion of Ponnan JA (Lewis JA concurring) in *Minister of Justice v SALC* (n 5 above), para 115 ('with due deference to my learned colleague, that conclusion, I daresay, renders his discussion on customary international law unnecessary').

71 *Minister of Justice v SALC* (n 5 above) para 103.

72 Eg, having considered that customary international law requires, without exception, the respect of immunity of heads of state, the Court holds that *ordinarily* this would mean that South Africa may not arrest him (*Minister of Justice v SALC* (n 5 above) para 85), and proceeds to find that there is a duty to arrest him. Similarly, having found that there is a tension between involving the rule of customary international law on immunities, art 27 of the Rome Statute, the duty to co-operate in the Rome Statute and art 98, the Court states that 'in view of my conclusion on the effect of the Implementation Act it is unnecessary to' resolve the conflict (*Minister of Justice v SALC* (n 5 above) para 106).

4 Evaluating the Court's approach to international law

As mentioned above, the purpose of the article is not to determine the correctness or not of the judgment. The purpose is to assess the Court's methodological approach to the identification and interpretation of international law. While in the current case, the Court suggested that international law issues are not material to the resolution of the primary question before it, the analysis below aims to show that the question before the Court cannot fully be answered without a rigorous approach to international law. It is for this reason that a methodological approach to the identification and interpretation of international law is so important.

4.1 Host country agreement

Before addressing the Court's approach to the interpretation of the host country agreement, a few preliminary points about the arguments presented before the Court should be noted. According to the Court, counsel for the government argued that article VIII of the host country agreement had been 'promulgated' *because* 'Sudan had requested that [Al Bashir] be afforded immunities of a delegate attending the AU'.[73] If this is indeed what counsel for the government argued, then counsel was mistaken. As stated above, the immunities provision is a standard provision in any host country agreement, and the AU insists (as do other international organisations) on it as a precondition for hosting any conference in the territory of any state. It was not inserted into the agreement *for the individual benefit of Al Bashir*, nor would it be correct to assume that had Al Bashir not been coming, the provision would not have been inserted. Second, it appears that counsel for the government argued that the host country agreement, together with the Minister's notice, gave Al Bashir immunities in domestic law. In the view of the author, the better argument would be that the Immunities Act, in particular section 6,[74] enabled the Minister of International Relations and Co-operation to incorporate the host country agreement into domestic law by means of a notice. As Dugard points out, an 'enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of a proclamation or notice in the Government Gazette'.[75] Thus, what grants the participants of the Summit

73 *Minister of Justice v SALC* para 43.

74 Sec 6(1) of the Immunities Act provides as follows: 'The officials of … any organisation, and representatives of any state, participating in an international conference or meeting convened in the Republic enjoy, for the duration of the conference or meeting such privileges and immunities as … are specifically provided for in any [international] agreement for this purpose.' Sec 6(2), in its part, provides that the 'Minister [of International Relations and Co-operation] must by notice in the Gazette recognise a specific conference or meeting for the purposes of subsection (1)'.

75 Dugard (n 9 above) 61.

immunity in domestic law is the incorporation of the host country by the Immunities Act.[76] At any rate, whatever effect this approach would have would depend ultimately on the interpretation given to the host country agreement, to which I now turn.

The Court's interpretation of article VIII rests on two pillars, both of which are based on an interpretation of the words of article VIII. Under the first pillar, heads of state are the 'embodiment of the member state itself' and, therefore, cannot be 'delegates'.[77] It appears that the Court arrived at this conclusion based on the definitions in the AU Constitutive Act, in which the phrase 'member state' is defined as 'member state of the AU'. Because the AU, so the argument goes, 'is composed of the heads of state and government or their duly accredited representatives', heads of state are an embodiment of member states and are not its delegates.[78] With respect, this argument is ill-conceived. The AU is not composed of the Summit. The Summit is an organ of the AU, the highest policy-making organ, but certainly not the only organ of the AU. It, being the AU, therefore, is not composed of heads of state. It is the Summit that is composed of heads of state, not the AU. The AU is composed of several organs, in addition to the Summit, including the Executive Council (the organ comprising the Minister for Foreign Affairs), the Permanent Representative Committee (the organ comprising ambassadors accredited to the AU), the Commission (the Secretariat of the AU) and the Specialised Technical Committee (various organs of Ministers in specialised areas such as agriculture and justice).[79] However, at any rate, even if the Summit were the AU, it would not follow that its heads of state were not delegates because the Summit is not merely a collection of its members, but an entity separate from its individual members.

The second pillar of the literal interpretation advanced by the Court does, however, have some basis in the text. The second pillar, which in fact is the interpretation advanced by the High Court,[80] is based on the meaning of the words in article VIII, namely, that immunities are to be granted to 'members of the Commission and staff members, the delegates and other representatives of inter-governmental organisations attending the meetings'. In the view of the Court, this did not include delegates from AU member states. The word 'delegate' in article VIII, in the view of the Court, applied only to representatives of other inter-governmental organisations. Although

76 An interesting legal question falling beyond the scope of this article is whether the *lex posterior* rule of interpretation would have the effect that the incorporation of the host country agreement takes priority over the Implementation Act since the former would be the later legislative act.

77 *Minister of Justice v SALC* (n 5 above) para 45.

78 *Minister of Justice v SALC* (n 5 above), the Court stating: 'The "Union" is the AU. In terms of article 6(1) *it is composed* of Heads of State and Government …' (my emphasis).

79 See art 5 of the Constitutive Act of the African Union.

80 *SALC v Minister of Justice* (n 5 above) para 28.

the SCA did not explain why this was the case, purely based on the language, it was a plausible interpretation.[81] In short, the word 'other' before 'representatives of inter-governmental organisations' must mean that the word 'delegates' also qualifies inter-governmental organisations, so that 'delegates' are a species of 'representatives'. Thus, according to this interpretation, it is delegates of the inter-governmental organisations and representatives of inter-governmental organisations that are covered by this provision.

This, of course, is a plausible literal interpretation, although a contrary interpretation is equally plausible as the text is ambiguous. The word 'delegate' could qualify inter-governmental organisations, in which case the Court's interpretation would have been correct, or it could be self-standing, in which the case the Court's interpretation would have been incorrect. At any rate, the Court's interpretation is open to at least two criticisms. The first criticism, also based on the meaning of the words, is that, in practice, while 'representatives' is a species of 'delegates', the reverse is not true. All members of a delegation are 'delegates', but only the more senior members acquire the title of 'representative'. Thus, if the text read 'representatives and other delegates', then, under a purely literal interpretation, one could argue that both representatives and delegates qualify inter-governmental organisations. However, since not all delegates are representatives, 'delegates and other representatives of other inter-governmental organisations' cannot mean delegates of inter-governmental organisations and their representatives. However, this flaw in the literal interpretation of article VIII is not the most serious methodological flaw.

From a methodological perspective, the Court's interpretation relied almost exclusively on a textual approach and did not account for the other, obligatory, means of interpretation. In particular, the interpretation did not consider, as part of the context, the reference to the General Convention on the Privileges and Immunity of the OAU (General Convention), which makes it clear that the immunities it seeks to give are principally for 'representatives of member states'. It is perhaps true, as the Court noted, that this could not be a form of incorporation of the General Convention into the host country agreement, since it is the type of immunities in the General Convention that is incorporated and not the beneficiaries of the immunities. Nonetheless, the General Convention does provide a context, which methodologically the Court ought to have taken into account, in shedding light on the persons who normally enjoy immunities at AU conferences. Moreover, since the text in article VIII is a standard text, the Court could have considered how it has been

81 For a fuller explanation, see the High Court judgment in *SALC v Minister of Justice* (n 5 above) para 28.

understood in the past, again with a view to determining who is ordinarily entitled at AU meetings.[82] Subsequent practice, including the ministerial notice, reflecting how South Africa, a party to the agreement, understood the host country agreement, can also not simply be ignored. The Court noted that the Minister of International Relations and Co-operation and the Cabinet interpreted the host country agreement as conferring immunities on Al Bashir and other delegates. Yet, the Court concluded that this 'erroneous belief [on the part of South Africa concerning what the content of the host country agreement is] is neither here nor there'.[83] But this dismissive statement reflects a lack of understanding of basic principles of interpretation of international law. It ignores the fact that, under international law, subsequent practice, as defined above, is an element of interpretation that *must* be taken into account. The Court ought to have considered whether it established the agreement of the parties, that is, whether both South Africa and the AU shared this interpretation. If it appeared that the AU adopted a similar interpretation, the Court ought to have considered this as a subsequent practice establishing the agreement of the parties, and thus given it considerable weight in the interpretation. At any rate, even if the practice did not establish the agreement of the parties, the Court ought to have considered it as a supplementary means of interpretation under article 32 of the Vienna Convention.[84]

The purely literal interpretation advanced by the Court also ignores the rules of interpretation because it accepts, without pause, an interpretation leading to a 'manifestly absurd and unreasonable' result. According to the Court's interpretation, representatives of observers, such as the EU, UN, ECOWAS and other inter-governmental organisations which have no official role in the Summit are given immunity, but the main participants of the conference are left out of the immunity regime. How can this be? It may be argued that covering heads of State is unnecessary since they would be covered by customary international law, but this is an unconvincing argument. First, other practice indicates that host country agreements cover

82 See, as examples of similar texts, art 13 of the Agreement between the Government of the Republic of South Africa and the Commission of the African Union (AU) on the Material and Technical Organisation of the Ministerial Conference on the African Diaspora, 16-18 November 2007, Pretoria, South Africa; and art 11 of the Agreement between the African Union Commission (AUC) and the Government of the Republic of South Africa on the Material and Technical Organisation of the 3rd Africa-India Trade Ministers Conference and the 2nd Africa-India Business Council Meetings, 30 September-1 October 2013, Sandton Sun, South Africa. Incidentally, what appears to be the 2013 negotiation comments is mistakenly left in the final text. The comment, presumably from the AU in response to a suggestion for an amendment from the South African side, reads: 'In keeping with the African Union legal format, we would prefer to keep using this phrase in order to maintain consistency as in previous agreements.'

83 *Minister of Justice v SALC* (n 5 above) para 47.

84 See Draft Conclusion 4(3) of the International Law Commission's Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (n 27 above).

persons ordinarily covered by other rules of international law. The UN Immunities and Privileges Agreement, for example, covers persons who would enjoy immunities under customary international law, since diplomats attending UN conferences have immunities under customary international law. Again, the application of context and object and purpose ought to have led the Court to consider how previous host country agreements have been understood. The fact is that, as a rule, without exception, host country agreements bestow immunities on the participants of the conference and where, for some or other reason, there is no host country agreement, the host state unilaterally ensures such immunity in terms of its own domestic law. The statement of Switzerland before the General Assembly in 2013 is instructive in this regard:[85]

> Although … many international conferences are held under the auspices of an international organisation with which a host state has concluded an agreement, not all of them are: When a conference is not connected with an international organisation, the host state often has to confer privileges and immunities *on the conference and its participants* unilaterally, based on national law. In this regard, we would like to underline that the privileges and immunities … are based on international law, even though they may be formalised by a unilateral decision.

Several points, relevant as context to the interpretation of the host country agreement, arise from this Swiss statement. First, it is clear from the statement that immunities are, in the view of Switzerland, as a matter of practice primarily conferred on the conference and the participants of the conference. Second, it is clear that these immunities are, in its view, in accordance with international law. The view expressed by the Swiss delegation is uncontroversial and reflects general practice and law. There is simply no host country agreement that confers immunities on non-participants to the exclusion of the main participants. As such, under article 31(3)(c) of the Vienna Convention, this ought to have been taken into account as an applicable principle of international law. These considerations, at the very least, ought to have played some role in the Court's interpretation of article VIII of the host country agreement. At any rate, the Court could have made an effort to source other examples of practice to contribute to the interpretation of the agreement to determine whether, in practice, host country agreements bestow immunities on the participants of the conference or on observers to the conference.

4.2 Customary international law and the Rome Statute

As stated above, the arguments concerning customary international law and the duty under the Rome Statute to co-operate are, in fact, intertwined. Simply put, the government's argument is that there is

85 *Déclaration du Suisse sur la Point 81 de l'ordre du jour ('Rapport de la Commission du Droit International') 68e session de l'Assemblée Générale, Octobre 2013* (my emphasis).

no duty *under the Rome Statute* to co-operate with the ICC because article 98 of the Rome Statute creates an exception, based on customary international law, to the duty to co-operate. This argument, thus, required both an interpretation of article 98 and the search for the content of customary international law.

I begin with the Court's methodological approach to the identification of customary international law. I am, in general, in agreement with the substantive conclusions of the Court, namely, that there is no exception under customary international law, as it currently stands, to the duty to respect the immunity of a sitting head of state.[86] I am also in general agreement with the methodological approach of the Court. The Court came to its conclusion having considered state practice in the form of national judicial decisions,[87] and decisions of international courts in the form of the International Court of Justice and the European Court of Human Rights.[88] There is, of course, more direct practice that the Court could have referred to, including statements by states before the General Assembly, for example, in response to the International Law Commission's work on immunities.[89] A consideration of the debate of the General Assembly would have revealed that states generally agree that heads of state enjoy immunity *for all acts* for the duration of their terms in office.[90] A study of the responses of states may, however, also have shown that there are some states that hold the view that international law *should* – rather than does – recognise some exceptions even for immunity *ratione personae.*[91]

86 See Tladi (n 6 above) 1040, criticising the conclusion that Al Bashir did not have immunity in the High Court judgment in *SALC v Minister of Justice* (n 5 above).

87 *Minister of Justice v SALC* (n 5 above) para 67, where the Court refers to various cases in which national courts have 'rejected attempts to implead sitting heads of state including Prime Minister Sharon of Israel, President Gaddafi of Libya, President Mugabe of Zimbabwe, Prime Minister Thatcher of the United Kingdom, President Castro of Cuba, President Zemin of China, President Kagame of Rwanda and President Arastide of Haiti'.

88 In addition to the *Arrest Warrant* case (n 60 above), the Court also considers the *Case Concerning the Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening),* Judgment of 3 February 2012, *ICJ Reports* (2012) 99; *Al-Adsani* (n 64 above).

89 See Draft Article 4 of the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, ch V of the Report of the International Law Commission on the Work of its 65th Session (A/68/10).

90 See, eg, Statement by the Delegation of the Republic of India on Agenda Item 81 (Report of the International Law on the Work of its Sixty-Fifth Session), at the 6th Committee of the General Assembly, October 2013; statement by Mrs Edwige Belliard, Director of Legal Affairs of the French Republic, on Agenda Item 81 (Report of the International Law Commission on the Work of its 65th Session) at the 6th Committee of the General Assembly, October 2013; statement by the United States of America on Agenda Item 81 (Report of the International Law on the Work of its 65th Session) at the 6th Committee of the General Assembly, October 2013.

91 See statement by Rita Farden, Director of Legal Affairs of the Ministry of Affairs of Portugal, Item 81 (Report of the International Law Commission on the Work of its 63rd and 65th Sessions), 68th Session of the United Nations General Assembly.

The potential for evolution of the law on immunities, as evidenced by the call by some states for development, puts the spotlight on a comment by the Court concerning the role of courts generally in the development of customary international law. The Court stated that it was not for it to develop customary international law because the '[d]evelopment of customary international law occurs in international courts and tribunals, in the content of international agreements and treaties and by its general acceptance' by states.[92] First, the role of international courts and tribunals is not to develop customary international law. In fact, national courts, whose decisions constitute state practice, are more empowered to develop customary international law than international courts. While international courts, in particular the International Court of Justice, are in a better position to judge the state of existing customary international law, national courts contribute directly to its development.[93] There are two implications flowing from this distinction. First, the Court understated its own importance for the development of customary international law. Second, the contribution that domestic courts can make to the development of international law underscores the importance of ensuring that decisions of national courts, including South African courts, are premised on the correct assessment of the law. Where the Court deviates from existing international law, it should be done because domestic law requires it to – in other words, it should be a conscious decision and not based on an incorrect assessment of customary international law. A careful and rigorous application of the methodology of the identification of customary international law, as in the current case, will contribute to this end.

While the Court's approach to customary international law was satisfactory, the Court's approach to the interpretation of article 98 was less so. Article 98 of the Rome Statute is critical to resolving the tension between immunities under customary international law and the duty to co-operate under the Rome Statute. There are various interpretative models that have been used by the Court to resolve this tension. The Court identified two. These are, first, that the UNSC makes Sudan akin to a state party to the Rome Statute, such that article 98 is inapplicable to Sudan and, second, that by virtue of article 98, the customary international law rule on the immunity of sitting heads of state nullifies the duty to co-operate under the Rome Statute. There is a third textual interpretation which has been advanced by the author, namely, that on its terms, article 98 is limited to very specific types of immunity.[94] The Court, however, declined to engage in any sort of interpretation, either of article 98 or of the Security Council resolution referring the situation in Darfur to Sudan. The Court only

92 *Minister of Justice v SALC* (n 5 above) para 74.

93 See for a discussion C Greenwood 'The development of international law by national courts' in T Maluwa et al (eds) *In search of a brave new world: Essays in honour of John Dugard* (forthcoming).

94 See Tladi 'Malawi and Chad' (n 51 above) 209-218.

stated that 'there is a tension between article 27 and 98 that has not as yet been authoritatively resolved'.[95] The function of the Court, however, was to resolve all legal issues necessary to address the controversy before it. The tools of interpretation, as described above, could have assisted the Court to address the tension by interpreting the provisions of the Statute.

These tools of interpretation include the text of articles 98 and 27, the context and the object and purpose of the Statute. For example, the Court ought to have considered, as part of the text *and* context, that articles 27 and 98 address different things. While article 27, which removes immunity, clearly is concerned with the relationship between an accused and the ICC *itself*, article 98 is concerned with the relationship between state parties and non-parties, on the one hand, and the relationship between the Court and state parties, on the other. Thus, in addressing the question whether Al Bashir was owed immunity *under* the Rome Statute, the Court ought to have considered the forum. This *might* suggest that article 98, rather than article 27, is applicable to the dispute. That article 98, and not article 27, applies to the situation of a person under an ICC arrest warrant before South African courts does not necessarily mean that there is no duty to arrest Al Bashir *under the Rome Statute.* Whether this is the case would ultimately depend on the interpretation of article 98 itself. Elsewhere it has been suggested that the text of article 98, in its context, together with the object and purpose of the Rome Statute, appears to exclude the scope of article 98, the immunities of heads of state, and is rather limited to immunities of diplomats and the immunities of the state itself.[96] Time and space do not permit the full reproduction of the arguments here, but it suffices to say that they are based on the following considerations:[97]

(i) The language of article 98 of the Rome Statute specifically refers to 'international law relating to the *state or diplomatic immunity*'.

(ii) International law recognises a distinction between different types of immunities, namely, state immunity, diplomatic immunity and heads of state immunity.[98]

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95 *Minister of Justice v SALC* (n 5 above) para 60. See also para 106: 'The position under the Security Council is hotly contested by the commentators.'

96 Tladi 'Malawi and Chad' (n 51 above) 213-218.

97 There are counter-arguments to these considerations. Eg, these are addressed fully in Tladi 'Malawi and Chad' (n 51 above) 231 *et seq.*

98 See for discussion Tladi 231-214. See also dissenting opinion of Judge Oda in the *Arrest Warrant* case (n 60 above) para 14 and dissenting opinion of Judge Van den Wyngaert para 15. See further *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France),* Judgment of 4 June 2008, *ICJ Report* 2008 177 para 193. See also judgment of the Court in the *Arrest Warrant* case where the Court, while recognising that the Vienna Convention on Diplomatic Relations does not contain provisions relevant to immunities of foreign ministers and heads of state. See also I Brownlie *Principles of public international law* (2003) 322 and S Knuchel 'State immunity and the promise of *jus cogens*' (2011) 9 *Northwestern Journal of International Human Rights Law* 149.

(iii) The object and purpose of the Rome Statute, being to serve the fight against impunity, would be served most by adopting a restricted interpretation of article 98.

While there is little in the way of preparatory works to the Rome Statute,[99] the little that there is suggests that article 98 ought to be interpreted restrictively.[100] The various texts provided to the Rome Conferences (and discussed there) suggest that the two main options were to have unlimited exceptions or restricted exceptions to the duty to co-operate. It appears that the Conference decided on a restricted interpretation and, in particular, that any exceptions should be specifically enumerated.[101] Again, this does not suggest that article 98 does not, as a matter of law, protect Al Bashir. This simply points to considerations that ought to have been taken into account in the process of interpreting article 98.

There is yet another argument, advanced by the Southern African Litigation Centre (SALC), the effect of which would be that article 98 would be inapplicable to Sudan. Sudan is a party to the Genocide Convention. SALC had, in this context, argued that, since the Genocide Convention removes immunity, and since both South Africa and Sudan are parties to the Genocide Convention, the customary international law rule of immunity does not apply between South Africa and Sudan in respect of genocide.[102] The Court gave this argument short thrift, stating that it had not received sufficient submissions to give it due consideration. While I do not share the interpretation by SALC that the Genocide Convention removes immunity, the Court ought to have considered this argument as an applicable principle of international law under article 31(3)(c) of the Vienna Convention on the Law of Treaties. Whether, as argued by SALC, the Genocide Convention removes immunity can only be determined by the application of the rules of interpretation, which surely the Court must do in the exercise of its judicial functions.

All the tools of interpretation discussed above could also be usefully applied to the interpretation of the relevant UN Security Council resolution.[103] The application of the normal rules of treaty interpretation could have led the Court to the ordinary meaning of

99 See Tladi 'Malawi and Chad' (n 51 above) 217. See also R Cryer et al *An introduction to international criminal law and procedure* (2010) 148. There are no formal *travaux préparatoires* for the Rome Statute. Summary UN records (available on the Official Document System of the UN) cover plenary debates only and main committee discussions.

100 Tladi 'Malawi and Chad' (n 51 above) 218.

101 As above. See also statement of the Peru Republic stressing that the importance of co-operation necessitated that from the duty to co-operate 'should be allowed' (A/Conf.183/SR.3); See also statement of Australia (A/Conf.183/SR.4).

102 See *Minister of Justice v SALC* (n 5 above) para 106.

103 D Tladi 'Interpretation of protection of civilians in United Nations Security Council resolutions' in D Kuwali & F Viljoen (eds) *'All means necessary': Protecting civilians and preventing atrocities in Africa* (forthcoming). See, for the application of these principles to UNSC Resolution 1593, Tladi 'Immunity in the "era of criminalisation"' (n 51 above) 36 *et seq.*

the resolution, the object and purpose not of the Rome Statute, but of the resolution, as well as subsequent practice in the form of the Security Council debate on the report of the prosecutor.

The Court justified its decision not to address the tension by stating that 'in view of [its] conclusion on the effect of the Implementation Act it is unnecessary to address these submissions'.[104] The Court essentially concluded that the Implementation Act trumped all, such that the resolution of international law questions was not critical for the Court to come it its conclusion. Presumably this reasoning could have applied equally to the question of customary international law and possibly the interpretation of the article VIII of the host country agreement. Moreover, for reasons discussed below, it is not correct that because of the conclusions on the Implementation Act, the resolution of the tension between articles 27 and 98 can be dispensed with. The failure of the Court to resolve, at least for itself, the article 98 conundrum results in an internal incoherence in the judgment.

4.3 Importance of international law for the interpretation of domestic law

There are at least two reasons why the resolution of the international law issues was important, if not critical, to the interpretation and application of the domestic legislation in question. First, section 233 of the South African Constitution provides that in the interpretation of any legislation, including the Implementation Act and Immunities Act, any reasonable interpretation that is consistent with international law must be preferred over any other interpretation. This provision can only be applied if 'international law' on the matter is identified and interpreted. The provision does not call for an interpretation that is consistent with 'a source' of international law, but rather an interpretation that is consistent with international law. Section 233 cannot be applied unless the position under international law relating to immunities has been determined, and this cannot be done without a resolution of the tension between articles 98 and 27. In this regard, the author has, prior to the Al Bashir situation, made the following observation, commenting on the importance of interpreting (and not just referring to) international law:[105]

> However, if international law is to be relied upon for the interpretation of the Constitution and legislation, it is reasonable to expect that international law itself would be interpreted, for how can international law be relied upon without first finding its meaning? Finding the meaning of international law requires its interpretation through the application of rules of interpretation. Thus, while these interpretive provisions do not directly call for the interpretation of international law, there is an indirect requirement, or at the very least an expectation, that international law will be interpreted.

104 *Minister of Justice v SALC* (n 5 above) para 106.

105 Tladi (n 4 above) 138, commenting on the importance of interpreting (and not just referring to) international law.

However, even more important than the significance of international law for the purposes of section 233, it is not clear how the domestic law questions can be addressed without a resolution of the international law questions. The Implementation Act implements the Rome Statute. The obligation to co-operate under the Implementation Act, by definition, is dependent on whether a duty exists to co-operate under the Rome Statute. The SCA, however, without addressing the article 98 issue, stated that 'South Africa is bound by its obligations under the Rome Statute' and that it 'is obliged to co-operate with the ICC and to arrest and surrender to the Court persons in respect of whom the ICC has issued an arrest warrant and a request for assistance'.[106]

The conclusion that there is a duty under the Rome Statute to arrest Al Bashir is important even for the finding that there is a duty under the Implementation Act. Presumably, if the ICC is not entitled to make a request for arrest and surrender because of the exception in article 98, then South African courts, being courts based on the rule of law, cannot order the arrest and surrender of Al Bashir. How then did the Court come to the conclusion that there was a duty under the Rome Statute without resolving the tension between articles 27 and 98? After all, the argument of the government was that there was no duty to arrest and surrender because of article 98 of the Rome Statute. In other words, the customary international law argument relates to the interpretation of article 98. The Court appeared to agree with the government that there was a duty under customary international law *not* to arrest Al Bashir. Surely this means that article 98 applied. If that were so, then there was no duty to arrest Al Bashir under the Rome Statute. The Court could not determine whether there was a duty under the Rome Statute to arrest Al Bashir unless it engaged with the various issues relating to article 98, including the possible effects of the UN Security Council and the textual limitations of article 98.

This internal incoherence – finding that there is a duty to arrest and surrender without resolving the article 98 debate – cannot be remedied by simply stating that the Implementation Act trumps all. This is because for arrest and surrender under the Implementation Act, there has to be a duty under the Rome Statute. However, this internal inconsistency may have another far more insidious effect. The effect of the Court's decision is that South Africa is obliged to arrest and surrender a sitting head of a non-state party *even in the absence of a UN Security Council* resolution as the basis for the referral – a decision that would be inconsistent with the ICJ's decision in the *Arrest Warrant* case and even the ICC Pre-Trial Chamber in the *DRC non-co-operation* case, since in those decisions the ICJ and the ICC respectively found

106 *Minister of Justice v SALC* (n 5 above) para 61.

that sitting heads of state enjoyed absolute immunity from the jurisdiction of foreign courts.[107] Moreover, given the Constitutional Court's judgment that the Implementation Act *obliges* South Africa to investigate Rome Statute crimes even where the perpetrator is not in South Africa, subject to certain limitation principles,[108] the current decision effectively means that South Africa can investigate sitting heads of non-state parties contrary to international law – and potentially prosecute them should they ever be present on South African soil. Akande, on whom the Court relied heavily, commenting on the judgment, makes the following observations about the judgment:[109]

> [T]hese conclusions regarding the lack of immunity *ratione personae* in South Africa … are odd [and] it is not clear why section 4(2) [of the Implementation Act] is not given a meaning which aligns more closely with the words used and with customary international law.

The oddity that Akande identifies is directly linked to the Court's decision not to address the article 98 argument. Akande, who supports the view that the UN Security Council referral turns Sudan into an analogous state party,[110] although he agrees with the conclusion of the Court that there are no exceptions under customary international law to incumbent head of state immunity, states that 'it was wrong for the Court' not to address the article 98 tension.[111]

I do not mean to suggest that the Court ought not to have reached the conclusion it reached – that is a substantive point which falls beyond the scope of the article. The pathways for reaching the same outcome while applying a sound methodological approach to the issues are numerous. I do, however, wish to point to the importance of resolving the international law issues in the case. This in turn, requires attention to the methodological issues raised above which, save in connection with questions of customary international law, the Court did not pay attention to.

5 Conclusion

The South African legal community prides itself on having an international law-friendly framework. Our Constitution has several provisions enjoining the consideration (and sometimes application) of

107 See *Decision on the Co-operation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* (n 7 above).

108 See, generally, *National Commissioner of the South African Police Service v Southern African Litigation Centre and Others* 2015 (1) SA 315 (CC) para 77 *et seq.*

109 Akande (n 6 above).

110 Akande (n 45 above) 342. See, however, Tladi 'Immunity in the era of "criminalisation"' (n 51 above) 33.

111 Akande (n 6 above).

international law. Our jurisprudence is similarly replete with references to international law materials.[112] Yet, South African courts have, generally, struggled with the methodological questions of the interpretation and identification of international law.[113] The result has been superficial references to international law.[114] For the most part, this has not harmed the judicial reasoning accompanying these cases as, in most instances, the Court was concerned with the interpretation of domestic law, such that ensuring a rigorous approach to international law might be seen as secondary.

However, South African courts are more often faced with cases in which the central issues revolve around international law. In these cases, international law cannot be treated as secondary, and attention to the details and methodology of international law is crucial. In the *Al Bashir* case, the approach of the SCA, first of all, was inconsistent. While it adopted a rich and somewhat rigorous approach to the identification of customary international law, on the one hand, on the other it adopted a superficial, a contextual interpretation of the host country agreement and decided not to resolve the key international law question at issue in the case, namely, the interpretation of article 98 of the Rome Statute. The Court also seemed to adopt the approach that international law was secondary. It is for this reason that, having gone through a careful analysis of customary international law, it proceeded to ignore international law in its assessment of domestic law. This is also the reason that the Court decided that it was unnecessary for it to resolve the tension between articles 27 and 98 of the Rome Statute. Much will be written about the substantive aspects of the judgment, but there is a need to pause and think about the methodology of international law in this and other South African cases.

112 See, eg, L du Plessis 'Interpretation' in Woolman et al (n 4 above) 37-176: 'Openness and generous reliance on international law has most been the default (judicial) disposition.'

113 See Tladi (n 4 above) 151-152.

114 See, eg, Strydom & Hopkins (n 4 above) 30-11 ('while there has been a significant *reference* to international human rights law, there is little evidence of "real *consideration*"') (original emphasis).

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Laws in conflict: The relationship between human rights and international humanitarian law under the African Charter on Human and Peoples' Rights

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Summary

Most armed conflicts today take place in Africa and it is increasingly African actors who are engaged in peacekeeping on the continent, yet scholarly writing on the regulation of these conflicts lags behind. One area where this is particularly true concerns sanctioning violations of international humanitarian law. This has long been difficult, given the tendency of domestic systems to close ranks and insulate their citizens from legal action. To provide at least some forum for justice in this situation, regional human rights bodies increasingly deal with rights violations even in situations of war, raising questions about their mandate and the relationship between human rights and humanitarian law. In the European and American context, these questions have already been the subject of considerable academic writing, but the same is not true for Africa. This article seeks to fill this gap. It first situates the existing approach of the major pan-African human rights institutions to international humanitarian law within the broader global debate. As a second step, it argues that an interpretive approach which takes international humanitarian law into consideration when interpreting rights in the African Charter provides the best approach to this question in the African context.

Key words: *African Charter; peacekeeping; humanitarian law; human rights law; armed conflict*

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1 Introduction

International humanitarian law has long lacked adequate means of sanctioning violations. Military mechanisms for punishing wrongdoers have often proved weak for lack of political willingness, and domestic courts have displayed a similar reluctance or grappled with other difficulties.[1] As a result, it has increasingly fallen to international courts or quasi-judicial bodies to address violations of international humanitarian law – be it within the realm of international criminal responsibility or human rights. Regional human rights bodies have dealt with this challenge in different ways. Some, such as the European Court of Human Rights (European Court), have approached international humanitarian law with caution and focused primarily on their human rights mandate (at least until recently),[2] whereas others, such as the Inter-American Commission on Human Rights (Inter-American Commission), have been more willing to engage with international humanitarian law and sometimes even applied it directly.[3]

The African human rights system and its capacity to deal with violations of international humanitarian law have thus far received little scholarly attention.[4] This is perhaps not surprising, considering the comparative dearth of legal scholarship on African issues. Yet, Africa is the region where most contemporary armed conflicts arise,

1 For more, see X Philippe 'Sanctions for violations of international humanitarian law: The problem of the division of competences between national authorities and between national and international authorities' (2008) 90 *International Review of the Red Cross* 359.

2 This is mainly because the European Court in the past required states to make an explicit derogation from the Convention, without which it would judge states against the 'normal legal background'. See eg *Isayeva v Russia* App 57950/00 EurCtHR (2005) para 191. For a detailed overview, see also K Oellers-Frahm 'A regional perspective on the convergence and conflicts of human rights and international humanitarian law in military operations: The European Court of Human Rights' in E de Wet & J Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 333. The European Court's decision in *Hassan v The United Kingdom* ECHR 29750/09 (2014) now changes this somewhat; for details see below.

3 See *Abella v Argentina* Case 11.137, IAm Comm of HR, OEA/Ser.L.N/1.95 Doc 7 (1997) which differs, however, from the Inter-American Court's approach in later cases, which is nevertheless still comparatively IHL-friendly. See eg *Bamaca-Velasquez v Guatemala*, IAm Comm of HR (ser C) No 70 (25 November 2000). For an overview of the developments in the Inter-American system only, see D Shelton 'Humanitarian law in the Inter-American human rights system' in De Wet & Kleffner (n 2 above); S Tabak 'Armed conflict and the Inter-American human rights system: Application or interpretation of international humanitarian law?' in D Jinks et al (eds) *Applying international humanitarian law in judicial and quasi-judicial bodies: International and domestic aspects* (2014) 219.

4 See F Viljoen 'The relationship between international human rights and humanitarian law in the African human rights system: An institutional approach' in De Wet & Kleffner (n 2 above); and for a very short treatment, L van den Herik & H Duffy 'Human rights bodies and international humanitarian law: Common but differentiated approaches' forthcoming in C Buckley et al (eds) *The harmonisation of human rights law* (2014).

and African states are also at the forefront of contemporary peacekeeping operations, frequently under the common roof of African regional organisations, such as the Economic Community of West African States (ECOWAS) and the African Union (AU).[5] As many domestic African courts still have to establish their independence and public authority,[6] here, more than elsewhere, regional bodies can play an important role in sanctioning violations of international humanitarian law.

The article focuses on the most important pan-African institutions charged with the protection of human rights[7] and their capacity to address violations of humanitarian law. These are the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court), both of which are mandated to apply, first and foremost, the African Charter on Human and Peoples' Rights (African Charter). I begin by setting out the position of these two bodies on international humanitarian law against the broader comparative background of the current debate on this topic. As will be seen, both the African Commission and the African Court are only just beginning to address questions of the application of humanitarian law, and even when they do so, it is often in vague and unclear terms, leaving more questions and problems open than answered. This raises the question, which is addressed in the second part of the article, namely, what a good approach to the relationship between international humanitarian law and African Charter rights may look like in the African context. Given that the African Charter, unlike other regional human rights instruments, such as the European Convention on Human Rights (European Convention), often formulates rights very broadly, it is argued that an interpretive approach that reads international humanitarian law into human rights provisions is here, perhaps unlike elsewhere, both feasible and convincing. Limitation clauses and a proportionality analysis can help minimise conflicts between human rights and humanitarian law within this framework – making this overall a sound approach to the relationship between international humanitarian law and human rights in the African context.

5 See also the AU's favourable stance on humanitarian interventions as expressed in art 4(h) of the AU's Constitutive Act; for more on regional developments, E de Wet 'The evolving role of ECOWAS and the SADC in peace operations: A challenge to the primacy of the United Nations Security Council in matters of peace and security?' (2014) 27 *Leiden Journal of International. Law* 353; and E de Wet 'Regional organisations and arrangements and their relationship with the United Nations: The case of the African Union' in M Weller et al (eds) *The Oxford handbook on the use of force* (2015) 314.

6 For an overview, see C Fombad 'Chapters 2 and 3' in C Fombad (ed) *Stellenbosch handbooks of African constitutionalism Volume 1: Separation of powers* (forthcoming).

7 I do not address the African Committee of Experts on the Rights and Welfare of the Child here since it deals with a more specific subject matter; for this, see Viljoen (n 4 above).

2 Obstacles and approaches to the application of humanitarian law by human rights bodies: State of the debate and African responses

Today, a number of earlier obstacles to the application of international humanitarian law by human rights bodies have fallen away. In particular, it is now broadly established that human rights do not generally cease to be applicable in armed conflicts. The International Court of Justice (ICJ) has confirmed this with respect to the International Covenant on Civil and Political Rights (ICCPR),[8] as have other bodies in Europe with regard to the European Convention[9] and in Latin-America[10] with regard to the American Convention on Human Rights (American Convention).[11]

Similarly, it has become largely accepted that international human rights apply extra-territorially in situations where states have jurisdiction over foreign territory or persons by exercising effective control over them.[12] While there still is much debate over what exactly constitutes effective control, the general principle, at least, is widely recognised today, even though some states, such as the United States, still partly resist the extra-territorial application of human rights.[13] Without much ado, the African Commission has assumed the extra-territorial applicability of the African Charter in its *DRC* decision in a situation where the respondents had occupied the territory of another member state.[14] Moreover, even some domestic African courts, such as the South African Constitutional Court, have applied domestic human rights provisions extra-territorially even though they are likely to be more deferent in reviewing foreign policy decisions.[15]

What remains contested, however, is the precise relationship between human rights and international humanitarian law in

8 See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ 136 (9 July); *Democratic Republic of Congo v Uganda* 2005 ICJ 168, TT 216-20 (19 December).

9 See eg *Al-Jedda v The United Kingdom* ECHR 27021/08 (2011).

10 See eg *Abella* (n 3 above).

11 Van den Herik & Duffy (n 4 above).

12 See eg the ICJ's jurisprudence in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* 1971 ICJ 16, 54 (21 June) and *Construction of a Wall* (n 8 above).

13 US resistance to the extra-territorial application of human rights has, however, been somewhat weakening under the Obama administration, eg on torture; Editorial Board 'Close the overseas torture loophole: President Obama and the Convention Against Torture' *New York Times* 20 October 2014.

14 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

15 *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC). In the recent Zimbabwean torture case, the South African Constitutional Court emphasised that extra-territoriality does not in principle preclude the duty of the police to investigate crimes committed elsewhere; *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre & Another* 2015 (1) SA 315 (CC).

particular cases, even if both regimes generally apply. This question has arisen particularly in human rights courts and quasi-judicial bodies, which have addressed this question in different ways. Most often, they have sought to avoid finding conflicts between the two bodies of law, sometimes with problematic results that have been widely criticised by the academic community (more below). How to deal with conflicts between international humanitarian law and human rights, therefore, remains contested among governments, scholars and courts, and the available case law is often less than consistent. Following Hathaway et al, it is useful to distinguish between three different approaches: one in which international humanitarian law prevails in cases of conflicts between the two bodies of law; another in which human rights prevail; and, finally, one in which the more specific law in the particular context and question at hand applies.[16]

The advantage of the first approach that resolves conflicts between the two regimes in favour of international humanitarian law is first and foremost its clarity: Whenever there is an armed conflict and human rights and international humanitarian law conflict, international humanitarian law is supreme.[17] The ICJ's *Nuclear Weapons* decision has been read by some this way, even though the wording is ambiguous:[18]

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

In its later *DRC* decision, however, the ICJ took a different, even less clear, position by avoiding addressing the possibility of conflict between the two bodies of law at all.[19]

Not surprisingly, it is mostly human rights bodies that have taken the second pro-human rights approach, based on the argument that their primary mandate, after all, is the protection of the respective

16 O Hathaway et al 'Which law governs during armed conflict? The relationship between international humanitarian law and human rights law' (2011) 96 *Minnesota Law Review* 1883.

17 As Hathaway et al (n 16 above 1906-1908) note, the Australian government has, among others, adopted this approach.

18 *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ 226 para 25 (8 July) (Advisory Opinion).

19 See *DRC* (n 14 above) para 216.

human rights instruments and that they have to observe the limits of their own jurisdiction.[20] To what degree they may take international humanitarian law into account depends on whether the respective treaties refer to other sources of international law and whether they include particular derogation clauses allowing for the suspension of human rights in favour of international humanitarian law. If there are no such references to other international law, article 31(3)(c) of the Vienna Convention on the Law of Treaties (Vienna Convention) at least sets out that other international rules binding on the parties are part of the relevant context to be taken into account when interpreting a treaty. This suggests that international humanitarian law can play some role in the interpretation of human rights even if there are no more specific references in the respective treaty, and the European Court's recent decision in *Hassan* confirms this (more on this below).

Derogation clauses are relevant in this context to determine the exact relationship of human rights and international humanitarian law under a particular human rights treaty. Article 15 of the European Convention, for example, provides:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

The American Convention adopts a similar approach in article 27. Once such derogation clauses are in place, it typically becomes harder for the respective bodies to apply human rights and, through human rights, international humanitarian law. This is because the relevant treaty is then typically understood to settle the question as to what happens in times of armed conflict: If governments decide to derogate under such circumstances, courts are deprived of their jurisdiction. If, in turn, governments do *not* explicitly derogate and, therefore, choose to suspend human rights standards (in favour of the then applicable international humanitarian law), then, so the standard argument goes, they have to live with the consequences, in other words they have to apply human rights instead. This seems problematic, given that both conventions restrict the possibility to derogate to specific rights; most importantly, they do not allow states to derogate from the right to life where many of the conflicts between international humanitarian law and human rights arise in practice.[21]

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20 See *Isayeva v Russia* (n 2 above); also *McCann v United Kingdom* (1995) 324 ECHR (ser A) 64; for the Inter-American system, see *Las Palmeras v Colombia*, *Preliminary Objections*, IAm Comm of HR (4 February 2000) (ser C) No 67.

21 For a discussion of the conflicts between human rights and international humanitarian law typically arising here, see M Sassòli & LM Olson 'The relationship between international humanitarian and human rights law where it matters: Admissible killing and internment of fighters in non-international armed conflicts' (2008) 90 *International Review of the Red Cross* 599 n 871.

Nevertheless, the derogation argument has been prominent, particularly in the jurisprudence of the European Court, until its recent decision in *Hassan*, which is worth a closer look.[22]

Addressing the legality of the capture of an Iraqi national, Tarek Hassan, by the British armed forces and his detention in Iraq during the hostilities in 2003, the European Court first pointed out that the right to liberty and security in article 5 of the European Convention did not square with the requirements for detention under the Third and Fourth Geneva Conventions, which had been invoked by the British government, even though it had not formally derogated from the Convention. Unlike in its previous jurisprudence, however, the European Court argued that the British government had explicitly asked the Court to disapply or modify Convention rights in favour of international humanitarian law. Drawing on article 31(3) of the Vienna Convention, the Court further reasoned that it was state practice not to derogate from human rights instruments during international armed conflicts and that it may, moreover, take other rules of international law, such as international humanitarian law, into account in interpreting the Convention. It proceeded to read article 5 of the European Convention in light of the Geneva Conventions, even though this ultimately entailed disapplying some of its procedural safeguards. In doing so, it did, however, interpret the Geneva requirements to provide for a 'competent body' to review the security detention of civilians (articles 43 and 78 GC IV), again in light of article 5 of the European Convention, requiring that such a body, while not a court, at least 'provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness'.

This more recent approach of the European Court aligns it more closely with the Inter-American Commission,[23] and many legal scholars who have taken the position that the relationship between human rights and humanitarian law can only be decided with regard to the specific concrete case and context.[24] In order to determine the more specific legal regime for the question at hand, a number of different factors are considered relevant, among them how much the situation resembles a classic battlefield scenario; how much effective control the government exercises over the area in question; previous declarations of intent; existing state practice; and so on.[25] Although this approach leaves much to an assessment of the concrete situation

22 *Hassan* (n 2 above).

23 *Abella* (n 3 above).

24 Among many, see N Lubell 'Challenges in applying human rights law to armed conflict' (2005) 87 *International Review of the Red Cross* 737 751 n 860; H Duffy 'Harmony or conflict? The interplay between human rights and humanitarian law in the fight against terrorism' in L van den Herik & N Schrijver (eds) *Counter-terrorism strategies in a fragmented international legal order* (2013) 482; Sassòli & Olson (n 21 above); Hathaway et al (n 16 above).

25 C Droege 'Elective affinities? Human rights and humanitarian law' (2008) 90 *International Review of the Red Cross* 501 519; Sassòli & Olson (n 21 above); Hathaway et al (n 16 above).

at hand, certain questions, such as the treatment of captured combatants, typically are understood to be better covered by international humanitarian law,[26] at least in the case of international armed conflicts.

The advantages and downsides of the different approaches have been explored elsewhere in the literature.[27] However, here the question is a narrower one: How have the African Commission and the African Court so far approached this question and what approach to international humanitarian law fits best with the African system?

Before going into the details of existing case law, it is important to set out the basic textual parameters for the application of international humanitarian law under the African Charter. To begin with, unlike the European and American Conventions, the African Charter contains no explicit derogation clause for situations of emergency or war. This absence of a derogation clause suggests that Charter rights apply both in times of peace and armed conflict[28] – and this is a point frequently made by the African Commission, as will be seen. Importantly, articles 60 and 61 of the African Charter explicitly allow the African Commission to have regard to other sources of international law. Indeed, they instruct it to 'draw inspiration from international law on human and peoples' rights' (article 60) and to (article 61)

> take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

Since international humanitarian law does not, at least in the traditional sense, represent 'international law on human […] rights',[29] we must assume that article 61 rather than article 60 must guide the African Commission's approach to international humanitarian law, and this corresponds to its reasoning in the *DRC* case.[30] Most African states are parties to the Geneva Conventions and Additional

26 Hathaway et al (n 16 above) 1917.

27 See Hathaway et al (n 16 above); M Milanović 'A norm conflict perspective on the relationship between international humanitarian law and human rights law' (2009) 14 *Journal of Conflict and Security Law* 459; O Ben-Naftali (ed) *International humanitarian law and international human rights law* (2011); and De Wet & Kleffner (n 2 above); for up-to-date discussions of the normative questions arising under the different regional regimes, see Jinks et al (n 3 above).

28 As Ouguergouz points out, this may not foreclose the possibility for derogations under the high standards of the Vienna Convention on the Law of Treaties, in particular arts 61 and 62 of the Convention; see F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 444; also AJ Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17 *Law, Democracy and Development* 78 93.

29 Viljoen (n 4 above).

30 *DRC* (n 14 above) paras 70 & 78.

Protocols,[31] much of the content of which has in any case by now become part of customary international law.[32]

2.1 African Commission on Human and Peoples' Rights

A quasi-judicial institution with its seat in Banjul (The Gambia), the African Commission is – similarly to the comparable UN bodies and the Inter-American Commission – charged with a broad mandate for the protection of human rights. This includes examining state reports and promoting human rights in Africa more broadly. In the exercise of this function, the Commission has repeatedly called on state parties to observe the rules of humanitarian law.[33] In its quasi-judicial function, the Commission addresses state and individual complaints about rights violations and has made a number of findings touching on the question of the relationship between human rights and humanitarian law that are of interest here.

In its early decisions, which were generally very short, the Commission did not at all or only in passing refer to international humanitarian law, in spite of the existence of armed conflicts. Typically, it merely insisted on the applicability of the African Charter even in times of 'war'. The first case in this regard represents the Commission's finding on grave and systemic human rights violations in Chad (*Chad Mass Violations* case) where it did not explicitly mention humanitarian law, but emphasised that[34]

> [t]he African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

The African Commission reaffirmed this position in a later finding on Sudan,[35] at the time involved in a civil war, albeit in a less absolute key, emphasising that '[t]he restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law'.[36] For this reason, the Commission is sometimes taken to favour a

31 All African states are at least party to the Geneva Conventions and most states to the Additional Protocols I and II of 1977. See https://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-map-conven-a3.pdf (accessed 30 July 2016).

32 J-M Henckaerts & L Doswald-Beck (eds) *Customary international humanitarian law* (2009); see also the ICRC's online database, https://www.icrc.org/customary-ihl/eng/docs/home (accessed 30 July 2016).

33 For an overview of the African Commission's attitude towards humanitarian law in its non-judicial function, see R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 129-145.

34 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.

35 *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

36 *Amnesty International* (n 35 above) para 79.

pro-human-based approach similar to that of the European Court.[37] At the same time, the Commission also noted that '[e]ven if Sudan is going through a civil war, civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law'.[38] Although not drawing directly on international humanitarian law, the Commission used international humanitarian law language in finding a violation of the right to life under the African Charter in the killing of 'unarmed civilians'.[39] This is still broadly in line with the European Court's approach in its earlier decisions,[40] and not particularly surprising for a human rights body charged mainly with the application of human rights. It is also important to note that both the Chad and the Sudan cases dealt with situations of civil war and, hence, non-international rather than international armed conflicts, where humanitarian law is least worked out as a matter of law and its relationship with human rights has long been unclear.

However, things changed in the African Commission's later jurisprudence. For the first and, to date, only time, the Commission explicitly addressed humanitarian law in some detail in its decision on the DRC conflict.[41] The case had been brought by the DRC against Burundi, Rwanda and Uganda, seeking redress against the violations of both human and peoples' rights committed by the enemies' armies on the territory of the DRC. The Commission's treatment of international humanitarian law here is both detailed and unclear and thus requires closer examination.

Already in the admissibility phase, the Commission draws on articles 60, 61 and 23 to argue that the activities of the armed forces of the respondent state parties are matters of humanitarian law and hence 'fall within the mandate of the [African] Commission'.[42] It is not clear exactly what this phrasing implies. Viljoen has argued that it suggests a separation of humanitarian law from the Court's actual mandate (human rights), again affirming that the latter are applicable in cases of armed conflict,[43] but it may also denote that the Commission implicitly assumes a mandate for humanitarian law based on articles 60 and 61, invoked immediately afterwards. It hence leaves open the question of which of the two common approaches of human rights bodies to humanitarian law the African Commission is going to follow: whether it will merely interpret African Charter rights during armed conflicts in light of humanitarian law standards, or

37 See DL Tehindrazanarivelo 'The African Union and international humanitarian law' in R Kolb & G Gaggioli (eds) *Research handbook on human rights and humanitarian law* (2013) 503.

38 *Amnesty International* (n 35 above) para 50.

39 *Amnesty International* para 48.

40 See eg *Ergi v Turkey* (1998) ECHR 23818/94 para 79.

41 *DRC* (n 14 above).

42 *DRC* para 64.

43 Viljoen (n 4 above) 308.

whether it will directly apply humanitarian law through articles 60 and 61.

In the following discussion on the merits, the African Commission continues oscillating between these two approaches. In doing so, it closely mirrors the Inter-American Court's approach in the *Bámaca-Velazquez* decision, where the Inter-American Court similarly argued that it would take the Geneva Conventions into consideration in interpreting the American Convention,[44] but at the same time suggested that the Court could find that violations of the Convention *also* violated international humanitarian law.[45] Invoking the text of articles 60 and 61, the Commission initially sets out to follow an interpretive approach, qualifying the Geneva Conventions as general principles of international law falling under article 61 of the African Charter.[46] It proceeds to declare the massacres, rapes, mutilations, mass transfers of populations and looting of peoples' possessions committed in the DRC as 'inconsistent' with the Fourth Geneva Convention and Additional Protocol I and subsequently 'also' as violations of the African Charter right against discrimination and right to life. It is, therefore, not entirely clear whether these acts constitute Charter violations merely on the basis of article 61 or more broadly of certain Charter rights read in light of the instructions of article 61.

The subsequent arguments on the merits then shift back and forth between a more independent international humanitarian law analysis on the basis of article 61 and an interpretive approach that reads African Charter rights in light of international humanitarian law. The African Commission engages in comparative detail with individual provisions in the Geneva Conventions, finding multiple violations of humanitarian law, which are classified as African Charter violations *merely* on the basis of articles 60 and 61:[47]

> The raping of women and girls, as alleged and not refuted by the respondent states, is prohibited under article 76 of the First Protocol Additional to the Geneva Conventions of 1949, which provides that 'women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault. It also offends both the African Charter and the Convention on the Elimination of All Forms of Discrimination against Women; and on the basis of articles 60 and 61 of the African Charter find the respondent states in violation of the Charter.

This suggests that rather than reading African Charter rights merely in light of international humanitarian law, the African Commission treats international humanitarian law essentially as a part of the Charter, incorporated by article 61. This impression is reinforced in the following analysis, where the Commission again analyses the same acts, but this time in light of both international humanitarian law *and*

44 *Bámaca Velásquez* (n 3 above) para 209.
45 *Bámaca Velásquez* para 208.
46 *DRC* (n 14 above) paras 70 & 78.
47 *DRC* para 79.

African Charter rights. In this vein, for example, it qualifies the mass burial of victims of the conflicts as a violation both of the right to cultural development in article 22 of the African Charter and *additionally* as prohibited under article 34 of the Additional Protocol I and, hence, as a violation of the African Charter on the basis of articles 60 and 61.[48]

Other passages in contrast are again more ambiguous, leaning perhaps towards a more interpretive approach, such as the analysis of the besieging of a hydroelectric dam, where the African Commission seems to use international humanitarian law to give content to a provision of the African Charter, namely, article 23. However, even here its formulation is vague at best:[49]

> As noted previously, taking article 56 [of the Additional Protocol I to the Geneva Conventions] quoted above into account and by virtue of articles 60 and 61 of the African Charter, the [African] Commission concludes that in besieging the hydroelectric dam in Lower Congo province, the respondent states have violated the [African] Charter … By parity of reason, and bearing in mind articles 60 and 61 of the [African] Charter, the respondent states are in violation of the said Charter with regard to the just noted article 23 [of the African Charter].

Some paragraphs later, the destruction of the dam is additionally and, rather in passing, also qualified as a violation of the Charter's right to property.[50]

Given this, it is doubtful whether it is correct to conclude that 'the African Commission has found only violations of human rights law, but in so doing, has sought interpretive guidance from international humanitarian law',[51] even though – as will be argued below – this conclusion represents a better, that is, legally more plausible reading of the African Charter. However, if the Commission really were taking only international humanitarian law into account in interpreting human rights, one would expect to see a different kind of legal analysis that starts out with the human rights provision in question and then draws on international humanitarian law to give content to this provision, in discussing its scope or limitations. One would, for example, expect to see the Commission analyse whether the destruction of the dam violates the right to property or, for that matter, the right to national and international peace and security. The first question in this regard would presumably be whether the dam constituted public or private property and if the first, whether public property enjoys protection under the African Charter. In this latter regard, the African Commission might then have drawn on article 23 of the Hague Convention with its qualified protection of the 'enemy's property' to argue for a broad reading that includes public property.

48 *DRC* para 87.
49 *DRC* paras 84-85.
50 *DRC* para 88.
51 Viljoen (n 4 above) 314.

In the next step, one would expect the Commission to engage with the question whether the right to property could have been limited as a matter of general interest to the community. Again, the Commission might now have taken the limitations of the Hague Conventions for cases of military necessity into account. Alternatively, if the Commission wanted to base its argument on article 23, one would expect some more detailed analysis of what peace and security implies, drawing only in the second step on international humanitarian law. But none of this really matches the Commission's approach. Instead, the international humanitarian law analysis of particular acts more often than not stands by itself. There is either no explanation of how and why the Commission incorporates international humanitarian law within a particular African Charter right where one would have expected a much more detailed legal analysis of the Charter right in question, or the Commission straightforwardly qualifies violations of international humanitarian law as Charter violations under articles 60 and 61. The destruction of the hydroelectric dam, for example, is qualified three times as an African Charter violation: once on the basis of articles 60 and 61 alone (drawing on article 56 AP I of the Geneva Conventions) and not on the basis of other substantive Charter rights, and twice in terms of particular (substantive) Charter rights, of article 23 as interpreted in light of international humanitarian law and of article 14 on its own.

The direction changes again in a later decision on the Darfur conflict, where the African Commission once again takes a more interpretive approach.[52] Dealing with abuses of the civilian population in Darfur, it falls back on its initial position of avoiding any explicit reference to humanitarian law, merely drawing on international humanitarian law language: Recognising that an 'armed conflict'[53] has taken place in Darfur, it incorporates in its reasoning explicit references to the humanitarian law principle of distinction, pointing out that '[t]he respondent state, while fighting the armed conflict, targeted the civilian population, instead of the combatants. This in a way was a form of collective punishment, which is prohibited by international law.'

The differences between these decisions demand explanation. The most likely reply may be that Commission members either did not engage sufficiently with this question at all, or perhaps that their composition had changed between the two cases and that the new members simply took a different position on the issue. However, given the ambiguous approach to international humanitarian law even within individual decisions themselves, it seems more likely that the Commission has simply not yet developed a firm stance on the role of international humanitarian law in its jurisprudence. One should,

52 *Sudanese Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur* case).

53 *Darfur* case (n 52 above) para 201.

therefore, be wary of treating either the *DRC* or the *Darfur* decision as firmly established judicial doctrine.

2.2 African Court on Human and Peoples' Rights

The African Court came into operation in 2006. Since then, it has only decided a handful of cases, which partly reflects the fact that some states have not yet ratified the African Court Protocol and even fewer have accepted that individuals may directly access the Court.[54] There are now plans to merge the African Court with the African Court of Justice, which will have jurisdiction over criminal justice issues as well.[55] It remains to be seen whether the new institution will become more relevant.

So far, only one decision of the African Court, a referral from the African Commission, addresses a situation of armed conflict, namely, its decision on provisional measures against Libya.[56] Although the decision makes mention of the fact that the African Peace and Security Council condemned the use of force in Libya 'in violation of human rights and international humanitarian law',[57] the Court does not itself draw on international humanitarian law. This may be due in part to the fact that the decision only deals with provisional measures and follows a minimalist French style of legal reasoning. It does, however, call on Libya to end actions contrary to both the African Charter and 'other international human rights instruments to which it is party'. Of course, this raises the question whether the Geneva Conventions and additional protocols may be considered as 'other international human rights instruments' in this context, on which the Court is explicitly allowed to draw under article 3 of its Protocol. The African Commission's assessment in the *DRC* decision suggests that the Geneva Conventions do not qualify as human rights treaties, but instead are other international treaties or at least general principles of international law. On the other hand, one may argue for a more generous reading focusing on the purpose of the relevant treaty or at least particular clauses and, therefore, qualify at least some parts of

54 For a table of ratifications, see http://www.achpr.org/instruments/court-establishment/; see also F Viljoen 'From a cat into a lion? An overview of the progress and challenges of the African human rights system at the African Commission's 25 year mark' (2013) 17 *Law, Democracy and Development* 298 307-309.

55 See Protocol on the State of the African Court of Justice and Human Rights, http://www.interights.org/userfiles/Documents/MergedCourtProtocol.pdf (accessed 30 July 2016). For an early assessment, see M Otieno *'The Merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we finding African solutions to African problems or creating African problems without solutions?'* 3 June 2014, published in SSRN http://ssrn.com/abstract=2445344 (accessed 30 July 2016).

56 *African Commission on Human Rights v Great Socialist People's Libyan Arab Jamarihiya* (2011) App 4/11.

57 *Libyan Arab Jamarihiya* (n 56 above) para 21.

humanitarian law as a 'human rights instrument', as Viljoen suggests.[58] In either case, the Court can at least rely on articles 60 and 61 of the African Charter and thus draw on other sources of international law if it does not directly apply them in its jurisprudence.

3 Recommendations

The current approaches to humanitarian law of both the African Commission and Court leave room for improvement. First of all, the Commission should develop a more coherent and consistent approach to international humanitarian law. While other international bodies also struggle with this task, a more consistent approach would be especially useful in the African context and in light of the Commission's collaborative role with the Peace and Security Council of the AU (PSC), which has recently taken on a broad peace-keeping mandate.[59] Since the PSC has so far not developed a consistent doctrine of its own with regard to the relationship between international humanitarian law and human rights in peacekeeping missions,[60] the African Commission is institutionally well-suited to provide guidance in this regard. The same may be true for the African Court, particularly if its merger with the African Court of Justice proceeds, which seems to be unclear at the moment as states seem reluctant to proceed with ratification.[61]

The next question must be what approach to international humanitarian law is most appropriate under the African Charter. Insofar as current decisions either ignore international humanitarian law entirely or apply it more or less directly through article 61, they are hard to square with the text of the Charter. Ignoring international humanitarian law disregards the clear instruction in article 61 ('shall') to take international law, such as humanitarian law, into consideration. This also presents an important counter-argument to those who are skeptical of any application of international humanitarian law by human rights bodies for reciprocity reasons,

58 Viljoen (n 4 above).

59 Arts 6(d) and 7 of the Protocol Relating to the Peace and Security Council (PSC) of the African Union for the Peace and Security Council's mandate, and art 19 of the Protocol for its relationship with the African Commission on Human and Peoples' Rights.

60 J Fowkes 'The relationship between international humanitarian law and IHRL in peacekeeping operations: Articulating the emerging AU position' (unpublished manuscript, on file with author).

61 See http://www.theeastafrican.co.ke/news/Mixed-reactions-to-Kenya-s-push-to-establish-African-court/-/2558/2616388/-/12dkljgz/-/index.html. However, there have been recent attempts by the AU to expedite the ratification process. See eg http://trendingnewsroom.com/readfeed/1361/african-states-move-to-create-a-court-to-replace-icc (accessed 30 July 2016).

given that such bodies can only hold states, but not non-state actors, accountable.[62] However, the rather free-wheeling, direct application of international humanitarian law observed in parts of the *DRC* decision is similarly problematic with regard to the text of the African Charter. To take international law into consideration 'as subsidiary measures to determine the principles of law' (article 61) implies that an interpretive process is already ongoing. According to article 61, humanitarian law can, therefore, play only a *subsidiary* role; it can help to fill gaps and give content to what are otherwise often vague Charter provisions and thus assist with their application in concrete cases.[63] Article 61 mirrors the similarly-phrased article 31(3)(c) of the Vienna Convention. Although the exact meaning and scope of article 31(3)(c) are contested, it is not usually understood to provide a means to apply other treaties directly or indeed to replace provisions of one treaty by the rules and principles of another treaty.[64]

Yet, text and doctrine are not everything in legal interpretation. The interpretive approach suggested by the language of the African Charter has in the European system created problems when the two bodies of law conflict, with the European Court not infrequently applying human rights in the context of armed conflict where international humanitarian law may be more appropriate. In doing so, it risks overstretching the limits of what states can and are in practice willing to do in a situation of armed conflict. Some commentators have, therefore, called on the European Court to apply the *lex specialis* rule in favour of international humanitarian law during armed conflicts, even if this may mean that the Court cannot exercise its jurisdiction in every case.[65] The recent *Hassan* decision has now found a way around this dilemma with its reliance on the government's explicit pleading to modify or disapply Convention rights in light of

62 R Provost 'Reciprocity in human rights and humanitarian law' (1994) 65 *British Yearbook of International Law* 383. However, it is important to keep in mind that, according to established precedent, the African Charter applies both in times of peace and armed conflict. The reciprocity argument in this context would mainly serve to increase (one-sided) obligations for state parties who are bound by the (usually) higher standards of Charter rights as opposed to international humanitarian law.

63 See also SS Yeshanew 'Treaty interpretation in the African regional human rights system: Streamlining the "conventional" and the "special"' (2014) 20 *East African Journal of Peace and Human Rights* 1-17.

64 See eg C McLachlan 'The principle of systemic integration and article 31((3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279; RK Gardiner *Treaty interpretation* (2015) 289; for an overview over the recent debate, see also the report on the ASIL panel 'Everybody come together over me: Systematic integration and Vienna Convention art 31(3)(c)' by I Khan, ASIL cable, 16 April 2014, https://www.asil.org/blogs/everybody-come-together-over-me-systematic-integration-and-vienna-convention-art-313c (accessed 30 July 2016). The *Hassan* decision of the European Court is not a counter-argument in this context, as the Court explicitly emphasised the government's own pleading as a condition for dis-applying or modifying the Convention in favour of international humanitarian law (*Hassan* (n 2 above)).

65 Oellers-Frahm (n 2 above) 361; also R Provost *International human rights and humanitarian law* (2005) 349-350.

international humanitarian law, but it remains to be seen how the Court will deal with situations where such explicit pleading is absent.[66]

In light of these experiences, it is worth enquiring whether the African Commission's more direct application of international humanitarian law in the *DRC* case may not in the long run be better suited as a realistic and international humanitarian law-friendly approach. Such an approach may allow the Commission to recognise conflicts between the two bodies of law where they arise, rather than muddling through them only ultimately to favour African Charter rights, which may not fit the particular situation at hand. This indeed is a risk of the interpretive approach: By staying within the human rights framework, humanitarian law can only be taken into consideration as long as it does not clearly conflict with the language of Charter rights. If it does, Charter rights must necessarily prevail, and it is then that human rights bodies risk adopting unrealistic perspectives on what states are allowed during armed conflict. A direct application of international humanitarian law, in contrast, is less prone to subordinating international humanitarian law to human rights in cases of conflict, but it comes with other risks.

A direct application of international humanitarian law is not only problematic with regard to the text of the African Charter and the African Commission's mandate, but its benefits are also perhaps more questionable in the African than in the European context. Many of the problems under the European Convention have arisen because the European Convention sets out both narrow and detailed textual provisions that make an interpretation of Convention rights in light of international humanitarian law more difficult than elsewhere. In particular, the right to life in article 2 and the right to liberty and security in article 5 of the European Convention are framed in very detailed terms that make it difficult to accommodate more lenient international humanitarian law standards with regard to the killing or detention of combatants, as the jurisprudence of the European Court demonstrates.

In contrast, the African Charter sets out individual Charter rights in comparatively less detail and, in doing so, leaves considerable room to take humanitarian law standards into account, as is evident in the traditional fields where problems arise, namely, the rights to life and liberty. The African Charter merely protects the right to life against arbitrary deprivations and the right to liberty against any deprivation of freedom 'except for reasons and conditions previously laid down by law', similarly ruling out 'arbitrary' arrest or detention.[67] In determining what counts as an arbitrary deprivation of life or liberty,

66 The long-awaited judgment of the European Court in *Georgia v Russia (II)*, App 38263/08 is supposed to shed light on this question.

67 See art 4 (right to life) and art 6 (right to liberty) of the African Charter on Human and Peoples' Rights.

the African Commission is, therefore, free to take the Geneva Conventions and Additional Protocols as well as customary international humanitarian law into account. In doing so, it can rely on the ICJ precedent in the *Nuclear Weapons* case:[68]

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities.

A potential hurdle to reading international humanitarian law into African Charter rights may, however, be article 7 of the Charter which entails a general right to have one's cause heard, comprising 'the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force' and article 4, 'the right to be tried within a reasonable time by an impartial court or tribunal'. It, therefore, envisages a more classical law enforcement model and has been read by the Commission more broadly as a right to fair trial,[69] limiting, among others, the jurisdiction of military tribunals to 'offences of a pure military nature committed by military personnel'.[70] How, then, does this square with articles 5 and 21 of the Third Geneva Convention, which allow for the detention of prisoners of war until the end of hostilities, granting only a right to a status determination by a 'competent tribunal', and of civilians for security reasons under articles 78 and 43 of the Fourth Geneva Convention, which is subject only to periodical review and appeal by an 'appropriate court or administrative body'?

The answer is that it does. For once, it seems already doubtful whether article 7(1)(a) is applicable to international armed conflicts, given that its wording ('competent *national* bodies') is clearly tailored to domestic rights violations. Even if we assume that it applies, the wording ('bodies') does in itself not necessarily require more than a status review board for prisoners of war or an 'administrative body' with regard to the security detention of civilians. Insofar as the Commission has understood article 7 more broadly as the right to a fair trial, limiting, *inter alia*, the jurisdiction of military commissions which will typically be involved in status reviews for prisoners of war and security detention for civilians, it is important to emphasise that it has done so in the context of criminal convictions. It is, therefore, not in conflict with the Geneva Conventions as long as such bodies are not pronouncing criminal sentences. Of course, this does not mean that military review boards should not be structured and staffed in such a way as to guarantee sufficient fairness and impartiality. Indeed,

68 *Nuclear Weapons* (n 18 above).

69 C Heyns 'Civil and political rights in the African Charter' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 155-163.

70 *Dakar Declaration on the Right to a Fair Trial in Africa*, adopted through Res 41 (XXVI) 99 Resolution on the Right to Fair Trial and Legal Aid in Africa, 15 November 1999, and recommendations.

they must, as the International Committee of the Red Cross (ICRC) commentary on article 43 GC IV confirms.[71] Last but not least, the more specific standards required by the Geneva Conventions, such as periodic review, can be accommodated in the interpretation of article 7.

The situation in non-international armed conflicts is different insofar as there is no explicit legal basis for detention in Additional Protocol II, though it is contested whether the rules for international armed conflicts may by analogy apply here.[72] In either case, conflicts with article 7 of the African Charter are unlikely to arise. As has been seen, article 7 leaves room for an (analogous) application of the Geneva rules on detention. In all other cases domestic law must conform to article 7 standards. If one selects the humanitarian law route, however, it seems appropriate in non-international armed conflicts to adopt a human rights-friendly reading of the relevant norms and add, along the lines of the European Court's recent *Hassan* decision, that there must also be 'sufficient guarantees of […] fair procedure to protect against arbitrariness'.[73]

Finally, like any human rights instrument, the African Charter allows for limitations of rights. Of the three rights discussed here, only the right to liberty contains an explicit limitation requirement, namely, that deprivations of liberty must be in accordance with the conditions previously laid down by law. This broad formulation may suggest that states have wide leverage to curtail the right to liberty, but the African Commission has refused to adopt a broad understanding of this clause as a general 'claw-back' clause. Instead, it has read this formulation more narrowly, requiring in particular that international rather than domestic legal standards must be satisfied, referring to articles 60 and 61 of the Charter. Commentators have taken this as a broader reference to international practice, requiring in addition that domestic limitations meet proportionality standards in being necessary and proportionate to the interest protected.[74]

This ultimately points in the same direction as article 27 of the African Charter, for even though the Charter does not contain an explicit general limitation clause, the African Commission has *de facto* turned article 27 into such a clause. Providing that rights 'shall be exercised with due regard to the rights of others, collective security, morality and common interest', the Commission has read article 27 to

71 ICRC commentary to art 43 of the Geneva Convention IV, https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=A0FD86E2FBA558E0C12563CD0051BD2C (accessed 30 July 2016).

72 See the recent debate on the decision of the British High Court in *Serdar Mohammed v Ministry of Defence* [2014] QB EWHC 1369; on the EJIL blog, eg by M Milanovic 'High Court rules that the UK lacks international humanitarian law detention authority in Afghanistan' http://www.ejiltalk.org/high-court-rules-that-the-uk-lacks-ihl-detention-authority-in-afghanistan/ (accessed 30 July 2016). See also *Al Jedda* (n 9 above).

73 *Hassan* (n 2 above) para 106.

74 Heyns (n 69 above).

stipulate a broader proportionality requirement.[75] In doing so, it has followed the international human rights trend with its approach to proportionality, requiring that limitations be both 'absolutely necessary for the advantages which are to be obtained' and 'strictly proportionate' with them.[76] In addition, the Commission has read article 27(2) of the African Charter to stipulate a sort of essential core guarantee in requiring that the right in question may not become 'illusory'.[77]

For advocates of international humanitarian law, this is good news: Proportionality offers an assessment of rights limitations that is tied to the aim and purpose of the limitation and is, therefore, broadly suited to deal with situations of both armed conflict and peace. This is not to say that proportionality implies that anything goes – the robust jurisprudence of many constitutional courts employing proportionality shows that this would be in error[78] – but merely that grave circumstances, such as armed conflict, may justify rights infringements that go beyond what is acceptable in times of peace.

Of course, proportionality in a human rights context differs from a proportionality analysis as it is conducted in humanitarian law. This is because international humanitarian law proportionality restricts the goods to be weighed – military advantage versus the (collateral) damage to civilians (article 51(5)(b) of Additional Protocol I) – whereas human rights proportionality has a broader scope which grants protection not only to civilians but also to soldiers, and is in principle open towards considering not only the rights at stake in particular military actions, but also the causes of armed conflict and the broader values involved. Indeed, proportionality is open to a large range of considerations, and this may for some serve as a welcome argument to break down the currently-existing strict boundaries between *ius ad bellum* and *ius in bello*.[79] However, if proportionality in a human rights analysis is broader than under international humanitarian law, this is not to say that under sufficiently war-like circumstances, it cannot be read in the narrower sense of international humanitarian law. After all, not all considerations must be accorded the same weight in the balancing test of proportionality. Therefore,

75 *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998); see also Viljoen (n 4 above) and Heyns (n 69 above).

76 *Media Rights Agenda* (n 75 above) para 69.

77 *Media Rights Agenda* para 70. The African Court has broadly followed the African Commission in this approach; see *Tanganyika Law Society & Another* App 9/2011 para 106.1; *Mtikila v Tanzania* African Court on Human and Peoples' Rights App 11/2011 para 107.2.

78 A Stone Sweet & J Mathews 'Proportionality balancing and global constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72; more broadly A Barak *Proportionality: Constitutional rights and their limitations* (2012).

79 Eg CJ Dunlap 'The end of innocence: Rethinking non-combatancy in the post-Kosovo era' (2000) 14 *Strategic Review* 9; for a critique, S Oeter 'Comment: Is the principle of distinction outdated?' in H von Heinegg et al (eds) *International humanitarian law facing new challenges* (2007) 53.

one does not necessarily need to go as far as the Israel Supreme Court, which frequently blurs its international humanitarian law and human rights analysis, emphasising that proportionality is both a constitutional principle and a general principle of international law.[80] For even if human rights proportionality differs from international humanitarian law proportionality by increasing the scope of what needs to be taken into account, its results must not necessarily differ from international humanitarian law: While even an enemy soldier's life must be attributed a value under human rights proportionality, it may routinely be outweighed by military advantages in case of an armed conflict. (This may change when child soldiers, whether forcibly recruited or not, are involved, since their right to life will weigh more heavily given their lack of autonomy at the time of their recruitment, but their life, too, may not always outweigh military necessity.)[81] Certainly, the African Commission's additional requirement that a right may not become illusory raises further questions in this regard: Does a soldier's right to life not become illusory if it is routinely subjected to other considerations in an armed conflict? No doubt, good arguments may be found for either side here, yet, if we seek to impose realistic constraints on warfare, much suggests that the answer will, at least in the standard cases, not be a resounding 'yes'.

Particularly during international armed conflict, international humanitarian law can give content to vague human rights provisions, something much needed in this context. Whereas international human rights bodies and courts have by now developed considerable jurisprudence on many human rights issues, the same is not true for the application of human rights in emergency scenarios or during armed conflict. Indeed, the recent discussion on human rights in the 'war on terror' with its very disparate voices from all ends of the political spectrum emphasises that we are still some way from agreeing on what emergencies and terror should mean for human rights protection. In international armed conflicts, however, there is an established body of humanitarian law. Even human rights bodies confronted with such situations would, therefore, do well to draw on the Geneva Conventions and Additional Protocols.

This is somewhat, but not entirely, different for non-international armed conflicts, which are more prevalent in Africa and governed only

80 *Beit Sourik Village Council v The Government of Israel* Israel Supreme Court, 29 February 2004, HCJ 2056/04 para 38. For a positive assessment of the Israel Supreme Court's approach, see G Nolte 'Thin or thick? The principle of proportionality and international humanitarian law' (2010) 4 *Law and Ethics of Human Rights* 245.

81 There is surprisingly little literature on this question so far, most of which is concerned with the ethics rather than the law of killing child soldiers in self defence; see eg ME Vaha 'Child soldiers and killing in self-defence: Challenging the "moral view" on killing in war' (2011) 10 *Journal of Military Ethics* 36; from a military practice perspective, see C Borchini et al 'Child soldiers: Implications for US forces' *Marine Corps Warfighting Lab Quantico VA* CETO-005-02 2002.

by Common Article 3, the Additional Protocol II to the Geneva Conventions as well as a body of customary law, the status of which is, however, often contested. Because explicit written rules are much rarer here, human rights already play an important role in this field. In determining the state of customary law in this area, the ICRC, for example, routinely draws on human rights standards as well as the rules for international armed conflicts and soft law.[82] However, the fact that the law is less clear regarding non-international armed conflict should not be a reason to adopt a pure human rights approach in the case of non-international armed conflict. It is granted that a more context-sensitive analysis will be necessary here than in the case of international armed conflict. Nevertheless, while any application of customary law is fraught with difficulties, there is considerable useful scholarship as well as extensive work by the ICRC in this area. Together with Common Article 3 and Additional Protocol II, this body of work can provide important guidance to courts dealing with situations of armed conflict, often lacking under a human rights paradigm. Finally, if the law here is nevertheless less determinate than international humanitarian law regarding international armed conflict, this to some degree appropriately reflects that many contemporary conflicts no longer represent classical battlefield situations. That human rights standards will have to be modified to some extent to meet demands for security is nothing unusual, and proportionality is in many ways ideally suited to accommodate shifting levels of threat and violence: Many domestic constitutional courts have in the past reduced their human rights standards in dealing with terrorism. Internal armed conflicts, therefore, present merely the next level downwards on the ladder of rights protection.

As a result, the most important objection to an interpretive approach in other systems such as the European – namely, that it does not leave sufficient room to adopt international humanitarian law standards in situations of armed conflict – is not persuasive in the African context. More openly-formulated textual provisions together with a broad understanding of proportionality, as developed by the African Commission, enable African institutions to take an international humanitarian law-friendly approach to their interpretation of African Charter rights without the risk of overstretching member states' obligations in armed conflicts.

Of course, the debate does not end here. An interpretive approach will further melt the boundaries of human rights and humanitarian

82 See ICRC (n 32 above). Eg, in defining what constitutes a 'fair trial' with all the necessary institutional and other guarantees, the ICRC report refers to multiple human rights instruments (354 ff.); more specifically, it explains that an 'independent and impartial tribunal' must be independent from other branches and in particular the executive, drawing on decisions by the UN Human Rights Committee, the African Commission on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Commission on Human Rights, n 353.

law. Human rights advocates have in the past feared that this will in the long run damage and reduce human right protection.[83] Rights will, in other words, no longer be the trumps we want them to be. This squares with the frequent critique of tools such as proportionality, which can – so some critics worry – justify just about anything if the dangers on the other side are sufficiently great.[84] Yet, this development is neither as problematic as it may seem at first glance, nor is it unavoidable. It is not as problematic as it may seem because there are – at least as a matter of law – reasonably clear thresholds for when an international or non-international armed conflict exists and when, therefore, humanitarian law becomes applicable.[85] Second, and more importantly, proportionality does not force us to go all the way down the sliding scale; it allows us to choose a more structured approach to questions of rights limitation. The history of proportionality demonstrates that there is room for this possibility, as proportionality initially evolved from a more structured, three-tiered test in German constitutional jurisprudence that set different requirements for each particular kind or level of rights limitation.[86] In those cases where an international armed conflict exists, proportionality may, therefore, be understood to generally afford the level of rights protection guaranteed by the applicable humanitarian law. In non-international armed conflicts, in turn, there is a different, if less definite, set of rules. A more context-specific approach will be necessary here.

Given this need for context-sensitivity and nuanced legal reasoning, of course, it may be of concern that the jurisprudence of the African Commission and, indeed, the African Court has frequently been of questionable quality. The Commission's analysis has in the past often been extremely thin and superficial. Rather than engaging in a detailed legal analysis, it tends to jump from the statement of facts immediately to the legal conclusion that a specific provision in the African Charter has been violated without providing much explanation or reasoning. For the kind of context-sensitive approach that will be necessary to address particularly non-international armed conflicts adequately, a more detailed and considered legal analysis is vital. Without this, there is not only the risk of damaging the

83 C Byron 'Blurring of the boundaries: The application of international humanitarian law by human rights bodies' (2006) 47 *Virginia Journal of International Law* 839.

84 For a convincing discussion of some of these objections, see Stone Sweet & Mathews (n 78 above).

85 See *Prosecutor v Dusko Tadic a/k/a 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (ICTY Appeals Chamber) paras 66 ff. For a more detailed theoretical discussion, see JK Kleffner 'Scope of application of international humanitarian law' in D Fleck (ed) *The handbook of international humanitarian law* (2013) paras 201-209.

86 *Pharmacies*, BVerfGE 7, 377; see also for the development of German proportionality D Grimm 'Proportionality in Canadian and German constitutional jurisprudence' (2007) 57 *University of Toronto Law Journal* 383 and J Bomhoff *Balancing constitutional rights: The origins and meanings of post-war legal discourse* (2013).

Commission's authority by overstretching human rights obligations in situations of civil war, but also of lowering human rights protection in the long run if it is not sufficiently clear what the respective requirements and thresholds are in different circumstances.

The African Commission's minimalist approach may partly be a reflection of French legal traditions present in much of Francophone Africa. It is, therefore, important for African lawyers to recall the key role that preparatory materials and the Advocate-General's advisory opinion play in the French system in explaining minimalist French judicial decisions,[87] but which are lacking in the African system. Moreover, there is typically less of an established legal culture in regional human rights courts[88] and little supporting doctrine in whose terms observers may be able to understand the reasoning behind scarce judicial decisions. More than in the case of other courts, it is important for regional bodies such as the African Commission to make the details of their reasoning transparent to the parties as a means of strengthening their authority.

One should also not defend the often vague and unclear language of the African Commission as an adequate reaction to the kind of situations the Commission is often confronted with. Only at first glance may we think that when citizens are killed in their thousands, tortured or detained without any possibility of appeal, there is no need for a detailed legal analysis because things are clear. Given the increase in non-traditional conflicts and the blurring between classical wars and internal riots, they will not always be so. Much therefore suggests that the African Commission should take a more structured and better reasoned approach in its current decision-making practice, even in cases that do not seem to call for a more legalistic approach on their own. As a matter of legal style, the Anglo-American tradition is better suited here to reconcile the strong emotional and rhetorical language appropriate to make a moral point with detailed legal analysis.

87 M de S.-O.-l'E Lasser *Judicial deliberations: A comparative analysis of transparency and legitimacy* (2004).

88 That is not to say that regional and international courts will not be able to establish their own legal and institutional culture. Nevertheless, such internal 'cultures' will generally be thinner than long-standing national legal traditions. A skeptical analysis of the European Court's decision making in terms of the common or civil law pedigree of its judges (showing no differences in decision making along these lines), however, relies on an outdated and stereotyped idea of common law versus civil law and should, therefore, be taken with a pinch of salt. E Voeten 'The impartiality of international judges: Evidence from the European Court of Human Rights' (2008) 102 *American Political Science Review* (2008) 419 ff. For a broader discussion of the role of personality and legal culture in shaping international adjudication, see D Terris et al '*The international judge: An introduction to the men and women who decide the world's cases*' (2007).

4 Conclusion

Keeping these things in mind, there are no reasons why the African Commission and Court should not be successful in elaborating a strong interpretive approach to the relationship between human rights and international humanitarian law in situations of armed conflict. By infusing the broad provisions of the African Charter with the standards of international humanitarian law, many of the inconsistencies and problems of the European approach in treating armed conflicts like situations of normalcy and peace can be avoided, without having to dismiss cases where no other institutions may be available to provide a measure of justice to the victims.

From a strategic perspective, too, this approach seems preferable to a stronger human rights-focused model. The African Commission correctly emphasises that regional African institutions must curb excesses of state power, but they also need to make sure that they do not reach too far into what many countries and executives consider classical state prerogatives. The downfall of the Southern African Development Community (SADC) tribunal[89] demonstrates the dangers associated with a lack of circumspection in African regional courts, which the African Commission and Court have so far done well to avoid. Drawing on humanitarian law may thus allow them to balance their human rights expectations adequately with states' concern for domestic security in a way that is likely to find more acceptance than a pure human rights-based approach.

In doing so, African institutions may even be at the forefront of the contemporary debate that accords a central role to human rights as part of global constitutional law and a *grundnorm* for other international legal regimes.[90] Unlike a direct application of international humanitarian law, the interpretive approach retains this foundational role of human rights. In doing so, it also avoids further contributing to what has been described as the 'fragmentation' of international law.[91] The constitutional role of international human rights is not challenged by the fact that they may mean different things in different situations. Their expansion to cover ever newer fields of life and ever newer questions has made it inevitable that they be flexible and adapted to new challenges and situations. One size

89 See eg L Nathan 'The disbanding of the SADC tribunal: A cautionary tale' (2013) 35 *Human Rights Quarterly* 870; E de Wet 'The rise and fall of the tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' (2013) 28 *ICSID Review* 45.

90 See eg J Klabbers et al (eds) *The constitutionalisation of international law* (2009).

91 See Report of the Study Group of the International Law Commission, finalised by M Koskenniemi 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' A/CN.4/L.682, 13 April 2006; more specifically with regard to the relationship of human rights and international humanitarian law, see A Orakhelashvili 'The interaction between human rights and humanitarian law: Fragmentation, conflict, parallelism, or convergence?' (2008) 19 *European Journal of International Law* 161.

has never fit all, and today 'all' has become an even wider circle than it used to be.

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Assessing enabling rights: Striking similarities in troubling implementation of the rights to protest and access to information in South Africa

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Summary

Many human rights have a dual value in that their realisation is both an important end, and a means to enable the realisation of other rights. The effective implementation of these kinds of rights is thus particularly important for advancing rights-based democracy. However, in practice, the implementation of such rights is often problematic. The article examines access to information and protest as examples of such 'enabling' rights. Drawing on the experience of communities and civil society organisations, it identifies and discusses some striking similarities in the way in which the legislation promulgated to give effect to these two rights in South Africa is being implemented, and argues that the problematic implementation of legislation is having the effect of thwarting these rights, rather than promoting them. Further, it argues that the existence of such striking similarities may point to a more systemic problem of civil and political rights failing to enable the realisation of socio-economic rights.

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Key words: *access to information; protest; human rights; implementation of rights; Promotion of Access to Information Act; Regulation of Gatherings Act*

1 Introduction

The rights of access to information and to protest are examples of 'enabling' rights which are valuable not just for their own sake, but also because they assist in the realisation of other rights. In South Africa, both are justiciable human rights,[1] and legislation has been passed which fleshes out the nuts and bolts of how to go about exercising these rights. This legislation is the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Regulation of Gatherings Act 205 of 1993 (Gatherings Act) respectively. Despite the very different contexts in which PAIA and the Gatherings Act were promulgated, their implementation bears striking similarities – similarities which help us understand the limitations of rights realisation in the last two decades of democracy in South Africa. In both contexts, the very legal mechanisms designed to give effect to these rights are being administered in a way which undermines the rights themselves. The consequences are severe. If realising enabling rights, such as protest and access to information, is a precondition to the realisation of other rights, such as socio-economic rights and the right to dignity, then the South African democratic system is faltering at one of the first hurdles. Significantly, those most affected by the denial of these rights are South Africa's poorest communities.

The article explores these themes according to the following framework: by establishing the conceptual idea of 'enabling rights' and discussing protest and access to information in this context; setting out the characteristics of the applicable regulatory frameworks in South Africa; contrasting this theory with the practical reality of attempts by communities and civil society organisations to exercise the rights to protest and access to information; and, lastly, highlighting some striking parallels in these two areas of human rights law and practice, which suggest that both PAIA and the Gatherings Act serve to impede rather than advance human rights.

2 Enabling rights

2.1 Idea of enabling rights

Human rights discourse has long acknowledged the intersectionality of human rights in the sense that rights acquire meaning and content through the existence and realisation of other rights. The African Charter on Human and Peoples' Rights (African Charter) explicitly

1 Secs 32 & 17 Constitution of the Republic of South Africa, 1996.

acknowledges that '[c]ivil and political rights cannot be dissociated from economic, social and cultural rights in their conception'.[2] While many jurisdictions have been at pains to avoid establishing a hierarchy of rights,[3] human rights are rarely violated in isolation and, therefore, the responses to rights violations should heed this intersectionality.[4]

One form that this intersectionality of rights can take is when the realisation of some rights is required for the realisation of other rights. The former category of rights may be referred to as 'enabling rights',[5] given the fact that the realisation of these rights is a necessary precondition to the full enjoyment of other rights.

From the outset it must be acknowledged that enabling rights are valuable for their own sake. Staging a protest is an important exercise of agency, and at times getting hold of information is useful just because of a 'right to know'. More often, however, we seek to protest and obtain information because there is something further that we want to achieve by doing so. The existence of these enabling rights does not guarantee that the end sought (say, for example, the provision of a house) will materialise, but it does change the relationship between the parties by empowering the rights holder to demand certain things from the duty bearer.[6]

Second, it is important to note that the 'enabling' process can be multi-directional. For example, while the right to protest may be necessary in order to realise socio-economic rights, such as access to housing and adequate water, the realisation of rights such as the right

2 Preamble to the African Charter. In its own Preamble, the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights goes on to explain that the African Charter 'reflects that all human rights are indivisible, interdependent and interrelated, and cannot be enjoyed in isolation from each other'.

3 See eg the views of the South African Constitutional Court on this topic expressed in *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC) and *Mthembi-Mahanyele v Mail & Guardian Ltd & Another* [2004] 3 All SA 511 (SCA) para 42.

4 Burke argues that despite the acknowledgment that human rights are indivisible and interdependent, the human rights sector 'lacks a unified approach to social, economic and cultural rights, on the one hand, and civil and political rights, on the other'. S Burke 'What an era of global protests says about the effectiveness of human rights as a language to achieve social change' (2014) 20 *SUR International Journal on Human Rights* 27.

5 See eg F Maupain 'Revitalisation not retreat: The real potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights' (2005) 16 *European Journal of International Law* 439 448, which discusses the idea of workers' rights as enabling the realisation of the rights to health and safety.

6 K Bentley & R Calland 'Access to information and socio-economic rights: A theory of change in practice' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 347.

to bodily integrity may, in turn, be necessary in order to unlock the exercising of the right to protest.[7]

2.2 Rights of access to information and to protest as enabling rights

There are various rights which may be said to fall in the category of 'enablers'. The article focuses on the right to protest and the right of access to information.[8] These two rights have been selected given noticeable parallels in the problematic way in which they are dealt with by government and the private sector in South Africa.

The notion of access to information as an enabling right is supported by the very language of section 32 of the South African Constitution, which makes a connection between access to information and the 'exercise or protection of any rights', at least in relation to information from private bodies. Bentley and Calland refer to access to information as both a 'power right' and a 'leverage right',[9] and articulate a theory of change which argues that the right of access to information can operate as a power lever to procure political space and, thereby, to claim socio-economic rights.[10] In *Brümmer v Minister for Social Development & Others*, the Constitutional Court confirmed that 'access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights'.[11]

The same applies to protest, where the Constitutional Court acknowledged that the right to protest was central to South Africa's constitutional democracy as it exists primarily to give a voice to groups that do not have political or economic power.[12] This right will, in many cases, be the only mechanism available to them to express

7 The Preamble to the African Charter recognises that 'the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'. Similarly, the Preamble to the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights emphasises that 'the enjoyment of economic, social and cultural rights is not only imperative for but dependant on the enjoyment of civil and political rights'.

8 This 'enabling' quality of the right is implicit in the existence of legal instruments such as the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998 http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (accessed 7 June 2016). See further J Bosek 'Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges' (2014) 14 *African Human Rights Law Journal* 489 498.

9 Bentley & Calland (n 6 above) 342.

10 Bentley & Calland 361. However, they do point out that this theory of change is subject to several caveats. First, intermediaries are necessary. Second, without an accessible and specialist enforcement mechanism, the right is unlikely to be widely claimed. Third, there is a need for government champions to champion the fight against a pervasive culture of secrecy. What is argued later in this article about problems regarding PAIA implementation confirms these caveats.

11 2009 (6) SA 323 (CC) para 63.

12 See *South African Transport and Allied Workers Union & Another v Garvas & Others* 2013 (1) SA 83 (CC) (*Garvas*).

their legitimate concerns. In the minority judgment in *Garvas*, Jaftha J held that '[i]t is through the exercise of the section 17 rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery'.[13] As Woolman puts it, section 17 'vouchsafes a commitment to a form of democracy in which the will of the people is not always mediated by political parties and the elites that run them'.[14]

3 Theory: An outline of legislation governing the rights of access to information and to protest

Although a full discussion of the regulatory systems governing access to information and protest in South Africa is beyond the reach of this article, it is necessary to give the broad strokes of each in order to contextualise the problematic implementation of these rights.

Section 32 of the South African Constitution contains quite a far-reaching access to information right.[15] It provides that everyone has a right of access to information held by the state, and to information held by private parties and which is required for the exercise or protection of any rights.[16] PAIA came into effect in 2001,[17] in accordance with the directive in section 32(2) of the Constitution that national legislation be enacted to give effect to the right of access to information. The relationship between the constitutional right and PAIA is succinctly summed up by Hoexter, who explains that PAIA

13 *Garvas* (n 12 above) para 120.

14 S Woolman 'My tea party, your mob, our social contract: Freedom of assembly and the constitutional right to rebellion in *Garvas v SATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC)' (2011) 27 *South African Journal on Human Rights* 346 348.

15 Almost half of the world's countries – 98 at present – have enacted some form of access to Information law. Of these, only 19 countries have enacted laws which allow information to be requested from private parties. Of these, South Africa is the only country that appears not to qualify access to information from private bodies on the basis of some kind of relationship between the private body concerned and the state or the exercise of a public function. See M Siraj 'Exclusion of private sector from freedom of information laws: Implications from a human rights perspective' (2010) 2 *Journal of Alternative Perspectives in the Social Sciences* 211 223. See also T Mendel 'Freedom of Information: A comparative legal survey' UNESCO http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION= 201.html (accessed 8 June 2016) 15.

16 The right to receive information is also recognised in art 9 of the African Charter, which is supplemented by the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission in 2002. Other regional instruments that emphasise the importance of access to information include the African Charter on Democracy, Elections and Governance; the African Union Convention on Preventing and Combating Corruption; the African Charter on the Values and Principles of Public Service and Administration; the African Youth Charter; the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; and the Model Law on Access to Information for Africa.

17 See *Institute for Democracy in South Africa & Others v African National Congress & Others* 2005 (5) SA 39 (C) para 13.

does not replace the constitutional right, but because it purports to 'give effect' to it, parties must now assert the right via PAIA.[18]

PAIA sets out the nuts and bolts of how to go about actually submitting or responding to a request for access to information. It provides for a request system;[19] requires the designation of information officers to process requests for information;[20] provides for the publication of a manual designed to make submitting requests easy to do;[21] provides for time periods for responses to requests;[22] and allows for partial redaction of confidential material[23] and, in the case of requests to a public body, for an appeal mechanism.[24] These are all features of an access to information system designed to pave the way for affordable, quick and hassle-free access to information by everyone living in South Africa.

The right to protest is also constitutionally protected in South Africa.[25] Section 17 of the Constitution provides that '[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions'.[26] The legislative accompaniment to section 17 is the Gatherings Act, which came into operation in the dawn of South Africa's democracy as a product of the attempt by the Goldstone Commission of Inquiry to bring South Africa's assembly jurisprudence in line with international practice.[27] The Preamble to the Gatherings Act recognises that '[e]very person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the state while doing so', although this right is qualified by the duty to protest 'peacefully

18 C Hoexter *The new constitutional and administrative law* (2001) 57.
19 Secs 11, 18, 50 & 53 PAIA.
20 Sec 17 PAIA.
21 Secs 10, 14 & 51 PAIA.
22 Secs 20, 56 & 57 PAIA.
23 Secs 28, 37, 59 & 65 PAIA.
24 Sec 74 PAIA.
25 Art 11 of the African Charter also protects assembly rights. In 2014, the African Commission gave further content to this right in Resolution 281 on the Right to Peaceful Demonstrations.
26 This right is collectively referred to in this article as the right to protest.
27 M Memeza 'A critical review of the implementation of the Regulation of Gatherings Act 205 of 1993: A local government and civil society perspective' (2006) Report by Freedom of Expression Institute 12. The Gatherings Act is, therefore, not constitutionally-compelled legislation in the same way that PAIA is. Interestingly, there is some suggestion that the Gatherings Act was only ever intended to be used during the difficult transition into democracy around the time of the first democratic elections, and that the drafters of the Act understood that it was flawed, but saw it as a stopgap measure compiled in somewhat of a rush. See Freedom of Expression Institute (FXI) *The right to protest: A handbook for protestors and police* (2007) 5.

and with due regard to the rights of others'.[28] This reflects the language of section 17.

The Gatherings Act defines what a public gathering is and outlines where, when and why a gathering can take place. It also introduces the main actors responsible for ensuring that gatherings in democratic South Africa occur peacefully.[29] A 'gathering' is understood as 'any assembly, concourse or procession of more than 15 people on any public road[30] or any other public place wholly or partly open to the air'. The purposes of a gathering can include criticising or promoting the policy or actions of any government, political party or political organisation; the handing over of petitions; and demonstrating either support for, or opposition to, the policy or actions of any person or institution.[31]

The three main actors involved in protest procedures outlined in the Gatherings Act are the municipality,[32] the police[33] and the convener of the gathering. The convener is the leader of the gathering and is appointed by the person or organisation arranging the gathering to be the point of contact.[34] Together, these three form the golden triangle supposedly responsible for negotiating the peaceful conduct of the protest.

For the purposes of this discussion, what is important is what the Gatherings Act provides for what should happen before a protest can occur lawfully. A convener must send a notification to the municipality of an intended gathering, using a standard form supposed to be available from all municipal offices. Notice must be given at least seven days before the planned gathering.[35] On receipt of the notification, the municipality must, within 24 hours, call the convener to a meeting at which the logistics of the gathering are discussed with the South African Police Services (SAPS) and any other required service providers, such as paramedics.[36] This meeting is often referred to as the 'section 4 meeting' or the 'triangle meeting' (referring to the three-way participation by the convener, the municipality and the SAPS). It is this triangle meeting which is the site

28 See S Murphy 'Unique in international human rights law: Article 20(2) and the right to resist in the African Charter on Human and Peoples' Rights' (2011) 11 *African Human Rights Law Journal* 474 for the discussion of a broader formulation of the right to resist in the African Charter.

29 'A municipality's role in the Regulation of Gatherings Act' Local Government Briefing Note 2012 (1) 1.

30 As defined in the Road Traffic Act 29 of 1989.

31 Including any government, administration or governmental institution.

32 Represented by an appointed 'responsible officer' or failing such appointment, by the chief executive officer (sec 2(4) Gatherings Act).

33 Also represented by an 'authorised member' (sec 2(2) Gatherings Act).

34 Sec 2(1) Gatherings Act.

35 There is certain information that must be included in the notice; see the helpful checklist and sample notice in FXI (n 27 above) 11-13.

36 If the municipality does not do so with 24 hours, the gathering is deemed legal and can proceed without any further formalities (secs 2, 3 & 4 Gatherings Act).

of contestation for communities across the country trying to organise lawful protests. This is discussed further below.

4 Practice: Attempting to exercise the rights of access to information and to protest

4.1 Experience of communities and civil society

Despite the existence of a progressive Constitution, as well as fairly-detailed legislation purporting to give effect to the rights of access to information and to protest, unfortunately both these rights remain outside the reach of most people living in South Africa. In fact, both PAIA and the Gatherings Act have proved to operate rather as an impediment to rights realisation than as a tool for providing effective access.[37]

The civil society experience of using PAIA is characterised by requests for information being met with attitudes of extreme suspicion, very poor levels of understanding of PAIA, and a general disregard for the access to information rights of communities. This uphill struggle is captured in an annual report (PAIA CSN Shadow Report) published by the PAIA Civil Society Network (PAIA CSN),[38] which documents civil society's collective experience in working with PAIA.[39] In the 2014 PAIA CSN Shadow Report (which tracks requests submitted in the period August 2013 to July 2014), the results reveal that 56,8 per cent of all requests were either expressly refused or deemed to have been refused (because they were simply ignored). See the chart below for more detail. This is clear evidence that the legislation is not achieving its desired objective of fostering a culture of transparency.

37 D Cote & J van Garderen 'Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest' (2011) 27 *South African Journal on Human Rights* 167 172.

38 The PAIA CSN, established in 2008, is a collective of organisations committed to access to information and the realisation of a culture of openness and accountability.

39 These reports are available at http://www.saha.org.za/projects/national_paia_civil_society_network.htm (accessed 7 June 2016).

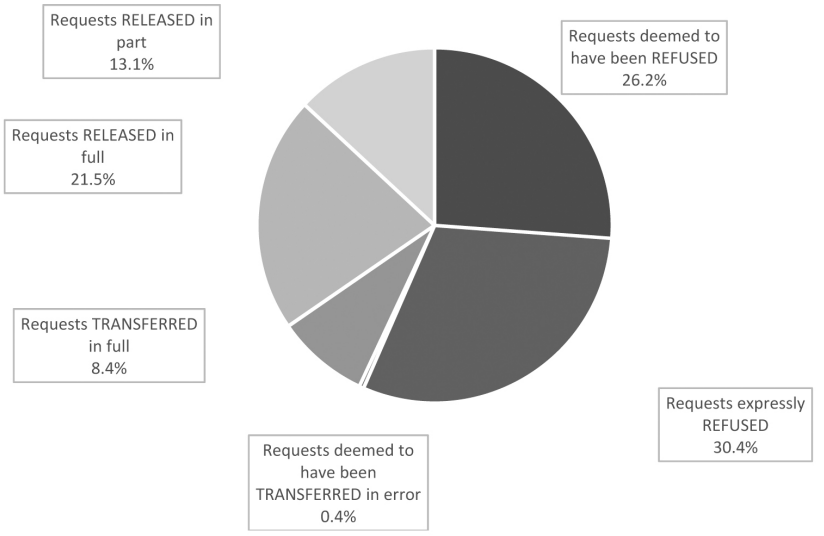

CHART 1: Nature of responses to initial requests submitted to public bodies[40]

Unfortunately, on the appeals front the story is not much better. In 2014, 58 internal appeals were submitted to 17 public bodies.[41] A disturbing 44 per cent of appeals were ignored. Of those appeals that were responded to, 35 per cent were denied.[42] These statistics do not reflect a society where access to information is a right and transparency is the default position. Rather, they demonstrate just how unlikely it is that the submission of a request for information will actually result in the release of information.

Another pattern emerging from the South African civil society experience is the use of inappropriate grounds for refusal by the state. This trend of relying on technical grounds for refusal to thwart access to information at a high cost to human rights is evident in *MEC for Roads and Public Works, Eastern Cape & Another v Intertrade Two (Pty) Ltd.*[43] In this case, an unsuccessful tenderer instituted review proceedings in order to obtain information relating to the adjudication of a tender for the repair and maintenance of hospital

40 2014 PAIA CSN Shadow Report 5.
41 2014 PAIA CSN Shadow Report (n 40 above) 7.
42 2014 PAIA CSN Shadow Report 2. The Report analyses a sample of 306 requests submitted by members of the PAIA CSN in that year; 260 of those requests were submitted to a total of 63 public bodies.
43 2006 (5) SA 1 (SCA).

equipment. The state took the technical point that section 7 of PAIA[44] precluded Intertrade from demanding additional documents before it had exhausted its procedural remedies under certain provisions of the Uniform Rules of Court.[45] The court held:[46]

> The appellants' resistance to Intertrade's request for documentation on technical grounds was … most reprehensible … Their response is rendered more deplorable by the report contained in the department's own correspondence which shows that, whilst they were embarking on delaying tactics at the taxpayer's expense, sick and vulnerable citizens were suffering and children were dying in poorly maintained hospitals.

Perhaps the most significant case relating to access to information in South Africa thus far is that which emerged out of the struggles of the Vaal Environmental Justice Alliance (VEJA) to obtain a document known as the Environmental Master Plan which mapped pollution levels caused by ArcelorMittal (AMSA), as well as the company's plan to remediate this damage over a 20-year period. VEJA sought access to the Master Plan in order to establish the extent to which their health problems and the threats to their livelihoods were being caused by AMSA, and also to assist them in playing a role in ensuring that AMSA complied with the pollution remediation measures outlined by the company itself. When other channels proved unsuccessful, VEJA in 2011 eventually resorted to submitting a request for the Master Plan in terms of PAIA.[47]

In November 2014, the Supreme Court of Appeal ordered AMSA to hand over the Master Plan. The Court made a number of critical findings in relation to AMSA's lack of good faith in its engagement with VEJA and the discrepancies between AMSA's shareholder communications and its actual conduct.[48] The Court found that the regulatory framework applicable to the environmental sector envisaged a form of collaborative corporate governance in relation to

44 Sec 7 provides: '(1) This Act does not apply to a record of a public body or a private body if – (a) that record is requested for the purpose of criminal or civil proceedings; (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law. (2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.'

45 Rules 53 & 35(12).

46 *Intertrade* (n 43 above) para 20. See also *Garden Cities Inc v City of Cape Town & Another* 2009 (6) SA 33 (WCC) para 24.

47 This case is the subject of a documentary produced by the Centre for Applied Legal Studies, the South African Human Rights Commission and One Way Up Productions, https://www.wits.ac.za/cals/about-us/law-and-film/ (accessed 7 June 2016).

48 For more information and discussion of this case, see http://cer.org.za (accessed 7 June 2016).

the environment, based on the notion that environmental degradation affects everyone.[49] The Court also emphasised the importance of corporate transparency in relation to environmental issues, stating that[50]

> [c]orporations operating within our borders, whether local or international, must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.

This judgment has correctly been hailed as an important vindication of the rights of access to information of communities, and clearly demonstrates the 'enabling' nature of the right to information. While it is of concern that it took VEJA about 15 years to actually get their hands on a full version of the Master Plan, justice has prevailed in the end, leaving a significant judicial precedent available for all who seek to advance transparency in South Africa.

Community experiences in trying to exercise the right to protest have been just as, if not more, frustrating as for those working in the access to information sector. The experience of the women of Marikana will be highlighted in order to demonstrate this. In August 2012, South Africa witnessed a degree of police brutality unprecedented in the democratic era, when 44 mine workers were killed during a strike on the platinum belt near the Lonmin mine at Marikana. In response, the women of the Marikana community decided to express themselves by organising a march to the local police station. They sought an end to police brutality in Marikana, the withdrawal of the army which had been deployed in the area, and a chance to express their grief at the death of their husbands, sons, lovers, fathers, brothers and friends.[51] In the context of a discussion of protest as an enabling right, it is pertinent to mention that they also wanted to draw attention to longstanding and ongoing violations of their rights to housing, adequate water and electricity, and the absence of schools, medical facilities, sanitation, roads and other basic infrastructure in their communities.[52]

However, all notices to the relevant municipalities were rejected with frivolous reasons provided, thus denying the women their right to protest. After attempting unsuccessfully to resolve the impasse through engagement with the local authorities, the women sought assistance from the Centre for Applied Legal Studies (CALS).[53] Late into the night on 28 September 2012, CALS prevailed in an urgent

49 *Company Secretary of ArcelorMittal South Africa & Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 71.

50 *AMSA v VEJA* (n 49 above) para 82.

51 'Woman's death in Marikana prompts march' *SABC* 22 September 2012 http://www.sabc.co.za/news/a/57633c004ccf33729a3fdbb8fc2f576b/Womans-death-in-Marikana-prompts-march-20120922 (accessed 7 June 2016).

52 Not unlike an expression of the activist-held understanding of 'security' discussed in IT Sampson 'The right to demonstrate in a democracy: An evaluation of public order policing in Nigeria' (2010) 10 *African Human Rights Law Journal* 432 434.

application in the North West High Court. The court order set aside the municipalities' decision to prohibit the march, recognised the women's rights and allowed the march to proceed.[54]

Unfortunately, the struggles of the women of Marikana to peacefully exercise their rights to protest did not end there. When in 2014 they again sought to hold a march, they again met with hostility and obstruction from the local authorities. This took the form, for example, of the two municipalities involved attempting to delay the holding of the triangle meeting by bouncing responsibility between them, claiming that notice had been served on the incorrect municipality. This time the women sought to gather on 21 March 2014 (Human Rights Day in South Africa) in an attempt to support mine workers in their community who were at the time engaged in a protracted strike against exploitative wages in the South African platinum sector. Again, it was unfortunately only due to the intervention by lawyers that the women of Marikana were able to proceed with their attempts to protest lawfully and peacefully.

Although this is a single story of one community struggling to exercise their constitutional right to protest, it is a common one. In South Africa, both the frequency and severity of protests have in recent years been steadily on the rise. Statistics on protests in South Africa abound. According to one source, in 2006 there were 11 000 protests in South Africa which translates to about 30 protests per day.[55] Another source has the figure of the average number of protests per month increasing from 8,7 in 2007 to 16,3 in 2010.[56] Yet another presents a picture in which South Africa experienced an average of 8,73 protests per month in 2007, 9,83 protests per month in 2008, rising to 17,75 in 2009 and tapering down to 8,8 during the first five months of 2011. In 2014, researchers at the Social Change Research Unit at the University of Johannesburg released the results of a study drawing on over 250 interviews and covering more than

53 CALS is a human rights organisation based at the Wits Law School which engages in research, advocacy and impact litigation across its five programmes: Basic Services; Business and Human Rights; Environmental Justice; and Gender and Rule of Law. More information on CALS may be found at https://www.wits.ac.za/cals/.

54 CALS media release of 28 September 2012 drafted by Kathleen Hardy. See also 'Marikana's women win right to march' *City Press* 29 September 2012 http://www.news24.com/Archives/City-Press/Marikanas-women-win-right-to-march-20150429 (accessed 7 June 2016).

55 FXI (n 27 above) 4.

56 J Hirsh 'Community protests in South Africa: Trends, analysis and explanations' (2010) Community Law Centre, Local Government Working Paper Series 1 in C Mbazira 'Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: Parallels and divergences' (2013) 29 *South African Journal on Human Rights* 251 266.

2 000 protests since 2004. The results track a general rise in protest action since 2004, with peaks in 2009 and 2013.[57] What is clear is that the system designed by the Gatherings Act is not working in practice.

4.2 Similarities in problematic implementation

The primary purpose of the article is to draw on lessons from practice in order to highlight the very similar ways in which the realisation of access to information and protest rights are being thwarted. The next section identifies some of these parallels.

4.2.1 Legislation deliberately or incompetently misinterpreted

The first and probably most significant similarity relates to the role of government officials in the interpretation of legislation. Both PAIA and the Gatherings Act are misunderstood – or deliberately improperly applied – by government officials tasked with implementing them. In relation to the Gatherings Act, municipal officials routinely operate on the basis that the conveners of a protest are required by the Gatherings Act to ask for *permission* to protest when this is in fact not the case. The requirement is notification, not consent. The Gatherings Act requires municipalities to be involved in the *administration* of the right to protest but not in providing consent. Local officials thus substitute an obligation to facilitate protest with a right to veto. As emphasised in the Local Government Briefing Note, '[t]he notice of a gathering should not be seen as an "application". Municipalities may, in principle, not refuse gatherings to take place.'[58]

The legal position is that the only grounds on which a protest can lawfully be prevented by the municipality before the protest has commenced is if less than 48 hours' notice is given[59] or if the gathering poses a threat of injury to participants or others, of extensive damage to property or of serious disruption of traffic *and* SAPS is not equipped to contain that threat.[60] Even then, a reasonable suspicion of violence is not sufficient. There must be credible information submitted under oath in an affidavit. Importantly, neither the purpose of the protest, nor past indiscretions by the group organising it are relevant considerations. The validity of a prohibition thus stands or falls on the ability of SAPS to provide security.

In addition, if the municipality suspects that a gathering may need to be prohibited, the triangle meeting must still occur in good faith in

57 'No quick fix for protests study' *Polity.org.za* 12 February 2014 http://www.polity.org.za/article/ni-quick-fix-for-protests-study-2014-02-12 (accessed 7 June 2016).

58 Local Government Briefing Note (n 29 above) 3.

59 Even then, prohibition is discretionary and not mandatory; see the language of 'may' in Gatherings Act sec 3(2).

60 Sec 5(2) Gatherings Act. Note that there are further sections allowing police officers to disperse a gathering once it is already in progress, but these are beyond the scope of this discussion.

order to explore whether any solutions exist. If after all this there is still no way of ensuring adequate containment of the credible threat supported by evidence on oath, reasons must be provided for the prohibition.[61] Notwithstanding this extremely high threshold outlined in the law, currently a community or social movement seeking to protest lawfully by going through the process set out in the Gatherings Act should steel themselves for the likelihood that they will be rebuffed and obstructed by either the municipality or the police, or both.[62]

In *Garvas,*[63] the Constitutional Court upheld the validity of provisions of the Gatherings Act which impose (at least partial) liability for damage caused to property during a gathering on the conveners of the gathering unless they took all reasonable steps to avoid the damage and did not reasonably foresee the damage. Importantly, on the topic at hand, the Court in *Garvas* seems to indicate that the Gatherings Act envisages a process of notification and administration of logistics, not permission-seeking.[64]

Similar misinterpretation problems are occurring in the context of access to information, where state officials administering PAIA erroneously demand that requesters of information held by a public body should justify why they seek such information. PAIA requires no such justification. While requestors seeking information from a *private* entity must explain which right they seek to exercise or protect by obtaining the information sought, there is no such requirement when asking a *state* entity for information.

The justification for this distinction is that information in public hands is, after all, the public's information and should, therefore, be easily and publicly accessible as the default position.[65] In fact, PAIA reinforces the idea that the right of access to information from a public body is an unqualified one when it expressly stipulates in section 11(3) that any reasons for the request given by a requester, or whatever the information officer may suspect are the reasons for the request, do not affect the right of access to information from a public body.

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61 Local Government Briefing Note (n 29 above) 3.

62 There is a groundswell of writing on this phenomenon. See eg Memeza (n 27 above); M Johnson & J Griffith 'Controlling gatherings – Great in theory' (June 2012) *Without Prejudice* 77; R2K Activists Guide 'Protesting your rights: The Regulation of Gatherings Act, arrests and court processes' http://www.r2k.org.za/wp-content/uploads/gatheringsGuide_WEB.pdf (accessed 7 June 2016); Woolman (n 14 above) 349; and various publications by Duncan who has written extensively on the subject; see eg J Duncan *The rise of the securocrats: The case of South Africa* (2014).

63 *Garvas* (n 12 above).

64 This reading of the judgment is supported by Johnson and Griffiths. See M Johnson & J Griffiths 'The Regulation of Gatherings Act 205 of 1993' *Legal City* online magazine 27 July 2012 http://www.legalcity.net/Index.cfm?fuseaction=magazine.article&ArticleID=4493411 (accessed 7 June 2016).

65 I Currie & J Klaaren *The Promotion of Access to Information Act commentary* (2002) 17 21.

These interpretation problems in the context of both protest and access to information must be understood in light of section 39(2) of the Constitution, which requires courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. While this interpretive obligation applies specifically to courts, the spirit of the Bill of Rights would seem to require state officials to do the same, given that the Constitution is the supreme law in South Africa.[66]

In summary, the exercise of the constitutional right to protest does not require permission and the exercise of the constitutional right of access to information from state bodies does not require justification. In both contexts, officials are either demonstrating a pervasive misreading of the legislation or there is a more sinister, deliberate 'misunderstanding' at play. In both cases, the purpose of the legislation is to spell out the nuts and bolts of the process of making the right a reality. Yet, the way in which it is being administered in practice is having the opposite effect: Rather than facilitating the rights in question, the processes are used to impede these rights.

4.2.2 Delay and double standards

The second similarity in the disturbing implementation of PAIA and the Gatherings Act is that requests for information and gathering notifications are routinely ignored or left to the very last minute before a response is given. For instance, the 2014 PAIA CSN Shadow Report reflects that only 37 per cent of PAIA requests and 19 per cent of PAIA appeals were responded to within the prescribed deadline.[67] The impact of non-compliance with statutory timeframes has a debilitating effect on the rights holder when, as is the case here, their recourse is litigation. Litigation is costly, slow, intimidating and requires access to legal representation. These difficulties relating to access to justice are particularly acute for the kind of communities who are likely to be seeking to protest or to access information in the first place.

In addition to the severe impact of non-compliance by the state (or the private sector), there are also double standards about the repercussions of non-compliance. The Gatherings Act imposes criminal sanctions on the convener of a gathering who fails to comply with the procedural requirements set out in the Act.[68] Post-*Garvas*, there is also the spectre of liability for damages caused by other people involved in the protest. The criminal sanctions and liability for damages faced by the conveners of a gathering must be compared to the consequences for municipal officials who merely ignore protest

66 Sec 2 of the Constitution provides that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

67 2014 PAIA CSN Shadow Report (n 40 above) 3.

68 Attracting a possible penalty of a fine up to R20 000 or imprisonment of one year, or both.

notifications or are deliberately obstructive in trying to avert the holding of a triangle meeting. What are the consequences for such officials? Typically, absolutely nothing. The same is true in the context of access to information. If an information officer ignores a PAIA request and the prescribed period for response elapses, it is treated as a deemed refusal of the request.[69] That means that the requester then has to lodge an internal appeal against the deemed refusal (assuming the request is to a public body).[70] In practice, there seems to be a disturbing trend of information officers routinely ignoring the initial request and appeal being the first time PAIA requests are dealt with.

Therefore, the picture looks something like this: If the convenor of a march does not comply with the Gatherings Act, they risk a criminal record; if a local authority tries to enforce unlawful requirements (such as confirmation of the attendance of the person to whom the protestors would like to hand a petition), it is unlikely that there will be any personal consequences. Instead, the convenors will find it more difficult to hold the protest. If a requester of information submits an improper request under PAIA, they do not obtain the information, but if an information officer ignores a proper request, the requester still does not get the information. In sum, whoever is in the wrong, communities lose. The kinds of communities seeking both to protest and to access information in order to realise their rights are typically poor, vulnerable and marginalised. The current system, therefore, skews power heavily in favour of the state and runs the risk of criminalising the poor.[71]

4.2.3 Need for legal assistance

The third point of resonance in the experience of those seeking to realise their rights of access to information and to protest is the unfortunate need for legal assistance. In both contexts, the processes have been constructed in such a way that the chances of realising these rights are considerably increased by the presence of an

69 PAIA secs 27 (public bodies) & 58 (private bodies).

70 There is no internal appeal mechanism for information requests to private bodies.

71 Encouragingly, there are moves afoot to shift this power imbalance. The Social Justice Coalition, a social movement based in Cape Town which campaigns for safe, healthy and dignified communities, is currently involved in ongoing litigation (in which they are represented by the Legal Resources Centre) challenging the constitutionality of sec 12(1)(a) of the Gatherings Act. See 'Trial of SJC-21 continues' 6 October 2014 http://www.sjc.org.za/posts/trial-of-sjc-21-continues (accessed 7 June 2016); 'GroundUp: Convicted activists vow to challenge gatherings law' *Daily Maverick* 12 February 2015 http://www.dailymaverick.co.za/article/2015-02-12-54dbde4ce32fd/#.VfEyCCIaJrQ (accessed 7 June 2016); 'How constitutional are the regulations on public gatherings?' *GroundUp* 17 July 2015 http://groundup.org.za/article/how-constitutional-are-regulations-public-gatherings_3133#sthash.HhwFrev5.dpuf (accessed 7 June 2016). A similar case is also being litigated by a group of 94 healthcare workers – represented by Section27 – who were detained and charged after holding a peaceful overnight vigil objecting to job losses. See http://www.dailymaverick.co.za/article/2015-10-05-rights-groups-take-on-law-after-free-state-healthcare-workers-conviction/#.V1ZyeuJ97IU (accessed 7 June 2016).

intermediary. In the experience of CALS, communities are far more likely to be able to stage a lawful protest if there is a lawyer present at the triangle meetings discussed above. Likewise, lawyerly follow-up to an access to information request also significantly increases the chances that the request is taken seriously.

Unfortunately, the need for legal assistance plays out not only in the preparation for a protest or a request for access to information, but also should it become necessary to challenge a decision. In the protest context, if a march is blocked by local authorities, one's recourse is to approach a court for urgent relief within 24 hours. Similarly, if both a PAIA request and internal appeal are denied, the only remedy is to approach the courts. While in theory it should be possible to do so without the assistance of a lawyer, in reality courtrooms and legal processes remain inaccessible and intimidating in South Africa. This intermediary problem is not unique to access to information or protest, but for a country which has for 21 years been committed to access to justice, it is a disquieting reality that is slowly suffocating the realisation of rights.

Fortunately, this problem may soon be somewhat mitigated, at least in relation to access to information. For several years, civil society activists have been calling for some kind of information ombud to make accessing information a quicker, cheaper and generally more accessible process.[72] Although the South African Human Rights Commission has up to now had a mandate in relation to access to information, this is not its only or even its primary role, with the result that it has tended to confine itself to promoting knowledge about PAIA rather than acting as its watchdog.[73] The Protection of Personal Information Act 4 of 2013 has now introduced an Information Regulator which will have jurisdiction to hear appeals against unsuccessful PAIA requests.[74] The Regulator is currently in the process of being established. Interviews have been conducted and a recommended list of appointments was handed to the National Assembly in May 2016. Hopefully, the Information Regulator will operate in such a way that communities are able to challenge attempts by either government or the private sector to block access to information, without the need for assistance from a lawyer.

4.2.4 Interplay between state and private entities

The last parallel to be drawn between the implementation of PAIA and the Gatherings Act relates to the way in which the state and private sector play 'tag team' in their attempts to avoid accountability. In the access to information context, state officials often use the third party

72 Particularly in relation to requests or information from private bodies as there is no internal appeal mechanism against refusals of such requests, which means that litigation is the only recourse.

73 Bentley & Calland (n 6 above) 359.

74 See ch 5 of that Act.

notification mechanism[75] to delay having to make a decision on an information request, hiding behind the cloak of supposed responsible handling of information. If the same request for information is made to the company concerned, the response is often that the information sought is held by the state and should be requested from them. The Centre for Environmental Rights[76] has done valuable work in documenting the civil society experience of using PAIA in particularly the environmental sector.[77] They confirm that both private and public bodies refer requesters to each other (particularly in the environmental sector when the information sought relates to permission and authorisation and is, therefore, held by both private and public bodies).

It is important to contextualise what this kind of delay may mean, as there is often time sensitivity in the need for information. Consider, for example, a community seeking information about levels of pollution and other environmental harm. If the PAIA requests are stalled for too long, the harm may well occur before the PAIA process is resolved. In the environmental context, there is often a window in which damage to the environment (and thereby to people's health and livelihoods) can be prevented. After that window closes, mitigating the extent of the damage is the best one can do. Timing is thus critical. No doubt, there are many examples from different sectors as to why accessing information is time-sensitive. This is not merely a technical matter of legal process.

This 'tag team' strategy was also evident in the Marikana women's march discussed above. In the 2014 protest, the women sought to march along a road on property owned by mining company Lonmin. One of the ways in which the municipality sought to obstruct the march was to take the position that the women would need permission from Lonmin to proceed. By sending communities with limited access to resources from pillar to post in this way, access to justice is further undermined in a country supposedly committed to making human rights a reality. Furthermore, while PAIA includes third party notifications in its envisaged regulation, the Gatherings Act provides scant guidance as to how to manage the inclusion of a private company in protest action.

75 In instances where an information officer receives a request which implicates a third party, according to sec 47 of PAIA, she must notify the third party of the existence of the request and give them 21 days to either consent to the release of the information or to make representations on the issue.

76 The Centre for Environmental Rights is a civil society organisation working in the environmental justice sector to provide legal and related support to environmental CSOs and communities. See further http://cer.org.za/ (accessed 7 June 2016).

77 The Centre for Environmental Rights has published several reports in respect of transparency and PAIA. These reports can be found at http://cer.org.za/programmes/transparency (accessed 7 June 2016).

5 The way forward

So what should be done about these disturbing trends in attempts to realise enabling rights such as rights of access to information and to protest? The article does not presume to present comprehensive answers (as it is primarily about analysing the nature of the problem), but a few ideas are offered for further discussion. First, given the similarities between attempts to protest and to access information described above, it should be considered whether there are systemic trends emerging in relation to 'enabling rights'. Is the nature of the difficulties in implementation similar in relation to other enabling rights in South Africa, or to the implementation of protest and access to information rights elsewhere in Africa, in a way which may point to a more systemic picture?

Second, to the extent that they do not do so already, civil society organisations and communities working on rights-based issues (whatever their focus) need to incorporate into their work a focus on enabling rights and develop expertise in these areas. This kind of intersectionality is required to enhance the possible impact of rights-based work.

Third, the executive needs to ensure that all officials responsible for administering PAIA and the Gatherings Act – primarily located in local government – fully understand the provisions of these laws.[78] Perhaps there is room for exploring a provincial or national oversight role in these areas.

Lastly, as the office of the Information Regulator is established in South Africa, government, the private sector and civil society alike need to support the operation of this office in the hope that it may remove the need for lawyers and, hence, make access to information a more user-friendly process.

6 Conclusion

South Africa is blessed with a progressive Bill of Rights containing a far-reaching right of access to information, as well as a right to protest. These rights are given flesh by PAIA and the Gatherings Act respectively. Fundamentally, laws about access to information and protest have the potential to make a difference to the lives of those living in poverty by shifting the power balances between communities and the state or private sector. Twenty-two years into democracy, neither PAIA nor the Gatherings Act is living up to this promise. We

78 Fuo has highlighted the way in which the design of the South African constitutional system puts local government at the forefront of the social justice project. See O Fuo 'Public participation in decentralised governments in Africa: Making ambitious constitutional guarantees more responsive' (2015) 15 *African Human Rights Law Journal* 167.

cannot afford to rest on the laurels of a progressive system in theory, and must confront the pervasive implementation problems occurring in practice.

The way in which both PAIA and the Gatherings Act are being implemented often impedes rather than promotes the rights concerned. The impediments in these two contexts (access to information and protest) are playing out in strikingly similar ways. The article has discussed four such similarities: misinterpretation of legislative provisions by government officials; delay and double standards; the continuing need for assistance from legal intermediaries; and the game of tag played by the state and the private sector.

If the implementation of this legislation is impeding the realisation of rights, and we understand these rights as enabling rights that hold the key to the realisation of an array of other constitutional rights, then the implementation failures have consequences beyond just the spaces of protest and access to information. Despite the potential of laws such as these, 'the prospect that they might make a meaningful contribution to a re-alignment of power relations may falter against the rock of weak implementation'.[79] The existence of such striking similarities in relation to protest and access to information may well point to the more systemic problem of civil and political rights failing to enable the realisation of socio-economic rights. The failure to realise the rights to protest and to access information undermines the ability to achieve the South African constitutional vision of a society based on dignity, equality and freedom, and strikes at the very heart of the ability to make democracy work.

79 R Calland 'Turning right to information law into a living reality: Access to information and the imperative of effective implementation' (2003) publication of the Open Democracy Advice Centre 2 quoting Andrew Puddephatt, Executive Director of ARTICLE 19 7.

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Boko Haram and sexual terrorism: The conspiracy of silence of the Nigerian anti-terrorism laws

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Summary

Over the centuries rape has been used effectively by terrorist groups as a weapon of terror. In this context, women's bodies are used by terrorists as battlegrounds, serving the dual purpose of spoils of war and a means of terrorising the populace. The Nigerian fundamentalist group, Boko Haram, has employed sexual terrorism in its campaign of terror against the Nigerian state and its people. Boko Haram has since 2013 embraced this tactic, which has led to the abduction of hundreds of women and girls, the most outrageous being the abduction of 276 'Chibok girls' that has attracted global concern. The Nigerian government has responded to the upsurge of Boko Haram terrorism by enacting the Terrorism Prevention Act, 2011, amended by the Terrorism Prevention (Amendment) Act, 2013, aimed at criminalising terrorist activities. Unfortunately, this Act is silent on the use of rape to further the ends of terrorist groups. Relying on media reports and interviews, the article examines what appears to be a conspiracy of silence by Nigerian anti-terror legislation regarding the use of rape as a weapon in the hands of terrorists. By not making any reference to the use of rape as a terror tactic, the Act appears either to have glossed over the possibility of rape being used by terrorists, or chosen to ignore it in line with the culture of silence surrounding rape in Nigeria. The article concludes that the Terrorism Prevention Act urgently needs to be amended in order to criminalise sexual assaults targeted at women and young girls by Boko Haram and other terror groups in Nigeria, so as to adequately address the perception of acts of rape as extensions of terrorist activities.

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Key words: *anti-terrorism law; Boko Haram; Chibok girls; rape*

1 Introduction

The end of World War II in 1945 was expected to herald the beginning of global peace. However, this was not to be, as it soon became clear that a new form of violence – 'terrorism' – had emerged to threaten the fragile global peace. Terrorism has become one of the hallmarks of international relations, although it is not a new phenomenon and dates back to the evolution of human society. An early manifestation of terrorism can be seen in the activities of the Zealot sect.[1] This sect evolved from the struggle of the Jews against their Roman rulers round about the year 4 BCE.[2] The Zealots tried to impose on the Jews a strict and pious religious practice[3] and wrest power from the Roman rulers in order to ensure the independence of the Jewish nation, using the tactic of terror.[4] In the eighteenth century, the French Revolution of 1793 similarly saw the deployment of terrorism by the Jacobin government which came to power in the course of the revolution.[5]

Throughout history, power appears to have been aided and wielded through the use of terror.[6] However, modern terrorism appears to be different due to its global visibility, aided by the availability of sophisticated weapons, money and the revolution in the information communication technology. Crenshaw explained the reason behind the evolution of terrorism as follows:[7]

> Since the beginning of the modern wave of terrorism around 1968, terrorists have developed new and elaborate methods of hostage taking, including aircraft hijackings, seizure of embassies or consulates and kidnapping of diplomats and business executives. As these tactics became familiar to governments and corporations, they ceased to surprise ... Terrorism then shifted to bombings that were shocking in their massive and indiscriminate destructiveness and in the apparent willingness of their perpetrators to die with their bombs. The purpose of innovation in terrorism is to maintain the possibility of surprise because it is critical to success.

This was clearly demonstrated by the terrorist attacks on targets in the United States of America on 11 September 2001. The choice of targets and methods adopted towards achieving this end took the

1 G Challiand & A Blin (eds) *The History of terrorism from antiquity to al-Qaeda* (2007) 55.
2 As above.
3 Challiand & Blin (n 1 above) 57.
4 As above.
5 B Forst *Terrorism, crime and public policy* (2009) 44.
6 Challiand & A Blin (n 1 above) vii.
7 M Crenshaw 'Theories of terrorism: Instrumental and organisational approaches' in DC Rapoport *Inside terrorist organisations* (2001) 15.

world by surprise. In the aftermath of that incident, various attempts have been made to conceptualise and define the term 'terrorism'.[8]

Terrorism at a general level may be associated with indiscriminate violence. In another context, terrorism may be conceived in terms of freedom fighting, revolution, rebellion, and so forth.[9] The foregoing shows that, besides the destruction of life and property that accompanies terrorist acts, terrorism also aims at instilling fear and psychological trauma in the target population. Acts of terrorism may take the form of missile attacks; suicide bombings; kidnapping or hostage taking; armed robbery; arson; and so on. Crenshaw notes that terrorism generally is a tactic that uses violence or the threat of violence as a coercive strategy to cause fear and political intimidation.[10] Terrorism also is a common feature within resistance movements, military *coups*, political assassinations and wars that have affected most African states at some point or other. Africa has been associated with a collection of ideologically-inspired violent non-state groups that have been perpetrating acts of terrorism. These groups include the Lord's Resistance Army in Uganda; al-Shabaab in Somalia; Al-Qaeda in the Islamic Maghreb in North Africa; Islamic State in Libya; and Boko Haram in Nigeria. Crenshaw further observes that terrorism is not peculiar to African states as it has for many decades been a global phenomenon.[11]

The history of acts of sexual violence against women committed during wars and conflicts is as old as the history of war. As in the case of rape generally, this form of sexual violence is subsumed in a conspiratorial culture of silence: The victims do not want to talk about it, while society pretends that it does not exist. The result of this conspiracy of silence is manifested in the low record of prosecution and conviction of men who sexually assault women in conflict situations. The global upsurge in terrorism has led to increasing reports of acts of sexual violence committed against women by members of various terrorist organisations.[12] This may be attributed to the incorrectly-held general belief that rape committed during wars and conflicts is pardonable and natural as 'a byproduct of wartime

8 A Adesoji 'The Boko Haram uprising and Islamic revivalism in Nigeria' (2010) 45 *Africa Spectrum* 95; CC Ojukwu 'Terrorism, foreign policy and human rights concerns in Nigeria' (2011) 13 *Journal of Sustainable Development in Africa* 371.

9 W Enders & T Sandler 'Distribution of transnational terrorism among countries by income class and geography after 9/11' (2006) 50 *International Studies Quarterly* 367.

10 Crenshaw (n 7 above) 15.

11 As above.

12 Report of the United Nations Secretary-General on Conflict-Related Sexual Violence S/2016/361 submitted to the United Nations Security Council on 20 April 2016, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_361.pdf (accessed 12 September 2016).

activity, as "collateral damage" and "spoils of war", not as a violation of humanitarian law'.[13] Terrorists have also realised that rape can be used effectively as a weapon of terror, without attracting any legal penalty, even in the midst of existing laws which criminalise and prescribe penalties for rape, as is the case in Nigeria.[14]

The Nigerian terror group Jama'atu Ahlis Sunna Lidda'awati Wat Jihad – people committed to the propagation of the Prophet's Teachings and Jihad (more popularly known as Boko Haram) – has been engaged in a campaign of terror against the Nigerian state and its people, especially women in the north-eastern part of the country, the group's theatre of operations. The name Boko Haram was derived from two separate words, *Boko* and *Haram*, which was born out of the sect's anti-Western posturing, and which literally means 'Western education (book)/civilisation is sin'.[15] The term *Boko* is described as the Hausa word for Western education,[16] while *Haram* is an Arabic word which figuratively means 'sin' but literally means 'forbidden'.[17] Thus, when these words are used together in the Hausa language, what emerges is 'Western education is forbidden' or *Boko Haram.*

This group has embarked on the deliberate use of sexual violence against women as one of its tactics in the terror campaign against the Nigerian state. The sexual violence which humiliates the Nigerian state and its people and also destroys the social fabric of society, where a high premium is placed on the chastity of its women, has had a devastating impact on the victims – physically as well as psychologically. While some of the women rescued from the camps of Boko Haram militants have tested positive for HIV,[18] the majority of the rescued women were found to be pregnant – a situation which caused Kashim Shettima, the governor of Borno state, to publicly declare:[19]

> The sect leaders make a very conscious effort to impregnate the women. Some of them, I was told, even pray before mating, offering supplications

13 These views were eloquently espoused by Brownmiller in her widely-read book, S Brownmiller *Against our will: Men, women and rape* (1975) where she described rape as a tool 'of oppression that men use to establish their manhood'.

14 Sec 357 of the Criminal Code (applicable in Southern Nigeria) defines rape as, *inter alia,* 'unlawful carnal knowledge of a woman or a girl without her consent', while sec 358 provides for a penalty of life imprisonment with or without caning for the offence. The Penal Code (applicable in Northern Nigeria) defines rape in sec 282 and also provides for a penalty of life imprisonment for the offence.

15 SHO Alozieuwa 'Contending theories on Nigeria's security challenge in the era of Boko Haram insurgency' (2012) 7 *Peace and Conflict Review* 1.

16 MP de Montclos (ed) 'Boko Haram: Islamism, politics, security and the state in Nigeria' (2014) 2 *West African Politics and Society Series* 3.

17 A Adesoji 'The Boko Haram uprising and Islamic revivalism in Nigeria' (2010) 45 *African Spectrum* 95 100.

18 A Nossiter 'Boko Haram militants raped hundreds of female captives in Nigeria' *The New York Times* 18 May 2015 http://www.nytimes.com/2015/05/19/world/africa/boko-haram-militants-raped-hundreds-of-female-captives-in-nigeria.html?_r=0 (accessed 5 August 2015).

19 As above.

> for God to make the products of what they are doing become children that will inherit their ideology.

The general opinion regarding the high number of pregnancies among the rescued female victims of Boko Haram's sexual terrorism is that these pregnancies resulted from a deliberate plan by Boko Haram to ensure that the women produce offspring that will continue the insurgency. This viewpoint has been expressed at various fora by government officials and individuals who point at the 'organised nature of Boko Haram's sexual violence' which 'appeared to point to a deliberate self-perpetuation plan'.[20] Abba Mohammed Bashir Shuwa, a senior government official, was quoted as saying that '[i]t's like they wanted to have their own siblings to take over from them'.[21] Speaking along the same lines, Hadiza Waziri, a relief official at one of the camps for internally-displaced persons and who works closely with the abused women, said: 'We are going to have another set of Boko Haram. Most of these women now, they don't want these pregnancies. You cannot love the child.'[22]

One may never know the full extent of the sexual violence unleashed on Nigerian women by members of the Boko Haram terror group, due to the prevailing culture of silence on matters relating to rape in Nigeria. Most victims are not willing to talk about their ordeal because of a fear of stigmatisation by other members of society.[23] These mindless acts have taken their toll on society: Lives have been destroyed, marriages have broken down and the victims have been left in despair, leading the Zainab Bangura Special Representative of the Secretary-General of the United Nations on Sexual Violence in Conflict to declare:[24]

> I am appalled by reports that hundreds of the recently released female captives were repeatedly raped by Boko Haram militias and compelled to 'marry' their captors. In order to give rise to a new generation raised in their own image, they [Boko Haram militants] are waging war on women's physical, sexual and reproductive autonomy and rights.

Although Nigeria has put in place anti-terrorism legislation, enacted to counter terrorist activities such as those of Boko Haram, regrettably the anti-terrorism legislation fails to address the issue of sexual terrorism, a situation aptly described as a conspiracy of silence.

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20 As above.

21 As above.

22 As above.

23 AO Awosusi & CF Ogundana 'Culture of silence and wave of sexual violence in Nigeria' *American Association for Science and Technology Journal of Education*, http://www.aascit.org/journal/education 34 (accessed 12 September 2016). See also E Mora 'Female victims of Boko Haram stigmatised by own communities' http://www.breitbart.com/national-security/2016/04/25/victims-boko-haram-stigmatized/ (accessed 12 September 2016).

24 United Nations News Centre 'Condemning use of sexual violence, UN envoy warns Boko Haram aims to destroy family structures' 27 May 2015, http://www.un.org/apps/news/story.asp?NewsID=50981#.V-o_9zV1yJc (accessed 26 September 2016).

Against this background, the article attempts to bring to the fore some of the activities of the group that constitute sexual terrorism, a situation brought to global attention by the case of the Chibok girls. The article goes further to examine the extent to which the anti-terrorism legislation covers or fails to cover the issue of sexual assault as a weapon of terrorism. After a critical examination of the above issues, a conclusion is drawn based on the inadequacies of the anti-terrorism legislation in matters relating to sexual abuse of which the Boko Haram group has been accused.

2 Conceptualisation of sexual terrorism

Sexual violence has variously been described as 'one of the most horrific weapons of war, an instrument of terror used against women';[25] 'the most intimate of violations';[26] and an opportunity for men to 'vent their contempt for women'.[27] Sexual violence during conflicts and wars historically evolved from the practice in ancient times when women were regarded as part of the 'spoils of war' to which soldiers are entitled.[28] As explained by Brownmiller, 'the body of the raped female becomes a ceremonial battlefield, a parade ground for the victors trooping of the colors'.[29] Against this background we intend to conceptualise sexual violence against women in the course of armed conflicts. Acts which constitute sexual violence include 'rape, sexual mutilation, sexual humiliation, forced prostitution, and forced pregnancy'.[30]

The rape of women has always been a much-favoured tactic adopted by members of conventional armies and insurgents in the course of wars and other forms of armed conflicts. In a special report by the United Nations (UN) Commission on Human Rights, war-time rape was described as 'a deliberate and strategic decision on the part of combatants to intimidate and destroy "the enemy" as a whole by

25 W Storr 'The rape of men: The darkest secret of war' *The Guardian* 17 July 2011, https://www.theguardian.com/society/2011/jul/17/the-rape-of-men (accessed 20 September 2016).

26 P Kirby 'Rethinking war/rape feminism: Critical explanation and the study of wartime sexual violence, with special reference to the Eastern Democratic Republic of Congo' unpublished PhD thesis, London School of Economics, 2012 2, http://etheses.lse.ac.uk/586/1/kirby-paul-2012-rethinking-warrape-thesis.pdf (accessed 16 August 2015).

27 Brownmiller (n 13 above) 32.

28 Report of the United Nations Secretary-General (n 12 above).

29 Brownmiller (n 13 above) 38.

30 Sexual Violence and Armed Conflict: United Nations Response Published to Promote the Goals of the Beijing Declaration and the Platform for Action, April 1998 2, http://www.un.org/womenwatch/daw/public/cover.pdf (accessed 16 August 2015).

raping and enslaving women who are identified as members of the opposition group'.[31] The report stated further:[32]

> 'Rape' should be understood to be the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim.

Sexual violence against women has been a common practice dating back to ancient times when the 'Greeks and Romans wholly accepted rape as a common practice in warfare and captive women came to expect this as a consequence of defeat'.[33] According to Strohmetz:[34]

> Documentation from the Wars of Religion in France outlines the rape and torture of Huguenot women. Records also detail rapes in the Scottish Highlands in 1746 and during the First World War where the German military raped Belgian and French women.

History is replete with examples of sexual violence on 'enemy' women. These include:

(i) the rapes committed against Jewish women in the concentration and prison camps, as well as in brothels established by the Germans during World War II;[35]

(ii) the rape of an estimated 80 000 Chinese women in the course of World War II during the Japanese occupation of Nanking in 1937 in seven weeks of wild carnage now commonly referred to as the Rape of Nanking;[36]

(iii) the enslavement and rape of thousands of Chinese and Korean 'comfort women' in 'comfort stations' established by the Japanese Military High Command in the course of World War II;[37]

(iv) the rape of Vietnamese women by United States (US) troops during the US war in Vietnam;[38]

(v) the rape of an estimated 200 000 women during the battle for Bangladeshi independence from Pakistan in 1971;[39]

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31 UN Sub-Commission on the Promotion and Protection of Human Rights, Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Final Report submitted by Gay J McDougall, Special Rapporteur, 22 June 1998, E/CN.4/Sub.2/1998/13 4-5 http://www.refworld.org/docid/3b00f44114.html (accessed 27 September 2016).

32 UN Sub-Commission (n 31 above) 8.

33 C Strohmetz 'Rape, women and war' https://www.usm.edu/gulfcoast/sites/usm.../rape_women_and_war (accessed 16 September 2016).

34 As above.

35 N Farwell 'War rape: New conceptualisations and responses' (2004) 19 *Affilia* 389, http://aff.sagepub.com/content/19/4/389.refs.html (accessed 5 September 2015).

36 Farwell (n 35 above) 390.

37 M Linehan 'Comfort women' in MD Smith (ed) *Encyclopaedia of rape* (2004) 47.

38 Farwell (n 35 above) 390.

39 KS Islam 'Breaking down the Birangona: Examining the (divided) media discourse on the war heroines of Bangladesh's Independence Movement' (2012) 6 *International Journal of Communication* 2131, http://ijoc.org/index.php/ijoc/article/viewFile/874/787 (accessed 26 September 2016).

(vi) the rape and sexual enslavement of Muslim Bosnian women by Serbian forces during the 1992-1995 Bosnia conflict in the former Yugoslavia;[40]

(vii) the rape of women by soldiers on both sides during the Eritrean-Ethiopian War of 1998-2000;[41] and

(viii) the state-sanctioned rape of thousands of women in the course of the 1994 Rwandan genocide.[42]

This list is by no means exhaustive. The foundations laid by the perpetrators of these heinous crimes, especially those committed in the course of World War II, have been built upon by the members of the modern day military, insurgent groups and terror organisations.

Several reasons have been advanced for the upsurge in sexual violence during conflicts. The first reason commonly advanced is that such rape is viewed as a routine and normal reward accruing to the victors.[43] In effect, the rape of women by members of the armed forces during wars and conflicts is regarded as one of the benefits which members of the victorious armies deserve as a reward for winning the war or overcoming the 'enemy'. This view point reduces an otherwise heinous crime to the level of a 'fringe' benefit for 'the boys' in the victorious army. The hapless female victims, humiliated and debased, become mere toys in the hands of the 'soldier boys'.

A second reason, allied to the first, is the belief by the military high command that such sexual violence is necessary to serve as morale booster for the troops and to keep the soldiers happy. In fact, this was one of the reasons advanced for the establishment of 'comfort stations' by the Japanese military high command.[44] Sexual violence during wars and armed conflict is also regarded as a deliberate act of terror, aimed at achieving the desired political goal of the group, and to humiliate and demoralise their opponents. In this context, the women become mere pawns in the hands of the perpetrators of the sexual violence and are used to send powerful messages to the opposing political leaders to accede to the demands of the group. This tactic becomes most effective because of the high premium placed on the chastity of women by most societies. The act of rape, therefore, humiliates not only the women but also the male members of society who are portrayed as incapable of protecting their women.

The use of rape as a tactic of terrorism is regarded by the terrorists as a relatively cheaper means of achieving their aim as it does not

40 CS Snyder et al 'On the battleground of women's bodies: Mass rape in Bosnia-Herzegovina' http://aff.sagepub.com/cgi/content/refs/21/2/184 (accessed 5 September 2015).

41 S Healy & M Plaut 'Ethiopia and Eritrea: Allergic to persuasion' Chatham House Africa Programme Briefing Paper 07/01 7 https://www.chathamhouse.org/sites/files/chathamhouse/ public/Research/Africa/bpethiopiaeritrea.pdf (accessed 26 September 2016).

42 A Desforges 'Leave none to tell the story: Genocide in Rwanda' *Human Rights Watch* March 1999, 163-164.

43 JR Lilly 'Wartime rape' in Smith (n 37 above) 270.

44 Linehan (n 37 above) 46-48.

require the purchase or use of guns and bullets on enemy targets, yet its effects on the victims are no less devastating. Indeed, it has been said:[45]

> In war there are many weapons that may be employed and while the Kalashnikov or Improvised Explosive Devices may be favoured arms in modern warfare, there is one weapon all men carry and more often use. Men are choosing to use their bodies as weapons – in fact their manhood – to attack. The victim is raped in an effort to dehumanise and defeat the enemy, leaving an entire society with long-term suffering as victims cascade across generational divides. The scourge of rape as a weapon, affects not only the individual lives of the victims, but the entire family and community in which they live. Leaving their lasting marks on the entire country's civil society, this in turn affects our globalised world.

Sadly, despite the widespread nature of and devastation caused by sexual violence in wars and armed conflicts, over the years the perpetrators have been able to get away with their crimes without any form of legal sanction to punish them for their crimes and to serve as deterrence to others. It is a big blemish on the conscience of the world that the rapes of hundreds of thousands of women over the years has gone unpunished, as though these rapes never took place.[46] It appears that the world was inflicted with collective amnesia in cases of sexual violence targeted at women during wars and conflicts, until the establishment of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY). These tribunals finally established legal definitions and precedents for prosecuting perpetrators of war-time rape and defining war-time rape as a crime against humanity.[47]

3 Boko Haram and sexual terrorism

The origin of the Nigerian fundamentalist group Jammatul Ahlis Sunnah lid Daawa wal Jihad (otherwise known as Boko Haram) is mired in controversy. Although there is a general belief that the group was founded around 2001 or 2002 by Mohammed Yusuf, this has been challenged by some writers.[48] The more general belief, however, is that the group came into existence in 2002 when a group of young Islamic fundamentalists gathered in the northern city of Maiduguri and, having claimed that the city was sinful and corrupt,

45 C Clifford 'Rape as a weapon of war and its long-term effects on victims and society' paper delivered at the 7th Global Conference Violence and the Contexts of Hostility, May 2008, Budapest, Hungary.

46 KA Koenig et al 'The jurisprudence of sexual violence' Working Paper of the Sexual Violence and Accountability Project, Human Rights Centre, University of California Berkeley, May 2011 6.

47 Koenig et al (n 46 above) 10.

48 Writers such as Madike believe that the group, then known as Sahaba, was founded in 1995 under the leadership of Lawan Abubakar. See I Madike 'Boko Haram: Rise of a deadly sect', http://www.nationalmirroronline.net/sunday-mirror/big_read/14548.html (accessed 21 September 2015).

moved to Yobe state and set up abode in the village of Kanama under the leadership of Mohammed Ali. After the death of Mohammed Ali in a confrontation with the military in December 2003, Mohammed Yusuf took over as leader of the group, recruited more members (largely from scions of the northern elite and unemployed youths and refugees from Chad), and returned the group to Maiduguri.[49] According to Oyebode, on their return to Maiduguri, Mohammed Yusuf embarked on the construction of[50]

> new structures, offering food, medicine and other benefits to the poor just like the Muslim Brotherhood in Egypt and other parts of the Middle East. The group had, more or less, become a state within a state with its own mosques, cabinet, religious police and farms. They now became known as 'the Nigerian Taliban' and reportedly received financial support from Salafist elements in Saudi Arabia as well as wealthy northern Nigerians. In addition, some of their members were known to have had military training in Al Qaeda training camps in Mauritania, Algeria, Mali and Somalia.

The group, which had hitherto conducted its affairs peacefully, resorted to violence in 2009 following the extra-judicial killing of its leader, Mohammed Yusuf, while in police custody, with its first terrorist attack in Borno in January 2010 at Dala Alemderi Ward in Maiduguri.[51] However, another version of the account has it that the group was initially a gathering of thugs used by politicians to further their own political interest. According to this version,[52]

> some politicians in Bornu State who were apparently using the sect members as thugs became frightened when they suddenly became too powerful for them and therefore had to invite the government to deal with them. Former Bornu State Governor Ali Modu Sheriff has been linked to the sect in this narrative – which he has strongly denied.

Whatever may have led to the radicalisation of the group, what has not been in dispute is the fact that the group has turned into a murderous band of terrorists operating not only in Nigeria, but also in Niger, Chad and Cameroon.[53]

Boko Haram's reign of terror tragically culminated in the attack on 15 April 2014 on a girls' school, the Government Secondary School,

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49 A Oyebode 'Legal responses to the Boko Haram challenge: An assessment of Nigeria's Terrorism (Prevention) Act, 2011' text of a paper delivered at the Oxford Round Table, Harris Manchester College, University of Oxford, England, 22-26 July 2012.

50 As above.

51 J Adibe 'What do we really know about Boko Haram?' in I Mantzikos *Boko Haram: The anatomy of a crisis* (2013) 9-15.

52 As above.

53 Tribune Wire Reports 'Boko Haram again attacks outside Nigeria, this time in Niger' http://www.chicagotribune.com/news/nationworld/chi-boko-haram-niger-20150206-story.html (accessed 20 September 2016); 'Boko Haram rampage in Cameroon after being hit by 3-nation offensive' http://www.chicagotribune.com/news/nationworld/chi-boko-haram-nigeria-cameroon-20150205-story.html (accessed 20 September 2016).

Chibok, Borno State in Northern Nigeria, and the abduction of an estimated 276[54] young school girls from their school dormitory. The audacious kidnapping of the 'Chibok girls' generated international uproar largely due to the number and ages of the girls who became victims of Boko Haram terrorism.[55] This incident, more than any other, has equally exposed the soft underbelly of Nigeria's anti-terrorism legislation.

The abducted girls, who were students from several schools in the area, had gathered at the Government Secondary School Chibok in Borno State to write their final examinations 'due to the closure of most schools in the state out of fear of Boko Haram attacks'.[56] Out of an estimated 276 girls who were kidnapped, 57 managed to escape over the next few days.[57] The resultant global outrage at and condemnation of the kidnapping of these girls led to a global movement – '#bringbackourgirls' – which has aroused and sustained global interest in this case. However, the kidnapping of the Chibok girls is not the only such instance by the Boko Haram.[58] A report by Amnesty International states that an estimated '2 000 women and girls have been captured and forced into slavery by Boko Haram fighters in a little over 12 months'.[59] The report recommended the prosecution of members of Boko Haram for 'rapes, sexual slavery and other forms of sexual violence'.[60]

At the height of the global outrage over the kidnapping of the Chibok girls, Boko Haram released a video recording showing about 100 of the girls, allegedly a part of the Chibok girls, reciting Koranic verses and stating that they had now converted to Islam. The leader of the Boko Haram group, Mohammed Shekau, stated in the video that he would sell off the girls in the slave market and marry some off.[61] Justifying these plans, he stated that they were sanctioned by

54 Human Rights Watch 'Those terrible weeks in their camps: Boko Haram violence against women and girls in North-East Nigeria' 2 http://www.hrw.org (accessed 5 October 2015).

55 R Reeve 'The internationalisation of Nigeria's Boko Haram campaign' 5, http://reliefweb.int/sites/reliefweb.int/files/resources/SpecialBriefingMayEn14_0.pdf (accessed 20 September 2016).

56 NB Nti 'Silence of the lambs: The abducted Chibok schoolgirls in Nigeria and the challenge to UNSCR 1325' Kofi Annan International Peace-Keeping Training Centre Policy Brief 3, November 2014.

57 Human Rights Watch (n 54 above) 18.

58 As above.

59 T Batchelor 'Rape and sex slavery: Life as a girl under Boko Haram exposed a year on from mass kidnap' http://www.express.co.uk/news/world/570401/Boko-Haram-exposed-year-mass-kidnap (accessed 20 October 2015).

60 K Dutta 'Boko Haram has abducted, raped and enslaved 2 000 women in reign of terror' http://www.independent.co.uk/news/world/africa/boko-haram-has-abducted-raped-and-enslaved-2000-women-in-reign-of-terror-10174152.html (accessed 20 October 2015).

61 M Pérouse de Montclos 'Nigeria's interminable insurgency? Addressing the Boko Haram crisis' November 2014, research paper prepared by the Africa Programme, Chatham House 13.

the Koran.[62] The reported accounts by some girls and women who had once been abducted by Boko Haram before their escape from its grip, or rescue by the Nigerian army, have given insights into the horrors of life in the camps. These are reproduced below:

According to a report,[63] Asabe Aliyu, a 23 year-old mother of four children from Delsak, a village near Chibok town, was found vomiting blood (a possible indication of internal injury) at the time of her rescue from the Sambisa forest by men of the Nigerian army in May 2015. Giving an account of her ordeal while in the captivity of Boko Haram, she stated that the 'terrorists took turns having sex with her on a daily basis and ended up getting her pregnant. Then they forced her into an unwanted marriage.'[64] Another young lady who escaped from her Boko Haram abductors a few days after she had been kidnapped stated that 'she was raped 15 times a day by 15 men throughout the time she was with the Islamic insurgents before she could escape from their den'.[65] These examples reflect just a minute tip of the proverbial iceberg of Boko Haram's devastating use of rape as a tactic of terrorism.

These abductions and rapes are not only criminal offences but also violations of the human rights of the victims as guaranteed in Chapter 4 of the Constitution of the Federal Republic of Nigeria, 1999. Section 34(1) of the Constitution provides:[66]

> Every individual is entitled to respect for the dignity of his person, and accordingly –
>
> (a) no person shall be subject to torture or to inhuman or degrading treatment;
> (b) no person shall he held in slavery or servitude; and
> (c) no person shall be required to perform forced of compulsory labour.

The abductions and rapes committed by members of Boko Haram have the effect of depriving the victims of dignity and also amount to torture, inhuman and degrading treatment. The victims are also, in violation of subsection 1(b), held in slavery and servitude by their captors. Similarly, the actions of Boko Haram towards their abducted victims contravene constitutionally-guaranteed rights such as (i) the right to personal liberty;[67] (ii) the right to freedom of thought,

62 As above.

63 'Boko Haram's rescued sex slaves tell their horror stories' http://www.thedailybeast.com/articles/2015/05/06/boko-haram-horror-stories-told-by-rescued-girls-in-nigeria.html (accessed 20 October 2015).

64 As above.

65 O Akukwe 'Chibok girls, Boko Haram and Jihad of the penis' http://www.nigerianbulletin.com/ (accessed 20 September 2016).

66 Constitution of the Federal Republic of Nigeria 1999.

67 Sec 35 Constitution of Nigeria.

conscience and religion;[68] (iii) the right to freedom of expression;[69] (iv) the right to assemble freely and associate with others;[70] and (v) the right to freedom of movement.[71]

The victims of these human rights violations are entitled to protection under the law from these violations and from the sexual violence visited upon them by their captors, the Boko Haram terrorist group. These acts of sexual violence have left the victims, their families and communities devastated. Marriages have been destroyed and communal values have been left in tatters.[72] Most victims yearn for justice for the crass violation of their bodies by members of Boko Haram and, thereafter, closure. One of the victims of Boko Haram's sexual terrorism exclaimed after the arrest of the Boko Haram member who had sexually assaulted her: 'God, I thank you, even if I die today, I am a happy woman.'[73] Their demand for justice is supposed to be facilitated by the anti-terrorism legislation put in place by the Nigerian state to prevent terrorism, deter persons who would otherwise have engaged in acts of terrorism and punish persons who actually engage in acts of terrorism.

4 Nigerian Terrorism (Prevention) (Amendment) Act, 2013 and conspiracy of silence

Prior to the enactment of the Terrorism (Prevention) Act, 2011 (as amended by the Terrorism (Prevention) (Amendment) Act, 2013) Nigeria had no specific law dealing with terrorism. What served as counter-terrorism laws were mainly provisions of the Criminal Code and the Penal Code germane to the specific acts complained about. The Criminal Code applies in the states of Southern Nigeria, while the Penal Code is applicable in the states of Northern Nigeria. The only law that made mention of terrorism then was the subsisting Economic and Financial Crimes Commission (Establishment) Act 2004,[74] which merely defined and prescribed penalties for acts of terrorism. The Terrorism Prevention Act, therefore, expressly provides the requisite legal framework for the prevention and punishment of terrorism in Nigeria. The Terrorism (Prevention) (Amendment) Act, 2013 amended certain aspects of the Terrorism (Prevention) Act, 2011.

The Terrorism Prevention Act (as amended) begins by prohibiting all acts of terrorism and the financing of terrorism.[75] The emphasis placed on the financing of terror has been informed by the key role

68 Sec 38 Constitution of Nigeria.
69 Sec 39 Constitution of Nigeria.
70 Sec 40 Constitution of Nigeria.
71 Sec 41 Constitution of Nigeria.
72 Human Rights Watch (n 54 above) 36.
73 Akukwe (n 65 above).
74 Sec 15 of the EFCC Act provides for offences relating to terrorism.
75 Sec 1(1) Terrorism (Prevention) (Amendment) Act of 2013.

played in terrorism by finance. The Act further provides that when a person or body corporate knowingly inside or outside Nigeria, directly or indirectly, willingly[76]

> (a) does, attempts or threatens any act of terrorism;
> (b) commits an act preparatory to or in furtherance of an act of terrorism;
> (c) omits to do anything that is reasonably necessary to prevent an act of terrorism;
> (d) assists or facilitates the activities of persons engaged in an act of terrorism or is an accessory to any offence under this Act;
> (e) participates as an accomplice in or contributes to the commission of any act of terrorism or offences under this Act;
> (f) assists, facilitates, organises or directs the activities of persons or organisations engaged in any act of terrorism;
> (g) is an accessory to any act of terrorism; or
> (h) incites, promises or induces any other person by any means whatsoever to commit any act of terrorism or any of the offences referred to in this Act
>
> commits an offence under this Act and is liable on conviction to maximum of death sentence.

From this definition it should be noted that the commission of offences of terrorism includes preparation. For instance, the receiving of terror training on its own is a complete offence, once it is proved that such training was received in preparation for a terrorist act. This has been referred to as a 'catch-all offence', since committing any act in preparation for or planning of a terrorist attack amounts to an offence.[77] Thus, for this offence to be committed it is not necessary for an actual terrorist attack to take place.[78]

The Act comprises of 41 sections, in eight parts, and a schedule which provides a list of all relevant international statutes dealing with terrorism, including:

> (a) the Convention on Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973;
> (b) the International Convention against the Taking of Hostages, 1979;
> (c) the Convention for the Suppression of Terrorist Bombing, 1997;
> (d) the Convention for the Suppression of the Financing of Terrorism, 1999;
> (e) the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1970;
> (f) the Convention for the Suppression of the Unlawful Seizure of Aircraft, 1970;
> (g) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971;

76 Sec 1(2) Terrorism (Prevention) (Amendment) Act.
77 As above.
78 As above.

(h) the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988;
(i) the Convention on the Making of Plastic Explosives for the Purpose of Detection, 1991;
(j) the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988;
(k) the Protocol for the Suppression of Unlawful Acts against Fixed Platforms Located on the Continental Shelf, 1988; and
(l) the Convention on the Physical Protection of Nuclear Material, 1980.

The Act equally strengthened the offences designated as terrorism, for example, (i) belonging to or attending meetings of groups designated as terrorist;[79] (ii) providing finance[80] or (iii) logistics to such group.[81]

Towards this end, the Act sets out measures intended to provide for the prevention, prohibition and countering of terrorist activities and their financing in Nigeria. It also provides for the effective implementation of conventions[82] on the prevention and combating of terrorism as well as the Convention for the Suppression of the Financing of Terrorism, and the appropriate punishments.

The Act has given wide powers to the Office of the National Security Adviser (referred to in the Act as ONSA) as the co-ordinating body for all security and enforcement agencies under the Act.[83] Specifically, the Office of the National Security Adviser has been empowered to:[84]

(a) provide support to all relevant security, intelligence, law enforcement agencies and military services to prevent and combat acts of terrorism in Nigeria;
(b) ensure the effective formulation and implementation of a comprehensive counter-terrorism strategy for Nigeria;
(c) build capacity for the effective discharge of the functions of all relevant security, intelligence, law enforcement and military services under this Act or any other law on terrorism in Nigeria; and
(d) do such other acts or things that are necessary for the effective performance of the functions of the relevant security and enforcement agencies under this Act.

Another office with wide powers under the Act is the Attorney-General of the Federation. This office has been conferred with powers as 'the authority for the effective implementation and administration of this

79 Sec 4 Terrorism (Prevention) (Amendment) Act.
80 Sec 13.
81 Secs 5 & 12.
82 Sec 40.
83 Sec 1(A)(1).
84 As above.

Act'.[85] The office of the Attorney-General was further empowered to[86]

> strengthen and enhance the existing legal framework to ensure -
>
> (a) conformity of Nigeria's counter-terrorism laws and policies with international standards and United Nations Conventions on Terrorism;
> (b) maintain international co-operation required for preventing and combating international acts of terrorism; and
> (c) the effective prosecution of terrorism matters.

Also relevant are the law enforcement agencies that have been given the responsibility of 'gathering of intelligence and investigation of the offences provided under this Act'.[87]

The Act sets out specific offences which are described as 'terrorist acts' and prescribes penalties for these offences. Some of the offences specifically mentioned in the Act include:

(i) the murder or kidnapping of internationally-protected persons;[88]
(ii) arranging, managing, assisting or participating in meetings concerned or connected with an act of terrorism or a terrorist group;[89]
(iii) soliciting or giving support to terrorist groups or for the commission of terrorist acts;[90]
(iv) harbouring terrorists or preventing the arrest of a terrorist;[91]
(v) providing training and instructions to terrorists or terrorist groups;[92]
(vi) the provision of devices to terrorists;[93]
(vii) the provision of facilities in support of terrorist acts;[94]
(viii) the provision of finance for terrorists;[95]
(ix) hostage taking;[96] and
(x) membership of a terrorist group or a proscribed organisation.[97]

Most of the offences enumerated above attract penalties ranging from ten years' to life imprisonment.

It is instructive to note that, while the Act specifically mentions kidnapping as an act of terrorism, it did not envisage a situation whereby terrorists would kidnap people not for ransom, but strictly for

85 Sec 1(A)(2) Terrorism (Prevention) (Amendment) Act.
86 As above.
87 Sec 1(A)(3) Terrorism (Prevention) (Amendment) Act.
88 Sec 3.
89 Sec 4.
90 Sec 5.
91 Sec 6.
92 Sec 7.
93 Sec 9.
94 Sec 12.
95 Sec 13.
96 Sec 15.
97 Sec 16.

sexual exploitation, slavery and abuse. As a result of this lack of foresight, the Act did not make provision for acts of rape committed by terrorists against women. The implication of this *lacuna* becomes obvious and glaring when one considers the fact that under Nigerian laws, an act does not constitute a crime unless a law creates the offence and prescribes penalties or punishments for its breach. Although the offence of rape has been provided for under Nigerian criminal laws, these laws may not be adequate for the purposes of prosecuting those who have resorted to the use of rape as a tactic of terrorism. Section 282(1) of the Penal Code[98] provides:

> A man is said to commit rape who … has sexual intercourse with a woman in any of the following circumstances:
>
> (a) against her will;
> (b) without her consent;
> (c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;
> (d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
> (e) with or without her consent when she is under fourteen years of age or of unsound mind.

Under this law, mere penetration is sufficient to constitute the sexual intercourse necessary to prove the offence of rape.[99] The Penal Code, which is applicable in Northern Nigeria, prescribes a maximum penalty of life imprisonment and the payment of a fine for anyone convicted of the offence of rape.[100] For its part, section 357 of the Criminal Code defines rape, providing:[101]

> Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force of by means of threats or intimidation of any kind or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by impersonating her husband, is guilty of an offence which is called rape.

For this offence, the Criminal Code prescribes a penalty of life imprisonment in addition to caning.[102] Similarly, the Violence Against Persons (Prohibition) Act, 2015 criminalises rape, which is defined as the intentional penetration[103]

> of the vagina, anus or mouth of another person with any other part of his or her body or anything else … the other person does not consent to the penetration; … the consent is obtained by force or by means of threat or

98 CAP 89 Laws of the Federation of Nigeria (LFN).
99 SS Richardson *Notes on the Penal Code law* (1963) 186.
100 See generally sec 283 of the Penal Code.
101 Criminal Code Cap C38, Laws of the Federation of Nigeria 2004.
102 See sec 358 of the Criminal Code.
103 Art 1 Violence Against Persons (Prohibition) Act 2015.

> intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or, in the case of a married person, by impersonating his or her spouse.

The offence of rape, when committed in the course of terrorism and as a tactic of terrorism, should attract a penalty as severe as the penalties prescribed for acts specifically mentioned in the anti-terrorism legislation. The nature of the offence and the need to deter others from committing the same offence make it imperative for the legislation to be amended to make such rape a capital offence, punishable by the death penalty. The existing laws on rape in Nigeria appear insufficient to serve as deterrence for those who rape women as a tactic of terrorism.

Under the existing criminal laws in Nigeria, proof of the allegation of rape may be a difficult task for the prosecution in the trial of those accused of committing rape in the course of terrorist activities. One difficulty that may be experienced by the prosecution involves the requirement that the evidence of the victim has to be corroborated. The evidence required in corroboration must be independent testimony which involves the accused by connecting or tending to connect him with the crime. It is important that this evidence must implicate him by confirming in some material way not only the fact that the crime has been committed, but also that the accused was the person who committed the crime. Corroborative evidence is considered necessary because[104]

> in the higher interest of justice and acceptable level of certainty, certain situational testimonies could be so unreliable and, in such circumstances, the court ought to be very wary in convicting an accused person of rape on the evidence of that witness alone.

This rule appears to be hinged on a latent disbelief regarding the account of events as narrated by the female victim of sexual assault. The practice also appears to cast doubt on the ability of women and girls to tell the truth on matters relating to sexual assault. Nowhere is an attempt to protect an accused as obvious as in a rape trial. A victim who cannot supply corroborative evidence is unlikely to be believed.

The rule has over the years received much attention, with some arguing that the rule is relevant, while others argue that in this time and age the rule has lost its meaning. The requirement of corroboration has become a rule of practice in rape cases in Nigeria. It is an established practice in criminal law that, although corroboration of the evidence of the victim in a rape case is not essential in law, in practice it is always sought, and the practice is also for the judge to warn himself against the danger of acting upon uncorroborated testimony.

104 PA Ocheme *The Nigerian criminal law* (2012) 177.

Although this rule has been abolished in England,[105] it still holds sway in Nigeria. In the case of *Igbine v The State*,[106] the court stated that '[c]orroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses'. The question then arises as to what may be regarded as corroboration sufficient to ensure conviction. This question becomes relevant when one considers the fact that rape rarely takes place in the presence of witnesses. In the case of *R v Kufi*,[107] the accused allegedly had carnal knowledge of a ten year-old girl without her consent. There was no witness to this incident. The unsworn evidence of the ten year-old victim was to the effect that she had not consented to the act, while her father stated that the accused, when confronted, had admitted to the act and offered him a promissory note in the sum of 20 pounds as compensation. The accused was convicted on the rape of the young girl on the ground that[108]

> [t]here is ample corroboration of the complainant's evidence by the evidence of her father. I accept the father's evidence that the accused admitted that he had intercourse with the complainant and handed him the note, Exhibit 2, in an attempt to settle the matter and keep it out of the hands of the police.

In this case, the promissory note given to the victim's father by the accused provided the much-needed corroboration without which the accused would have been acquitted.

Similarly, in the case of *Olaleye v The State*,[109] the accused allegedly raped a 14 year-old girl. The corroborative evidence was supplied by the medical examination conducted on the girl after the rape. The medical examination revealed that the girl had been infected with gonorrhea of the same species found on the accused when he was subjected to a similar medical examination. The court held that the presence of the same type of gonorrhea in both the accused and the victim was sufficient to serve as circumstantial corroborative evidence. In the case of the rape victims of Boko Haram, as captives of the terrorist group, these victims do not have the opportunity of undergoing medical examinations immediately after having been raped. As a result, the possibility of providing corroborative evidence through immediate medical examination is most unlikely.

In the absence of medical and other corroborative evidence, and in light of the foregoing precedents, it may prove difficult for a victim of sexual terrorism by Boko Haram to convince a court, on the basis of her evidence alone, that she had been raped by the accused member of the Boko Haram terrorist group. However, had rape been included

105 See sec 32 of the Criminal Justice and Public Order Act, 1994.
106 (1997) 9 NWLR (Pt 519) 101(a) 108.
107 (1960) WNLR 1.
108 As above.
109 (1970) 1ALL NLR 300.

among the acts that constitute 'acts of terrorism' under the Nigerian anti-terrorism legislation, courts may not have insisted on the strict, unwritten rule on corroboration of the testimony of the victim, thereby making it easier for such victims to see justice done. Unfortunately, the Nigerian anti-terrorism legislation does not specifically mention the issue of 'sexual terrorism' – an omission which, regrettably, has led to a situation that can only be described as a conspiracy of silence on the part of the drafters of the anti-terrorism legislation. Since the upsurge of terrorism in Nigeria, no aspect has elicited national and international attention more than sexual terrorism, which has been watered down and only described in terms of 'the Chibok girls': The abduction of the Chibok girls was necessary to raise awareness and discourse by scholars in Nigeria and the Nigerian state on the issue of sexual terrorism. It is important to note that, prior to the abduction of the Chibok girls, Boko Haram terrorists had abducted and sexually assaulted hundreds of women and girls without attracting the type of media scrutiny as much as the abduction of the Chibok girls did.[110] The abduction of the Chibok girls changed this position and created public awareness about the use of rape and sexual enslavement by Boko Haram as a tactic of terrorism, and drew attention to its absence from the list of acts constituting terrorism under the anti-terrorism legislation in Nigeria.

While the legislation is silent on the issue of penalties for sexual violence committed against women as a tactic of terrorism, it has made reasonably adequate provision for other acts considered as 'terrorism' – for instance, participating in a meeting of a terrorist group attracts a penalty of twenty years' imprisonment.[111] Another example is membership of a proscribed organisation, which attracts imprisonment for a maximum term of 20 years. Taking a cue from this, therefore, it will not be inappropriate to canvass for the imposition of the death penalty for terrorists convicted of rape and other forms of sexual violence committed in the course of their terrorist campaigns because of the havoc their actions wreck on their victims. The harrowing experiences of the victims of this depravity are a pointer to the fact that this is a fitting punishment for the offence of rape committed as a tactic of terrorism. The silence of the Nigerian anti-terrorism legislation in the face of the realities of rape as a tactic of terrorism appears to be a case of conspiracy, which should be addressed by the Nigerian state. There is, therefore, an urgent need to review the anti-terrorism legislation to include rape as one of the offences of terrorism and to prescribe appropriate penalties.

110 A Nossiter 'Boko Haram militants raped hundreds of female captives in Nigeria' *The New York Times* 18 May 2015.

111 See, generally, sec 4 of the Terrorism (Prevention) (Amendment) Act, 2013.

5 Conclusion

The focus of this research article has been the increased resort to sexual violence on women by members of the Nigerian fundamentalist group Boko Haram. The use of sexual violence as an increasingly important and integral part of the group's terrorist operations and tactics since 2012 has led to the kidnapping of hundreds of girls and women, the most notorious being the abduction of the Chibok girls. Age appears not to be a barrier, as girls as young as nine years old have been kidnapped and forced into sexual slavery by members of this group. These abductions and sexual assaults have left indelible marks on the victims. Some victims have become pregnant; some have developed vesico vaginal fistula (VVF); some have been infected with sexually-transmitted diseases, especially HIV; and nearly all have been psychologically affected by the traumatic experience.

The Federal Government of Nigeria, with the support of the international community, has taken steps aimed at combating the great threat posed to the unity of the country by the terrorist activities of Boko Haram. One such step is the military response. A second and equally important step is the enactment of anti-terrorism legislation. This legislation has criminalised certain actions as terrorism. Such acts include an attack upon a person's life leading to bodily harm or death; kidnapping for ransom; destruction of public infrastructure, public places or private property likely to result in major economic loss; the possession and manufacture of weapons and explosives; and the dissemination of views aimed at destabilising the polity. Regrettably, it did not expressly include sexual violence perpetrated by members of a terrorist group. This *lacuna* has been exploited by Boko Haram by unleashing a campaign of sexual terror on women of the north-eastern part of Nigeria, an area which has borne the brunt of the terrorist activities of Boko Haram.

While the victims and society demand justice for the demeaning violation of their bodies, the law on prevention of terror has not been able to give them succour: No provision for the offence committed against them is made in the law. The law and society have also not made provision for the maintenance of the children born out of the sexual violence visited on their mothers. Nigeria's anti-terror laws appear to have assumed that sexual violence cannot be used as a tactic by terrorists to intimidate the populace, pollute bloodlines and destroy society. The reality is that sexual violence against women is a most favoured tool of terrorists and has been widely used by Boko Haram, who have been described as 'the worst sexual abusers in the world' after the ISIS by the UN spokeswoman, Zainab Bangura.[112] With such a vicious and unflattering reputation, therefore, it is

112 Special Representative of the Secretary-General of the United Nations on Sexual Violence in Conflict.

imperative for Nigeria to review its anti-terror legislation so as to include sexual violence as an act of terrorism, and also to prescribe appropriate penalties for the offence. This, apart from ensuring justice for the victims, would also serve as a deterrent and hopefully eliminate or reduce to the barest minimum incidents of sexual violence against women during wars and other forms of armed conflicts.

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The admissibility in Namibia of evidence obtained through human rights violations

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Summary

Unlike the case in other African countries, such as South Africa, Kenya and Zimbabwe, the Namibian Constitution does not require courts to exclude evidence obtained through human rights violations if the admission of that evidence would render the trial unfair or would be detrimental to the administration of justice. The only article in the Namibian Constitution dealing with the issue of evidence is article 12(1)(b), which provides that '[n]o persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons' testimony which has been obtained from such persons in violation of article 8(2)(b) hereof'. However, Namibian courts have invoked the criteria (set out in the Constitutions of South Africa, Kenya and Zimbabwe) in determining whether or not to admit evidence obtained through human rights violations. This article deals with the jurisprudence emanating from Namibian courts dealing with evidence obtained through human rights violations, and highlights the challenges that courts have grappled with in dealing with such evidence. The issues discussed are the relevant provisions relating to the admission of evidence obtained through violating human rights; the tests courts have developed to decide whether or not to admit evidence obtained through human rights violations; the right to remain silent at the time of arrest; the accused's right not to incriminate himself at the trial; the right to consult a lawyer before making

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a statement; and evidence obtained through violating the rights to freedom from torture, cruel, inhuman or degrading treatment. It is recommended that Namibia may have to amend its Constitution to provide, inter alia, for criteria to be used in deciding whether or not to admit evidence obtained through human rights violations.

Key words: *evidence; admissibility; Namibia; human rights violations; fair trial; obtained*

1 Introduction

One of the features of some of the constitutions that were adopted in African countries in the 1990s is that they specifically dealt with the issue of the accused's right to a fair trial.[1] This could be attributed to the fact that by that time some human rights treaties which had been ratified by some of these countries deal with the issue of the right to a fair trial. These include the International Covenant on Civil and Political Rights (ICCPR)[2] and the African Charter on Human and Peoples' Rights (African Charter).[3] Some of the constitutions of countries such as Cape Verde, Ethiopia, Guinea-Bissau, Liberia, Mozambique, Somalia and Sudan require courts to exclude evidence obtained through the violation of certain human rights.[4] There appears to be a new development in Africa to the effect that the drafters of constitutions have started to address the relationship

1 See C Heyns & M van der Linde (eds) *Human rights law in Africa* (2004).

2 Art 14.

3 Art 7.

4 See, eg, art 33(6) of the Constitution of Cape Verde (1980) which provides that '[a]ll evidence obtained by torture; coercion; assault on physical or moral integrity; illegal invasion of correspondence, telephone, domicile, or privacy, or other illicit means, shall be null and void'. Art 19(5) of the Constitution of Ethiopia (1994) provides that '[p]ersons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.' Art 35(6) of the Constitution of Guinea-Bissau 1984 provides that '[a]ny evidence or confession … obtained by torture, coercion, or physical or mental harm shall be null and void'. Art 21(c) of the Constitution of Liberia (1986) provides that '[e]very person suspected or accused of committing a crime shall immediately upon arrest be informed in detail of the charges, of the right to remain silent and of the fact that any statement made could be used against him in a court of law. Such person shall be entitled to counsel at every stage of the investigation and shall have the right not to be interrogated except in the presence of counsel. Any admission or other statements made by the accused in the absence of such counsel shall be deemed inadmissible as evidence in a court of law.' Art 65(3) of the Constitution of Mozambique (2004) provides that '[a]ll evidence obtained through the use of torture, coercion, offences against the physical or moral integrity of the person, the abusive intrusion into their private and family life or into their home, correspondence or telecommunications, shall be invalid'. Art 35(4) of the Constitution of Somalia (2012) provides that '[e]very person may not be compelled to self-incriminate, and a verdict may not be based on evidence acquired by means of coercion'. Art 156(c) of the Constitution of Sudan provides that '[p]ersonal privacy is inviolable and evidence obtained in violation of such privacy shall not be admissible in the court of law'.

between obtaining evidence and the right to a fair trial. For example, the Constitutions of South Africa,[5] Kenya[6] and Zimbabwe[7] deal directly with the issue of the impact that evidence obtained through human rights violations could have on the fairness of the trial or the administration of justice. In all these countries, courts are obliged[8] to exclude evidence obtained through the violation of any right in the Bill of Rights if the admission of the evidence would render the trial unfair or be detrimental to the administration of justice or to the interests of justice. For example, in *Shamduth Singh & Others v The State*,[9] the South African Supreme Court of Appeal held:[10]

> Section 35(5) of the Constitution does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice.

5 Sec 35(5) of the 1996 Constitution of South Africa provides that '[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.

6 Art 50(4) of the 2010 Constitution of Kenya provides that [e]vidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice'. Jurisprudence has started to emerge from Kenyan courts on art 50(4), including *Republic v John Kithyululu* [2016] eKLR (23 March 2016); *Martin Musyoka Mutia v Republic* [2016] eKLR 1 (22 January 2016); *Charles Enos Makokha v Republic* [2015] eKLR (5 February 2015); *Stephen Ouma Ambogo v Attorney-General* [2014] eKLR (21 March 2014); *Oluoch Dan Owino & 3 Others v Kenyatta University* [2014] eKLR (5 December 2014); *Thoya Kitsao v Republic* [2015] eKLR (4 December, 2015); *NMA v Republic* [2016] eKLR (17 February 2016); *Michael Sistu Mwaura Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others* [2016] eKLR (9 March 2016); *Mary Ngechi Ng'ethe v Attorney-General & Another* [2012] eKLR (25 October, 2012); and *Robert Muli Matolo v Republic* [2015] eKLR 1.

7 Sec 70(3) of the 2013 Constitution of Zimbabwe provides that '[i]n any criminal trial, evidence that has been obtained in a manner that violates any provision of this chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest'.

8 Once a court finds that the admission of evidence would render the trial unfair or would be detrimental to the administration of justice, it must exclude that evidence irrespective of the seriousness of the offence the accused is alleged to have committed. Eg, in *Magwaza v S* [2015] 2 All SA 280 (SCA), the appellant was not adequately informed of his rights to remain silent and to consult a lawyer before he confessed to a robbery and, in excluding evidence, the South African Supreme Court of Appeal held: 'I accept that particularly in the current state of endemic violent crime, the public reaction to the exclusion of such evidence is likely to be one of outrage. But we need to remind ourselves that s 35(5) is designed to protect "even those suspected of conduct which would put them beyond the pale"' (para 22).

9 [2016] ZASCA 37 (24 March 2016).

10 *Shamduth Singh* (n 9 above) para 16.

Courts consider various factors in deciding whether or not the admission of unconstitutionally-obtained evidence would render a trial unfair or be detrimental to the administration of justice.[11] In other words, a value judgment has to be made before unconstitutionally-obtained evidence is excluded.[12] In Namibia, the Constitution[13] is silent on how courts should deal with evidence obtained through the violation of human rights. Article 12(1)(f) of the Constitution provides:

> No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of article 8(2)(b) hereof.

Article 8(2)(b) provides that '[n]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'. Namibian courts have started to develop jurisprudence dealing with articles 12(1)(f) and 8(2)(b). The purpose of this article is to highlight this jurisprudence and to suggest ways in which the court's jurisprudence could be strengthened and the Constitution amended to strike a proper balance, in the fight against crime, between obtaining evidence in violation of human rights, on the one hand, and ensuring that the admissibility of such evidence does not violate the accused's right to a fair trial or is detrimental to the administration of justice, on the other.

2 Jurisprudence emanating from Namibian courts on evidence obtained through the violation of human rights

In this section of the article, I highlight the jurisprudence emanating from Namibian courts on the relationship between evidence obtained through the violation of human rights and the accused's right to a fair trial or the administration of justice. Where feasible, the author will deal with the cases in chronological order. It should be noted that the Constitution of Namibia came into effect in March 1990. The author first discusses the case which dealt with the relevant legal provisions

11 In *Magwaza* (n 8 above) para 15, the South African Supreme Court of Appeal held: 'Although s 35(5) of the Constitution does not direct a court ... to consider "all the circumstances" in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to be logical that all relevant circumstances should be considered ... A number of factors to be considered in the determination of whether the admission of evidence will bring the administration of justice into disrepute [including]: the kind of evidence that was obtained; what constitutional right was infringed; was such infringement serious or merely of a technical nature and would the evidence have been obtained in any event.' See also *Shamduth Singh* (n 9 above) para 18.

12 See generally PJ Schwikkard & SE van der Merwe *Principles of evidence* (2016) 229-278.

13 Of 1990.

on the issue of evidence obtained through the violation of human rights.

2.1 Relevant legal provisions

As mentioned earlier, the Namibian Constitution does not require courts to exclude evidence which has been obtained through the violation of human rights. In this section, the author will illustrate the relevant constitutional and legislative provisions which courts have invoked to decide whether or not evidence obtained through human rights violations is admissible. The first case in which the issue of evidence obtained through human rights violations arose was that of *S v Minnies and Another.*[14] The Court, on the basis of section 218 of the Criminal Procedure Act, dealt with a pointing-out (of stolen goods and the place where they had been buried)[15] that had been obtained through torture by the police from the accused. This section provides:

> (1) Evidence may be admitted at criminal proceedings of any fact otherwise in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.
>
> (2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

The effect of the above section is that, if a court finds that a confession is inadmissible, it may admit a fact or a pointing-out discovered on the basis of such a confession. The question that arose in this case was whether a pointing-out that occurred after the torture of the accused was admissible. The Court held that, under section 218 it had a discretion whether or not to admit evidence obtained as a result of an inadmissible statement or confession.[16] The Court observed:[17]

> Where the evidence is obtained by torture, it would bring the administration of justice into disrepute if such evidence were admitted. This affords adequate grounds, in my view, for exercising such a discretion

14 1990 NR 177 (HC).

15 In *Minnies* (n 14 above) 192, the Court defined a pointing-out in the following terms: 'A "pointing-out" takes place when the accused has physically drawn the attention of the witness to a place or a thing, by some gesture or movement. It could include the accused leading the witness to a place, and describing to him then what to do to ascertain the location of a thing.'

16 *Minnies* 199.

17 As above.

> against the admission of such evidence. The views expressed herein are based on the facts of this case. I do not deal with other forms of illegally-obtained evidence, and do not wish to do so.

The Court added: 'Article 12(1)(f) is peremptory in its terms. The Court shall not admit in evidence testimony which has been obtained by torture.'[18] In dismissing the state's argument that the evidence obtained from the accused was admissible, the Court held, *inter alia*, that that argument 'overlooks one of the main underlying reasons for excluding illegally-obtained evidence, namely, that the use of such evidence can bring the administration of justice into disrepute'.[19] It is against this background that the Court concluded that[20]

> [s] 218 must be interpreted in the light of the provisions of the Constitution. A pointing-out which results from an interrogation conducted in a manner in conflict with art 8(2)(b) of the Constitution cannot be used in evidence against the accused.

There are at least two points worth noting about the Court's finding: first, the reason the Court advanced to exclude the evidence in question, namely, that its admission would be detrimental to the administration of justice. The Court does not explain how the admission of that evidence would be detrimental to the administration of justice, for example, that its admission would encourage the police to violate rights in their bid to obtain evidence.[21] The Court did not hold that the admission of that evidence would have rendered the accused's trial unfair. This is the case even though article 12(1)(f) of the Constitution provides that the accused has a right not to incriminate himself. The second point is that, although the facts of the case dealt with evidence obtained through human rights violations, the Court used an all-encompassing term: 'illegally'-obtained evidence. One has to recall that not all

18 As above.

19 As above.

20 As above. The same approach has also been adopted in South Africa. See *Matlou & Another v S* [2010] 4 All SA 244 (SCA) para 22. In *Mhlongo v S* [2015] ZAKZPHC 9 (30 January 2015), the Court held that '[i]t is important, having due regard to section 218(1), that the evidence will only be admissible if the accused submits to a pointing-out after having due knowledge of his rights' (para 9).

21 In South Africa, eg, in *S v Tandwa & Others* 2008 (1) SACR 613 (SCA) para 120, the Court explained why the admission of evidence would render the trial unfair or be detrimental to the administration of justice. The Court held that 'admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused's fair trial right at its core, and stains the administration of justice. It renders the accused's trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilised injunctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating it with barbarous and unacceptable conduct.' In *S v Mini & Others* [2015] ZAWCHC 49 (30 April 2015), the South African High Court, in excluding evidence obtained from the accused through assaults, held that 'this judgment will hopefully serve as a reminder to persons involved in investigating crime, whether from the public or private sector, that the courts will not tolerate the extraction of information by violence or threats of violence' (para 10).

evidence obtained through the violation of human rights is illegally-obtained evidence, and not all the evidence obtained illegally is obtained through violating human rights.[22] However, on the facts of this case, the evidence had been obtained illegally and in violation of a right in the Bill of Rights. It is, therefore, critical that a distinction between evidence obtained through human rights violations and that obtained illegally is kept in mind. The author will now deal with the test for excluding evidence obtained through the violation of human rights in Namibia.

2.2 Test(s) for excluding evidence obtained through the violation of human rights

As mentioned above, the Namibian Constitution does not provide for the criteria courts have to invoke to decide whether or not to exclude unconstitutionally-obtained evidence. Namibian courts have adopted the South African criteria regarding whether the admission of such evidence would render the trial unfair or be detrimental to the administration of justice. The issue whether a violation of any right in the Bill of Rights would vitiate the accused's trial was addressed by the Supreme Court in *S v Shikunga & Another*.[23] The Court held that the proper approach to dealing with evidence obtained irregularly is the following:[24]

> Even if it is assumed that the breach of every constitutional right has the same effect on a conviction which is attacked on appeal, it does not follow that in all cases that consequence should be to set aside the conviction. I am not persuaded that there is justification for setting aside on appeal all convictions following upon a constitutional irregularity committed by a trial court. It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims – the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where

22 See *Gumede v S* (800/2015) [2016] ZASCA 148 (30 September 2016), in which the South African Supreme Court of Appeal discusses the differences between illegally-obtained evidence and unconstitutionally-obtained evidence.

23 1997 NR 156 (SC).

24 *Shikunga* (n 23 above) 171-172. In this case, the Court held that sec 217(1)(b)(ii) of the Criminal Procedure Act was unconstitutional. This section provided that if a confession had been made before a magistrate or had been reduced in writing before a magistrate, there was a presumption that it had been made validly. If the accused wanted to challenge the validity of such a confession, he had the burden of proving that the confession had not been validly made. The Court held that the right to be presumed innocent places a duty on the prosecution to prove beyond reasonable doubt that a confession had been made validly.

> the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon.

In this case, the Supreme Court held that not every human rights violation annuls the proceedings. The judicial officer has to consider the seriousness of the violation. The more serious the violation, the more compelling the reason for excluding such evidence. In a subsequent decision, the High Court explained why the record of bail proceedings in which the accused had incriminated themselves without being informed of the right to remain silent was inadmissible at their trial. This is because it would have rendered the trial unfair. In *S v Malumo & 111 Others*[25] the Court held:[26]

> The failure to inform the accused persons of the privilege against self-incrimination (in terms of the provisions of s 203) or their right not to be compelled to give evidence against themselves (in terms of art 12(1)(f) of the Namibian Constitution) will in my view render this trial unfair since to allow it would expose the accused persons to cross-examination by the state on the contents of the record of the bail proceedings in circumstances where a fundamental right of the accused persons had been violated.

In another case, where the accused was not informed of the right to legal aid before making a statement to the police, the Court, in holding that the statement was inadmissible against the accused, held:[27]

> It is trite that the failure to inform an accused does not in all cases constitute an irregularity; and that this court has a discretion to exclude evidence obtained in violation of an accused's constitutional rights where its admission would render the trial unfair or otherwise detrimental to the administration of justice.

This decision raises four crucial points as far as the issue of admitting evidence obtained through human rights violations is concerned. First, for the test above to be invoked, an accused's constitutional right should have been violated in the process of gathering the evidence in question. This raises the question as to what happens to evidence obtained in violation of a right which is not specifically provided for in the Constitution (for example, the right to remain silent at the time of arrest and the right to consult with a lawyer before making a statement). These rights cannot properly be labelled constitutional rights simply because they are not provided for in the

25 (2) 2012 (1) NR 244 (HC).
26 *Malumo* (n 25 above) para 34.
27 *S v Haifiku* 2013 JDR 2105 (Nm) para 7 (references omitted).

Constitution. As the High Court held in *Gomes v Prosecutor-General of the Republic of Namibia & Others*,[28] 'the right to remain silent after arrest and during trial is nowhere specifically mentioned in art 12 [of the Constitution], but it undoubtedly is an important component of a fair trial'.[29] Second, the judgment appears to suggest that for the evidence to be excluded, it is the accused's constitutional right or rights that should have been violated. This raises the question as to whether evidence obtained as a result of violating the rights of another person may be admissible against the accused. Third, the Court held that it has 'a discretion' to exclude evidence obtained through violating the accused's constitutional right if its admission would render the trial unfair or otherwise be detrimental to the administration of justice. In other words, a court is not obliged to exclude evidence obtained through violating the accused's constitutional right, even if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. In countries, such as Kenya, South Africa and Zimbabwe, a court does not have such a discretion. The court must exclude evidence obtained through human rights violations if its admission would render the trial unfair or otherwise be detrimental to the administration of justice. However, the Court held that, on the facts of the case before it, '[t]he admission [of the statement] would render the trial of the accused unfair'.[30]

In the above judgments courts have excluded evidence obtained through human rights violations either because the admission of this evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. The seriousness of the violation is a factor that has to be considered in deciding whether or not to exclude such evidence.

In *S v Sankwasa*,[31] the Court had to decide whether to admit real evidence (diamonds) obtained from the accused at a time when he was not a suspect. After examining the circumstances in which the evidence had been obtained from the accused, the Court held: 'I am satisfied that the admission of the 12 unpolished diamonds in evidence … would not render the trial unfair and bring the administration of justice into disrepute.'[32] Here the Court sets a test different from that of the cases discussed above, to the effect that evidence obtained through human rights violations has to be excluded if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice. The Court in *S v Sankwasa*[33] appears to suggest that, for evidence obtained through violating a constitutional right to be inadmissible, it has to be

28 (A61/2012) [2013] NAHCMD 240 (9 August 2013).
29 *Gomes* (n 28 above) para 9.
30 *Haifiku* (n 27 above) para 17.
31 2013 JDR 1977 (Nm).
32 *Sankwasa* (n 31 above) para 42.
33 As above.

satisfied that the admission of such evidence would render the trial unfair *and* bring the administration of justice into disrepute. In other words, both of the two requirements must be met: The fairness of the trial must be affected and, in addition to that, the administration of justice must also be brought into disrepute. It is also important to note that the Court used the phrase to 'bring the administration of justice into disrepute' as opposed to 'detrimental to the administration of justice' which is used in the South African Constitution and the South African jurisprudence relied on by the Court. In the same case, the Court also dealt with the admissibility of a confession the accused made after having been assaulted by the police. In holding that the confession was inadmissible as it had not been made freely and voluntary, as required by section 217 of the Criminal Procedure Act, the Court held: [34]

> Article 12(1)(f) of the Constitution provides that … no court shall admit in evidence testimony which has been obtained in violation of article 8(2)(b). This court would thus be mandated to exclude evidence which had been obtained as a result of any assault or threat perpetrated in order to persuade the accused to give a statement.

It is beyond dispute that, in terms of article 12(1)(f), a statement made by an accused after an assault or threat of assault would be inadmissible against him for violating his right against self-incrimination. However, although all assaults would undoubtedly violate rights under article 8(2)(b), the same cannot be said of all threats. Therefore, in cases of cruel, inhuman or degrading treatment (such as threats that do not amount to violating rights under article 8(2)(b)), evidence would have to be excluded only on the basis of the first part of article 12(1)(f) of the Constitution. Another important point to note about the judgment is that the Court held that for a confession to be admissible, it is necessary that a proper inquiry be conducted to decide 'whether there was a causal connection between the assault complained of by the accused and his decision to confess'.[35] Implied in this ruling is the fact that, if there is no causal connection between the human rights violation and the discovery of evidence, the evidence would be admissible unless it has to be excluded on other grounds. The duty is on the accused 'to demonstrate a violation of any of his constitutional rights'.[36] The issue of specific rights and how courts have dealt with the evidence obtained through their violation will now be considered.

34 *Haifiku* (n 27 above) para 28.
35 Haifiku para 31.
36 *Sankwasa* (n 31 above) para 39.

2.3 Right to remain silent at the moment of arrest

Although the Constitution of Namibia provides for several rights of an arrested person,[37] it contains no provision that an arrested person has the rights to remain silent and to consult with a lawyer before making a statement to the police. The question that arises is whether evidence, for example a statement or an admission, obtained from an arrested person without informing him of the right to remain silent or to consult with a lawyer, is inadmissible. The High Court dealt with this question in the case of *S v Kapiya*.[38] According to a state witness, the accused had made an incriminating statement after having been informed by a police officer that he 'was not [to be] forced to answer any questions and that, if he gives a statement, it would be used in a court of law', and that he had 'a right to a legal representative of his own choice or, if he cannot afford it, he could apply for a state lawyer to be appointed'.[39] It is against this background that 'the accused indicated that he did not need a lawyer and that he would make a statement'.[40] He made the statement which was taken down by the police officer who 'read it back to him and he signed it'.[41] However, during the trial, the accused challenged the admissibility of the statement in question in that, amongst other grounds, he had not been informed of his right to remain silent and that his statement would be used in court.[42] The accused's lawyer argued that[43]

> [i]t is clear from the evidence that the right to remain silent was not made clear to the accused. She argued that the accused understood that he had a choice to make his statement either to [the police officer] or to court and that such an explanation did not include the right not to make a statement at all.

The Court observed that '[t]he question is whether the Court, on the evidence presented, is satisfied that the accused was informed of his

37 Art 11 provides: '(1) No persons shall be subject to arbitrary arrest or detention. (2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest. (3) All persons who are arrested and detained in custody shall be brought before the nearest magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a magistrate or other judicial officer. (4) Nothing contained in sub-article (3) hereof shall apply to illegal immigrants held in custody under any law dealing with illegal immigration: provided that such persons shall not be deported from Namibia unless deportation is authorised by a tribunal empowered by law to give such authority. (5) No persons who have been arrested and held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.'

38 2011 JDR 0776 (Nm).

39 *Kapiya* (n 38 above) para 5.

40 *Kapiya* para 5.

41 As above.

42 *Kapiya* para 8.

43 *Kapiya* para 10.

constitutional right in terms of article 12(1)(f) that he was not compelled to give evidence against himself'.[44] The Court held:[45]

> The accused, to his credit, candidly admitted that he understood her explanation in respect of his right to legal representation and exercised his right freely. He furthermore admitted that he understood that he did not have to give a statement to the investigating officer. The question, however, is whether it can be said that he understood that he also did not have to give testimony against himself in court. The above forms the basis of some of the concerns raised by the explanation given by [the police officer]. According to her, the accused was rude by not indicating that he understood her. This should have alerted her that perhaps the accused did not fully appreciate what she was explaining to him. The explanation which should have been given to the accused was simply that he has a right to remain silent. This would include the right not to say anything or give a written statement to the police, the right not to give an explanation in terms of section 115 and the right not to testify during trial. The explanation should be given in clear language and should not leave room for confusion. [The police officer's] explanation could be construed in the manner it was understood by the accused, ie that he has to give a statement, if not to her then to the court, which clearly was not a correct interpretation of article 12(1)(f).

Against this background, the judge held that he was 'not convinced that the accused was informed in clear and unambiguous terms of his right to remain silent'.[46] The judge added:[47]

> I entertain serious doubt whether [the police officer] gave the accused a proper explanation of his right to remain silent. An accused needs to be informed in clear terms what his right is so as to make an informed choice before it can be said that it was made freely and voluntarily.

This decision has at least three implications. First, it imposes a duty on police officers to inform an arrested person, in clear terms, of the right to remain silent. Second, it extends article 12(1)(f) of the Constitution to arrested persons before they appear in court as accused. This is the case even though article 12(1)(f) provides for one of the rights making up the right to a fair trial. The implication of this is that the accused's right to a fair trial does not begin at the time he appears in court. It begins at the time of arrest. This should be understood against the following background, as the Namibian High Court held in *S v Tomas*:[48]

> The right of an accused to remain silent has always been acknowledged by the courts; more so, since the advent of the Constitution through which a fair trial is guaranteed by article 12(1)(f) – a right that the courts have interpreted to also include the process of bringing an accused person to trial, ie during pre-trial proceedings.

44 *Kapiya* para 12.
45 *Kapiya* paras 13-14.
46 *Kapiya* para 15.
47 *Kapiya* para 16.
48 2012 JDR 1293 (Nm) para 45.

The third and, perhaps, debatable implication of the ruling is that a police officer has a duty to inform an arrested person that he has a right to remain silent not only at the police station, but also when he appears before a court and enters a plea of not guilty in terms of section 115 of the Criminal Procedure Act. For one to appreciate the far-reaching consequences of this holding, it is perhaps important to reproduce section 115 of the Criminal Procedure Act. This section provides:

> (1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.
>
> (2)(a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.
>
> (b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.
>
> (3) Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he confirms such reply or not.

The Court's ruling that a police officer has to inform an arrested person of the fact that he has a right to remain silent at his trial seems to ignore the fact that under section 115, the police have no role to play in putting questions to the accused. These questions have to be put to the accused by a judicial officer who is required to explain to the accused that he has a right to remain silent.[49] The ruling also ignores the fact that there are nine different pleas from which an accused may choose,[50] and that there is no guarantee that he will plead not guilty or that, if he pleads not guilty, he will be prosecuted

49 *S v Smith* 2002 (2) SACR 464(C) para 466; *Maqala v S* (A382/2014) [2015] ZAGPJHC 80 (14 May 2015) para 2.

50 Sec 106 of the Criminal Procedure Act provides: '(1) When an accused pleads to a charge he may plead (a) that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or (b) that he is not guilty; or (c) that he has already been convicted of the offence with which he is charged; or (d) that he has already been acquitted of the offence with which he is charged; or (e) that he has received a free pardon under section 327(6) from the State President for the offence charged; or (f) that the court has no jurisdiction to try the offence; or (g) that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or (h) that the prosecutor has no title to prosecute. (2) Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge. (3) An

at a summary trial. There is also no guarantee that the accused will be prosecuted. The decision whether or not to prosecute a person suspected of committing an offence lies with the prosecution and not the police.[51] Police officers, most of whom are not lawyers, should not be expected to understand the choices the accused has under section 115. The complex nature of this section is evidenced by the fact that there are many cases in which magistrates have misunderstood it.[52] In the author's opinion, the police should only be obliged to inform the arrested person that he has a right not to make a statement to the police. They should not, however, tell him that, if he does not make a statement at the police station, he would have to make one in court. When an accused appears in court and section 115 applies, the duty is on the presiding judicial officer to explain the section to the accused and his right to remain silent.[53] A police officer should not be expected to give legal advice to the accused.[54] Another point emerging from the above judgment (*S v Kapiya*) is that the Court does not explain why the statement in question should be inadmissible. Is this because of the fact that its admission would render the accused's trial unfair? This omission could be attributed to the fact that article 12(1)(f) does not state the purpose or purposes for which evidence obtained through human rights violations should be excluded. As mentioned earlier, the Constitutions of Kenya, South Africa and Zimbabwe expressly state the purposes for which evidence obtained through human rights violations should be excluded.

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accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given. (4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.'

51 See generally *Ex Parte: Attorney-General In Re: Constitutional Relationship Between Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS); *Kahorere & Others v Minister of Home Affairs & Others* (A292/2008) [2011] NAHC 44 (22 February 2011) para 16.

52 See, eg, *S v Tjipetekera* (CR 75/2012) [2012] NAHC 291 (11 September 2012); *S v Kau & Others* (SA 1/93) [1993] NASC 2; 1995 NR 1 (15 October 1993); *S v Gqagqa* (17/15, SH232/14) [2015] ZAGPPHC 585 (7 May 2015) para 13; *S v Ramokone* 1995 (1) SACR 634(O); *S v Masike* 1996 (2) SACR 245(T).

53 *S v Christiaan* (Case CR 53/08) [2008] NAHC 44 (27 May 2008) para 3; *State v Petrus* (Siboleks J) [2016] NAHCMD 93 (5 April 2016) para 3.

54 *S v Mngeni* 2013 (1) SACR 583 (WCC) para 114. The Court held: 'It is not expected of the police officer taking a confession or statement to offer an accused person any legal advice as to how best to exercise his or her rights. There is no duty on the police to provide any further assistance than what is required and set out in the Constitution, as long as the process is fair and the accused is not deliberately set up in such a manner that he or she would be forced against his or her will not to exercise his or her rights in terms of the Constitution.'

2.4 Type of evidence: Self-incrimination

Related to the above is the issue of the kind of evidence governed by article 12(1)(f) if it is not read in tandem with article 8(2)(b). As mentioned earlier, article 12(1)(f) states:

> No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons' testimony which has been obtained from such persons in violation of article 8(2)(b) hereof.

Article 21(1)(f) deals with the following issues in the context of criminal law:

(1) It protects the accused's right against self-incrimination.[55] However, it does not prevent the accused from making an incriminating statement, admission or confession as long as he or she has done so voluntarily.

(2) It provides that a person cannot be compelled to give evidence against his or her spouse. However, it does not mean that such spouse is not a competent witness for the prosecution. What it means is that such spouse is not a compellable witness for the prosecution.[56] It also means that a person is a compellable witness for his or her spouse. In light of the fact that Namibian law does not recognise same-sex relationships,[57] people in such relationships, for example, if they have contracted their marriage or have entered into a civil union outside Namibia, are not protected by article 12(1)(f). Thus, they will be compellable witnesses for the prosecution.

(3) Article 12(1)(f) is silent on the accused's right to remain silent at his trial, and the issue of whether a presiding judicial officer has a duty to explain to an accused who has not pleaded guilty that he has the right to remain silent is still contentious.[58] However, there is jurisprudence from Namibian courts to the effect that an accused has a right to remain silent at his trial. In *S v Tomas*,[59] the Court held:[60]

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55 See *Hendricks & Others v Attorney-General, Namibia & Others* 2002 NR 353 (HC) 354.

56 See *S v Du Preez* (CC 64/07) [2009] NAHC 70 (18 June 2009) para 13, where the accused's wife was a state witness in a case against the accused. In *Dladla v S* 2011 (1) SACR 80 (KZP) para 10, the Court held that '[a] witness is competent if he or she may lawfully give evidence. Generally, everyone is presumed to be a competent and compellable witness. A compellable witness is one who is competent and in addition can be forced to testify under the pain of punishment in terms of section 189 of the Act.'

57 See *Chairperson of the Immigration Selection Board v Frank & Another* (SA8/99, SA8/99) [2001] NASC 1 (5 March 2001).

58 See *S v Kasanga* (CA2/05, CA2/05) [2005] NAHC 46 (2 December 2005), discussing *S v Shikongo & Another* 1999 NR 375 (SC).

59 (CC 02/2012) [2012] NAHC 214 (30 July 2012).

60 Tomas (n 59 above) para 45.

> The right of an accused to remain silent has always been acknowledged by the courts; more so, since the advent of the Constitution through which a fair trial is guaranteed by article12(1)(f) – a right that the courts have interpreted to also include the process of bringing an accused person to trial, ie during pre-trial proceedings.

In *Gomes v Prosecutor-General of the Republic of Namibia & Others*,[61] the Court held that 'the right to remain silent after arrest and during trial is nowhere specifically mentioned in art 12, but undoubtedly it is an important component of a fair trial'.[62] In *S v Neidel and Others*,[63] the Court held that the accused had 'exercised their constitutional right to remain silent' by not testifying at the trial.[64] The Court added that '[t]he accused exercising their right to remain silent is not a warrant for the conclusion that they are guilty'.[65] Likewise, in *S v Gariseb and Another*,[66] the Court held that '[a]fter the state closed its case, the two accused persons exercised their constitutional rights to remain silent. They called no witnesses.'[67] The same approach was taken in *S v Shuudeni*.[68] In *S v Namweya*,[69] where there was compelling evidence that the accused had committed murder, the Court observed that the accused had not called witnesses and 'exercised his right to remain silent'.[70] The prosecution 'criticised the accused for having decided to remain silent in the face of the evidence led by the state establishing a *prima facie* case'.[71] The Court held that '[a]lthough the accused is not obliged to give evidence, I am of the view that this is not an appropriate case where the accused can safely opt to exercise his right to remain silent'.[72]

The accused's right to remain silent extends to sentencing proceedings.[73] In the above cases, and in many other High Court[74]

61 *Gomes* (n 28 above).
62 *Gomes* para 9.
63 (CC 21/2006) [2011] NAHC 232 (27 July 2011).
64 *Neidel* (n 63 above) para 14.
65 *Neidel* para 15.
66 (CC 16/2010) [2013] NAHCMD 25 (30 January 2013).
67 *Gariseb* (n 66 above) para 49.
68 (CC 09/2011) [2012] NAHC 183 (3 July 2012) 19. In *Shuudeni*, the Court held that '[t]he accused opted to exercise his constitutional right to remain silent'.
69 (CC 13/2013) [2013] NAHCMD 333 (14 November 2013).
70 *Namweya* (n 69 above) para 20.
71 *Namweya* para 23.
72 *Namweya* para 27.
73 *S v Kharigub* (CC 17/2010) [2012] NAHC 106 (8 March 2012) para 4, where the Court held that '[t]he accused opted to exercise his right to remain silent in mitigation'.
74 *S v Farmer* (CC 6/2010) [2013] NAHCMD 95 (11 April 2013) para 15; *S v Malumo & Others* (CC 32/2001) [2013] NAHCMD 33 (11 February 2013) para 29; *S v Stephanus & Others* (CA 68/2000) [2012] NAHC 75 (19 March 2012) para 14; *S v Karirao* (CC 18/2010) [2011] NAHC 152 (6 June 2011) para 12; *Eric v S* Case CA 56/2011 (6 February 2012) para 9; *S v Mwilima* (CC 67/07/2008) [2011] NAHC 246 (18 August 2011); *S v Erastus & Others* (CR 33/2011) [2011] NAHC 117 (13 April 2011) para 6; *S v Dausab* (CC 38/2009) [2010] NAHC 90 (20 September 2010) para 23; *S v Goagoseb & Another* (CC6/08) [2010] NAHC 37 (8 June 2010)

and Supreme Court[75] decisions, Namibian courts have expressly stated that an accused has the right to remain silent at his trial. In some cases, courts have referred to this right as a 'constitutional right', whereas in others this has not been the case. Whether the right to remain silent is a 'constitutional right', as some courts have held, is open to debate in light of the fact that the Constitution does not expressly provide for this right. However, in *S v Katari*,[76] where the accused chose not to testify in his defence and closed his case without rebutting the evidence led by the prosecution, the High Court held that the fact that the accused has rights to be presumed innocent and not to incriminate himself 'does not mean that an accused's election to remain silent in the face of incriminating evidence against him is without consequence in the overall assessment of the evidence by the court'.[77]

(4) The first part of the section does not use the word 'accused' and does not state that it is only applicable to criminal cases or to trials.[78] In fact, the words 'accused' or 'trial' are absent from the whole section. If it were to be advanced, an argument that section 12(1)(f) could, therefore, be extended to situations such as commissions of inquiry or disciplinary hearings should not be easily dismissed. Had the drafters of the Constitution wanted to restrict this to criminal cases, they would expressly have done so, as they did in article 12(1)(b), where the word 'accused' is used; article 12(1)(d), where it is very clear that it is applicable to criminal trials; article 12(1)(e), where the word 'trial' is used; and articles 12(2) and (3), which are only applicable to criminal cases. In *Gases & Others v The Social Security Commission & Others*,[79] the Court dealt with the question whether article 12(1)(e) was applicable to an insolvency inquiry which was conducted on the basis of section 417(2)(b) of the Companies Act.[80] This section compelled the person appearing before such an inquiry to answer incriminating questions notwithstanding the fact that the answers

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para 47; *S v Morkel* (CC 40/97) [1996] NAHC 43 (3 April 1996) (the Court observed that the accused had a fundamental right to remain silent); and *S v Kapolo* (CC 05/2012) [2013] NAHCNLD 28 (16 May 2013).

75 In *Auala v S* (SA 42/2008) [2010] NASC 3 (27 April 2010) para 5, the Supreme Court observed that 'at the trial the appellant exercised his right to remain silent and thus did not testify'.

76 2006 (1) NR 205 (HC).

77 *Katari* (n 76 above 210. The Court added that '[w]hen the state has established a *prima facie* case against an accused which remains uncontradicted, the court may, unless the accused's silence is reasonably explicable on other grounds, in appropriate circumstances conclude that the *prima facie* evidence has become conclusive of his or her guilt'.

78 In *S v Thambapilai* 2013 JDR 1415 (Nm) para 10: 'It must be expressly pointed out that article 12(1)(f) of the Constitution proved the protection against self-incrimination to an accused for not being compelled to give evidence against himself.'

79 2005 NR 325 (HC).

80 Act 61 of 1973.

given at the inquiry may be used against him as evidence at a subsequent criminal trial. Section 417(2)(b) was to the following effect:

(1) In any winding-up of a company unable to pay its debts, the Court may at any time after it has made a winding-up order summon before it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

(2)(a) The Court may examine any person summoned under ss (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(b) Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.

(3) The Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.

(4) If any person who has been duly summoned under ss (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the Court at the time appointed by the summons without lawful excuse made known to the Court at the time of its sitting and accepted by it, the Court may cause him to be apprehended and brought before it for examination.

The applicants argued that section 417(1)(b) was unconstitutional and submitted that the insolvency proceedings should be stayed pending the outcome of a constitutional challenge to section 417(1)(b). The Court held that the applicants' challenge regarding the constitutionality of section 417(1)(b) was likely to be successful.[81] However, the Court added:[82]

> But does this mean that the applicants are entitled to a stay of the s 417 proceedings? I am of the view that the bad part of s 417(2)(b) is clearly severable from the good part. The good part of the section is now accepted across the world, that in certain circumstances a person may be required (in insolvency investigations) to answer a question even though that answer may incriminate him. As in South Africa, and all over the world, the provision of art 12(1)(f) is not an absolute right. Requiring a person to answer, even in circumstances where he may incriminate himself

81 *Gases* (n 79 above) 333.
82 *Gases* 337.

> (in the circumstances of an insolvency enquiry), is rationally connected to a legitimate purpose. That is probably the test which any Namibian Court deciding the constitutionality of s 417 will apply. I am also of the view that the applicants do not have any reasonable prospects to declare the good part of s 417(2)(b) unconstitutional. It is a provision, acknowledged to be rationally connected to a legitimate purpose. I see no reason, let alone reasonable prospects, for any Namibian Court to hold otherwise.

The Court added that the inquiry would enable the liquidators to establish where the applicant had put the money that had been missing from the company.[83] It held further:[84]

> In any event, the provisions of the bad part of s 417(2)(b) are not peremptory. The word 'may' clearly indicates that a trial court may still reject the evidence, once the state endeavours to lead such evidence in any criminal trial. I do not suggest that the fact that the bad part of s 417(2)(b) vests the trial court with a discretion whether or not to allow such evidence will save the bad part from being declared unconstitutional, but it is a factor which I am entitled to take into consideration now.

The Court concluded that the applicants' insolvency inquiry under section 417 should proceed and 'if and when criminal proceedings are instituted against the applicants, the courts will probably come to their assistance (by not allowing such incriminating evidence or by declaring the bad part unconstitutional)'.[85]

Another important question arising in the context of the second part of article 12(1)(f) is whether the testimony obtained from another person, who is not the accused or the spouse of the accused, in violation of article 8(2)(b), is admissible against the accused. The second part of article 12(1)(f) appears to be limited to evidence obtained from the accused or from the accused's spouse. This issue will be dealt with later in the article.

Another issue to be noted about article 12(1)(f) is that it is limited to testimonial evidence only. In *S v Nassar*,[86] the High Court held that article 12(1)(f) 'refers only to testimonial evidence'.[87] In *S v Shipanga & Another*,[88] the Supreme Court held that article 12(1)(f) of the Constitution was 'peremptory in its terms' and that, in the context of article 12(1)(f), '[t]estimony includes a pointing-out done through an admission or a statement and therefore a pointing-out obtained in violation of art 8(2)(b) of the Constitution cannot be used in evidence against the accused'.[89]

83 As above.
84 As above.
85 *Gases* 339.
86 1994 NR 233 (HC).
87 *Nassar* (n 86 above) 259.
88 2015 (1) NR 141 (SC).
89 *Shipanga* (n 88 above) 155.

2.5 Right to legal representation

As in the case of the issue of the right to remain silent, the Namibian Constitution does not provide for the right of an arrested person to be informed of his right to consult with a lawyer before making a statement, confession or admission to a police officer. The issue of evidence obtained from an accused by the police without informing him of the right to consult with a lawyer arose in the case of *S v Gariseb*,[90] where the Court held:[91]

> All officers who took the confessions and admissions although they had explained the right to legal representation there is no indication that they had also explained that the accused persons had a right to apply for legal aid …The Constitution did not specifically provide for a right to legal aid. It provides for a fair trial in article 12 which includes the right to legal representation and the right for one not to incriminate himself or herself. The confessions and admissions were obtained in violation of article 12 of the Constitution because accused 1 was effectively compelled to incriminate himself due to the assaults he had endured. Again both accused were not properly informed of their rights to legal representation and the failure to explain the right to apply for legal aid rendered the confessions and admissions made by the accused inadmissible.

The Court also held that a confession or admission made by one of the accused as a result of an assault was inadmissible on the basis of article 12(1)(f) read with article 8(2)(b) of the Constitution. In *Haifiku*, the High Court held that, because of the relatively low level of the accused's education (having completed Grade 9) and his young age at the time of arrest (he was 18 years old), '[t]his evidence does not entitle this court to assume that he was aware of his rights'.[92] This implies that, if the accused is not informed of his right to remain silent and his right to consult a lawyer before making a statement, but there is evidence that he was aware of his rights, the evidence obtained from him may be admissible. However, in *S v Dausab*,[93] where the police officers did not inform the accused of his rights before he made statements as they assumed that he knew his rights since he had been arrested before and been informed of his rights, the Court, in holding that the statements were inadmissible, observed:[94]

> The three officers had a legal obligation to make sure that the rights were properly explained to the undefended accused in the language that he understands before he started telling them what happened regarding the allegations he is facing, which they conceded they didn't do. This shortcoming is fatal as it militates against the accused's constitutional right to a fair trial enshrined in art 12(1)(f) of the Constitution. The fact that at the time of the accused's arrest … he was already aware of his rights from his previous arrests cannot remedy the damage caused by such a failure.

90 2013 JDR 0083 (Nm).
91 *Gariseb* (n 90 above) para 48.
92 *Haifiku* (n 27 above) para 12.
93 2014 (3) NR 652 (HC).
94 *Dausab* (n 93 above) para 9.

In *S v Shipanga*,[95] the Supreme Court held that the general rule was that an accused has to be informed of his right to a lawyer before making a confession or pointing-out.[96] The Court added that whether or not the accused has decided to waive his right 'depends to a large extent on whether the accused has been informed of his or her constitutional entitlements in connection to the specific procedure (confession or pointing-out) and it is clear that he knowingly chose to proceed to make the confession or the pointing-out without his lawyer'.[97] The Court referred to the rights under article 12, and held that '[t]he only exceptional cases relating to the right to be informed regarding legal representation concern lawyers, the educated and those knowledgeable of the said right'.[98] The Court added:[99]

> Where the appellant voluntarily indicated his readiness to offer a confession and pointing-out, the police's obligation was to warn him again of his right to legal representation … and ensure that if he waived his right to legal representation, he knew and understood what he was doing. The latter is a question of fact and has to be established.

It has now become clear that, apart from the fact that the police have to inform the accused of the right to legal representation, they must also inform him of the right to apply for legal aid. However, in another decision, the High Court held that it is the indigent arrested person who should be informed on the right to legal aid.[100] The Court added that '[i]t is trite that a fair trial includes fair pre-trial procedure and it is important that the right to apply for legal aid should be explained to an unrepresented accused'.[101] In *S v De Jay*,[102] the accused had a private lawyer and before he made a confession, the magistrate did not inform him that he had a right to legal aid. In holding that the confession was admissible, the High Court held, *inter alia*:[103]

> It is very clear from the [evidence before court] that the accused had a lawyer and was aware of the purpose of having him. It follows therefore that his judgment on the choices to make regarding his legal representation was not affected by the magistrate's omission to explain the legal aid part of his rights to legal representation at the beginning of the confession proceedings.

The Court concluded that 'it was the accused's choice not to have his lawyer present at the confession proceedings'.[104] However, even in cases where an accused has a private lawyer, the police have a duty to

95 *Shipanga* (n 88 above).
96 *Shipanga* para 42.
97 *Shipanga* para 43.
98 *Shipanga* para 45.
99 *Shipanga* para 53.
100 *Haifiku* (n 27 above) para 15.
101 As above.
102 2013 JDR 1978 (Nm).
103 *De Jay* (n 102) above para 11.11.
104 *De Jay* para 11.13.

explain to him that he has the right to remain silent, to legal representation and to legal aid, and the accused has to understand this explanation.[105]

2.6 Evidence obtained through torture or cruel, inhuman, degrading treatment

Namibia is a state party to the United Nations (UN) Convention against Torture (CAT). Article 15 of the CAT provides:

> Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

In its Concluding Observations on Namibia's initial report, the Committee against Torture (CAT Committee) called upon Namibia to enact legislation which addresses 'the need procedurally to exclude all evidence obtained by the use of torture in criminal and all other proceedings, except in proceedings against the perpetrator of torture himself'.[106] Although article 15 of the CAT refers to 'statement', the practice of the CAT Committee reveals that state parties have an obligation to exclude any statement or statements,[107] confessions[108]

105 *De Jay* para 11.15.

106 Report of the Committee against Torture, General Assembly, Official Records, 52nd session, Supplement 44(A/52/44) (1997) para 241(e).

107 Concluding Observations of the Committee against Torture on the Fourth Periodic Report of Israel, CAT/C/ISR/CO/4, 23 June 2009 para 25; Concluding Observations of the Committee against Torture on the Third Periodic Report of Armenia, CAT/C/ARM/CO/3, 6 July 2012 para 16; Concluding Observations of the Committee against Torture on the Combined Fourth to Sixth Periodic Reports of Paraguay, CAT/C/PRY/CO/4-6, 14 December 2011 para 20; Concluding Observations of the Committee against Torture on the Fifth and Sixth Combined Periodic Report of Finland, CAT/C/FIN/CO/5-6, 29 June 2011 para 21; Concluding Observations of the Committee against Torture on the Second Periodic Report of Tajikistan, CAT/C/TJK/CO/2, 21 January 2013 para 13; Concluding Observations of the Committee against Torture on the Third Periodic Report of Senegal, CAT/C/SEN/CO/3, 17 January 2013 para 13.

118 Concluding Observations of the Committee against Torture on the Second Periodic Report of Yemen, CAT/C/YME/CO/2/Rev.1, 25 May 2010 para 28; Concluding Observations of the Committee against Torture on the Second Periodic Report of Jordan, CAT/C/JOR/CO/2, 25 May 2010 para 30; Concluding Observations of the Committee against Torture on the Second Periodic Report of Cambodia, CAT/C/KHM/CO/2, 20 January 2011 para 28; Concluding Observations of the Committee against Torture on the Initial Periodic Report of Djibouti, CAT/C/DJI/CO/1, 22 December 2011 para 20; Concluding Observations of the Committee against Torture on the Third Periodic Report of Armenia, CAT/C/ARM/CO/3, 6 July 2012 para 16; Concluding Observations of the Committee against Torture on the Second Periodic Report of the Philippines, CAT/C/PHL/CO/2, 29 May 2009 para 23; Concluding Observations of the Committee against Torture on the Initial Report of Ethiopia, CAT/C/ETH/CO/1, 20 January 2011 para 31; Concluding Observations of the Committee against Torture on the Second Periodic Report of the Republic of Moldova, CAT/C/MDA/CO/2, 29 March 2010 para 21; Concluding Observations of the Committee against Torture on the Fourth Periodic Report of Belarus, CAT/C/BLR/CO/2, 7 December 2011 para 18;

and 'evidence'[109] obtained as a result of torture. The Committee has also called upon state parties to exclude evidence obtained through cruel, inhuman and degrading treatment or punishment.[110] As mentioned earlier, article 8(2)(b) of the Constitution provides that '[n]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'. In *Ex parte Attorney-General, In Re: Corporal Punishment by Organs of State*,[111] in which the Namibian Supreme Court held that corporal punishment by organs of state was unconstitutional for violating article 8(2)(b) of the Constitution, the Court added that the words in article 8(2)(b) have to be read disjunctively and, as a result, article 8 protects the citizen from seven different conditions: torture; cruel treatment; cruel punishment; inhuman treatment; inhuman punishment; degrading treatment; and degrading punishment.[112] The Court further held:[113]

> The state's obligation is absolute and unqualified. All that is therefore required to establish a violation of article 8 is a finding that the particular statute or practice authorised or regulated by a state organ falls within one or other of the seven permutations of article 8(2)(b).

As mentioned earlier, article 12(1)(f) obliges courts to exclude evidence obtained through violating any right provided for under article 8(2)(b) of the Constitution. Namibian courts have held that evidence obtained through torture, whether of the accused or a third

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Concluding Observations of the Committee against Torture on the Initial Report of Mauritania, CAT/C/MRT/CO/1, 18 June 2013 para 8(c); Concluding Observations of the Committee against Torture on the Third Periodic Report of Senegal, CAT/C/SEN/CO/3, 17 January 2013 para 13; Concluding Observations of the Committee against Torture on the Fifth Periodic Report of the Russian Federation, CAT/C/RUS/CO/5, 11 December 2012 para 10; Concluding Observations of the Committee against Torture on the Combined Fifth and Sixth Periodic Reports of Mexico, CAT/C/MEX/CO/5-6, 11 December 2012 para 15(a).

109 Concluding Observations of the Committee against Torture on the Second Periodic Report of Lithuania, CAT/C/LTU/CO/2, 19 January 2009 para 18; Concluding Observations of the Committee against Torture on the Second Periodic Report of Cambodia, CAT/C/KHM/CO/2, 20 January 2011 para 28; Concluding Observations of the Committee against Torture on the Combined Third and Fourth Periodic Report of Sri Lanka, CAT/C/LAK/CO/3-4, 8 December 2011 para 11; Concluding Observations of the Committee against Torture on the Initial Report of Ethiopia, CAT/C/ETH/CO/1, 20 January 2011 para 31; Concluding Observations of the Committee against Torture on the Combined Fourth to Sixth Periodic Reports of Paraguay, CAT/C/PRY/CO/4-6, 14 December 2011 para 20; Concluding Observations of the Committee against Torture on the Initial Report of Turkmenistan, CAT/C/TKM/CO/1, 15 June 2011 para 20.

110 For a recent discussion of this jurisprudence, see JD Mujuzi 'Evidence obtained through violating the rights to freedom from torture and other cruel, inhuman, inhuman or degrading treatment in South Africa' (2015) 15 *African Human Rights Law Journal* 89.

111 (SA 14/90) [1991] NASC 2; 1991 (3) SA 76 (NmSc) (5 April 1991). The Court held that corporal punishment by organs of state on adult and juvenile offenders and in schools was inhuman and degrading punishment within the meaning of art 8(2)(b) of the Constitution.

112 *Corporal Punishment by Organs of State* (n 111 above) 18.

113 *Corporal Punishment by Organs of State* 19. See also *Engelbrecht v Minister of Prisons and Correctional Services* 2000 NR 230 (HC) 232.

party, is inadmissible.[114] In *S v Malumo and Others*,[115] the Court referred to the witnesses' evidence, which indicated that they had been assaulted, and held that that evidence was inadmissible.[116] The Court concluded:[117]

> I have discussed the issue of torture and degrading and humiliating treatment of witnesses … and must mention at this stage that had the state presented the evidence of this witness as the only evidence against the accused person I would have disallowed such evidence and would have released the accused.

Evidence will be excluded whether the torture was physical or mental (psychological).[118] Although the Court does not expressly refer to article 15 of the CAT, its conclusion appears to have been influenced by that treaty.[119] Apart from evidence obtained through torture, the Supreme Court has also held that evidence obtained through cruel, inhuman and degrading treatment is inadmissible. In *Shipanga*,[120] the Supreme Court referred to article 12(1)(f) of the Constitution and held:[121]

> That article provides that a court shall not admit in evidence testimony that has been obtained in violation of article 8(2)(b) of the Constitution. Testimony includes a pointing-out done through an admission or a statement and therefore a pointing out obtained in violation of article 8(2)(b) of the Constitution cannot be used in evidence against the accused.

The Court added that 'article 8(2)(b) prohibits torture cruel, inhuman or degrading treatment or punishment. The second appellant was not subjected to any of the prohibitions contained in article 8(2)(b) of the Constitution.'[122] As illustrated earlier, in *Minnies*,[123] the Court held that a pointing-out discovered as a result of a confession that had been extracted from the accused through torture is inadmissible notwithstanding the fact that section 218(2) of the Criminal Procedure Act allows a court to admit a pointing-out obtained as a result of an inadmissible confession. What emerges from this jurisprudence is that in Namibia, evidence obtained through torture

114 (CC 32/2001) [2013] NAHCMD 33 (11 February 2013) paras 46-49 (adopting the reasoning of the Supreme Court of Zimbabwe).

115 As above. For the High Court judgment, see *S v Malumo* (CC 32/2001) [2010] NAHC 20 (1 March 2010). See also *S v Malumo & Others* (CC 32/2001) [2011] NAHC 318 (24 October 2011) (the trial-within-a trial to challenge the admissibility of a pointing-out obtained through torture); *S v Malumo & Others* (CC 32/2001) [2011] NAHC 220 (19 July 2011) (the trial-within-a trial to determine the admissibility of a statement allegedly obtained through torture).

116 *Malumo* (n 114 above) para 220.

117 *Malumo* para 221. See also para 419.

118 *Malumo* paras 396-397.

119 *Malumo* paras 46-47 & 551.

120 *Shipanga* (n 89 above).

121 *Shipanga* para 55.

122 *Shipanga* para 56. See also *S v Kukame* 2007 (2) NR 815 (HC) paras 4-5; *S v Van den Berg* 1995 NR 23 (HC) 38.

123 *Minnies* (n 14 above).

or cruel, inhuman or degrading treatment will always be inadmissible. The Supreme Court of Zimbabwe has adopted the same approach.[124] However, the European Court of Human Rights has not been as assertive as the courts in Namibia and Zimbabwe on the question of evidence obtained through cruel, inhuman or degrading treatment.[125]

2.7 Exclusion not limited to rights mentioned in article 12 of the Constitution and evidence obtained by private individuals

In Namibia, the right to a fair trial does not consist of only those rights enumerated in article 12. The Supreme Court held in *Attorney-General of Namibia v Minister of Justice & Others*:[126]

> It appears to me that the essential content of art 12 is the right to a fair trial in the determination of all persons' 'civil rights and obligations or any criminal charges against them' and that the rest of the subarticles, which only relates to criminal trials, expounds on the minimum procedural and substantive requirements for hearings of that nature to be fair. A closer reading of art 12 in its entirety makes it clear that its substratum is the right to a fair trial. The list of specific rights embodied in art 12(1)(b)-(f) does not, in my view, purport to be exhaustive of the requirements of the fair criminal hearing and as such it may be expanded upon by the courts in their important task to give substance to the overarching right to a fair trial.

The above reasoning shows that Namibian courts will persist in extending the ambit of the right to a fair trial. In fact, courts have started expanding this ambit.[127] The case of *Sankwasa*[128] raises three important issues in relation to evidence obtained through human

124 *Mukoko v Attorney-General* [2012] JOL 29664 (ZS).

125 *Jallow v Germany* Application 54810/00 (11 July 2006).

126 2013 (3) NR 806 (SC) para 17.

127 In *Shonena v The State* (CA 02/2016) [2016] NAHCNLD 67 (8 August 2016) para 7, the Court held that '[t]he Namibian Constitution provides for a fair trial in article 1. In my view it entails that, amongst others, any accused should also be able and for that matter should be put in a position to follow what is happening in a trial.' In *S v Sheehama* (CR 48/2010) [2010] NAHC 101 (24 September 2010) para 7, the Court stated: 'I will now look at the list of some of the rights that need to be explained to an undefended accused at various stages of the criminal trial: the right to apply for bail; the right to legal representation; the right to the disclosure of docket (witness's statements); the right of the accused in terms of section 112(l)(b) after pleading guilty; the right of the accused at the close of the state's case: such as the right to testify, to call witnesses, to be cross-examined, and to remain silent (as well as the consequences of the last option); the right of the accused in terms of section 115 after he has tendered a plea of not guilty; the right to address Court before judgment; the right to address Court in mitigation of sentence and to reply to the state's submissions in aggravation of sentence; the right of the accused to review and appeal; the right of the accused to seek the state's assistance to bring his witnesses to court; the right of the accused to react to the prosecutor's request for a postponement; the right to be informed of the reasons why he is convicted or acquitted (reasons for judgment) and reasons for the sentence imposed on him.' The Court added that '[t]he above list is not exhaustive, the reason being that law is a developing phenomenon. More rights could still gradually find their way into our justice system' (para 8).

128 *Sankwasa* (n 31 above).

rights violations, namely, (i) whether a person who is not a crime suspect is protected by article 12 of the Constitution; (ii) whether security officers of a private company have a duty to inform a suspect of his constitutional rights; and (iii) the stage at which a suspect should be informed of his rights. In this case, during a routine daily and non-discriminatory X-ray examination of all employees leaving company premises, some foreign objects were detected on the accused's body by security officers of a diamond company for which the accused worked. With regard to the first question, the Court held:[129]

> The principle that a suspect must be informed of his constitutional rights is law, but the point at which point the duty to do so (ie to inform a suspect of his rights) is a factual question. I am of the view that if there is no questioning or request for a suspect to make any statement or pointing-out, then there is no duty on the police officer to inform the suspect of his right to remain silent, the right to consult a legal practitioner or his or the right not [to] incriminate himself.

This holding contradicts an earlier High Court decision to the effect that, even if an accused volunteers to make a statement to the police, the police should inform him of his rights, otherwise the statement will be inadmissible in evidence against the accused.[130] This means that there are two conflicting High Court decisions on this issue. With regard to the second question raised above, the Court held:[131]

> It is clear that in this matter the discovery about the presence of the foreign object was made at the time when the appellant was not a suspect and when there was no duty on the security officers to inform the appellant of his constitutional rights, the appellant was not asked to make any statement nor was any statement which is inculpatory of him taken from him, he was also not asked to make any pointing out. I am therefore of the view that there was no duty on [the police officer] in those circumstances to inform the appellant of his constitutional rights under article 12. I am consequently of the view that the police officer did not infringe any of the appellant's constitutional rights guaranteed in article 12 of the Namibian Constitution.

The above holding, therefore, makes it clear that a police officer does not have a duty to inform a non-suspect of the rights under article 12 of the Constitution. In the Court's opinion, these rights only become applicable once the person has become a suspect. The Court gives a detailed explanation of who a suspect is.[132] With regard to the third question raised above, the Court held:[133]

> It is clear that the information which [the police officer] received as to the location of the 'foreign object' on the appellant was obtained while the appellant was a non-suspect and when there was no duty on the Namdeb

129 *Sankwasa* para 35.
130 *De Jay* (n 103 above).
131 *De Jay* para 36.
132 *De Jay* paras 28-30. See also *S v Oroseb* (CR 02/2012) [2012] NAHC 3 (20 January 2012).
133 *De Jay* para 42.

> [Namdeb Diamond Corporation (Pty) Ltd] security officers to inform him of his constitutional rights, he was not questioned or asked to make any statement or give any self-incriminating information.

Implied in this judgment is the fact that security officers of private companies have a duty to inform suspects of their constitutional rights, otherwise evidence obtained by such security officers from those suspects will be inadmissible. However, like police officers, such security officers do not have a duty to inform non-suspects of the rights under article 12 of the Constitution. This is because of the fact that this constitutional provision is not applicable to non-suspects.

The issue of whether or not suspects are protected by the pre-trial rights provision of the South African Constitution, which only refers to the rights of arrested persons, is far from clear. There are three different approaches taken by South African courts: first, that suspects are protected by this provision;[134] second, that this the provision is only applicable to arrested persons;[135] and third, that the Supreme Court of Appeal has not found it necessary to express a view on which of the above two approaches is correct.[136]

3 Conclusion and recommendations

The above discussion has illustrated how courts in Namibia have dealt with evidence obtained through the violation of human rights. It is argued that there is a need to amend the Bill of Rights in the Namibian Constitution to expressly provide for the rights of suspects, arrested persons, detained persons and accused persons. The discussion shows that, because the Constitution does not provide for the rights of these groups, courts are relying on common law and jurisprudence from other countries to expand the rights in the Bill of Rights. The result is that there have been cases where courts have handed down conflicting jurisprudence on the applicability of a given right. In amending the Bill of Rights, reference could be made to the jurisprudence developed by courts – hence not indirectly rendering these judgments useless. Reference could also be made to the Bills of Rights of other countries in Africa, such as Kenya,[137] South Africa[138] and Zimbabwe,[139] the constitutions of which provide for the rights of arrested, detained and accused persons. By specifically providing for the rights of suspects in the Constitution, Namibian courts will not have to grapple with the question of whether the Bill of Rights is only applicable to suspects. It is submitted that there is a need to amend article 12(1)(f) so that it is formulated like the relevant Kenyan,

134 *S v Orrie & Another* 2005 (1) SACR 63 (C).
135 *Khan v S* 2010 (2) SACR 476 (KZP).
136 *Lachman v S* 2010 (2) SACR 52 (SCA) para 38.
137 Art 49.
138 Secs 35(1) & (2).
139 Sec 50.

Zimbabwean or South African constitutional provisions dealing with evidence obtained through human rights violations. This is so because of at least three considerations, namely, (i) that any relevant right in the Bill of Rights would be expressly included in the equation; (ii) that it would still in certain circumstances be possible to compel spouses to give evidence against one another; and (iii) that courts will have the discretion to exclude evidence on at least one of the two grounds: the fairness of the trial or the administration of justice. The jurisprudence of Namibian courts shows that, in deciding whether or not to admit evidence obtained through human rights violations, the issues of whether or not the admission of evidence would render the accused's trial unfair or would be detrimental to the administration of justice have been considered. This is the case although the Constitution does not authorise the courts to do so. The absence of such a provision has had three results: (i) that some courts have excluded evidence obtained through human rights violations without explaining whether the exclusion of that evidence has been motivated by the need to protect the accused's right to a fair trial or to ensure that the administration of justice would not be put into disrepute; (ii) that some courts have invoked the test of fairness of the trial or detriment to the administration of justice; and (iii) that other courts have invoked one test – the impact the evidence would have on the fairness of the accused's trial.

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Child justice administration in the Nigerian Child Rights Act: Lessons from South Africa

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Summary

Child justice administration is critical in any legal system. This is due to a general recognition of the vulnerability of children. As such, they must be treated with much care and should be distinguished from adults in the handling of their legal matters. Thus, special legal regimes are put in place to protect the rights of this special class of persons. In Nigeria, the Children and Young Persons Act, together with other related criminal laws, used to be the main statute on child justice administration. However, their inadequacies, the fact that they were unco-ordinated and that large numbers of children technically fell outside their scope, in 2003 led to the enactment of the Nigerian Child Rights Act. The goal of the Child Rights Act was to remedy some of the former injustices against children who are either in conflict with the law or in need of care and protection. The article argues that even this new law does not provide adequate protection for the rights of children as they are still being tried in conventional court environments by the same judges that handle adult criminal cases. The article, therefore, critically examines child justice administration under the regimes of the Child Rights Act, the Children and Young Persons Act and other relevant laws. It argues that, in spite of the lofty provisions of the Child Rights Act, more needs to be done for the protection of the rights of the child. As such, one can gain vital insights from the South African child justice administration regime which, for example, has separate civil and criminal jurisdictions for civil and criminal cases involving children.

Key words: *Children's rights; child justice administration; delinquency; young person; Nigeria; South Africa*

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1 Introduction

In Nigeria and South Africa the concept of child justice administration is not clearly defined in provisions relating to children. According to provisions of the Nigerian Child Rights Act (CRA),[1] the South African Children's Act[2] and the South African Child Justice Act,[3] child justice administration may be understood as the process of justice administration of children who are either in 'conflict with the law, beyond parental control or in need of care and protection'.[4]

Bamgbose, cited by Alemika and Chukwuma, holds that the child justice administration regime is based on the philosophy of reformation and rehabilitation of child offenders and children in need of care and protection as these children are immature and should not be treated as adult offenders.[5] Thus, child offenders are considered to be in need of protection and proper guidance.[6] The Children and Young Persons Act (CYPA)[7] was the first and main legislation on the 'protection of children and young persons'[8] in Nigeria. Apart from the CYPA, other complementary statutes applicable to child justice administration in Nigeria include the Criminal Procedure Act,[9] the Criminal Procedure Code,[10] the Penal Code,[11] the Criminal Code[12] and the Sharī'a Penal Code.[13]

Despite the enactment of the CYPA and other associated laws that made provision for the welfare and treatment of children[14] to become

1 The combined effects of secs 50 & 204 of the CRA, 2003.
2 Sec 42(8)(c) of the South African's Children's Act 38 of 2008 (as amended).
3 Long title to the South African's Child Justice Act 78 of 2005 (as amended).
4 It should be noted that children in conflict with the law are different from children in need of care and protection or children that are beyond parental control, as the former relates to children that are 'alleged to have committed an act which would constitute a criminal offence if they were adults'. In Nigeria, children in need of care and protection are interchangeable as children that are beyond parental control. These are children who are adjudged not to have commited any act which would constitute a criminal offence, but status/minor offences such as truancy, or 'street children or children that are exposed to danger'.
5 EEO Alemika & IC Chukwuma *Juvenile justice administration in Nigeria: Philosophy and practice* (2001) 10; O Bamgbose 'An exposition of the laws of crime and health implications in cases of child abuse in Nigeria' (1998) 7 *Nigerian Journal of Health Education* 112.
6 As above.
7 See the Children and Young Persons Act Cap 32, Laws of the Federation of Nigeria and Lagos, 1958 http://www.cleen.org/Juvenile%20Justice%20Repert (accessed 20 January 2010).
8 See the Nigerian Children and Young Persons Ordinance Cap 32 of 1958; as above.
9 See the Criminal Procedure Act Cap C41, Laws of the Federation of Nigeria, 2004.
10 See the Criminal Procedure Code Cap C46.
11 See the Penal Code Act, 1960.
12 See the Criminal Code Act, 1965.
13 Zamfara State Court Law, 1999 and 2000. Zamfara State Criminal Procedure Code Law 2000 No 1 vol 4, http://www.dare.ubvu.vu.nl (accessed 15 March 2012).
14 See the long title to the Children and Young Persons Act (n 7 above).

law-abiding citizens in Nigeria, there was still an upsurge in the number of children involved in crime and those beyond parental control or in need of care and protection. As of 2013, these children occupied more than half of the capacity of custodial institutions,[15] for offences ranging from property offences at 30,72 per cent; offences against the person; offences against the state; moral offences; and victimless offences.[16] Also, the system of child justice contends with challenges as child offenders or children in need of care and protection are remanded in 'squalid prisons and [being] deprived of salutary impact of reformative and rehabilitative custodial environment'.[17] Furthermore, child offenders or children in need of care and protection are also being tried within the conventional court environment by the same magistrates that handle criminal cases involving adults.

The article argues that the above problems expose children to the potential danger of associating with hardened criminals. It further argues that these problems are against the spirit behind the administration of child justice which protects the rights of child offenders from mingling with adult offenders. Similarly, a recent study has shown[18] that existing laws on the child justice system have not adequately protected children who have been adjudged to have committed minor offences, such as being beyond parental control, as they were committal to custodial institutions, contrary to the international standard which allows institutionalisation as a measure of last resort[19] and encourages the use of diversionary measures.[20]

Based on the foregoing, in 2003 the Nigerian National Assembly passed a new law, titled the Child Rights Act,[21] which is expected to replace existing legislation on the administration of child justice.[22] The objective of the CRA is to remedy the inadequacies in the CYPA and other associated laws.[23] Thus, it has been argued that the CRA

15 Custodial institutions referred to in this article are the Remand homes; the government approved schools; the rehabilitation/reformatory centres; and the Borstal institutions.

16 See Operational Research Report on Challenges of Borstal Institutions, Remand Homes, Reformatories and Approved Schools in Nigeria, submitted to the Federal Department of Social Welfare, Federal Ministry of Women Affairs and Social Development, Abuja, Nigeria, by Alamveabee E Idyotough, June 2013.

17 Alemika & Chukwuma (n 5 above).

18 Study conducted by Y Akinseye-George 'Juvenile justice system in Nigeria', Centre for Socio-Legal Studies, Abuja, 2010. See also B Owasanoye & M Wernham *Street children and juvenile justice system in Lagos State of Nigeria* (2004).

19 See Rules 13 and 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) GA Res 40/33, annex, 40 UN GAOR Supp (No 53) UN Doc A/40/53 (1985) http://www.iprt.ie (accessed 19 April 2012).

20 See Commentary to Rule 5 of the Beijing Rules. Proportionality of the reaction by law and from the society includes social status; the family situation; the gravity of the harm caused by the offence; and any other factors affecting personal circumstances.

21 Child Rights Act, 2003, Cap C50, Laws of the Federation of Nigeria, 2004.

22 Child Rights Act (n 21 above).

seems to harmonise several existing laws regulating child justice administration in Nigeria. The Act particularly seems to take cognisance of the welfare and treatment of young persons. Surprisingly, however, the enactment of the CRA does not seem to have solved the problems discussed above. Further, the CRA has not been seen to repeal other existing legislation on the administration of child justice in Nigeria, particularly the CYPA. Some states in the country are still making use of the CYPA, the Criminal Code and the Penal Code in dealing with issues of child justice administration.[24]

In light of the above, the article adopts a multi-disciplinary approach to examine the provisions of the CRA regarding matters of child justice. In doing so, the article examines how the administration of child justice has evolved 55 years after independence. It also analyses the challenges in the treatment of children after the enactment of the CRA in 2003, and draws some vital insights from the South African child justice administration regime for the purpose of enhancing the rights of child offenders and children that are beyond parental control or in need of care and protection in Nigeria.

2 Conceptualising a child under the Nigerian child justice administration laws and international instruments

From the outset, it is important to note that a child under international, regional and national laws is defined in terms of age.[25] However, the domestic laws of countries have laid down a different minimum age below which a person is exempt from prosecution and punishment.[26] The definition of a child is, therefore, made 'dependent on each respective legal system in order to accommodate the different economic, social, political, cultural and legal systems of the respective state'.[27]

The term 'child' has also been defined in various international and regional instruments. The United Nations (UN) Standard Minimum

23 'In order to give effect to the country's obligations under many international laws governing the administration of juvenile justice, states parties are required to pass specific laws and regulations at the national level' and, in 1993, 'A draft Child Rights Bill aimed at principally enacting into law in Nigeria the principles enshrined in the Convention on the Rights of the Child was drafted.' 'It is only after about ten years of heated debates by the parliamentarians that the Bill was eventually passed into law by the Nigeria National Assembly in July 2003' as Child Rights Act, Cap C50, Laws of the Federal Republic of Nigeria, 2004, http://www.nigeriarights.gov.ng/files/download/40 (accessed 10 December 2010).

24 Sokoto, Zamfara, Kebbi, Katsina, Kano, Kaduna, Yobe, Borno, Bauchi, Gombe, Niger, Adamawa and Enugu are the states that are yet to domesticate the CRA, http://www.nou.edu.ng (accessed 18 November 2012). See also http://www.unicef.org/wcaro/WCARONigeriaFactsheetsCRA.pdf (accessed 18 January 2013).

25 See the Consortium for Street Children, http://www.streetchildren.or.uk (accessed 5 March 2013).

Rules for the Administration of Juvenile Justice (Beijing Rules),[28] for example, define a 'juvenile' as 'a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult'.[29] Similarly, article 1 of the United Nations Convention on the Rights of the Child (CRC)[30] defines a child as 'any person under the age of 18 years unless, under the law applicable to the child, majority is attained earlier'. In Article 2 of the African Charter on the Rights and Welfare of the Child (African Children's Charter), a child is defined more concisely as 'every human being below the age of eighteen years'. [31]

The Nigerian Constitution does not define a child, but in other legislation, individuals are classified into four categories: infants, children, young persons and adults.[32] Similarly, Nigerian laws distinguish between adult offenders and children who are in conflict with the law or children who are in need of care and protection with respect to criminal responsibility.[33] The difference in age of criminal liability can be distilled from Nigerian legislation. For instance, section 50 of the Penal Code[34] and section 30 of the Criminal Code,[35] respectively, define a child on the basis of criminal responsibility, that a child younger than seven years is considered not to be criminally liable and presumed to be *doli incapax* (incapable of committing an offence).

Similarly, 'a male child under the age of twelve years is presumed to be incapable of having carnal knowledge', and[36]

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26 Eg, the official minimum age of criminal responsibility in countries such as Australia, Bangladesh, Egypt, The Gambia, Ghana, India, Nigeria, Sudan, South Africa, Iraq, Kenya, the United Kingdom, Scotland, Turkey, Canada, Colombia, Sweden, Burundi, Gabon, Netherland, Saudi Arabia, New Zealand and a host of others ranges from eight years to 18 years. See UNICEF and Melchiorre 2002 in 'Juvenile justice: Modern concepts of working with children in conflict with the law' Save the Children UK, http://www.crin.org/docs/savejjmodern_concepts.pdf-similar (accessed 20 December 2013).

27 See Rule 2.2(a) Beijing Rules (n 19 above) http://www.un.org/documents/ga/res/40/a/40r033.htm (accessed 20 June 2012.)

28 As above.

29 Under the standard of the UN, the age limit will depend on the particularities of the different legal systems. There is, therefore, provision for a wide range of minimum ages under this definition, ranging from seven to 18 years. See Beijing Rules (n 19 above) 207. However, the CRC Committee has approved 12 years as the minimum age for criminal responsibility. See South African Press Report dated 22 February 2016.

30 Art 1 CRC, http://www.nwu.ac.za (accessed 20 August 2013).

31 African Charter on the Rights and Welfare of the Child, 1990.

32 See sec 2 of the Children and Young Persons Act, 1958.

33 This distinction is made in order to determine the age when a person can be held liable for crimes committed.

34 Nigeria operated a dual penal legal system in which the Penal Code is applicable to the northern part of Nigeria.

35 The Criminal Code is applicable in the southern part of Nigeria.

36 See sec 2 of the Criminal Procedure Act. See also TA Aguda & I Okagbue *Principles of criminal liability in Nigerian law (*1990) 323-329; Y Osinbajo & AU Kalu *Law development and administration in Nigeria* (1990) 168-169.

> a child between the age of seven to twelve years will not normally be held responsible for his/her actions unless it can be proved that at the time of committing the offence, he/she had the capacity to know that he/she ought not to do it.

However, under Shari'a (Islamic) law, the age of criminal responsibility is determined either by puberty or if the person has attained the age of 18 years, except in the case of Zina (fornication or adultery), where the age of criminal responsibility is 15 years.[37] Instructively, the CYPA defines a juvenile as 'a young person who falls between 14 and 17 years of age'.[38]

It is, however, important to note that the issue of age in the determination of either his or her criminal responsibility, or whether he or she is in need of care and protection has been settled under the CRA.[39] This is pursuant to section 277 of the CRA, which defines 'a child as a person under the age of eighteen years'.[40] Thus, the discrepancies in 'age of criminal responsibility' under the Nigerian Criminal Code, Penal Code, Criminal Procedure Code, Criminal Procedure Act and the CYPA have been harmonised. Without a doubt, the CRA's regime introduced a uniform age so as to bring about consistency in the conceptualisation of a child and child justice administration in Nigeria, though without adopting a minimum age at which a child can be prosecuted for an offence as provided for under the South African child justice regime. For instance, according to section 7 of the South African Child Justice Act, a child below the age of 10 years is not criminally responsible and cannot be prosecuted,[41] but must be dealt with in accordance with section 9 of the Act, while a child above 10 years but under 14 years of age can only be prosecuted for an offence if proved by the state and in accordance with section 11 of the Act.[42]

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37 See Shari'a Penal Code Law of Zamfara State 2000 and Shari'a Courts Law of 1999 (Zamfara 1-1999). See also IA Nyazee *Islamic jurisprudence* (2000) 111.

38 See sec 2 of the Children and Young Persons Law Cap C 10 Laws of Federation and Lagos State, 1958. It was initially Ordinances 44 of 1945; 27 of 1947; 16 of 1950 as well as the Laws of Nigeria 131 of 1954; 47 of 1955 and Order in Council 22 of 1946. The law was extended to the 'eastern and western regions of Nigeria in 1946 by Order-in-Council 22 of 1946. The law was enacted for the northern region in 1958 and constituted the Children and Young Persons Law, Cap 21 of the Laws of Northern Nigeria 1963, http://www.afrimap.org (accessed 14 June 2013).

39 Interestingly, the Child Rights Act, 2003 draws its basis from the Constitution of the Federal Republic of Nigeria (as prescribed in ch four); the UN Convention on the Rights of the Child, 1989 (ratification by the government of Nigeria on 16 April 1991); the Beijing Rules (n 19 above); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990; and the UN Guidelines for the Prevention of Juvenile Delinquency, 1990 (Riyadh Guidelines) http://www.ncpcr.gov.in (accessed 20 April 2013).

40 B Owasanoye & M Wernham 'Membership in Lagos, Nigeria: Challenge and resilience' (2011) *Journal of Adolescent Research* 210.

41 The South African cabinet met on 17 February 2016 and approved the report on upward review of the minimum age for criminal responsibility to 12 years with some special protection measures in place for 13 and 14 year-old children. See South African Press Report dated 22 February 2016.

However, it is submitted that there is no basis for such delimitation as the Nigerian Constitution, being the primary law of the land, has not made any provision which limits or delimits the age of childhood. It may be argued that the approach of the CRA is derived from other legislative approaches and international conventions. As is the case with the Nigerian Marriage Act[43] and the Nigerian Electoral Act,[44] an adult is defined as 'a person above the age of 18 years'. Thus, it can be argued that any person below 18 years is a child in Nigeria. The CRA defines a child in the same way as the South African Constitution[45] and the South African Children's Act.[46] In addition, the applicability of the CRA depends on its domestication by states in Nigeria in order to bring uniformity to the age of a child, as the CRA is a federal Act on a subject which is not within the exclusive legislative competence of the federal government. The CRA (with the exception of the federal capital territory, Abuja, which has direct application) can only become binding on states in the federation if it is approved by a simple majority or if the interested state passes its own version without reference to the federal statute.[47] This problem results from a lack of definition of a child in the 1999 Nigerian Constitution, which is the *grundnorm* of the country.

In spite of the innovations of the CRA in child justice administration, its delimitation of the age of childhood creates certain problems.[48] One such difficulty is seemingly placing culpability on a child below 10 years of age, as no minimum age is adopted under the CRA.

3 Legal framework for child justice administration in Nigeria: A critique

The Nigerian child justice administration regime is influenced by international, regional and national laws. Nigeria is a state party to the CRC[49] and the African Children's Charter[50] that govern child justice

42 See generally part 2 of the South African Child Justice Act 78 of 2008. See also *S v GK* 2013 (2) SACR 505 (WCC) 58-59.

43 See sec 18 of the Nigerian Marriage Act Cap M6, Laws of the Federation of Nigeria, 2004.

44 See sec 2(1) of the Nigerian Electoral Act, 2010.

45 Sec 28(3) of the Constitution of the Republic of South Africa, 1996.

46 See secs 1 and 17 of the South African Children's Act (as amended by sec 3(c) of the Children's Act 41 of 2007) volume 7, JUTA's Statutes of South Africa 2013/2014, which define a child as 'a person under the age of 18 years' and state that 'a child whether male or female becomes a major upon reaching the age of 18 years'.

47 See also B Owosanoye & M Wernham, M *Street children and juvenile justice system in Lagos State of Nigeria* (2004) 11, http://www.gvnet.com (accessed 12 May 2013).

48 This warranted each state in the Federation of Nigeria to adopt their respective age of 'criminal responsibility'. It is evident from sec 274 of the Kwara State Child Rights Law, 2007 where 'a child is defined as any person under the age of 16'.

49 Nigeria ratified the CRC in 1991.

administration[51] by emphasising the 'treatment of child offenders to be fair and humane' by emphasising 'their well-being and rehabilitation and that the reaction of the authorities should be proportionate to the circumstances of the offender as well as the offence'.[52] The rationale behind these provisions is to prevent issues that may affect the child from his or her development in life and to accord him or her dignity and respect.

The core principle of the CRC and the African Children's Charter is to emphasise the best interests of the child as being the prime consideration. For instance, articles 37 to 40 of the CRC emphasise that 'a child cannot be deprived of his/her liberty unjustly', recognise the right of juveniles to 'rehabilitation and social reintegration extending to children who are victims of neglect, exploitation and abuse' and confers some rights on juveniles which apply to all phases of the juvenile justice process. Article 17 of the African Children's Charter affords the 'juvenile offender accused of having infringed penal law the opportunity of having the right to special treatment in a manner consistent with the child's dignity and worth'. This reinforces the respect for the child's rights and fundamental reforms by reintegrating and rehabilitating him or her back to his or her family and society.

Due to the global increase in child delinquency[53] and the lack of definite provisions dealing with 'children who are in conflict with the law' or 'in need of care and protection' in the Nigerian Constitution,[54] the concept of child justice administration in Nigeria was formalised with the enactment of the CYPA and later the CRA, after Nigeria signed the international and regional instruments.

As noted earlier, Nigeria presently has two types of legislation on issues of children who are in conflict with the law or beyond parental control.[55] The CYPA has been in use and is still being used by some states in child justice administration[56] in Nigeria. However, the CYPA does not place the principle of the best interests of the child as paramount consideration when dealing with him or her, as

50 Nigeria signed the African Children's Charter in 1999 and ratified it in 2001.

51 The combined effects of arts 3, 6, 12 and 37 of the CRC, Rules 5 and 17(1)(a) of the Beijing Rules and art 17 of the African Children's Charter.

52 See I Okagbue 'The treatment of juvenile offenders and the rights of the child' in IA Ayua & IR Okagbue (eds) *The rights of the child in Nigeria* (1996) 243. See Commentary to Rule 1 of the Beijing Rules (n 19 above).

53 Juvenile Justice Report 'Juvenile justice in Nigeria' http://www.britannica.com/EBcheckedtopic/kuvenilejustice/nigeria (accessed 2 February 2012).

54 Reference can only be inferred from ch four of the 1999 Nigerian Constitution which generally protects Nigerian citizens on fundamental human rights.

55 The Children and Young Persons Act, 1958 and the Child Rights Act, 2003.

56 The Child Rights Act has been promulgated into law in only 23 out of 36 states; these are Abia, Anambra, Bayelsa, Eboniyi, Ekiti, Imo, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Plateau, Rivers, Taraba, Kogi, Oyo, Benue, Osun, Edo, Delta, Cross River and Akwa Ibom, http://www.iags.org. See also http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf (accessed 18 January 2013).

emphasised in the CRA. It concentrates more on punitive measures than on the welfare of the child.[57]

However, the CRA's provisions emphasise the need for proper care, protection, treatment and development in the administration of child justice, and provide for and protect the rights of the Nigerian child and other related matters.[58] It, therefore, puts in place 'a child-friendly approach in the adjudication and disposition of matters in his/her best interests'[59] and 'best ways to secure his/her ultimate rehabilitation through various institutions established under this enactment'. Nevertheless, the Act has no clarity on what should be done to ensure 'the best interests of the child', contrary to the position in South Africa. [60]

Similarly, section 223(2) of the CRA makes the confinement of a child alleged to have committed an offence or being beyond parental control the last option to be resorted to only when 'there is no other way of dealing with the child' and, more importantly, the court is required to state the reason(s) for choosing the option of confining the child. It is contended that the rationale for this provision of the CRA is that the punitive approach adopted for a child under the CYPA could lead to criminalisation and stigmatisation, and may have a recidivistic result for the child offender, rather than rehabilitating and socially readjusting the child against criminality.

The CRA, similar to some of the provisions of South African legislation, provides for the substitution of the word 'juvenile'[61] in the CYPA with 'child offender';[62] 'juvenile court'[63] in the CYPA with 'family court'[64] in the CRA; and juvenile justice administration'[65] in the CYPA with 'child justice administration'[66] in the CRA. Other changes include the substitution of the word 'detention'[67] in the CYPA with 'custody'[68] in the CRA; 'approved schools'[69] in the CYPA

57 An example is the provision of sec 27 of the CYPA which directs the court to order a child who is beyond parental control to be kept with a probation officer.

58 See long title to the Nigerian Child Rights Act, 2003. See also secs 50 and 204 of the CRA.

59 Sec 1 of the Child Rights Act provides that '[t]he best interests of the child shall be the primary consideration in any action taken against a child'.

60 The next part of this article will examine the legal framework for child justice administration in South Africa.

61 See generally Part 2 of the Children and Young Persons Act, 1965.

62 Sec 213 CRA.

63 Sec 6 CYPA.

64 Sec 149 of Part XIII CYPA. The terms 'child justice court' and 'children's court' were used in both the old Child Justice Act and Child Cares Act and the new South African Child Justice Act and Children's Act respectively.

65 Part 2 CYPA.

66 See Part XX of the CRA.

67 Sec 16 CYPA.

68 Sec 223(1)(f) CRA.

69 Sec 19 CYPA. In South Africa, correctional centre in the old Correctional Services Act 111 of 1998 was replaced with child and youth care centre in both the Child Justice Act and Children's Act.

with 'children residential and children correctional centres'[70] in the CRA; and 'probation and probation officers'[71] in the CYPA with 'child care, guidance and supervision'[72] in the CRA. It is my contention that these substitutions in the CRA bring about greater clarity in the application of the law in Nigeria as these replacements, if implemented, will prevent the stigmatisation of a child alleged to have committed an offence, or one who is beyond parental control to be regarded as an offender.

In practice, the replacement of approved schools or remand homes or Borstal institutions, as indicated in the CRA, has not been implemented as the old system is still in operation,[73] especially as the Laws of the Federal Republic of Nigeria (LFN) 2004 have not been amended to reflect the new names. For instance, the remand home and Borstal institution in the old order of the CYPA are still retained in the LFN as the Borstal Institutions and Remand Centre Act,[74] despite the enactment of the CRA which changed the name, as indicated above. The article, therefore, argues that retaining the old names in the LFN results in discrepancies in the treatment of a child alleged to have committed an offence or a child in need of care and protection.

4 Legal framework for child justice administration in South Africa

Child justice administration in South Africa[75] has gained constitutional recognition in chapter 2 of the South African Constitution, specifically in section 28, which deals with issues relating to the definition of a child and the treatment of a child for the purposes of adjudicating a child alleged to have committed an offence or one in need of care and protection. The South African Constitution emphasis the 'presumption of innocence'[76] and 'the best interests of the child to be of paramount importance'[77] and, where the confinement of a child is necessary, he or she must[78]

70 Sec 248 CRA.

71 Sec 18 CYPA. The new African legislation still retained probation.

72 Part XXI CRA.

73 Studies conducted by MA Abdulraheem-Mustapha 'An analysis of the framework for juvenile justice administration in Nigeria' unpublished PhD thesis, Faculty of Law, University of Ilorin, Nigeria, 2014.

74 Borstal Institutions and Remand Centre Act 32 1960, now Cap B38 Laws of the Federation of Nigeria 2004.

75 It should be noted from the outset that the relevant legislation for South African child justice administration in this article will be limited to the Constitution of the Republic of South Africa, 1996 (as amended), the South African Child Justice Act 78 of 2008 (as amended) and the Children's Act 38 of 2005 (as amended) respectively. However, reference may be made to the South African Child Care Act 74 of 1983 (as amended).

76 See sec 35(3)(h) of the Constitution of the Republic of South Africa, 1996 (as amended).

77 See sec 28(2) of the South African Constitution.

not be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12[79] and 35,[80] the child may be detained only for the shortest appropriate period of time.

Prior to the enactment of the two sets of legislation in South Africa,[81] which separate the adjudication of children in need of care and protection[82] and children in conflict with the law,[83] the country lacked a single body of law that contained a comprehensive and integrated system that took into account children's vulnerability and special needs, particularly those of black children.[84] The concept of child justice administration in South Africa was formalised with the enactment of the Reformatory Institutions Act, 1879, followed by the Deserted Wives and Children's Protection Act 7 of 1895, the Cruelty to Animals Act 13 of 1895, the Care of Neglected Children Act 24 of 1895, the Child Protection Act 38 of 1901 and the Children's Care and Protection Act 25 of 1913.[85]

Despite the South African Child Care Act,[86] which harmonised all the existing laws on child justice administration, children, especially street children, were not protected under the Act as the Child Care Act in its long title 'provides for the establishment of children's courts and the appointment of commissioners of child welfare; and for the protection and welfare of *certain children*'.[87] However, the drafting of a new Constitution for South Africa as well as the ratification of the CRC in 1995 and the Hague Conventions on Abduction and Adoption, in 1996 and 2003, ushered in an era of change by setting the stage for a comprehensive review of the Child Care Act.[88]

Subsequently, new legislation[89] was enacted to provide adequate, special and specific laws that protect the rights of children in South

78 See sec 28(1)(g) of the South African Constitution.

79 Sec 12 of the South African Constitution deals generally with the rights to freedom and security of the person.

80 Sec 35 of the South African Constitution deals generally with arrested and detained persons.

81 These are the Children's Act 38 of 2005 (as amended) and the Child Justice Act 38 of 2008 (as amended).

82 This is referred to as civil jurisdiction by virtue of sec 42(8)(c) of the Children's Act 38 of 2005 (as amended).

83 This is referred to as the criminal jurisdiction by virtue of the long title to the South African Child Justice Act 78 of 2008 (as amended).

84 Long title and Preamble to the South African Child Justice Act 38 of 2008 provides: 'Before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law.'

85 The Children's Care and Protection Act 25 of 1913 was later replaced with the Children's Act 31 of 1937 followed by the Children's Act 33 of 1960 and the Child Care Act 74 of 1983.

86 South African Child Care Act 74 of 1983 (as amended).

87 My emphasis.

88 See A Skelton & P Proudlock 'Interpretation, objects, application and implementation of the Children's Act' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2014) 2.

Africa, including black and street children.[90] The enactment is in accordance with the values underpinning the South African Constitution, which is the *grundnorm* that emphasises 'the best interests of children, and single them out for special protection and affording children in conflict with the law specific safeguards'.[91] Based on these statutes, the civil jurisdiction of the court was separated from the criminal jurisdiction on child justice administration in South Africa. The Child Justice Act[92] was enacted specifically as the criminal adjudicatory law to take care of South African children who are in conflict with the law.[93] However, '[t]he Constitution, the Criminal Procedure Act and the common law of South Africa have not been superseded or altered by the Child Justice Act but serve instead to enhance the welfare and special needs of children who are in conflict with the law'.[94]

Instructively, this section is limited to the rights of children in conflict with the law in the child justice court to the presumption of innocence, legal representation and privacy. The Child Justice Act contains some commendable provisions regarding trials of children in respect of the above limitations. For instance, section 63(1)(b) of the Act provides that '[a] child justice court[95] must apply the relevant provisions of the Criminal Procedure Act relating to plea and trial of accused persons, as extended or amended by the provisions set out in chapters 9 and 10 of the Child Justice Act'.[96] According to section 63(4) of the Act, '[a] child justice court must, during the proceedings, ensure that the best interests of the child are upheld'.[97]

In addition, sections 5, 17 and 29 of the Child Justice Act emphasise that a child under the age of 10 years who is alleged to

89 These are the Children's Act 38 of 2005 (as amended) and the Child Justice Act 38 of 2008 (as amended).

90 As above.

91 See generally ch 2 of the South African Constitution and sec 28 in particular. See also the Panel of Constitutional Experts Memorandum on Children 5 February 1996 2, cited in Boezaart et al (n 88 above).

92 South African Child Justice Act.

93 Some of the laudable provisions were analysed in the latter part of this article as a leverage in enhancing the Nigerian child justice administration regime.

94 See *S v Mahlangu & Another* GSJ Case CC70/2010, 22 May 2012 (unreported).

95 This means any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child.

96 Chs 9 and 10 of the Child Justice Act deal with the trial of children in the child justice court ranging from the child justice court and conduct of trials involving children, diverting children's matters to the appropriate court in minor offences in order to meet the child's basic needs and general sentencing options available to children adjudged to be in conflict with the law in order to promote the 'best interests of the child'.

97 The Appeal Court in the case of *S v Ndwandwe* KZP Case AR 99/12, 6 August 2012 (unreported) held that the child justice court had failed to comply with sec 63 of the Child Justice Act by not promoting the best interests of the child. The Appeal Court emphasised that the 'primacy of the rights of children prevails irrespective of whether the child witness is a complainant or an accused' in order to ensure justice.

have committed an offence will be 'handed over to a probation officer to be dealt with in accordance with section 9' of the Act, while a child above the age of 10 years 'will be taken for preliminary inquiry' after the probation officer's assessment by way of 'written notice,[98] summons[99] or arrest'.[100] However, it should be noted that a child alleged to have committed an offence may be placed in a child and youth care centre or prison in certain circumstances provided for in sections 29 and 30 of the Act, but before such placement, the Act enjoins the victim and the child to undergo a family group conference[101] and victim offender mediation[102] after their consent[103] has been sought and obtained.

Interestingly, the Child Justice Act emphasises the right of presumption of innocence of the child and his or her right to privacy under sections 11 and 63(5) of the Act, by compelling 'the state to prove beyond reasonable doubt'[104] the culpability of the child, especially the capacity to commit an offence by a child 'who is 10 years or older but under the age of 14 years'. Further, 'no person may be present at any sitting of a child justice court unless that person's presence is necessary and granted by the presiding officer'. The combined effect of sections 80 to 83 of the Act is that the right of a child offender to 'legal representation of his/her choice either at his/her own expense' or as 'directed by the presiding officer' is emhasised. A child offender may under no circumstances be allowed to 'waive legal representation' as the 'presiding officer may direct that the child be represented by legal aid'.[105]

5 Issues regarding child justice administration in Nigeria

A child is viewed as a vulnerable and dependent being and, thus, deserving of special care.[106] This perception gives rise to the creation of different legal frameworks involving children who are in conflict with the law or children in need of care and protection or who fall

98 See sec 18 of the Child Justice Act.
99 Sec 19 Child Justice Act.
100 Sec 20 Child Justice Act.
101 This is provided for in sec 61 of the Child Justice Act.
102 This is provided for in sec 62 of the Child Justice Act.
103 Secs 61(1)(b) & 62(1)(b) Child Justice Act.
104 See *S v Mgcina* 2007 (1) SACR 82 (T).
105 See sec 24(1) of the Legal Aid South Africa Act, 2014. See also sec 25(1) of the Child Justice Act 39 of 2014. See also *S v Bekisi* 1992 (1) SACR 39 N(C) and *S v Manuel & Others* 1997 (2) SACR 505 (C).
106 The inference can be drawn from the World Declaration on the Survival and Development of Children which provides that '[c]hildren of the world are innocent, vulnerable and dependent'.

within the purview of status/minor offences.[107] The article will be limited to the examination of child justice administration in respect of the child's point of entrance in adjudication in the child justice court and the rights available to a child in court proceedings, such as the child's right to be considered innocent, to legal representation, and to privacy.

The CRA, like South African legislation,[108] has in section 3 adopted all the fundamental human rights enshrined in the Constitution of the Federal Republic of Nigeria, 1999 (as amended), in addition to the rights specifically provided for as far as children are concerned. For instance, section 11 of the CRA provides specifically for the right to dignity of the child, including sexual abuse, neglect or maltreatment, torture, inhuman or degrading treatment or punishment, among others, in order to combat juvenile delinquency in Nigeria, as these factors may lead to juvenile delinquency.

5.1 Child's point of entry into court proceedings

In order to adequately deal with children, especially those in conflict with the law or beyond parental control, the CRA, similar to chapter 9 of the South African legislation, allows all persons and authorities handling cases involving children 'the use of discretionary powers at all levels of the child justice system'.[109] However, unlike in sections 17 to 20 of the South African Child Justice Act, the initiation of court proceedings against a child offender or a child in need of care and protection takes the form of arrest[110] by the police[111] or petition by social workers, even in the case of children below the age of 10 years, as opposed to the South African child justice regime.

It is worth noting that before the start of an interview or interrogation, the parent or guardian and the child are provided with a copy of the written allegation against the child and are adequately informed about the child's constitutional rights, including the right to

107 These are behaviours that are considered violations of the law only if committed by juveniles, such as truancy, running away from home, and so on.

108 See secs 10, 12, 28, 34 & 35 of the South African Constitution which relate to human dignity, freedom and security of the person, children, access to courts, and arrested, detained and accused persons. See also the long titles to the South African Children's Act 38 of 2005 (as amended) and the South African Child Justice Act 75 of 2008 (as amended).

109 The inference can be drawn from sec 208(1) of the Child Rights Act which provides that '[a] person who makes determination on the child offenders shall exercise such discretion as he deems most appropriate in each case at all proceedings and at different levels of child justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions'. See Owasanoye & Wernham (n 47 above) 31. Here the 'police have the first opportunity to divert child offenders from the formal court system followed by the prosecutors and then the magistrate and judges who are empowered to operate a model that is restorative then rehabilitative and in the least retributive'.

110 The form of complaint or petition to the family court by the police or social worker can be in the form set out in Part I of the Eleventh Schedule to the CRA.

111 Sec 207(1)(c) CRA.

remain silent,[112] similar to what is contained in chapter 3 of the South African Child Justice Act. Similar to sections 63(3), 65 and 80(1)(a)(b) of the South African Child Justice Act, the child also has the right to be informed that he or she may have a lawyer present during the interview or interrogation,[113] and the right to talk to his or her parent or to demand that the parent be present during the interrogation.

Similar to sections 22 to 25 of the South African Child Justice Act, the police have the right in the child justice system to release a child suspect to his or her parents or guardian on bond,[114] except if the charge is one of murder or manslaughter or some other serious crime,[115] or if it is in the interests of the child offender to be dissociated with an undesirable person or his or her incarceration would not defeat the ends of justice.[116] The CRA prohibits the use of any incriminating statement by the probation officer who is considering an informal trial against a child in any criminal proceeding.[117] However, there is a constitutional right that a legal practitioner be engaged to attend before this interview or interrogation session is conducted.

In practice, however, one of the problems relating to child justice administration in Nigeria is that, in many cases, child offenders are taken into custody only for questioning, in which case they are not entitled to legal representation. The public, particularly the parents of child offenders, are usually not adequately informed about their rights to be present at the interrogation or their rights to insist on being present during the child offender's interrogation.[118] Importantly, there has been no evidence of adherence to the provisions regarding the interrogation of the child offender in accordance with the

112 Under sec 211 of CRA it is the responsibility of the police to inform the parents or guardian of the apprehended child as soon as practicable.

113 See sec 216 of the CRA, 2003 and sec 81 of the Child Justice Act.

114 Sec 215(d) of the Child Rights Act which is to the effect that '[t]he child is not deprived of his personal liberty unless he is found guilty of (i) a serious offence involving violence against another person; or (ii) persistence in committing other serious offences and there is no other appropriate response that will protect the public safety'. Also, the 1999 Nigerian Constitution in sec 35 recognises three exceptional circumstances where the constitutional right to personal liberty of persons including 'children in conflict with the law' may be inoperative. These are '(i) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence or to such extent as may be reasonably necessary to prevent his committing a criminal offence; (ii) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare; (iii) … or vagrants, for the purpose of their care or treatment or the protection of the community'.

115 Sec 222 CRA.

116 P Harms *Detention in delinquency cases, 1990-1999* (2003); Fact Sheet. Washington, DC US Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. See also secs 211 and 212 of the CRA which provide procedures to be followed during apprehension of juveniles and, if need be, for the juvenile to be detained.

117 See secs 209 & 211(1)(2) of the CRA.

118 See field survey conducted by MA Abdulraheem-Mustapha 'An analysis of the framework for juvenile justice administration in Nigeria'. See sec 211 of the CRA.

provisions of the Child Rights Act,[119] and this hampers the constitutional right of the child to a fair hearing.

However, section 207 of the CRA, which differs from section 89 of the South African Child Justice Act,[120] provides for a specialised children's police unit with well-trained police officers for the prevention of child offences to handle interviews or interrogations of a child in their custody. Incidentally, there is no evidence of the existence of such a unit in the Nigerian police force, as studies have shown that child offenders are held together with women in the juvenile and women centre (JWC) of the police force. In a survey carried out,[121] 71 per cent (849 out of 1 500) of respondents strongly disagreed that there were special cells for children in police stations in Nigeria.

The implication of this finding is that children are being kept in the same cells as adult offenders. This finding is confirmed in an interview conducted in the Bauchi state police headquarters in Nigeria, where one of the respondents said: 'We do not have separate police cells for child offenders; we put them behind the counter or in an empty adult cell.'[122] The reason for the creation of such a specialised children's unit in the police force is to ensure that the child's first contact is well managed in such a way as to respect his or her legal status, to promote the well-being of the child offender, and to avoid harm with due regard to the circumstances of the case.

5.1.1 Trial of the child offender in the family court

The combined effect of sections 151 and 162 of the CRA means that the family court in Nigeria has unlimited and exclusive jurisdiction to hear and determine both civil and criminal matters relating to a child alleged to have committed an offence or a child in need of care and protection. These provisions of the CRA are contrary to what is found in the South African child justice administration regime,[123] where the South African Child Justice Act deals with criminal proceedings,[124] basically involving those children who are in conflict with the law, while the South African Children's Act[125] deals with civil proceedings involving those children that are beyond parental control, that is,

119 See secs 209 & 219 of the CRA.

120 Sec 89 of the Child Justice Act provides for 'one-stop child justice centres with a part designated to be used by the police during inquiry instead of the Children Police Unit established in the CRA'.

121 Abdulraheem-Mustapha (n 118 above).

122 Interview conducted at Bauchi police headquarters on 12 February 2014 by MA Abdulraheem-Mustapha.

123 Interview conducted with the presiding magistrates in the Family Court and Child Justice Court, Grahamstown, South Africa, 20 March 2015 by MA Abdulraheem-Mustapha.

124 See a similar provision in the long title to the South African Child Justice Act 78 of 2008 (as amended).

125 See secs 47, 70, 150 & 152 of the South African Children's Act 38 of 2005 (as amended).

children in need of care and protection, thereby separating the administration of child justice.

It is, therefore, contended that the unlimited jurisdiction of the family court under the CRA may lead to a congestion of children's cases and create an unnecessary delay in child justice administration, as it follows that a single magistrate will be presiding over cases involving both children and adults, as the CRA has not made provision for separate courts although, in practice, the same magistrate adjudicates on both children in conflict with the law and those in need of care and protection, but in different courts and different sittings.[126] Also, these provisions negate the Act in section 215(3) which emphasises that the court shall handle children's cases expeditiously and without undue delay.

Another important issue is whether the establishment of a court for each state of the Nigerian federation as a family court[127] referred to in the CRA should be read as meaning all the High Courts or all the magistrate's courts in each of the states in the federation, or any High Court or any magistrate's court of the state. The literal meaning of the provision of the Act favours the last-mentioned interpretation, which is 'any High Court or any magistrate's court in the state'.

In practice, this could lead to a very unsatisfactory situation, considering the doctrine of *forum convenience*, as the location of the state family court could make children's matters very problematic, particularly those of children in rural areas across the vast geographical area that each Nigerian state occupies. For instance, Kwara State has domesticated the Child Rights Act,[128] has 16 local government areas and more than 30 magistrate's courts, with only one magistrate's court in the city designated as the family court. This poses a challenge to the rights to a fair hearing of children in conflict with the law or in need of care and protection in local government areas that are far from the city,[129] compared to what is provided for in sections 42(1)(6) and 44(1)(a) of the South African Children's Act,[130] which deal only with children in need of care and protection and not with children in conflict with the law.

126 Interview conducted in Kwara State Family Court, 18 February 2014 by MA Abdulraheem-Mustapha.

127 See secs 149 & 150 of the CRA.

128 Kwara state domesticated the Child Rights Act in 2006. See Kwara State of Nigeria Gazette 7 Vol 41, 2007.

129 Secs 35(4) and (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that a person arrested or detained should be taken to court within a reasonable time, and this means within a radius of 40 kilometers or a day or two days or longer period, as the court may consider reasonable in the circumstances. The unfortunate situation is that each local government in Kwara state has a magistrate's court, but this court cannot hear and determine the case of a child offender unless it is taken to the city where the family court is situated.

130 See also the long title to the South African Child Justice Act which makes provision for more than one child justice court, but more often than not these are ordinary magistrate's courts which exclude the public.

5.1.2 Children's rights to the presumption of innocence in court

Section 3 of the CRA incorporates the provisions of section 36(5) of the Nigerian Constitution, which guarantees a child alleged to have committed an offence or who is beyond parental control the right to 'be presumed innocent until the contrary is proved'.[131] This provision places the burden of proving the allegation that a crime has been committed or that the child is in need of care and protection on the prosecution or the complainant.[132] In this regard, a child may remain silent[133] throughout his or her trial as he is not obliged to say anything. This means that a child in court proceedings enjoys all the constitutional safeguards offered by the Constitution and relevant legislation regulating trials similar to that enjoyed by an adult offender. It is contended that the approach of the CRA is consistent with international standards[134] and similar to the Bill of Rights in chapter 2 of the South African Constitution (particularly sections 10, 12, 28 and 38), Chapter 2 of the South African Children's Act (particularly sections 8, 9, 10, 14 and 15) and section 11of the South African Child Justice Act.

However, a study conducted with 1 500 respondents on child justice administration in Nigeria[135] indicates that 744 (59 per cent) of the respondents agreed that the presumption of innocence is not adequately considered by the family courts in Nigeria, especially in a situation where the child is beyond parental control or in need of care and protection. This was confirmed in interviews conducted in Borstal institutions in Kaduna State and Ilorin in Kwara State,[136] where some officers noted that one of the reasons for the congestion at Borstal institutions was that the family court did not observe the right of presumption of innocence of the child since many children were adjudged to be beyond parental control. It is submitted that this is actually a status or minor offence and that the practice is contrary to international law, which calls for diversionary measures to be applied and institutionalisation to be the last resort.

5.1.3 Children's rights to legal representation in court

The right of a child alleged to have committed an offence or who is in need of care and protection to representation in court proceedings by a legal practitioner of his or her choice is fundamental.[137] The court has the obligation to so inform the child of the right to be assisted by

131 See also sec 210(a) of the CRA, http://www.nials-nigeria.org (accessed 20 June 2012).

132 Sec 139 Evidence Act Cap E14 Laws of the Federal Republic of Nigeria 2004.

133 Sec 210(c) CRA.

134 S Freeman & M Seymour 'Just waiting: The nature and effect of uncertainty on young people in remand custody in Ireland' (2010) 10 *Youth Justice* 126. See art 37 of the CRC.

135 Studies conducted by Abdulraheem-Mustapha (n 73 above).

136 Interviews conducted in Borstal institutions in Kaduna and Ilorin, 14 and 18 February 2014 respectively.

a lawyer upon apprehension.[138] The child has the right to communicate with his or her lawyer during the preliminary inquiry. Where the child has no counsel, the court must assign one to him or her.[139]

This provision of the CRA is to some extent consistent with sections 80 to 83 of the South African Child Justice Act[140] and section 28(1)(h) of the South African Constitution. However, sections 14, 54 and 55 of the South African Children's Act has added special protections for the child by going beyond the provision of the CRA[141] which limited the assistance to be rendered to the child to legal representation only, by broadening the assistance to include a family advocator, the parents or guardian, who may not necessarily be legal practitioners, in order to avoid technicalities in the proceedings. There are specific provisions regarding the legal representation of children in the Child Justice Act.[142] These are important in policy and in practice. In fact, legal representation is one of the great success stories, as the Legal Aid Board has rolled out services so that hardly any children are unrepresented.[143]

However, in practice, most of the family courts in Nigeria do not observe this provision as studies have shown[144] that minor offences, such as where a child is alleged to be beyond parental control, are not heard at all as the complainants most often are parents. Instead of obtaining the assistance of a legal practitioner or legal aid, the child is

137 See secs 155 & 210(e) of the CRA. It has been observed in *Haley v Ohio* (332 US 596 599-600 (1948)) http://www.fairfaxzerototerancereform.org (accessed 13 October 2013) that 'juveniles stand in particular need of careful advice concerning their constitutional rights by someone who is expressly and solely identified with their interests'. The child 'needs counsel and support if he is not to become the victim first of fear, then of panic', http://www.njdc.info (accessed 18 November 2013). See also RW Sterling 'Role of juvenile defence counsel in delinquency court' National Juvenile Defender Centre, Spring 2009 1.

138 Sec 36(6)(c) Nigerian Constitution, 1999. See also Principle 5 United Nations Basic Principles on the Role of Lawyers (1990); *AG Trinidad and Tobago v Whiteman* (1992) 3 NZLR 540 http://www.nwu.ac.za (accessed 15 March 2013).

139 Sec 155 of the Child Rights Act, 2003 provides that 'a child has the right to be represented by a legal practitioner and to free legal aid in the hearing and determination of any matter concerning the child in the court' http://www.unicef-irc.org (accessed 20 April 2013).

140 See ch 11 of the Child Justice Act.

141 See *MS v S (Centre for Child Law as* Amicus Curiae*)* 2011 (2) SACR 88 (CC), cited in the *Commentary to the Children's Act* (2104) http://www.jutalaw.co.za (accessed 20 February 2015).

142 See generally ch 11 of the South African Child Justice Act 78 of 2008.

143 See secs 22(1)(b) & 24(1) of the Legal Aid South Africa Act of 2014.

144 In a study conducted by Abdulraheem-Mustapha (n 73 above), one of the parents interviewed observed that '[t]he current juvenile justice system in Nigeria does not recognise the child's rights to fair trial, especially in legal representation, unlike what is obtainable in other countries of Africa'.

committed to remand homes or a Borstal institution,[145]contrary to the provisions of the CRA.

5.1.4 Children's rights to privacy in court

The right to privacy is specific to a child alleged to have committed an offence or who is in need of care and protection. This is contained in section 205 of the CRA, similar to sections 56 and 63(5) of the South African Children's Act and Child Justice Act respectively. The only persons entitled to attend the hearing are the officers of the court, the parties, the legal practitioner representing him or her, parents, the child offender's custodian or guardian, witnesses, and 'other persons directly concerned in the case' or 'institutions dealing with problems relating to children and probation officers'.[146] In order to secure the enforcement of the right to privacy of the child, the law prohibits the publication of information that may lead to the identification of the child being prosecuted.[147] The rationale is to protect the privacy of the child and also to protect him or her from the effects of brutalisation, traumatisation and stigmatisation that may result from a public trial.

It is important to note that there is no special or dedicated court environment for the trial of a child in Nigeria,[148] although courts exercising jurisdiction have the obligation to observe all laws and procedures stipulated for a child alleged to have committed an offence or one who is in need of care and protection. The enactment of the CRA seems to have harmonised the child justice system in Nigeria. However, it does not make provision for a special structure for family courts,[149] contrary to what is provided for in section 89 of the South African Child Justice Act. Although family courts have been

145 Interview conducted by MA Abdulraheem-Mustapha in Borstal institutions in Kaduna and Ilorin in her PhD research work (n 73 above), 12 and 18 February respectively.

146 Secs 156, 159(1) 216(1) & (2) CRA. This is similar to secs 66 & 74 of the Children's Act.

147 See sec 157 & 205 of the CRA. The publication includes records of child offenders.

148 Instructively, a few states, especially Lagos state, have a visible structure of child justice administration on the ground. However, in most states, such structures are not readily visible. Instead of a permanent family court, magistrates hear cases involving child offenders outside the normal courtrooms or outside normal court sessions, either in the courtrooms or in their chambers. Osinbajo & Kalu (n 36 above).

149 See sec 149 of the CRA. From the report of the 7th United Nations Congress on the Prevention of Crime and Treatment of Offenders CA/Conf.121/22/Rev 1 http://www.pogar.org (accessed 15 April 2013), it was observed with seriousness that the juvenile courts derogated from the international standards of preventing the mingling of juvenile with adult criminals as they use existing courts structures for juvenile trials which expose the juveniles to formal criminal processes with a view to determining whether or not these have any adverse effect on subsequent attempts at their rehabilitation and regeneration into society

created in most states that have domesticated the Child Rights Act, studies[150] have shown that the practice of using conventional court environments with the same magistrate presiding over adult cases remains, contrary to the objectives and spirit of child justice administration, thereby exposing child offenders to future dangers.

Studies have shown,[151] in a questionnaire administered to 1 500 respondents in the administration of child justice in Nigeria, that 881 (70 per cent) agreed that the establishment of family courts outside the conventional court environment would prevent the mingling of child delinquents with adult criminals. This finding corresponds with the view expressed by the presiding magistrate of the Kwara State family court in an interview[152] that '[t]he family court sits in chambers to hear and determine child cases yet these sittings are still in the conventional court environment'. It is, therefore, argued that this practice exposes the child alleged to have committed an offence or who is in need of care and protection to adult criminals.

6 Reform of child justice administration in Nigeria: Lessons from South Africa

1 The non-inclusion of the definition of a child in the Nigerian Constitution brings about inconsistency in the definition of a child as the Nigerian legislation, such as the CRA, cannot be adopted uniformly as it has to be domesticated by all the states in the federation. A lesson, therefore, is to be drawn from the Constitution of the Republic of South Africa, which designates section 28 to issues of children. In section 28(3) a 'child' is defined to mean 'a person under the age of 18 years'. I recommend the amendment of the Nigerian Constitution to include a section to reflect issues of children in order to make a child's age of uniform.

2 It is also recommended that the Nigerian CRA be amended to include the 'minimum age' at which a child can be held criminally liable, as it argues for different treatment of a 10 year-old child offender and an offender of 17 years of age, as they cannot have the same mental capacity for committing an offence. Thus, a lesson may be drawn from sections 7, 9, 10 and 11 of the South African Child Justice Act, which classifies offences according to the minimum age of a child. For instance, in section 7 of the South African Child Justice Act, 'a child offender under the age of 10 years does not have criminal capacity' and can be neither

150 Interview conducted with the presiding magistrate in the family court in Kwara State, 18 February 2014 in Abdulraheem-Mustapha (n 73 above).

151 Studies conducted by Abdulraheem-Mustapha (n 73 above).

152 Interview (n 150 above).

arrested nor prosecuted for the offence committed and the child will be dealt with under the provisions of section 9 thereof.[153]

3 The problem of s single magistrate at magisterial level and single High Court at High Court level of each state hinders the effective administration of child justice in Nigeria, as studies have shown[154] that these courts are loaded with cases involving children, contrary to what is the case in the South African legislation, which approach is preferable as the provisions of the South African legislation bring justice to every child alleged to have committed an offence or one who is in need of care and protection.[155]

4 It is also recommended that the CRA be amended to reflect the methods adopted by the South African Child Justice Act, which provides for securing the attendance of a child alleged to have committed an offence by way of either written notice, summons or arrest[156] upon a determination of the nature or seriousness of the offence. For instance, section 20(1) of the South African Child Justice Act provides that 'a child may not be arrested for an offence referred to in Schedule 1, unless there are compelling reasons justifying the arrest'.[157]

The problem with the creation of a specialised children's unit in the Nigerian police force, addressed earlier in this article, will be resolved if lessons are drawn from South Africa, where the entry into the child justice system is basically through a preliminary inquiry connected with the establishment of the family group conference,[158] victim-offender mediation[159] and one-stop child justice centres,[160] as opposed to the methods provided for in the CRA. The idea is to make proceedings involving children more inquisitorial and to avoid technicalities and the merging of child offenders with adult criminals in conventional police stations and courts, which are not in practice separately available in Nigeria.

153 Sec 9 of the Child Justice Act provides that 'a child under the age of 10 years' will not be arrested but 'handed over to his/her parents or appropriate adult or guardian or a suitable child and youth care centre'.

154 See field survey conducted by Abdulraheem-Mustapha (n 73 above).

155 See generally secs 42(1)(6) and 44(1)(a) of the South African Children's Act. See also the long title to the South African Child Justice Act which makes provision for more than one child justice court.

156 See secs 17-20 of the South African Child Justice Act.

157 Schedule 1 to the South African Child Justice Act deals with minor offences like 'theft, receiving stolen property where the amount does not exceed R2 500 or fraud, extortion or forgery where the amount does not exceed R1 500, malicious injury to property where amount does not exceeds R1 500, etc'.

158 See sec 61 of the South African Child Justice Act.

159 See sec 62 of the South African Child Justice Act.

160 These are structural facilities provided for under sec 89 of the South African Child Justice Act for 'child justice court, police services office for preliminary inquiry', and offices for use by probation officers, among others.

5 Based on the empirical study used for purposes of this article regarding experiences in cases determined in the Nigerian family court, it is recommended that the CRA be amended to separate the civil and criminal jurisdiction of the family court by drawing a lesson from the South African child justice administration regime[161] in order to bring about a balance in the Nigerian child justice system.

7 Conclusion

The article has considered issues of child justice administration in Nigeria, particularly the CRA, and argues that there is a need for government to implement some of the innovative provisions in the CRA and to draw some lessons from the South African experience. The Child Rights Act is a federal Act which seeks to incorporate contemporary principles, philosophy and standards of child justice administration into the Nigerian legal system. It is also considered a comprehensive uniform law on the protection of children's rights nationwide. However, it has been observed that, in some states in Nigeria, there are differences in the treatment of cases involving children. This hampers the uniformity of the CRA at national level.

It has also been observed that the CRA seems to have incorporated all previous legislation dealing with the child justice system. There is a need to learn lessons from South Africa, as identified in this article, in order to harmonise this legislation. The existing provisions of the CYPA and other related laws in Nigeria need to be repealed and any provision thereof which is inconsistent with the provisions of the CRA must be declared null and void to the extent of its inconsistency, in order to evolve a child justice system regime that will be humane and responsive.

161 Sec 63(2) of the South African Child Justice Act provides that the Act will be applicable to 'the child alleged to have committed an offence having similar facts with the adult offender and the Criminal Procedure Act of South Africa will be applicable to the adult offender'.

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A comparison between the position of child marriage 'victims' and child soldiers: Towards a nuanced approach

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Summary

This article aims to juxtapose and draw analogies between the legal position of children affected by child marriage and child soldiers. It is argued that childhood is not an undifferentiated status or category. The authors do not subscribe to a catch-all approach with regard to the accountability of children or those who exploit children. It is vital to make distinctions according to the age and maturity of a child, whether in the context of child soldiering or child marriage. This is the practice in most domestic legal systems and has to a large extent been followed in international instruments. This approach might seem to diverge from the so-called 'straight 18 approach' in favour of standardisation of the minimum age at which children can enter into the armed forces or enter into marriage. In our view, the 'standardisation' approach should only be followed with regard to setting the age for the definition of children at 18 years. Within the category 'children', however, the authors support a sliding scale approach in dealing with child soldiers and children in early marriage, an approach which will vary according to factors such as the maturity of the child, the cultural context, domestic laws and legal criteria such as voluntariness. Whereas children under the age of seven do not

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possess criminal capacity and do not have the ability to give genuine consent to marriage, the position of children over the age of seven is more complex. The authors argue that children on the verge of adulthood should not be stigmatised for voluntarily entering into marriage.

Key words: *child soldiers; child marriage; accountability; criminal capacity*

1 Introduction

To what extent should children be held accountable for international crimes? According to conventional wisdom, children are mostly innocent and passive victims that should be protected from criminal prosecution. This view is also held by the majority of scholars, and is described as a 'protectionist' approach. The innocent victim perception has a strong hold on what Drumbl calls the 'international legal imagination'.[1] This perception affects the way in which children affected by child marriage as well as child soldiers are viewed.

The article aims to both juxtapose and draw analogies between the legal position of children affected by child marriage and child soldiers. It will be argued that childhood is not an undifferentiated status or category. Therefore, we do not subscribe to a catch-all approach with regard to the accountability of children or those who exploit children. It is vital to make distinctions according to the age and maturity of a child, whether in the context of child soldiering or child marriage. This is the practice in domestic law and has to a large extent been followed in international instruments. This approach might seem to diverge from the so-called 'straight 18 approach'[2] in favour of standardisation of the minimum age at which children can enter into the armed forces or enter into marriage. In our view, the 'standardisation' approach should only be followed with regard to setting the age for the definition of children at 18 years. Within the category 'children', however, we support a sliding scale approach in dealing with child soldiers and children in early marriage, an approach which will vary according to factors such as the maturity of the child, the cultural context, domestic laws and legal criteria such as voluntariness. Whereas we emphasise that children under the age of seven do not possess criminal capacity and do not have the ability to give genuine consent to marriage, the position of children over the age of seven is more complex. We argue that children on the verge of adulthood should not be stigmatised for voluntarily entering into marriage.

1 Drumbl describes the international legal imagination as a 'normative, aspirational and operational mix of international law, policy and practice': M Drumbl *Re-imagining child soldiers* (2012) 9.

2 See Child Soldiers International, http://www.child-soldiers.org/theme_reader.php?id=1/ (accessed 20 September 2016).

The article, therefore, aims to take a more nuanced approach than approaches which generalise about children. A distinction will be made between early childhood, adolescents and children on the verge of young adulthood. It will be argued that, since children as young as 14 years are deemed to have criminal capacity in many domestic legal systems,[3] mature children should not necessarily escape accountability for their crimes. Although legal systems vary in terms of the age at which they consider children to have criminal capacity,[4] it will be argued that the correct approach is one that takes a more nuanced view of the category 'childhood'.

Furthermore, article 4(3)(c) of Additional Protocol II to the Geneva Conventions prohibits the recruitment and use of children under the age of 15 to take part in hostilities. This means that there is a window period (between 15 and 18 years) during which children could be deemed to have the criminal capacity, agency and autonomy to decide voluntarily to enter into hostilities. It follows from the voluntary nature of such acts that children expose themselves to the risk of criminal prosecution. It will be submitted that, although the authors do not support criminal prosecution in all cases of atrocities committed by and to children and would mostly find alternative accountability mechanisms more appropriate, it would be appropriate in certain limited circumstances to hold children accountable where it can be proven that children between the ages of 15 and 18 years have acted voluntarily.[5] However, the article does not focus on the question of whether children should be held accountable in the form of criminal prosecutions. The concept of voluntariness in the context of children will be examined as will the concept of duress.

Whereas Drumbl recognises that the term 'child soldier' is sufficiently capacious to be employed to refer to children who are soldiers outside the context of an armed conflict, the article focuses on the position of children in atrocity-producing armed conflicts, including national and international armed conflicts. These are the types of conflicts in which the question of prosecuting children or those who mistreat children is most acute. The jurisprudence of the *ad hoc* international criminal tribunals, the International Criminal Court and the Special Court for Sierra Leone (SCSL) with regard to child soldiers will be considered.

3 Notably, in South Africa and Germany. The age at which children have criminal capacity in France is 13. In England and Wales, the age is even younger. Section 16 of the Children and Young Persons Act 1963 states that the age of criminal responsibility in England and Wales is ten years.

4 In North Carolina, eg, children have criminal capacity from the age of six. In other jurisdictions, such as Brazil, children have criminal capacity from age 18. For this data, see Drumbl (n 2 above) 104.

5 Drumbl (n 1 above) 11.

2 Definition of 'child'

The European Convention on Human Rights, the American Declaration on the Rights and Duties of Man, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (African Charter) and the ILO Worst Forms of Child Labour Convention all make mention of the term 'child' several times. A 'child' is defined as being 'every human being below the age of eighteen years of age' by the CRC,[6] the African Charter on the Rights and Welfare of the Child (African Children's Charter)[7] and the ILO Worst Forms of Child Labour Convention.[8] This definition centres on the objective element of age.

Whereas there is broad agreement in international law on the age at which individuals are considered 'children', namely, 18 years, there is less agreement on the question of the age at which individuals can participate in conflict.

A few key international instruments consider the age of 15 years as significant. Of these provisions, article 38 of the CRC is the most significant. In terms of article 38, the minimum age for recruitment or participation in armed conflict is the lower age of 15. The wording is taken from article 77(2) of Additional Protocol I to the 1949 Geneva Conventions.

The Rome Statute of the International Criminal Court is arguably the most important current instrument guiding international criminal law. The definition of war crimes in the Rome Statute includes 'conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities'[9] in international armed conflict. As far as internal armed conflict is concerned, the Statute states that 'conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities' is prohibited.[10]

Sexual slavery is defined as a war crime[11] and a crime against humanity.[12] As will be discussed below, sexual slavery can be a form of child soldiering, since children who are forced into sexual slavery are often associated with an armed group. The United Nations

6 Convention on the Rights of the Child, General Assembly Resolution 1386 (XIV) art 1.
7 African Charter on the Rights and Welfare of the Child (1990), OAU Doc CAB/LEG/24.9/49 (entered into force 1999) art 2.
8 ILO Worst Forms of Child Labour Convention 182 (entered into force 19 November 2000) art 2.
9 Art 8(2)(b)(xxvi).
10 Art 8(2)(e)(vii).
11 Art 8(2)(b)(xxii).
12 Art 7(1)(g).

Children's Fund (UNICEF) has observed that children often fulfil multiple roles in conflict situations.[13]

Whereas the laws of war put a general prohibition on the recruitment of child soldiers under the age of 15 years, efforts have been made by humanitarian groups to extend this ban to persons under the age of 18. The non-governmental organisation (NGO) coalition Stop the Use of Child Soldiers as well as the CRC have adopted the so-called 'straight 18' position. This approach has received wide acceptance amongst states[14] and is advocated in soft law instruments, such as the Paris Principles, as well as by influential international organisations, such as Amnesty International.[15] However, until such time as this has been achieved, there is no agreed definition, but there is agreement that the age of recruitment should not be below 15 years of age.

Some states still permit the voluntary recruitment of children under the age of 18. Fortunately, this number is diminishing. For example, 17 year-olds can enlist in the armed forces of countries such as France, Germany and Israel,[16] and the number of states that continue to allow the voluntary recruitment of children at the lower age of 16 years is not insignificant.[17] In a few states, there is no minimum age or the age has been set below 16 years. Such states include Barbados, Guinea Bissau, Guyana, Pakistan and the Seychelles.

The Optional Protocol argues for increased momentum towards 18 as the universal minimum age for conscription and enlistment by states' armed forces. Ultimately, it should be remembered that, like all age limits in law, setting the age limit for childhood at 18 is essentially arbitrary. Tobin asks the question: 'Does a child of 15, 16 of 17 years really need special protection relative to adults, or are their physical and mental capacities sufficiently aligned with the capacities of persons over 18 years of age?'[18] The arbitrariness becomes especially clear if it is kept in mind that determining the exact age of many children is almost impossible due to the loss of birth certificates (particularly by those from refugee source countries) or the fact that births in conflict zones are often not registered.

13 'A guide to the Optional Protocol on the Involvement of Children in Armed Conflict' UNICEF Report 3.

14 Child Soldiers International (n 2 above).

15 Amnesty International 'Child soldiers: Criminals or victims?' IOR 50/002/2000 22 December 2000.

16 Countries following this approach are Australia, Austria, Algeria, Brunei, Bolivia, Cuba, Cape Verde, Chile, China, Cyprus, France, Israel, Germany, Lebanon, Jamaica, Malaysia, The Netherlands, New Zealand, the Philippines, the USA and Saudi Arabia.

17 The following countries follow this approach: Brazil, Bangladesh, Canada, Egypt, India, Iran, Ireland, Jordan, Pakistan, Singapore, Mexico, Mauritania, Papua New Guinea, Trinidad and Tobago, the United Kingdom and Zambia.

18 J Tobin 'Justifying children's rights' (2013) 21 *International Journal of Children's Rights* 21.

3 Definition of child marriage

According to UNICEF, child marriage is as 'a formal marriage or an informal union before age 18'.[19] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that 'the marriage of a child shall have no legal effect', thereby outlawing child marriages.[20] The African Children's Charter unequivocally prohibits child marriages of both boys and girls under the age of 18 years. Even though marriage is not directly referred to in the CRC, it is frequently addressed by the CRC Committee as it is linked to other rights in the CRC. These rights include the right to protection from all forms of abuse[21] and the right to be protected from harmful traditional practices.[22] Furthermore, the Pan-African Forum Against the Sexual Exploitation of Children regards child marriage as a kind of commercial exploitation of children, which is also prohibited in the CRC.[23] Whilst child marriage also affects young boys,[24] the number of girls affected is much higher.[25] As a result of the impact this has on girls, it is safe to say that child marriage is a manifestation of discrimination against girls which goes against the grain of CEDAW and is clearly outlawed.

According to a UNICEF report,[26] child marriage has the following consequences: first, girls are denied their childhood. Second, they are socially isolated from their friends and, more importantly, their families, while the CRC explicitly protects children from being subjected to interference with their families and homes.[27] Third, they have limited employment and educational opportunities as most child brides abandon their education, which is contrary to their right to education.[28] Fourth, they are not able to safely negotiate safe sex with their partners. This inability to negotiate safe sex in itself can be seen as a type of sexual abuse, which is also prohibited by the CRC.[29] Fifth, many health implications, especially sexual health problems, flow from early marriage, even though the CRC protects children's rights

19 http://www.unicef.org/protection/57929_58008.html (accessed 14 September 2015).
20 Art 16.
21 Art 19.
22 Art 24(3).
23 Arts 19 & 34.
24 See http://www.unicef.org/protection/57929_58008.html (accessed 14 September 2015).
25 In Zambia, eg, 45% of women between the ages of 20 and 49 were married by the age of 18. According to the Zambia Demographic and Health Survey Report, child marriage is more common among girls (17%) than boys (1%). 'Child marriage situation for Zambia: Qualitative and quantitive summary' (report) (2015), paper presented at National Workshop on Child Marriage Laws in Zambia, 23-24 June 2015.
26 UNICEF 'Ending child marriage: Progress and prospects' 22 July 2014 8.
27 Art 16.
28 Art 28 CRC.
29 Art 34.

to health.[30] Sixth, early pregnancy results in a higher mortality rate not only of the young mothers but also of their infants, indirectly infringing the right to life.[31]

By allowing child marriages, a state does not only violate the CRC and CEDAW, but also the Universal Declaration of Human Rights, a declaration that is widely considered to have become hard law. The Universal Declaration guarantees the right to free and full consent to marriage. It is clearly not possible for consent to be free and full if one party to the marriage is not sufficiently mature to make an informed decision regarding the choice of a marriage partner.[32] In the absence of free and full consent, it would follow that such a marriage is 'forced'. The Special Court for Sierra Leone in 2008 held that forced marriage was a crime against humanity.[33] Early in 2016, the Constitutional Court of Zimbabwe outlawed child marriage in the case of *Mudzuru*[34] and raised the minimum age for marriage to 18 years.[35] The judgment was based on the finding that section 78 of the Zimbabwean Constitution sets the minimum age for marriage at 18. In this case, the Deputy Chief Justice of Zimbabwe referred to article 16(2) of CEDAW according to which only women and men of full age can marry.

In order to meet the requirements of a crime against humanity, an act must be part of a 'widespread and systematic attack'. The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu* defined 'widespread' as 'massive frequent large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.[36] The brief list of consequences flowing from child marriage mentioned above satisfies the 'considerable seriousness' criterion. The 'multiplicity' requirement is probably the easiest requirement to satisfy because, according to the International Research Centre for Women (IRCW), the number of women who married before they reached the age of 18 years exceeds 700 million.[37]

A trial chamber of the ICTR defined 'systematic' as 'thoroughly organised and following a regular pattern on the basis of a common policy'.[38] The ICTR further stated that the action does not necessarily have to be official state policy; a preconceived plan or some kind of

30 Art 3(1).
31 Art 6 CRC.
32 UNICEF 'Early marriage: A harmful traditional practice' 1.
33 MP Scharf 'Forced marriage as a separate crime' in C Jalloh *The Sierra Leone Special Court and its legacy* (2014) 193.
34 *Mudzuru & Another v The Minister of Justice, Legal Parliamentary Affairs & 2 Others* CCZ 12/2015. See also in this *Journal* 'Recent developments', 554 below.
35 Emma Batha 'Zimbabwe court bans child marriage' *Reuters* http://www.reuters.com/article/us-zimbabwe-childmarriage-idUSKCN0UY27H (accessed 20 September 2016).
36 *Prosecutor v Akayesu* ICTR-96-4-T para 580.
37 UNICEF (n 26 above) 8.
38 *Akayesu* (n 36 above) para 580.

policy will suffice.[39] It is essential to understand that child marriage, or early marriage, is a deeply-entrenched cultural practice. This means that it may be argued that such cultural practice, which often goes unchallenged by the state, qualifies as a 'policy'. Governments also often have an interest in perpetuating the continuation of oppressive practices, such as child marriage.

Child marriage is often described as a cultural practice. As such, child marriage is heavily influenced by Islam, which is widely practised in Northern Africa, a region with a particularly high rate of child marriage.[40] In countries with a high child marriage rate, cultural and social practices often hold more value in the community than laws, resulting in the poor enforcement of domestic laws prohibiting these marriages.[41] Nigeria is a perfect example. Despite the fact that Nigeria has ratified the African Children's Charter as well as the CRC and has also domesticated the CRC in the Child Rights Act,[42] the provisions of Shari'a (Islamic) law is more highly respected among the local population.[43] While international law caps childhood at 18 years, Shari'a law specifies no maximum age for childhood.[44] Under this law, maturity is determined by puberty, more particularly menstruation.[45] This, in turn, leads to the interpretation by some that a child is fit for marriage after she has reached maturity.

4 Cultural relativity

Since child marriage and child soldiering may be described as cultural practices and find different levels of acceptance in different contexts, it is necessary to engage with the question of whether these two practices are *necessarily* immoral or contrary to human rights.

At the other end of the spectrum, universality entails that the validity of rights cannot be determined with reference to culture.[46] While the wide and almost unanimous support of the Universal Declaration may be seen as an acceptance of the universal approach, it must be borne in mind that the Universal Declaration itself guarantees the right to cultural freedom.[47] The text of the African

39 As above.
40 UNICEF (n 32 above) 3.
41 C Burris 'Why domestic institutions are failing child brides: A comparative analysis of India's and the United States' legal approaches to the institution of child marriage' (2015) *Tulane Journal of International and Comparative Law* 153.
42 Child Rights Act, 2003.
43 TS Braimah 'Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *African Human Rights Law Journal* 474.
44 Braimah (n 43 above) 481.
45 As above.
46 J Donnelly 'Cultural relativism and universal human rights' (1984) 6 *Human Rights Quarterly* 401.
47 Art 27(1).

Children's Charter makes it clear that the rights contained and guaranteed in the Charter are supreme over 'any custom, tradition, cultural or religious practice' inconsistent with such rights.[48]

Many consider the 'straight 18' approach to contradict established cultural and local norms. Given that international human rights law is believed to be based on universal ethical standards,[49] some claim that the 'straight 18' approach does not acknowledge local and regional cultures and traditions. It is also not sensitive to varying views on the definition of a child. Therefore, some argue that an approach which is sensitive to context and to the 'the culturally-constructed' ideas and practices surrounding childhood and adulthood'[50] would be more appropriate.

According to Donnelly, there are two types of cultural relativism. The first type is strong cultural relativism, which entails that the validity of a right is determined based primarily on culture. The second type, weak cultural relativism, considers culture as not being the dominant consideration in determining the validity of a right, but nevertheless an important one.[51] Shari'a law may be seen as a manifestation of weak cultural relativism.

Shari'a law may be considered an example of weak cultural relativism for two reasons. First, and most importantly, Shari'a law is not the only source used in determining the validity of rights. Second, and equally important, culture and religion are separate but not mutually-exclusive concepts since the one influences the other. In the case of Shari'a law, it is Islamic law, religious law, which has a bearing and influence on culture, especially in areas where it is the predominantly practised religion. Culture, however, is influenced by a variety of different factors, including different religions, of which Islam is but one.

A crucial question is how much weight should be given to cultural relativism in this ethical debate.[52] There are three possible answers. First, according to the cultural relativist theory, cultural relativism should be considered as important as any other factor.[53] This, in turn, leads to the continued tolerance of child marriage and child soldiering. A second, perhaps more acceptable, view is that some weight should, at the very least, be given to this factor.[54] According to this view, the importance of the practice to the culture will

48 Art 1(3) African Children's Charter.

49 See eg BD Lepard *Customary international law: A new theory with practical applications* (2010).

50 Donnelly (n 46 above) 400.

51 Donnelly 401.

52 D Wilkinson 'Cultural relativism and female genital mutilation' http://blog.practicalethics.ox.ac.uk/2014/02/cultural-relativism-and-female-genital-mutilation/ (accessed 28 September 2015).

53 Wilkinson (n 52 above).

54 As above.

determine the weight ascribed to it.[55] Therefore, if the practice in question lies at the roots of a culture, it should outweigh the other ethical factors.[56] The view is that cultural relativity has no place in ethical considerations and, therefore, should not be given any weight.[57]

One problem with cultural relativism is that it denies the rights to women who have become aware that they have rights because they have an identity of their own separate from the community to which they belong.[58] Every time a woman demands that her universally-accepted rights be recognised, an ethical problem arises.[59] When the number of demands for the recognition of women's rights increases, the ethical problem starts to take on a political nature.[60] Cultural relativity is essentially a complex concept with a strong political foundation.[61] However, it is perhaps naive to assert that rights which are universally accepted can and will necessarily be recognised as opposed to rules and norms that are imposed by culture.[62] This is the case especially in societies where culture determines national identity or in societies where dominant social practices cannot be resisted without adverse consequences for the individual or family.[63]

While international laws which outlaw child marriage do infringe cultural rights, it is the argument of the 'child's best interests' that must prevail as the CRC directs that in all matters concerning children, the best interests of the child shall be the primary consideration.[64] The CRC Committee has expressed the view that the 'best interests of the child' is a flexible, adaptable concept, and should be determined on a case-by-case basis.[65]

Some scholars, like Waschefort, are critical of the idea that children's capacity and interests should be determined on a casuistic basis. Waschefort writes:[66]

> International law cannot be based on a system whereby the unique development characteristics of each young person are considered to inform a determination as to whether or not the specific child can make an informed decision whether or not to enlist.

55 As above.
56 As above.
57 As above.
58 M Afkhami 'Cultural relativism and women's human rights' http://www.mahnazafkhami.net/2000/cultural-relativism-and-womens-human-rights/ (accessed 28 September 2015).
59 As above.
60 As above.
61 As above.
62 As above.
63 See in this regard S Merry *Human rights and gender violence: Translating international law into local justice* (2006) 14-20.
64 Art 3(1).
65 General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3 para 1) 9.
66 G Waschefort *International law and child soldiers* (2015) 11.

Whereas Waschefort's argument makes practical sense, it fails to appreciate the fact that many domestic courts determine the culpability of children on a casuistic basis. The fact that domestic criminal justice systems differentiate on the basis of age does not mean that all children should be tarred with the same brush.

Child marriages have many harmful consequences, as discussed above, and, as a result, the child's best interests should limit any cultural rights. It is submitted that cultural considerations can only be accommodated if it can be proved that the child validly consented to entering into marriage or voluntarily became a child soldier.[67] However, it is further submitted that consent given by children under seven years of age cannot be valid consent. This will be dealt with further in section 7 below.

5 Child soldiers

According to the Paris Principles and Guidelines, a child soldier is 'a child associated with an armed force or armed group … [a child soldier] is any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity'. This includes boys and girls used as fighters, messengers, porters, cooks and spies. Crucially, it includes girls and boys who are recruited for sexual purposes, such as sexual slavery. To meet the definition of a child soldier, therefore, it is not necessary for a child to be directly taking part in hostilities.[68] Since the Paris Principles merely constitute soft law, domestic laws do not yet reflect this broader understanding of the definition of child soldiers. The approach taken in the Paris Principles, however, is a very positive and progressive development since it is a realistic reflection of the close relationship between child soldiering and child soldiers. Drumbl emphasises this shift in the understanding of child soldiering when he writes about the move towards referring not merely to child soldiers but to 'children associated with armed forces or armed groups'.[69]

Children of both genders are used in armed conflict and play a wide variety of roles. These roles may involve frontline duties as fighters, but children may also be used in other roles such as porters, couriers, spies, guards, suicide bombers or human shields, or to perform domestic duties such as cooking and cleaning.[70] Furthermore, armed groups could use both boys and girls for sexual purposes.

67 See in this regard L Mwambene & J Sloth-Nielsen 'Benign accommodation? *Ukuthwala*, "forced marriage" and the South African Children's Act' (2011) 2 *Journal of Family Law and Practice* 5.

68 Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, 2007.

69 Drumbl (n 1 above) 4.

70 Drumbl (n 1 above).

International standards do not prohibit the voluntary recruitment of children of 16 and 17 years by armed forces. However, it certainly is contrary to best practice to recruit children of this age.[71] The Optional Protocol on the Involvement of Children in Armed Conflict (OPAC)[72] has set the minimum age for direct participation in hostilities and for compulsory recruitment by states' armed forces at 18 years. Even though states may, upon their ratification or accession to OPAC, accept volunteers from the age of 16, states must deposit a binding declaration setting out their minimum age for voluntary recruitment and the safeguards employed for such recruitment. OPAC further prohibits both the use and recruitment of children under the age of 18 in hostilities by non-state armed groups.

Additional Protocol II to the Geneva Conventions puts the threshold as low as 15 years. This instrument states that '[c]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.[73]

There is a need to determine the minimum age of criminal liability, internationally and nationally. This is becoming particularly important since children accused of committing crimes in the context of armed conflicts are being 'increasingly brought before the justice system, both international and national … to stand trial as defendants'.[74]

6 Juxtaposing and comparing child soldiering and child marriage

At first glance, victims of child marriage and child soldiers appear to represent two sides of a coin: Victims of child marriage are typically considered victims and child soldiers are often considered perpetrators of crime. In international criminal law, the position of children in these two contexts is indeed very different. Without exception, victims of child marriage are always considered to be victims of the 'crime' of child marriage or forced marriage. Child soldiers, on the other hand, may be considered either perpetrators or victims or occasionally both. The prosecution by the International Criminal Court of a former Ugandan child soldier-turned-LRA commander, Dominic Ongwen, has brought this matter to the public attention.[75] However, some authors have rejected the binary victim/perpetrator distinction outright.[76]

71 Child Soldiers International http://www.child-soldiers.org/about_the_issues.php (accessed 20 September 2016).

72 Adopted by UN General Assembly on 25 May 2000, entered into force on 12 February 2002.

73 Art 4(3)(c).

74 UN Office of the Special Representative of the Secretary-General for Children in Armed Conflict Working Paper 3 (September 2011) 5.

75 M Schenkel 'Uganda: The thin line between victim and perpetrator' *Mail & Guardian* 16 February 2015.

76 I Derluyn et al 'Vicitms and/or perpetrators? Towards an interdisciplinary dialogue on child soldiers' (2015) 15 *BMC International Health and Human Rights* 28.

Others have described those in the position of Ongwen as 'complex political victims'.[77] Whatever the prevailing view, as critiqued by Drumbl, children are passive victims. Child soldiers are almost always considered victims.[78]

A further overly simplistic distinction is prevalent in the literature and attitudes. A fairly superficial gender division is often drawn between children affected by child marriage and child soldiers. 'Victims' of child marriage are almost always perceived as female, whereas child soldiers are perceived to be male. Whereas the statistics confirm that this is indeed overwhelmingly the case, there are significant exceptions to this rule. In some countries, 40 per cent of armed force groups are made up of young girls.[79] A prime example would be Uganda, where young girls account for a third of their child soldiers.[80] Girls in these situations often become victims of the crime of forced pregnancy.[81] The fact that female child soldiers are used not only as domestic servants, but also for sexual purposes, clearly illustrates the overlap and intersections between various forms of abuse and crimes against children.

Importantly, boys are also coerced into child marriage. The gender difference should, therefore, not lead one to support the idea that women should be protected whereas men should be more easily subjected to possible prosecution for child soldiering.

Children affected by child marriage and child soldiers suffer grave human rights violations. Forcing children to enter into marriage or to forcibly recruit children into the armed forces violates a wide range of fundamental human rights, such as the right to dignity, the right to education, the right to family life and the right to health. This means that child soldiers and children in child marriages often suffer the same type of harm.

Drumbl mentions the auxiliary activities to fighting in an armed conflict in which children take part. Recognising children who engage in these activities as child soldiers expands the category of child soldiers. Drumbl writes that, throughout history, '[children] have fought as soldiers; maintained morale as drummer boys; cooked, portered and sustained garrison life; served as defence of last resort; suffered indignities and abuses; and inspired through their courage'.[82]

77 'Comparing victims and perpetrators in Uganda' JRP Field Note 7 5 http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf (accessed 20 September 2016).

78 Interestingly, it may be argued that international criminal law has not been sufficiently sensitive to cases in which war criminals are prosecuted and where the defendant entered into the armed service as a child.

79 S Tiefenbrun 'Child soldiers, slavery and the trafficking of children' (2008) 31 *Fordham International Law Journal* 424.

80 It is well documented that girl soldiers suffer serious abuse. Tiefenbrun (n 79 above).

81 Tiefenbrun (n 79 above).

82 Drumbl (n 1 above) 27.

This constitutes an important link between child marriage and child soldiering. Children in child marriages can also be considered child soldiers if they support the armed conflict in this way.

7 Presence of duress

It is often assumed that children who enter into the armed forces are victims of brainwashing.[83] A widespread view exists that children who become soldiers are unduly influenced and indoctrinated and do not act voluntarily. Whereas it is indeed the case that children are often indoctrinated and forced into early marriage or child soldiering, it should be recognised that this is not *always* the case. We are of the view that one should treat the question of voluntariness with circumspection and resist the temptation of assuming that children do not voluntarily enter into marriages or enlist in the army. As stated above, it is emphasised that children under the age of seven do not have criminal capacity and do not have the ability to give genuine consent. However, the 'faultless and passive victim' image does not always fit the specific circumstances of child marriage or child soldiering. It should be recognised that older children possess various degrees of agency and autonomy. The paternalistic 'liberal' position, the ideology currently dominating the scholarship on child soldiering and child marriage, emphasises the victimhood of children and promotes the idea that children who have willingly taken part in hostilities are considered to have lost control of their limited agency. Agency is a type of autonomy which focuses not only on the capacity to conceive projects and values, but also the capacity to act upon them.[84] Agency, as explained by Honwana, 'concerns events of which an individual is the perpetrator, in the sense that the individual could, at any phase in a given sequence of conduct, have acted differently'.[85]

In determining the possible culpability of children, the question of consent and the extent to which children have voluntarily entered into either early marriage or soldiering is highly relevant.

Consent has been defined as the 'legal competence and factual ability of the affected individual to dispose of the protected interest under attack'.[86] An individual may absolve a perpetrator from liability

83 See Tiefenbrun (n 79 above).

84 N Quenivet 'The liberal discourse and the new wars of/on children' (2013) 38 *Brooklyn Journal of International Law* 1104, citing D Johnston *The idea of a liberal theory: A critique and reconstruction* (1994) 71.

85 A Honwana 'Innocent and guilty: Child soldiers as interstitial and tactical agents' in A Honwana & F de Boeck (eds) *Makers and breakers: Children and youth in post-colonial Africa* (2005) 31 48, quoting A Giddens *The constitution of society* (1984) 9. See also M Nussbaum & R Dixon 'Children's rights and a capabilities approach: The question of special priority' (2012) 97 *Cornell Law Review* 549.

86 W Schomburg & I Peterson 'Genuine consent to sexual violence in international criminal law' (2007) 101 *American Journal of International Law* 125.

by giving genuine consent.[87] The meaning of 'genuine consent' is, however, controversial in the context of child soldiers and child marriage. The ICTR in *Gacumbitsi* held that, where coercive factors can be proven, genuine consent is impossible.[88]

Child marriage is sometimes referred to as 'forced marriage' to emphasise the fact that young girls who are married are not in the position to give their full and free consent and are often coerced into marriage.[89] Coercion in this sense would occur when children's parents or guardians put pressure on girls to get married, and sometimes even force them to.[90] Of course, not only children are coerced into forced marriages, which is one reason why it is not accurate to describe all instances of child marriage as forced marriages.

Australia is one of the few jurisdictions that have explicitly criminalised coercion with respect to marriages. The amended Criminal Code[91] states:[92]

> A marriage is a forced marriage if, because of the use of coercion, threat or deception, one party to the marriage (the victim) entered into the marriage without freely and fully consenting.

Coercion can include '(a) force; (b) duress; (c) detention; (d) psychological oppression; (e) abuse of power; and (f) taking advantage of a person's vulnerability'.[93] This model is more than capable of being directly transferred and used to determine whether the marriage of a child was the result of coercion or in fact voluntary. In the event that coercion is present, the Criminal Code criminalises two types of conduct: first, the conduct of forcing a person to be party to a forced marriage; and, second, being a party to such a forced marriage but not the victim of or the one coerced into the forced marriage.[94]

In addition to coercion, other factors, such as deception and emotional pressure, may also influence the genuineness of consent. The family and community constantly inform the child that the family's reputation is dependent on the marriage and, in extreme cases, the children are even isolated and ignored by their families.[95]

Whereas more often than not child marriages are entered into without the necessary consent, it should be appreciated that there will

87 As above.
88 *Prosecutor v Gacumbitsi* ICTR-2001-64-A para 321.
89 Plan International Australia *Just married, just a child: Child marriage in the Indo-Pacific region* (2015) 5.
90 As above.
91 Crimes Legislation Amendment Act 2013 sec 270(7)(A).
92 Plan International (n 89 above) 30.
93 As above.
94 As above.
95 http://www.stopvaw.org/forced_and_child_marriage (accessed 16 September 2015).

be marginal cases in which a girl has entered into a marriage of her own accord.

We support the argument that some children, more particularly young adolescents, do to a certain degree possess autonomy.

Adolescence has become a recognised developmental period in which there are differing levels of understanding and maturity.[96] For example, 16 year-old children are better at reasoning than 13 year-olds.[97] Drumbl's arguments for autonomy and international humanitarian norms allow the recruitment of soldiers from the age of 15 years.[98] This article argues that, in certain circumstances, in cases where young adolescents are involved, it is possible that consent may be given freely without coercion of any kind.

Therefore, under the umbrella term of child marriage, a distinction should be made between early marriage and forced marriage. A forced marriage will be a marriage in which consent was not given or, where given, it was influenced by coercion and, therefore, cannot be considered true consent. The previous United Nations (UN) Secretary-General, Kofi Annan, added that 'in its most extreme form, forced marriage can involve threatening behaviour, abduction, imprisonment, physical violence, rape and, in some cases, murder'.[99] Early marriage is a marriage in which a young adolescent has freely consented to the marriage.

This article proposes that, in the case of child marriages, the following presumptions should exist: Between the ages of zero and seven, it is irrebuttably presumed that genuine consent cannot be obtained from the child and, therefore, such a marriage is a forced marriage. Between the ages of seven and 15, children should be considered rebuttably incapable of giving consent. Between the ages of 15 and 18, it should be rebuttably presumed that genuine consent is capable of being given. This would correspond with the position in many domestic legal systems, such as South Africa and the United Kingdom. For those between 15 and 18, marriage can either be a forced marriage if no consent was given or, if consent was in fact given, it will merely be an early marriage.

In the context of an early marriage involving older children, one should consider the following question, namely, if the 'child' or 'young adolescent' wants to be in the marriage, should it still be considered unacceptable and a crime against humanity? Or is the issue of early marriage really only a problem when the marriage is abusive or violent?

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96 N Cahn 'Poor children: Child "witches" and child soldiers in sub-Saharan Africa' (2005/6) 3 *Ohio State Journal of Criminal Law* 425.

97 As above.

98 Art 8(2) Rome Statute; art 38 CRC.

99 United Nations General Assembly 2012 'Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences' Gulnara Shahinian. Thematic report on servile marriage 10 July 2012.

Multiple factors contribute to the prevalence of forced marriages. Marriage is seen as the penultimate protector of a girl's honour.[100] Marriage at a young age is considered to prevent premarital sex and to guard against sexual immorality.[101] Forced marriage is also used to construct family alliances, create economic partnerships or strengthen political ties.[102] Poverty is particularly crucial as an underlying factor leading to forced marriages.[103] A girl is sometimes seen as an economic burden on her family, highlighting the importance of marriage, since the family will receive valuable goods and money from the groom in return for their daughter.[104] Political instability and armed conflicts which impoverish communities are also contributing factors to forced marriages.[105]

Forced marriages of young girls and women are prevalent in times of conflict and are sometimes called 'bush marriages' or even 'AK47 marriages'.[106] These girls and women are forcibly married to the men taking part in the armed hostilities, and are expected to guard the husband's property in addition to cooking, cleaning, satisfying his sexual desires and bearing his children.[107] Forced marriages contain both sexual and non-sexual elements. The SCSL Appeals Chamber recognised forced marriage as a crime distinct from sexual slavery.[108] It is important to recognise the non-sexual element of forced marriages, as the wives are not only sexually abused, but also subjected to other forms of abuse which must be taken into consideration.[109] The Armed Forces Revolutionary Council (AFRC) Appeal Chamber also defined forced marriage as a crime against humanity. It added that it involved 'forced conjugal association with another person'.[110] Forced marriage as a crime against humanity was for the very first time recognised in international law by the SCSL.[111]

The crime of conscripting, enlisting and using child soldiers is often interlinked with the issue of forced marriage.[112] In the case of the conflict in Sierra Leone, girls and women were abducted by child soldiers and were not only forced to marry them, but also to provide

100 'Child, early and forced marriage: A multi-country study' submission by Women Living Under Muslim Laws to OCHCR 13.
101 As above.
102 'Child, early and forced marriage' (n 100 above) 15.
103 'Child, early and forced marriage' 16.
104 As above.
105 'Child, early and forced marriage' (n 100 above) 17.
106 ASJ Park 'Forced marriage, girl soldiers and the Special Court for Sierra Leone' (2006) 15 *Social and Legal Studies* 327.
107 V Oosterveld 'The Special Court for Sierra Leone, child soldiers, and forced marriage: Providing clarity or confusion?' (2007) 45 *The Canadian Yearbook of International Law* 133.
108 As above.
109 Oosterveld (n 107 above) 155.
110 Oosterveld 133.
111 Oosterveld 152.
112 Oosterveld 169.

support to those fighting in the front lines.[113] These girls were then trained to burn down houses, spy on the enemy and loot.[114] The UN Special Representative for the Secretary-General has expressed the view that the war crime of using child soldiers, in itself, can include subjecting women and children to forced marriage.[115]

The Rome Statute does not include forced marriage as a crime against humanity, neither does the Statute of the Special Court for Sierra Leone. The International Criminal Court can, therefore, be guided by the manner in which the SCSL treated the issue of forced marriage as a crime against humanity.

8 Conclusion

Although on the surface the position of children in early marriage and the position of child soldiers seem to be very different, there are important overlaps and commonalities between the positions of children in these circumstances. The article essentially argues that children, both in the context of child marriage and that of child soldiers, can possess a measure of agency and should not necessarily be considered innocent victims if they were at an age where they were capable of giving consent and did in fact give their consent freely and voluntarily. This position takes cultural arguments seriously without allowing culture to be used as a justification for harming children. Recognising this reality will help destigmatise the positions of older children, children on the verge of adulthood and young adults who decide to marry. It also recognises the reality that many older children willingly enter into marriage and soldiering and take advantage of or even benefit from the specific circumstances of marriage or the context of armed conflict. By advancing this argument, the authors do not deny the seriousness of the detrimental effects of marriage on young children or children who are the victims of forced marriage. The severely detrimental effects on children who are forcibly recruited into the armed forces are also recognised.

Tobin writes about children as 'vulnerable yet evolving in their autonomy'.[116] The current international law position emphasises the vulnerability of children, but does not sufficiently appreciate the fact that children constantly evolve in their autonomy. Adopting presumptions used in the criminal law of domestic legal systems can assist in making the necessary distinctions within the category 'childhood'. This position may lead one to redefine concepts such as child soldiers and child marriage.

113 As above.
114 Park (n 106 above) 324.
115 Oosterveld (n 107 above) 169 fn 185.
116 Tobin (n 18 above) 10.

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Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union

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Summary

This article examines article 4(h) of the Constitutive Act of the African Union, which provides for military intervention in an AU member state by the AU to stop mass atrocities, namely, serious human rights violations constitutive of international crimes. The article identifies a five-prong, sequential and cumulative test as applied in Darfur (Sudan) and Libya. This test is largely based on article 4(h), the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union, and related sources. Although not binding, the Pretoria Principles, drafted and adopted by a group of experts following a conference convened by the University of Pretoria in December 2012, provide a complete set of guidelines to apply and implement article 4(h). In applying this test, it is concluded that article 4(h) should have been applied and is still applicable in Darfur and Libya.

Key words: *article 4(h) of the Constitutive Act of the African Union; African Union; Pretoria Principles; mass atrocities; responsibility to protect; Security Council; Darfur (Sudan); Libya; International Criminal Court*

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1 Introduction

According to article 4(h) of the Constitutive Act of the African Union (AU),[1] an AU principle is 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. Article 4(j) of the Protocol Relating to the Establishment of the Peace and Security Council (PSC) of the AU[2] re-states this principle.

Based on article 4(h), the Pretoria Principles[3] and related literature,[4] the article seeks to, first, identify a test to trigger article 4(h) forceful intervention, namely, military intervention by the AU in Darfur (Sudan) and Libya; second, to demonstrate that article 4(h) military intervention should have been applied and should still be applied in order to stop ongoing and prevent further mass atrocities in Darfur and Libya. Darfur and Libya are considered because of factors such as complexity, duration, international effects and gravity. As evidenced by sources discussed here, not only did Darfur and Libya constitute paradigmatic cases for military intervention in Africa but, additionally, the current situation on the ground arguably still merits military intervention. It may be argued that the current situation in Burundi warrants a more immediate triggering of article 4(h). However, considering the above-mentioned factors, Darfur and Libya deserve at least equal attention. The analysis is limited to these two cases in order to examine them in greater detail.

Data on mass atrocities in Darfur and Libya used here mainly stems from mechanisms at the international level, namely, the United Nations (UN) and the International Criminal Court (ICC), and is complemented by information from the AU mechanisms. The analysis focuses on the conditions under which to apply article 4(h) in Darfur and Libya. Considering the above-mentioned aims of the study, the implementation of article 4(h) is not, as such, discussed extensively. However, certain aspects relating to the implementation (and 'implementability') of article 4(h) are examined under the proposed test, particularly paying attention to the PSC structures, the role of the AU human rights system, and the AU Assembly in the matrix of implementation of article 4(h).

The analysis presented builds on existing literature on article 4(h) and, to some extent, the responsibility to protect. Thus, the focus is on the application of doctrinal and legal considerations to the cases of

1 Constitutive Act of the African Union, adopted 11 July 2000, entered into force 26 May 2001.

2 Protocol Relating to the Establishment of the Peace and Security Council, adopted 9 July 2002, entered into force 26 December 2003.

3 Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union, Centre for Human Rights, Pretoria, 2012.

4 Eg, D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014).

Darfur and Libya. Some theoretical consideration of article 4(h) is examined, as complemented by a discussion of the legal nature of the Pretoria Principles. Thereafter the study follows a proposed test to trigger military intervention by the AU in an AU member state in order to stop mass atrocities. This test consists of five sequential and cumulative criteria. First, there must be grave circumstances to be prevented or halted, namely, war crimes, genocide and crimes against humanity. Second, the target state must be unwilling or unable to stop these mass atrocities. Third, article 4(h), namely, military intervention, must be the last available resource or measure. Fourth, the AU Assembly should take the decision to intervene. Fifth, the AU must seek the authorisation of the UN Security Council.

2 On the theoretical foundations of article 4(h) and the nature of the Pretoria Principles

Regarding the theoretical foundations of article 4(h) for the purposes of this study, first, the responsibility to protect and its relationship to article 4(h) are examined. The responsibility to protect is not a binding legal principle capable of founding a case for military intervention by itself. This responsibility is fundamentally a political commitment carrying persuasive value. The lack of binding effect is caused mainly by the absence of consensus among states regarding the scope, manifestations and implementation of the responsibility to protect.[5] The three documents associated with its genesis, namely, the Report of the International Commission on State Sovereignty and Intervention (ICISS Report),[6] the High-Level Panel Report (HIPPO Report),[7] and the Outcome Document of the 2005 World Summit (Outcome Document),[8] as well as the reports by the Secretary-General on implementing the responsibility to protect,[9] have not led to an emerging hard norm of international law.[10] Rather, the responsibility to protect constitutes soft law or a political principle.[11] The responsibility to protect is 'partly a political catchword', but some propositions on the responsibility are based on established

5 See C Focarelli 'The responsibility to protect doctrine and humanitarian intervention: Too many ambiguities for a working doctrine' (2008) 13 *Journal of Conflict and Security Law* 191-213.

6 ICISS 'The responsibility to protect' (2001) http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 1 November 2016).

7 *A more secure world: Our shared responsibility. Report of the High-Level Panel on Threats, Challenges and Change*, UNGA Doc A/59/565, 2 December 2004.

8 *The use of force in international relations: Challenges to collective security* (2006) UN General Assembly, World Summit Outcome, 60th session, UN Doc A/60/L.1/2005, 15 September 2005.

9 Eg Report of the Secretary-General *Implementing the responsibility to protect*, A/63/677, 12 January 2009 paras 17-19 & 53-54.

10 C Stahn 'Responsibility to protect: Political theory or emerging legal norm' (2007) 101 *American Journal of International Law* 99 118.

11 As above.

international law.[12] The responsibility to protect is based on three pillars: states are primarily responsible for protecting their populations from mass atrocities; the international community has a duty to assist states to meet this responsibility; and if a state fails to protect its population, the international community should be prepared to take collective action (in principle via the UN Security Council) under the UN Charter.[13] Article 4(h) corresponds to or is akin to this third pillar[14] and, arguably, codifies it to an important extent.[15] As examined later, the kind of intervention under article 4(h) is primarily of a military nature or by the use of force.[16] In this study the responsibility to protect is used as a general framework for article 4(h) which binds state parties to the AU Constitutive Act. Therefore, the responsibility to protect may be used as a persuasive ground for suggesting military intervention in situations that meet the article 4(h) threshold.

Second, despite pursuing the same goal of the prevention of mass atrocities,[17] article 4(h) is different from humanitarian intervention.[18] Unlike unilateral intervention (such as Tanzania's intervention in Uganda (1978)) or multilateral humanitarian intervention (North Atlantic Treaty Organisation (NATO)), article 4(h) intervention is a statutory treaty-based intervention, that is, based on a legal entitlement to intervene.[19]

Third, the approach of sovereignty as responsibility and the possibility to curtail sovereignty in cases of mass atrocities underlie article 4(h). Indeed, the rationale behind article 4(h) is to avoid genocidal massacres such as occurred in Rwanda (1994). AU member states are expected to prove that they fulfil their responsibility to protect their own populations so that no article 4(h) intervention takes place.[20]

Regarding the nature of the Pretoria Principles, they neither constitute formal sources of international law nor generate international obligations. The Principles have no legal effect. However, they can add important persuasive value to invoke article 4(h) in Darfur and Libya. Indeed, the Pretoria Principles may be placed within the context of similar initiatives, including the academic and non-

12 Stahn (n 10 above) 102.
13 UN General Assembly (n 8 above) paras 138-140.
14 D Kuwali 'Meaning of "intervention" under article 4(h)' in Kuwali & Viljoen (n 4 above) 26; Pretoria Principle 5.
15 Pretoria Principle 5.
16 Kuwali (n 14 above) 26; A Abass 'The African Union and the responsibility to protect. Principles and limitations' in J Hoffmann & A Nollkaemper (eds) *Responsibility to protect: From principle to practice* (2012) 213 224-226.
17 Abass (n 16 above) 223.
18 D Kuwali & F Viljoen 'Conclusion' in Kuwali & Viljoen (n 4 above) 341.
19 Kuwali (n 14 above) 32-33.
20 Stahn (n 10 above) 119; Kuwali (n 14 above) 31.

academic sources examined in this study, on the importance of implementing article 4(h).

Whether the Pretoria Principles could be considered part of 'the teachings of the most highly-qualified publicists of the various nations, as subsidiary means for the determination of rules of law' under article 38(1)(d) of the Statute of the International Court of Justice, is open to debate. It may be argued that the Pretoria Principles represent the opinions of only a handful of scholars. Nevertheless, the Principles indeed resulted from a conference that brought together a significant number of scholars and experts on article 4(h), including several prominent legal scholars. A collective book on article 4(h) related to the Pretoria Principles conference has been published, and civil society has made reference to the Principles.[21] The Pretoria Principles and their 'companion' book arguably reflect 'the teachings of the most highly-qualified publicists of the various nations' in Africa on article 4(h).

It may be also argued that the Pretoria Principles constitute soft law. Although not constituting law, the Principles are legally relevant as they claim to seek to 'provide greater clarity and inform action' by a variety of regional, sub-regional, state and non-state actors on how to enhance their roles concerning article 4(h).[22] Soft law consists of a wide variety of instruments, including statements prepared by individuals in a non-governmental capacity that seek to establish international principles.[23] The Pretoria Principles fall in this soft law category. The Principles also serve certain roles that non-binding normative instruments can play in relation to hard law: consolidating political opinion around the need for action on a problem; filling in gaps in treaties; and providing guidance.[24] Moreover, as the Principles may arguably carry political and/or moral value in international law, they may be considered soft law.[25]

3 Existence of grave circumstances, namely, war crimes, genocide and crimes against humanity, to be prevented or halted

Article 4(h) mentions intervention 'in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity' – also

21 See Kuwali & Viljoen (n 18 above); Stanley Foundation et al *Civil society perspectives: A view from Africa: From non-interference to non-indifference: Reflecting on the implementation of the article 4(h) agenda at the African Union* (2014).

22 Pretoria Principles introduction.

23 CM Chinkin 'The challenge of soft law: Development and change in international law' (1989) 38 *International and Comparative Law Quarterly* 850-851.

24 D Shelton 'Soft law' in D Armstrong (ed) *Handbook of international law* (2009) 68 72.

25 M Bothe 'Legal and non-legal norms: A meaningful distinction in international relations' (1980) 11 *Netherlands Yearbook of International Law* 67-95.

mentioned in article 4(j) of the PSC Protocol. The Pretoria Principles provide:

> 8 The threshold for intervention pursuant to article 4(h) is 'grave circumstances' that constitute serious violations of human rights and humanitarian law in the form of genocide, war crimes and crimes against humanity.
>
> 9 Article 4(h) empowers the AU to intervene in a member state under a limited set of stipulated 'grave circumstances' … when populations are at risk of war crimes, genocide and crimes against humanity.

This study examines article 4(h) as it currently stands: 'intervention in the event of grave circumstances (intervention to protect populations from mass atrocities)'.[26] The instruments of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR), the ICC and Special Court for Sierra Leone include definitions of the above-mentioned crimes. These crimes have been interpreted in the robust case law of these tribunals. The commission of these crimes breaches *ius cogens* rules.[27] For the purposes of this study, the ICC Statute provisions, which largely codify customary international law and bind most African states, suffice. Following the UN Genocide Convention, the ICC Statute in article 6 establishes that genocide consists of five criminal acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. Crimes against humanity (article 7 of the ICC Statute) refer to criminal acts such as murder, torture, sexual crimes and persecution 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Finally, war crimes (article 8 of the ICC Statute) consist of serious violations of international humanitarian law committed in international or non-international armed conflicts.

A wide range of sources have extensively documented the commission of war crimes, genocide and/or crimes against humanity in Darfur and Libya. In this section some of these sources are discussed to evidence the protracted and continuous commission of mass atrocities and, thus, argue that 'grave circumstances', as laid down in article 4(h), not only existed but also continue to exist in Darfur and Libya. Regarding the findings, conclusions and recommendations of fact-finding commissions relating to crimes committed in Darfur and Libya, these arguably constitute soft law sources and should be considered by organs such as the UN Security Council, the AU Assembly and the PSC.

With respect to Darfur, under UN Security Council Resolution 1564 (2004),[28] the Secretary-General established the International Commission of Inquiry on Darfur (ICID). In 2005 the ICID concluded

26 Pretoria Principle 2.

27 W Schabas *An introduction to the International Criminal Court* (2004) 34.

28 S/RES/1564 (2014), 18 September 2014 para 12.

that Sudan and the state-affiliated Janjaweed were responsible for serious violations of international human rights law and international humanitarian law, constituting war crimes and crimes against humanity, committed since 2003.[29] No existence of genocidal state policy was found; however, the ICID recognised that individuals may commit acts with genocidal intent to be determined by courts.[30] War crimes perpetrated by non-state armed groups were found, albeit not committed in a systematic or widespread pattern.[31] Thus, the UN Security Council referred the situation in Darfur to the ICC. This led to cases involving leaders of the parties to the armed conflict, prominently including President al-Bashir, for war crimes, crimes against humanity and genocide. The evidence relied on to issue arrest warrants against al-Bashir concerns crimes committed up to July 2008. However, the ICC prosecutor has denounced ICC Statute crimes attributed to state actors in later reports to the UN Security Council. In her June 2016 report, the prosecutor denounced the continuing deterioration of the security situation in Darfur and aerial attacks against civilians.[32]

The Human Rights Council (HRC)-mandated High Level Mission (2007), and the UN Office of the High Commissioner for Human Rights (UNOHCHR) (2015) documented gross and systematic violations of international humanitarian law and international human rights law (war crimes and crimes against humanity) allegedly perpetrated for several years mainly by state actors.[33] Human Rights Watch also reported recent serious abuses.[34]

In 2004 the African Commission on Human and Peoples' Rights (African Commission) denounced the commission of mass atrocities mainly by state actors in Darfur.[35] However, apparently it has not denounced mass atrocities in Darfur.[36] In turn, the PSC apparently has not closely co-operated with the African Commission's fact finding. This affects the matrix of implementation of article 4(h), as the AU and the PSC would benefit from factual information gathered by the African Commission to authorise military intervention. This deficit was partially corrected by the 2013 joint report of the AU and UNOHCR

29 *Report of the ICID to the UN Secretary-General*, 25 January 2005 paras 630-638.

30 *Report of the ICID* (n 29 above) paras 640-642.

31 *Report of the ICID* para 639.

32 *Twenty-third report*, 9 June 2016 para 15.

33 *Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101*, A/HRC/4/80, 9 March 2007 para 76; *Report of the UNOHCHR on Impunity and Accountability in Darfur for 2014*, August 2015 paras 73-74.

34 HRW *World Report 2016, Sudan, Events of 2015* (2016), https://www.hrw.org/world-report/2016/country-chapters/sudan#399c55 (accessed 1 November 2016).

35 Report of the African Commission's Fact-Finding Mission to the Republic of Sudan in the Darfur Region, EX.CL/634 (XI), 8-18 July 2004 paras 107-110 & 120-123.

36 Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, 12th extra-ordinary session of the African Commission on Human and Peoples' Rights, 29 July-4 August 2012.

which documented serious abuses.[37] Nevertheless, three years later no updated fact-finding report has been released.

As far as Libya is concerned, under HRC Resolution S-15/1 (2011),[38] the International Commission of Inquiry to investigate alleged violations of international humanitarian law in Libya (ICIL) was set up and delivered reports before and after the fall of the Gaddafi regime. In 2011 the ICIL found that most crimes against humanity and war crimes were committed by Gaddafi's government forces.[39] Conversely, in 2012 the ICIL focused on war crimes and crimes against humanity committed by the *Thuwar* (anti-Gaddafi forces).[40] This difference reflected the shift of power in Libya and demonstrated that mass atrocities continued after Gaddafi's death. In turn, the African Commission and the African Court on Human and Peoples' Rights (African Court) in the *Libya* case referred to ongoing and imminent mass atrocities in Benghazi and other locations in Libya (during the Gaddafi regime), and the African Court ordered Libya to adopt provisional measures.[41]

As of 2016, the UNOHCHR reported that several actors in the ongoing Libyan armed conflict continued to commit war crimes and crimes against humanity.[42] These include state actors (mainly the Libyan National Army); armed groups (Libya Dawn affiliates included); ISIL-affiliated armed groups; and tribal armed groups.[43] Several actors have perpetrated mass atrocities since 15 February 2011. This date marks the start of the ICC's temporal jurisdiction over Libya under UN Security Council Resolution 1970 (2011).[44] Pre-Trial Chamber I issued arrest warrants against Gaddafi, Saif Al-Islam Gaddafi and Al-Senussi for crimes against humanity (murder and persecution).

The Government of National Accord was formed following the agreement adopted on 17 December 2015 amid UN-backed negotiations. However, as of November 2016, Libya is still being affected by armed conflicts[45] and related international crimes. In her November 2016 report to the UN Security Council, the ICC prosecutor denounced large executions committed by ISIL, civilian

37 UN, UNAMID, AU, UNOHCHR Human Rights Situation in Darfur in 2013, November 2014.

38 HRC Resolution S-15/1, Situation of Human Rights in the Libyan Arab Jamahiriya, A/HRC/S-15/1, 25 February 2011 para 11.

39 *Report of the ICIL*, A/HRC/17/44, 1 June 2011 7-8.

40 *Report of the ICIL*, A/HRC/19/68, 8 March 2012 para 11.

41 ACHPR/CHAIR/AfCHPR/108.11; African Court *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya Application 004/2011*, Order for Provisional Measures, 25 March 2011, paras 13, 22 & 25.

42 Investigation by the UNOHCHR on Libya, *Report of the UNOHCHR*, A/HRC/31/47, 15 February 2016 paras 60-64.

43 As above.

44 S/RES/1970 (2011), 26 February 2011 para 4.

45 Armed Conflict Location and Event Data Project, 'Libya – October 2016 Update' http://www.crisis.acleddata.com/libya-october-2016-update/ (accessed 15 November 2016).

deaths as a consequence of indiscriminate air strikes, and other atrocities perpetrated by all parties to the conflict.[46] Major human rights non-governmental organisations (NGOs) confirmed that international crimes were still being perpetrated in Libya.[47]

4 Target state unwilling or unable to stop mass atrocities

Neither article 4(h) of the AU Constitutive Act nor article 4(j) of the PSC Protocol explicitly requires that the target state must be unwilling or unable to stop mass atrocities as a condition for the AU to authorise military intervention. However, the Pretoria Principles and scholars refer to such a requirement. According to the Principles:

> 4 Article 4(h) allows the AU to protect populations at risk of war crimes, genocide and crimes against humanity if the target state is unable or unwilling to discharge its primary responsibility to protect the fundamental rights of its citizens.
>
> ….
>
> 9 [T]he AU Assembly should consider the inability or unwillingness of the national government to protect its population from mass atrocities … where a state violates the fundamental rights of its own citizens, or tolerates or fails to stop mass atrocities within its territory, the AU is authorised by article 4(h) to intervene to prevent or halt mass atrocities …

Additionally, the Pretoria Principles provide:

> 15 [T]he AU should also ensure that member states respect their legal obligations to bring perpetrators of genocide to justice.
>
> 16 The AU should exert peer pressure on AU member states to end violations where systematic patterns of human rights and humanitarian law violations are revealed, and encourage member states to enact laws to prevent mass atrocity crimes and punish the perpetrators of these crimes in the domestic group.

Scholars have considered that the target state must be unwilling or unable to stop mass atrocities as a condition to implement military intervention under article 4(h).[48] The target state is primarily responsible for protecting its population. Its unwillingness or inability to fulfil this responsibility is a condition for article 4(h) intervention, 'in which case such responsibility shifts to the AU'.[49] Accordingly, when an AU member state is unable or unwilling to protect its population within its borders from mass atrocities, the AU should assume this

46 *Twelfth Report*, 9 November 2016 paras 13-17 & 26.

47 HRW *World report 2016, Libya, events of 2015* (2016), https://www.hrw.org/world-report/2016/country-chapters/libya (accessed 26 June 2016).

48 Eg, Kuwali & Viljoen (n 18 above) 342-344; T Kabau 'The responsibility to protect and the role of the regional organisations: An appraisal of the African Union's interventions' (2012) 4 *Goettingen Journal of International Law* 49 90.

49 CB Murungu 'International crimes that trigger article 4(h) intervention' in Kuwali & Viljoen (n 4 above) 70 81.

responsibility.[50] Generally, when a state is unable or unwilling to protect its own nationals, the international community is expected to assume the residual responsibility under the responsibility to protect.[51] The responsibility to protect populations from mass atrocities is primarily placed on the territorial state, but permits collective external intervention as a last resort in case the territorial state fails in this regard.[52] Sovereignty entails responsibility and, thus, non-intervention is subject to the fulfilment by the target state of its duty to protect its own population.[53]

An inability or unwillingness to prevent or stop mass atrocities may be inferred from diverse factors. Among others, the sources examined suggest the need for a close consideration of the systematic and/or widespread ongoing and protracted commission of international crimes in Darfur and Libya. 'Unwillingness' is present when state agents and/or their proxies have committed serious abuses and there is impunity. This has taken place in Libya and, especially, in Darfur (Sudan). In turn, 'inability' mainly concerns the incapacity of the target state to protect its population from mass atrocities. This has arguably been present in Darfur (Sudan) and, especially, in Libya. As examined, diverse sources evidence the commission of mass atrocities by state and non-state actors in Darfur and Libya. The absence of and/or serious deficits in accountability mechanisms in Sudan and Libya are also examined to demonstrate that these states have been unwilling and/or unable to fulfil their obligation to protect their populations from mass atrocities.

Moreover, the impact of article 46A*bis* of the so-called Malabo Protocol (not yet in force),[54] which grants immunity to AU sitting heads of states and high-level officials from prosecution at the prospective AU African Court of Justice and Human Rights, evidences 'unwillingness' to investigate those allegedly most responsible for mass atrocities in Africa. Article 46A*bis* impacts on the implementation of article 4(h) because criminal prosecution, as a non-military measure, is precluded. Thus, the need for military intervention as last resort would arguably increase. Also, article 46A*bis* could be conveniently invoked by African leaders to justify their (potential) reluctance to co-operate with the implementation of article 4(h). As

50 D Kuwali 'From stopping to preventing atrocities. Actualisation of article 4(h)' (2015) 24 *African Security Review* 243 249; L Sunga 'The role of humanitarian intervention in international peace and security: Guarantee or threat?' in H Kochler (ed) *The use of force in international relations: Challenges to collective security* (2006) 41; UN General Assembly (n 8 above).

51 Kabau (n 48 above) 66; K Kindiki *Intervention to protect civilians in Darfur: Legal dilemmas and policy imperatives* (2007) 6.

52 GJ Evans *The responsibility to protect: Ending mass atrocity crimes once and for all* (2008) 141 144; HIPPO Report (n 7 above) paras 55 & 202-203.

53 Stahn (n 10 above) 111-114; Kabau (n 48 above) 53.

54 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Assembly, AU Doc Assembly/AU/Dec.529(XXIII), 27 June 2014.

far as Darfur is concerned, the ICID found in 2005 that Sudan's measures to address the crisis had been 'grossly inadequate and ineffective', which had led to total impunity, and that the Sudanese system was unable or unwilling to address the crisis.[55] In 2013, the UN and the AU jointly pointed out that impunity 'remained a major concern', and that state inaction was caused by a lack of political will or capacity.[56] In 2007[57] and 2015,[58] respectively, the UN High-Level Mission on Darfur and the UNOHCHR reached similar findings and concluded that Sudanese justice mechanisms had been negligible, regarding accountability or redress, and had mostly ceased to exist. The national system failed to impact on 'combatting impunity and strengthening accountability'.[59] Apparently, this situation remains.[60]

Sudan's unwillingness or inability is also evidenced by its very uncooperative and obstructionist position to implement the ICC arrest warrants. The ICC prosecutor has reported about this situation.[61] Sudan's co-operation ended when the ICC issued arrest warrants against state actors (2007), and worsened when al-Bashir was indicted (2008 and 2009).[62] In 2016, the ICC prosecutor reported to the UNSC that the Sudanese judicial system was 'unable' or 'unwilling' to address international crimes committed in Darfur,[63] which the Chambers had already found.[64]

As far as Libya is concerned, the ICIL found an absence of governmental action to address mass atrocities in June 2011 (before Gaddafi's fall).[65] As of late 2016, the situation on the ground reveals mainly an 'inability' to stop mass atrocities in Libya. Despite some recent efforts, discussed later, no effective central government has been in place in Libya since Gaddafi's fall. There have been factional governments with different levels of international recognition and internal legitimacy. Libya has been qualified as a failed or lawless state, as the country is still divided among competing armed groups (including two rival parliaments and three governments) that have control over territory and population amid a lack of institutional framework.[66] This power vacuum goes to the heart of 'inability' and

55 ICID (n 29 above) 5-6.
56 UN/AU (n 37 above) paras 106 & 109.
57 UN High-Level Mission on Darfur (n 33 above) paras 46-49.
58 UNOHCHR (n 33 above) para 68.
59 UNOHCHR para 72.
60 See HRW (n 34 above).
61 Eg *Twenty-third Report* (n 32 above) para 17.
62 *Seventh Report*, 13 May 2014 para 30.
63 *Twenty-third report* (n 32 above) para 17.
64 Al-Bashir Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, 9 March 2015, ICC-02/05-01/09-227 11.
65 ICIL (n 39 above) 8.
66 The Economist 'Libya: The next failed state' 10 January 2015, http://www.economist.com/news/leaders/21638122-another-font-global-mayhem-emergingnot-helped-regional-meddling-and-western (accessed 7 November 2016);

legality and strengthens the need for military intervention by the AU similar to the UN Security Council intervention in Somalia.

The situation regarding Libyan accountability mechanisms confirms and illustrates this inability. In March 2012, the ICIL found deficient accountability mechanisms, and no functioning court system to hold perpetrators accountable, to be considerable challenges to prosecuting violations.[67] In 2016, the UNOHCHR stated that the 'justice system has been significantly compromised by the security situation and structural weaknesses'.[68] The Sudanese justice system lacks the means or capacity to conduct prompt, independent and credible investigations or prosecute those responsible in a form consistent with human rights.[69] In 2016 Human Rights Watch found that the criminal justice system had collapsed or was dysfunctional.[70]

Libya's past and present unwillingness or inability is also evidenced by its relationship with the ICC. The ICC prosecutor has found no genuine national investigation or prosecution.[71] The prosecutor requested the immediate transfer of Saif Gaddafi to the ICC. However, as the prosecutor reported to the UN Security Council in November 2016, Libya is unable to do so as Gaddafi remains outside the control of the Government of National Accord (after having been held prisoner by the Abu-Bakr al-Siddiq Battalion) and as the unstable security situation persists.[72] Pre-Trial Chamber I had made a finding of Libya's non-compliance.[73] This illustrates Libya's current inability to stop mass atrocities.

Finally, when examining the situations in Darfur[74] and Libya,[75] several scholars have found an unwillingness and/or inability of Sudan and Libya to protect their nationals from mass atrocities. Regarding ICC prosecution triggered by UN Security Council resolutions, Sudan, Libya and all other UN member states are obligated to co-operate

A Kuperman 'Obama's Libya debacle: How a well-meaning intervention ended in failure' (2015) 94 *Foreign Affairs* 66-77; BBC 'Why is Libya so lawless?' 14 September 2016 http://www.bbc.com/news/world-africa-24472322 (accessed 15 November 2016).

67 ICIL (n 40 above) paras 101-109.

68 UNOHCHR (n 42 above) para 66.

69 UNOHCHR para 70.

70 HRW (n 47 above).

71 *First Report*, 4 May 2011 para 3; *Seventh Report* (n 62 above) para 20.

72 *Twelfth Report* 10 December 2010 paras 3-8 & 13.

73 Gaddafi Decision on the Non-Compliance by Libya with Requests for Co-operation by the Court and Referring the Matter to the United Nations Security Council, 10 December 2014 ICC-01/11-01/11-577 16.

74 Eg, J Traub *Unwilling and unable: The failed response to the atrocities in Darfur* (2010); Kabau (n 48 above) 66; FK Abiew 'Article 4(h) intervention: Problems and prospects' in Kuwali & Viljoen (n 4 above) 109 114; K Mills *International responses to mass atrocities in Africa. Responsibility to protect, prosecute and palliate* (2015) 184 204.

75 Eg, C Sahn 'Libya, the International Criminal Court and complementarity. A test for "shared responsibility"' (2012) 10 *Journal of International Criminal Justice* 325 326; Murungu (n 49 above) 81; Kuwali & Viljoen (n 18 above) 342; Kuwali (n 50 above) 252.

with the ICC, regardless of their status as parties to the ICC Statute, as this obligation stems from the UN Charter.[76]

5 Article 4(h) military intervention as the last available resource or measure

Article 4(h) makes express mention of 'to intervene', which also appears in article 4(j) of the PSC Protocol. According to article 23(2) of the AU Constitutive Act,

> any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communication links with other member states, and other measures of a political and economic nature to be determined by the Assembly.

According to the Pretoria Principles:

> 4 Where diplomacy and other peaceful means have failed, the AU may use force to protect populations at risk of mass atrocities. Therefore, it is coercive measures, in particular, military force, that require the decision of the AU Assembly under article 4(h).
>
> 5 Intervention on the basis of article 4(h) is an exceptional measure in the face of grave circumstances that are beyond non-coercive measures and so require military option as a last resort.
>
> ....
>
> 7 … article 23(2) … provides for political and economic sanctions and denial of transport and communication against errant states, article 4(h) recognises that there are limits to non-violent means in stopping mass atrocities, and the only realistic means can be military intervention.

According to a textual interpretation, article 4(h) intervention only consists of coercive measures other than sanctions, that is, military intervention, since article 23(2) provides for sanctions.[77] This interpretation is also consistent with the fact that the AU can engage in non-coercive measures such as preventive diplomacy, dialogue, conflict resolution, good offices and deployment of monitors.[78] Therefore, article 4(h) adds military intervention as a measure of last resort.[79] In light of a purposive interpretation, the sort of intervention needed to neutralise the gravity of the international crimes listed in article 4(h) requires very intrusive means, namely 'incisive and purposeful military action', to prevent harm resulting from international crimes and akin to 'peace enforcement'.[80]

The Pretoria Principles establish that 'accountability through criminal prosecution to deter potential perpetrators, for example by

76 Al-Bashir Decision on the Prosecution's Application for a Warrant of Arrest, 4 March 2009 ICC-02/05-01/09-3 paras 242-249; Stahn (n 75 above).
77 Kuwali & Viljoen (n 18 above) 341.
78 As above.
79 As above; Kuwali (n 50 above) 252.
80 Kuwali & Viljoen (n 18 above) 341.

arresting perpetrators, may also be part of an article 4(h) intervention'.[81] However, it is argued that criminal prosecution does not form part of an article 4(h) intervention. First, scholars have considered that criminal prosecution, alongside diplomatic and economic sanctions, is not part of military intervention.[82] Second, the establishment by the UN Security Council of the ICTY and ICTR as peaceful measures (non-military intervention) under article 41 of Chapter VII of the UN Charter exemplifies that criminal prosecution falls short of article 4(h). Third, the AU has refrained from invoking or referring to article 4(h) in its non-military interventions as the AU intended article 4(h) to be invoked only when the AU wishes to use military force and not criminal prosecutions. The Ezulwini Consensus, which is the most influential and authoritative AU document relating to the character and intended purpose of article 4(h), exemplifies the AU's above-mentioned position:[83]

> Article 51 of the UN Charter … authorise[s] the use of force only in cases of legitimate self-defence … article 4(h) [of the Constitutive Act] authorises intervention in grave circumstances … Consequently, any recourse to force outside the framework of article 51 … and article 4(h) … should be prohibited.

Lastly, the ICISS found that (international) criminal prosecutions fall 'short of military intervention'.[84] Additionally, the HIPPO Report,[85] the Outcome Document[86] and various UN Secretary-General reports on the implementation of the responsibility to protect[87] have not regarded criminal prosecution as part of military intervention.

Punitive actions, particularly sanctions under article 23(2) of the AU Constitutive Act, may relate to the process of implementing article 4(h). These sanctions are necessary to be undertaken prior to the implementation of article 4(h), which consists of military intervention as a measure of last resort. Indeed, the exhaustion of all possible non-military measures, both sanctions and non-punitive measures, is a condition precedent to proceeding with the application and implementation of article 4(h). Additionally, it may be argued that, once the implementation of article 4(h) is in motion, a continuous follow-up to potential article 23(2) measures must be conducted to see whether, if possible, an article 4(h) military intervention is no longer necessary or to stop its implementation. Considering the above, it is argued that, in the case of Darfur, several measures, other

81 Principle 8.

82 Eg Kuwali (n 14 above) 34; Kabau (n 48 above) 59; E Yemisi Omorogbe 'Can the African Union deliver peace and security?' (2011) 16 *Journal of Conflict and Security Law* 35 41.

83 AU Executive Council 'The Common African position on the proposed reform of the United Nations (the Ezulwini Consensus)' 7th extraordinary session 7-8 March 2005, Addis Ababa, Ethiopia, Ext/EX.CL/2 (VII) 6.

84 ICISS Report (n 6 above) 8.

85 HIPPO Report (n 7 above) para 90.

86 UN General Assembly (n 8 above) paras 77-80 & 138-140.

87 Eg Report (n 9 above) paras 17-19 & 53-54.

than military intervention, have already and unsuccessfully been implemented by the AU, the UN and ICC to stop mass atrocities and to prevent further violence since the start of the ongoing violations in 2003.

First, under article 4(j) of the AU Constitutive Act, which grants AU member states the right to request intervention by the AU to restore peace and security, the AU Mission in Sudan (AMIS) was created in 2004. However, this constituted an inadequate peacekeeping force which was deployed with Sudan's consent. AMIS was not an enforcement (article 4(h)) but a consensual action resulting from the agreement between the PSC and all parties to the conflict.[88] Due to the increase in hostilities and international crimes, the UN Security Council authorised the establishment of a stronger hybrid joint operation with the AU: the Hybrid Mission in Darfur (UNAMID). UNAMID constituted a compromise between Sudan, which opposed UN intervention, and the UN, which suggested expanding the UN Mission in Sudan. Nevertheless, UNAMID was only a peacekeeping and not an enforcement force.[89] Hence, UNAMID was unable to stop international crimes. UN Security Council Resolution 1769 established that UNAMID forces would be led under 'principles of peacekeeping'. Whereas the AU intervened on consensual basis (Sudan's consent) and never changed its mandate, the Security Council issued Chapter VII Resolutions that may enable enforcement action.[90] Nevertheless, the UN arguably contradicted its enforcement mandate by seeking the consent of Sudan despite the direct involvement in mass atrocities of the latter.[91] These contradictions and related problems of impartiality, co-operation and state consent are important reasons why the Darfur crisis should have been and should still be tackled by a robust and well-developed enforcement action to stop the mass atrocities.[92] UNAMID has been mostly ineffective in protecting civilians from violence, hampered by Sudan's denial of access to conflict areas.[93]

Second, by means of Chapter VII Resolutions, the UN Security Council has ordered UN member states to implement targeted sanctions against specific individuals or groups that are suspects of being involved in mass atrocities in Darfur. These sanctions have included bans on travel and transit restrictions; the freezing of funds, financial assets, and economic resources; and arms embargoes.[94] Individuals and entities that planned, sponsored or participated in attacks threatening the stability in Darfur have been or are to be

88 Abiew (n 74 above) 115.
89 As above; D William 'African Union mission in Sudan' (2006) 13 *International Peacekeeping* 168 175-177.
90 Kabau (n 48 above) 68.
91 Kabau 69.
92 As above.
93 HRW (n 34 above).
94 Eg, S/RES/1591 (2005), 29 March 2005 para 3; S/RES/2200 (2015), 12 February 2015 paras 6-9; S/RES/2265 (2016), 10 February 2016 para 13.

sanctioned.[95] These measures are called 'smart sanctions', as they impose restrictions on specific individuals or organisations rather than on entire populations, and under 'black lists' prepared by the UN Security Council Sanctions Committee. Targeted sanctions are more advisable because indiscriminate restrictions on the human rights of entire populations are to be avoided.

Third, the UN Security Council via Chapter VII Resolution 1593 found the Darfur crisis to be a threat to international peace and security, and triggered the ICC's jurisdiction (referral) to investigate mass atrocities perpetrated in Darfur since 1 July 2002, when the ICC Statute entered into force.[96] Arrest warrants have been issued against those allegedly most responsible, including al-Bashir, for international crimes that constitute 'grave circumstances' under article 4(h). Under the UN Security Council's referral, state parties and non-state parties to the ICC Statute are obliged to co-operate with the ICC.[97] However, this obligation was breached when some African state parties and non-state parties to the ICC Statute did not arrest al-Bashir during his official visits to those states. The former and current ICC prosecutors have reported this to the UN Security Council.

Once consensual intervention, peacekeeping and other measures (including international criminal prosecution) proved to be ineffective to stop mass atrocities in Darfur, the AU should have accepted and should accept that forceful, military intervention under article 4(h) was, and arguably still is, the only measure remaining.

As far as Libya is concerned, the UN Security Council timely authorised intervention during indiscriminate attacks launched in March 2011 by the Gaddafi regime against the civilian population. Notwithstanding the 2011 NATO military intervention, international crimes are still being committed by diverse actors amid the volatile situation in Libya. This may constitute a scenario for a second military intervention to be implemented by the AU. Non-military intervention measures have already been implemented by the UN, the AU and the ICC. These measures are discussed to illustrate that article 4(h) military intervention should have been applied and arguably should still be applied as a measure of last resort.

First, in a Communiqué dated 23 February 2011, the PSC condemned the excessive use of force against civilians and the loss of lives, called for an end to the violence and repression, and supported the democratic aspirations of the Libyan people. Nevertheless, unlike in the case of the Arab League, the AU did not suspend Libya's AU membership, nor did the AU impose sanctions on the Gaddafi regime. As examined later, the AU indeed criticised the NATO-led

95 Eg S/RES/2265 (2016), 10 February 2016 para 19.

96 S/RES/1593 (2015) para 1.

97 D Akande 'The effect of Security Council resolutions and domestic proceedings on state obligations to co-operate with the ICC' (2012) 10 *Journal of International Criminal Justice* 299-324.

intervention. The AU decided to seek a peaceful solution and rejected foreign intervention, including military intervention.[98] The AU called for an immediate ceasefire and political reforms.[99] The National Transitional Council rejected this since Gaddafi's resignation was excluded.[100] In September 2011, the UN Security Council established a UN Support Mission in Libya.[101] The UN Security Council welcomed the Libyan Political Agreement to form the Government of National Accord (17 December 2015), which resulted from UN-backed negotiations, and also endorsed the Rome Communiqué (13 December 2015) to support the Government of National Accord as the sole legitimate Libyan government based in Tripoli.[102] However, as discussed, armed conflicts, a lack of control over the whole Libya and mass atrocities still persist late in 2016.

Second, besides the authorisation of military intervention to protect civilians under threat of attack, especially in Benghazi,[103] the UN Security Council ordered a no-fly zone to protect these people.[104] Additionally, the Arab League's call for the imposition of a no-fly zone over Libya to protect civilians was pivotal to raising support for external military intervention.[105]

Third, the UN Security Council via Chapter VII Resolutions has requested states to implement its Sanctions Committee's targeted sanctions against specific individuals or organisations involved in atrocities in Libya.[106] Bans on travel, the freezing of funds, financial assets and economic resources, an arms embargo, a ban on flights and the prevention of illicit oil exports have been ordered.[107] The AU and its member states are obliged to implement these sanctions. However, unlike the UN or the European Union,[108] the AU has not issued similar sanctions.

Fourth, the UN Security Council referred the situation in Libya to the ICC for investigation of crimes under ICC jurisdiction allegedly committed since 15 February 2011.[109] The ICC has considered one

98 AU 'Communiqué of the 265th Meeting of the Peace and Security Council' 10 March 2011 PSC/PR/COMM.2 (CCLXV).

99 AU 'Official Presentation by the AU to the Libyan Parties of a Proposal on a Framework Agreement for a Political Solution to the Crisis in Libya' Press Release, 1 July 2011; UN Doc S/2011/455, 26 July 2011, 'AU Proposals to the Libya Parties for a Framework Agreement on a Political Solution to the Crisis in Libya' para 8.

100 EY Omorogbe 'The African Union, responsibility to protect and the Libyan crisis' (2012) 59 *Netherlands International Law Review* 141 161.

101 S/RES/2009 (2011), 16 September 2011 para 12.

102 S/RES/2259 (2015), 23 December 2015 paras 1 & 3.

103 S/RES/1973 (2011), 17 March 2011 para 4.

104 n 103 above, para 6.

105 Abiew (n 74 above) 118.

106 S/RES/1970 (2011) paras 22-23.

107 Eg, S/RES/1973 (2011) paras 13-23; S/RES/2278 (2016), 31 March 2016 paras 1-4 & 6-10.

108 Eg, Council Decision 2011/137/CFSP, 28 February 2011, OJ 2011 L 58/53.

109 S/RES/1970 (2011) para 4.

case, originally involving three suspects, for crimes against humanity (murder and persecution).[110] The case against Muammar Gaddafi was withdrawn after his death (20 October 2011) and the case against Abdullah Al-Senussi was declared inadmissible. The AU rejected the ICC arrest warrants as it found these to seriously compromise a political solution to the crisis.[111] This obstructionist position of the AU is criticised as the AU-led efforts have not yielded a real solution to the ongoing Libyan crisis.

Fifth, on 25 March 2011, the African Court issued provisional orders[112] against Libya to immediately refrain from actions resulting in the loss of life or the violation of physical integrity.[113] These measures were ordered considering extreme gravity, urgency, and risks of irreparable harm.[114] However, since the AU opposed any military intervention in Libya, it did not enforce these orders by forceful intervention.[115] This has been criticised as the findings of the African Court should have prompted the AU to apply and implement article 4(h).

6 AU Assembly takes the decision to intervene

Article 4(h) of the AU Constitutive Act mentions 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly'. Article 4(j) of the PSC Protocol includes the same provision. Intervention under article 4(h) requires a decision of the AU Assembly of Heads of State and Government, as highlighted by the Pretoria Principles.[116] Whether this intervention is a right, as indicated by article 4(h), or may be purposely interpreted as an obligation is, to an important extent, clarified by the Pretoria Principles:

> 6 The 'right' in article 4(h) implies a legal entitlement or prerogative which is compatible with the notion of sovereignty as responsibility. This 'right' should as far as feasible be interpreted to imply a duty to intervene to prevent or halt mass atrocities.

Importantly, the Pretoria Principles explained the rationality that the AU Assembly should follow when deciding to intervene: 'The AU must prioritise the imperative to save lives over technical or overly legalistic ascertainment of the commission of war crimes, genocide and crimes against humanity.'[117]

110 See Situation in Libya, ICC-01/11 https://www.icc-cpi.int/libya (accessed 25 June 2016).
111 Abiew (n 74 above) 118.
112 Art 27(2) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 9 June 1998, entered into force 25 January 2004.
113 African Court (n 41 above) para 25.
114 African Court para 22.
115 Kabau (n 48 above) 72.
116 Principle 4.
117 Principle 10.

To apply article 4(h), the AU Assembly is expected to proceed in a two-phase inquiry.[118] First, it must be determined that war crimes, genocide and/or crimes against humanity have been, are being or are very likely to be perpetrated based on a number of fact-finding and judicial sources.[119] Second, when exercising its discretion to intervene, the AU should draw attention to implied factors under article 4(h).[120] These factors include the commission of crimes by state actors; state collusion with non-state actors; a state's inability to stop mass atrocities; the AU's prior efforts; the availability of military capacity and resources; actions and approaches undertaken at the international – mainly the UN Security Council – and sub-regional levels; and a cost-benefit analysis,[121] including an assessment of the loss of life and other consequences related to intervention.

Bearing in mind the large volume of evidence demonstrating mass atrocities in Darfur and Libya involving, inter alia, state actors, and also the unwillingness and/or inability of the Sudanese and Libyan governments, the lack of military intervention by the AU should be critically examined. The AU may have believed that there were objective factors or indicators for military intervention but, in exercising its discretion, the AU decided not to authorise military action.[122] The lack of application of article 4(h) by the AU Assembly concerning Darfur and Libya reveals the AU's unwillingness or inability to tackle this issue. Indeed, rather than taking the decision to militarily intervene in Darfur or Libya, the AU Assembly has opposed foreign military intervention.

The PSC can potentially play a pivotal part in the matrix of application and implementation of article 4(h) in Darfur and Libya. The PSC is a collective security and early-warning arrangement organ concerning conflict and crisis situations in Africa.[123] It may recommend that the AU Assembly intervenes.[124] However, the PSC's role is recommendatory, unlike the AU Assembly's decision-making role. Although some practice of the PSC has suggested the use of force to save lives,[125] the AU Assembly has yet to apply and implement article 4(h). Nevertheless, should the PSC actively exercise its recommendatory role, it may become a key body to trigger article 4(h). Moreover, the PSC Protocol grants large powers upon the PSC

118 Kuwali & Viljoen (n 18 above) 343-344.
119 As above; Kuwali (n 50 above) 257.
120 Kuwali & Viljoen (n 18 above) 343-344; Kuwali (n 50 above) 257.
121 As above.
122 K Akonor 'Assessing the African Union's right of humanitarian intervention' (2010) 29 *Criminal Justice Ethics* 157 165; Abiew (n 74 above) 118-119.
123 Art 1 PSC Protocol.
124 Art 7(1)(e) PSC Protocol.
125 Eg, concerning Somalia PSC Communiqué, 27 February 2013, PSC/PR/Comm (CCCLVII).

to 'approve the modalities of intervention' by the AU following a decision adopted by its Assembly.[126] The PSC may, thus, play a crucial role in the architecture of peace and security in Africa, which includes a continent-wide early warning system.[127] Indeed, the intersection between human rights and conflict prevention evidences the role of the AU Commission (the functional body of the AU), particularly its Peace and Security Department, which arguably requires more experienced and professional human rights officers.[128] The AU Assembly, as advised by the PSC, should apply article 4(h) in Darfur and Libya. To deploy military operations in Darfur and Libya, the PSC needs the co-operation of the AU for the African Standby Force[129] to effectively implement article 4(h) on the ground.

In the matrix of implementation of article 4(h) and existent operational context of the AU, the African Commission's fact-finding powers may be crucial to inform both the AU Assembly and the PSC when deciding on the authorisation for and implementation of military intervention. Nevertheless, as far Darfur and Libya are concerned, the African Commission's fact-finding has arguably been limited, especially when compared to the UN fact-finding missions. The African Commission's fact-finding mission in Darfur in 2004 recommended that Sudan accept an international commission of inquiry to investigate mass atrocities in Darfur, and the role of state and non-state actors.[130] However, the African Commission apparently no longer has undertaken fact-finding actions concerning Darfur. As far as Libya is concerned, other than the African Commission's participation in the *Libya* case (2011), the Commission has seemingly conducted no fact finding. The importance of the Commission's sustained fact finding, as compared to that of the UN, is the fact that the AU and PSC may regard it as more legitimate. The African Commission is not only a non-political body, but also an organ of the AU. In addition, the Commission may bring cases (such as the *Libya* case) to be decided by the African Court.[131] The African Commission can also bring cases of mass atrocities in Darfur and Libya to the attention of the AU Assembly[132] and the PSC.[133] Moreover, the African Commission may submit cases of 'emergency' (concerning Darfur and Libya) to the AU Assembly.[134] Thus, the AU Assembly and PSC would have more AU sources to apply and implement article 4(h) in Darfur and Libya. AU member states could, therefore, hardly raise allegations of 'neo-colonialism' or interference in African matters.

126 Art 7(1)(f) PSC Protocol.
127 Art 12 PSC Protocol.
128 F Viljoen *International human rights law in Africa* (2012) 192.
129 Art 13 PSC Protocol.
130 African Commission (n 35 above) paras 137-138.
131 Art 5(1)(a) African Court Protocol.
132 Art 58(1) African Charter on Human and Peoples' Rights.
133 Viljoen (n 128 above) 196.
134 Art 58(3) African Charter.

Furthermore, the PSC Protocol introduces a two-way synergetic exchange. The African Commission should provide the PSC with pertinent information, and the PSC should co-operate closely with the Commission and seek to involve the Commission in its activities by, for example, inviting the Commission to its discussions, or requesting the Commission to conduct studies or on-site missions on its behalf.[135] Nonetheless, as far as Darfur and Libya are concerned, this has yet to materialise. The PSC's support of the African Commission to conduct fact-finding missions must take place.

As far as Darfur is concerned, the AU has rejected forceful intervention and opted for other options previously examined.[136] A PSC member state party to a matter before the PSC is prohibited from discussion and decision making on that matter.[137] However, Sudan used its position within the PSC to block deliberations regarding Darfur.[138] Since Sudan provided no consent, the AU was unwilling to intervene.[139] The AU has not lobbied for forceful international intervention to stop mass atrocities in Darfur,[140] nor has it undertaken a forceful intervention in terms of article 4(h).[141] Furthermore, not only has the AU Assembly opposed the ICC arrest warrants against al-Bashir, but it has also, alongside the PSC, urged AU members not to co-operate with the ICC.[142] Based on sources previously discussed, the above-mentioned first phase of the enquiry for the AU to decide to intervene has been met.[143] Thus, the position of the PSC/AU Assembly of blocking rather than respectively recommending or applying article 4(h) military intervention is criticised. Indeed, although the AU denied allegations of genocide, it accepted that war crimes and crimes against humanity had been perpetrated.[144]

However, the above-mentioned second phase of the inquiry has militated against AU intervention because, arguably, certain circumstances, mainly related to implementation or 'implementability' problems, were present. These included Sudan's resistance; uncertainty regarding the position of the UN Security Council;[145] the lack of an available African standby force; and the fact that the PSC

135 Viljoen (n 128 above) 195-196.

136 AU Doc PSC/AHG/Comm.(X), 25 May 2004 para 6; PSC/PR/Comm.(XIII), 27 July 2004; PSC/PR/Comm(XVII), 20 October 2004 paras 6-7; PSC/PR2(XIII), 20 October 2005.

137 Art 8(9) PSC Protocol.

138 PD Williams 'The Peace and Security Council of the African Union: Evaluating an embryonic international institution' (2009) 47 *Journal of Modern African Studies* 603 620; Omorogbe (n 82 above) 41.

139 Kabau (n 48 above) 60.

140 As above.

141 As above.

142 AU Doc Assembly/AU/Dec.245(XIII), 3 July 2009 para 10; AU Doc PSC/PR/Comm (CXCVIII), 21 July 2009 para 14.

143 Kuwali (n 50 above) 260.

144 Eg, *Report of the African Union High-Level Panel on Darfur*, AU Doc PSC/AHG/2 (CCVII).

145 See section 7 below.

only started functioning in 2004 – the PSC Protocol entered into force on 26 December 2003.[146] These factors were present during the early stages of the conflict in Darfur, and some remain. Nonetheless, the fact that the conflict, mass atrocities and impunity still continue should prompt the AU Assembly to authorise military intervention to be implemented on the ground by the African Standby Force, closely supported by the UN. Furthermore, the AU Assembly should be aware of the fact that the failure by the AU to bring peace and security to Darfur affects the AU's legitimacy. Thus, it would be in the best interests of the AU to apply article 4(h).[147]

As far as Libya is concerned, the AU has expressed unease about and opposition to NATO military intervention. The AU Peace and Security Commissioner complained about the non-African actors' pursuit of their own agendas, which allegedly prevented the AU from promoting a peaceful settlement.[148] The AU Assembly stated that the NATO-led intervention contradicted Resolution 1973, as it considered this intervention to be a threat to civilians, complicating the democratic transition.[149] The AU Assembly also manifested its disappointment at the marginalisation of the AU.[150] However, the AU should have participated in the implementation of the responsibility to protect the civilian population from mass atrocities, including support for the implementation of a no-fly zone.[151]

As far as the above-mentioned first phase of the enquiry is concerned, sources previously discussed have proved the perpetration of war crimes and crimes against humanity in Libya. Nevertheless, the AU did not apply article 4(h). Regarding the above-mentioned second phase of the enquiry, the Arab league called upon the UN Security Council to impose a no-fly zone over Libya. However, the AU refrained from doing so and, instead, the PSC adopted two decisions which the UN Security Council took over. These decisions were a roadmap to be followed by Libya to sort out the crisis, and the establishment of an AU High Level *Ad Hoc* Committee on Libya, constituted of five heads of state, alongside the Commission's Chairperson.[152] After NATO's military intervention, this Committee confirmed its opposition to foreign military intervention.[153] The AU also called for an African solution to solve the crisis in Libya.[154]

146 Kuwali (n 50 above) 260.
147 Abiew (n 74 above) 115; Omorogbe (n 82 above) 53.
148 A Maasho 'AU says non-Africans sidelining Libya peace plan' *Reuters* 26 April 2011.
149 AU Doc EXT/ASSEMBLY/AU/DEC/(01.2011), 25 May 2011 para 5.
150 n 149 above, para 8.
151 Kabau (n 48 above) 61.
152 Kuwali (n 50 above) 260.
153 Meeting of the AU High-Level *Ad Hoc* Committee in Libya, Nouakchott, Islamic Republic of Mauritania, 19 March 2011.
154 M du Plessis & A Louw 'Justice and the Libyan crisis: The ICC's role under Security Council Resolution 1970' ISS Africa Briefing Paper (2011) 5.

The second phase was compounded by internal and political divisions within the AU concerning Libya. There were different positions within the AU regarding the recognition of the National Transitional Council (NTC) as the legitimate government of Libya.[155] The AU did not formally recognise the NTC immediately after the death of Gaddafi.[156] In any event, the prolonged continuation of international crimes and Libya's inability to address impunity constitute powerful factors that may guarantee article 4(h) intervention.

Indeed, some support related to potential military intervention given by the AU, or some of its members, may be inferred from the Libyan situation. The AU supported the UN Security Council no-fly zone via a PSC press statement.[157] Moreover, as part of the strong international support for Resolution 1973, three AU member states, at the time non-permanent members of the Security Council, voted in favour of this resolution.[158]

The inaction of the AU Assembly regarding Darfur and Libya illustrates the tense and potentially-contradictory relationship between what is stated in article 4(h) and political factors (*realpolitik* considerations). The voting procedure at the AU Assembly, namely, decisions adopted by consensus or eventually by a two-thirds majority,[159] has to an important extent enabled political considerations to prevail over legal criteria and abundant evidence. As discussed, the AU Assembly and the PSC, unfortunately, have disregarded legal and factual considerations for the sake of political considerations. The fact-finding powers of certain AU organs, particularly the African Commission, are not constrained by the AU Assembly's political decisions. However, the African Commission, especially when compared to the UN mechanisms, has exercised only limited fact finding regarding mass atrocities in Darfur and Libya. Therefore, the PSC and AU Assembly should actively co-operate with the African Commission's fact-finding initiatives.

7 Need for authorisation by the UN Security Council

Neither article 4(h) of the AU Constitutive Act nor article 4(j) of the PSC Protocol contains any explicit reference to the need for authorisation by the UN Security Council should the AU Assembly decide to apply article 4(h). It is open to debate whether the AU requires this authorisation when relying on article 4(h) to undertake military intervention in an AU member state, notwithstanding the

155 Kuwali (n 50 above) 261.
156 AU Communiqué of the 297th Meeting of the Peace and Security Council, PSC/PR/COMM/2 (CCXCVII) para 4.
157 AU Doc PSC/PR/BR.1 (CCLXVIII), 23 March 2011.
158 UN Doc SC/10200, 17 March 2011.
159 Art 7(1) Constitutive Act.

provisions of Chapter VII of the UN Charter.[160] However, even those who question the need for this authorisation prior to an article 4(h) military intervention reckon that *ex post facto* authorisation by, or at least a lack of opposition on the part of the Security Council, is necessary.[161] The predominant view is that article 4(h) military interventions should be preceded by Security Council authorisation and that only if the Security Council remains unwilling or unable to act in the face of mass atrocities, the AU should exceptionally be able to intervene without prior authorisation.[162] The most recent sub-regional African practice, that is, the practice of the Economic Community of Western African States (ECOWAS) and the Southern African Development Community (SADC), supports this.[163] Moreover, state practice,[164] scholars[165] and the ICISS Report[166] support the notion that the decision to intervene militarily only falls on the UN Security Council as a matter of principle.

Furthermore, an important reason to seek Security Council authorisation before military intervention is to increase the likelihood of the successful implementation of article 4(h) on the ground. Even after the African Standby Force finally becomes fully operational, the deployment of military forces to overcome powerful armies, such as that of Sudan, requires the co-operation of the international community. Should the AU obtain the UN Security Council's *ex ante* consent, article 4(h) military intervention will have passed the test of legality and will gain legitimacy. Thus, UN member states would be expected to support the implementation of article 4(h) with material, military, financial and logistical support.

The Pretoria Principles clarify the fact that there should be authorisation by the UN Security Council unless the Council is unwilling or indecisive:

> 11 As a matter of legal requirement, the AU requires the authorisation of the UN Security Council for article 4(h) intervention. The UN Security Council has the responsibility to authorise the use of force in the implementation of article 4(h) intervention. Where the UN Security Council is unwilling or indecisive in authorising intervention, the conferment of the right to intervene on the AU by member states of the AU provides greater space for the AU to act in the face of war crimes, genocide and crimes against humanity on the continent.

160 See HIPPO Report (n 7 above) paras 199-209.

161 M Kunschak 'The role of the United Nations Security Council in the implementation of article 4(h)' in Kuwali & Viljoen (n 4 above) 54 60-61.

162 Eg, Kuwali & Viljoen (n 18 above) 344; Omorogbe (n 82 above) 41; Akonor (n 122 above) 157; G Amvane 'Intervention pursuant to article 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorisation' (2015) 15 *African Human Rights Law Journal* 282-298.

163 Kuwali & Viljoen (n 18 above) 344-345.

164 Focarelli (n 5 above) 203.

165 As above; Stahn (n 10 above) 120.

166 ICISS Report (n 6 above) para 6.5.

The responsibility to protect civilians from mass atrocities when the state concerned is unwilling or unable to do so should, in principle, be borne by the international community as mainly channelled via the UN Security Council. The Pretoria Principles also suggest that '[s]hould peaceful means be inadequate and national authorities manifestly fail to protect their populations from mass atrocities, the international community should help the AU to intervene to stop the mass atrocities'.[167]

The legal foundation of the Pretoria Principles quoted is found in article 53 of the UN Charter, namely, that '[n]]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council'.[168] Although it may be argued that article 4(h) requires no Security Council authorisation, article 53 of the UN Charter seems to subject military intervention by the AU to this authorisation. Additionally, article 103 of the UN Charter provides that, in case of a conflict between state obligations under the UN Charter and state obligations under any other treaty (the AU Constitutive Act), the former shall prevail.

Taking the above into account, it is argued that if the AU had decided to apply or decides to apply article 4(h) to stop or prevent further mass atrocities in Darfur and Libya, the UN Security Council would have given or should give the necessary authorisation.

As far as Darfur is concerned, the UN Security Council has considered and continues to consider the situation in Darfur as a threat to both international peace and security and regional stability, which prompted it to adopt Chapter VII measures.[169] Security Council authorisation of military intervention is necessary based on legal considerations and challenges to implementation on the ground. To overcome the well-organised and strong military force of Sudan, external support is required to complement the limited military power of the AU.[170] Thus, Security Council authorisation should be accompanied by financial, material, military and technical support.[171] The AU could have sought Security Council authorisation to trigger article 4(h) military intervention in Darfur and, additionally, could have requested support by the international community to complement its resources in such intervention.[172]

Legally speaking, UN Security Council authorisation for a request by the AU to apply article 4(h) should in principle be given. However, China and Russia, as permanent members of the UN Security Council,

167 Principle 30.
168 See also Kuwali (n 50 above) 258-259.
169 Eg, S/RES/1593 (2005) Preamble; S/RES/2291 (2016) 10 February 2016 Preamble.
170 Kunschak (n 161 above) 67.
171 As above.
172 Kabau (n 48 above) 70.

including their right of veto, have economic interests in Sudan's oil and have not confronted the Sudanese government.[173] This casts doubts on the likelihood of the Security Council being willing or able to grant this authorisation. Nevertheless, permanent member states of the Security Council assume an increased or enhanced responsibility to protect, which entails not using their power of veto to obstruct actions that may stop mass atrocities.[174] Therefore, when deciding to grant the AU's request for authorisation for an article 4(h) military intervention in Darfur, the permanent members of the Security Council should not use their veto power to block what would otherwise be a majority resolution authorising the AU to proceed.

Moreover, based on factual considerations, the situation in Darfur presented and, arguably, still constitutes a very strong case to protect people from mass atrocities by forceful military intervention under article 4(h).[175] Thus, a denial by the UN Security Council of the AU's request for authorisation to forcefully intervene would be problematic or controversial. Furthermore, non-forceful measures in terms of Chapter VII have had a limited effect on halting the commission of international crimes against civilians.[176] Indeed, although the Security Council's referral of the situation in Darfur to the ICC should be welcomed, this unintentionally or inadvertently served the interests of powerful states to, at least for the time being, avoid military intervention in Darfur.[177] All these factors would strengthen the legitimacy of the AU's request for Security Council authorisation of military intervention.

As far as Libya is concerned, UN Security Council Resolution 1973 authorised UN member states that have notified the Secretary-General, acting nationally or through regional organisations or arrangements, to use force to protect civilians in Libya and to enforce a no-fly zone over the country.[178] This suggests that, if the AU had requested authorisation for an article 4(h) military intervention, the UN Security Council would have granted or would have been likely to grant it.

173 Omorogbe (n 82 above) 53; GA Critchlow 'Stopping genocide through international agreement when the Security Council fails to act' (2009) 40 *Georgetown Journal of International Law* 311 319-320; HIPPO Report (n 7 above) para 256; L Arbour 'The responsibility to protect as a duty of care in international law and practice' (2008) 34 *Review of International Studies* 445 453-454.

174 A Peters 'The responsibility to protect and the permanent five: The obligation to give reasons for a veto' in Hoffmann & Nollkaemper (n 16 above) 205-206.

175 Abass (n 16 above) 226.

176 Mills (n 74 above) 200.

177 Mills 202.

178 S/RES/1973 (2011) paras 4 & 8.

What ultimately prompted military intervention by NATO, under Security Council authorisation, was the imminent attack against Benghazi. Gaddafi announced that no mercy would be shown to the opposition forces in Benghazi.[179] Had such an attack taken place, it was likely to have resulted in a large-scale massacre of genocidal proportions.[180] Under these extreme and pressing circumstances, had the AU requested UN Security Council authorisation to militarily intervene under article 4(h), the Council was likely to have granted it.

The UN Security Council's reaction reveals that it proceeded more determinedly and quicker than the AU. However, AU military intervention under article 4(h) and the Security Council's Chapter VII powers must be regarded as complementary.[181] The AU's decision to apply article 4(h) should be authorised by the Security Council. As mentioned above, the UN Security Council has considered and continues to consider the situation in Libya as a threat to both international peace and security and regional stability.[182] This prompted the Security Council to adopt Chapter VII measures, which is a strong indication of the likelihood that the Security Council would grant authorisation in the event of the AU deciding to intervene militarily. Furthermore, the Libyan case illustrates conflicting positions. Whereas the AU followed diplomatic and political solutions, the UN Security Council decided to authorise the military intervention[183] implemented by NATO. As the Security Council adopted a forceful intervention approach as opposed to non-forceful methods in order to solve the Libyan crisis, a hypothetical decision by the AU to intervene militarily in Libya would have been authorised and may yet be authorised by the UN Security Council. In the latter situation, this would be the case, especially if the conflict escalated in intensity, leading to further mass atrocities.

The likelihood of the Security Council's eventual authorisation in favour of military intervention under article 4(h) in Libya may also be evidenced by the fact that three AU members and non-permanent Security Council members voted for Resolution 1973.[184] Since there are three AU member states in the Security Council at any given time, the likelihood of being granted authorisation may increase.

179 D Kirkpatrick & K Fahim 'Qaddafi warns of assault on Benghazi as UN vote nears' *The New York Times* 17 March 2011 http://www.nytimes.com/2011/03/18/world/africa/18libya.html?pagewanted=all&_r=0 (accessed 30 June 2016).

180 See D Bosco 'Was there going to be a Benghazi massacre?' *Foreign Policy* 7 April 2011, http://foreignpolicy.com/2011/04/07/was-there-going-to-be-a-benghazi-massacre/ (accessed 1 July 2016).

181 Kunschak (n 161 above) 66.

182 Eg, S/RES/1973 (2011) Preamble; S/RES/2291 (2016), 13 June 2016 Preamble.

183 Kuwali & Viljoen (n 18 above) 345.

184 UN Doc SC/10200, 17 March 2011.

8 Conclusion

The situations in Darfur (Sudan) and Libya present several similarities for article 4(h) to be applied. Some important differences or particularities may, however, be identified. Whereas in Darfur, state actors are mainly responsible for mass atrocities consisting of war crimes, genocide and crimes against humanity, in Libya, actors behind mass atrocities have been more diverse and no genocide has apparently occurred. Sudan mainly has been unwilling to halt and prevent mass atrocities, as illustrated by the obstruction of ICC activities and the lack of local justice initiatives. In turn, Libya has transitioned from initial unwillingness to, mainly, an inability to stop or prevent mass atrocities. Finally, unlike Darfur, a military intervention by NATO, authorised by the UN Security Council, took place in Libya.

A sequential and cumulative test to legitimately and legally trigger the application of article 4(h) of the Constitutive Act may be identified based on article 4(h) and the Pretoria Principles. As demonstrated, the five sequential and cumulative prongs identified in this test have been met and, arguably, continue to be met with regard to Darfur and Libya. These two scenarios were, and still are, to a greater or lesser extent, characterised by protracted mass atrocities with the active involvement of, among others, (senior) state actors, amid a climate of long-term impunity or state inability to stop these abuses. A number of non-forceful measures or mechanisms have proven to be insufficient to prevent (further) mass atrocities. Therefore, the AU Assembly should apply article 4(h) and, in this way, authorise forceful (military) intervention in the target state subject to final authorisation by the UN Security Council. The Security Council should answer in the affirmative, taking into account the above-mentioned circumstances. Considering these circumstances in Darfur and Libya, this test has been met.

However, even if the Security Councl authorises military intervention, attention must be drawn to the manner of implementing it. The idea is that the ultimate goal of protecting civilian populations in Darfur and Libya from (further) mass atrocities may be achieved promptly and with any side or collateral effects minimised as much as possible. This is crucial to guarantee a lasting and stable situation in the target state, namely, Sudan or Libya, so that the purpose underlying an article 4(h) forceful intervention is not paradoxically defeated by side-effects stemming from such intervention. In any event, fears of potential side-effects or political reluctance regarding foreign military intervention should not become insurmountable obstacles to proceeding with forceful intervention in terms of article 4(h) when the protection of civilians against mass atrocities is at stake. This is precisely the situation in Darfur and Libya.

Necessary and lawful article 4(h) forceful interventions should also enhance the legitimacy of the AU as an institution which, in the case

of the target state's inability or unwillingness to protect its civilian population from mass atrocities, should effectively and efficiently intervene. For the successful application and implementation of article 4(h), well-co-ordinated action by AU organs, particularly the AU Assembly, the PSC, the African Commission and African Standby Force, is required, supported and endorsed by the UN Security Council, the UN and the international community as a whole. In this way, the AU can truly become the guardian of peace and security on the continent, especially when the very existence and fundamental rights of large numbers of people are severely affected by the prolonged and unpunished commission of mass atrocities.

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The story of a legal transplant: The right to free, prior and informed consent in sub-Saharan Africa

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Summary

Land grabs in sub-Saharan Africa have in the recent past attracted considerable attention. Different strategies for confronting the problem are being discussed; one of them is the right to free, prior and informed consent (FPIC). This right seeks to balance power asymmetries between foreign corporations or the state and local communities by ensuring their participation in matters concerning their land. The article argues that FPIC is still in the vertical legal transplantation process in sub-Saharan Africa. Legal transplantation has two components: appropriation and translation. It is a multi-pronged process, in which FPIC is transplanted from the global to the (sub)-regional or national level, mostly by states. This is either the basis for the transplantation to the local level or the norm is directly transferred from the global to the local level. The examination of the legal transplantation process includes an analysis of the current state of recognition in sub-Saharan Africa. Besides that, it will be assessed whether diverging understandings have been developed. Moreover, the practical and structural limits of FPIC, which could constitute an obstacle to the full transplantation of FPIC, will be assessed. These include power inequalities within communities as well as the structural inequalities of the global order. Whether the legal transplantation will succeed ultimately depends on the communities in question.

Key words: *free, prior and informed consent; land rights; participation; legal transplants*

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1 Introduction

During colonialism, 'human and natural resources were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves ... alienating them from their land'.[1] According to the African Commission on Human and Peoples' Rights (African Commission), 'Africa's precious resources and people [are] still vulnerable to foreign misappropriation'[2] today. Local communities are those who benefit the least from extractive industry projects and are regularly confronted with human rights abuses and environmental degradation. Consequently, the phenomenon of land grabs has become a pressing concern in many African regions. This arises when government authorities lease or sell land to investors even though it is already being occupied and used by communities or when the foreign use has negative effects on their wellbeing.[3]

It is increasingly argued that the right to free, prior and informed consent (FPIC) could be the panacea to empower local communities. It is the right of communities 'to give or withhold their free, prior and informed consent to actions that affect their lands, territories and natural resources'[4] and can assist them to 'renegotiate their relations with states'[5] and also companies. FPIC is primarily rooted in the right to self-determination and also related to property and cultural rights, as well as to the principle of non-discrimination. It goes beyond the principles of consultation and participation.[6] It has been recognised by a growing number of international human rights documents[7] and applied by regional and national institutions.[8] Even though its acceptance in sub-Saharan Africa has been growing in the last 15 years, its implementation turns out to be difficult. This may be explained by the fact that FPIC is still in the middle of a vertical legal transplantation process.

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1 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*) para 56.

2 As above.

3 R Hall 'Land grabbing in Southern Africa: The many faces of the investor rush' (2011) 38 *Review of African Political Economy* 193 194.

4 M Colchester & MF Ferrari 'Making FPIC work: Challenges and prospects for indigenous peoples' 2007 1 http://www.forestpeoples.org/topics/civil-political-rights/publication/2010/making-fpic-free-prior-and-informed-consent-work-chal (accessed 5 February 2015).

5 'Standard-setting: Legal commentary on the concept of free, prior and informed consent` (14 July 2005) UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1 para 5.

6 T Ward ˆThe right to free, prior and informed consent: Indigenous peoples' participation rights within international law' (2011) 10 *Northwestern Journal of International Human Rights* 54 55-56; A Xanthaki 'Rights of indigenous peoples under the light of energy exploitation' (2013) 56 *German Yearbook of International Law* 315 321.

7 ILO Indigenous and Tribal Populations Convention (1957) 107 art 12; ILO Indigenous and Tribal Peoples Convention (1989) 169 art 13; Declaration on the Rights of Indigenous Peoples' (2007) UN Doc A/61/L.67 and Add.1 art 10.

8 HRCom (n 5 above) paras 16ff.

Legal transplantation consists of two components: appropriation and translation.[9] Appropriation entails taking ideas developed in one setting and transplanting them into another one, while translation is the process in which the concept is adapted to varying degrees.[10]

As FPIC is a relatively new right, examples of programmes and 'best practice' are still lacking. Consequently, its transplantation is not necessarily a one-step process. Instead, FPIC is likely to be transplanted in a multi-pronged process on different levels: It is transplanted from the global to the (sub)-regional or national level, mostly by states. This is either the basis for the transplantation to the local level or the norm is directly transferred from the global to the local level. The intermediate step to the (sub)-regional or national level can facilitate the localisation of the right.

In the first section, the origin of FPIC is examined in order to determine whether it is a legal transplant in sub-Saharan Africa. This is followed by an exploration of the degree of appropriation of FPIC in sub-Saharan Africa based on its legal status. Second, it will be assessed where the translation process currently stands and whether diverging understandings of FPIC have been developed in sub-Saharan Africa. This includes an analysis of the rights holders, duty bearers and the content of FPIC. Due to the lack of (data on) local translations, this section focuses on (sub)-regional and national sources. It will be shown that, even though some of these pursue quite a progressive and comprehensive approach, incoherencies and gaps persist. In the third section, the practical and structural limits of FPIC in sub-Saharan Africa will be assessed. These could constitute an obstacle to the full transplantation of FPIC.

2 Appropriation: (Legal) status of free, prior and informed consent

The origin of FPIC is relevant as the transfer of legal norms from a different geographical and 'cultural' context raises particular socio-legal and practical questions.[11] In a second step, the appropriation of FPIC in sub-Saharan Africa will be analysed.

2.1 Origin of free, prior and informed consent

The origin of FPIC is somewhat controversial. While it is sometimes argued that FPIC originates from the field of medicine, the concept of

9 S Engle Merry *Human rights and gender violence* (2006) 135.

10 As above.

11 See P Legrand 'The impossibility of legal "transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; W Menski *Comparative law in a global context: The legal systems of Africa and Asia* (2006) 51.

'indigenous consent' is much older and possibly even pre-dates colonialism.[12] It became strongly intertwined with the Europeans' civilising mission and early land grabs.[13] From the mid-1980s onwards, indigenous rights activists increasingly appropriated it and used it as a tool to protect their land from unwanted interference.[14] Particularly in the Americas FPIC has been claimed by indigenous groups. Consequently, many strategies for the implementation of FPIC have their origin in South America, and American human rights institutions have developed a broad body of jurisprudence on FPIC.[15]

In the past years, FPIC has been taken up by international organisations, have strongly contributing to its global dissemination. The indigenous-led organisation First Peoples Worldwide criticises that only 25 per cent of all FPIC-related materials is produced by indigenous organisations.[16] Western non-governmental and international organisations, where the global North has a strong influence, have appropriated FPIC and shaped the international understanding(s) of FPIC. The fact that African institutions, when calling for the implementation of participatory mechanisms, make reference to institutions such as the World Bank, adds to the assumption that FPIC has been transplanted vertically.[17]

2.2 Recognition of free, prior and informed consent in sub-Saharan Africa

Appropriation is the first step in the legal transplantation process and describes the way in which states or other actors transfer a norm from one setting to another. From the early 2000s onwards, FPIC has increasingly been discussed and recognised in sub-Saharan Africa. Selected examples provide a general idea about the current state of appropriation.

12 See RR Faden et al *A history and theory of informed consent* (1986); C Doyle *Indigenous peoples, title to territory, rights and resources: The transformative role of the right to free, prior and informed consent* (2015) 16.

13 Doyle (n 12 above) 14.

14 Colchester & Ferrari (n 4 above) 2.

15 S Boyd 'Tambogrande has domino effect' 16 July 2002 http://www.cipamericas.org/archives/1162 (accessed 31 August 2015); A Page 'Indigenous peoples' free prior and informed consent in the Inter-American human rights system' (2004) 4 *Sustainable Development Law and Policy* 16.

16 First Peoples Worldwide 'FPIC 101: An introduction to FPIC' http://firstpeoples.org/wp/fpic-101-an-introduction-to-free-prior-and-informed-consent/ (accessed 18 November 2014).

17 UNECA & AU 'Minerals and Africa's development: The international study group report on Africa's mineral regimes 2011' 2011 55 http://www.uneca.org/publications/minerals-and-africas-development (accessed 10 March 2016).

2.2.1 (Sub)-regional organisations

While the 1990 African Charter for Popular Participation in Development and Transformation[18] only recognises the importance of public consultations, the 2003 African Convention on the Conservation of Nature and Natural Resources, which has not yet entered into force, requires the 'prior informed consent of the concerned communities' with regard to indigenous knowledge and the preservation of 'the traditional rights and property'.[19]

The African Charter on Human and Peoples' Rights (African Charter)[20] does not contain any specific reference to FPIC, but it could be derived from the African Charter's collective rights or from the individual right to property. The African Commission on Human and Peoples' Rights (African Commission) has so far dealt with participation rights of local communities in two cases: the 2001 *SERAC*[21] and the 2010 *Endorois* decisions.[22] The *SERAC* case was situated in the conflict over oil spills caused by Shell Nigeria. The African Commission found that the collective right to a satisfactory environment required that the government conduct environmental and social impact assessments, provide information to the population and grant access to regulatory and decision-making bodies.[23] The Commission did not explicitly mention FPIC.

In the *Endorois* case, the African Commission confirmed the right to FPIC. The Endorois people had been expelled by the Kenyan government for the purposes of creating a natural reserve without proper prior consultation and adequate compensation.[24] The Commission found that, derived from the right to development, the government was under a duty to obtain the FPIC of the whole community as the project had major implications on their lives.[25]

Another case is currently pending before the African Court on Human and Peoples' Rights (African Court). The Ogiek community had received a notice of eviction from the government for conservation reasons. In 2013, the Court issued an order of provisional measures as the eviction was of sufficient gravity and

18 African Charter for Popular Participation in Development and Transformation (1990) http://repository.uneca.org/handle/10855/5673 (accessed 10 March 2016) para 13.

19 Art 17 African Convention on the Conservation of Nature and Natural Resources (adopted 11 June 2003) http://faolex.fao.org/docs/pdf/mul45449.pdf (accessed 26 January 2015).

20 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; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 29.

21 *SERAC* (n 1 above).

22 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* decision).

23 *SERAC* (n 1 above) Appeal to the government.

24 *Endorois* decision (n 22 above) para 2.

25 *Endorois* paras 277, 283 & 290.

constituted, amongst others, a possible violation of the Ogiek people's right to property and the right to development.[26] The final ruling could provide further clarification.

Moreover, FPIC has been included in a number of non-binding documents. In 2012 the Pan-African Parliament expressed its concern about large-scale farm land acquisitions and the impact of development projects on land, water and related natural resources. It called on member states to ensure that 'any investment is approved through free, prior and informed consent of affected communities'.[27] FPIC was also discussed in the context of the Africa Mining Vision (AMV) adopted by the African Union (AU) heads of state.[28] It demands the 'broad-based, active and visible involvement of affected communities'[29] and calls for the mainstreaming of public participation policies.[30] Another example is the AU Model Law for the Rights of Local Communities, Farmers and Breeders, adopted by the AU Ministerial Conference in order to establish a common position with regard to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Convention on Biological Diversity.[31] It stipulates that decisions concerning access to biological resources, traditional knowledge and technologies of local communities are invalid without their consent.[32]

The participation of local communities is also foreseen in a number of sub-regional documents. For instance, the Guidelines on the Participation of Local Communities and Indigenous Peoples and NGOs in Sustainable Forest Management in Central Africa, which are mainly based on recommendations of the international community, feature FPIC.[33] The Mining Code of the West African Economic and Monetary Union (WAEMU), which groups together eight West African states, and the Protocol on Mining of the Southern African Development

26 *African Commission on Human and Peoples' Rights v Republic of Kenya* (Provisional Measures) App 006/2012 (15 March 2013) para 20.

27 Pan-African Parliament 'Recommendations and resolutions, Sixth ordinary session' (16-20 January 2012) OAU Doc PAP2/RECOMS/VI 6.

28 http://www.africaminingvision.org/about.html (accessed 26 January 2015).

29 http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf (accessed 22 October 2015) 34.

30 Africa Mining Vision (n 28 above) 35.

31 P Munyi et al 'A gap analysis report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources' (February 2012) http://www.abs-initiative.info/uploads/media/GAP_Analysis_and_Revison_African_Model_Law_FINAL_2902_01.pdf (accessed 23 November 2015) 9.

32 African Union 'African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources' 2000 http://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.pdf (accessed 27 January 2015) art 5 (AU Model Law).

33 The Guidelines were adopted by the Central African Forest Commission which seeks to protect the Congo Basin rainforest by harmonising the environmental policies of its member states; S Assembe-Mvondo 'Local communities' and indigenous peoples' rights to forests in Central Africa: From hope to challenges' (2013) 48 *Africa Spectrum* 25 26.

Community (SADC) prescribe only environmental impact assessments.[34] The directive on mining of the Economic Community of West African States (ECOWAS) states that 'companies shall obtain the free, prior and informed consent of local communities'.[35] More than 50 West African civil society organisations were involved in the drafting process.[36] Member states are obliged to implement the directive by adapting their national legislative framework by July 2014 while having a choice of form and method.[37] ECOWAS plans to adopt a regional mining code in order to ensure the coherent implementation of the directive. However, not much progress has been made so far.[38]

Even though many of the aforementioned materials are not legally binding, the influence of such soft law must not be underestimated. The growing recognition of FPIC is a noteworthy development, indicating that the problem of land grabs has come to the attention of the African international community. A transfer from the global to the (sub)-regional level has thus taken place.

2.2.2 National legislation

Many sub-Saharan African states are obliged to respect FPIC under international law.[39] Still, the number of countries where FPIC has been incorporated into national law is low. The Forest Lands Act of Liberia stipulates that the FPIC of the local population has to be obtained if the status or use of forest resources is to be changed.[40] In the Democratic Republic of the Congo, FPIC for development projects has been codified for indigenous groups.[41] Expropriation and

34 *Réglement 18/2003/CM/UEMOA portant adoption du code minier communautaire de l'UEMOA* art 18; Protocol on Mining in the Southern African Development Community (2006) art 8.

35 Economic Community of West African States 'Harmonisation of guiding principles and policies in the mining sector' (2009) Directive C/DIR. 3/05/09 art 16(3).

36 Oxfam America 'West African states endorse regional mining sector policy' 22 April 2009 http://www.oxfamamerica.org/press/west-african-countries-endorse-regional-mining-sector-policy/ (accessed 3 November 2015).

37 E Greenspan 'Free, prior and informed consent in Africa: An emerging standard for extractive industry projects' 2013 http://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF (accessed 26 January 2015) 10.

38 L Ruso 'ECOWAS urged to finalise regional mining code' 2013 http://www.oxfamamerica.org/press/ecowas-urged-to-finalize-regional-mining-code/ (accessed 2 December 2014).

39 Besides the regional law, 31 sub-Saharan African states have voted in favour of the Declaration on the Rights of Indigenous Peoples. The Central African Republic has ratified the ILO Convention 169; 43 sub-Saharan African states are parties to the ICESCR from which FPIC has been derived.

40 An Act to establish the community rights law of 2009 for forest lands (16 October 2009) http://www.fda.gov.lr/wp-content/uploads/2015/07/Community-Rights-Law-of-2009-with-Respect-to-Forest-Lands.pdf (accessed 10 March 2016) sec 2.2.

41 Loi du 25 Février 2011, Journal Officiel de la République du Congo http://faolex.fao.org/docs/pdf/con105791.pdf (accessed 3 December 2015) art 3.

resettlement in the public interest are, however, still possible.[42] Other examples of progressive legislation can be found in Ghana and Zambia, where customary decision-making institutions can refuse land alienation.[43] Nevertheless, in Ghana conflicts over natural resources frequently occur.[44] Additionally, the newly-adopted mining code of Burkina Faso requires the consent of a community in cases where there is a well on the land, a cemetery or a holy place.[45]

In South Africa, the Supreme Court strengthened the land rights of communities that were dispossessed during colonialism in the case of *Alexkor v Richtersveld*.[46] Even though FPIC was not mentioned in the judgment, it is often cited as a positive example for the recognition of land rights and FPIC.[47] The 2004 Communal Land Act stated that new order rights in communal land should not be granted without the 'prior consent' of the community or the land administration committee.[48] This, however, was declared unconstitutional in 2010.[49] Therefore, while consultations are taking place,[50] FPIC is not legally required in South Africa.[51]

Local participation as an element of environmental and social impact assessments is more widely recognised than FPIC.[52] For instance, in Botswana, the competent authority is obliged to 'consider' the objections raised by affected communities.[53] In Uganda, affected populations have the right to be heard.[54] The 2002 Environment Protection Act of Mauritius merely allows for the public

42 Loi du 25 Février 2011 (n 41 above) arts 32 & 35.

43 GC Schoneveld 'Governing large-scale farmland investments in sub-Saharan Africa' (2014) *Centre for International Forestry Research* Infobrief 1 3.

44 USAid 'Property rights and resource governance: Ghana' 2013 http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Ghana_Profile_0.pdf (accessed 22 December 2015).

45 Loi no 036-2015/CNT portant Code Minier du Burkina Faso, adopted 26 June 2015, art 120.

46 *Alexkor Ltd & Republic of South Africa v The Richtersveld Community & Others* 2003 (12) BCLR 1301 (CC) paras 8 & 19.

47 See HRCom (n 5 above) para 32.

48 Art 41(b) Act 11 of 2004.

49 *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (8) BCLR 741 (CC).

50 See K Hite 'Towards consent: Case studies and insights on company-community agreements in forest landscapes' 2014 42ff http://www.profor.info/sites/profor.info/files/docs/TFD_FPIC%20Report_Towards%20Consent_EN_Web.pdf (accessed 11 January 2016).

51 See Mineral and Petroleum Resources Development Act 28 of 2002; Centre for Research on Multinational Corporations 'South African communities speak out: Free, prior and informed consent' 4 June 2009 http://www.somo.nl/news-en/south-african-communities-speak-out-free-prior-and-informed-consent (accessed 11 January 2016); Centre for Environmental Rights and Lawyers for Human Rights 'Mining and your community: know your environmental rights' http://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf (accessed 11 January 2016) 6-7.

52 UNECA & AU (n 17 above) 198.

53 As above.

54 UNECA & AU (n 17 above) 54.

to 'inspect' environmental impact assessments.[55] Cameroonian environmental legislation and the 2011 Land Law call for local consultations.[56] These provisions do not sufficiently accommodate the needs of local communities.

It may be summarised that national implementation in sub-Saharan Africa to date has been poor. Moreover, many of the corresponding institutions are weak.[57] A study on large-scale farm land investments that compared different sub-Saharan African countries confirms that the participation of the local population does not even work in those countries with the most progressive legislation.[58] Vermeulen and Cotula similarly assert that FPIC has not effectively been integrated in any national policy.[59]

2.2.3 Local appropriation

The situations in which FPIC may be useful in sub-Saharan Africa are characterised by a strong heterogeneity. Consequently, local appropriation processes indicate whether FPIC has actually arrived on the ground.

In Liberia, the Jogbahn clan called for the assistance of a national non-governmental organisation (NGO) in order to take action against land clearing by an oil palm company without their consent. The case was brought before the Roundtable on Sustainable Palm Oil.[60] In 2016, a memorandum of understanding between the community and the company was signed.[61] Moreover, the REDD+ programme, which seeks to combat deforestation and forest degradation, contributes to the recognition of FPIC on the ground in sub-Saharan African countries.[62] This, however, faces many problems. The recommendations are strongly influenced by Western concepts of

55 Environment Protection Act 19 of 2002 para 20.

56 S Carodenuto & K Eobissie 'Development of national FPIC guidelines for REDD+: Experiences from Cameroon' 2014 6 https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjQ1Nmv2v7JAhXCGA8KHcJtCUcQFggwMAI&url=http%3A%2F%2Fwww.researchgate.net%2Fprofile%2FSophia_Carodenuto%2Fpublication%2F271487110_Development_of_national_FPIC_guidelines_for_REDD_Experiences_from_Cameroon%2Flinks%2F54c8da520cf289f0ced0feb3&usg=AFQjCNGGn7vRnOyqOCU3StPUjPFPubgZVQ&sig2=MZS8bvd19yESpS02goGgCQ (accessed 28 December 2016).

57 Schonefeld (n 43 above) 4.

58 Schonefeld 5.

59 S Vermeulen & L Cotula 'Over the heads of local people: Consultation, consent, and recompense in large-scale land deals for biofuel projects in Africa' (2010) 37 *Journal of Peasant Studies* 899 907.

60 Sustainable Development Institute 'Winning the battle' 2015 https://investigations.sdiliberia.org/story/?id=20 (accessed 18 November 2016).

61 Sustainable Development Institute 'Letter to the Roundtable on sustainable palm oil' 2016 https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwigxIjX5rLQAhULECwKHTfXAWgQFgg3MAM&url=http%3A%2F%2Fwww.rspo.org%2Ffiles%2Fdownload%2Fc5471446bf56466&usg=AFQjCNGUafazT1rlthmBagp5LiuJ3jkelA&sig2=aee-_zhcG--EhmNdocbfog (accessed 18 November 2016).

62 Carodenuto & Eobissie (n 56 above) 6.

property rights, which can render implementation difficult, and the voices of local communities play only a subsidiary role.[63]

Additionally, a clear line has to be drawn between local appropriation and legal mobilisation processes. Legal mobilisation entails the raising of legal consciousness. This has occurred more often: In Cameroon, four villages joined forces with the Forest Peoples' Programme, as they were concerned about the lack of information about an oil palm concession granted to an international firm in order to build up political pressure.[64] Other examples for legal mobilisation may be found in Nigeria and Kenya.[65] Even though FPIC is not required under national law, these communities were aware of their rights and felt that these had been violated. This could indicate that local communities are willing to make use of international human rights, such as FPIC, when it serves their cause. However, they are in need of intermediaries such as NGOs, who frame the injustice in legal terms and play a crucial role in the legal mobilisation process.[66]

To summarise, except for Liberia, no cases could be found where FPIC was actually implemented. Therefore, while the appropriation from the global to the (sub)-regional has progressed, national and particularly local appropriation is still in its infancy.

3 Translation: Conceptualising free, prior and informed consent in sub-Saharan Africa

It has been shown that FPIC is a legal transplant to Africa, which has been recognised to varying degrees. Menski stresses that 'local concerns continue to shape how universal categories or rights are implemented, resisted and transformed'.[67] The appropriated norms may thus move away from the international conception(s) in a way that corresponds better to the situation on the ground. The underlying process is called translation. In its course a concept is framed into cultural narratives, adjusted 'to the structural conditions in which it operates'[68] and the target population is redefined.[69] Intermediaries such as NGOs play an important role in this, as they

63 K Foster & D Ouya 'How is REDD+ doing in Africa?' 2012 http://www.worldagroforestry.org/news/how-redd-doing-africa (accessed 18 November 2016).

64 A Perram 'Behind the veil: Transparency, access to information and community rights in Cameroon's forestry sector' 2016 9 http://www.forestpeoples.org/topics/environmental-governance/publication/2016/behind-veil-transparency-access-information-and-com (accessed 24 October 2016).

65 *SERAC* (n 1 above); *Endorois* decision (n 22 above).

66 See J Nelson & T Lomax 'They want to take our bush' 2013 http://www.forestpeoples.org/sites/fpp/files/publication/2013/07/fpp-fpic-herakles-final-july-18-web.pdf (accessed 18 November 2016).

67 Menski (n 11 above) 41.

68 Engle Merry (n 9 above) 136.

69 Engle Merry 136-137.

ideally have both an understanding of the global norm as well as of the culture on the ground and move between the different layers.[70]

In this section, translations from the global to the regional or national will be explored. While translation is not necessarily required for transplanting legal norms, it enhances the potential effectiveness and also the legitimacy. It may facilitate the appropriation of the concept by local actors in the future. In the following section, the most problematic aspects of the global understanding of FPIC from an African (governmental) perspective will be illuminated as well as the responses of the different African legal documents to date.

With regard to an actual localisation, Liberia is probably the only African country where FPIC has been transplanted by companies to the local level.[71] However, little information on the concrete localised form of FPIC is available. In the case of Golden Veroleum Liberia, the roadmaps are redolent of the international recommendations on FPIC and the communities have no significant influence on the process.[72] Consequently, at best a very superficial translation based on the judgment of outsiders has taken place.

3.1 Marginalised communities as right holders

It is not uncommon that the target group is redefined in the course of transplanting a programme or a legal concept.[73] A core issue of FPIC in sub-Saharan Africa is that it traditionally applies to indigenous peoples. Despite the absence of a static definition of indigenous peoples, it was widely accepted that indigenous groups have a pre-colonial or pre-occupational history.[74] However, in sub-Saharan Africa the situation is different, as many states are characterised by multiculturalism without any majoritarian ethnic group and no settlers threatened the existence of the original population.[75] In order to render FPIC workable in Africa, marginalised local communities need to be recognised as right holders. This could occur by either broadening the traditional understanding of indigenousness or by extending the scope of FPIC to non-indigenous groups.

70 Engle Merry 210.

71 Eg Sime Darby 'Sime Darby plantation in Liberia' 1 http://www.simedarby.com/upload/Sime_Darby_in_Liberia.pdf (accessed 21 November 2016); Golden Veroleum Liberia 'Free, prior and informed consent: GVL-FPIC roadmap' 2013 http://goldenveroleumliberia.com/upload/gvl_fpic__principles_and_roadmap_description.pdf (accessed 21 November 2016).

72 Golden Veroleum Liberia (n 71 above).

73 Engle Merry (n 9 above) 137.

74 RL Barsh 'Indigenous peoples: An emerging subject of international law' (1986) 80 *American Journal of International Law* 369 374.

75 R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 213 215.

3.1.1 Indigenousness in sub-Saharan Africa

The indigenous movement has its origin in the Americas and has subsequently been universalised by non-governmental and international organisations.[76] The African experiences were for a long time neglected in the international organisations and the indigenous movements.[77] Many sub-Saharan African governments rejected the notion of indigenousness, fearing that the recognition of indigenous groups could facilitate secessionist movements and lead to civil unrest by privileging indigenous communities over other groups.[78] However, after initial reluctance, many states and African NGOs have participated in the work of the UN Working Group on Indigenous Populations and pushed towards the adoption of a clause in the Preamble stating that indigenousness depends on the regional context[79].

The African Commission set up a Working Group on Indigenous Populations/ Communities in Africa (Working Group) in 2000. The Working Group rejects the viewpoint that indigenous rights are not relevant in sub-Saharan Africa and emphasises the particular vulnerability of many communities.[80] Even though, according to the African Commission, every 'African can legitimately consider him/ herself as indigene to the continent',[81] it identifies three main criteria for identifying indigenous communities in the absence of a definition, namely,[82] (a) self-identification; (b) a special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and (c) a state of subjugation, marginalisation, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic or dominant model.[83]

76 F Mukwiza Ndahinda *Indigenousness in Africa: A contested legal framework for marginalised communities in Africa* (2011) 62.

77 Mukwiza Ndahinda (n 76 above) 350.

78 M Davis 'Indigenous struggles in standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 2 18-19.

79 DL Hodgson 'Introduction: Comparative perspectives on the indigenous rights movement in Africa and the Americas' (2002) 104 *American Anthropologist* 1037 1039-1040; Davis (n 78 above) 20.

80 'Report of the African Commission's Working Group on Indigenous Populations/ Communities' (2000) AU Doc DOC/OS(XXXIV)/345 88.

81 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' 2007 para 13 http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/ (accessed 30 October 2014).

82 *Endorois* decision (n 22 above) para 149.

83 Advisory Opinion (n 81 above) para 12.

The most important feature of the definition is the 'link between people, their land and their culture' and the principle of self-identification.[84] Indigenous groups have to perceive themselves as a distinct, indigene community.[85] In some countries, local communities have embraced the concept of indigenousness in order to garner international support.[86] In past years, the African experiences of indigenousness have been increasingly acknowledged and the AU and activists have embraced it as a tool to address 'the root causes of subordination'.[87]

On the other hand, there has been criticism that the characteristics of indigenousness are a 'foreign test'[88] and that the AU institutions have failed to develop a truly African concept of indigenousness.[89] African indigenous groups are also still heavily influenced by foreign indigenous movements, their strategies vary largely and no common understanding of indigenousness has thus far been developed.[90] The Department of Human Resources, Science and Development of the African Commission declared that indigenous food systems produce 90 per cent of all agricultural products in Africa, which also seems to blur the line between local and indigenous communities.[91]

Additionally, the concept of indigenousness gives rise to controversies on the ground: Communities sometimes are reluctant to self-identify as indigenous. Especially in some Francophone countries, 'indigene' has a negative connotation as 'it has been used in derogatory ways during European colonialism and … by some post-colonial African governments'.[92] In Cameroon, the distinction between recognised indigenous and other local communities causes tensions.[93]

84 *Endorois* decision (n 22 above) paras 151, 154 & 157.

85 African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs 'Indigenous peoples in Africa: The forgotten peoples' (2006) 11 http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf (accessed 29 January 2015).

86 Hodgson (n 79 above) 1042-1043.

87 African Commission and International Work Group for Indigenous Affairs (n 85 above) 23.

88 RK Ako & O Oluduru 'Identifying beneficiaries of UN Indigenous Peoples' Partnership (UNIPP): The case for the indigenes in Niger's Delta region' (2014) 22 *African Journal of International and Comparative Law* 369 382.

89 World Bank 'Operational Manual 4.10 indigenous peoples' 2005 para 4a; EIA Daes 'An overview of the history of indigenous peoples: Self-determination and the United Nations' (2008) 21 *Cambridge Review of International Affairs* 7 10.

90 Hodgson (n 79 above) 1042-1043.

91 Munyi (n 31 above) 10.

92 African Commission on Human and Peoples' Rights 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (2005) 86; African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs 'Report of the African Commission's Working Group on Indigenous Populations/Communities: Mission to the Republic of Niger 14-24 February 2006' 2008 paras 88-90 & 92 http://www1.chr.up.ac.za/chr_old/indigenous/acwg/Niger%20Rapport_UK68_v4.pdf (accessed 5 October 2015).

93 Carodenuto & Eobissie (n 56 above) 11.

Hence, the usefulness of indigenousness remains controversial. Besides that, the survival of local communities often also depends on the fertile land that has been in their possession for generations and the cultivation whereof they have brought to perfection. FPIC could better enfold its emancipatory potential if indigenousness were not established as a precondition for its applicability.

3.1.2 Non-indigenous groups as rights holders

At the international level, the applicability of FPIC to non-indigenous groups is increasingly being discussed. Oxfam applies a streamlined version of FPIC to non-indigenous groups by demanding consultations governed by the principle of FPIC.[94] The Forest Stewardship Council states that local communities only have a right to FPIC when this is based on 'long-established use',[95] and the Forest Peoples Programme when they 'have collective tenure systems governed fully or partly by customary law'.[96] In 2013, the Human Rights Council Advisory Committee issued a draft declaration on the rights of peasants according to which FPIC is applicable to a 'man or woman of the land, who has a direct and special relationship with the land and nature through the production of food or other agricultural products', including landless persons.[97] According to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), rural development projects may only be implemented with the FPIC of rural women.[98] Therefore, even though a certain tendency to broaden the scope of FPIC can be observed, as yet no consensus on the conditions for its application and its content exists. Consequently, Manirakiza, the former Chairperson of the AU Working Group on Extractive Industries, Environment and Human Rights Violations, raises the criticism that local communities are still disempowered due to their inadequate legal definition.[99]

In the African human rights system, the concept of 'peoples' might help to bridge the gap between marginalised minorities and

94 C Hill et al 'Guide to free, prior and informed consent' 2010 8 https://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf (accessed 21 September 2015).

95 L van der Vlist & W Richert 'FSC guidelines for the implementation of free, prior and informed consent' 30 October 2012 22 https://ca.fsc.org/preview.fsc-guidelines-for-fpic.a-505.pdf (accessed 11 December 2015).

96 Forest Peoples' Programme 'The rights of non-indigenous forest peoples with a focus on land and related rights: Existing international legal mechanisms and strategic options' 2013 http://www.forestpeoples.org/topics/rights-land-natural-resources/publication/2013/rights-non-indigenous-forest-peoples-focus-lan (accessed 4 February 2015).

97 Declaration on the Rights of Peasants and Other People Working in Rural Areas, Human Rights Council 20 June 2013), UN Doc A/HRC/WG.15/1/2 art 4(5).

98 CEDAW Committee General Recommendation 34 on the Rights of Rural Women' (2016) UN Doc CEDAW/C/GC/34 54(e).

99 P Manikariza 'Loyola University Chicago international law symposium keynote address towards an African human rights perspective on the extractive industry' (2013) 11 *Loyola University Chicago International Law Review* 1 4.

indigenes. The African Charter recognises collective rights, the beneficiaries whereof are 'peoples', for instance the right to freely dispose of wealth and natural resources, the right to development and the right to self-determination.[100] There is no definition of 'peoples' in the African Charter, and it may even be described as a 'chameleon-like term'.[101] Groups can be (i) persons living in the territory of a not as yet independent entity; (ii) groups possessing common characteristics within an entity; (iii) a synonym for the state; or (iv) all persons within a state.[102] The applicable definition depends on the right being invoked and the context. The African Commission and the Working Group have confirmed the applicability of collective rights to groups within a state and the potential importance for indigenous groups.[103] Peoples also need a common identity, which is softened by the principle of self-identification.[104] Consequently, there is a strong overlap between the concepts of indigenous groups and peoples. While the Working Group understands the group rights as a way of enforcing the rights of indigenous peoples, they could also be used for deriving FPIC for non-indigenous groups.[105]

The *SERAC* decision is not illuminating, as the African Commission did not provide any clarification on their status, which is generally the subject of some controversy.[106] In the *Endorois* case, the African Commission concluded that the Endorois were both an indigenous community and a group. Therefore, it remains unclear whether FPIC is applicable to non-indigenous peoples.

While the African Commission has not taken a clear a position, some (sub)-regional documents are more straightforward. The African Parliament takes the view that 'affected communities' need to give their consent to large-scale investments.[107] The AMV's action plan calls for the domestic implementation of the Protocol of FPIC with regard to mining-affected communities.[108] Moreover, the AU Model Law and the COMIFAC guidelines strengthen the rights of local

100 Arts 20, 21, 22 & 24 African Charter.

101 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 211.

102 RN Kiwanuka 'The meaning of people in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80 100-101.

103 African Commission (n 80 above) 79.

104 Communication 270/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) para 220; *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 179.

105 African Commission on Human and Peoples' Rights 'Manual on the promotion and protection of the rights of indigenous populations/communities through the African human rights system' http://www.achpr.org/files/special-mechanisms/indigenous-populations/idp_manual_eng.pdf (accessed 25 May 2015) 25.

106 Manirakiza (n 99 above) 6; Mukwiza Ndahinda (n 76 above) 81.

107 Pan-African Parliament (n 27 above).

108 African Union Commission et al 'Action plan for implementing the AMV' 2011 25 http://aamig.com/wp-content/uploads/2012/08/Action-Plan-for-AMV-Final-Version-Jan-2012.pdf (accessed 20 May 2015).

communities.[109] Similarly, the ECOWAS directive directly designates the local population.[110] The Liberian community land law also applies to non-indigenous communities, as well as the FPIC roadmap of the oil palm corporation Golden Veroleum Liberia.[111] In the Democratic Republic of the Congo, however, FPIC remains a right of indigenous groups.[112]

In conclusion, it may be observed that it is difficult to grasp indigenousness as a concept in sub-Saharan Africa. While not all local communities are eager to label themselves as indigenous, the AU institutions seem to adhere to the concept of indigenousness without clarifying the implications for FPIC. Consequently, the approach adopted by the different sub-regional instruments seems to be more promising. However, the African Charter and its group rights also certainly have a notable potential for extending the scope of FPIC.

3.2 Duty bearers

Many international organisations and NGOs stress the fact that the duty to provide for FPIC is incumbent only on the state.[113] This is also the approach adopted by the African Commission.[114] The Congolese and Liberian laws do not clarify whether the FPIC procedure could be delegated to non-state actors.[115] The AU Model Law requires the competent national authority to consult with the local population in order to ensure that their consent has been obtained.[116] A noteworthy exception is the ECOWAS directive. Companies are obliged to obtain the FPIC of the local population.[117] States should, among other things, provide capacity-building measures for the local population.[118] Allowing companies to conduct FPIC procedures comes with certain risks: Power asymmetries between companies and local communities can make it difficult to establish a meaningful dialogue. Particularly, differences with regard to access to information, legal expertise and skills can prevent a fair FPIC procedure.[119]

109 AU Model Law (n 32 above) art 3; Assemble-Mvondo (n 33 above) 35.
110 ECOWAS directive (n 35 above) art 16(3).
111 Community Lands Act (n 40 above) sec 2.2.c.; Golden Veroleum Liberia (n 71 above) 1.
112 Loi du 25 Février 2011 (n 41 above).
113 Eg Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador UN Doc E/C.12/1/Add.100 (7 June 2004) para 35; HRC 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya' (15 July 2009) UN Doc A/HRC/12/34 para 38.
114 *SERAC* (n 1 above) para 53; *Endorois* decision (n 22 above) para 281.
115 Congolese indigenous law (n 41 above) art 3.
116 AU Model Law (n 32 above) art 5.
117 n 35 above, art 16(3).
118 n 35 above, arts 11, 15 & 16.
119 L Cotula *Legal empowerment for local resource control: Securing local resource rights within foreign investment projects in Africa* (2007) 26-27.

Moreover, a top-down understanding of FPIC denudes it of its empowering potential.

In some cases, a FPIC procedure organised by a company may still be a lesser evil. Due to their limited administrative capacity and the non-existence of the rule of law, states are sometimes simply incapable of defending their populations' interests. Simultaneously, corporations seem to be increasingly willing to accept their duty to consult with the local population. The UN Global Compact, the world's largest corporate social responsibility network with a large number of corporate members, has adopted several documents featuring FPIC.[120] Moreover, the International Council for Mining and Metals (ICMM) recommends companies to 'work to obtain consent'.[121] The Roundtable on Sustainable Palm Oil, of which many Africa-based oil palm companies are members, has accepted FPIC as one of their key principles.[122] Companies in Liberia seem to share this viewpoint.[123]

According to Oxfam's Community Consent Index,[124] since 2012 the number of companies with a public commitment to FPIC has increased from 13 to 37 per cent, while more companies refer to FPIC-relevant human rights treaties and instruments.[125] Unfortunately, none of the companies extended their definition of FPIC to cover local communities.[126]

Strong institutions for redress are needed in order to ensure company compliance. When the host state lacks the financial or personal capacities for a lengthy FPIC procedure, the state could oblige the company to obtain the FPIC of the population and monitor it. If it fails to do so, regional institutions, such as ECOWAS and the AU, could step in. In the African human rights system, states are

120 Eg UN Global Compact 'Indigenous peoples' right and the role of free, prior and informed consent' 2014 https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/FPIC_Indigenous_Peoples_GPN.pdf (accessed 23 November 2016).

121 International Council on Mining and Minerals 'Indigenous peoples and mining' 2013 2 http://www.icmm.com/publications/pdfs/position-statements/5433.pdf (accessed 23 November 2016).

122 Roundtable on Sustainable Palm Oil 'RSPO principles and criteria for sustainable palm oil production' 2007 http://www.rspo.org/file/RSPO%20Principles%20&%20Criteria%20Document.pdf (accessed 24 November 2016).

123 Eg Friends of the Earth International 'Sime Darby and land grabs in Liberia' 2013 http://www.foei.org/wp-content/uploads/2014/03/Factsheet_Sime_Darby_Liberia.pdf (accessed 23 November 2016).

124 Oxfam 'Community consent index 2015' 23 July 2015 https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp207-community-consent-index-230715-en.pdf (accessed 4 January 2016). Oxfam examined the recognition of community rights and community engagement of 38 major mining, gas and oil companies.

125 Oxfam (n 124 above) 14 26.

126 Oxfam 15.

obliged to protect their population against human rights abuses by non-state actors.[127] The future will show whether the ECOWAS approach to FPIC turns out to be ground-breaking or whether the traditional construction as an exclusive state duty is more adequate.

3.3 Consent

Another core question is what FPIC actually entails: What does consent mean and do communities have a veto right? What is the timely dimension of a FPIC procedure, and what about the relation to substantive rights?

3.3.1 Localising consent

One problem of FPIC is that the understanding of a state or NGO of consent and its consequences does not necessarily correspond to that of local communities. In Central Africa, consent is understood as a 'transactional social relationship based on ongoing verbal and material exchange'.[128] Thus, if these communities enter into direct negotiations with companies, this may lead to serious misunderstanding and endanger the whole FPIC process.

The African Commission acknowledges the problem and emphasises that consultations must be conducted according to the group's customs and traditions and information about the nature and consequences of the process must be provided.[129] The Congolese indigenous law, similarly, emphasises that indigenous customs and decision-making structures must be respected.[130] In Cameroon, multi-stakeholder efforts have been undertaken for developing a culturally-appropriate FPIC process.[131]

It has to be kept in mind that the development of national FPIC policies is particularly problematic in sub-Saharan Africa, as local customs and societal structures may differ greatly even within a particular country. Therefore, it might be reasonable to first establish processes for developing a common terminology with affected communities. FPIC can only be empowering if it is understood as a bottom-up project that gives voice to marginalised communities on their own terms.

127 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 22; *SERAC* (n 1 above) paras 46, 57 & 69.

128 J Lewis et al 'Free, prior and informed consent and sustainable forest management in the Congo basin: A feasibility study conducted in the Democratic Republic of Congo, Republic of Congo and Gabon regarding the operationalisation of FSC principles 2 and 3 in the Congo Basin' 2008 22 http:assets.gfbv.ch/downloads/fpic_congo_report_english.pdf (accessed 5 February 2015).

129 *Endorois* decision (n 22 above) paras 289 & 290.

130 n 41 above, art 3.

131 Carodenuto & Eobissie (n 56 above)

3.3.2 A right to veto?

Another controversy revolves around the question of whether FPIC vests communities with a right to veto. Companies and political elites tend to interpret the 'C' in FPIC not as 'consent', but rather as meaningful consultations.[132] In the *SERAC* decision, the African Commission stated that the state was obliged to provide both information to affected communities and 'meaningful opportunities for individuals to be heard and to participate in development decisions affecting their communities'.[133] However, the Commission did not define whether the community's consent was necessary. This terminology resembles the World Bank's concept of 'free, prior and informed consultations'.[134] In the *Endorois* decision, the Commission declared that consultations alone did not meet the requirements of article 22.[135] The AU Model Law emphasises that FPIC also includes the right to refuse access to biological resources.[136] It has been shown above that, at the national level, most provisions only provide for consultations and not for consent. The roadmap of Golden Veroleum Liberia, the company which has allegedly implemented FPIC in Liberia, asserts the communities' right to say no and states that it will only continue the project if a mutual agreement has been reached.[137]

Manirakiza stresses that FPIC should not be construed as a right to veto, but rather as a meaningful dialogue in which local populations can affect the outcome.[138] While it is certainly true that interpreting FPIC as a simple 'yes or no' question is not productive, it remains important that local communities, participating as equal partners in a negotiation process, can ultimately decide to withhold their consent. Denying communities this right runs the danger of FPIC being used to legitimise projects implemented against the wishes of the local population. This would degrade it to a tool that possibly helps to avoid social unrest, but fails to substantially mitigate the power imbalances between vulnerable communities and powerful corporations.

132 See E Greenspan et al 'Community consent index 2015: Oil, gas and mining company public positions on free prior and informed consent' 23 July 2015 3 https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp207-community-consent-index-230715-en.pdf (accessed 10 December 2015); Manirakiza (n 99 above) 6.

133 *SERAC* (n 1 above) para 53.

134 World Bank 'Indigenous peoples' 2005 http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20550365~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y,00.html (accessed 9 November 2015).

135 *Endorois* decision (n 22 above) 291.

136 n 32 above, paras 19 & 20.

137 n 71 above, 1.

138 n 99 above, 6.

3.3.3 Duration of the free, prior and informed consent process

Another challenge facing the realisation of FPIC is that it can give states or companies the impression that their obligations *vis-à-vis* the local population are fulfilled once their consent has been obtained.[139] Understanding FPIC as a one-off procedure would limit its emancipatory potential. In the *Endorois* decision, the African Commission unfortunately did not clarify at what stage the participation must take place.[140] According to the AMV, communities have the right to participate 'in the approval, planning, implementation and monitoring of mining projects'.[141] A broad understanding of the duration of FPIC is also promoted by the ECOWAS directive, according to which consent must be obtained 'before exploration begins and prior to each subsequent phase of mining and post-mining operations'.[142] At the national level, consultations and consent are sometimes perceived as a one-off procedure. In Mozambique, consultations must take place before the allocation of land use rights, but investor land applications must be processed within 90 days.[143] In practice this prevents meaningful consultations. These examples indicate that the duration of the FPIC obligation remains controversial and further clarification is necessary.

3.3.4 Substantive rights

Moreover, FPIC is strongly linked to substantive rights, particularly land rights. FPIC alone is not enough if other rights, such as the right to land and to benefit sharing, are not respected.[144]

Because of the duality of the legal and also the land rights system in the majority of African states, this can be particularly complex. The individualistic tradition of human rights and the diversity of African legal systems impede the power of FPIC as collective customary land rights are often not sufficiently recognised. This mainly can be traced back to colonialism: When the colonisers imposed a legal system, they also attempted to codify pre-colonial usufructuary land rights.[145] Customary land rights were, however, often very narrowly interpreted and the colonising powers were eager to declare land vacant in order to transform it into public land and, like in Kenya, assign it to foreign settlers.[146] Local populations could then either remain on their land

139 Xanthaki (n 6 above) 330.
140 n 22 above.
141 http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf (accessed 22 October 2015) 34.
142 n 35 above, art 16(3).
143 n 59 above, 909.
144 Xanthaki (n 6 above) 330.
145 E Colson 'The impact of the colonial period on the definition of land rights' in V Turner et al (eds) *Colonialism in Africa 1870-1960, profiles of change: African society and colonial rule* (1971) 193 196.
146 Colson (n 145 above) 196-197.

'illegally' or move to a 'native reserve'.[147] In Gabon, the French were reluctant to grant permanent land titles to locals because of their supposedly backward mode of production.[148] The introduction of a new tenure system thus fundamentally changed societal relations and also had a gendered dimension, as only men were entitled to land.[149] Since their independence, many sub-Saharan African countries have struggled to reform their land laws and to deal with the colonial legal heritage that has in many cases caused – and continues to cause – social tensions. The colonial legal systems often remain in place with codified Western-style land rights co-existing in conflict with over-simplified customary rights.[150] Many newly-independent nations adopted the colonisers' point of view on the inferiority of indigenous law, with the result that a decolonisation of the law did not take place.[151] In some countries, such as Ethiopia, Tanzania and Mozambique, the government owns all land and natural resources within the territory of the state, while the local population can only have long-term rights of use.[152] In other countries, such as Sudan and Cameroon, private land ownership is legally possible but in practice highly uncommon.[153] In both cases, it is not difficult for the state to limit the rights of the local population.[154] In Senegal, local communities have full ownership of land, and the government cannot only seize the land in the public interest, but also for 'productive resource use'.[155]

Nevertheless, in several African countries a tendency to recognise customary land rights and the adoption of land acts can be observed.[156] However, because of poor implementation and stringent requirements for the recognition of such rights, their impact has at best been mixed.[157] In West Africa, the mapping of land rights has contributed to the marginalisation of certain groups.[158] A static understanding of land ownership and use can produce unfair results, for instance for pastoralists who use the land only sporadically yet still

147 AK Barume *Land rights of indigenous peoples in Africa: With special focus on Central, Eastern and Southern Africa* (2010) 106 108.

148 L Alden Wiley *Land rights in Gabon: Facing up to the past – and present* (2012) 98.

149 Colson (n 145 above) 194.

150 W Wicomb & H Smith 'Customary communities as "peoples" and their customary tenure as "culture": What can we do with the *Endorois* decision?' (2011) 11 *African Human Rights Law Journal* 422 425

151 S Assembe-Mvondo (n 33 above) 32.

152 Cotula (n 175 above) 62.

153 Vermeulen & Cotula (n 59 above) 905.

154 Cotula (n 175 above) 64.

155 As above.

156 See L Krantz 'Securing customary land rights in sub-Saharan Africa: Learning from new approaches to land tenure reform' 2015 https://gupea.ub.gu.se/bitstream/2077/38215/1/gupea_2077_38215_1.pdf (accessed 11 January 2016).

157 Greenspan (n 37 above) 40.

158 D Roe et al (eds) 'Community management of natural resources in Africa: Impacts, experiences and future directions' 2009 58-59 http://pubs.iied.org/pdfs/17503IIED.pdf (accessed 11 January 2016).

depend on it.[159] For women, problems arise when indirect forms of tenure in societies with a patrilineal inheritance tradition are not codified.[160] Hence, as land rights are still a controversial issue in many sub-Saharan African countries, it may be worth a thought to detach FPIC from land ownership or other forms of registered land use.

Another crucial issue is the right to benefit sharing. While many new-generation mining codes define in detail the participation of the host state,[161] benefit sharing with the local population is often not prescribed. However, the regional and sub-regional documents examined above tend to regard FPIC in conjunction with other substantive rights. The African Commission argues that article 22 encompasses the right to be present in the decision-making structures concerning the management of one's land.[162] Moreover, it requires the state to ensure 'mutually-acceptable benefit sharing'.[163]

The AU Model Law links FPIC to benefit sharing and the state should ensure that communities participate in and approve the agreement on benefit sharing.[164] Moreover, the consent to access biological resources can be withdrawn where there are negative socio-economic consequences for the community.[165] The Congolese indigenous law foresees benefit sharing, and the Liberian Forest Land Act even stipulates that local populations have the right to at least 55 per cent of the revenues generated by large-scale contracts.[166] In countries where the land is owned by the national government, it is common that extremely low land lease fees are often paid to the national authorities. There are a few positive exceptions, like Madagascar and Ghana, where land rental fees are shared at the regional or local level.[167]

Consequently, the criticism that FPIC contributes to the ignoring of substantive rights falls short in the sub-Saharan African context. While it certainly is true that implementation on the ground is very difficult, most regional documents have adopted a comprehensive approach. Particularly the African Charter with its group rights shows great potential, as the right to FPIC can be derived from its collective rights. It is thus not mandatory to see it in conjunction with the right to property and land rights, and it would be desirable for the African Commission to further elaborate on the concept.

159 Cotula (n 119 above) 76.

160 Roe et al (n 158 above) 59.

161 Eg S Brabant 'Current trends in mining law and regulation in West Africa' 28 October 2014 31-32 http://www.mineafrica.com/documents/Workshop%201%20-%20Herbert%20Smith%20Freehills%20-%20Stephane%20Brabant1.pdf (accessed 3 December 2015).

162 *Endorois* decision (n 22 above) 280.

163 *Endorois* decision 296.

164 AU Model Law (n 32 above) para 22.

165 AU Model Law paras 19 & 20.

166 Liberian Forest Lands Act (n 40 above) sec 3.1; Congolese indigenous law (n 41 above) art 41.

167 Vermeulen & Cotula (n 59 above) 910; Schonefeld (n 43 above) 3.

3.4 Obstacles to the full transplantation of free, prior and informed consent

While the appropriation of FPIC has taken place, particularly on the (sub)-regional level and to some extent also nationally and locally, translation processes are still lacking. Moreover, poor implementation is quite noteworthy. In order to give an outlook with regard to the prospects of FPIC in sub-Saharan Africa and its potential for communities, the conceptual, practical as well as structural limits of FPIC will be reviewed, which present an obstacle to the full transplantation of FPIC.

3.5 Practical limit: Issue of non-implementation

Scholars and NGOs seem to agree that the implementation of FPIC in sub-Saharan Africa is poor. There are either (i) no applicable national legal provisions, or (ii) these are not applied, or (iii) the national legislation is fragmented, or (iv) communities are not recognised as rights holders. In Cameroon, for instance, there are conflicts between the mining code and the nature and wildlife legislation.[168] The African Commission's decisions on participative rights have also been ignored, and the recognition if indigenous rights is generally poor.[169] In Nigeria, the elites used the non-recognition of indigenous groups to contest their rights.[170] In Kenya and Namibia, indigenous groups were also deprived of their rights due to the non-recognition of their representatives.[171] Due to the controversy surrounding indigenousness in sub-Saharan Africa, recognising local communities as rights holders would put an end to the highly-politicised discussion on their status and make FPIC more powerful.

In view of the widespread non-implementation, it is tempting to find that FPIC has failed. However, Okafor rightly stresses that state compliance (and implementation) should not be the standard for evaluating the impact of the African human rights system. The same is true for the other legal sources. Instead, it should be taken into consideration how it contributes to normative change, for instance by means of its incorporation in local activists' strategies.[172] While the legal uncertainty makes it more difficult to fully transplant FPIC, favourable governmental institutions and policies increase the likelihood of local communities making use of foreign rights.[173] The

168 B Schwartz et al 'Emerging trends in land-use conflicts in Cameroon' (2012) 12-3 http://d2ouvy59p0dg6k.cloudfront.net/downloads/cameroonminingenglish.pdf (accessed 30 December 2015).

169 Both the Nigerian and Kenyan governments have ignored the African Commission's recommendations; NGOs report that human rights abuses are ongoing.

170 See Ako & Oluduru (n 89 above) 373.

171 *Endorois* decision (n 22 above) para 20; African Commission (n 92 above) 46.

172 OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 296.

173 Engle Merry (n 9 above) 223.

legal mobilisation, which can be increasingly observed in sub-Saharan Africa, indicates that there is still room for localising FPIC.

3.6 Structural limits

The non-implementation of FPIC can, to a large extent, be explained by structural problems, namely, the limits imposed by internal and external hierarchies. The *raison d'être* of FPIC is to resist and overcome power imbalances. However, these power asymmetries can also prevent the full and meaningful transplantation of FPIC.

3.6.1 Internal versus external empowerment

FPIC should be a tool for balancing power imbalances between communities and the state or corporations and can, thus, in theory improve the external standing of groups. At the same time, empowerment has an internal component and raises questions of representation and identity. Empowerment needs to take place both internally and externally in order to provide substantial justice to the group and its members.

In some cases, different groups use the same piece of land or the same natural resources.[174] In other cases, intersectional discrimination based on criteria such as class, gender or religion within groups makes it very difficult to achieve substantive equality for everybody. This conflict is exemplified by the discussions surrounding customary decision-making structures. In Ghana, land rights can only be transferred with the consent of principal elders who must act in the best interests of the community. Research has shown that some chiefs abuse their power by appropriating land for themselves or concluding dubious land deals.[175] Community members are often powerless against these practices.[176]

In this context, it also must be explored what customary law actually is. In many cases, it is the law that was documented by the colonisers that reflected their own patriarchal and racist understanding of culture. Consequently, they created hierarchies that did not previously exist and which changed both society and law.[177] The negative implications to date on the rights of women and other marginalised subgroups cannot be ignored. Large-scale mining can, for instance, be more positive for men as it creates employment for them, while women, who in many societies are responsible for subsistence agriculture, suffer disproportionately from negative side

174 Cotula (n 119 above) 69.

175 Cotula 60.

176 J Ubink 'Struggles for land in peri-urban Kumasi and their effect on popular perceptions of chiefs and chieftaincy' in JM Ubink & KS Amanor (eds) *Contesting land and custom in Ghana: State, chief and the citizen* (2008) 155.

177 See JL Parpart 'Women and the state in Africa' 1986 http://pdf.usaid.gov/pdf_docs/PNAAX586.pdf (accessed 30 December 2015).

effects.[178] Therefore, it is crucial that women's voices are heard in the decision-making process. The indigenous rights legislation in the Democratic Republic of the Congo acknowledges this problem by demanding that FPIC procedures need to be both gender-sensitive and conducted in accordance with customary law.[179] In feminist legal studies and political science, different approaches to ensuring the compatibility of customary law and women's rights are discussed.[180] While these discussions extend beyond the scope of the article, it cannot be stressed enough that internal empowerment is a crucial component of FPIC.

3.6.2 Free, prior and informed consent in the global order

In the widespread modernist development paradigm, investment-friendly narratives prevail which emphasise the importance of foreign development projects and their potential benefits without demanding a 'just international order'.[181] The unequal distribution of power between transnational corporations and international institutions and Third World states, and the power relations between Third World states and local communities impair the effectiveness of FPIC. Many governments depend on the revenues originating from foreign investors and prioritise development over environmental and social concerns. Therefore, they are hesitant to grant participatory rights to local communities and fail to share the benefits of the exploitation with them. They fear that lengthy consultation processes with open outcomes will hinder foreign investment.[182] This behaviour can also be traced back to the pressure exercised by international institutions: Until the 1990s, most African countries pursued a neoliberal approach to natural resource management.[183] Later, the negative impact of this mining policy became obvious and many countries started to adapt their mining codes by including provisions requiring environmental impact assessments, although to date consultations are usually only recommended.[184] Simultaneously, the danger that companies or corrupt governments abuse FPIC in order to whitewash land deals cannot be overlooked. There is a risk that FPIC becomes a way of mitigating the negative side effects of these activities without as such questioning them.

178 Oxfam Australia 'Women, communities and mining: The gender impacts of mining and the role of gender impact assessment' 7 http://www.oxfam.org.au/explore/mining (accessed 11 January 2016).

179 Congolese indigenous law (n 130 above) art 3.

180 See SH Williams 'Democracy, gender equality and customary law: Constitutionalising internal cultural disruption' (2011) 18 *Indiana Journal of Global Legal Studies* 65.

181 U Baxi *The future of human rights* (2006) 249.

182 See Fédération Internationale des Ligues des Droits de l'Homme 'Gold mining and human rights in Mali' 2007 https://www.fidh.org/IMG/pdf/Mali_mines_final-en.pdf (accessed 16 December 2014).

183 B Campbell (ed) *Regulating mining in Africa: For whose benefit?* (2004) 9.

184 Campbell (n 183 above) 23.

In this context, the question arises whether FPIC as a legal transplant depending (in most cases) on the goodwill of states or companies can empower local communities at all. Some decolonial theorists, like Suárez-Krabbe, doubt that concepts such as human rights can be appropriated in a meaningful way, as appropriation processes through regional and national elites happen 'at the expense of the subaltern and their voice'.[185] The proliferation of human rights on the local level contributes to the decline of other strategies of empowerment and homogenises modes of resistance.[186] Moreover, it is questionable whether human rights can help overcome power asymmetries emanating from today's global order. FPIC does not necessarily amount to a 'real choice'.

Despite these negative observations, legal transplantation also opens up opportunities for local communities. In this respect, it is crucial that local communities define what FPIC means and what the procedure should look like. From a practical point of view, human rights lawyering and political civil society advocacy can improve the position of local communities.[187] However, the involvement of such intermediaries also bears dangers by creating more dependencies and hierarchies. There is an urgent need for more anthropological data on how the voice of communities (or lack thereof) impacts the transplantation as well as on the role of intermediaries.

4 Conclusion

While governmental organisations and a few states and companies have appropriated and translated FPIC, a 'localisation' of the right is still lacking. But even (sub)-regionally, many documents fail to translate FPIC in a meaningful way. While it is a positive development that some of them extend the scope of FPIC to non-indigenous communities, the potential of the African Charter has not yet been fully tapped. Many documents suffer from a lack of clarity, for instance, with regard to the temporal dimension of FPIC. It is also obvious that FPIC in some cases needs to be interpreted as a veto right. Otherwise, it is likely to become merely another tool for muzzling critics and whitewashing development projects. The fact that it is generally put in relation to substantive rights, such as the right to benefit sharing, is a positive development.

However, the lack of national implementation of FPIC is striking. This may be traced back to two main reasons: first, the key challenge of bridging the gap between internal and external empowerment;

185 J Suárez-Krabbe *Race, rights and rebels: Alternatives to human rights and development from the global south* (2015) 103.

186 S Engle Merry 'Transnational human rights and local activism: Mapping the middle' (2006) 108 *American Anthropologist* 38 49.

187 See Cotula (n 119 above) 113.

second, the persisting asymmetries in power between local communities, Third World states and transnational corporations.

The structural problems of FPIC notwithstanding, communities in sub-Saharan Africa have decided to use their right to FPIC as a way of working with what they have. Rajagopal acknowledges that, even though human rights are not by nature anti-hegemonic, social movements have in some cases successfully appropriated them.[188] FPIC could be reinterpreted as a counter-hegemonic project and contributes to a new subaltern cosmopolitanism.[189] This it can do by evolving from a localised globalism[190] to a process which is to the largest extent possible controlled by the communities in question.[191] Both intermediaries and communities need to be aware of the structural limitations inherent to FPIC and should try to find ways around these. The early stage of the transplantation process can be both an advantage and a disadvantage. On the one hand, it leaves intermediaries and local communities more room for translation; on the other, it also facilitates contestations and undermines legal certainty and the predictability of legal processes. In view of the strong advocacy by NGOs and international organisations and the growing local legal consciousness, it is unlikely that FPIC has already developed fully.

To conclude, FPIC, just like any other strategy for mitigating the effects of global injustice, is not clear-cut. The choice of whether to use and adapt a legal transplant and to accept the offers made by intermediaries must ultimately be in the hands of the communities.

188 B Rajagopal 'Counter-hegemonic international law: Rethinking human rights and development as a Third World strategy' (2006) 27 *Third World Quarterly* 767 770.

189 B de Sousa Santos & CA Rodríquez-Garavito 'Law, politics and the subaltern in counter-hegemonic globalisation' in B de Souse Santos (ed) *Law and globalisation from below: Towards a cosmopolitan legacy* (2005) 13.

190 Localised globalism describes the process in which transnational concepts are transferred to the local level and destructure and restructure local conditions.

191 B de Sousa Santos 'Toward a multicultural conception of human rights' in B Hernández-Truyol (ed) *Moral imperialism: A critical anthology* (2002) 39 42-43; Doyle (n 12) 16.

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Recent developments

Human rights developments in the African Union during 2015

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Summary

There were few significant normative developments in the African human rights system during 2015. Draft protocols on the death penalty and the right to nationality were adopted by the African Commission, but whether these will be adopted eventually by the African Union remains to be seen. The Commission also adopted soft law instruments, such as a General Comment on the right to life. The Commission made a small dent in the backlog of communications by adopting a number of merits decisions, including one decision in which it found that hanging as a method of executing the death penalty violated the African Charter. Other merits decisions dealt with the right to nationality and gender-based violence. Despite an increasing docket, the African Court handed down only one merits judgment in 2015. The African Children's Committee made some progress in examining state reports, while some attempts were made to revive the African Peer Review Mechanism, which has not in recent years made much progress in its mandate. The dominant challenge facing the African human rights system in 2015 was the reaction of the AU Executive Council to the granting by the African Commission of observer status to the Coalition of African Lesbians. The directives by the Executive Council clearly challenged the independence of the African Commission as an autonomous organ of the African Union.

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Key words: *African Union; African Commission on Human and Peoples' Rights; African Court on Human and Peoples' Rights; African Committee on the Rights and Welfare of the Child; African Peer Review Mechanism*

1 Introduction

This article considers the work of the main human rights bodies of the African Union (AU) in 2015: the African Commission on Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court); and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The work, or lack thereof, of the African Peer Review Mechanism (APRM), which also has a clear human rights mandate, is also considered.

The article starts with an overview of the interaction of the AU political organs with the human rights organs. The focus is on the confrontation between the AU Executive Council and the African Commission following the granting by the latter of observer status to the non-governmental organization (NGO) Coalition of African Lesbians (CAL). The eventual outcome of this conflict has serious implications for the independence of the African human rights system.

2 African Union political organs and human rights

2.1 Developing the legal and policy framework

Following the adoption of six treaties in 2014,[1] the AU did not adopt any new international agreements in 2015. In April the African Commission adopted a Draft Protocol to the African Charter on the Abolition of the Death Penalty in Africa, and in August a Draft Protocol on the Right to Nationality.[2] It remains to be seen whether these draft protocols will make their way through the AU system and be adopted eventually by the AU Assembly.

The Draft Protocol on the Abolition of the Death Penalty was tabled for the consideration of the AU Specialised Technical Committee on Justice and Legal Affairs in November 2015. The Committee declined

1 AU Convention on Cyber Security and Personal Data Protection; Protocol on the Establishment of the African Monetary Fund; African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development; Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament; AU Convention on Cross-Border Co-operation (Niamey Convention); Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

2 Final Communiqué 18th extraordinary session, para 11.

to consider the draft protocol as it was of the opinion that the African Commission lacked the legal basis to initiate protocols.[3] This is in contrast with earlier practice where the African Commission has been deeply involved in the development of legal instruments adopted by the AU Assembly, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).

Should the Protocol abolishing the death penalty be adopted, Africa will be the third regional human rights system to adopt such a protocol after Europe and the Americas.[4] A number of African states have ratified the Second Additional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty, illustrating a slow movement towards the abolition of the death penalty on the continent. However, a few states go against this trend. For example, Egypt has been particularly vocal in its opposition to any move towards abolition.

A protocol on the right to nationality would be a complement to the UN conventions on statelessness. Other regions have also adopted legal instruments with regard to nationality, such as the European Convention on Nationality and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.[5]

In addition to its decisions on the human rights bodies' reports, human rights concerns were highlighted in some AU Assembly decisions. For example, in July the Assembly reiterated 'the need to respect, in the fight against terrorism and violent extremism, the highest standards of human rights and international humanitarian law'.[6]

2.2 Budget

The overreliance on donor funding for the AU has for many years been a bone of contention within the organisation. The budget for 2016, adopted by the AU Executive Council in July 2015, is approximately US $417 million of which US $170 million is obtained from member states and US $247 million is obtained from donors. Only the African Institute for Remittances (AIR) has an operational budget funded by donors.[7] However, only US $19 million of the total

3 Oral statement on the state of the death penalty in Africa at the 58th ordinary session of the African Commission on Human and Peoples' Rights, AFR 01/3808/2016, 12 April 2016.

4 Protocol 6 to the European Convention on Human Rights (1982); Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990). The Second Optional Protocol to the ICCPR on the death penalty was adopted in 1989.

5 See Council of Europe 'Nationality', http://www.coe.int/t/dghl/standardsetting/nationality/default_en.asp (accessed 30 October 2016).

6 Decision on the report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa, Assembly/AU/Dec.584(XXV).

7 Decision on the budget of the African Union for the 2016 financial year, Assembly/AU/Dec.577(XXV).

of US $247 million AU programme budget comes from contributions by member states. This is a far cry from the 75 per cent of the programme budget which the AU in January decided should be funded from contributions by member states.[8] In June the Assembly gave itself five years to implement this decision.[9]

Of the AU budget for 2016, more than US $10 million is allocated to the African Court, of which US $2,4 million comes from donors, and US $5,6 million to the African Commission, of which US $1,3 million is from donors. The budget of the African Children's Committee is US $739 178, of which US $445 802 is from partners.[10]

As in past years, it is noticeable that the African Court has a significantly higher budget than the African Commission despite having a more limited mandate. Also, fewer AU member states have subscribed to the jurisdiction of the Court than the Commission. By the end of 2015, 29 states had ratified the Court Protocol. By contrast, all 54 AU member states had ratified the African Charter.[11]

In its decision on the 38th Activity Report of the African Commission, the Executive Council called on member states and the AU Commission to ensure that the African Commission is 'provided with adequate resources to enable it to carry out its mandate without over depending on external funding'.[12] In this context, it is worth noting that the 2015 budget was close to US $5 million from member states, while the member states' share of the 2016 budget was lower at US $4,3 million,[13] indicating increasing rather than decreasing donor dependence.

2.3 Backlash

The most serious attack on the African Commission's independence in its almost 30 years of existence occurred in 2015 as a result of a procedure that has not in previous years attracted much attention from states, namely, the granting by the Commission of observer status to NGOs. Currently close on 500 NGOs have observer status with the Commission. NGOs with observer status can make statements at the Commission's sessions,[14] and observer status with the African Commission is also a requirement for a NGO wishing to submit a case under the direct access provision of the African Court.

8 Decision on the report of alternative sources of financing of the African Union, EX.CL/Dec.867(XXVI) para 5.
9 Decision on the 2016 budget (n 7 above) para 8.
10 Decision on the 2016 budget (n 7 above).
11 Despite having ratified the African Charter, South Sudan had by the end of 2015 not yet deposited its instrument of ratification.
12 Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) para 8.
13 38th Activity Report (n 12 above) para 44.
14 Criteria for the granting of and for maintaining observer status with the African Commission on Human and Peoples' Rights (1999) II.1.

Observer status mostly has been granted by the Commission without much discussion. However, this is not always so, as is illustrated by the case of the Coalition of African Lesbians (CAL) which was finally granted observer status in 2015. To provide some context to this decision, it is worth highlighting CAL's earlier attempt to be granted observer status. CAL first applied for observer status in May 2008. The application was considered in public session in November 2009. Some commissioners and state delegates opposed the application, with the Ugandan delegation stating that it would 'leave the ACmHPR if observer status was ever granted to CAL'.[15] The application was deferred again and, at the session in May 2010, a few NGO representatives involved in lesbian, gay, bi-sexual, transgender and intersex (LGBTI) rights were invited to a private session of the Commission. From the discussion it was clear that a number of commissioners were homophobic, arguing that LGBTI persons were not protected under the African Charter.[16] A few days later, the Commission decided not to grant observer status. CAL was only notified about the decision in October, without the Commission providing any reasons for the decision.[17] An explanation was provided in the Commission's 28th Activity Report, which noted:[18]

> The ACHPR decided, after a vote, not to grant observer status to the Coalition of African Lesbians (CAL), South Africa, whose application had been pending before it. The reason being that, the activities of the said organisation do not promote and protect any of the rights enshrined in the African Charter.

CAL describes itself on its website as a 'regional network of organisations in sub-Saharan Africa committed to advancing freedom, justice and bodily autonomy for all women on the African continent and beyond'.[19] It is not clear how this goes beyond the rights protected in the African Charter. It should also be noted that NGOs promoting LGBTI rights had previously been granted observer status, the difference possibly being that the names of these organisations did not make this clear in the same way as that of CAL.[20]

At the session following the decision to grant observer status to CAL,[21]

> many NGOs who took the floor to address the African Commission expressed solidarity with CAL and their disappointment with the decision of the Commission. They urged the Commission to reconsider its decision. On the other hand, some states (such as Zimbabwe) took the floor and

15 S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa* 28.

16 Ndashe (n 15 above) 30-31.

17 Ndashe 31.

18 Para 33.

19 http://www.cal.org.za (accessed 30 October 2016).

20 F Viljoen *International human rights law in Africa* (2012) 267.

21 J Biegon 'The African Commission grants observer status to Coalition of African Lesbians' *AU Watch* Issue 5, 14 May 2015 2.

> lauded the Commission for upholding 'African values' by rejecting CAL's application.

The above provides the context for what occurred when CAL submitted a new application for observer status in August 2014, which application was considered at the Commission's 1st ordinary session in 2015. At its 56th ordinary session in April-May 2015, the African Commission granted observer status to seven NGOs, bringing the total number of NGOs with observer status to 485.[22] The Activity Report does not mention which seven NGOs these were. However, the Communiqué of the 56th session lists the seven NGOs, but does not mention anything about the controversy surrounding the granting of observer status to one of these, CAL. However, the controversy was evident for anyone attending the session, as the question of whether to grant CAL observer status had been discussed in public session. Ultimately, five commissioners voted in favour of granting observer status, while three voted for consideration of the application to be deferred.[23] The other commissioners abstained or were not present.

As was to be expected, the AU political organs did not respond favourably. Homophobia is ingrained in the political rhetoric of many African leaders, including President Mugabe of Zimbabwe, who was the AU Chairperson in 2015. In its decision on the 38th Activity Report of the Commission in July, the Executive Council[24]

> [r]equest[ed] the ACHPR to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard REQUESTS the ACHPR to review its criteria for granting observer status to NGOs and to withdraw the observer status granted to the organisation called CAL, in line with those African values.

The Executive Council further urged the African Commission to[25]

> (i) observe the due process of law in making decisions on complaints received;
> (ii) consider reviewing its rules of procedure, in particular, provisions in relation to provisional measures and letters of urgent appeals in consistence with the African Charter on Human and Peoples' Rights;
> (iii) take the appropriate measures to avoid interference by NGOs and other third parties in its activities.

22 Activity Report para 14.
23 Biegon (n 21 above).
24 Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) para 7.
25 Para 12.

The Council authorised the publication of the African Commission's Activity Report 'after its update and due incorporation of the proposals made by member states and agreed upon, within that report, as reflected in these conclusions'.[26] The second quote above indicates that the Executive Council took the opportunity to express its concern not only over the CAL decision, but also other decisions that had upset member states, such as the complaints procedure, provisional measures, urgent appeal letters and 'interference' by NGOs and 'other third parties'. The reference to 'other third parties' may be linked to the opinion of some member states that Western states, through their donor agencies, wield too much influence over the agenda setting of the Commission, as discussed above.

It comes as no surprise that representatives of NGOs and national human rights institutions highlighted the importance of the independence and autonomy of the African Commission at the Commission's 2nd ordinary session in November.[27] Importantly, the representative of the state parties to the African Charter, the Angolan Secretary of State for Foreign Affairs, made no mention of the controversy, highlighted the importance of civil society, and called on AU member states 'to co-operate with the African Commission on Human and Peoples' Rights and to support the Commission's activities to promote and protect human rights in Africa'.[28] However, it is worth noting that only 24 out of the 54 AU member states sent representatives to the session, fewer than the 32 states at the April-May session.

In its 39th Activity Report, the African Commission provides its answer to the Executive Council with regard to the request to withdraw the observer status of CAL and reviewing the criteria for granting observer status:[29]

> Following extensive deliberations, the Commission decided to undertake a detailed legal analysis on this matter, including considering issues relating to the Commission's relationships with its various stakeholders, the notion of African values, the legal basis for the grant of observer status by the Commission, and the implications of withdrawing or retaining the observer status of NGOs.

A request for an advisory opinion on the powers of the AU Executive Council was submitted to the African Court by the Centre for Human Rights, University of Pretoria, and CAL, and is pending before the Court.[30]

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26 Para 11.

27 Final Communiqué of the 57th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 4 to 18 November 2015.

28 Communiqué para 11.

29 Para 50.

30 African Court on Human and Peoples' Rights, Advisory Proceedings, Pending Opinions, Request 002/2015, http://en.african-court.org/index.php/cases/2016-10-17-16-19-35#pending-opinions (accessed 30 October 2016).

The challenge to the African Commission's independence goes against the trend of the AU political organs expressing support for the Commission's work in its decisions. However, the CAL situation is not unique in challenging the independence of the Commission. For example, the Executive Council in 2011 and 2012 refused to authorise the publication of the Commission's Activity Report as some states had argued that it included unverified facts. In 2015 only did the Executive Council request the Commission to delete references in its Activity Report to two merits decisions it had adopted against Rwanda and to reconsider these cases.[31] This forms the background to the call in the Executive Council decision to '[o]bserve the due process of law in making decisions on complaints received'.

In September the AU Permanent Representatives' Committee (PRC) held a three-day meeting with African Governance Architecture (AGA) platform members[32]

> to explore practical ways of building functional linkages and interactions between AU member states and AGA platform members with the ultimate aim of promoting and sustaining democratic and participatory governance, constitutionalism and rule of law and respect for human and peoples' rights in Africa.

Whether meetings such as these served to diffuse tensions remains to be seen.

In 2015, the AU political organs were not only on a collision course with one of its own organs, but also continued its antagonistic relationship with the International Criminal Court (ICC), an international court with criminal jurisdiction over the crimes of genocide, crimes against humanity and war crimes, which many African states have subscribed to, but which has been irritating African leaders through its almost exclusive focus on Africa and indictment of incumbent heads of state of Kenya and Sudan. In 2015, the AU Assembly expressed its 'deep concern regarding the conduct of the Office of the Prosecutor and the Court and the wisdom of the continued prosecution against African leaders'.[33] It is worth noting that in 2015 no state ratified the Malabo Protocol, adopted in 2014, providing the African Court with criminal jurisdiction over, among others, crimes covered by the Statute of the ICC. This is in line with the idea that most states are likely to have supported the adoption of the Malabo Protocol as a political statement expressing displeasure

31 See Decision on the 37th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.864(XXVI) para 8: 'As regards Communications 426/12 and 392/10 concerning the government of Rwanda, Council REQUESTS that the cases in question be expunged from the report of the African Commission for the period June-December 2014 until Rwanda is offered the opportunity of oral hearing on the two cases, as requested through various correspondence to the ACHPR.'

32 ACERWC/ RPT(XXVI) para 33.

33 Decision on the progress report of the Commission on the implementation of previous decisions on the International Criminal Court (ICC), Assembly/AU/ Dec.547(XXIV).

with the ICC rather than expressing a genuine willingness to ratify the treaty.[34]

3 African Commission on Human and Peoples' Rights

3.1 Composition

In 2015 Commissioner Kayietsi from Rwanda was re-elected to the Commission. The African Commission received two new members, Mrs Jamesina King from Sierra Leone and Mr Solomon Dersso from Ethiopia, who were sworn in at the November session. They replace Commissioner Khalfallah of Tunisia and Commissioner Manirikaza of Burundi. The Commission, thus, retained a majority of women, since two men left and one man and one woman were elected. The Commission is thus now composed of six women and five men. Two women were elected to lead the Commission. Commissioner Tlakula from South Africa was elected Chairperson and Commissioner Maiga from Mali as Vice-Chairperson.

The issue of LGBTI rights does not appear to have featured significantly in the election of new Commission members. Commissioner Khalfallah, who had as commissioner publicly expressed deeply homophobic views,[35] was not re-elected, while Commissioner Kayietsi, who had also voted against granting CAL observer status, was re-elected. Commissioner Manirikaza, who had voted in favour of granting CAL observer status, was not re-elected. As far as the new members are concerned, it may be noted that Mrs King is Vice-Chairperson of the Human Rights Commission of Sierra Leone, which in its report to parliament noted that it would 'continue to protect persons with different sexual orientation from violent attacks and discrimination'.[36]

3.2 Sessions

The African Commission held four sessions in 2015: the 17th extraordinary session (19-28 February); the 56th ordinary session (21 April-7 May); the 18th extraordinary session (29 July-7 August); and the 57th ordinary session (4-18 November). These were all held at the seat of the Commission in Banjul, The Gambia, with the exception of the 18th extraordinary session, which was held in Nairobi, Kenya.

34 By the end of 2015, the Protocol had been signed by five states (Benin, Congo, Guinea-Bissau, Kenya and Mauritania) although none had ratified it. The fact that Kenya was the first state to sign the Protocol in January 2015 is hardly surprising, considering that Kenya had taken the lead in developing the Protocol following the indictment of the Kenyan President and other political leaders by the ICC.

35 Biegon (n 21 above).

36 Human Rights Commission of Sierra Leone *The state of human rights in Sierra Leone in 2013* (2014) 59.

3.3 State reporting

At its April session, the Commission considered the state reports of Djibouti, Ethiopia, Malawi, Niger, Nigeria, Senegal and Uganda. At its November session, the Commission considered the reports of Algeria, Burkina Faso, Kenya and Sierra Leone. Among the states reporting in 2015 were some states that had for a long time not reported. Of the state parties to the African Charter, only Comoros, Equatorial Guinea, Eritrea, Guinea-Bissau, São Tomé and Principe and Somalia have never submitted a state report to the African Commission. A few states, including major states such as Ghana, have not reported since the 1990s.

At the February session, the African Commission adopted Concluding Observations on the reports of Liberia and Mozambique that had been considered in 2014. At the August session, the Commission adopted Concluding Observations on Sahrawi (considered in 2014), Niger, Djibouti, Senegal and Ethiopia. However, the Concluding Observations on Djibouti, Sahrawi and Senegal had as of August 2016 not yet been made public by the Commission on its website. At the November session, the Commission adopted Concluding Observations on the reports of Malawi, Nigeria and Uganda.

In the Concluding Observations on the report of Malawi, the Commission noted 'with appreciation that Malawi was the first state party to the Maputo Protocol to submit to the African Commission a report on the measures that have been taken to implement the Protocol in the country'.[37] The Commission called on Uganda to report on the implementation of the African Women's Protocol (also referred to as the Maputo Protocol), taking into consideration the guidelines on state reporting.[38] However, the Commission does not consistently call for such reporting.[39]

The fact that a state has not reported on the implementation of the Women's Protocol is no reason for the Commission to address issues arising in relation to women's rights in two brief paragraphs under the heading 'protection of women and children' as in the case of the Concluding Observations on Uganda.[40] It is even more surprising to note that the Commission in its Concluding Observations on Malawi does not relate its concerns with regard to women's rights to the provisions of the African Women's Protocol, but list recommendations in relation to rights under the Protocol mainly under the heading 'protection of the rights of women and children'.[41]

37 Para 10.
38 Concluding Observations: Uganda para 50.
39 See eg Concluding Observations: Mozambique.
40 Paras 69-70.
41 Paras 103-115.

The Concluding Observations on Uganda call on the state to report on the implementation of socio-economic rights in line with the Commission's guidelines. However, in all the Concluding Observations adopted in 2015, the Commission, in its list of concerns and recommendations, focuses much more on civil and political rights than on socio-economic rights.

3.4 Resolutions, guidelines and General Comments

The Commission adopted 22 resolutions in 2015. These resolutions may be divided into three categories: resolutions relating to the human rights situation in Africa or with regard to specific states; thematic resolutions providing normative guidance to states; and administrative resolutions with regard to Commission procedures. Some resolutions fall outside this categorization, such as the Resolution on the World Bank's Draft Environmental and Social Policy (ESP) and associated Environmental and Social Standard (ESS).

With regard to country-specific resolutions, the Commission adopted a resolution on elections in Africa in 2015 and resolutions on Burundi (one on the human rights situation and one on the urgency of undertaking a fact-finding mission), Egypt, The Gambia, Kenya, Nigeria and South Africa (with regard to xenophobic violence).

The African Commission only adopted three thematic resolutions: the resolution on the right to water obligations; the resolution on the right to rehabilitation for victims of torture; and the resolution on accessibility for persons with disabilities.

The ten procedural resolutions adopted by the Commission deal mainly with the mandates and composition of the Commission's working groups. The Resolution on the Governance of the Commission and its Secretariat is interesting in that the Commission has found it necessary to adopt a public resolution to 'ensure that the Secretariat provides it with full support in the execution of its mandate in conformity with the relevant provisions of its Rules of Procedure'.

The lack of thematic resolutions should be viewed in the context of the African Commission adopting a number of other types of normative instruments interpreting provisions of the African Charter. Thus, at the 56th ordinary session, the Commission launched General Comment 2 on article 14 of the African Women's Protocol, the Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa and studies on female human rights defenders in Africa, nationality in Africa, freedom of association and assembly in Africa. The Commission also adopted Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism. In November 2015, the Commission adopted General Comment 3 on the Right to Life (article 4).[42] The General Comment was developed by the Working Group on the Death Penalty and Extra-Judicial, Summary or

42 Draft Protocol on the Right to Nationality.

Arbitrary Killings in Africa. It explores various aspects with regard to the right to life in great detail, including the death penalty; the use of force in law enforcement; the use of force in armed conflict; responsibility for persons in custody; and responsibility for non-state actors.

Arguably, whether a normative 'soft law' instrument is called a resolution, guidelines or general comment is not very important. The importance of these instruments lies in the way in which they are used by the Commission and various stakeholders in holding states to account.

3.5 Communications

The focus in this section is on the six decisions on merit decided by the African Commission in 2015 which were available publicly at the time of writing.

Interights and Ditshwanelo v Botswana[43] was brought on behalf of Modisane Ping, sentenced to death for murder. Mr Ping unsuccessfully appealed to the Court of Appeal and his application for clemency to the President was denied. Mr Ping's mother and legal counsel were not allowed to see him before the execution.

On 31 March 2006 the Commission received the complaint. The Commission Secretariat attempted to submit a request for provisional measures to stay the execution while the case was being heard. However, its attempts to send a fax to the Office of the President of Botswana were unsuccessful. Before the Secretariat could find alternative means of reaching the relevant authorities, it was informed by the complainants that Mr Ping had been executed on 1 April 2006.[44] This situation is similar to the failure of the Commission to reach the Botswana authorities to prevent the execution of Ms Bosch in 2001.[45]

Since the complainant contended that all the admissibility requirements had been met and the state did not make any submissions on admissibility despite several reminders, the Commission declared the communication admissible.

The complainant argued that the imposition of the death penalty violated the African Charter as Mr Ping had been assigned an inexperienced defence counsel. However, the Commission held that this could not merit the finding of a violation since this issue had not been raised in the Court of Appeal.[46] The Commission further held that it would not re-evaluate facts unless the domestic courts' 'evaluation of the facts are manifestly arbitrary or amounted to a

43 Communication 319/06.
44 Para 24.
45 *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).
46 Para 72.

denial of justice'.[47] The complainant had not shown this to be the case. The same applied to the evaluation of extenuating circumstances. The Commission further held that powers of clemency were not subject to judicial review as they formed part of the state's prerogative powers.[48]

With regard to the prohibition of torture and ill-treatment in article 5 of the African Charter, the Commission held that hanging as a method of execution 'causes excessive suffering' and, therefore, constitutes a violation of article 5.[49] The Commission held that the execution had not been unduly prolonged, thereby not giving rise to the so-called 'death row phenomenon', given the fact that Mr Ping was executed shortly after the end of the appeal and the clemency process had been concluded.[50] The Commission noted that prisoners on death row should be given 'adequate notice of their execution'. In line with its decisions in two other death penalty cases against Botswana, *Bosch*[51] and *Spilg*,[52] the Commission further held that the failure to inform the family and lawyer of Mr Ping of the time of the execution and the place of burial constituted a violation of article 5.[53]

The most noticeable part of the decision is the finding that execution through hanging constitutes cruel, inhuman or degrading punishment under article 5 of the African Charter. The Commission did not go as far as fully outlawing the death penalty, even though it noted that 'it seems that no method of execution is appropriate under international law'.[54] However, the decision remains significant, given that the Commission in the *Spilg* case in 2013 had held that, while hanging could constitute cruel, inhuman or degrading punishment, it had not been shown to constitute such punishment in the case at hand.

In *The Nubian Community in Kenya v The Republic of Kenya* it was alleged that the Nubian community in Kenya has been denied their right to nationality. Kenya argued that the case should be declared inadmissible as the community had not exhausted local remedies. However, the Commission held that the complainants 'in the particular circumstances are unable to utilise local remedies mainly because of many procedural and administrative bottlenecks put in their path',[55] including the failure of the High Court to constitute a panel to hear a case filed by a Kenyan NGO in 2003.

47 Para 73.
48 Para 81.
49 Para 87.
50 Para 91.
51 *Interights* (n 45 above).
52 Communication 277/2003, *Spilg and Mack & Ditswanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* (2013).
53 Para 96.
54 Para 85.
55 Para 52.

On the merits, the Commission held that Kenya had acted in a discriminatory fashion against the Nubian community by imposing additional requirements for obtaining a Kenyan identity document to those that exist for Kenyan citizens of other ethnic groups.[56] The Commission held that this practice 'failed to recognise the legal status of Nubians' in violation of article 5 of the African Charter. The Commission further held that the lack of access to an identity document affected the right to political participation and access to public service, health and education. The Commission also held that eviction without notice or the provision of alternative housing or compensation violated the right to property of the Nubians affected. It should be noted that the African Children's Committee dealt with related violations against the Nubian community in Kenya in its first merits decision in 2011.[57]

Open Society Justice Initiative v Côte d'Ivoire[58] dealt with the controversial nationality law of Côte d'Ivoire. With regard to the exhaustion of local remedies, the Commission noted that[59]

> the insecurity existing in Côte d'Ivoire at the time of the facts, especially towards the targeted communities, could not have motivated the victims to seek protection under the law from authorities involved in the alleged violations. In such circumstances, internal remedies could not be said to be available.

The Commission further noted that the violations were 'serious or massive' given that 'hundreds of thousands of persons' were stateless in Côte d'Ivoire as a result of the legislation complained of and that, in line with its jurisprudence, the exhaustion of local remedies was not required in these circumstances.[60] On the merits, the Commission held that Côte d'Ivoire had violated the African Charter through its nationality law, and recommended constitutional and legal reform, including a simplified application procedure for obtaining Ivorian nationality for specific groups, and a reformed birth registration system.

The Commission held that *Mbiankeu v Cameroon*[61] was admissible since local remedies were not accessible to the complainant. The Commission noted that the complainant had provided evidence that she had submitted complaints to relevant Cameroonian authorities without any action being taken.[62] The Commission noted that the

56 Paras 127, 134 & 135.

57 Communication 2/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v The Government of Kenya* (22 March 2011). See M Killander & A Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 199-221.

58 Communication 318/06.

59 Para 44.

60 Para 47.

61 Communication 389/10.

62 Para 52.

state had not 'provided the Commission with evidence that the formalities and means of seizure used by the complainant are prohibited by the relevant laws or fail to comply with these laws'.[63] The reversion by the Commission to only deal with admissibility issues that have been contested by the state, in this case the exhaustion of local remedies, should be welcomed. On the merits, the Commission found a violation of the right to property and adequate housing, the latter as an implied right under articles 16 and 18 of the African Charter.[64] As reparation, the Commission ordered both material and non-material damages.

In *Atangana Mebara v Cameroon*,[65] the complainant challenged his incarceration on corruption charges. Cameroon challenged admissibility on two grounds: insulting language (article 56(2) of the African Charter) and non-exhaustion of local remedies (article 56(5)). It is clear that what constitutes insulting language in a communication must be decided on a case-by-case basis. In the present case, the Commission held that the following quote from the complainant's submission did not constitute insulting language:[66]

> Faced with a largely negative balance sheet, the regime, which has been in power for thirty years, has come up with a hoax to scapegoat a number of senior officials, on the trumped-up charge of misappropriation of state funds, for the sole purpose of gaining credibility in the eyes of international donors.

The Commission held that local remedies had been unduly prolonged since the magistrate had not responded despite statutory timeframes for such response having expired.[67]

With regard to the merits, the Commission held that Mr Atangana Mebara's right to be presumed innocent had been violated through public statements about his guilt.[68] The Commission also found a violation of the right to legal representation, the right to be tried within a reasonable time and the prohibition of arbitrary detention. As remedies, the Commission called for the release of the complainant (in line with a national High Court judgment), and the imposition of sanctions against those responsible and compensation. For most of its existence, the Commission has called for compensation without specifying the amount. In the current case, it decided to call for compensation in the amount of 400 000 000 CFA (approximately US $650 000) for seven years of detention. The Commission noted:[69]

63 Para 54.
64 Para 124.
65 Communication 346/07 *Mouvement du 17 Mai v Democratic Republic of Congo*; 325/06.
66 Para 54.
67 Paras 63 & 69.
68 Para 103.
69 Para 142.

> In assessing the amount, it should also be noted that until his detention, the complainant was working as a senior research fellow and occupied senior posts in government. His prolonged detention brought his professional activities to a standstill while his reputation was ruined due to the presumption of guilt that he was subjected to before the public.

Apart from citing the practice of the European Court of Human Rights and the Economic Community of West African States (ECOWAS) Court of Justice in relation to compensation for arbitrary detention, the Commission provided no reasoning in relation to its decision of providing an exact amount of compensation in its decision. It is worth noting that the African Court has a much more elaborate system for providing reparations, which include a separate reparations judgment adopted after a merits judgment, finding violations of the African Charter or other relevant human rights instruments.

Equality Now and Ethiopian Women Lawyers Association v Ethiopia[70] was adopted by the African Commission in November 2015. The case dealt with the rape and abduction of a 13 year-old girl as part of a traditional practice in Ethiopia and the lack of response by the Ethiopian authorities. The perpetrator was initially convicted by a court, but the conviction was overturned on appeal. The Commission held that violators must be pursued with diligence and that the decisions of the national appeal courts had been 'manifestly arbitrary and affront the most elementary conception of the judicial function'.[71] In addition to prosecution, the state had an obligation to adopt preventive measures. However, the Commission noted that it would not dictate what these would be, given the state's 'unique knowledge of the local realities'.

Two of the Commission's 2015 decisions on merit, both against the Democratic Republic of the Congo, were not publicly available at the time of writing.[72]

The African Commission also adopted a few inadmissibility decisions, two of which are briefly discussed here.[73] In *Human Rights Council & Others v Ethiopia*,[74] the Commission held that the House of Federation, despite being part of the Ethiopian Parliament, was a 'dispute settlement body on constitutional issues' and that it was necessary to approach this body in relation to a constitutional complaint as part of the requirement to exhaust local remedies prior to submitting a case to the African Commission.

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70 Communication 341/2007.

71 Para 137.

72 Communications 346/07 *Mouvement du 17 Mai v Democratic Republic of Congo*; 325/06 *Democratic Republic of Congo*.

73 The others are Communication 410/12, *Congress for Democracy and Justice (CDJ) v Gabon* (not available); Communication 400/11, *Reseau ouest Africain des defenseurs des droits humains et Coalition ivorienne des defenseurs des droits de l'homme v Côte d'Ivoire* (failure to exhaust local remedies); Communication 477/14, *Crawford Lindsay von Abo v Zimbabwe* (submission within reasonable time after exhausting local remedies).

74 Communication 445/13.

A case brought by 529 persons sentenced to death in Egypt was declared inadmissible since a retrial had been ordered by an Egyptian court. However, the Commission took the opportunity to call on Egypt to implement a moratorium against the death penalty and to ensure that the 'retrial observes all standards of fair trial and due process'.[75] This followed an oral hearing in relation to the case at the 56th ordinary session.

At the extraordinary session in Nairobi, the African Commission held two oral hearings in cases against Rwanda. This followed the decision to reconsider the cases following the Executive Council's decision that references to the merits decisions should be removed from the Commission's Activity Report.

The Commission's Activity Reports note that the Commission adopted provisional measures with regard to some communications. However, apart from the case names, no public details on these have been provided and the general public would have to wait for the final decision on a communication to get information on the provisional measures.

At its November session, the Commission referred one communication to the African Court, namely, *Family of Late Audace Vianney Habonarugira v Burundi*.[76] This followed a response from Burundi in relation to provisional measures issued by the Commission.[77] Non-compliance with the provisional measures of the Commission is one of the grounds in the Commission's Rules of Procedure to refer a case to the Court. This is obviously subject to the state having ratified the African Court Protocol, which Burundi did in 2003. Countries with many cases pending before the Commission, such as Egypt, have not ratified the Court Protocol.

4 African Court on Human and Peoples' Rights

4.1 Docket

Close to two decades after the adoption of the African Court Protocol, the number of states that have subjected themselves to the jurisdiction of the Court remains limited. Cameroon deposited its instrument of ratification of the Protocol in August 2015, taking the number of ratifications to 29. Of these, only eight states (Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania) had made a declaration allowing access to the Court. Cases can also be submitted to the Court by the African Commission.[78] Despite repeated calls by AU policy organs and the African Commission for

75 Communication 467/14 *Ahmed Ismael & 528 Others v Egypt* para 176.
76 Communication 472/14.
77 Para 31.
78 In an advisory opinion in 2014, the Court decided that the African Children's Committee may not refer cases to the Court.

states to ratify the Protocol and make an article 34(6) declaration, the number of states that have subjected themselves to the Court remains limited.

At the end of 2015, the African Court had not yet determined whether NGOs may request advisory opinions, an important issue considering that all pending requests for advisory opinions have been submitted by NGOs.

4.2 Decisions and judgments

The African Court delivered few judgments and orders in 2015. On 5 June it handed down the reparations judgments in *Zongo v Burkina Faso.*[79] This was the second reparations judgment of the Court. In the merits judgment in *Zongo*, the Court had held Burkina Faso responsible for the lack of due diligence in the investigation of the murders of the investigative journalist, Norbert Zongo, and his companions in December 1998. The reparations judgment dealt with the issue of damages to the family members and NGO that brought the case and also with the issue of whether the Court should order the reopening of the case.

After extensive discussion of relevant comparative case law, the Court held that those entitled to compensation for 'moral prejudice' are the spouses, children and parents of the deceased persons, and ordered the state to compensate each spouse with 25 million CFA (approximately US $40 000), each child with 15 million CFA and each parent with 10 million CFA. The Court held that the state should give the NGO that submitted the case together with the relatives a token 1 CFA. The state was also ordered to pay costs amounting to more than 43 million CFA. The Court's order on compensation was unanimous, while Judge Tambala dissented with the Court's order that the state should 'reopen investigations with a view to apprehend, prosecute and bring to justice the perpetrators'.[80]

On 20 November, the African Court delivered its first (and only) merits judgment for 2015, *Alex Thomas v Tanzania.*[81] The Court held that Mr Thomas had been subjected to an unfair trial and sentenced to 30 years' imprisonment in 1997. The Tanzanian Court of Appeal dismissed Mr Thomas's appeal in May 2009. The Court held that the question whether the case before the Court had been submitted within a reasonable time should be determined based on the fact whether it was reasonable to file the application to the African Court in August 2013 when Tanzania had made the declaration under article 34(6) of the Protocol in March 2010. The Court held that a

79 *In the matter of beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blais Ilbudo & Burkinabe Movement on Human and Peoples' Rights v Burkina Faso* Application 013/2011, judgment on reparations, 5 June 2015.

80 Para 111(x).

81 *Alex Thomas v United Republic of Tanzania* Application 5/2013, judgment 20 November 2015.

delay of three years and five months in submitting the case was not unreasonable considering the circumstances of Mr Thomas as 'a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records'.[82] On the merits, the Court held that various fair trial rights had been violated, including the non-provision of legal aid despite the fact that the provision of legal aid was in the interests of justice. With regard to remedies, the Court held that Tanzania must take appropriate measures to redress the violations, but that these should not include the reopening of the defence case or a retrial, since this would be prejudicial to Mr Thomas, considering that he had already spent close to 20 years of a 30-year sentence in prison at the time of the Court's judgment. In a joint dissenting opinion, judges Thompson and Ben Achour argued that Mr Thomas had shown exceptional circumstances that would have merited an order that he should be released.

On 20 November, the African Court gave an order in the case of *Femi Falana v African Commission on Human and Peoples' Rights*.[83] The background was that Mr Falana, a Nigerian human rights lawyer, in May 2015 filed a case at the African Commission with regard to systematic and widespread human rights violations in Burundi. He submitted an application to the Court against the Commission when the Commission did not refer the case to the Court. Hardly surprisingly, the Court declared that it did not have jurisdiction. Judge Ouguergouz highlighted the fact that this was the type of case that should rather be dismissed administratively by the Registry than be subject to judicial determination by the Court.

5 African Committee of Experts on the Rights and Welfare of the Child

5.1 Composition

In January 2015, the AU Assembly adopted an amendment to article 37(1) of the African Children's Charter and decided that the amendment should enter into force with immediate effect. The amendment had been requested by the African Children's Committee and entailed that members of the Committee could be re-elected for a second term of five years. Under the original Charter, members were elected for a non-renewable term of five years.

In June the AU elected six members to the Committee of which two, Benyam Mezmur (Ethiopia) and Clement Mashamba (Tanzania), were re-elected to serve a second term. In appointing the members, the Assembly requested 'the [AU] Commission to prepare modalities to ensure the scrupulous respect of the principles of equitable regional

82 Para 74.
83 Application 19/2015, order 20 November 2015.

and gender representation in all AU organs and institutions, and to submit the modalities to the January 2016'.

5.2 Sessions

The African Children's Committee held its 25th session from 20 to 24 April[84] and its 26th session from 16 to 19 November.[85] Both sessions were held in Addis Ababa, Ethiopia.

5.3 State reporting

The state reports of Madagascar, Namibia, Rwanda and Zimbabwe were considered at the 25th session. The Madagascar delegation was headed by the Minister of Justice, while the delegation of Namibia was headed by the Permanent Secretary of the Ministry of Gender Equality and Child Welfare, the Rwandan delegation by the Executive Secretary of the National Commission for Children, and the Zimbabwean delegation by the Minister of Health and Child Care. At the 26th session, the state reports of Algeria, Congo, Gabon and Lesotho were considered. The reports were presented by ministers, with the exception of the Algerian report which was presented by the Director of Political Affairs and International Security of the Ministry of Foreign Affairs.

The African Children's Committee should be commended for providing detailed reports in its session reports on the examination of the state reports, including the answers of the state delegations to questions posed by the Committee. At its 26th session, the Committee decided that the time allocated at a session for the presentation of a report should be a maximum of 20 minutes, followed by questions by the Rapporteur for a maximum of eight minutes, while other members of the Committee would be given a maximum two minutes each to raise questions.

5.4 Communications

The African Children's Committee did not adopt any decisions on communications in 2015. As opposed to the African Charter, there is no provision in the Children's Charter that the communications procedure should be confidential. Despite this, the Committee does not provide any information on pending communications in its session reports. This is all the more remarkable, considering the fact that the Committee provides a database of national children's rights cases on its website, which includes cases from Botswana, Kenya, Lesotho, Namibia, South Africa and Zimbabwe.[86]

84 Report 25th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child ACERWC/RPT (XXV).

85 Report 26th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child, ACERWC/ RPT(XXVI).

86 http://national-cases.acerwc.org/ (accessed 30 October 2016).

6 African Peer Review Mechanism

The African Peer Review Mechanism (APRM) has in recent years lost steam. Gruzd and Turianskyi noted with regard to the APRM Forum held in connection with the AU Summit in Addis Ababa in January 2015:[87]

> Only three (out of a possible 35) presidents attended the meeting of the African Peer Review Mechanism (APRM) Forum on 29 January 2015 in Addis Ababa, Ethiopia. This was in spite of the announcement and endorsement of a number of key decisions, which have the potential to revive and strengthen the APRM – the continent's premier home-grown governance assessment and improvement tool.

Scheduled progress reports by Benin and Sierra Leone were not presented. On a positive note, a CEO for the APRM Secretariat, Prof Adebayo Olukoshi, was appointed. Côte d'Ivoire became the thirty-fifth state to sign up for the APRM at the January APRM Forum.[88]

Financing remains a serious challenge, with many states not paying their membership contributions and very limited support for the APRM from international donors remaining. However, the lack of funds is not the only challenge. Gruzd and Turianskyi noted:

> Enthusiasm around the APRM has been declining in recent years, with fewer new countries joining and fewer reviews taking place. What started out as an initiative that could transform Africa became an overly complex and technical academic review, with member states seemingly lacking the political will to implement proposed changes. It will be up to the new CEO and his team to demonstrate that there is still energy and drive in the APRM project, and to demonstrate tangible governance results. He will need to strategise how to re-engage the continent's leaders to actively participate. And he will have to raise serious funding to fulfil the APRM's potential aspirations.

At the June APRM Forum, Kenyan President Uhuru Kenyatta replaced Liberian President Ellen Johnson Sirleaf as Chairperson of the APRM Forum.[89] More than a decade after its establishment, only 17 states, less than half of the members, have been reviewed. The last country review report (Tanzania) was published in January 2013. It is unfortunate that African states have allowed a procedure that had great potential to bring improved governance to participating states to fail. It remains to be seen whether this moribund institution can be revived under the new leadership.

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87 S Gruzd & Y Turianskyi 'Where is the African Peer Review Mechanism heading?' http://www.saiia.org.za/opinion-analysis/where-is-the-african-peer-review-mechanism-heading (accessed 14 September 2016).

88 'The 22nd Summit of the Committee of Participating HOSG of the APRM' http://aprm-au.org/viewNews?newsId=64 (accessed 14 September 2016).

89 Article 19 'Africa: African Peer Review Mechanism in dire need of review' https://www.article19.org/resources.php/resource/38001/en/africa:-african-peer-review-mechanism-in-dire-need-of-review (accessed 16 September 2016).

7 Conclusion

Close to 30 years after its establishment, the African Commission experienced the greatest challenge so far in relation to its independence through the granting of observer status to CAL and the ensuing fall-out with the AU Executive Council and other decisions of the Commission that had upset member states, such as the merits decisions against Rwanda, which the Commission was forced to remove from its activity report. At the end of the year, it seemed that the dust had settled somewhat, and to some extent it was back to business as usual. However, it is clear that LGBTI rights remain a sensitive issue for many member states, and indeed within the Commission itself.

With regard to communications, the Commission decided a number of important cases, including those on the death penalty and gender-based violence. In contrast, during 2015 the African Court was still struggling to get off the ground and delivered only one merits judgment and one judgment on reparations. The African Children's Committee made some progress, in particular in relation to state reporting. The APRM seems to have lost much of its initial appeal, and it remains to be seen whether attempts to revive it will yield results.

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Recent developments

Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review

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Summary

This article reviews the recent judgment of the Constitutional Court of Zimbabwe in Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*, which has been hailed with acclaim worldwide. The review highlights three areas where the judgment makes a significant jurisprudential contribution: first, with respect to the issue of standing to bring a constitutional challenge under the Zimbabwean Constitution; second, with respect to the use of international treaty law and foreign case law; and third, in its purposive approach to the interpretation of the relevant constitutional provisions relating to child marriage. The regional impact of the decision is also considered in relation to recent litigation in Tanzania.*

Key words: locus standi*; international law; marriage; children's rights; constitutional interpretation*

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1 Introduction

In 2013 Zimbabwe enacted a new Constitution. The new Zimbabwean Constitution has a strong bias towards the protection and promotion of human rights. Chapter 4 of the Constitution is entitled 'Declaration of Rights' and enshrines the rights of Zimbabwean citizens and residents. The article discusses the constitutional advances brought about by the finding in *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others.*[1] Three areas where the judgment arguably makes a significant jurisprudential contribution are highlighted, namely, (i) with respect to the issue of standing to bring a constitutional challenge under the Constitution of Zimbabwe; (ii) with respect to the use of international treaty law and foreign case law; and (iii) its purposive approach to the interpretation of the relevant constitutional provisions relating to child marriage.

The case revolved around a constitutional challenge to the Marriage Act[2] and to the Customary Marriages Act.[3] The former, in section 22(1), prohibited the marriage of a boy under the age of 18 and a girl under the age of 16 years, except with the written permission of the Minister of Justice if he or she considered such a marriage desirable. This entailed permitting child marriages and establishing a different marriage age for boys and girls. The Customary Marriages Act sets no minimum age for a customary marriage, thus, according to received wisdom, the minimum age for marriage is the attainment of puberty. A constitutional challenge was brought by two Zimbabwean women who had been in a union since an early age. They sought to have child marriage under both civil and customary law declared in violation of various sections of the Zimbabwean Constitution. Based on an analysis of the consequences of child marriage, and relying on treaty law and foreign case law in its interpretation of the applicable constitutional sections, the Constitutional Court found that from the date of the judgment, no marriage of a person below the age of 18 years would be legal. The ruling applies equally to girls and boys.

2 *Locus standi* to pursue a constitutional case

The *Mudzuru* matter is an example of litigation instituted in the public interest. Public interest is defined as[4]

1 CCZ 12/2015, http://www.lrfzim.com/wp-content/uploads/2016/01/Landmark-ruling-on-child-marriages.pdf.
2 Cap 5:11.
3 Cap 5:07.
4 *Black's law dictionary* (1994).

> something in which the public, the community at large, has some pecuniary interest or some interest by which their legal rights or liabilities are affected. It does not mean anything as narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government …

A 2009 paper[5] describes public interest litigation as 'an expression for the sufferers of silence' as well as 'a blessing to the downtrodden, oppressed sections of society'. Acting in the public interest requires that the applicant in the case has adequate *locus standi*. *Locus standi* refers to standing or the right to approach a court directly to seek appropriate relief in cases arising from an alleged infringement of a fundamental human right or freedom enshrined in Chapter 4 of the Constitution. How public interest litigation widens the interpretation of the *locus standi* principle is discussed later in this section. Persons specified under section 85(1) of the Constitution have the right to approach a court directly. Section 85(1) provides:[6]

> (1) Any of the following persons, namely –
>
> (a) any person acting in their own interests;
> (b) any person acting on behalf of another person who cannot act for themselves;
> (c) any person acting as a member, or in the interests, of a group or class of persons;
> (d) any person acting in the public interest;
> (e) any association acting in the interests of its members;
>
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

The *Mudzuru* judgment sets out the applicant's cause of action based on a claim[7]

> that the fundamental rights of a girl child to equal treatment before the law and not to be subjected to any form of marriage as enshrined in section 81(1) as read with section 78(1) of the Constitution have been, are being and are likely to be infringed if an order declaring section 22(1) of the Marriage Act and any other law authorising child marriage unconstitutional was not granted by the Court.

The first *locus standi* issue the bench had to decide was in which capacity the applicants acted in claiming the right to approach the court in relation to the allegations they had made.[8] In claiming *locus standi* under section 85(1) of the Constitution, a person should act in

5 IK Walia 'Public interest litigation: An expression of voice for the sufferers of silence' 20 November 2009) http://ssrn.com/abstract=1510271 (accessed 10 October 2016).

6 This section finds an equivalent in sec 38 of the South African Constitution.

7 *Mudzuru* (n 1 above) 9.

8 As above.

a single capacity when approaching a court, and not in two or more capacities in one proceeding, as the applicants in this matter had attempted to do when they based their application on both sections 85(1)(a) and 85(1)(d).[9]

The respondents (the Minister of Justice, Legal and Parliamentary Affairs) correctly submitted that, although the applicants claimed to have been acting in their own interests in terms of section 85(1)(a) of the Constitution, the facts showed that they had failed to satisfy the requirements of that provision. According to the respondents, the rule requires that a person claiming the right to approach the court using section 85(1)(a) must show on the facts that he or she is the victim, or there must be harm or injury to his or her own interests, arising directly from an infringement of the fundamental right or freedom of another person. In other words, the respondents sought a narrow interpretation of *locus standi*, an interpretation which required that the applicant must have a direct relationship with the cause of action.

Both applicants in the *Mudzuru* matter fell pregnant before the age of 18. Having fallen pregnant, they proceeded to live with the families of their respective partners, but neither of their pregnancies led to any of the applicants entering into a formal or customary marriage. In other words, neither of the two applicants was a victim of child marriage (strictly construed), which was the reason why they could not prove a direct relationship to the cause of action. Moreover, when they approached the court, they were no longer under 18 years of age and, therefore, were no longer children (as constitutionally defined in section 81(1)). The applicants thus failed to meet the standard of *locus standi* based on the requirement of proof by the claimant that he or she had been or was a victim of infringement, or threatened infringement, of a fundamental right or freedom enshrined in Chapter 4 of the Constitution. The applicants' papers further did not refer to any particular girl or girls whose rights had been, were being, or were likely to be infringed by being subjected to child marriage, whether such marriage was concluded in terms of section 22(1) of the Marriage Act or any other law.

In legal matters heard under the previous Zimbabwean Constitution, standing usually was interpreted in the traditional narrow manner, and no one could ordinarily seek judicial redress for legal injury suffered by another person, the only exception being when a person was unable to seek relief because they were in detention. However, the Zimbabwean Constitution liberalised and gave the *locus standi* principle a much more generous interpretation. This means that a court exercising jurisdiction under section 85(1) of the Constitution could adopt a broad and generous approach to standing. In the *Mudzuru* matter, the bench chose a wider interpretation of *locus standi*. This wide interpretation followed Canadian case law,[10] which effectively states that an applicant may

9 As above.

act even in instances where he or she has only an indirect interest in the outcome of the matter. This interpretation was a step forward in implementing the current constitutional provisions related to standing. A wider interpretation means that the standing rule no longer serves as an overly-restrictive tool used for 'narrowing the road to litigation'.[11] Instead, the *locus standi* principle, when widely interpreted, gives anyone with a sufficient direct and indirect interest in a matter the right to be heard before an appropriate court of law.

While it was held that the applicants had failed to meet the requirements for establishing *locus standi* based on section 85(1)(a), the Court held that the applicants could nevertheless act in terms of section 85(1)(d) of the Constitution. The respondents' argument that the applicants were not entitled to approach the Court to vindicate public interest in the well-being of children protected by the fundamental rights of the child, enshrined in section 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose welfare constitutes a category of public interest. Actions brought in terms of section 85(1)(d) of the Constitution seek to protect the public interest adversely affected by the infringement of a fundamental right. According to the Court:[12]

> The right to a remedy provided for under section 85(1) of the Constitution is one of the most fundamental and essential rights for the effective protection of all other fundamental rights and freedoms enshrined in Chapter 4.

Hence, in the event of a proven infringement of a fundamental right, the right to a remedy provided for by section 85(1) of the Constitution becomes an effective tool for the protection of fundamental rights and freedoms enshrined in Chapter 4. Section 85(1) of the Constitution in its current form ensures that formal defects in the legal system are overcome, thereby guaranteeing[13]

> real and substantial justice to every person, including the poor, marginalised, and deprived sections of society. The fundamental principle behind section 85(1) of the Constitution is that every fundamental human right enshrined in Chapter 4 is entitled to effective protection under the constitutional obligation imposed on the state. The right of access to justice, which is itself a fundamental right, must be availed to a person who is able, under each of the rules of standing, to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned.

10 The bench quoted the cases of *R* v *Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 and *Morgentaler Smoling & Scott* v *R* (1988) 31 CRR 1.

11 GN Okeke 'Re-examining the role of *locus standi* in the Nigerian legal jurisprudence' (2013) 6 *Journal of Politics and Law* 210.

12 *Mudzuru* (n 1 above) 13.

13 *Mudzuru* 14, referring also with approval to *Ferreira* v *Levin NO & Others* 1996 (1) SA 984 (CC).

According to the Court, the section 85(1)(d) procedure should, however, never be used 'to protect private, personal or parochial interests since, by definition, public interest is not private, personal or parochial interest'.[14] This requirement is necessary to guard against frivolous and *mala fide* applications brought before the courts, not in an attempt to seek justice, but to waste time or actually impede the carrying out of justice. It is imperative, therefore, for the applicants' cause of action to show that the proceedings are in the public interest. However, it does not need to be shown that a significant section of the community is affected.[15] Public interest is a value-laden concept which is not defined in section 85(1)(d) of the Constitution. The courts have preferred to leave the definition of public interest open, instead preferring to determine the question of public interest on a case-by-case basis. Since most violations of fundamental human rights and freedoms are fact and context-specific, it is appropriate to keep concepts such as 'public interest' broad and flexible to develop in line with changing times and social conditions reflective of community attitudes. The concept is elastic and relative rather than fixed and absolute. Whether a person is acting in the public interest is a question of fact.[16]

This approach to section 85(1)(d) of the Constitution does not mean that public interest is 'that which gratifies curiosity or merely satisfies appetite for information or amusement'.[17] There is a difference between 'what is in the public interest' and what is of interest to the public. Matters of public interest that affect fundamental rights and freedoms include, for example, public health; national security; defence; international obligations; proper and due administration of criminal justice; independence of the judiciary; observance of the rule of law; the welfare of children; and a clean environment, among others.[18] On the other hand, matters that are of interest to the public are often matters that arouse the public's curiosity, for example, a scandal involving a person widely known in that society. Whereas matters in the public interest involve the protection and promotion of fundamental rights of a section of society, matters of interest to the public do not revolve around the protection or promotion of any rights.

According to the Court, the paramount test in public interest cases should be whether the alleged infringement of a fundamental right or freedom has the effect of prejudicially affecting or potentially affecting the community at large or a segment of the community. The test covers cases of marginalised or underprivileged persons in society who, because of reasons such as poverty, disability, socially or

14 *Mudzuru* 15.
15 *Mudzuru* 16.
16 *Mudzuru* 18.
17 *Mudzuru* 17.
18 As above.

economically disadvantaged positions, are unable to approach a court to vindicate their rights. A public interest action will usually involve forgoing personal benefit to benefit a greater good to achieve the goals of social justice.[19] Children fall squarely in this category of potential beneficiaries.

The broad interpretation given to *locus standi* in *Madzuru* bodes particularly well for future actions brought to further the interests of vulnerable groups based on alleged constitutional infringements. These could include advancing women's rights, children's rights, the rights of the elderly, persons with disabilities and veterans of the liberation struggle, all of whom have dedicated provisions attaching to them in Part 3 of Chapter 4 of the Constitution. Other vulnerable groups, such as migrants, cannot be left out of the equation either. This has also introduced certainty in the role played by public interest litigation in relation to breathing life into the provisions of the Zimbabwean Constitution, in that anyone with a direct or indirect interest can move to have constitutional rights protected and upheld.

3 Reliance on international treaty law and foreign law

3.1 Treaties

In the three years following the enactment of the Constitution, the courts have already relied on international law and treaties to deal with alleged violations of a Chapter 4 right. For example, in the case of *S* v *C (A minor)*,[20] the Court relied on international law and treaties, excerpts of which are quoted at length in the judgment, to test the constitutionality of a sentence of corporal punishment imposed upon a juvenile offender. In this case, corporal punishment was found to be a violation of the international law principles protecting children's rights, such that the court held that corporal punishment was an unconstitutional method of punishing juvenile offenders. This led the court to strike down the offending provision of the Criminal Procedure and Evidence Act.[21] (In an *obiter dictum*, the Court also held that the constitutional prohibition against corporal punishment extended to that imposed by parents or those acting *in loco parentis*.) In the recent case of *Makoni v Minister of Justice, Legal and Parliamentary Affairs*,[22] a sentence of life imprisonment without the possibility of judicial review or parole was ruled to be unconstitutional. The Court cited, *inter alia*, the International Covenant on Civil and Political Rights (ICCPR), General Comment 21 of the United National Human Rights Committee, and Resolution 70/175 of the UN General Assembly,

19 *Mudzuru* 18.
20 2015 ZWHHC 718.
21 Cap 9:07.
22 CCZ 46/15 (judgment of 13 September 2016).

titled United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), in support of its finding.

Deputy Chief Justice Malaba's judgment in *Mudzuru* also presents a commendable example of how the courts can make effective use of international law and treaties in their reasoning. The applicants had in fact relied on the UN Convention on the Rights of the Child (CRC)[23] and the African Charter on the Rights and Welfare of the Child (African Children's Charter)[24] in support of the argument that allowing children under the age of 18 years to be married entails subjecting them to maltreatment, neglect and abuse which is proscribed in section 81(1)(e) of the Constitution.[25] The argument is bolstered by constitutional provisions requiring courts to take international law, treaties and conventions into account when interpreting constitutional rights,[26] by the provision enjoining courts to interpret legislation in a manner consistent with international customary law,[27] and the provision requiring the adoption of an interpretation consistent with any treaty or convention that is binding on Zimbabwe.[28]

In *Madzuru* the Constitutional Court held that, by ratifying the CRC and the African Children's Charter, 'Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice'.[29] A reading of section 78(1) of the Constitution, dealing with marriage rights,[30] and of section 81 (dealing with children's rights) indicates that these sections were formulated with international treaties in mind, as aptly noted in the *Mudzuru* case.[31] This gave rise to the inference that these constitutional provisions must, therefore, be read progressively. The constitutionalisation of the applicable international human rights norms, and the influence they consequently exerted on the reasoning of the Court in this case, indicate that these treaty rights may be

23 Ratified by Zimbabwe in 1990.
24 Ratified by Zimbabwe in 1995.
25 Sec 81(1) provides: '(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right – (a) to equal treatment before the law, including the right to be heard; .... (d) to family or parental care or to appropriate care when removed from the family environment; (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse; (f) to education, health care services, nutrition and shelter. (2) A child's best interests are paramount in every matter concerning the child. (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.'
26 Sec 46(1)(c).
27 Sec 326(2).
28 Sec 327(6).
29 *Mudzuru* (n 1 above) 27.
30 Titled 'Marriage Rights', sec 78(1) provides: '(1) Every person who has attained the age of eighteen years has the right to found a family. (2) No person may be compelled to enter into marriage against their will.'
31 *Mudzuru* (n 1 above) 42.

directly applicable in domestic jurisprudence. This point has previously been made with regard to the jurisprudence of the South African Constitutional Court in the sphere of children's rights.[32]

In this regard, the Court held that the meaning of section 78(1) could not be ascertained without having regard to the context of the obligations undertaken by Zimbabwe under international conventions and treaties on matters of marriage and family relations at the time of the enactment of the Constitution in May 2013. 'Regard must also be had to the emerging consensus of values in the international community of which Zimbabwe is a part on how children should be treated.'[33] Noting that most earlier conventions do not provide a minimum age for marriage (cited were the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Marriage Convention of 1962,[34] which do not specify a minimum age for marriage,[35] and the CRC),[36] the Court narrowed its focus to article 21 of the African Children's Charter, which was quoted in full in the judgment.[37] In 'clear and unambiguous language', article 21 imposes on state parties, including Zimbabwe, an obligation which they voluntarily undertook 'to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child'.[38] According to the Court, these positive measures entail that state parties are obliged to abolish child marriage.

Not mincing its words, the Court found that article 21 of the African Children's Charter had a 'direct effect' on the validity of the impugned sections of the Marriage Act.[39] Hence, the contention by the respondent Minister that the provisions of section 78 dealing with marriage rights should be read literally to mean that a person of 18 years or older has the right to found a family (but that it does not in express terms impact on their right to marry when younger than this age, as provided for in the Marriage Act) was rejected. The Court stated that it would lead to an absurd position, namely, that a family is not founded on marriage and, conversely, that a person under the

32 J Sloth-Nielsen & H Kruuse 'A maturing manifesto: The constitutionalisaton of children's rights in South African jurisprudence 2007-2012?' (2013) *International Journal on Children's Rights* 646-678. Also see A Skelton 'South Africa' in J Doek & T Liefaard (eds) *Litigating the rights of the child* (2015) 15.

33 *Mudzuru* (n 1 above) 26-27.

34 Convention on Consent to Marriage, Minimum Age and Registration of Marriages.

35 The Recommendation which accompanied the Marriage Convention directed state parties to specify a minimum age of not less than 15 years.

36 See the definition of 'child' in art 1, that is, every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. Marriage, of course, is one way in which majority would be obtained earlier. As the judge notes, the CRC does not contain a specific provision on child marriage.

37 *Mudzuru* (n 1 above) 36.

38 *Mudzuru* 37.

39 As above.

age of 18 years would have the right to marry but not to found a family.[40] A literal interpretation of section 78(1) would, in addition, not give the fundamental right guaranteed the full measure of protection that it deserves. The nature and scope of the right to found a family (not always, but in many instances) require an agreement to live together as husband and wife, which union forms the foundation and nucleus of the family.[41] Furthermore, the Court held that, read in the context of section 78(2),[42] which enshrines the guarantee that persons who have attained the age of 18 years must give free consent to marriage without compulsion, section 78(1) clearly entails restricting marriage to those of 18 years and above. This leads to the conclusion that those below the age of 18 years have no legal capacity to marry.

The use by the Court of international human rights law, and in particular the African Children's Charter, is to be welcomed.[43] The judgment sets an important standard for the other 47 state parties to the Charter,[44] insofar as it delineates the expectation for domestic statutes on marriage and child protection law. Further, it accords primacy to treaty obligations which were voluntarily undertaken.

3.2 Foreign law

The Constitutional Court judgment is also commendable for the wide variety of foreign cases cited in support of various assertions and conclusions. Deputy Chief Justice Malaba drew on jurisprudence from Canada, South Africa, Australia, various cases from the United Kingdom, and from India. Although none of the foreign cases cited directly involved child marriage, it is to be welcomed that the Zimbabwean Constitutional Court is willing to seek support in foreign law for advancing principles of constitutional interpretation which resonate with international best practices.[45]

40 *Mudzuru* 43. See also *dicta* to this effect at 45 and 46.

41 *Mudzuru* 44. The Court subsequently does not privilege this view of the nuclear family to the exclusion of other family forms, but acknowledges that the right to found a family may be exercised by a single person who lives with or brings up his or her children (46). Further, at 45, the Court notes that the Constitution does not specify the type or nature of marriage contemplated and, therefore, that a person can choose to enter into any kind of marriage and found a family according to sec 78(1).

42 Sec 78(3) contains a prohibition on persons of the same sex entering into marriage.

43 For an earlier discussion of the use of the African Children's Charter and the CRC in jurisprudence, see A Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 482. See further Skelton (n 32 above).

44 At the time of writing.

45 Extensive reliance on foreign law is evident in the recent *Makoni* decision (n 22 above).

4 Purposive reading of section 78(1)

In considering the purposive reading accorded section 78(1) by the Court, regard must be had to the defence adduced by the respondents in support of the interpretation of the constitutional validity of the provisions of the Marriage Act, and the Customary Marriages Act (insofar as the latter does not establish a minimum age for marriage).

One leg of the defence has already been referred to in section 2 of the article, namely, that the applicants lacked standing to bring an application for constitutional validity as they were parties to unregistered unions covered by neither the Marriage Act nor the Customary Marriages Act. Moreover, they were no longer children as constitutionally defined. The Court, however, found that they did have standing in the public interest.

A second objection argued by the respondents was alluded to in section 3.1, namely, that section 78(1) read literally only established the right to 'found a family' from the age of 18, and that this did not mean that persons below this age could not marry. The absurdity of this interpretation was correctly identified by the Court.[46]

The third objection raised by the respondents was that a discriminatory age for marriage of girls and boys was justified on the ground that, physiologically and psychologically, a girl matures earlier than a boy. This averment, the Court held, was without scientific evidence to support it, and was countered by the international law position which is to the effect that the minimum age for marriage is set at 18 precisely because only persons above this age are considered psychologically and physiologically developed enough to be capable of giving free and full consent to marriage, and to bear children.[47] The Court's reasoning displayed commendable concern for gender equality, dispelling patriarchal views that 'females were destined solely for the home and the rearing of children of the family and that only males were destined for the market place and the world of ideas'.[48]

A fourth strand of reasoning cited by the respondents was the fear that if the marriage laws allowing child marriage were struck down as unconstitutional, 'men would impregnate girls and not bear the responsibility of having to marry them'.[49] In its response, the Court reiterated the constitutional guarantee of equality of boys and girls without exception, and noted that the circumstance of a girl falling pregnant did not 'disentitle her from the enjoyment of all the rights of a child enshrined in section 81(1) of the Constitution'. Pregnancy did not make her an adult.[50] Whilst pregnant, she is also entitled to all

46 *Mudzuru* (n 1 above) 43. Also see *dicta* to this effect at 45 and 46.
47 *Mudzuru* 51.
48 *Mudzuru* 52.
49 *Mudzuru* 53.
50 As above.

other rights awarded children, such as the right to parental care, and the right to schooling.[51] In the view of the Court, the parental obligation to care for and control the girl child does not cease because of her pregnancy. The Court conceded that early pregnancy was a social problem that stakeholders should co-operate to solve, but that compelling a pregnant girl to marry constitutes a form of abuse, and cannot justify child marriage.[52]

The Court further held, after providing convincing and detailed evidence of the harmful consequences of child marriage for a child's education, economic opportunities in life, and sexual and reproductive health, that a law which purported to authorise child marriage as legitimate could not be said to be in the best interests of the child[53] and, hence, that the various aspects of the constitutional clause on children's rights supported a position which recognised the horrific consequences of early marriage for girl children, and justified striking down the Marriage Act as unconstitutional. The Court ultimately declared that section 78(1) of the Constitution set 18 as the minimum age for marriage in Zimbabwe and that, with effect from the date of judgment (20 January 2016), no person, male or female, may enter into any form of marriage[54] before attaining the age of 18 years.

In adopting a purposive interpretation of section 78(1), the Court was mindful of the social milieu in which such an endeavour had to occur, by stating:[55]

> The history of the struggle against child marriage sadly shows that there has been, for a long time, lack of common social consciousness on the problems of girls who became victims of early marriages.

The stark reality is that Zimbabwe is regarded as a child marriage 'hotspot'. With a child population estimated at 47 per cent, 4 per cent of girls are married before the age of 15, and 31 per cent are married before the age of 18. Zimbabwe is ranked at 41 on the list of countries where children marry before the age of 18 years.[56] The rate of child marriage is higher in some areas than in others. An analysis of the 2012 National Housing and Population Census by the Zimbabwe Statistics Agency illustrates that the majority of child marriages occur in rural areas, in districts such as Chiredzi, Kariba Rural, Makonde,

51 Education Circular 35 of 2001 grants leave to girls who fall pregnant in primary and secondary schools and allows their re-enrolment after delivery.

52 *Mudzuru* (n 1 above) 54.

53 *Mudzuru* 51.

54 Unregistered customary law unions and unions arising out of religion or religious rites are expressly covered by the ruling.

55 *Mudzuru* (n 1 above) 53.

56 http://www.devinfo.info/mdg5b/profiles/files/profiles/4/Child_Marriage_Country_Profile_AFRZWE_Zimbabwe.pdf (accessed 5 January 2014).

Mbire, Muzarabani, Sanyati and Shamva, with a proportion of above 35 per cent.[57] On average, one out of three girls will be married before their eighteenth birthday.[58]

Furthermore, there have been reports of acceptance of the phenomenon in influential circles. In June 2015, the Attorney-General of Zimbabwe was widely reported as saying that young girls who are not in school and who are doing nothing should be able to be married off by their parents.[59] Further, he is reported to have claimed that it was not practical to jail adults who have sex with 'consenting' 12 year-old girls because the girls would suffer more with no one to look after them while their abusers are being incarcerated.[60] These comments were very widely reported and attracted a barrage of criticism, as Zimbabweans took to various forms of social media to protest and to call for his resignation from office. The Constitutional Court could not have been unaware of this, given the extensive media coverage that it attracted, and given the fact that the *Mudzuru* matter had already been argued before it in December of the preceding year. It is thus possible that the Constitutional Court was aware of the need to send out a strong message against child marriage to counter these conservative and, it should be stated, rather irresponsible remarks from a public leader.

The transformative nature of the Constitution in altering the social reality appears to have been fully appreciated by the Court. The Court highlights that once it becomes known that child marriage in Zimbabwe is abolished, 'the imperative character of the law shall be felt in the hearts and minds of men and women so strongly that transformative obedience to it shall become a matter of habit'.[61]

5 Regional impact

Subsequent to this ruling, a legal challenge to the Tanzania Law of Marriage Act was brought, which allowed girls to marry at the age of 15 with parental permission, and at the age of 14 with the permission of a court.[62] The High Court ruled this provision unconstitutional on

57 http://www.zimstat.co.zw/sites/default/files/img/National_Report.pdf (accessed 5 October 2016).

58 Zimbabwe National Statistics Agency (ZIMSTAT) Multiple Indicator Cluster Survey 2014, Key Findings. Harare, Zimbabwe. This survey is cited in the *Mudzuru* judgment. See further Plan International *In-depth review of legal and regulatory frameworks on child marriages in Zimbabwe* (2016). See further http://www.girlsnotbrides.com (accessed 5 October 2016).

59 http://www.chronicle.co.zw/let-them-have-sex-marry-tomana-says-12-year-olds-can-consent/ (accessed 10 October 2016).

60 As above.

61 *Mudzuru* (n 1 above) 54.

62 *Rebeca Gyumi v Attorney-General* Misc Civil Cause 5 2016 (copy on file with authors).

the basis that it contravened the equality clause[63] of the Constitution of Tanzania, 1977 (as amended). Apart from the difference in the minimum age for marriage of girls and boys, a further ground for alleging discrimination was that the Act provided differently for girls who had parents or guardians in a position to furnish consent, and those who did not (in this instance parental consent could be waived).

However, the government of Tanzania (in the words of the High Court) 'strongly resisted' the claim of unconstitutionality' in that Court. The basis for the respondent's opposition was the sentiments of the people in divergent communities based on custom, tradition and religious belief in relation to marriage. Arguing that the 1971 Marriage Act of Tanzania was a compromise to accommodate this diversity, it was further suggested that the provision requiring the intervention by a court for the marriage of a person below the age of majority provided a safety valve.[64] Noting that the law itself seemed to have reservations about the capacity of girls aged 15 years and over to make an informed decision to marry (by also requiring parental consent), and significantly swayed by the in-depth arguments in *Madzuru* about the negative consequences of child marriage for girls, the Court agreed with the petitioner that the Marriage Act of Tanzania was unconstitutional. As was the case with the *Madzuru* judgment, significant weight is accorded the provisions of the African Children's Charter, notably article 21, and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) (which also establishes the minimum age for marriage at 18).[65]

The government of Tanzania, however, has now noted an appeal against the judgment,[66] which is clearly indicative of ongoing strong resistance to the proposition that the marriage of children under 18 should as a matter of principle be outlawed.

At the time of writing, the conclusion of the Tanzanian appeal was still being awaited. However, it is hoped that the Appeal Court will follow the lead of the Zimbabwean Constitutional Court by rejecting arguments defending child marriage on the basis of custom, culture and belief,[67] in clear contravention of regional human rights commitments.

63 Since male persons were entitled to marry only from the age of 18 years.

64 *Gyumi* (n 62 above) 10. It was also argued that boys could approach a court for leave to marry if they were below 18 but above 14 years of age.

65 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005) (African Women's Protocol), ratified by Zimbabwe in 2008.

66 *Legalbrief* 10 August 2016 (accessed 10 August 2016).

67 Mutangi refers to the fact that Pentecostal churches in Zimbabwe support the practice of child marriage on religious grounds; T Mutangi 'Religion, law and human rights in Zimbabwe' (2008) 8 *African Human Rights Law Journal* 526.

6 Conclusion

It has been argued that the *Madzuru* judgment discussed here is significant for more reasons than may at first glance appear. By striking down the offending provisions of the Marriage Act, and including customary marriages and unregistered unions within the reach of the pronouncement on constitutional invalidity, a strong signal is sent out that new marriage laws have to be devised. The international human rights community has for some time been urging Zimbabwe to undertake this.[68] The Constitutional Court has taken a bold step by addressing the seeming reluctance of the government to develop and enact such revised laws. Recent research which analysed the correlation between marriage laws that consistently set the age for marriage for girls at 18 years or older, and the prevalence of child marriage and teenage childbearing in 12 sub-Saharan African countries, revealed that the prevalence of child marriage was 40 per cent lower in countries with consistent laws against child marriage in comparison with countries without consistent laws against this practice, and that the prevalence of teenage childbearing was 25 per cent lower in countries with laws setting a consistent minimum age for marriage compared to countries without such laws.[69] These results support the hypothesis that laws containing a consistent minimum age for marriage protect against the exploitation of girls, and provide concrete evidence in support of the unequivocal stance taken by the Constitutional Court of Zimbabwe.

Further, the Court's willingness to engage with widely-held social perceptions regarding girls' sexual maturity and the appropriate protection of pregnant girls is important in the context of apparent support at high level for legal provisions enabling child marriage.

However, an equally important aspect of the decision lies in the generous approach to *locus standi* adopted by the Court, which signals that in future the Constitution can become a valuable tool in the hands of civil society seeking to enforce human rights. Furthermore, the Court's reliance on international treaty law to underpin the interpretation of the Constitution and its recourse to foreign judgments in support of its reasoning are welcomed, as it lends stature and weight to the Court's reasoning and avoids the insularity that characterises some jurisdictions.

68 See, eg, the Concluding Observations of the Committee on the Rights of the Child to Zimbabwe in 2016 (CRC/C/ZWE/CO2 para 46(a)). As early as 1998, in its Concluding Comments addressed to Zimbabwe, the Human Rights Committee recommended that the government of Zimbabwe adopt measures to prevent and eliminate prevailing social and cultural attitudes supporting early and child marriage, and to address law reform in this regard (CCPR/C/79/Add.89).

69 B Maswikwa et al 'Minimum marriage age laws and the prevalence of child marriage and adolescent birth: Evidence from sub-Saharan Africa' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 58.

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Position as at 31 July 2016
Compiled by: I de Meyer
Source: http//www.au.int (accessed 30 November 2016)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03		
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00	**27/01/16**		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02			05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03		
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	
Namibia	30/07/92		23/07/04		11/08/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03*	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13		27/11/13
São Tomé and Príncipe	23/05/86					
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan		04/12/13				13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	**54**	**46**	**47**	**30**	**37**	**24**

* Additional declaration under article 34(6). Rwanda withdrew its declaration on 1 March 2016. This declaration will only take effect on 1 March 2017 (see African Court on Human and Peoples' Rights Application 2/2014, *Ingabire v Rwanda*, Ruling on the Effects of the Withdrawal of the declaration under article 34(6) of the Protocol, 3 June 2016).

Ratifications after 31 December 2015 are indicated in bold.