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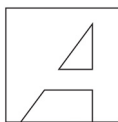
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CONTENTS

Editorial.....	iv
Revisiting the normative framework of the African Commission on Human and Peoples' Rights in the context of evidence obtained through human rights violations: Has it served its purpose? by Robert D Nanima	1
Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights by Chairman Okoloise	27
Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union by Ashwanee Budoo	58
Civic space and human rights advocacy in the extractive industry in Uganda: Implications of the 2016 Non-Governmental Organisations Act for oil and gas civil society organisations by Christopher Mbazira and Teddy Namatovu.....	75
A critique of the judicial attitude towards matrimonial property rights under customary law in Nigeria's southern states by Anthony C Diala	100
Implementing legal accountability to reduce maternal mortality and morbidity in Uganda by Daphine Kabagambe Agaba	123
Boko Haram and the child's right to education in Africa: Examining the accountability of non-state armed groups by Seun Solomon Bakare	143
Payment obligations of taxpayers pending dispute resolution: Approaches of South Africa and Nigeria by Carika Fritz.....	171
Does the Mauritian Constitution protect the right to privacy? An insight from <i>Madhewoo v The State of Mauritius</i> by Roopanand Mahadew	189

Focus: The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects

Editorial introduction to special focus: The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects

<i>by Charles M Fombad and Eric Kibet</i>	205
 An overview of the crisis of the rule of law in Africa <i>by Charles M Fombad.....</i>	213
 The rule of law and democracy in Ghana since independence: Uneasy bedfellows? <i>by Kwame Frimpong and Kwaku Agyeman-Budu</i>	244
 Standing, access to justice and the rule of law in Zimbabwe <i>by Admark Moyo</i>	266
 Prosecuting international crimes in the Democratic Republic of the Congo: Using victim participation as a tool to enhance the rule of law and to tackle impunity <i>by Derek Inman and Pacifique Muhindo Magadju</i>	293
 Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol <i>by Annika Rudman</i>	319
 Large-scale agricultural land acquisitions and Ethiopia's ethnic minorities: A test for the rule of law <i>by Tilahun Weldie Hindeya.....</i>	346
 The challenges for the rule of law posed by the increasing use of electronic surveillance in sub-Saharan Africa <i>by Lukman Adebisi Abdulrauf.....</i>	365
 The right to privacy in the age of surveillance to counter terrorism in Ethiopia <i>by Hiruy Wubie Gebreegziabher.....</i>	392
 The Nairobi Principles on Accountability as a means of monitoring and enforcing the rule of law and accountability for international crimes in Africa <i>by Thomas Obel Hansen and Njonjo Mue</i>	413

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Editorial

This issue of the *African Human Rights Law Journal* is divided into two sections: first, a section containing regular contributions; and second, a special focus section containing contributions dealing with contemporary challenges to the rule of law in Africa.

The contributions in the first section of the *Journal* cover both the African regional human rights system and aspects of the human rights situation in national jurisdictions on the continent.

The *Journal* appears at a time of heightened scrutiny of the African Commission on Human and Peoples' Rights. This is largely due to the tension between the Commission and the African Union's policy organs over the granting of observer status to the non-governmental organisation, the Coalition of African Lesbians (CAL). In 2015 the AU Executive Council directed the Commission to withdraw the status granted to CAL. For some time the Commission suspended its response pending the outcome of a request for an advisory opinion on this issue to the African Court on Human and Peoples' Rights. After the Court had declined to hear this request, tensions were brought to a head at a 'retreat' organised between the African Commission and the AU Permanent Representatives Committee (the ambassadors of member states to the AU Commission in Addis Ababa), which took place in June 2018.

It is therefore important that scholars in this *Journal* continuously examine aspects of the African Commission's mandate and functioning, with a view to its constant improvement. Three contributions in this issue do so: Nanima interrogates the approach of the African Commission to evidence obtained through human rights violations; Okoloise aims to provide constructive suggestions to improve states' implementation of the African Commission's recommendations; and Budoo reflects on women's rights monitoring mechanisms.

The year 2018 marks 15 years since the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol; often referred to as the Maputo Protocol). Assessing the influence of the African Women's Protocol after a relatively short period, there is cause for some optimism. While it took some time, state parties now report regularly to the African Commission in terms of the Protocol-specific guidelines.

This process allows for greater scrutiny of a state's record on women's rights.

As with human rights scholarship more generally, in respect of women's rights there is also a 'turn' away from dissecting standards towards a greater preoccupation with the implementation and state compliance with these standards. This 'turn' also sees closer attention being devoted to supervisory or monitoring mechanisms – as is exemplified by the two complementary contributions (Budoo in this section; and Rudman in the 'Focus' section) critically examining the suitability of the supervisory structure of the African Women's Protocol. Whatever reform may be required it is our view that – as the Protocol stands – the African Commission has the competence to receive and make findings on individual communications related to alleged violations of the African Women's Protocol. To come to a different conclusion, based on a literal interpretation of the African Women's Protocol, would be to miss the obvious point that the Protocol complements the African Charter as far as substance is concerned, but leaves intact (and is superimposed on) the monitoring mechanism already in place.

Worldwide civil society is a thorn in the flesh of authoritarian and corrupt governments. Not surprisingly, these organisations are regularly targeted in an effort to minimise their influence. Africa has seen its fair share of legislation, policies and executive conduct in this regard. Recent discoveries of oil and gas in various parts of the continent have brought with them opportunities both to address long-standing inequality and social hardship, and for self-enrichment of narrow elites and corruption. Responding to the adoption of the 2016 Non-Governmental Organisations Act in Uganda, Mbazira and Namatovu in their contribution spell out its implications for the civic space and human rights advocacy in the extractive industry in Uganda.

Other country-specific articles (by Diala, Agaba, Bakare, Mahadew and Fritz) deal with Mauritius, Nigeria, Uganda and South Africa.

This issue also contains nine contributions constituting a 'Special Focus' on 'The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects'. Professor Charles Fombad and Dr Eric Kibet, the editors, introduce the special focus section of the *Journal* (starting on page 205 of this issue). Professor Fombad is professor of law at the Centre for Human Rights and the Institute of International and Comparative Law in Africa. He organises an annual symposium on an aspect of constitutionalism in Africa. The Special Focus brings together peer-reviewed and reworked papers presented at the 2017 symposium. The focus on the rule of law is timely and important to the realisation of human rights. The optimism and exuberance for human rights and liberal democracy of the 1990s and early 2000s have been replaced by greater caution and skepticism. The rule of law is closely associated with the liberal democratic state,

and is a prerequisite for effective judicial review and checks and balances.

It has come to our attention that, in terms of the international ranking of scholarly journals undertaken by the Washington and Lee School of Law, the *African Human Rights Law Journal* is ranked the top internationally-cited law journal in Africa. (See <https://journals.assaf.org.za/per/announcement/view/47>.) In a total list of 1 527 indexed 'law journals', worldwide, only 18 are from Africa: 16 are published in South Africa, one in Malawi, and one in Ethiopia. Although the *AHRLJ* is placed first among 'African' journals, its modest global position (at 837) underlines the limited exposure of African-based scholarship, on the one hand, and the need to publish contributions that just cannot go unnoticed by scholars in the human rights field, on the other. We reiterate our call to all scholars – from across Africa and further afield – to submit contributions to the *Journal*, at any time, on any human rights-related topic.

Our sincere appreciation and thanks go to all who have been involved in making the *AHRLJ* the quality and well-regarded journal it has become since its establishment in 2001.

For this particular issue, we extend our genuine gratitude to our anonymous reviewers who gave so generously of their time, expertise and insights: Jean Allain; Lorette Arendse; Usang Assim; Hlengiwe Dube; Ebenezer Durojaye; Christof Heyns; Nora Ho Tu Nam; Faith Kabata; Emmanuel Kasimbazi; Debra Long; Moseki Maleka; Stuart Maslen; Satang Nabaneh; Charles Ngwena; Michael Nyarko; Chidi Odinkalu; Chairman Okoloise; Annika Rudman; Omar Sheira; Ann Skelton; Philip Stevens; Emerson Sykes; Attila Teplan; Dire Tladi; Ben Twinomugisha; Fanie van Zyl; and Attiya Waris.

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Revisiting the normative framework of the African Commission on Human and Peoples' Rights in the context of evidence obtained through human rights violations: Has it served its purpose?

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Summary

This article examines the normative context of the African Commission on Human and Peoples' Rights in dealing with evidence obtained through human rights violations, and whether it serves its purpose. It unpacks the concept of a norm and uses the liberal school of thought as the theoretical framework, which informs the adoption of legal norms at the regional level. These, in turn, provide a yardstick that is used to evaluate the efficacy of the norms. With the aid of four normative developments between 1992 and 2003, it evaluates the extent to which these developments serve their purpose in dealing with evidence obtained through human rights violations. It is argued that while the Tunis Resolution and the Dakar Declaration have not served the purpose of dealing with evidence obtained through human rights violations, the Robben Island Guidelines specifically dealt with evidence obtained through torture. The adoption of the Principles can be reconciled with the African Commission's approach to the admission of evidence obtained through human rights violations.

Key words: *African Commission; evidence; normative framework; violations*

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1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) is the major institutional structure of the African human rights system. The African Charter on Human and Peoples' Rights (African Charter)¹ establishes the Commission with a mandate to promote and protect human rights.² As an institutional structure,³ the African Commission uses existing norms to develop jurisprudence to guide it and state parties on human rights.⁴ The Commission may formulate and lay down principles and rules designed to solve legal problems arising out of human and peoples' rights and fundamental freedoms.⁵ It follows, therefore, that designing solutions that arise from legal issues emanating from evidence obtained through human rights violations is within the African Commission's mandate. This contribution questions the efficacy of the Commission's normative framework in dealing with evidence obtained through human rights violations. In a bid to contextualise a norm, the author uses a theoretical framework to understand the characteristics of a norm that led to its adoption. An evaluation of the sufficiency of this normative framework is undertaken and suggestions for reform follow.

Before an evaluation of the normative framework on the evidence obtained through human rights violations is made, it should be noted that a normative framework develops in two ways: first, through the intentional, deliberate development and its subsequent improvement by a human rights body. For instance, the African Commission's decision to improve the protection of the rights of women in Africa led to the adoption of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol).⁶ Its normative framework was informed by the intention of the African Commission to formulate a law to protect the rights of women in Africa⁷ and culminated into the adoption of the

1 1520 UNTS 217, art 30.

2 As above.

3 C Heyns 'The African regional human rights system: The African Charter' (2003-04) 108 *Pennsylvania State Law Review* 681.

4 T Buergenthal 'The normative and institutional evolution of international human rights' (1997) 19 *Human Rights Quarterly* 723.

5 Art 45(1)(b) African Charter; NJ Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 298 305.

6 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd ordinary session of the Assembly of the African Union, Maputo, CAB/LEG/66.6.

7 Seminar organised by the African Commission and Women in Law and Development in Africa (WILDAF) in Lomé, Togo in 1995, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_africa.pdf (accessed 20 April 2018).

Lomé Resolution to prepare a protocol on the rights of women in Africa.⁸ This was followed by the adoption of the African Women's Protocol and, subsequently, General Comment 2 on articles 14(1)(a), (b), (c) and (f) and articles 14(2)(a) and (c) of the Women's Protocol.⁹ Second, a normative framework may develop organically through the general improvement of other thematic concepts into a nuanced normative framework that deals with a specific aspect of human rights. This contribution adopts this second mode of development of a normative framework, and engages the thematic concept of evidence obtained through human rights violations.

The major normative developments with regard to evidence obtained through human rights violations include the Tunis Resolution on the Right to Recourse and a Fair Trial (Tunis Resolution);¹⁰ the Dakar Declaration on the Right to a Fair Trial in Africa (Dakar Declaration);¹¹ and the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).¹² The contribution also evaluates the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Fair Trial Principles).¹³ The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa 2014 (Luanda Guidelines)¹⁴ are not employed as they are still novel and have not yet been tested by the African Commission in the exercise of its mandate. The reasons that inform the adoption of these norms are offered in the course of their evaluation. It suffices to note that the normative developments were initiated by the inadequacy of article 7 of the African Charter with regard to the right to a fair trial.¹⁵ The study employs a desktop research-based review and analysis of the literature on normative frameworks. Case law and communications which offer jurisprudential developments are used to evaluate the effectiveness of the normative

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- 8 Lomé Resolution AHG/Res.240 (XXXI) on the Recommendation of the African Commission on Human and Peoples' Rights to Prepare a Protocol on the Rights of Women in Africa.
 - 9 General Comment 2 on arts 14(1)(a), (b), (c) and (f) and arts 14(2)(a) and (c) of the African Women's Protocol adopted by the African Commission at its 55th ordinary session held from 28 April to 12 May 2014 in Luanda, Angola.
 - 10 Tunis Resolution on the Right to Recourse and Fair Trial (1992) Document ACHR/Res.4 (XI) 92.
 - 11 Dakar Declaration on the Right to a Fair Trial in Africa (1999) ACPHR/Res.41 (XXVI) 99.
 - 12 Robben Island Guidelines; Resolution 61 (XXXII) 02 adopted by the African Commission at its 32nd ordinary session, 17-23 October 2002.
 - 13 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247; MA Baderin 'Recent developments in the African regional human rights system' (2005) 5 *Human Rights Law Review* 117-118.
 - 14 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa 2014 http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf (accessed 7 March 2017).
 - 15 F Ouguerouz *The African Charter on Human and Peoples' Rights. A comprehensive agenda for human dignity and sustainable development in Africa* (2009) 141.

framework. With regard to the article, effectiveness means the ability of the normative framework as a source of soft law to deal with the admission of evidence obtained through human rights violations, from an interpretational perspective. The author submits that once the interpretation of the normative framework is appreciated, the application can be done in a manner that seeks to make the soft law relevant to the mandate of the African Commission.

2 Conceptualising a normative framework

Various meanings may be attached to a norm, which intertwines with the concept of a legal principle. The various definitions show that a norm and a legal principle are synonymous. A nuanced evaluation of the two concepts is instructive in aiding this contribution in establishing a norm. According to Jordan, a norm is synonymous with a legal principle or a standard upon which legal rules should be based.¹⁶ It is imperative to establish the standard that forms the basis of these aforementioned normative developments, who sets the standard, and where one looks to point to this standard. Therefore, African political, judicial and human rights issues need to be evaluated to ascertain the standard or basis of the norms. The normative structure, such as the Preamble and the content, is useful in discerning the standard of the norm. However, there is no drafting history of these developments, other than the writing up of the norms that have been formally adopted by state parties.

Jordan adds that a norm or a legal principle is a prevailing standard or set of standards of behaviour or judgment assumed to be just standards of behaviour for a society or for humanity in its entirety.¹⁷ This definition, first, points to the existence of different standards to a legal norm. However, it is not clear whether the different standards are evident in one particular norm, or exist across various norms. Second, the standards are assumed to be just. This is an indication that the justice of a given standard in a norm is an assumption which may be proved or disproved by its application over time. It is prudent to establish the norms that inform these assumptions. Third, the standards or set of standards are applicable to humanity as a whole. It should be recalled that the main challenge to the application of the norm lies in the commitment of a state party to ensure that it is used in the domestic jurisdiction.

On the other hand, Joaquin and Toubé state that legal norms consist of legal rules and legal principles, which provide for standardised forms of behaviour for subjects of the law.¹⁸ This means that legal norms play a practical role of specifying or generalising

16 D Jordan 'Legal principles, legal values and legal norms: Are they the same or different' (2010) *Academicus – International Scientific Journal* 109.

17 As above.

18 JR-T Muñoz 'Legal principles and legal theory' (1997) 10 *Ratio Juris* 267.

standards to be used to justify the validity of other written sources such as laws and subordinate legislation.¹⁹ The content that is specified or generalised by the norm forms a basis for the future development of the said norm. This description leads to pertinent questions, such as whether particular concepts are specified in a norm, the extent of their specification and what they seek to validate.

It follows from the above analysis that the concept of a norm entails its ability to handle a number of aspects: first, a standard or assumption that forms the basis of the norm; who sets the standard; and the content of the norm that points to this standard; second, the balancing of different standards in a norm or various norms, without conflating the spirit of the norm; third, the specification of a norm and the extent of its specification; and, fourth, the enforceability of the norm by human rights systems. The answers to these key points aid in the examination of the African Commission's mode of dealing with evidence obtained through human rights violations. Before using the four points to evaluate the norms, a review of the theoretical framework aids the understanding of a norm as a concept.

3 Theoretical framework

The international relations theory explains the emergence of norms in international human rights law. Various schools of thought inform this theory, such as constructivism; Marxism; idealism; realism; and liberalism.²⁰ Before evaluating the theory, the historical background to the theory will aid in the appreciation of its contemporary nature.

The liberal theory has among its origins the works of Immanuel Kant (1724-1804), who agitated for a peace programme to be followed by states.²¹ Kant was of the view that the success of the programme would rely on mutual co-operation between states as they pursued freedoms and benefits.²² He offered four principles which over time have aided in the development of the liberal theory. First, he believed that the actions of the state at the international level were a product of a focus on a domestic process. It meant that there are various players on the domestic scene, who influence the state's decisions in signing treaties and adopting laws, and pointed to the need to disaggregate the state from a unitary system to an all-inclusive system which ensured that domestic players performed a key role in state actions.²³

19 Jordan (n 16 above) 113.

20 This is not a closed list of schools of thought that inform the international relations theory. Other theories may include international political economy; feminism; functionalism; post-modernism; post-colonialism; and hegemonic stability theory.

21 I Kant 'Perpetual peace: A philosophical sketch' (1795) <https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm> (accessed 30 June 2018).

22 Kant (n 21 above) sec I.

23 OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935 at 1952.

Kant's works were premised on the need for a democratic process. He stated that '[t]he civil constitution of every state shall be republican'.²⁴

Kant's concept of 'republican' was understood to mean a constitution established by a democratic process, which upheld principles of freedom, the rule of law and equality.²⁵ This concept has been applied in the contemporary era as the state's engagement with its citizens in the running of its affairs with the purpose of achieving peace.²⁶ The state has to account to its citizens as the domestic players with regard to its actions on the international scene. This position recognises the constitution as the grand norm in a domestic jurisdiction, which empowers its citizens to guide the state's actions. States, therefore, cannot be labelled as unitary entities that decide what they want contrary to the needs of their citizens. Rather, decisions of the state as a democratic entity are influenced by domestic players such as political groups, interest groups, non-governmental organisations (NGOs) and civil society.²⁷

In the second place, Kant formed the opinion that the 'law of the nations shall be founded on a federation of free states'.²⁸ This proposition meant for states to have a uniform law that applies in their various territories; they ought to have that uniform system of government in the domestic territory, for example, democracy. This uniformity would ensure that they benefit from the use of normative principles that spoke to the nature of governments at home. It follows that states that did not comply with this requirement were not eligible to be members of or to be bound by this law of nations. Citing other thinkers, such as Hugo and Grotius, who justified the existence of war, Kant believed that war led to lawlessness that could not be attributed to the law of states. Some writers were of the opinion that this may mean war by states. However, it refers to tensions within states that arise out of the failure to have meaningful engagement on issues that affect a state in the domestic sphere.²⁹

Third, he stated that '[t]he law of world citizenry shall be limited to the condition of universal hospitality'.³⁰ According to Kant, the freedoms that an individual enjoyed in his domestic jurisdiction had to be enjoyed in all domestic jurisdictions. With regard to the first principle, the effect of this principle is that the role of the domestic players in guiding states to action on the international scene had to be uniform in all jurisdictions. This uniformity was recognised in the adoption of the rules at the international level by states. This principle

24 Kant (n 21 above) sec II, first definitive article for a perpetual peace.

25 As above.

26 Hathaway (n 23 above) 1952.

27 As above.

28 Kant (n 21 above) sec II, second definitive article for a perpetual peace.

29 Hathaway (n 23 above) 1953.

30 Kant (n 21 above) sec II, third definitive article for a perpetual peace. See Hathaway (n 23 above) 1952.

recognised the universality of the rights of an individual, such as the right to a fair trial, equality, and freedom and security of the person.³¹

3.1 Liberal school of thought

This article limits its scope to the liberal school of thought in the international relations theory (liberal theory), to explain the creation of norms on the regional plane. This theory provides:³²

The relationship between states and the surrounding domestic and transnational society in which they are embedded critically shapes state behaviour by influencing the social purposes underlying state preferences [and] can be restated in terms of three core assumptions. These assumptions are appropriate foundations of any social theory of international relations: They specify the nature of societal actors, the state, and the international system.

The theory assumes that there has to be a relationship between the state and its actors who usually are the government in power. On the other hand, there are the domestic players, such as civil society, NGOs and political or socio-economic groups. These players direct the decisions of the state at the international level through their provision of shadow reports to international organisations.³³ They may oppose the position of the state by enforcing their own position in that they have a stake in the leadership of a country. This relationship leads to the creation of a purpose in a domestic jurisdiction which provokes a conflict between the state and domestic players. This conflict leads to the need for co-operation on the course of action. This course of action informs the action or the foreign policy of the state at an international or regional level.

The theory is informed by three principles: first, that power politics is not the only outcome that may arise from international relations.³⁴ Other outcomes may be decisions influenced by the domestic players. Second, these decisions are mutual benefits, which arise out of international co-operation. This co-operation arises out of the conflict that arises in the domestic sphere and informs the need for co-operation between the state and the domestic players. Third, the domestic players shape state action and policy at the international level.³⁵ These three principles indicate a departure from other schools of thought in various respects. According to the realists, the central actors in international politics are the state actors other than the individuals or domestic players. Second, this political system at the

31 These rights are now provided for in international and regional human rights instruments.

32 A Moravcsik 'Taking preferences seriously: A liberal theory of international politics' (1997) 51 *International Organisation* 513-516.

33 Eg, there is a shadow report to the African Commission by Amnesty International on Eritrea, <https://www.amnesty.org/en/documents/afr64/8161/2018/en/> (accessed 21 April 2018).

34 EB Shiraev & VM Zubok *International relations* (2015) 78.

35 As above.

international level implies anarchy with no recourse to a supranational authority to enforce rules. Third, the state actors as the central players are rational in so far as their actions maximise their self-interest. Fourth, the existence of power held by state parties serves their self-preservation and not the interests of the societal players.³⁶ The creation of any norms, therefore, is based on what the state party wants with no regard to the interests of domestic players.

Constructivism, on the other hand, states that the structures of human association arise out of shared ideas other than material forces, whether as domestic players or state actors.³⁷ This school of thought further states that the characteristics and interests of both parties arise from shared ideas instead of the respective contemporary positions of the domestic players.³⁸ The outcome, therefore, of an international engagement by the states is as a result of constructive and equal engagement with various stakeholders. Norms should be created through the concerted effort of both the domestic players and the state. This school of thought disregards the fact that there are always unequal players in both the domestic arena and the state.

Another school of thought is idealism, which provides that a state should have a philosophy that guides its foreign policy and the subsequent actions it takes as a way of providing transformation in the domestic sphere.³⁹ A perfect example is the policy of the United States of America to negotiate the contents of international treaties, yet taking a long time to sign, accede or ratify them.⁴⁰ The structure of the international relations of a state should be able to transform it into the desired state of being. This line of thought, however, does not consider the biases, the various shortcomings, and the negative motives that may inform its philosophy in the creation of norms. Therefore, with regard to the creation of norms using the liberal theory, one needs to evaluate the formation of norms at the international level as a result of domestic players who prevail on the state to take action.

3.2 Tenets of the liberal theory

The liberal theory relates to a distinct ideology that is created by the domestic players who shape the perceptions, capacities and actions of the state in the political, social and economic areas of a particular state.⁴¹ It may be interpreted as an ideology propagated by domestic

36 RE Goodin 'The state of the discipline, the discipline and the state' in RE Goodin (ed) *The Oxford handbook of political science* (2011) 8.

37 A Wendt *Social theory of international politics* (1999) 1.

38 As above.

39 D Markwell *John Maynard Keynes and international relations: Economic paths to war and peace* (2006) 3.

40 CA Bradley 'Unratified treaties, domestic politics, and the US Constitution' (2007) 48 *Harvard International Law Journal* 307.

41 DW Michael 'Kant, liberal legacies, and foreign affairs' (1983) 12 *Philosophy and Public Affairs* 206.

players intended to influence decisions or actions or policies of a state at an international level. Therefore, what affects the common man forms the agenda for redress at the international level. As a result, the theory enhances the freedoms of an individual.⁴² The theory assumes that people and states seek welfare, and use reason instructively to design strategies and institutions that are conducive to attaining this goal.⁴³ If a norm does not improve the welfare of the people within its jurisdiction, then a state should not adopt it.

The first tenet provides:⁴⁴

The fundamental actors in international politics are individuals and private groups, who are on the average rational and risk-averse and who organise exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence.

The main actors on the international political scene are individuals or private organisations.⁴⁵ These engage collectively to promote various interests of the people within the jurisdiction of a given state party.⁴⁶ Existing limitations, such as different values and differences in the ability to guide decisions, may affect their effectiveness.⁴⁷ The use of a bottom-up approach is designed to enhance independence from political influence. It advances interests for the common good of the people within the state's jurisdiction. The structures in a domestic framework, therefore, mould state behaviour towards a common quality of outcomes.⁴⁸

The second tenet provides:⁴⁹

States (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics.

This provision means that the state through its actions represents the concerns of the domestic players other than its concerns as a unitary body. The state acts as the tool that is used to achieve the goals, which may not otherwise be achieved by individuals at the international level. A state adopts a declaration or a resolution for the good of its people other than its self-preservation. Self-preservation is contextualised as the urge by a government to cling to power through the abuse of human rights violations, and the quelling of any

42 As above.

43 RN Lebow *A cultural theory of international relations* (2008) 74.

44 Moravcsik (n 32 above) 517.

45 S Haggard & BA Simmons 'Theories of international regimes' (1987) 41 *International Organisations* 491 499.

46 As above.

47 As above.

48 As above.

49 Moravcsik (n 32 above) 518.

form of resistance.⁵⁰ It follows that clinging on to power as a mode of self-preservation against the will of the masses is not for the 'good of the people'.⁵¹ This tenet, however, assumes that all individuals have equal influence on state policy. The domestic players may be composed of obscure groups that do not influence decisions like other domestic players or state actors. For instance, a small political party or civil society organisation may not have the force to direct state policy as do established political parties or civil society organisations. It may pass as a narrow pluralist perception of domestic politics, where all individuals and groups have equal influence on state policy, but is not always the case. More often than not the state does not represent the views of its people equally.

The third tenet provides that '[t]he configuration of interdependent state preferences determines state behaviour'.⁵² The behaviour or the actions of the state are a reflection of the various patterns of state preferences. These actions are guided by a purpose that provokes conflict, proposes co-operation, and culminates in the adoption of foreign policy action, which benefits the people within its jurisdiction.⁵³ It may be said that when a state party assents to or ratifies or signs a treaty, its action is informed by the position of the domestic players. Thus, the variation in the means used leads to an expected end. The fallacy with this approach is that it may be taken to be a reductionist one, rather than a systemic understanding between the domestic players and the state.⁵⁴

This theory is evident in various passages of the African Charter. The Charter provides that '[e]very individual shall have duties towards his family and society, the state and other legally recognised communities and the international community'.⁵⁵ This provision recognises that an individual plays a distinct role in the affairs of his or her family and at a subtle level in the community. The duties to the community inform the affairs of the state or other communities at the level of the state, such as kingdoms, and cultural institutions. The apex of the performance of these duties is seen in the actions of the state at the international level. This contribution, therefore, validates the application of the liberal theory to the African Charter. In addition,

50 For more on the state's use of self-preservation, see AL Fuller *Taking the fight to the enemy: Neo-conservatism and the age of ideology* (2011) 230. Compare with Morgenthau's model in F Rösch *Power, knowledge, and dissent in Morgenthau's worldview* (2016) generally.

51 A detailed engagement with self-preservation and the good of the people is beyond the scope of this article. One may consider the recent events in Zimbabwe that illustrate that a change in the leadership of the country, despite its constitutional ramifications, to a great extent was geared towards the good of the people and an act of putting a stop to self-preservation by Robert Mugabe's government.

52 Moravcsik (n 32 above) 518.

53 Moravcsik 520.

54 Moravcsik 522.

55 Art 27(1) African Charter.

the individual has the duty to 'preserve and strengthen social and national solidarity, particularly when the latter is threatened'.⁵⁶ This provision mandates the individual to ensure that the state does not threaten individual freedoms and a collective duty to agitate for state action to improve welfare.

The African Commission is mandated as follows with regard to the exercise of its functions:⁵⁷

To promote human and peoples' rights and in particular ... to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia, and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to governments.

The provision points to the critical role that national and local institutions play in the forging of decisions by the African Commission. The views of these domestic players form the Commission's recommendations to state parties.⁵⁸ This provision points to the critical role of domestic players in forming the foreign policy of their respective state parties at the international level. This line of thought also forms the basis of the inclusion of the views of civil society when monitoring a state party's adherence to the African Charter.

4 Use of normative developments between 1992 and 2003

The right to a fair trial includes the question of evidence obtained through human rights violations. This evidence, the admissibility of which may be questioned in the course of a trial, may affect the fairness of a trial. The literature indicates that most normative developments on the right to a fair trial occurred between 1992 and 2003. This study scrutinises this period to establish which normative developments point to the right to a fair trial, with an emphasis on the mode of dealing with evidence obtained through human rights violations. The evaluation of these developments offers insights into whether the normative developments have dealt with evidence obtained through human rights violations, and to what extent these developments deal with this impugned evidence.

According to Odinkalu, the African Union's normative developments on the right to a fair trial commenced in 2002.⁵⁹ Odinkalu gives no justification for a retrospective review of the period

56 Art 29(4) African Charter.

57 Art 45(1)(a) African Charter.

58 Moravcsik (n 32 above) 518-522.

59 CA Odinkalu 'Human rights mechanisms in Africa: Recent developments in their norms, institutions and jurisprudence' (2003) 3 *Human Rights Law Review* 105.

before 2002 and there has been no corresponding update to his earlier study. Banderin makes use of jurisprudential developments by the African Commission to gauge the normative frameworks as a basis. His insights are instructive as far as they implicitly show how the Commission has interpreted its normative framework in developing its jurisprudence in the communications brought before it. He analyses three communications to show that normative frameworks underscore the developments. The decisions in *Law Office of Ghazi Suleiman v Sudan (II)*,⁶⁰ *Doebbler v Sudan*⁶¹ and *Purohit & Another v The Gambia*⁶² deal respectively with the right to freedom of expression and democracy in Africa; Islamic law and human rights in Africa; and the human rights of mental health patients in Africa. However, they fail to offer any insight into norms that determine evidence obtained through human rights violations. This failure validates this research by indicating that one has to appreciate the history and scope of a normative framework before applying it in the development of jurisprudence. The researcher, therefore, is justified in evaluating the norms that may be instructive to understanding the African Commission's principles on evidence obtained through human rights violations.

According to Ouguerouz, the African Commission was aware of the fact that article 7 of the African Charter did not adequately deal with the right to a fair trial.⁶³ This led to the adoption of a series of soft law measures that could resolve this *lacuna*,⁶⁴ such as resolutions,⁶⁵ declarations,⁶⁶ legal principles⁶⁷ and guidelines.⁶⁸ Other authors suggest that some of the soft law adopted by the African Commission in 2002 has not been valuable in dealing with human rights violations such as torture.⁶⁹ This failure points to a limitation in developing jurisprudence by the Commission. Equally it points to a poor standard or assumption that a given law seeks to accomplish, and illustrates the need to revisit each norm to establish the standard or assumption it stands for and how it contributes to the normative framework of evidence obtained through human rights violations.

60 (2003) AHRLR 144 (ACHPR 2003).

61 (2003) AHRLR 153 (ACHPR 2003).

62 (2003) AHRLR 96 (ACHPR 2003).

63 Ouguerouz (n 15 above) 141.

64 The relevant norms that form this soft law will be dealt with shortly.

65 Tunis Resolution (n 10 above).

66 Dakar Declaration (n 11 above).

67 The Principles (n 13 above).

68 Dakar Declaration (n 11 above) para 3.

69 D Long & R Murray 'Ten years of the Robben Island Guidelines and Prevention of Torture in Africa: For what purpose?' (2012) 12 *African Human Rights Law Journal* 311.

Mujuzi's analysis of the African Commission's communication of the *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*⁷⁰ is a point of departure from the foregoing literature. His engagement with the decision shows that there has been a progressive development of the Commission's normative framework with regard to evidence obtained through human rights violations. Three milestones are evident from his analysis to show the progressive development. First, the Tunis Declaration and the Dakar Declaration deal with the improvement of the right to a fair trial from a general continuum. Second, the Robben Island Guidelines deal with specific aspects such as the non-admission of evidence obtained through torture. Third, the Principles engage the admission of evidence obtained through human rights violations. While his review shows a development with regard to dealing with evidence obtained through torture, the latter forms a small and the most egregious part of the rights that can be susceptible to evidence obtained through human rights violations. The researcher questions the answers that the Principles offer with regard to its normative structure in dealing with evidence obtained through human rights violations. Second, the Principles show a positive normative framework that deals with evidence obtained through human rights violations. The study notes the lessons that are instructive for future normative developments.

On the basis of the foregoing literature, the study narrows its focus to four major normative developments that relate to the right to a fair trial, with the emphasis on evidence obtained through human rights violations. These include the Tunis Resolution;⁷¹ the Dakar Declaration;⁷² the Robben Island Guidelines;⁷³ and the Fair Trial Principles.⁷⁴ The most recent normative development with regard to evidence obtained through human rights violations is the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa adopted in 2014 (Luanda Guidelines).⁷⁵ The researcher is of the opinion that it is premature to evaluate whether these guidelines have served their purpose. A conscious decision has been made to exclude these Guidelines from the study. However, it should be stated in the interim that the Luanda Guidelines address some issues that are not dealt with by the Tunis Resolution, the Dakar Declaration, the Robben Island Guidelines and the Fair Trial Principles. First, the Luanda Guidelines require that any evidence obtained in violation of confidentiality of information between legal counsel and the suspect is inadmissible.⁷⁶ Second, the Luanda Guidelines emphasise that an

70 JD Mujuzi 'The African Commission on Human and Peoples' Rights and the admissibility of evidence obtained as a result of torture, cruel, inhuman and degrading treatment: *Egyptian initiative for Personal Rights and Interights v Arab Republic of Egypt*' (2013) 17 *International Journal of Evidence and Proof* 287.

71 Tunis Resolution (n 10 above).

72 As above.

73 Robben Island Guidelines (n 12 above).

74 Luanda Guidelines (n 14 above). Banderin (n 13 above) 117-118.

75 Luanda Guidelines (n 14 above).

accused is informed of the right to the presence and assistance of a lawyer or suitably-qualified paralegal before a confession is recorded.⁷⁷ This requirement extends to the accused's enjoyment of this right in the course of recording the confession.⁷⁸

4.1 Tunis Resolution on the Right to a Fair Trial

The Tunis Resolution was adopted by the African Commission at its 11th ordinary session in Tunis. The Commission reiterated its mandate to promote and protect human rights according to the African Charter and international standards.⁷⁹ In addition, the Tunis Resolution recognised the importance of the right to a fair trial under article 7 of the African Charter, in ensuring the right to a fair trial.⁸⁰ Therefore, the requirement to uphold the right to a fair trial in international and regional law was the standard that informed the adoption of the Resolution by state parties. This standard, however, did not address the specific aspects relating to evidence obtained through human rights violations. The Resolution assumed the provision of the right to a fair trial to be a just cause, which had to be upheld by state parties.⁸¹ This assumption, however, did not convey justice in so far as the Resolution did not deal with evidence obtained through human rights violations.

The Resolution was specifically addressed to state parties to inform persons in their jurisdiction of the remedies and the procedure relevant thereto.⁸² A remedy with regard to the admission of impugned evidence featured nowhere in the Resolution. The Resolution required state parties to provide needy persons with legal aid.⁸³ The provision of legal aid did not necessarily lead to the exclusion of evidence obtained through human rights violations. The Resolution lacked guidance as to the extent of the available remedies, especially with regard to evidence obtained through human rights violations, such as the non-admission of this evidence, or the procedure to be followed in dealing with such evidence. This failure indicated that the standard and assumption that formed the basis of the norm was not sufficient to ensure the right to a fair trial in instances where there was evidence obtained through human rights violations. The failure to address evidence obtained through human rights violations impeded the ability of the Resolution to influence the mode of dealing with evidence obtained through human rights violations. However, its attempt at improving the standards of the

76 Art 8(d)(ii) Luanda Guidelines.

77 Art 9(a)(i) Luanda Guidelines.

78 Art 9(a)(ii) Luanda Guidelines. Compare with Principle N(6)(d)(1) and (2) of the Principles.

79 Para 1 Tunis Resolution (n 10 above).

80 Paras 2-5 Tunis Resolution.

81 Paras 3 & 6 Tunis Resolution.

82 Paras 2-5 Tunis Resolution.

83 As above.

right to a fair trial indicated that it recognised individuals and their wellbeing as a paramount consideration.⁸⁴ However, it failed to deal with instances that spoke to the specific tendencies by state parties that led to the admission of evidence obtained through human rights violations. It is on this basis that one may conclude that the Tunis Resolution did not deal with the specific aspects of the right to a fair trial, such as evidence obtained through human rights violations. The Tunis Resolution as part of the normative framework was effective in improving the right to a fair trial generally. However, this effectiveness does not speak to evidence obtained through human rights violations in so far as it did not address instances of evidence obtained through human rights violations.

4.2 Dakar Declaration

Another development occurred in September 1999 culminating in the adoption of the Dakar Declaration.⁸⁵ This Declaration, which was a product of engagements with civil society organisations, academics and lawyers, targeted state parties. As in the case of the Tunis Resolution, the right to a fair trial was the normative standard. With regard to the balancing or extent of the standard of this norm the African Commission formed the opinion that the realisation of this right depended on four aspects. The first aspect was the elimination of certain practices by state parties.⁸⁶ These practices included state parties' use of acts of impunity such as the torture of suspects in pre-trial detention. This aspect was informed by the political, social and economic circumstances that affected the realisation of fair trials in Africa, such as armed conflicts, massive human rights violations and the lack of tangible methods to implement the obligations assumed under treaties.⁸⁷

In the second place, the Declaration emphasised the need for state parties to respect the rule of law.⁸⁸ This indication was instrumental in ensuring that respect for the right to a fair trial was in an enabling environment where the rule of law subsisted.⁸⁹ The insistence by the Declaration on the need for accountability by political institutions offered insights into the fact that evidence obtained through human rights violations would be challenged in courts of law. The rule of law required the existence of fully-accountable political institutions where

84 Moravcsik (n 44 above) 517 on the primacy of the domestic society that represents the interests of individuals in a domestic jurisdiction.

85 Dakar Declaration (n 11 above).

86 Paras 3 & 6 Dakar Declaration.

87 Para 4 Dakar Declaration.

88 Para 7 Dakar Declaration.

89 As above.

state parties, through their agents, did not acquire evidence obtained through human rights violations.⁹⁰

Third, the African Commission advocated the independence and impartiality of the judiciary.⁹¹ This independence related to the appointment, security and tenure of the members of the judiciary, while the impartiality related to the ability of the judiciary to hand down decisions without the influence of any organ or person.⁹² This issue ought to be distinguished from the first point above. The first point dealt with instances before the hearing of a case, where state parties engaged in acts that compromised a fair trial of a suspect, such as torture. With regard to the current point, it related to the need to guard the tenure of judicial officers to ensure that they exercised independence in handing down decisions. The African Commission's advocacy of the system of appointment, tenure and removal of judges, however, did not deal with a scenario where a state party would have a vibrant legal regime governing the judiciary, while it lacked rules to govern evidence that had been obtained through human rights violations.⁹³ As a result of this standard, the requirement to deal with evidence obtained through human rights violations was not directly dealt with, because the concept dealt with the offices of the judiciary other than issues dealing with the admission of evidence. To a small extent respect for the rule of law provided insights into the possibility of dealing with evidence obtained through human rights violations.

In the fourth place, the African Commission recognised that most state parties had military courts and special tribunals that operated alongside the institutionalised courts of judicature.⁹⁴ It insisted that although the military courts adjudicated offences of a military nature, they had to adhere to fair trial standards.⁹⁵ The special tribunals were not expected to try offences that would be tried by the institutionalised courts of judicature.⁹⁶

The African Commission did not pronounce itself on whether these military courts had to use the same rules of evidence that were used in

90 This was largely limited to instances of torture, cruel, inhumane and degrading treatment, which was a small aspect of evidence that would be obtained through human rights violations.

91 Para 8 Dakar Declaration (n 11 above).

92 As above.

93 The Constitution of the Republic of Uganda, 1995 provided for a robust system in arts 126-151 on the judiciary. It still lacks a law on evidence obtained through human rights violations (RD Nanima 'The legal status of evidence obtained through human rights violations in Uganda' (2016) 19 *Potchefstroom Electronic Law Journal* 1-38 generally). The same was evident in the Constitution of the Republic of Kenya, 1963, which had a legal regime concerning the judiciary, but lacked a provision on evidence obtained through human rights violations. The same was evident in the 1980 Lancaster Constitution of Zimbabwe.

94 Para 9 Dakar Declaration (n 11 above).

95 As above.

96 As above.

the institutionalised courts in adducing evidence. This omission affected the enforceability of the fair trial standards that the Declaration alluded to. This insight would have led to the realisation of the fact that a rule on the admissibility of evidence obtained through human rights violations would affect the trial process in all these courts. In Uganda, for instance, the court martial adjudicates offences that are similar to the offences in the Penal Code Act. The question of which rules of evidence are used is not clear.⁹⁷ The African Commission's normative stand on evidence obtained through human rights violations remained an issue of implication rather than clarity.⁹⁸

The African Commission recognised that the bar associations, as domestic players, were essential to the enhancement of the right to a fair trial.⁹⁹ The ability of lawyers to represent clients without intimidation or harassment from other organs or persons was the bedrock of the right to a fair trial.¹⁰⁰ Even though this position is disregarded by the realist school of thought, which that looks at the state as a unitary body that seeks to maintain its self-preservation,¹⁰¹ it could be true to a given extent that bar associations played an oversight role which might be ignored by state parties. In *Law Office of Ghazi v Sudan (I)*, the complainant was arrested and incarcerated as he represented persons who were critical of the government.¹⁰² This incident shows that the actions of the state point to its use of anarchy, and focus on the need for self-preservation.¹⁰³ In a liberal view the lodging of complaints with the African Commission is indicative of the consequence of a state that tries to suffocate the views of its domestic players.¹⁰⁴ The researcher insists that the issues dealing with evidence obtained through human rights violations should take centre stage. The bar associations would then act as a buffer, which would ensure that evidence obtained through human rights violations would not be admitted.

The African Commission recognised the lack of effective remedies by state parties in dealing with the right to a fair trial.¹⁰⁵ This recognition was a reiteration of the Commission's use of a general perspective in the emphasis on the general improvement of the right

97 The Uganda People's Defence Act, 2005, which establishes the court martial, by implication uses the same rules of evidence that govern criminal law and procedure. See sec 217 of the Uganda People's Defence Act.

98 The same was evident in the African Commission's declaration in para 10 with regard to traditional courts. While it appreciated the courts' role in promoting social cohesion, the Commission failed to hint at the mode of admission of evidence.

99 Para 11 Dakar Declaration (n 11 above). Moravcsik (n 28 above) 517.

100 Para 11 Dakar Declaration.

101 Goodin (n 36 above) 133.

102 (2003) AHRLR 134 (ACHPR 2003).

103 Goodin (n 36 above) 133. See the detailed discussion on the theoretical framework above.

104 Hathaway (n 23 above) 1953.

105 Para 6. See paras 1-4 of the Tunis Resolution (n 6 above).

to a fair trial. This position is proved through its reference to punitive, restorative and compensatory remedies.¹⁰⁶ The failure to take a stand on evidence obtained through human rights violations affected the enforcement of a rule to that effect. It would have been better if the remedies with regard to punishment included the exclusion of evidence obtained through human rights violations and the use of such evidence against the perpetrators of human rights violations. The African Commission's desire was to have fair trial standards, whereby state parties provided adequate protection of victims' rights and interests.¹⁰⁷ This position, however, required clarity on some procedural aspects of admitting evidence, such as subjecting the evidence to a trial within a trial to ascertain its voluntariness. Although the accused persons were to receive legal aid, the failure to question the voluntariness of evidence obtained through human rights violations meant that the accused still would suffer from the probable use of evidence obtained in abuse of their rights.

The Dakar Declaration did not deal directly with issues concerning evidence obtained through human rights violations. As in the case of the Tunis Resolution, it referred to the general component of the right to a fair trial in terms of legal representation and independence of the judiciary in the appointment, tenure and removal of judicial officers. Aspects dealing with evidence obtained through human rights violations were not dealt with. In the author's opinion the circumstances on the continent maintained the focus of the African Commission on the general right to a fair trial. As a result this normative development was inclined to those principles that affected the right to a fair trial. This position presents the lack of oversight by the Commission with regard to questions that would arise in dealing with evidence obtained through human rights violations. However, the recognition by the Declaration of the four key aspects that affected an individual and the domestic institutions, such as the judiciary and the bar associations, showed that their legal protection was key to their contribution to the formation of the foreign policy of a state party.¹⁰⁸ It is evident that the concepts engaged under the Dakar Declaration served the purpose of illustrating that acts of impunity by state parties had to end, and that the independence of the judiciary had to be protected. This effectiveness did not extend to dealing with instances of evidence obtained through human rights violations.

4.3 Robben Island Guidelines

The Robben Island Guidelines were adopted by the African Commission against the backdrop that there was a need to

106 Para 13 Dakar Declaration.

107 As above.

108 Moravcsik (n 44 above) 518, on the role of domestic players on formation of a state's foreign policy.

implement the various international and regional instruments with regard to torture and cruel, inhuman and degrading treatment. The requirement to deal with torture and cruel, inhuman and degrading treatment informs the normative standard for the Robben Island Guidelines.

The Preamble recalls 'the universal condemnation and prohibition of torture, cruel, inhuman and degrading treatment and punishment',¹⁰⁹ and recognises 'the need to take positive steps to further the implementation of the existing provisions on the prohibition of torture, cruel, inhuman and degrading treatment and punishment'.¹¹⁰ It is discernible from the Preamble that the Robben Island Guidelines radically depart from the preceding legal norms that used the right to a fair trial as the standard for implementation of the right by embracing a mode of dealing with evidence obtained through human rights violations. With the aid of the universal condemnation and prohibition of torture as the standard, the Robben Island Guidelines employ a tight standard, which relates to the prohibition of torture, other than the general enforcement of the right to a fair trial.¹¹¹ However, this standard is inclined towards the right against torture and cruel, inhuman and degrading treatment to the exclusion of all other rights which would be abused in the cause of adducing evidence. Even if the standard created a focus on evidence obtained through human rights violations, it included only the right against torture. This focus meant that a person whose right to the presumption of innocence had been violated could not claim a violation of his rights under the Robben Island Guidelines unless the violation was related to torture.¹¹²

The generalisations in the Robben Island Guidelines relating to torture and cruel, inhuman and degrading treatment and punishment are addressed to state parties. The states are required to

(e)nsure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.¹¹³

As such, the Robben Island Guidelines are limited to the non-admission of evidence obtained through torture and cruel, inhuman and degrading treatment, to the exclusion of evidence obtained through other human rights violations. It is not in doubt that there are

109 Preamble para 1 Robben Island Guidelines (n 12 above).

110 Para 4 Robben Island Guidelines.

111 Para 7 Robben Island Guidelines.

112 Art 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), adopted by General Assembly Resolution 39/46 on 10 December 1984, entered into force on 26 June 1987; art 5 of the Universal Declaration of Human Rights (1948); art 5 of the African Charter; Communication 416/12 *Jean-Marie Atangana Mebara v Cameroon*, paras 81-83.

113 Robben Island Guidelines (n 12 above) Guideline 29.

international human rights instruments that deal with torture.¹¹⁴ To a great extent these instruments form a basis for the Robben Island Guidelines.¹¹⁵ One may argue that the Robben Island Guidelines reflect the content of international instruments, but its effectiveness ought to be seen in its application as a normative instrument.¹¹⁶ It is on this basis that one may conclude that these guidelines do not provide useful direction in interpreting article 5 of the African Charter.¹¹⁷ As such, there is a need for them to provide a structure to use in dealing with torture.

Pursuant to the implementation of the regional and international instruments on torture, the Guidelines require 'ratification of the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights'.¹¹⁸ This Protocol established the African Court with a mandate to complement the African Commission in the promotion and protection of human rights in Africa.¹¹⁹ One may argue that it does not provide clarity on the admission of evidence obtained through human rights violations. This position is countered as far the Protocol provides that '[i]f the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.¹²⁰ 'In cases of extreme gravity and urgency, and when necessary to avoid

114 UN Convention Against Torture, Cruel, Inhuman and Degrading Treatment 1465 UNTS 85.

115 Art 6 of the Universal Declaration, adopted by General Assembly Resolution 217 A(III) of 10 December 1948; Standard Minimum Rules for the Treatment of Prisoners (1955), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva on 30 August 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; art 8 of the International Covenant on Civil and Political Rights (1966) 999 UNTS 171; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975) adopted by General Assembly Resolution 3452 (XXX) of 9 December 1975; arts 2 and 5 of the Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85; art 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) adopted by General Assembly Resolution 43/173 of 9 December 1988; art 5 of the African Charter.

116 Long & Murray (n 69 above) 311.

117 As above.

118 Robben Island Guidelines (n 12 above) Guideline 1(a).

119 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) arts 1 & 2. For a discussion of the African Court on Human and Peoples' Rights and the African Commission, see E Badawi 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights: Introductory note' (1997) 9 *African Journal of International and Comparative Law* 953.

120 Art 27(1) African Court Protocol (n 119 above).

irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.¹²¹

It is an indication that the orders the African Court makes are not limited to financial reparation.¹²² Rather, the Protocol mandates the Court to make 'appropriate orders', a requirement which is broad enough to encompass a declaration of inadmissibility of evidence obtained through human rights violations.¹²³ Financial compensation is mentioned only as an example of orders that may be made; it is not to the exclusion of other appropriate orders as the Court may deem fit.

The Robben Island Guidelines specify the context of the evidence that will be dealt with, namely, evidence obtained through torture, cruel, inhuman and degrading treatment or punishment. The normative standard of the need to deal with torture limits the applicability of the guidelines beyond the violation of the right against torture. In the second place, this limitation affects the African Commission's role in the development of a normative framework to deal with evidence obtained through human rights violations, other than torture. Without prejudice to the foregoing, the Robben Island Guidelines recognise and concretise the right to human dignity of everyone, and that the state cannot violate the right for purposes of self-preservation.¹²⁴ The Robben Island Guidelines are effective in ensuring that evidence obtained through torture or cruel, inhuman and degrading treatment is not admissible. This effectiveness does not extend to instances of evidence obtained through other human rights violations. To this extent the normative framework did not serve its purpose in as far as it did not deal with evidence obtained through all human rights violations.

4.4 The Fair Trial Principles

The fourth major development was the passing of a resolution to establish a working group to prepare a draft of general principles and guidelines on the right to a fair trial and legal assistance.¹²⁵ The working groups involved in the drafting of these principles included

121 Art 27(2) African Court Protocol.

122 This formed the main type of remedy in the Tunis Resolution and the Dakar Declaration.

123 For a discussion on appropriate orders, see G Naldi 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 *African Human Rights Law Journal* 366 381. For reparations as a remedy, see G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681; *Mtikila v Tanganyika Law Society and The Legal and Human Rights Law Centre and Reverend Christopher Mtikila v Tanzania* App 009 & 011/2011 para 126(4) 14 June 2013.

124 Moravcsik (n 44 above) 518, on the state taking decisions for the welfare of its citizens.

125 Resolution on the Right to a Fair Trial and Legal Assistance in Africa, Res AHG/222(XXXVI); para 3 Robben Island Guidelines (n 12 above).

academics, advocates, NGOs and other domestic players.¹²⁶ This process led to the adoption of the Fair Trial Principles.¹²⁷ There are four normative concepts in the Principles, which form the standard that guide the African Commission's mode of dealing with evidence obtained through human rights violations.¹²⁸ This standard is dealt with in respect of four aspects: the right to an effective remedy;¹²⁹ the role of prosecutors;¹³⁰ the prohibition of the collection of evidence through a violation of a detained suspect's rights;¹³¹ and the rule on how to deal with evidence obtained through force or coercion.¹³²

First, with regard to an effective remedy, the Principles state:¹³³

Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.

Further:¹³⁴

Every state has an obligation to ensure that ... any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body.

The cumulative effect of this Principle is to widen the standard of an effective remedy by extending it from actual or pecuniary remedies to evidential remedies, such as the exclusion of evidence. This exclusion includes a violation that leads to any kind of harm other than physical harm, such as the violation of an accused's right to the presumption of innocence until proven guilty.¹³⁵ This normative development requires the African Commission to call on state parties to provide an effective remedy, such as the exclusion of evidence obtained through human rights violations, by a competent judicial body.¹³⁶

Second, prosecutors have a key role to play in instances where they have evidence that has been obtained through human right violations. The Principles state:¹³⁷

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the

126 Moravcsik (n 44 above) 517, with regard to the liberal theory's primacy on domestic actors as key players.

127 Fair Trial Principles (n 13 above). Baderin (n 13 above) 118.

128 Fair Trial Principles (n 13 above) Preamble.

129 Principle (C)(a) Fair Trial Principles.

130 Principle F Fair Trial Principles.

131 Principles M(7)(d)-(f) Fair Trial Principles.

132 Principle N(6)(d)(1) Fair Trial Principles.

133 Principle C(a) Fair Trial Principles.

134 Principle C(c)(1) Fair Trial Principles.

135 *Jean-Marie Atangana Mebara v Cameroon* Communication 416/12 paras 81-83.

136 Principle C(c)(1) Fair Trial Principles (n 13 above).

137 Principle F(l) Fair Trial Principles.

suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

This Principle requires prosecutors to refrain from procuring the admission of evidence which has been obtained through a violation of a suspect's rights unless it is being admitted to be used against perpetrators of the human rights violations. A prosecutor exercises a discretion to establish whether the evidence was obtained through a disregard of rights. Once he forms the opinion that the evidence was obtained through a violation of human rights, then, first, he should not admit that evidence against the suspect; and, second, he should have that evidence admitted against the perpetrator(s) of the human rights violation.¹³⁸ This Principle creates a standard which recognises the need to deal with evidence obtained through human rights violations and in other improper ways.¹³⁹ Furthermore, it places a significant role on prosecutors to ensure that impugned evidence is not tendered for admission. These normative developments require the state to desist from using its machinery to coerce people in its jurisdiction, without being accountable to the African Commission.¹⁴⁰

Third, the Fair Trial Principles protect suspects in the course of the collection of evidence by the investigating arms of government. The relevant provision states that '[s]tates shall ensure that all persons under any form of detention or imprisonment are treated in a humane manner and with respect for the inherent dignity of the human person'.¹⁴¹ This principle introduces distinct features that are instructive on evidence obtained through human rights violations. A person whose rights are infringed is still imbued with dignity. In addition, it is indicative that the collection of evidence should use the dignity of an individual as the yardstick. Furthermore, where the right to human dignity is violated, then the evidence that is being obtained may be questioned.¹⁴²

Fourth, with regard to undue influence, the Fair Trial Principles deal with evidence obtained through any other form of coercion or undue influence. With regard to coercion, it provides:¹⁴³

Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession obtained during *incommunicado* detention shall be considered to have been obtained by coercion.

138 Mujuzi (n 70 above) 287.

139 Principles M(7)(d) & F(l) Fair Trial Principles (n 13 above).

140 See the discussion on the liberal theory above.

141 Principle M(7)(a) Fair Trial Principles (n 13 above). See M(7)(a)-(f).

142 Nanima (n 93 above).

143 Principle N(6)(d)(1) Fair Trial Principles (n 13 above).

It is worth noting that this provision extends the standard from evidence obtained through human rights violations to improperly-obtained evidence, although from the wording of the provision its application is limited to evidence obtained through coercion or force. Principle M(7) provides two instances where the application of the fourth concept may be extended. The first instance is the prohibition of taking undue advantage of a detained or imprisoned person by compelling him or her to confess, for the purposes of incriminating himself or herself or incriminating others.¹⁴⁴ The second instance where the application of the fourth concept is extended is where a detained person is subjected to threats or methods of interrogation which impair his or her capacity for judgment.¹⁴⁵ These methods relate to coercion, but the departure point is their ability to affect the fairness of a trial without having the blemish of human rights violations.

The interpretation of the four concepts forms the interrelated and interdependent normative framework on evidence obtained through human rights violations and improperly obtained evidence. The developments between 1995 and 1999 related generally to the right to a fair trial, but were not specific to evidence obtained through human rights violations. It was the normative developments, such as the adoption of the Robben Island Guidelines (2002) and the Principles (2003), which deal with the concept of evidence obtained through human rights violations as an integral part of the right to a fair trial. This development amounts to a change in the normative developments that would be instrumental in subsequent jurisprudential developments. A difference between the Dakar Declaration and the Principles is that, although the former was rather elaborate on the right to a fair trial, it missed the mark on evidence obtained through human rights violations. The Principles to a large extent deal with evidence obtained through human rights violations and improperly-obtained evidence.

The Fair Trial Principles reflect two principles that are key to the application of liberal theory. First, they protect vulnerable members of society when their liberty has been curtailed by the state. Second, they require that state actors, as in the case of domestic players, should protect vulnerable members of society. This need is evident in the requirement that prosecutors do not procure the admission of evidence obtained through human rights violations unless the evidence is to be used in evidence against the perpetrators of the human rights violations. The Principles effectively dealt with evidence obtained through all human rights violations, including evidence illegally obtained. This was a point of departure which demonstrates a move from slow effectiveness to a more effective framework on evidence obtained through human rights violations. As such, the

144 Principle M(7)(d) Fair Trial Principles.

145 Principle M(7)(e) Fair Trial Principles.

Principles deal with the general standards that illuminate developments from the Tunis Resolution and the Dakar Declaration. In addition, the Principles reconcile the limited application of the Robben Island Guidelines to a more nuanced approach that embraces evidence obtained through human rights violations.

5 Conclusion

The current normative structure was developed on the standard of the right to a fair trial. This need arose because states were using impunity to rule their citizens, a position that many domestic players opposed. As such, the general development of the right to a fair trial is evident in the failure by the Tunis Resolution and the Dakar Declaration to deal with the admission of evidence obtained through human rights violations. The use of civil society was geared towards other aspects of the right to a fair trial, other than evidence obtained through human rights violations. The normative fortunes of the African Commission changed with the development of the Robben Island Guidelines, which deal with this impugned evidence but limited it to evidence obtained through torture. The Fair Trial Principles that were adopted a year later deal with evidence obtained through human rights violations and improperly-obtained evidence. Despite the change in the in-depth content, the Principles were introduced at a time when the normative framework had done little to alleviate the problem of dealing with evidence obtained through human rights violations.

It follows, if the African Commission employs liberal theory grounded in the various articles of the African Charter, it needs to carry out mass sensitisation and dissemination of information on the rights under the Charter. This position should be a precursor to the subsequent use of the views of domestic players. When domestic players are informed, they will offer informed views to guide the foreign policy of the respective states. The obligation to disseminate information should be placed on states to create programmes and legislation to support this cause.

There should be a study on the trends of the jurisprudence of the African Commission on evidence obtained through human rights violations to ascertain whether this normative framework has aided or limited its development. This demand is coupled with the fact that since its inception, the Commission has decided on 229 communications.¹⁴⁶ Eighty-nine of these communications have been decided on their merits, representing 38 per cent of the total number of communications.¹⁴⁷ Approximately 90 communications have been regarded as inadmissible, representing 39 per cent of the total

146 IHRDA African Human Rights Case Law Analyser; search documents <http://caselaw.ihrda.org/doc/search/?m=83> (accessed 6 November 2016).

147 As above.

number of communications.¹⁴⁸ Subject to conceptual and empirical research, the normative concepts that inform evidence obtained through human rights violations are instructive in improving the normative and subsequent jurisprudential developments.

It is significant to visit the experiences of domestic, regional and international human rights systems to draw insights as to how their normative frameworks are developed. This study will guide future engagements on the creation of frameworks on aspects that fall within the mandate of the African Commission. In addition, it is a well-acknowledged principle that domestic laws may be used to contribute to the normative frameworks of a regional human rights system.¹⁴⁹ It is argued that domestic courts may guide the Commission's creation of a normative framework that produces clarity on the issues that need to be addressed at the drafting stages.

148 As above.

149 *S v M* 2008 (3) SA 232 (CC) where the decision of the South African Supreme Court of Appeal was instructive in the content of General Comment 1 of 2014 regarding the caregivers and the children.

Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights

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Summary

The African Commission on Human and Peoples' Rights was inaugurated on 2 November 1987, with a mandate to promote and protect human rights in Africa. The commemoration of its thirtieth anniversary in 2017 presented another appropriate opportunity to revisit the long-standing debate on its quasi-judicial character, the status of its recommendations and its (in)ability to effectively monitor states' compliance. This article assesses the challenges associated with the Commission's seemingly 'non-binding' recommendations and the perceived effect on its mandate, and proposes two solutions for their circumvention. First, the article suggests that if non-compliance is taken broadly as a sustained infraction of states' obligations under article 1 of the African Charter on Human and Peoples' Rights and allied instruments, the Commission's recommendations can be elevated to binding African Union decisions that subsequently become enforceable under article 23(2) of the AU Constitutive Act. Second, it is proposed that where a state against which a violation has been found fails to comply

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with the Commission's recommendations, the latter may institute an action before the African Court under article 5 of the Protocol Establishing the African Court against that state for non-compliance with its obligations under the Charter.

Key words: *human rights; implementation; compliance; recommendations; quasi-judicial; non-binding; African Commission; African Court; African Union*

1 Introduction

A system of law that tolerates defiance hardly ever commands obedience. So too is a human rights system at the supranational level barely capable of ensuring effective safeguards if it lacks the requisite political support for its domestic implementation.¹ True to these assertions, the current relationship between state parties to the African Charter on Human and Peoples' Rights (African Charter) and the African Commission on Human and Peoples' Rights (African Commission) is one mired by defiance. The never-ending deficit of state adherence to African Commission recommendations² regenerates the 'compliance' argument and brings under closer scrutiny the triangular relationship between the Commission, the rights enshrined in the African Charter and supplementary instruments, and state parties. For Viljoen, 'compliance' is 'the fulfilment of a state obligation under a treaty'.³ Under the African Charter, the implementation of obligations acquired under article 1 (article 1 obligations) is a threshold for state compliance. However, the African Commission's responsibility to monitor state implementation, investigate allegations of violations or determine complaints often is pre-emptively blocked, in no small way by its inability to make decisions and recommendations that are binding on states.

Undoubtedly, the Commission is the principal regional human rights body responsible for promoting human and peoples' rights and ensuring their protection in Africa.⁴ Established under the African

1 F Viljoen 'The African human rights system and domestic enforcement' in M Langford et al (eds) *Socio-economic rights judgment and the politics of compliance: Making it stick* (2017) 351; GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 466, where they state very succinctly that '[a] human rights guarantee is only as effective as its system of supervision'.

2 Recommendations, in this context, include recommendations based on the African Commission's Concluding Observations on state reports and decided cases (communications).

3 Viljoen (n 1 above) 351; A Chayes et al 'Managing compliance: A comparative perspective' in EB Weiss & H Jacobson (eds) *Engaging countries: Strengthening compliance with international environmental accords* (1998) 39.

4 Art 30 African Charter.

Charter as a treaty body within the framework of the Organisation of African Unity (OAU), now the African Union (AU), the African Commission is vested with the mandate to promote, protect and interpret the Charter's sundry provisions, and perform any other functions entrusted to it by the OAU/AU Assembly of Heads of State and Government (OAU/AU Assembly).⁵ However, there are two major limitations to the effective discharge of its mandate. One, the African Commission is a quasi-judicial body whose decisions are understood not to be binding on state parties. Two, by its current bureaucratic structure and functioning, it is unable to effectively utilise the avenue of the African Court on Human and Peoples' Rights (African Court) to persistently hold non-compliant states accountable under the Charter.

This article attempts to articulate, from a prism intended to provoke scholarly thought and political action, ways of navigating the African Commission out of the murky waters of state defiance in order to accomplish its expected outcomes. In so doing, it is clarified from the outset that rather than rehearse the arguments already articulated by many highly-acclaimed scholars on state (non)compliance, the focus of the article is on enabling the work of the African Commission through the institutional support of AU organs such as the Assembly and the Executive Council and the Court. Hence, the issues identified and addressed here are not whether the Commission's recommendations were designed to be non-binding or have 'a direct effect' on states.⁶ Rather, it is whether, having regard to state parties' article 1 obligation to take steps to recognise the freedoms guaranteed by the African Charter, they will not merely be fulfilling that obligation if they comply with such recommendations. In other words, the article questions whether a state party's failure to comply with recommendations targeted at the promotion and protection of the Charter rights does not invariably amount to a sustained violation of the article 1 obligation itself, rather than a violation of the Commission's recommendations. The second question is whether a state party's failure to implement its article 1 obligation reasonably allows the AU Assembly to make binding decisions on Commission recommendations and impose sanctions for non-compliance under article 23(2) of the Constitutive Act. Lastly, where state parties fail to implement recommendations, can the African Commission seek to enforce their Charter obligations through the avenue of the Court?

5 African Charter art 45(1)(a)(b)(c), (2), (3) & (4).

6 AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 *African Human Rights Law Journal* 14; F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015); M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008).

Two working hypotheses respond to the above queries. First, it is proposed that although African Commission recommendations are by themselves non-binding, the African Charter anticipates that, by deferring them to the AU Assembly which can take binding decisions on them, non-conforming state parties can subsequently be held accountable for their obligations and may be susceptible to sanctions under article 23(2) of the AU Constitutive Act. Second, by having unlimited access to the African Court, the Commission can sue a non-compliant state party for breach of its article 1 obligation. In justifying the possibilities for 'bypassing' the Commission's current challenges, an effort will be made to streamline the conversation against the backdrop of the link between the Commission's mandate and the substantive provisions of the Charter.

The article is divided into six sections. Section one is the introductory section above; sections two and three assess the Commission's 'watchdog' functions and the impact of states' non-compliance on its mandate. In sections four and five, much is said about how the Commission's recommendations can be politically enforced by the AU Assembly, the Executive Council (and, to some extent, the Peace and Security Council), and judicially through the African Court in fulfilment of states' article 1 obligation. The potential limitation of the article's propositions and the conclusion are detailed in section six. The article adopts desktop and exploratory approaches. It also explains a select number of cases and reports that demonstrate instances where states have not perfected the Commission's recommendations.

2 African Commission and the burden of state 'resistance'

Considering that the year 2017 was significant in the life of the African Commission as it marked the thirtieth anniversary of the Commission's operationalisation,⁷ its 30-year life-circle provides another opportunity for critical reflection on its sojourn so far and an appraisal of the obstacles that deflate its effectiveness with a view to better facilitating its efficiency. Apparently, the obstacles posed by non-compliance are incalculable. From an outright failure to undertake law reform to a barefaced refusal to implement recommendations and, by extension, the provisions of the African Charter itself, these, in no small measure, clog the wheels of the Commission's effectiveness and its determination to deliver on its mandate. As noted by the First OAU Ministerial Conference on Human Rights, there is a need to not only evaluate the Commission's functioning and ascertain the extent of its accomplishment, but also

⁷ The African Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission was subsequently relocated to Banjul in The Gambia, where it is hosted and from where its day-to-day activities are run.

to 'assist it to remove all obstacles to the effective discharge of its functions'.⁸

2.1 Institutional credibility versus state sovereignty

For some 30 years, the human rights commitment of the African Commission and state parties has been anything but mutual and quite often at a distant parallel. The obligation of states as primary implementers of human and peoples' rights and the responsibility of the Commission as monitor are always in constant friction. The implementation of the African Charter marked by perplexing contradictions, thereby causing its intended beneficiaries to suffer considerably. It is ironic that while there has been nearly one hundred per cent ratification of the Charter by African states, this has not necessarily matched compliance.⁹ African states have neglected to channel the same speed and energy with which they subscribe to international instruments, into domestic action for better human rights results. The rush in treaty adoption is very quickly decelerated by domestic inaction. Several reasons explain this unpleasant trend.

The African Commission, for one, is not a judicial body and does not have a status that is equal to a continental court of law such as the African Court. It is only a quasi-judicial body and its decisions and recommendations often are conceived of as not binding on state parties. This reality evidences many a scenario where state parties found culpable under the African Charter and supplementary instruments do not comply with its decisions and recommendation and do so without the slightest consequence.¹⁰ Despite the African Commission's international status, independence, high moral fibre and impartiality, it has had more than a fair dose of determined resistance from states. With a natural penchant for suspiciously holding tenaciously to their sovereignty in the face of internal infractions, the idea of constantly being told what to do by a panel mandated to monitor human rights compliance in Africa, may be a hindrance to states. However, the blatant disregard for a continental institution of the Commission's calibre without a feel of the 'heat', if not some 'burns', from the AU, exacerbates an already-growing culture of impunity and fatal abuse of continental principles and institutions.

It cannot be true that the African Commission is not worthy of support and commendation. During the discharge of its arduous mandate over the years, the Commission has steadily evolved as an apparatus for entrenching human rights and democratisation in

8 Para 23 Grand Bay Declaration.

9 The only exception being Morocco which only returned to the AU in January 2017, after it had withdrawn its members in 1984 due to the OAU's recognition of Western Sahara as an independent territory.

10 Viljoen & Louw (n 6 above) 12; Wachira & Ayinla (n 1 above) 471; CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 228.

Africa. By subtly but increasingly ‘bending the arm’ of repressive African states through its promotional, protective and interpretive authority, it tends to realise, on an ongoing basis, the goal of fostering a human and peoples’ rights culture in Africa. As seen in the classic cases of *Centre for Minority Rights Development v Kenya* (Endorois case),¹¹ *Purohit v The Gambia* (Gambian mental health case),¹² *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (Saro-Wiwa case)¹³ and *Socio-Economic Rights Action Centre (SERAC) v Nigeria* (SERAC case),¹⁴ it tends to beam its searchlight on errant states to assess their conduct *vis-à-vis* the demands of the African Charter. The avalanche of high-profile decided cases is evidence of its determination to break through the sacred curtains of state sovereignty, to tread uncharted grounds, to interrogate spaces previously jealously guarded by states, and to pronounce on issues that states previously considered as being exclusively their internal affairs. As the African Commission rightly noted in *Article 19 v Eritrea*,¹⁵ the African Charter would be rendered meaningless if states were permitted to construe its provisions in a manner that limits or negates its substantive guarantees. Consequently, even if to a lesser extent, the Commission’s naming-and-shaming of states importantly reinforces the need to push states to act within the tenor of their obligations under international law.¹⁶

11 (2009) AHRLR 75 (ACHPR 2009).

12 (2003) AHRLR 96 (ACHPR 2003).

13 (2000) AHRLR 212 (ACHPR 1998).

14 (2001) AHRLR 60 (ACHPR 2001) paras 57-58, 61-63; F Coomans ‘The Ogoni case before the African Commission on Human and Peoples’ Rights’ (2003) 52 *International and Comparative Law Quarterly* 751.

15 (2007) AHRLR 73 (ACHPR 2007) paras 105 & 108.

16 *Saro-Wiwa case* (n 13 above) para 115. The African Commission held that it was a blot on the Nigerian legal system for the government to have executed Ken Saro-Wiwa despite the Commission’s pleas and global opinion to the contrary, something that should never happen again. *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) paras 76-77 (DRC case). The African Commission disapproved of the military occupation of the DRC by Burundian, Rwandan and Ugandan forces. The Commission held that such action was impermissible under the African Charter and international law. *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) paras 76-77, where the Commission held that the African Charter does not give states a free hand to deal arbitrarily with non-nationals and that the arbitrary arrest and deportation of non-nationals lawfully working in Angola, which caused them to lose their jobs, was a violation of the African Charter; *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 73 (the Commission found that a military *coup* was a violation of the right of Gambians to freely choose their government); *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 70: ‘[N]o state party to the Charter should avoid its responsibilities by recourse to the limitations and “claw-back” clauses in the Charter’; *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 77, where the African Commission held that a decree allowing the government to seal the premises of a media organisation and seize its publications violates the African Charter. Other cases include *Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003) paras 64 & 66; *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000) paras 134-135.

It is generally acknowledged that the work of the African Commission is essential to the effective observance of human rights in Africa.¹⁷ However, as recognised by the OAU/AU Ministerial Conference on Human Rights, 'the primary responsibility for the promotion and protection of human rights lie with the state'.¹⁸ This imperative makes the Commission an appropriate mechanism for continuous dialogue with African governments on the implementation of their article 1 obligation.¹⁹ The following two grounds clarify that by the nature and tenure of its establishing mandate, the Commission is (a) a necessary counter measure against repressive and abusive state conduct; and (b) a forum for continuous engagement and dialogue with state parties on the discharge of their article 1 obligation.

The activation of the African Commission in 1987 ushered in great expectations among keen human rights watchers. It signalled for the first time that the massive human rights violations that preceded the pre-Charter era would be rebuffed by a vigilant continental human rights watchdog. Several indices precipitated this rousing expectation. First, the formation of the African Commission was a breakaway from the past in terms of the OAU's approach to human rights monitoring. The surge in civil wars and armed conflicts between the early 1960s and late 1970s, including the gross human rights violations perpetuated by Bokassa in the Central African Empire, Nguema in Equatorial Guinea and Idi-Amin in Uganda led to an unprecedented number of crises on the political and refugee fronts.

The OAU Assembly, as a necessary response, adopted the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (OAU Refugee Convention) as a standard-setting measure to address the chaos and instability that came with the transnational exodus of people. However, although laudable in many respects, this response was inadequate and did very little to salvage the situation. Specifically, the OAU Refugee Convention, among other reasons, failed to accommodate a treaty mechanism that would have been responsible for monitoring compliance. With no monitoring body in place, the potential of the Convention as a catalyst for change in national laws and practices was immediately lost.²⁰

Not surprisingly, at that time African states had little tolerance for human rights scrutiny. There was such a rigid attachment to the principles of sovereignty, territorial independence and non-interference in the internal affairs of member states, that it compounded the OAU's ability to intervene during crises to prevent or curtail the deterioration of human rights.²¹ This leeway, sustained

17 Para 23 Grand Bay Declaration.

18 Para 15 Grand Bay Declaration; para 27 Kigali Declaration.

19 Para 23 Grand Bay Declaration.

20 F Viljoen *International human rights law in Africa* (2012) 158.

21 Arts 3(1), (2) & (3) OAU Charter 1963; compare *DRC* case (n 16 above) para 74.

by the provisions of the OAU Charter, occasioned the 'grandstanding' of regimes notorious for perpetuating massive human rights violations and conflicts. In the face of brutal atrocities, the OAU stood idly by, while hapless victims had to bear the torrents of agony and pain meted out to them. However, criticism of the OAU's position of indifference, coupled with pressures from the United Nations (UN), eventually led to the 1979 UN-sponsored Monrovia Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa.²² These spurred African states to action and to concede, to a limited extent, a portion of their sovereign authority, even if only pertaining to human rights-related matters. This series of events led to the African Commission's creation under the African Charter.

Second, the attendant recognition of fundamental freedoms and the Commission's establishment brought about a relative limitation of state sovereignty. It gave rise to the authority of the African Commission to monitor, identify and otherwise recommend action(s) that reasonably warrant African governments to address domestic human rights concerns. It signalled a new era of continental thinking and expectation from states in that it set the tone for domestic human rights conditions to cease to be entirely deferred to states. It also demonstrated that states were to be increasingly monitored by the Commission for better human rights compliance. Simultaneously, the Charter's provision for Commission recommendations to not only states but also the OAU/AU Assembly manifestly opened up a possibility for decisive action by the OAU/AU should states fail to implement their article 1 obligation. This promising possibility, were it to be supported by the necessary political will of the AU Assembly, created room for a significant paradigm shift in the way state parties deal with the Commission's recommendations and decisions. However, this has hardly been the case.

The African Charter's one foot in the door of states' sovereignty, nonetheless, has not prevented the Commission from reiterating the sovereignty principle in favour of states. In *Gunme v Cameroon*,²³ the Commission observed that while a state could not rely on the excuses of sovereignty and territorial integrity to ignore allegations of political or ethnic domination by one group over another, the Charter could not be relied on to threaten the territorial integrity and sovereignty of a state party.

22 African Commission on Human and Peoples' Rights 'African Commission on Human and Peoples' Rights' <http://www.achpr.org/about/history/> (accessed 21 May 2018).

23 (2009) AHRLR 9 (ACHPR 2009) paras 181 & 191; *Katanga Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 5 ('[t]he Commission is obligated to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights'). Compare *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) paras 2 & 56.

Lastly, if status is a yardstick for compelling state compliance, then the African Commission's institutional essence largely is reinforced by its competence and extensive mandate. It is composed of eleven commissioners selected from amongst African personalities of the highest reputation and proven credentials in terms of integrity, impartiality, high moral standing and competence in human and peoples' rights. The commissioners are elected by the AU Assembly from a list of suitably qualified persons nominated by state parties to the African Charter. Commissioners serve in their personal capacity and no two commissioners may come from the same state. The kernel of these salient requirements is to have a commission that is not susceptible to national or diplomatic influence and cloaked with an international persona that commands the respect of all state parties. This intention is further illustrated by the Commission's ability to make its own rules and regulate its own proceedings.

In terms of the extensiveness of its mandate, the African Commission is one of the very few mechanisms in the world responsible for monitoring all three generations of human rights at the same time. Consistent with the idea in the African Charter that all human rights are indivisible, interrelated, interdependent and justiciable,²⁴ it has occasionally read into the Charter rights that are not expressly provided for, but which can be associated with existing substantive rights. As an apparatus for social change, the Commission presents a platform for supporting states in mainstreaming civil and political rights, socio-economic rights and development-related rights in domestic legislation. In the *SERAC* case, the Commission took a progressive approach towards the interpretation of the African Charter's text when it held that '[g]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties'.²⁵ In that case, the Commission also took on the responsibility of locating the right to housing in the African Charter, even where no express provision was made for it. It held that although the Charter does not categorically provide for the right to shelter, this right could be deduced from the combined provisions of articles 14, 16 and 18(1) pertaining to the right to enjoy the best attainable state of mental and physical health, the right to property and the protection of the family.²⁶

One manifest burden on the African Commission is its inability to derive the much-anticipated results that regular dialogue with states

24 Viljoen (n 20 above) 214; *Gambian mental health case* (n 12 above) para 48; para 1 Grand Bay Declaration; para 1 Kigali Declaration.

25 *SERAC case* (n 14 above) para 57; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) paras 19-20, where the Commission held that 'if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation'; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 144; Viljoen (n 20 above) 296.

26 *SERAC case* (n 14 above) paras 60-61; Viljoen (n 20 above) 217.

should otherwise have afforded it. Despite the increasing need to foster state compliance through frictionless and non-combative channels,²⁷ the goal of hosting fruitful state-commission engagement has not yielded the desired outcomes. Under the African Charter, states are invited to frequently engage with the Commission through the avenues of state participation, state reporting, promotional visits and communications, among others. These channels provide state parties with a veritable forum to frequently dialogue on the implementation of their regional and international obligations. To guide the engagement process, the African Commission has made comprehensive provisions in its revised Rules of Procedure of 2010 (Rules of Procedure) to not only facilitate state reporting and participation, but also to keep track of its recommendations.²⁸

As a general principle under the Rules of Procedure, state parties may be invited to discuss any human rights issue that is of interest to them.²⁹ Where they are not invited, they may request to participate and may propose the inclusion of matters in the African Commission's agenda or merely join the session to enlighten the Commission on issues within their peculiar knowledge. However, the state reporting process and communications procedure, by far, are the most important contact points between the Commission and states. In the case of the reporting process, state parties are availed an important opportunity to redeem their reporting obligations under article 62 of the African Charter and article 26 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (African Women's Protocol). To ease the process, the African Commission has laid down specific guidelines in addition to its Rules of Procedure on how national periodic reports should be developed and submitted.³⁰ It has also issued further guidelines on how reports should be made on specific thematic issues such as socio-economic and women's rights.³¹ After consideration of state parties' reports, the Commission issues what are often referred to as Concluding Observations.³²

In the case of communications, a similar stream of engagement is open to states.³³ Under this channel, state parties may initiate inter-state proceedings against other states, have proceedings instituted

27 Viljoen (n 20 above) 350.

28 Rule 78 Rules of Procedure.

29 Rules 62, 63(1) & 64 Rules of Procedure.

30 Guidelines for National Periodic Reports 1989.

31 State party reporting guidelines for economic, social and cultural rights in the African Charter on Human and Peoples' Rights 2010 (Tunis Reporting Guidelines); Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

32 Centre for Human Rights *A guide to the African human rights system* (2016) 28-29.

33 Exceptions are cases of extreme emergency where the communication depicts a situation of massive or serious human rights violations, in which case the African Commission should draw the attention of the AU Assembly and the Peace and Security Council to the matter pursuant to Rule 84 of its Rules of Procedure.

against them by individuals, groups or non-governmental organisations (NGOs) for breaches of the provisions of the African Charter or may request to participate as *amici curiae* in proceedings in which they originally were not parties. The adversarial nature of proceedings originated by communications in no way diminishes the rapport between states and the African Commission. Given that the Charter encourages the amicable settlement of disputes, the Commission facilitates the settlement process and plays a key role in drawing up a memorandum of understanding between the parties.³⁴ In *Henry Kalenga v Zambia*³⁵ the Commission amicably resolved a communication alleging false imprisonment against Zambia. This channel of engagement has equally been utilised by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). In 2016, the Children's Committee brokered a landmark settlement between the Institute for Human Rights and Development in Africa (IHRDA) and Malawi.³⁶ The IHRDA had sued Malawi because section 23(5) of the Malawian Constitution defined a child as any person below 16 years of age and was inconsistent with article 1 of the African Charter on the Rights and Welfare of the Child 1990 (African Children's Charter), which defines a child as anyone below 18 years. Following agreement between the parties, Malawi undertook constitutional reforms to bring its definition of the child in line with that of the African Children's Charter, thereby giving a striking example of circumstances where a state has employed the avenue of dialogue and constructive engagement to comply with its human rights obligations.

By itself, the African Commission's quasi-judicial status is not as consequential as the wilful defiance by state parties, and the non-binding nature of its recommendations does not necessarily warrant the negative exercise of state discretion. Indeed, had the Commission's interaction with states been productive, the chances of government reticence to recommendations after participating in the reporting process or the Commission's contentious proceedings would have been less likely.³⁷ In the face of their article 1 obligations, the *non-bindingness* of the Commission's recommendation does not outrightly permit states that consciously participate in the reporting process to thereafter flout so-called 'non-binding' decisions and recommendations. If a state is bound by its commitments under a treaty, which in this case are the duties to protect rights, adjust its laws and policies and report on those measures, then it must not be allowed, after making a report, to plead *non-bindingness*. It is paradoxical to undertake obligations under a treaty and thereafter to

34 Rule 109(6) Rules of Procedure.

35 (2000) AHRLR 321 (ACHPR 1994).

36 African Committee of Experts on the Rights and Welfare of the Child 'Amicable Settlement on Communication No 004' <http://www.acerwc.org/amicable-settlement-on-communication-no-004/> (accessed 21 May 2018).

37 Viljoen & Louw (n 6 above) 15.

refuse to comply with decisions which are made in furtherance of those undertakings. Such irony seriously affects the entrenchment of accountability in the African human rights system.

Indeed, different analytical approaches have been developed to explain why states comply with international law. For the purposes of this article, three approaches are identified, namely, the enforcement approach, the managerial approach and the process or social construction approach.³⁸ Under the enforcement approach, while realists argue that state compliance is less likely to occur if the cost of compliance outweighs its benefits, rational institutionalists are of the opinion that the monitoring, sanctioning and adjudicatory mechanisms of international organisations and regimes add to the burden of non-compliance by states.³⁹ On the contrary, the managerial approach contemplates that non-compliance is involuntary; that states often are not compliant with international law due to the limited resources at their disposal and, therefore, by no deliberate effort on their part.⁴⁰ Scholars in this school argue that state compliance with international rules is not necessarily persuaded by the threat of sanctions, but through 'the dynamic created by the treaty regimes' to which states belong.⁴¹ To keep compliance at an acceptable level, they argue, states must be allowed to operate within the interactive process of constant dialogue among parties to the treaty, the treaty body and the wider public.⁴² However, social constructivists argue that compliance with international rules can occur only where they are domestically recognised by states through a 'process' of legitimacy, socialisation and internalisation.⁴³

Intense contestations have emanated from these schools of thought as to why nations obey international law. Henkin states that with international law lacking an enforcement machinery, state implementation of international norms only occurs when it is in their interests to do so.⁴⁴ This suggests that compliance occurs based primarily on moral, rather than legal, considerations. It is predicated on the assumption that nations 'conform' to rather than 'obey' international rules. Koh explains that a state's compliance with

38 TA Börzel et al 'Obstinate and inefficient: Why member states do not comply with European law' (2010) 43 *Comparative Political Studies* 1363-1364. See also H Pickering 'Why do states mostly obey international law?' 4 February 2014 <http://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/> (accessed 8 April 2018), which identifies the theories of realism, liberalism and constructivism to explain why states comply with international norms.

39 Börzel et al (n 38 above) 1367-1368.

40 Börzel et al 1369.

41 HH Koh 'Why do nations obey international law?' (1997) *Faculty Scholarship Series* 2599-2601 http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers (accessed 4 April 2018).

42 A Chayes & AH Chayes *The new sovereignty: Compliance with international regulatory agreements* (1998) 25; Chayes et al (n 3 above) 39-62.

43 Börzel et al (n 38 above) 1370-1371; JT Checkel 'Why comply? Social learning and European identity change' (2001) 55 *International Organisation* 553-558.

44 L Henkin *How nations behave* (1979) 49.

international law, rather than an outright phenomenon, involves 'the complex process of institutional interaction' between global norms and domestic legal orders.⁴⁵ He argues that compliance by states with international norms can best be understood by reference to the process by which they interact with international rules in a way that translates international obligations into action.⁴⁶ However, there are those that argue that the 'process' argument does not sufficiently address the legal implications of state consent to a treaty. Under international law, the ratification of a treaty implies that a state agrees to be bound by its provisions and consequences and undertake to execute its provisions in good faith. This is understood by the Latin maxim *pacta sunt servanda*. According to Von Stein, the voluntariness of international treaties makes them legitimate and binding, and states are bound by the treaties to which they consent.⁴⁷ Lister equally argues that since international law functions as a single system, 'it must be consented to all together or not at all'.⁴⁸ Hence, Guzman stresses that the importance of consent to the functioning of the system warrants that deviation from it must be carried out with caution.⁴⁹

Therefore, considerations of process as a reference point in the compliance dialogue cannot preponderate over the significance and implication of consent to be bound and to ensure domestic compliance. As will be explained below, further consent to the Constitutive Act and the African Court Protocol to be bound by decisions of the AU and the Court even further reinforces the obligations of states to ensure compliance or be sanctioned.

2.2 Connecting the broken link between the African Charter obligations and the mandate of the African Commission

The founding of the African Commission as a quasi-judicial monitoring mechanism under the African Charter does not from the outset sanction state defiance. This is implicit because the Charter evidences an inextricable link between its substantive provisions and the Commission's mandate. The state obligation to be bound by the entire African Charter accordingly leaves no ostensible room for indiscriminate compliance, neither does it entertain subjective interpretations of the weight to be appropriated between its

45 Koh (n 41 above) 2602.

46 Koh 2618.

47 J von Stein 'Compliance with international law' 3 12 <http://www.janavonstein.org/uploads/4/6/1/9/46194525/isa-compendium-update.pdf> (accessed 8 April 2018).

48 M Lister 'The legitimating role of consent in international law' (2011) 11 *Chicago Journal of International Law* 663 690.

49 AT Guzman 'The case against consent in international law' (2012) *UC Berkeley: Berkeley Program in Law and Economics* <https://escholarship.org/uc/item/11p1v5fw> (accessed 9 April 2018); A Guzman 'The consent problem in international law' 10 March 2011 <https://escholarship.org/uc/item/04x8x174> (accessed 9 April 2018).

substantive provisions and the Commission's recommendations. If a progressive interpretation of state parties' omnibus obligations under article 1 is to be undertaken, then a favourable assumption can be made that the expectation of compliance with recommendations emanating from the Commission is implicit in that obligation. As such, by that article, states that have willingly asserted an intention to be bound by the Charter can arguably be understood to have invariably expressed a disposition to give positive, rather than dismissive, consideration to the Commission's recommendations.

Several indices support the argument in favour of a comprehensive state duty – that is, the intention expressed at the time of ratification to recognise rights and be favourably disposed to the African Commission's recommendations. First, under article 1 of the African Charter, state parties are obliged – not persuaded – to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to these.⁵⁰ This prescriptive obligation is further enhanced by the similarly voluntary state undertaking to submit periodic reports on the measures so adopted every two years. Analogous obligations abound in the African Women's Protocol, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa 2016 (Older Persons' Protocol) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities 2018 (Disability Rights Protocol).⁵¹ It follows, therefore, that the threefold obligation to recognise the enshrined rights, to adopt measures that bring domestic law in consonance with treaty prescriptions and to make regular periodic reports, indispensably highlights the essence of the African Commission's role in bringing about states' compliance with the Charter and its supplementary protocols.

Second, in addition to its reporting function, the African Commission probes into human rights issues in Africa and makes recommendations to governments that require implementation at the national level. No mode of conducting human rights inquiries or investigations is specifically prescribed under the Charter. Rather, the Commission may make inquiries through 'any appropriate method of investigation', such as through document gathering, studies and research into human rights issues, seminars and symposia, fact-finding missions to the state concerned or the consideration of communications (complaints) submitted to it.⁵² Apart from inquiries of these kinds, it is also vested with the authority to formulate and prescribe rules and principles pertaining to human and peoples' rights upon which African governments can, and often times should, legislate. To do this, the African Commission may act pursuant to an

50 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) paras 47 & 61.

51 Art 22(1) Older Persons' Protocol; art 28(3) Disability Rights Protocol.

52 Art 45(1)(a) African Charter.

inquiry or a need merely to give normative clarification on any of the Charter provisions or its supplementary protocols.

In all this, the African Commission finds itself making some pronouncement which congruently eventually requires some state action. From the consideration of state reports, the Commission issues Concluding Observations; from inquiries, it issues reports; and from communications decisions (and accompanying recommendations). In all three categories of outcomes, the Commission makes some form of recommendation or decision which, to be effective, demands some ostensible conduct by state parties. The pertinent question that soon comes to mind is whether a state party to which the Commission has issued such a recommendation is bound to implement it. The answer, in this author's view, is hardly a straightforward answer. Several considerations, rather than an outright 'no', will apply. While a state party is not automatically bound – on the surface of the plain text of the African Charter – to implement African Commission recommendations, it is bound by article 1. That commitment, arguably, is greatly complemented by the obligation to regularly submit periodic reports to the Commission, as a compliance monitor under article 62 of the African Charter and article 26 of the African Women's Protocol.⁵³ In effect, where a state fails to honour article 1 or any other treaty obligations, the African Commission can activate its 'recommending' power under article 45 of the Charter by making 'concluding observations' on potential measures to take to bring national action in line with the state's international human rights obligations.

Third, it is possible to argue that the obligation to take not only legislative but also 'other measures' to give effect to the provisions of the African Charter in article 1 contemplates practicable measures suggested by the African Commission. If progressively interpreted, and it is hoped that the African Court will have a chance to make a pronouncement on the issue in the nearest future, 'other measures' as envisaged by the Charter cannot be divorced from measures which the Commission suggests after a thorough consideration of a state party's report. Given its expertise and function, there is no doubt that it is in the most favourable position to recommend feasible and attainable measures that can help states comply with their obligations under the African Charter. Besides, by the tenure of article 45 of the Charter, it is a mandatory function of the Commission to 'give its views or make recommendations to governments'. The use of 'shall' implies that the Commission's duties under article 45 are not disjointed from the combined provisions of articles 1 and 62 of the Charter. Accordingly, it is suggested that the Commission's responsibility to make recommendations necessarily emanates from its duty to monitor state compliance with their obligations under article

53 n 51 above. As at 21 May 2018 the Older Persons' Protocol had five signatories and was yet to be ratified by any state.

1 and to report on this under article 62. Consequently, the absence of a categorical statement in the Charter on the 'bindingness' of the Commission's recommendations does not automatically imply that they are non-binding. Based on the above, it is inferred that state parties, nonetheless, cannot ignore such recommendations.

3 Non-compliance – A festering wound

The assumption that the quasi-judicial character of the African Commission and its non-binding recommendations may be grounds for non-compliance, even though misconceived, has of late precipitated a fast decline in the Commission's visibility on the monitoring and adjudicatory fronts. In its 30 years of operation, it has had an undulating record of achievement with its greatest gains in the mid-1990s and early 2000s when many African states returned to democratic rule. Today, many of the Commission's notable records are fast deteriorating in value, and what is left of its good old productive days are now rather statistics than practical human rights results. Whereas Africa boasts some 54 states that have ratified the African Charter and 37 states having ratified the African Women's Protocol, only some 47 states have reported under the Charter and a fraction of those under the Women's Protocol.⁵⁴ Currently, only ten states have submitted up-to-date reports.⁵⁵ Six states have never submitted any initial or periodic reports;⁵⁶ 20 states are late by between three and 13 reports each;⁵⁷ while some 18 states are late by one or two reports.⁵⁸ In other words, while 48 states have at one point or the other submitted reports, 44 states are currently in default. This is despite the fact that the African Commission has made some 67 missions to states with an average of two visits per state.⁵⁹ Undoubtedly, the 30-year period under review surely witnessed 'better attendance at Commission sessions', but it is only a superficial

54 African Union 'OAU/AU Treaties, Conventions, Protocols & Charters' <https://www.au.int/web/en/treaties/status> (accessed 5 April 2017).

55 Angola, Botswana, Côte d'Ivoire, DRC, Eritrea, Mauritania, Niger, Nigeria, Rwanda and Togo; African Commission on Human and Peoples' Rights 'State reporting' <http://www.achpr.org/states/> (accessed 21 May 2018).

56 Comoros, Equatorial Guinea, Guinea Bissau, São Tomé and Príncipe, Somalia and South Sudan; African Commission (n 55 above); M Killander 'Human rights developments in the African Union during 2014' (2015) 15 *African Human Rights Law Journal* 537.

57 Benin (5); Burundi (3); Cape Verde (13); Central African Republic (6); Chad (10); Congo (5); Egypt (7); The Gambia (12); Ghana (9); Guinea (10); Lesotho (8); Libya (3); Madagascar (4); Seychelles (7); Sudan (3); Swaziland (9); Tanzania (5); Tunisia (6); Zambia (6); and Zimbabwe (5); African Commission (n 55 above).

58 Algeria (1); Burkina Faso (1); Cameroon (2); Djibouti (2); Ethiopia (2); Gabon (2); Kenya (1); Liberia (2); Malawi (2); Mali (1); Mauritius (1); Mozambique (2); Namibia (1); Sahari Arab Democratic Republic (2); Senegal (2); Sierra Leone (2); South Africa (1); and Uganda (2); African Commission (n 55 above).

59 African Commission on Human and Peoples' Rights 'State reporting' <http://www.achpr.org/states/stats/> (accessed 21 May 2018).

indication that 'the African human rights system has become entrenched in the affairs of state'.⁶⁰ As Viljoen rightly notes, many states still disregard their reporting obligations.⁶¹

Also, irrespective of the African Commission having issued more than 12 Concluding Observations with accompanying recommendations, the margin of compliance by states has been anything but appreciable. For instance, in its Concluding Observations on Nigeria's 5th periodic report,⁶² the Commission made a litany of recommendations which included that Nigeria legislate on affirmative action for women, including the provision of quotas to increase women's representation in decision-making positions. As if the reference was inconsequential, the government acted in opposition. In fact, in 2016 Nigeria's senate voted down the Gender and Equal Opportunities Bill on 'religious grounds' notwithstanding the fact that it has domesticated the African Charter and ratified the African Women's Protocol.⁶³ Similarly, following the recommendations to Cameroon, Mozambique and Togo, no significant effort has been made to align domestic legislation and policy with their regional and international human rights obligations.⁶⁴ These incidents speak of the African Commission's fast-diminishing authority as an effective human rights watchdog on the continent.

The mortification of the African Commission's Concluding Observations have also not spared the Commission's decisions on communications lodged before it. States have equally shown a clear

60 Viljoen (n 20 above) 298.

61 As above.

62 African Commission on Human and Peoples' Rights 'Concluding Observations and Recommendations on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter on Human and Peoples' Rights (2011-2014)' 57th ordinary session 4-18 November 2015, Banjul, The Gambia http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf (accessed 5 April 2017).

63 M Payton 'Nigerian senate votes down gender equality bill due to "religious beliefs"' 17 March 2016 <http://www.independent.co.uk/news/world/africa/nigerian-senate-votes-down-gender-equality-bill-due-to-religious-beliefs-a6936021.html> (accessed 5 April 2017); 'Nigeria anger as Gender and Equal Opportunity Bill fails' BBC News 16 March 2016 <http://www.bbc.com/news/world-africa-35820970> (accessed 5 April 2017).

64 African Commission on Human and Peoples' Rights 'Concluding Observations on the 3rd periodic report of the Republic of Cameroon' 15th extraordinary session, 7-14 March 2014, Banjul, The Gambia http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf (accessed 5 April 2017); African Commission on Human and Peoples' Rights 'Concluding Observations and Recommendations on the second and combined periodic report of the Republic of Mozambique on the implementation of the African Charter on Human and Peoples' Rights (1999-2010)' 17th extraordinary session, 19-28 February 2015, Banjul, The Gambia http://www.achpr.org/files/sessions/17th-eo/conc-obs/1-1999-2010/concluding_observations_mozambique_eng.pdf (accessed 5 April 2017); African Commission 'Concluding Observations and Recommendations on the combined 3rd, 4th and 5th periodic report of the Republic of Togo' 51st ordinary session, 18 April-2 May 2012, Banjul, The Gambia http://www.achpr.org/files/sessions/51st/conc-obs/3rd-2003-2010/achpr51_concobs_3_4_5_togo_2012_eng.pdf (accessed 5 April 2017).

unwillingness to bring fellow state parties under the Commission's scrutiny. The only known inter-state communication was the *DRC* case.⁶⁵ Regarding other communications – those brought by individuals, groups and NGOs – there is hardly a celebrated case of state compliance. Between 1988 – when the first non-inter-state communication⁶⁶ was lodged – and 2018, the African Commission determined more than 280 communications, yet full compliance with its recommendations is contemplated to oscillate between 13 and 14 per cent.⁶⁷ In the notable *SERAC* case, for example, the Commission recommended to Nigeria to compensate the Ogoni victims of human rights violations, provide relief and resettlement assistance to the displaced, and undertake 'a comprehensive clean-up of lands and rivers damaged by oil operations'.⁶⁸ Not only has the Nigerian government failed to assuage the victims more than a decade later, but it is yet to undertake a comprehensive clean-up of their land and continues to permit a series of avoidable large-scale oil spillages by oil majors in the Niger Delta region.⁶⁹ In 2011 the UN Environment Programme (UNEP) issued a report indicating that the chronic exposure of the Ogoni people to the contaminated environment can

65 *DRC* case (n 16 above); Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*) ICJ (19 December 2005) (2005) ICJ Reports 2005 168; G Nzongola-Ntalaja 'The international dimensions of the Congo crisis' http://projectcongo.org/images/The_20International_20Dimensions_20of_20the_20Congo_20Crisis.pdf (accessed 5 April 2017); R Carroll 'Court orders Uganda to pay Congo damages' 20 December 2005 <https://www.theguardian.com/world/2005/dec/20/congo.uganda> (accessed 5 April 2017).

66 (2000) AHRLR 140 (ACHPR 1988).

67 African Commission (n 59 above); Viljoen & Louw (n 6 above) 2 & 5, who place compliance with the Commission's recommendations between 1994 and 2004 at 14%. In a recent study, full compliance between 2000 and 2015, however, is pegged at 13%, while partial compliance is estimated at 41%; VO Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five selected African states' unpublished LLD thesis, University of Pretoria, 2018 128.

68 *SERAC* case (n 14 above) para 71.

69 Amnesty International 'Nigeria: Hundreds of oil spills continue to blight Niger Delta' <https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/> (accessed 5 April 2017); Deutsche Welle 'Oil spills keep devastating Niger Delta' <http://www.dw.com/en/oil-spills-keep-devastating-niger-delta/a-18327732> (accessed 5 April 2017). The Nigerian federal government inaugurated a Governing Council and a Board of Trustees for the Hydrocarbon Pollution Remediation Project (HYPREP) in 2016 in response to the UNEP report, and is yet to comprehensively clean up polluted areas as recommended by the African Commission; L Nwabughiohu 'Ogoni clean up governing board, BoT: See full list of Buhari's appointees' *Vanguard* 5 August 2016 <https://www.vanguardngr.com/2016/08/ogoni-clean-up-governing-board-bot-see-full-list-of-buhari-appointees/> (accessed 5 April 2018); D Iheamachor 'MOSOP seeks end to delay in Ogoni clean-up' *Vanguard* 19 March 2018 <https://www.vanguardngr.com/2018/03/mosop-seeks-end-delay-ogoni-clean/> (accessed 5 April 2018).

lead to 'acute health impacts' and that it would take up to 30 years to clean up polluted lands.⁷⁰

A similar scenario of non-compliance is The Gambia's response to the Commission's recommendations in the *Gambian mental health case*,⁷¹ where the Gambian government was requested to undertake a review of the Lunatics Detention Act (LDA) enacted in 1917 and only last revised in 1964. The Gambia was urged to repeal and replace the LDA with new mental health legislation that aligns with the African Charter, adequately cater for the medical and material wellbeing of institutionalised Gambians and, in the interim, establish an expert board to review the cases of those detained under the LDA and make recommendation for their treatment or discharge.⁷² More than a decade later, The Gambia has only adopted a Mental Health Policy and Plan.⁷³ However, no concrete legislative action that directly responds to the Commission's recommendations has been taken on the issue by the government.⁷⁴ This might be considered to reflect the dominant trend of state parties' response to recommendations. Although the African Commission in its Rules⁷⁵ has devised a system for following up on its recommendations, it lacks a coherent strategy to respond to pressing cases.⁷⁶ The limitation of resources, the dearth of staff and the inability to adaptively engage the Assembly on the need to muster the required political will to take on non-compliant states puts its relevance in limbo.⁷⁷

The above scenarios arguably sustain the conclusion that state parties' persistent disregard for recommendations that are sanctioned by the African Charter is tantamount to a violation of their treaty obligations. On the surface, the failure to adhere to the Commission's recommendations may have a whiff of contempt for the institution, but the infraction, in effect, targets not only the spirit and letter of the African Charter, but also the African human rights system as a whole. If the African Commission's references to states are encouraged by an intended and legitimate official goal to bring an otherwise inconsistent domestic state of affairs in line with the Charter's

70 United Nations Environment Programme 'Environmental assessment of Ogoniland' (2011) 41 214 http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf (accessed 5 April 2017).

71 *Gambian mental health case* (n 12 above).

72 *Gambian mental health case* para 85.

73 World Health Organisation 'Best practices – WHO African region' http://www.who.int/mental_health/policy/country/BestPractices4_AFRO.pdf (accessed 12 May 2018).

74 Viljoen (n 1 above); C Mbazira 'The right to health and the nature of socio-economic rights obligations under the African Charter: The *Purohit* case' (2005) 6 *ESR Review* 17-18.

75 Rule 112 Rules of Procedure.

76 Viljoen (n 20 above) 295.

77 AU Assembly 'Decision on the report of activities of the African Commission on Human and Peoples' Rights Doc EX.CL/446 (XIII)' Assembly/AU/Dec.200(XI) Egypt (30 June-1 July 2008) para 4, which 'REITERATES the need for the ACHPR to be provided with adequate resources'.

prescriptions, then states' response to such references should and must be seen to favourably support them. A contrary riposte by states negates such genuine endeavour by the Commission and contravenes their article 1 obligations.

4 'Teething' the African Commission's recommendations

The current institutional and state-imposed obstacles beleaguering the African Commission cannot be expected to suddenly disappear. The AU policy-making organs, especially the Assembly, the Executive Council and the Peace and Security Council, must each rise to the challenge of complementing the important functions of the Commission with a more affirmative human rights approach supported by action. Since it would be pointless for states to adopt treaties that they have no interest in honouring, the AU must reaffirm its commitment to human rights as a core value of the AU and its preparedness to take more decisive action to enforce the human rights treaty obligations of member states should they neglect to do so. Only by being resolute will the AU truly manifest an attentiveness to protect such intrinsic continental principle.

As it stands, a chain reaction of state impunity is fast settling deeply into state conduct. Each time a violation of the African Charter occurs at no price and compliance with the African Commission's Recommendation on such violation is not enforced, it opens a floodgate of state impunity to regional commitments on all fronts. Such a regressive situation not only replays the failures of the defunct OAU, but also reinforces old beliefs that the AU is not very different from its predecessor. If the AU cannot be relied upon to stamp its feet against blatant violations of binding instruments such as the African Charter and non-compliance with recommendations made pursuant to it, then it is likely that it will also fail to do so when it matters most, for example, where states flout the orders of the African Court.⁷⁸ It would seem that the 'wound' of non-compliance with the orders of supra-national (quasi-)judicial institutions in Africa is festering. If unstopped, it may lead to unanticipated negative results such as the unfortunate demise of the Southern African Development Community (SADC) Tribunal⁷⁹ and the impulsive state disobedience to orders of

78 CS Martorana 'The new African Union: Will it promote enforcement of the decisions of the African Court on Human and Peoples' Rights?' (2009) 40 *George Washington International Law Review* 599.

79 K Premhidi 'The SADC Tribunal's disappointing rebirth' 9 September 2014 <http://hsf.org.za/resource-centre/hsf-briefs/the-sadc-tribunals-disappointing-rebirth> (accessed 6 April 2017); N Fritz 'Quiet death of an important SADC institution' *Mail & Guardian* 29 August 2014 <https://mg.co.za/article/2014-08-29-quiet-death-of-an-important-sadc-institution> (accessed 6 April 2017). See also the

the West African Community Court of Justice.⁸⁰

In the face of the African Commission's throes, two things are imperative: The AU Assembly cannot continue its indecisiveness, and the Commission's bureaucratic challenges must not continue unattended. These two issues must be addressed immediately. For the African Commission to reassert itself, a rearrangement of its functioning and work would need to take place in two ways. First, there must be a paradigm shift in the manner in which the AU responds to the Commission's reports and recommendations. The Assembly must not merely adopt the Commission's activity reports and recommendations. It will have to transform them into binding decisions enforceable under article 23(2) of the AU Constitutive Act. Second, a comprehensive overhaul of the Commission's bureaucracy is urgently needed if it is to have in place, in relation to states' article 1 obligations, a compliance monitoring structure that effectively relates with the African Court on a regular basis. This will require a re-organisation of the Commission in a way that significantly cuts down its bureaucratic bottlenecks, a financial oiling of its processes and an effective monitoring and enforcement unit well-resourced and equipped to track state (non)compliance as a functional litigation machinery ready to approach the African Court. These two points are expatiated on below.

4.1 From non-binding recommendations to binding AU decisions

To circumvent the first hurdle of non-compliance, it is vital that the African Commission's recommendations in its activity reports to the AU Executive Council and Assembly be considered and adopted as binding decisions of the Union.⁸¹ This is because under the African Charter, the Commission functions within the framework of the OAU/AU and is placed under the supervisory authority of the OAU/AU Assembly.⁸² The AU Assembly is the apex organ of the AU responsible

speech by the former president of the SADC Tribunal, AG Pillay 'SADC Tribunal dissolved by unanimous decision of SADC leaders' <http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf> (accessed 6 April 2017).

80 C Osioma 'Is the ECOWAS Court of Justice a toothless bulldog that only barks? Issues arising from the decision of the High Court of Accra in *Mr Chude Mba v The Republic of Ghana*' 4 March 2016 <http://www.spaajibade.com/resources/wp-content/uploads/2016/03/Is-the-ECOWAS-Court-of-Justice-a-Toothless-Bulldog-that-Only-Bark1.pdf> (accessed 5 April 2017); C Chikelu '27 ECOWAS court decisions awaiting compliance from member states – Odinkalu' *Leadership* 5 February 2015 <http://leadership.ng/news/409745/27-ecowas-court-decisions-awaiting-compliance-member-states-odinkalu> (accessed 6 April 2017); 'ECOWAS court frowns at non-enforcement of decisions by member states' *Premium Times* 22 April 2014 <http://www.premiumtimesng.com/news/159166-ecowas-court-frowns-non-enforcement-decisions-member-states.html> (accessed 6 April 2017); compare HS Adjolohoun 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the *Koraou* slavery judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 346.

81 Wachira & Ayinla (n 1 above) 469.

82 Arts 30, 41, 46, 47 & 49 African Charter.

for monitoring the implementation of AU standards, decisions and policies, and ensuring compliance by member states.⁸³ It superintends the actions of all AU organs and bodies and takes final decisions on their recommendations. In relation to the Commission, the Assembly conducts several important administrative and supervisory functions. First, under the African Charter, the African Commission has an obligation to submit to the Assembly a report on its activities, commonly known as an 'activity report'. The Assembly was responsible for considering, assessing and approving the activity reports of the Commission.⁸⁴ However, in 2003, the Assembly mandated the Executive Council to 'consider the Annual Activity Report of the Commission on Human and Peoples' Rights and to submit a report to it'.⁸⁵ The Assembly may act further based on the Executive Council's report. Second, it is responsible for electing or confirming the nomination of members of the Commission.⁸⁶ Third, it is responsible for approving the day-to-day running costs and remuneration of members and staff of the Commission. These form a substantial part of the AU's regular budget.⁸⁷ Also, prior to the establishment of the Peace and Security Council, the Assembly was responsible for dealing with urgent matters involving serious and massive violations brought to its attention by the African Commission.⁸⁸

The Assembly's responsibilities have tremendous implications for compliance with the African Commission's recommendations. It can transform the Commission's recommendations to AU decisions so as to become binding and enforceable on member states. The Constitutive Act highlights human rights as a key element of the AU's objectives and principles. Under article 3, it is provided that the objectives of the AU shall be to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments. It is also provided for in article 4 that the AU shall function in accordance with the principles of human rights. These provisions clearly indicate that human rights issues arising from key African human right instruments are real issues to which the Assembly must dutifully respond. They lend weight to the Assembly's role in supporting the Commission's effective functioning and deterring state defiance. Certainly, the Assembly's decisions are the most potent solution to the Commission's dilemma of non-compliance. The Assembly has the final say in all matters pertaining to the AU and the ability to ensure state compliance with African

83 Arts 6(2) & 9(1)(e) Constitutive Act; Viljoen (n 20 above) 179.

84 Arts 53 & 54 African Charter.

85 AU Assembly 'Decision on the 16th annual activity report of the African Commission on Human and Peoples' Rights Doc. Assembly/AU/7 (II)' Assembly/AU/Dec.11 (II) Mozambique (10-12 July 2003) para 5.

86 Arts 33 & 34 African Charter.

87 Art 44 African Charter.

88 Art 58 African Charter.

Commission recommendations if such decisions are supported by the threat of sanctions.

It is not incontrovertible that the African Charter itself has left unresolved the kind of action the AU Assembly (and the Executive Council) is expected to take on recommendations contained in the Commission's activity reports. Does the Charter require the AU executive organs to merely adopt the Commission's recommendations or does it anticipate that they go a step further to take expressly-couched decisions in relation to states indicted by the activity report? This is quite unclear. A cursory look at article 54 of the African Charter does not clearly indicate what the effect of the Assembly's adoption of the activity report is and, therefore, leaves unsettled an essential aspect of the Assembly's function.⁸⁹ The mist created by this lack of clarity has led to ambivalent explanations of the consequence to be attached to the AU's decision adopting the Commission's activity reports. On the one hand, a mere adoption of the report elicits two equally-valid interpretations. The first suggests that the Assembly's *adoption* of the report, which details in it the Commission's recommendations to culpable states, can be understood to be a binding decision of sorts.⁹⁰ In this case, it will have binding consequences for the states concerned, and sanctions may lie in the event of a breach. Although suggestive, this is not the current approach of the AU Assembly.⁹¹ The alternative view is that the mere adoption of the African Commission's activity report without more does not by itself transform the Commission's recommendations into binding AU decisions. At the moment this seems to be the AU's approach: Decisions adopting the Commission's report do not outrightly impose an expectation of compliance by the states concerned.

On the other hand, it is suggested that for there to be a transformation of the African Commission's supposedly non-binding recommendations to binding AU decisions, the AU Assembly and the Executive Council must not simply approve the activity report but must also expressly adopt a decision, the wording of which must be clear in that the state(s) concerned in each given case must take steps to implement the Commission's recommendations. By adopting this interpretation, it is expected that the decision must be premised on the recommendations of the Commission and must clearly require the states concerned in the activity report to take certain steps to bring them in line with their obligations under the African Charter.

Arguably, the appropriation of oversight powers over the African Commission to the OAU/AU Assembly (rather than state parties to the

89 See also arts 58 & 59 of the African Charter.

90 Viljoen (n 20 above) 181; Viljoen & Louw (n 6 above).

91 AU Assembly (n 77 above) para 2, which also illustrates that the Assembly only 'adopts and authorises' the publication of the 23rd and 24th Activity Reports of the African Commission on Human and Peoples' Rights and their Annexures.

African Charter) was foreseeably to procure and deploy its superintending authority over non-compliant states. While it is acknowledged that the OAU/AU in the past has adopted resolutions urging states' compliance with Commission decisions and recommendations,⁹² this has hardly been adequate. The Assembly's failure, therefore, to take decisive action on errant states in part is a neglect of its responsibility that has contributed to the declining fortunes of the African Commission. Indeed, it was such similar failures of the defunct OAU Assembly over the Commission's reports and recommendations that partly laid the foundation for the transformation of its functions under the AU Constitutive Act into a more forceful one. The realisation that unless there was a complete overhaul of the old arrangement, nothing meaningful could be done about contemptuous states, led to the decision to empower the AU Assembly with the authority to impose sanctions pursuant to article 23(2) of the Constitutive Act.

Although the AU Assembly's responsibility to take binding decisions on Commission recommendations is both a political and discretionary one, it must be exercised – it is argued – circumstantially and judiciously. It should not be left to the vagaries of politics and the foibles of discretion.⁹³ Rather, it must be a responsibility triggered by the expectations of law (in this case, human rights law) to guarantee the rights enshrined in its instruments, and the requirement to allow states to comply voluntarily with its dictates or be compelled where they neglect to do so. This responsibility to act may be considered inchoate, in a sense, in that it is activated only after a state, having been afforded an opportunity to comply with Commission recommendations and its article 1 obligation, fails to do so. The responsibility must be triggered by circumstances of fact in relation to the victim(s) and the actor – state or non-state – and weighed against the essence and intentment of the law, whenever there has been a finding of a human rights violation.

As established earlier in the article the inseparable connection between the substantive guarantees and the African Commission's monitoring function in the African Charter demand that recommendations made in response to findings of violations be complied with. Where states fail to comply, the Commission is permitted by the Charter not just to submit a report on its activities but also to make recommendation(s) to the Assembly on the way forward. Since the Commission is entitled to make recommendations

92 See, eg, AU Executive Council 'Decision on the activities of the African Commission on Human and Peoples' Rights (ACHPR)' Doc EX.CL/998 (XXX) EX.CL/Dec.948(XXX) Ethiopia (25-27 January 2017) para 4, where it merely 'encourages member states to comply with decisions and recommendations of the ACHPR, and inform the ACHPR of the measures taken'.

93 Viljoen & Louw (n 6 above) 13 argue that '[t]he implementation of treaty body findings depends on the will of state parties'.

in its reports as it considers fit,⁹⁴ the underlying role of the AU Assembly in its affairs is a clear indication that the Charter left the final determination of the enforceability of recommendations to the Assembly.

Another useful political avenue that the African Commission can explore to circumvent the obstacle of non-compliance is the Peace and Security Council (PSC). Whilst no role is created for the PSC under the African Charter, the Assembly, which has superintending functions over the Commission, can delegate any of its powers and functions to any other AU organ.⁹⁵ Pursuant to the exercise of this power, the Assembly established the PSC as an essential organ of the AU responsible for the promotion of peace, security and stability in Africa.⁹⁶ In this sense, the PSC is regarded as possessing a human rights mandate that, very conveniently, complements that of the African Commission.

More importantly, the PSC is guided by the principles enshrined in the Constitutive Act, the UN Charter, the Universal Declaration of Human Rights and, in particular, 'fundamental human rights and freedoms'.⁹⁷ Given the role of the AU Chairperson in the day-to-day running of the African Commission, the PSC, in conjunction with the AU Chairperson, is also tasked with the responsibility of following up on the progress made by member states towards the protection of human rights and fundamental freedoms.⁹⁸ In this way, the PSC maintains a close working relationship with the Commission 'in all matters relevant to its objectives and mandate'.⁹⁹ Specifically, the Commission is obliged to bring to the PSC's attention any information relevant to the PSC's objectives and mandate.¹⁰⁰

Considering the African Commission's lack of a comprehensive policy to deal with urgent cases, the delegation of the Assembly's role under the African Charter to the PSC (as a more accessible, responsive and specialised organ) offers an appropriate solution to the Commission's pending quagmire. In line with the African Charter and its Rules of Procedure, the Commission can and should refer urgent cases involving massive or serious violations of human and peoples' rights to the Assembly and the PSC.¹⁰¹ This is instructive because not only does the PSC hold meetings at more regular intervals than the Assembly, but its decisions are binding on AU member states. Member states agree that the PSC acts on their behalf, accept to implement its decisions, and undertake to fully cooperate with it to

94 Arts 52, 53, 54 & 58 African Charter.

95 Art 9(2) Constitutive Act.

96 Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002 (PSC Protocol) art 6.

97 Art 4(c) PSC Protocol.

98 Art 7(1)(m) PSC Protocol.

99 Art 19 PSC Protocol.

100 As above.

101 Art 58 African Charter; Rule 84(1) Rules of Procedure.

prevent, manage and resolve crises and conflicts in Africa.¹⁰² In order to ensure compliance with these obligations, the PSC can decide on any issue that dwells on its mandate and exercise the Assembly's delegated powers.¹⁰³ Rather than dissipate time and energy on getting its recommendations to pass at the AU bi-annual summits, the Commission can utilise the forum of the PSC and the good office of the AU Chairperson to pursue effective momentary measures in responding to pressing cases and ensuring compliance.

4.2 Consequences of non-compliance with AU decisions

AU decisions and directives are generally binding and enforceable on all member states.¹⁰⁴ Any member state that fails to comply with AU laws, decisions, principles and policies may be subject to sanctions. Article 23(2) suggests that in the face of non-compliance, the imposition of sanctions is entirely a matter of will. Although no criteria are prescribed for the exercise of the AU's sanctioning power and, indeed, some discretion is warranted, this is not necessarily a limitation to its exercise. This is so because to guide the judicious exercise of its discretion on the imposition of sanctions, the Assembly established the Rules of Procedure of the AU Assembly 2002 (AU Assembly Rules).¹⁰⁵ The basic conditions for the exercise of such sanctioning power are the non-payment of assessed contributions; violations of the principles enshrined in the Constitutive Act and its Rules; non-compliance with AU decisions; or unconstitutional changes of government. Where there is a finding of any of these elements, it is a matter for which a sanction can be determined and imposed.¹⁰⁶ The Assembly poignantly emphasises that '[t]he non-implementation of Regulations and Directives shall attract appropriate sanctions in accordance with article 23 of the Constitutive Act'.¹⁰⁷ Decisions, directives and regulations are automatically binding and enforceable 30 days after they have been published in the AU official journal or as specified in the decision.¹⁰⁸

Under the Assembly's Rules, the responsibility to recommend sanctions is delegated to the Executive Council. Once recommended, the Assembly must give its approval under article 23(2) where a member state contravenes AU decisions and policies and has shown no reasonable cause for its failure.¹⁰⁹ Potential sanctions for non-

102 Arts 7(2), (3) & (4) PSC Protocol.

103 Art 7(1)(r) PSC Protocol.

104 Art 23(2) Constitutive Act; arts 7(2), (3) & (4) PSC Protocol.

105 African Union 'Rules of Procedure of the Assembly of the Union' Assembly of the African Union 1st ordinary session 9-10 July 2002, Durban, South Africa ASS/AU/2(I)-a http://www.au2002.gov.za/docs/summit_council/assemrop.pdf (accessed 8 April 2017).

106 Rule 4(1)(g) AU Assembly Rules.

107 Rule 33(2) AU Assembly Rules.

108 Rules 4(1)(g), 34(1)(2) & 36 AU Assembly Rules.

109 Rule 36(1) AU Assembly Rules.

compliance are a denial of transportation and communication links with other AU member states, a denial of AU Assembly hosting rights or a denial of its voting right in the sessions of the Assembly.¹¹⁰ Other measures may be of a political or economic nature.

Considering the ability of decision-making organs of the AU such as the Assembly, the Executive Council and the PSC to not only promote but also enforce state compliance with the African Commission's recommendations, it is evident that the African human rights system will achieve no meaningful progress if inaction continues to dictate the AU's position. It being clear that semi-judicial bodies such as the Commission and the Committee, and judicial bodies such as the African Court must depend heavily on AU action against non-compliant states, the conditions for triggering these organs to act must flow from the breach of AU principles and instruments more than the political whim of member states. The violation of regional instruments, by itself, is sufficient to activate the AU's disciplinary action against guilty states. The failure to abide by a Commission decision or recommendation, made after a finding of state culpability, is evidence of a sustained violation of AU instruments and principles. Accordingly, a recommendation to the AU Executive Council and the Assembly should be considered and decided upon in line with the Assembly's Rules to enforce compliance.

5 The African Court channel: Enforcing compliance through litigation

The other major alternative to the tragedy of non-compliance having binding consequences for states is the African Court. As of today, the African Court is the only truly functional judicial organ of the AU.¹¹¹ Established in 1998, it complements the protective mandate of the African Commission as enshrined in the African Charter and related instruments.¹¹² The Court has jurisdiction over 'all cases and disputes submitted to it' concerning the interpretation and application of the

110 Rules 36(2), 5(3) & 26(2) AU Assembly Rules.

111 The multiplication of treaties and the slow pace of ratification of the amended African Court Protocols have delayed the transformed African Court from coming to fruition and substantially deflated the objective of continental accountability. Eg, the Protocol on the Statute of the African Court of Justice and Human Rights 2008, which is intended to fuse the AU Court of Justice established under articles 5(1)(d) and 18 of the Constitutive Act with the current African Court has been ratified by only six AU member states as at June 2017, and the Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights 2014 (Malabo Protocol) has not been ratified by any African state as at June 2017.

112 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998 (African Court Protocol) arts 1 & 2; arts 28 & 32 African Women's Protocol; arts 22(3) & (4) Older Persons' Protocol; D Juma 'Access to the African Court on Human and Peoples' Rights: A case of the poacher turned gamekeeper' (2007) 4 *Essex Human Rights Review* 7.

Charter, its Protocol, other relevant human rights treaties ratified by a respondent state, and over the determination of any question pertaining to its jurisdiction or lack of it.¹¹³ The fact that the African Commission and the African Court share the mandate to protect human and peoples' rights on the continent in itself creates room for potential conflict. Conscious of this and as a strategy to ensure coherence and co-ordination in their separate but reinforcing roles, the two institutions mutually agree to meet at least once a year and as often as is necessary in furtherance of their complementary and important institutional relationship.¹¹⁴ In 2010, both institutions adopted synchronised rules of procedure for this purpose.

Based on their rapport, the African Court offers an important procedural route to enforce state compliance in scenarios where the African Commission has (i) established a violation of the provisions of the African Charter or related instruments; and (ii) made recommendations that are neglected by a state party. This enforcement channel is relevant to the Commission's deteriorating role for two reasons. First, the Court's jurisdiction is binding on all state parties to the African Court Protocol.¹¹⁵ Parties to the Protocol accept its jurisdiction in the event that cases are submitted against them and undertake to comply with its judgment in any matter to which they are parties.¹¹⁶ They equally guarantee the execution of its judgments. By this token, states are not at liberty to disregard the Court's judgment in the same way they treat recommendations.

Second, the African Commission has unfettered access to the African Court through which it can seek to enforce states' article 1 obligations.¹¹⁷ Under the African Court Protocol, access is granted to the Commission; a complaining state party (in the case of inter-state cases); a respondent state party; a state party whose national is the victim of a human rights abuse; and African intergovernmental organisations.¹¹⁸ By contrast, individuals and NGOs do not have 'direct' or automatic access to the Court unless the state against which they complain has ratified the Protocol and made a declaration pursuant to article 34(6).¹¹⁹ Without such declaration, they cannot directly access the Court to either seek redress for a breach of the

113 Arts 3(1)(2) & 7 African Court Protocol.

114 Rules 114 & 115 Rules of Procedure; Rule 29 Rules of Court 2010.

115 *Atabong Atemnkeng v African Union* App 14/2011 paras 40-41.

116 Art 30 African Court Protocol; Rule 61(5) Rules of Court: 'The judgment of the Court shall be binding on the parties.'

117 Art 5(1)(a) African Court Protocol; Rules 118(3) & (4) Rules of Procedure.

118 In *African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights* Request 002/2013 para 100(3), the Court held that the Committee is not an African intergovernmental organisation within the meaning and tenure of art 5(1)(e) of the African Court Protocol and so does not have a right of access to the Court.

119 Art 5(3) African Court Protocol; *Alexandre v Cameroon and Nigeria* App 008/2011 para 10.

substantive Charter provisions or enforce compliance with recommendations. However, the African Commission's unfettered access to the African Court in respect of states that have ratified the Charter and the Court Protocol provides individuals and NGOs – or victims generally – indirect access.¹²⁰ It can institute cases, on behalf of applicants in communications filed before it or on its own motion, against states for violations of African Charter rights or pursue the enforcement of its recommendations pursuant to their article 1 obligations.

Regrettably, the African Commission has hardly risen to the occasion to explore strategic litigation to enforce compliance under article 1 of the African Charter. The gross indifference to a large number of its over 280 decided communications still has not prompted the Commission to take on errant states through the avenue of the African Court. Due to its own failure, it has only instituted three cases before the Court since the Court's inception in 2002, and obtained only two decisions on the merits.¹²¹ When the Commission first approached the Court in 2011, it performed so woefully that its application was struck out for want of diligent prosecution.¹²²

The efficacy of the African Commission's follow-up mechanism on state compliance and its willingness to utilise litigation before the African Court have been challenged. In *Femi Falana v African Commission on Human and Peoples' Rights*,¹²³ the applicant, a renowned Nigerian lawyer, was frustrated that his request to the Commission to refer a particular communication to the African Court on behalf of alleged victims of massive and serious human rights violations in Burundi had been ignored. Strangely, in a rather awkward procedural move, he approached the African Court for an order requesting the Commission to refer the communication against Burundi to the Court. Because of glaring procedural issues, his application failed. Despite the failure, the case achieved the intended result: It exposed the latent deficiencies associated with the African Commission's follow-up machinery and the impact of its current bureaucratic composition on its functioning.

120 Centre for Human Rights (n 32 above) 45-46.

121 *African Commission on Human and Peoples' Rights v Libya* App 002/2013 (judgment), where the Court found a violation of the rights of Saif al-Islam Gaddafi under the Charter, ordered Libya to terminate the illegal criminal procedure before the domestic court and report on the measures taken within 60 days of the judgment. A few weeks after the Court's judgment, he was pardoned of the death sentence and released; R Donaghy 'Gaddafi's son Saif al-Islam "released from prison in Libya"' *Middle East Eye* 7 July 2016 <http://www.middleeasteye.net/news/gaddafi-s-son-released-prison-libya-1632253259>; *African Commission on Human and Peoples' Rights v Kenya* App 006/2012; merits decision of 26 May 2017 (accessed 30 June 2018).

122 *African Commission on Human and Peoples' Rights v Libya* App 004/2011 para 26.

123 App 019/2015 paras 3-4.

The Commission's failure to exploit litigation not only justifies the growing criticism of it, but also reveals the need for its urgent reorganisation. One of the reasons for its fast-declining authority is its inability to evolve, adapt its bureaucratic structure to meet the urgency of human rights issues, and respond appropriately. It has failed to enlarge the size of its Secretariat and staff, especially the number of legal officers that treat communications and follow up on decisions and recommendations. Staff training and retraining are also low. Accordingly, the Commission is unable to effectively track its recommendations and the extent of implementation. Second, it is acknowledged that the Commission cannot shoulder all the blame for its shortcomings. Being poorly resourced and catered for, it thrives on the very meagre resources the AU allocates to it to stay afloat. It has no serious investment in its mandate, and barely enough legal officers for the whole continent. Given the enormity of its responsibility and the 54 states it currently monitors, it is expected that it should have at least two times its present professional work force, if it is to make judicious use of litigation before the African Court.

6 Conclusion

The long and short of the argument here is that the article 1 obligation to give effect to the provisions of the African Charter is more broadly linked to the Commission's mandate to give its views or recommendations to governments. This connection raises an implied expectation that its recommendations, made pursuant to articles 1 and 45 of the Charter, will be given positive consideration and effect by states. Where states fail to do so, the Commission's report and recommendations to the AU Executive Council and the Assembly can be decided upon and so become binding on the states concerned. Failure to comply with AU decisions may warrant sanctions under article 23(2) of the Constitutive Act. Alternatively, the Commission may enforce compliance with its recommendations by approaching the African Court under article 5(1)(a) of the African Court Protocol to enforce a non-compliant state's article 1 obligation.

The above propositions are not without potential challenges. If the patent and latent obstacles currently bedevilling the enforcement of the African Commission's decisions and recommendations must be bypassed in order to further the goal of human rights protection in Africa, then both the AU and the Commission must be prepared to take bold steps. Whilst it has been argued that legal considerations rather than political persuasions should be the primary trigger of AU action against state defiance, nothing seems to work where the necessary political will is lacking.¹²⁴ Two points summarise this unfortunate state of affairs. First, whereas the breach of its instruments

124 Viljoen & Louw (n 6 above) 15.

and core principles should ordinarily activate the AU sanctioning process, neither the AU Executive Council nor the Assembly have in the past swung into action to penalise errant states for breaches of their article 1 obligations and non-compliance with recommendations. Second, the proposal to overhaul the functioning and bureaucracy of the Commission also hinges largely on the political will of the AU executive organs to increase allocations to the Commission. If the Commission's Secretariat is to be well-resourced and transformed for better outcomes, then the political will of the AU is an inescapable imperative.

Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union

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Summary

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted under article 66 of the African Charter on Human and Peoples' Rights to supplement the provisions on women's human rights protection of the Charter. Consequently, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights are the human rights bodies at the African Union level that are mandated to oversee the implementation of the African Women's Protocol. Until now the African Union has had three judicial and human rights institutions, namely, the African Commission, the African Court and the African Committee of Experts on the Rights and Welfare of the Child, to oversee the implementation of the human rights set out in its different treaties. To emphasise the importance of the realisation of women's human rights, the African Commission created the mechanism of the Special Rapporteur on the Rights of Women in Africa. Despite the adoption of the African Women's Protocol and the mechanism of the Special Rapporteur on the Rights of Women in Africa, violations of women's human rights across the continent remain widespread. The article's contention is that, as the African Commission has several aspects to its mandate and has to oversee all aspects of human rights in Africa, women's human rights do not receive the attention they require. The article analyses whether existing mechanisms sufficiently ensure the oversight of the Women's Protocol and proposes alternatives that the African Union may explore to do so.

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Key words: *African Women's Protocol; women's rights; African Commission; African Court; Special Rapporteur on the Rights of Women in Africa*

1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹ (African Women's Protocol) was adopted to fill the gaps that existed in the framework for the protection of women's rights in Africa.² The Women's Protocol was adopted as a special protocol to supplement the provisions of women's rights protection of the African Charter on Human and Peoples' Rights (African Charter) under article 66 of the Charter. Consequently, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court), which were established under article 30 of the African Charter and article 1 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), respectively, are the human rights bodies mandated to oversee the implementation of the African Women's Protocol.

Until now the African Union (AU) has had three judicial and human rights institutions, namely, the African Commission, the African Court and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), to oversee the implementation of the human rights set out in its different treaties. To emphasise the importance of the realisation of women's human rights, the African Commission created the mechanism of the Special Rapporteur on the Rights of Women in Africa during its 25th ordinary session in 1999³ to, amongst other things, 'serve as a focal point for the promotion and protection of the rights of women in Africa amongst the 11 members of the African Commission'.⁴

In addition to considering 2010-2020 as the African Women's Decade, the AU declared the year 2015 as the Year of Women's Empowerment and Development towards Africa's Agenda 2063, and the year 2016 as the African Year of Human Rights with Particular Focus on the Rights of Women. This demonstrates that the AU is dedicated to the protection and promotion of women's human rights. However, despite the adoption of the African Women's Protocol and the mechanism of the Special Rapporteur on the Rights of Women in

1 Adopted on 11 July 2003, entered into force on 25 November 2005.

2 F Banda 'Protocol to the African Charter on the Rights of Women in Africa' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 445.

3 ACHPR/res.38 (XXV).

4 Website of the African Commission, <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed 7 August 2016).

Africa, violations of women's human rights across the continent remain widespread. This article's contention is that, as the African Commission has several mandates and has to oversee all aspects of human rights in Africa, women's rights do not receive the attention they require. The article proposes alternative mechanisms to oversee the implementation of the African Women's Protocol.

The article generally seeks to analyse the viability of alternative mechanisms to oversee the implementation of the Women's Protocol. It first elaborates on the Protocol as an instrument for change. Second, it analyses the existing human rights mechanisms within the African Commission for the protection of women's rights with a view to highlighting the shortcomings of the existing framework. Third, it analyses the alternative frameworks that the AU could consider. Fourth, it provides conclusions and recommendations.

2 African Women's Protocol as an instrument for change

Without the African Women's Protocol violations of women's rights were not dealt with adequately at the institutional level, since the African Commission was not successful in making 'state parties accountable for gender-based discrimination occurring within their boundaries'.⁵ The drafting of the African Charter did not take into account women's rights and the challenges they face.⁶ For instance, several provisions of the African Charter⁷ highlight the importance of traditions for African society, but there is no mention of harmful traditional practices which violate women's rights.

Analysing the African Women's Protocol, one can see why there was a need for an African document since its rights are beyond the scope of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Women's Protocol deals with the rights of African women with 'greater specificity'.⁸ The adoption of the Women's Protocol has been regarded as a 'long-awaited realisation' since it took eight years for the text to be

5 F Banda *Women, law and human rights: An African perspective* (2005) 66-67.

6 As above.

7 Para 5 of the Preamble to the African Charter: 'Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterise their reflection on the concept of human and peoples' rights'; art 17(3) of the African Charter: 'The promotion and protection of morals and traditional values recognised by the community shall be the duty of the state'; art 18(2) of the African Charter: 'The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.'

8 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 21.

'endorsed'.⁹ The Women's Protocol, although not 'perfect', may be viewed as a 'bill of rights for African women', since it contains specific provisions that address the 'specific problems and issues' of women across the continent.¹⁰ The Women's Protocol 'primarily brings into the open' the African Charter's 'shrouded premise that women are included in its protective scope'.¹¹ It brings the provisions of the CEDAW home by including specific issues African women face.¹²

However, despite 49 signatures and 39 ratifications of the African Women's Protocol,¹³ women's human rights across the continent continue to be violated. This means that the implementation of the Protocol faces challenges. The article recognises that one of the reasons for the non-realisation of the rights in the Women's Protocol might be its monitoring bodies not fulfilling their purpose.

3 Analysing the existing mechanisms to oversee the implementation of the African Women's Protocol

The Women's Protocol was adopted under article 66 of the African Charter to supplement the provisions of the latter regarding the protection of women's rights. Consequently, the African Commission and the African Court, the institutions responsible for the oversight of the African Charter, are also the organs responsible for overseeing the implementation of the African Women's Protocol. The African Commission has several entry points through which it can oversee the implementation of the Protocol. However, the Special Rapporteur on the Rights of Women in Africa (Special Rapporteur) serves as focal point for women's rights within the African Commission. The other institution that is responsible for interpreting matters 'arising from the application or implementation' of the Women's Protocol is the African Court.¹⁴ This section analyses how the African Court and the African Commission have contributed to overseeing the implementation of the African Women's Protocol.

3.1 African Court

The African Court was established under article 1 of the African Court Protocol, to 'complement the protective mandate' of the African

9 FJ Mohamed 'African Union Protocol on the Rights of Women in Africa: The SOAWR Campaign' in R Musa et al *Breathing life into the African Union Protocol on Women's Rights in Africa* (2006) 15.

10 As above.

11 F Viljoen *International human rights law in Africa* (2012) 253.

12 As above.

13 African Union 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 7 September 2017 https://au.int/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa.pdf (accessed 4 May 2018).

14 Art 27 African Women's Protocol.

Commission.¹⁵ Its jurisdiction comprises the African Charter and, by extension, the African Women's Protocol. Hence, being a judicial organ with binding decisions, it could be a good platform for overseeing the implementation of the Women's Protocol.

The African Court has been approached in relation to violations of the Women's Protocol but as of May 2018, only one of these cases has been decided on its merits. The case of *APDF & IHRDA v Republic of Mali*¹⁶ may be considered ground-breaking since it is the first case where the African Court has found violations of the African Women's Protocol. The Court decided that several articles of the Persons and Family Code of Mali were in contravention of the African Women's Protocol. These articles provide for the minimum age of marriage to be below 18; there is no verification of parties' consent to marriage; and unequal inheritance for women. These provisions further led to the conclusion that Mali does not respect the obligation to eliminate practices or traditions that are harmful to women and children. The Court ordered Mali to amend its Persons and Family Code to ensure that it abides by its obligations under international law, including under the African Women's Protocol. This case is the only case at the AU level in which violations of the Women's Protocol have been found. Hence, it may safely be concluded that if all the preliminary conditions are met, the African Court would not hesitate to decide against a country on issues that concern the Women's Protocol.

Nevertheless, in most cases applicants find it difficult to satisfy the admissibility requirements, and cases are dismissed without them being considered on the merits. For instance, in the case of *Mariam Kouma & Another v Republic of Mali*,¹⁷ where the applicants had alleged violations of several articles of the African Women's Protocol, although the Court admitted that it has jurisdiction, the case was held inadmissible on the basis of non-exhaustion of local remedies. Additionally, in an advisory opinion concerning article 6(d) of the African Women's Protocol, the African Court held that it could not give the opinion requested since the case was not brought by institutions recognised by the AU.¹⁸

As noted, the African Court's accessibility conditions make it difficult for human rights activists to use it as a platform for overseeing the implementation of the African Women's Protocol. First, a state has to make a declaration under article 34(6) of the African Court

15 Art 2 African Court Protocol.

16 *Association pour le progrès et la défense des droits des femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* Application 46/2016 11 May 2018.

17 Application 40/2016 21 March 2018.

18 *Request for Advisory Opinion by the Centre for Human Rights & Others* 001/2016 28 September 2017.

Protocol¹⁹ for non-governmental organisations (NGOs) to bring a case against it.²⁰ As of 15 June 2017, only seven countries have made such a declaration,²¹ including Mali, which explains why the applicants were able to approach the Court in the case of *APDF & IHRDA v Mali*. The small number of declarations made under article 34(6) of the African Court Protocol demonstrates that African countries are fearful of giving NGOs the opportunity to hold them accountable for any human rights violation.

Second, there are many barriers to accessing the African Court. The advisory opinions submitted by the Socio-Economic Rights and Accountability Project²² and the Centre for Human Rights²³ are indicative of the barriers to accessing the African Court since there are but a few selected NGOs that are recognised by the AU itself, and not by any of its organs.

Therefore, although the African Court could be a good avenue to hold state parties accountable for women's rights violations, its accessibility criteria might act as a challenge. As such, despite the fact that the African Court has proved itself worthy of making a decision concerning violations of the African Women's Protocol, such a positive stride might be repeated any time soon.

3.2 African Commission

The African Commission was established under article 30 of the African Charter. The Commission has various mandates and functions, one of which is to 'ensure the protection of human and peoples' rights under conditions laid' under the African Charter and, by extension, under the African Women's Protocol. This section analyses the role of the African Commission in overseeing the implementation of the Women's Protocol through, first, the mechanism of the Special Rapporteur and, second, the communication procedure.

19 Art 34(6) of the African Court Protocol: 'At the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.'

20 Art 5(3) of the African Court Protocol: 'The Court may entitle relevant non-governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.'

21 African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' 15 June 2017 https://www.au.int/web/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 28 June 2017).

22 African Court *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* 001/2013 26 May 2017 [http://en.african-court.org/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Request%20for%20Advisory%20Opinion%20No.001-2013-Socio-%20Economic%20Rights%20and%20Accountability%20Project%20\(SERAP\)%20ENGLISH%20\(2\).pdf](http://en.african-court.org/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Request%20for%20Advisory%20Opinion%20No.001-2013-Socio-%20Economic%20Rights%20and%20Accountability%20Project%20(SERAP)%20ENGLISH%20(2).pdf) (accessed 27 June 2017).

23 *Centre for Human Rights & Others* (n 17 above).

3.2.1 Special Rapporteur on the Rights of Women in Africa

The African Commission established the mechanism of the Special Rapporteur in 1999 to ensure that women's human rights receive sufficient attention while exercising its functions under article 45(1)(a) of the African Commission.²⁴ The mechanism of the Special Rapporteur was the first mechanism created by the African Commission to 'place particular emphasis on the problems and rights specific to women in Africa'.²⁵

The mechanism of the Special Rapporteur has several mandates, which are²⁶ to 'serve as a focal point for the promotion and protection of the rights of women in Africa amongst the 11 members of the African Commission'; to 'assist African governments in the development and implementation of their policies of promotion and protection of the rights of women in Africa, particularly in line with the domestication' of the African Women's Protocol and 'the general harmonisation of national legislation to the rights guaranteed' therein; to 'undertake promotional and fact-finding missions' in African countries²⁷ to 'disseminate' the provisions of the African Women's Protocol and to 'investigate on the situation of women's rights'; to follow up the implementation of the African Women's Protocol; to 'draft resolutions on the situation on women in the various African countries'; to 'carry a comparative study' on women's human rights situations in different African countries'; to 'define guidelines for state reporting' under the African Women's Protocol'; and to collaborate with other relevant stakeholders in the protection and promotion of women's human rights.

Since the article critically analyses the existing mechanisms to oversee the implementation of the African Women's Protocol, the following paragraphs demonstrate the challenges that the mechanism of the Special Rapporteur faces in the exercise of its mandates. These challenges are the basis for the motivation of alternatives to oversee the implementation of the Women's Protocol.

Fact-finding or promotional missions

As a commissioner of the African Commission, the Special Rapporteur usually takes part in the fact-finding or promotion missions of the African Commission without undertaking the mission on its own. For

24 African Commission 'Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa' ACHPR/res.38 (XXV) 99 (1999) para 4: 'Referring to the provisions of article 45(1)(a) of the African Charter on Human and Peoples' Rights'.

25 Website of the African Commission, <http://www.achpr.org/mechanisms/rights-of-women/> (accessed 4 May 2018).

26 Website of the African Commission, <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed 2 October 2016).

27 See the activity reports of the Special Rapporteur for information about the missions undertaken <http://www.achpr.org/mechanisms/rights-of-women/> (accessed 17 March 2016).

instance, during the 60th ordinary session of the African Commission (held from 8 to 22 May in Niger), on 10 May the Special Rapporteur, in collaboration with the Centre for Human Rights, had an advocacy meeting with relevant government stakeholders from Niger concerning the ratification of the African Women's Protocol.²⁸ Moreover, from 13 to 18 January 2014 the Special Rapporteur took part in a promotion mission to the Gabonese Republic with another commissioner of the African Commission.²⁹ The objectives of this mission, amongst others, were to promote the African Women's Protocol and to gather information on the situation of women in the country.³⁰ The mission discussed in depth the issue of women's human rights with different stakeholders. However, the discussion is centred on women's rights only when the Special Rapporteur accompanies the delegation or when the objective of the mission is to promote the African Women's Protocol. For instance, during the mission to Uganda in 2013 by commissioners of the African Commission, despite the fact that a meeting was held with the Minister of Gender, Labour and Development,³¹ the discussions were very shallow compared to the mission in Gabon. Since there was a need to meet several stakeholders in different areas in the promotion mission to Uganda, the focus could not be on women's rights. Similarly, during the promotion mission to the Republic of the Seychelles, although the commissioner undertaking the mission did meet with stakeholders working on women's rights, the focus was shared since the mission had to consult with stakeholders working in other areas of human rights as well.³²

This article's contention is that the Special Rapporteur forms part of the African Commission which is responsible for a whole range of human rights contained in the African Charter, in addition to the African Women's Protocol. Consequently, the missions of the African Commission have to be balanced and have to cover all the human rights that it is responsible for. Even when the Special Rapporteur is part of a mission, she cannot fully investigate the implementation of the African Women's Protocol since there is a need to assess the implementation of other rights in the African Charter. As a result, the focus is shared. Such a situation would not arise if, similar to the

28 On file with author.

29 Website of the African Commission, <http://www.achpr.org/mission-reports/> (accessed 2 October 2016).

30 African Commission 'Report of the human rights promotion mission to the Gabonese Republic 13-18 January 2014' para 5 http://www.achpr.org/files/sessions/54th/mission-reports/gabon-promo-2014/achpr54os_misrep_promo_gabon_2014_eng.pdf (accessed 2 October 2016).

31 African Commission 'Report of the joint promotion mission undertaken to the Republic of Uganda 25-30 August 2013' paras 62-79.

32 See generally African Commission 'Report of the human rights promotion mission to the Republic of Seychelles 6-10 April 2016' http://www.achpr.org/files/news/2016/09/d231/report_of_achpr_promotion_mission_to_seychelles_6_10_april_2015.pdf (accessed 2 October 2016).

CEDAW Committee or the African Children's Committee,³³ there was a human rights institution at the AU level which would focus solely on the implementation of the African Women's Protocol. Such an institution could undertake missions on different areas of women's human rights to have a more comprehensive understanding of the implementation of those particular rights compared to the African Commission's missions, which only provide for an overview of certain rights protected by the African Women's Protocol.

Guidelines on state reporting

The state reporting procedure is an important component of the implementation of the African Women's Protocol since it 'serves as a forum for constructive dialogue' and allows the African Commission to 'monitor' the implementation of the document in question and to 'identify the challenges' that the country faces in the implementation of the provisions therein.³⁴ The state reporting procedure offers states the opportunity to keep up to date with the steps they have taken in the implementation of the African Women's Protocol. As such, it acts as an incentive for states to implement the provisions of the Women's Protocol so as not to be shamed by the African Commission in its Concluding Observations.

In line with its mandate, the Special Rapporteur in 2009 prompted the African Commission to issue guidelines on state reporting under the African Women's Protocol. These guidelines direct states on how to prepare their state reports taking into account the African Women's Protocol. Twenty-eight countries have since 2009 submitted state reports to the Commission,³⁵ and 18 of these had ratified the African Women's Protocol at the time of the submission.³⁶ However, of these 18 countries, only seven have prepared their state reports while making reference to the guidelines on state reporting under the African Women's Protocol.³⁷

The Special Rapporteur has been emphasising the guidelines on state reporting by jointly holding a side session with the Centre for Human Rights, University of Pretoria, on the topic during the ordinary sessions of the African Commission. However, such sessions last only one hour. Moreover, the Special Rapporteur has supported initiatives by the Centre for Human Rights to train government officials on the

33 Website of the African Children's Committee <http://www.acerwc.org/investigation/missions-reports/> (accessed 28 June 2017): The African Children's Committee has undertaken two advocacy missions to South Sudan and Central African Republic respectively in 2014.

34 Website of the African Commission <http://www.achpr.org/states/> (accessed 2 October 2016).

35 Website of the African Commission <http://www.achpr.org/states/reports-and-concluding-observations/> (accessed 28 June 2017).

36 Website of the African Commission <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 28 June 2017).

37 The author analysed the state reports submitted.

state reporting guidelines under the African Women's Protocol, and the reports that have been prepared according to the guidelines are from countries whose officials have attended the training.

The above demonstrates that if there is in-depth engagement with states on the state reporting guidelines under the African Women's Protocol, these guidelines might be followed during the preparation of state reports. The Special Rapporteur has to rely on civil society organisations (CSOs) to popularise these guidelines.

Investigations, studies and research

Article 45(1)(a) of the African Charter provides that the African Commission has the following function:

to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to governments.

As such, the African Commission has to undertake studies and research in the area of human rights. For instance, during the 16th extraordinary session of the African Commission, a resolution was passed to the effect that a study would be conducted by the African Commission on child marriage, the report of which would be adopted during its 57th ordinary session.³⁸

Moreover, the African Commission can carry out investigations under article 46 of the African Charter. The African Charter does not define the scope and different methods of investigation.³⁹ However, the Rules of Procedure of the African Commission adopted in 2010 (Rules of Procedure) state that the African Commission may invite 'specialised agencies, intergovernmental organisations and United Nations bodies' to 'submit reports on the implementation of the African Charter in areas of common concern'.⁴⁰ However, since the adoption of the Rules, the African Commission has not undertaken any investigation under the African Women's Protocol.

The Special Rapporteur, being the focal point for women's rights in the African Commission, has pushed for the adoption of a resolution for the study on child marriages. Since the African Commission already has many other mandates, it is difficult for it to focus its resources on investigations, research and studies that focus only on women's human rights.

38 African Commission 'Resolution on the need to conduct a study on child marriage in Africa' adopted during the 16th extraordinary session of the African Commission 20-29 July 2014.

39 CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20 *Human Rights Quarterly* 2 242.

40 Rule 65(3) Rules of Procedure.

Resolutions, General Comments and guidelines

Article 45(1)(b) of the African Charter mandates the African Commission to 'formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations'. The African Commission has executed this mandate by adopting guidelines, resolutions and General Comments on different human rights issues, including women's human rights.

The African Commission, with the motivation of the Special Rapporteur and with the support of the Centre for Human Rights, 'proactively'⁴¹ issued General Comments on articles 14(1)(d) and (e) of the African Women's Protocol in 2012 (General Comment 1) under article 45(1)(b) of the African Charter. These General Comments are intended to be 'used by human rights treaty bodies to interpret the provisions of relevant international legal instruments, with a view to assisting states to fulfil their obligations under such instruments'.⁴² Furthermore, the African Commission adopted a General Comment on articles 14(1)(a), (b), (c) and (f) and articles 14(2)(a) and (c) of the African Women's Protocol in 2014, again through the Special Rapporteur and with the support of IPAS Africa Alliance, an NGO.⁴³

In addition to the above two General Comments under article 14 of the African Women's Protocol, the African Commission and the African Children's Committee in 2017 jointly adopted a General Comment under article 6(b) of the African Women's Protocol and under article 21(2) of the African Children's Charter on ending child marriage.⁴⁴ This process was spearheaded by the Special Rapporteur with the technical support of the Centre for Human Rights.

The above General Comments of the African Commission were all spearheaded by the Special Rapporteur and had the technical assistance of NGOs. Although one might say that the adoption of the three General Comments represents a milestone in the protection and promotion of women's human rights, this article contends that on a continent where women's rights violations are so widespread, there is a need for more guidance to as to how states can implement the provisions of the African Women's Protocol.

41 R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 67.

42 General Comments on arts 14(1)(d) and (e) of the African Women's Protocol para 1.

43 Preface to General Comment 2 http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf (accessed 28 June 2017).

44 General Comment on child marriage http://www.achpr.org/files/news/2018/01/d321/joint_gc_acerwc_achpr_ending_child_marriage_eng.pdf (accessed 4 May 2018).

3.2.2 Communication procedure

The African Commission is mandated to receive cases relating to violations of the provisions of the African Charter⁴⁵ and, by extension, those of the African Women's Protocol since the African Women's Protocol was adopted as a supplement to the African Charter.

An analysis of a database of the African Commission's cases demonstrates that the Commission has dealt with women's rights issues. For instance, the Commission has used article 18(3) of the African Charter to find a violation of women's human rights in the case of *Egyptian Initiative for Personal Rights & Interights v Egypt II* in 2011.⁴⁶ However, Egypt had not yet ratified the African Women's Protocol and although the incidents happened after the entering into force of the instrument, the complainants could not refer to the document. Moreover, the coming into force of the Protocol might have motivated the decision of the African Commission.

Nevertheless, unlike the African Court, the African Commission has not yet decided a case concerning the violation of a right protected by the African Women's Protocol. This may have been due to the wide mandate of the African Commission which tends to overshadow women's human rights.

4 Proposed reforms at the African Union level

The above section has demonstrated that the overseeing mechanisms at the AU level have undertaken steps to ensure that the rights in the African Women's Protocol are implemented. Nevertheless, despite strides towards the promotion and protection of human rights, the AU still has to take steps to ensure that its mechanisms optimally warrant that the rights in the African Women's Protocol are realised. There is thus a need for reforms at the AU Union level that would accelerate the protection and promotion of women's rights.

4.1 Creation of a new institution to oversee the implementation of the African Women's Protocol

The African Commission faces challenges in overseeing the African Women's Protocol since it has several other functions that shift its focus from women's rights. One proposed reform could be the creation of another institution that oversees the implementation of the Women's Protocol. The creation of such an institution will ensure that the AU has one specific institution focusing solely on the Women's Protocol, thereby ensuring that women's human rights across the continent receive the attention they deserve. The inspiration for the

45 Arts 47-59 of the African Charter: In the event a state has violated the provisions of the African Charter, another state or individuals or organisations can submit a communication to the African Charter alleging such violations.

46 (2011) AHRLR 90 (ACHPR 2011).

creation of such an institution comes from, first, the CEDAW Committee and, second, the fact that there already is an institution at the AU level that focuses on one particular vulnerable group, namely, children. Therefore, the institution proposed to be established could be inspired by a combined institutional structure of the CEDAW Committee and the African Children's Committee. However, the creation of the proposed institution would need a legal basis, and this can be achieved either by the adoption of a new protocol to the African Charter which establishes the proposed institution, or by amending the African Women's Protocol.

As discussed above, article 66 of the African Charter provides for the adoption of special protocols to supplement its provisions. One possible means of providing the legal basis for the creation of the proposed institution could be the adoption of a new protocol under article 66 of the African Charter. This would not be the first time that the AU would be using article 66 of the African Charter to adopt a protocol to create an institution. The African Court Protocol was adopted under article 66 setting up the African Court, hence confirming that an institution to oversee the African Charter could be created using the same article. However, this article's contention is that the process of the adoption of a new treaty to establish an institution might be too lengthy and might require too many resources since it requires discussions before the adoption and it might take time for states to ratify it.⁴⁷ It might face the same situation as the African Court Protocol, and the procedure may take more than ten years, which is too long, taking into consideration that there are urgent women's rights issues that need to be addressed on the continent.

Another way of providing the legal basis for the proposed institution is through the amendment of the African Women's Protocol by following the steps provided by article 30 of the Women's Protocol. In such a situation, a state party must submit a written proposal for the amendment of the African Women's Protocol to the Chairperson of the AU Commission.⁴⁸ Thereafter, the AU Commission has to transmit the written proposal to the other state parties who, in the form of the Assembly, will review the proposal within one year of submission.⁴⁹ The amendment to include the creation of the proposed institution could be adopted by a simple majority and it would come into force 30 days after the Chairperson of the AU Commission receives the notice of the vote.⁵⁰

47 Website of the African Court <http://en.african-court.org/index.php/about-us/establishment> (accessed on 27 June 2017). The African Court Protocol was adopted on 9 June 1998 and came into force only on 25 January 2004.

48 Arts 30(1) & (2) African Women's Protocol.

49 Arts 30(2) & (3) African Women's Protocol.

50 Arts 30(4) & (5) African Women's Protocol.

Once the amendment has been effected, the AU could seek funding from either states or international partners to set up the proposed institution. Inspired by the African Children's Committee, this institution may be called the African Committee of Experts on the Rights of Women in Africa. This procedure should involve consultations with states, the African Commission, more specifically the Special Rapporteur, the African Children's Committee, members of the CEDAW Committee, and experts and NGOs working in the area of women's human rights.

However, the creation of such an institution is not without challenges. The fact that the AU has not considered the creation of an institution that has women's rights as focus indicates that this step faces challenges. The most obvious challenge hindering the creation of an institution to oversee the implementation of the African Women's Protocol is a lack of resources. An institution focusing on the implementation of the Women's Protocol at the AU level would require substantial resources for its functioning, and this may be a deterrent factor. For instance, the budget of the African Commission for the year 2017 is US \$5 525 705,⁵¹ whereas that of the African Children's Committee is US \$827 556.⁵¹

Since the proposed institution would be modelled on the African Children's Committee, its budget would be similar, which represents about one-sixth of the budget of the African Commission. A logical solution to find the resources for the new institution would be to divert one-sixth of the African Commission's budget to it. However, it is doubtful that within the African Commission, the budget dedicated to women's human rights is that figure, given the panoply of rights the African Commission has to deal with. Therefore, even if there were the creation of a new institution which would oversee the implementation of the African Women's Protocol, the budget of the African Commission would not substantially decrease and there will be a need to raise additional funds.

This lack of financial resources may be the greatest challenge in the creation of a new institution for the implementation of the African Women's Protocol since, as it is, the AU has to rely on its international partners to support the largest part of its budget. The creation of a new institution to oversee the implementation of the African Women's Protocol would imply seeking more financial support from international partners, and this would be dependent upon whether such support would be available.

However, this article's contention is that, given the focus on women's human rights in the contemporary world, the AU must be motivated to raise funds towards the creation of an institution which would oversee the implementation of the African Women's Protocol.

51 African Union 'Decision on the budget of the African Union for the 2017 financial year' adopted during the 29th ordinary session of the Executive Council 13-15 July 2016 EX.CL/Dec.919(XXIX) 2.

The Women's Protocol has been regarded as an instrument of change in the women's human rights landscape across the continent, and it would be futile to have such a document if the rights therein are not fully realised. Although there have been strides towards the protection of women's human rights, progress is very slow. To speed up the implementation of the African Women's Protocol, the AU might consider the setting up of an additional institution and must be dedicated to raise funding from either states or from international partners.

4.2 Reinforcing existing mechanisms

The African Women's Protocol was 'needed' since there had been 'insufficient attention' paid to existing women's rights standards on the continent.⁵² The proposal to have an additional instrument to regulate women's rights across the continent faced some resistance.⁵³ It was argued that the African Charter already contains provisions which, if subjected to a 'progressive and expansive interpretive approach', will ensure that women's rights in Africa are protected.⁵⁴ The discussion about a new instrument for women's rights in Africa faced challenges because the existing norms had not been exploited to its full: '[T]he normative and institutional potential of the existing system should be used to its full potential.'⁵⁵

A parallel may be drawn between arguments against the adoption of the African Women's Protocol and for the reinforcement of existing mechanisms at the AU level to ensure its implementation. The African Commission and, specifically, the mechanism of the Special Rapporteur, have not been given the opportunity to fully execute their mandate. The AU could reinforce its existing mechanisms. For instance, the mechanism of the Special Rapporteur could be reviewed to ensure that it operates to its maximum. As indicated above, the Special Rapporteur has limited resources in terms of time and personnel and, hence, cannot fulfil its mandate to the optimum. The AU needs to enhance the support it provides to the mechanism of the Special Rapporteur to ensure that the mechanism has the required tools to oversee the implementation of the African Women's Protocol.

4.3 Creation of working groups/independent experts/additional special rapporteurs

Similar to the Special Rapporteur, the African Commission has established several other mechanisms to ensure that human rights across the continent are realised. One of these mechanisms are

52 Banda (n 2 above) 445.

53 Viljoen (n 8 above) 18.

54 Viljoen 18-19.

55 Viljoen 19.

Working Groups on different human rights issues.⁵⁶ At the moment the Special Rapporteur is the only special mechanism that has as its sole focus the implementation of the African Women's Protocol, even if other mechanisms deal with issues affecting women. The Special Rapporteur usually is only one person and, hence, there is a constraint in terms of human resources. The creation of a Working Group on the Rights of Women at the African Commission level would ensure that the oversight of the African Women's Protocol is not left to only one person who has limited time, but instead to a group of persons who would have more resources to deal with women's rights.

As discussed above, the African Commission and the Special Rapporteur have limited resources to undertake country visits and, therefore, they cannot fully realise their promotional mandates. The AU has recognised this challenge and in 2014 established the mechanism of the Special Rapporteur on Child Marriage that focuses on issues affecting the girl child.⁵⁷ The Special Rapporteur on Child Marriage has been working in collaboration with the Special Rapporteur on the Rights of Women on child marriage issues. Similar to the mechanism of the Special Rapporteur on Child Marriage, the AU can consider the appointment of additional special rapporteurs that deal with issues that gravely affect women across the continent.

Moreover, at the United Nations level, there are independent experts that are mandated to 'report and advise on human rights from a thematic or country-specific perspective'.⁵⁸ The African Commission could be inspired by this practice and set up independent experts responsible for a particular country or theme. The creation of independent experts at the African Commission level would ensure that sufficient time and resources are dedicated to a specific women's rights issue or country. The independent experts can each be responsible for one topic that affects women's rights and can approach donors to fund their mandates.

5 Conclusion

The article sought to assess whether the existing mechanisms at the AU level are sufficient to ensure the proper implementation of the African Women's Protocol. It first demonstrated how the African Women's Protocol was adopted as an instrument for change regarding women's human rights in Africa. It then pointed out that despite the presence of the African Women's Protocol, women's rights across the continent continue to be violated. The article then

56 Website of the African Commission <http://www.achpr.org/mechanisms/> (accessed 7 May 2018).

57 Website of the African Union <https://au.int/en/newsevents/28021/appointment-special-rapporteur-child-marriage> (accessed 21 May 2018).

58 Website of the United Nations <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (accessed 7 May 2018).

suggested that the reasons for the continued violations could be linked to the fact that the existing mechanisms do not fully focus on the implementation of the Women's Protocol due to resources constraints. This section demonstrated that, despite the presence of the mechanism of the Special Rapporteur and the will to ensure the implementation of the African Women's Protocol, the existing institutions have a panoply of rights to focus on and face challenges in the form of their accessibility. It then proposed alternatives in the form of the creation of a new institution, the reinforcement of existing mechanisms, and the creation of working groups/independent experts/additional special rapporteurs that the AU could consider for overseeing the implementation of the African Women's Protocol.

However appealing these alternatives seem, one needs to bear in mind that they would also require resources, be it financial, human or in terms of time, on the part of the AU. Nevertheless, the AU has committed itself to ensure that women's rights across the continent are realised, and it is now time to take further steps towards that goal. Despite the fact that some progress has been made in this field, much still needs to be done, and the AU needs to review its existing *modus operandi* with a view to ensuring that state parties implement the rights set out in the African Women's Protocol.

Realising women's rights across the continent will also need the full support of civil society organisations. As of now, civil society organisations have provided full support to the AU towards the implementation of the rights set out in the African Women's Protocol. It is recommended that the AU deepens its partnership with civil society organisations and consults them on the way forward.

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Civic space and human rights advocacy in the extractive industry in Uganda: Implications of the 2016 Non-Governmental Organisations Act for oil and gas civil society organisations

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Summary

The discovery of oil and gas in Uganda has been identified as having the potential to transform Uganda's economy, moving Uganda away from a predominantly low-income to a competitive upper-middle-income country by 2040. However, this discovery has precipitated human rights violations and abuses, especially in the Albertine Graben, where the oil exploration activities are concentrated. For example, the acquisition of land for oil-related infrastructure has changed the patterns of use of land and water, and people are already experiencing negative effects, such as a loss of livelihood and resources. Civil society organisations aimed at addressing these human rights issues in the sector face a number of hurdles despite constitutional protection and ratification of international instruments that

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guarantee fundamental rights for CSO operations in the country. Currently, CSOs are governed by the recently-enacted Non-Governmental Organisations Act of 2016. This Act is accompanied by other laws, such as the Public Order Management Act. These laws have created several stumbling blocks that have frustrated CSO efforts in the fulfilment of their mandate. The weight of these laws is especially felt by NGOs working on sensitive issues such as natural resource governance. The article analyses the impact of the legislative framework governing CSOs, specifically the NGO Act, on organisations addressing or working on oil and gas issues in Uganda. In addition to the NGO Act, other pieces of legislation that have a direct bearing on the activities of these organisations are also analysed.

Key words: *freedom of association; civil society; extractive industry; non-governmental organisations; civic space*

1 Introduction

Notwithstanding Uganda's constitutional provisions and the ratification of several international human rights instruments providing for freedom of expression and association, civic space in the country has constantly been under threat. Civil society operations in the country are continually affected by the enactment of legislation that either directly or indirectly affects civil society work. Legislations such as the Public Order Management Act (POMA) are used by security agencies to frustrate civic engagement, in some cases by deploying security personnel to disperse gatherings and arrest those involved. This state of affairs may be understood in the context of the global war against terrorism, which has seen many governments use terrorism as a pretext for undermining civil liberties. The Arab Spring uprisings, which saw the fall of governments in Egypt and Tunisia, pushed governments, especially in Africa, into a frenzied restriction on freedom of assembly and expression.

It is in this spirit that the promulgation of the Non-Governmental Organisations Act of 2016 (NGO Act) was received by civil society organisations (CSOs) in Uganda. Many CSOs perceived the law as a ploy by the state to tighten its grip on civil society engagement in the country. From its inception as the NGO Bill, the proposed law received a negative response from CSOs, with a number of them publishing position papers challenging some clauses and the spirit of the law.¹ The objectors urged government to ensure that the

1 See Human Dignity Trust 'Note on the Non-Governmental Organisations Bill', http://www.humandignitytrust.org/note_on_the_NGO_Bill_2015_20150506.pdf (accessed 8 August 2016); Human Rights Network Uganda 'Analysis of the Non-Governmental Organisations Bill, 2015' <http://www.hurinet.or.ug/ANALYSIS-OF-NGO-BILL.pdf.2015-8-13> (accessed 20 March 2017); Human Rights Awareness and Promotion Forum 'The NGO Bill 2015 and its practical and human rights implications on organisations working on the rights of marginalised persons' May 2015.

proposed law conformed to internationally-acceptable standards on freedom of expression and association.² CSOs called for the revision of several clauses in the Bill. Nonetheless, although some contentious provisions eventually were removed, the Act as it currently stands continues to present a threat to the operations of CSOs.

In the civil society sector the organisations that have been most affected by state regulation include those working on issues of anti-corruption; electoral democracy; governance; and human rights, as well as those working on accountability and social justice issues in the extractive sector. This article is concerned with CSOs working on issues relating to oil and gas. These CSOs have committed their time and resources to promoting access to information for citizens in order to promote citizen participation in shaping and monitoring sector developments. In addition to informing the policy and legal framework for the oil and gas sector, a number of organisations have been involved in advocacy for fair and just acquisition of land for sector activities, environmental protection, as well as advocacy for transparency and accountability in the management of revenues from the oil sector.

The Ugandan government in 2006 announced that large deposits of oil had been discovered in several parts of the country, most of it in the Albertine region in Western Uganda.³ Presently, three oil companies, Total, CNOOC and Tullow, have production licences, and control 54,9 per cent, 33,3 per cent and 11,76 per cent respectively of the upstream oil sector. Nonetheless, the oil sector has also been characterised by controversy arising from government secrecy regarding matters in this sector, including the terms of the concessions to oil companies; the exact extent of deposits; the impact on the environment; the role of players in the sector; and revenue so far collected and how these revenues are managed. Other concerns relate to the acquisition of land by both the government and private sector to facilitate oil activities and revenue-sharing with local communities. Indeed, negative experiences of other African countries has encouraged CSOs in Uganda to raise public interest in this sector, albeit causing some discomfort on the part of government. For this reason government has moved fast to regulate the activities of CSOs in this sector, sometimes by imposing *ad hoc* regulations applicable only to organisations working on oil and gas and in the oil-rich region. The 2016 NGO Act is viewed as part of the range of regulatory laws that could negatively impact on the work of CSOs working on oil and gas.

2 As above.

3 See 'Uganda confirms new oil deposits' *BBC News* <http://www.bbc.com/news/business-19637784> (accessed 18 January 2017).

2 Context of oil and gas and civil society work

Mineral wealth, including oil and gas (also commonly known as the extractive sector), for some time has been viewed as a vehicle through which countries can attain economic development and overcome poverty. In fact, the extractive sector in Uganda has been identified by government as an important segment of the economy contributing to the transformation of the country. The flagship Vision 2040 has earmarked oil and mineral resources as critical in changing 'the country from a predominantly low income to a competitive upper middle income country within 30 years with a per capita income of USD 9 500'.⁴

However, the paradox is that, although there are exceptions such as Botswana, mineral wealth in Africa has not brought much-needed economic development. It has, for instance, been demonstrated that some countries with vast mineral wealth, such as the Democratic Republic of the Congo (DRC), Chad and Sudan-Khartoum, are among countries at the bottom of the United Nations Development Programme (UNDP) Human Development Index.⁵

The paradox, dubbed 'the oil curse', has been associated with a number of factors, the most important of which is bad resource governance.⁶ Among others, bad governance in the sector has been characterised by a lack of transparency at different levels, which the World Bank has described to include (i) the award of contracts and licences; (ii) the regulation and monitoring of operations; (iii) the collection of taxes and royalties; (iv) revenue management and allocation; and (v) the implementation of sustainable development policies and projects.⁷ It is as a result of this that since the 1990s much time and resources have been invested in campaigns aimed at promoting transparency in the oil sector and putting in place norms and standards for this purpose. The justification for taking this direction came after a number of civil society expositions and the publication of corruption and abuse in the extractive sector.⁸ These campaigns were successful to the extent that international financial institutions such as the World Bank included conditions relating to

4 See Government of Uganda, Vision 2040 'A transformed Ugandan society from a peasant to a modern and prosperous country within 30 years', <http://gov.ug/content/uganda-vision-2040> (accessed 21 March 2017).

5 J van Alstine et al 'Resource governance dynamics: The challenges of "new oil" in Uganda' (2014) 40 *Resources Policy* 48.

6 Van Alstine et al (n 5 above) 49.

7 See EM Alba 'Extractive industries value chain' Extractive Industries for Development Series 3, Africa Region Working Paper Series 125, The World Bank Washington, as referenced by Van Alstine et al (n 5 above) 50.

8 See A Gillies 'Reputational concerns and the emergence of oil sector transparency as an international norm' (2010) 54 *International Studies Quarterly* 103.

transparency as prerequisites for funding some extractive-related projects.⁹

In addition to the governance deficits, but also as a result of these, activities in the extractive industry have given rise to a number of human rights issues. There have been issues around economic, social and cultural rights as well as civil and political rights, and issues that have been viewed from the perspective both of violations by state actors and abuses by non-state actors. It has indeed been asserted that oil, gas and mining industry operations too often go hand-in-hand with allegations of human rights abuses.¹⁰ According to Oil Change International:¹¹

There is an alarming record of human rights abuses by governments and corporations associated with fossil fuel operations, resulting in appropriation of land, forced relocation, and even the brutal and sometimes deadly suppression of critics. In addition to strong evidence for a 'repression effect' from oil production, in which resource wealth thwarts democratisation by enabling governments to better fund internal security, dependence on oil is associated with a higher likelihood of civil war. Additionally, oil production has been found to negatively impact gender equality by reducing the number of women in the labor force, which reduces their political influence.

To prove the above, cases of human rights violations associated with oil are mentioned, including those from Nigeria and Myanmar, but the United States of America and Canada as well, which demonstrates that this problem is not restricted to developing countries.¹² The Energy Justice Network on its website lists a total of 29 conflicts associated with oil from countries across the world.¹³ The Niger Delta in Nigeria stands out in Africa as an area where oil activities have wrecked people's lives and brought about untold suffering resulting from serious environmental degradation, unlawful evictions and the destruction of houses and food gardens, as well as deaths.¹⁴ The killing of Ogoni human rights activist Sarowiwa by the Nigerian government under Sani Abacha is fresh in the minds of many.

9 The example can be given of conditions imposed upon the government of Chad as part of the agreement to fund the construction of a pipeline from Chad to Cameroon.

10 Amnesty International, USA 'Oil, gas and mining industries' <http://www.amnestyusa.org/our-work/issues/business-and-human-rights/oil-gas-and-mining-industries> (accessed 24 January 2017).

11 Oil Change International 'The price of oil: Human rights violations' <http://priceofoil.org/thepriceofoil/human-rights> (accessed 24 January 2017).

12 As above.

13 Energy Justice Network 'Blood for oil: Oil and gas interests vs people and the environment' <http://www.energyjustice.net/bloodforoil> (accessed 24 January 2017).

14 See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

A 2016 report published jointly by Publish What You Pay (PWYP) and Civicus paints a grim picture for activists working on natural resource issues and highlights the dangers they face.¹⁵ The report reveals the number of reported killings associated with advocacy for natural resources justice, numbering 185 in 2015, compared to 88 in 2010. The total number between 2010 and 2015 stands at 753.¹⁶ Means used to restrict the work of activists, according to PWYP and Civicus, include the law and extra-legal means. The legal means include regulations that suffocate civil society; tight control of public space; and the criminalisation of activists. The extra-legal means include vilifying those who speak out; unwarranted surveillance; and intimidation and violence.¹⁷

It is on the basis of the above that human rights defenders have embarked on work in this sector with the aim, according to the Eastern and Horn of Africa Human Rights Defenders Project, of seeking to influence both the regulatory frameworks governing the extractive sector as well as public discourse. This purpose in itself influences policy making, raising the alarm when actors diverge from their responsibilities or when abuses go unaddressed.¹⁸ Indeed, the work of human rights defenders is beginning to pay off, as is evident from the recent suspension of Azerbaijan from the Extractive Industries Transparency Initiative (EITI) for failing to lift restrictions on civil society freedoms.¹⁹

In Uganda, civil society organisations working in the oil and gas sector have organised themselves in coalitions such as the Civil Society Coalition for Oil (CSCO), which plays a significant role in human rights advocacy in the oil and gas sector. The umbrella organisation fulfils its objectives mainly through advocacy; capacity building; research; and engaging with oil companies and government departments and communities in areas directly affected by oil exploration.²⁰ Action Aid has established a website on 'Oil in Uganda' which is dedicated to providing necessary and significant information to the general public on oil and gas activities in the country.²¹ CSOs have also been very instrumental in legislative advocacy through making submissions on various laws before they are passed into law,

15 Publish What You Pay and Civicus 'Against all odds: The perils of fighting for natural resource justice' December 2016, [http://www.civicus.org/images/AgainstAllOdds%20%20PWYPCivicus%20reportoncivicspace\(1\).pdf](http://www.civicus.org/images/AgainstAllOdds%20%20PWYPCivicus%20reportoncivicspace(1).pdf) (accessed 21 March 2017).

16 Publish What You Pay and Civicus (n 15 above) 8.

17 Publish What You Pay and Civicus 10.

18 East and Horn of Africa Human Rights Defenders Project 'Only the brave talk about oil': Human rights defenders and the resource extraction industries in Uganda and Tanzania (2012) 1.

19 Acts Activism Education Research 'Azerbaijan suspended by extractive industries governance watchdog' <http://platformlondon.org/2017/03/16/azerbaijan-suspended-by-extractive-industries-governance-watchdog/> (accessed 20 March 2017).

20 See the website of the Civil Society Coalition on Oil and Gas <http://cscoug.org/#> (accessed 13 April 2018).

21 See <http://www.oilinuganda.org/about> (accessed 13 April 2018).

such as the comments offered on the National Environment Bill by CSCO.²²

2.1 Oil and gas: Ugandan context

In Uganda, oil exploration began as early as the 1950s but was halted following a sharp fall in the price of oil, only to be aggressively resumed in the mid-2000s. The 2000s were an incentive for oil exploration as one witnessed a sharp and steady rise in the price of a barrel of oil.²³ The first discoveries were made in 2006, and since then government has made strenuous efforts to establish the requisite legal and administrative infrastructure to enable it to produce approximately 1,4 billion barrels estimated to be recoverable out of the total estimate of 6,5 billion barrels that have been discovered to date.

In December 2013 the Uganda Human Rights Commission (UHRC) published a report on what it described as emerging human rights issues in the Albertine oil region.²⁴ The Commission report indicates that its publication followed investigations conducted in the districts of Hoima, Bulisa, Nebbi, Nwoya and Amuru, prompted by various petitions alleging human rights violations in these districts. The Commission found issues with respect to compensation by government to those whose land had been expropriated to pave the way for the oil exploitation and processing activities, especially in Hoima District. In some respects the compensation rates used were inadequate and in some places in Nebbi the land was taken away before compensation had been finalised.²⁵

The UHRC also took issue with regard to the extent to which people were consulted and involved in making decisions on matters that affected them, thereby assenting the right to participation.²⁶ There were participation deficits in determining the compensation rates as well as with respect to the choice of services that some corporations provided as part of corporate social responsibility. Equally, the traditional institutions in the area, including the Kingdom of Bunyoro, had not been involved in the oil activities which, according to the UHRC, implicated a violation of the right to self-determination. The Commission examined this issue from the perspective of the right of peoples to dispose of natural resources, stating:²⁷

It is important that people are not denied meaningful say in government and in decisions on disposal and benefit of natural resources. The African

22 See n 20 above.

23 B Augé 'Oil and gas in Eastern Africa: Current developments and future prospects' (2015) *French Institute of International Relations and OCP Policy Centre* 8.

24 Uganda Human Rights Commission 'Oil in Uganda: Emerging human rights issues. Special focus on selected districts in the Albertine Graben' December 2013.

25 Uganda Human Rights Commission (n 24 above) 17.

26 Uganda Human Rights Commission 18-19.

27 Uganda Human Rights Commission 20-21.

Commission clearly underscored the obligations of the states to take precautionary steps to protect their citizens to exercise the right to freely dispose of wealth and natural resources. It was held that the non-participation of the Ogoni people and the absence of any benefits accruable to them in the exploitation of oil resources by the Nigerian government and the oil companies was a breach of its obligations under the ACHPR to exercise this right in the exclusive interest of the people and to eliminate all forms of foreign economic exploitation.

Similar deficits were found with respect to the related right of access to information.²⁸ In some cases people were not given information as to how their compensation had been determined. The authorities also were not adequately responding to requests to access information as required by law.

Other human rights violations identified by the UHRC included a violation of the right to a clean and healthy environment as a result of the pollution of the environment by dust, noise and smells, among others. With respect to workers' rights there were accusations of discrimination against the locals as far as access to work was concerned, as most of the employment positions were given to persons from other parts of the country. Related to this matter was the limited monitoring of labour standards at the work sites, in some cases because of a denial of access of labour inspectors to the sites.²⁹

The Commission found a number of issues related to the right to land, including the selling off of communal land without following proper procedures; a lack of clarity over the government ban on acquisition of land titles in the Albertine Graben; inadequate compensation that did not take into consideration land use rights; delayed restoration of the derelict land; and the alleged forced signing of compensation disclosure agreements by some residents.³⁰

The above concerns recorded by the UHRC confirm similar concerns raised over the years by a number of civil society actors. Surveys conducted by Global Rights Alert (GRA) further indicate how the livelihoods of people affected by the developments in the area have been destroyed. In their reports,³¹ the organisation has documented several violations and challenges such as limited and/or biased information; a lack of opportunities for participation; and limited access to justice.

It is against this background that the impact of the 2016 NGO Act on CSOs in the oil sector should be understood. Nonetheless, the impact cannot be fully understood without an understanding of the national and international standards and rights relevant for CSOs.

28 Uganda Human Rights Commission 21.

29 Uganda Human Rights Commission 26.

30 Uganda Human Rights Commission 27-29.

31 GRA *Acquisition of land for the oil refinery: Tracking progress in resettling project affected persons who opted for land for land compensation* (2015).

3 Civic engagement and human rights standards

The rights of civil society should be understood in the context of three fundamental freedoms, namely, expression and association and assembly. It is on the premise of these freedoms that different civic formations, including non-governmental organisations (NGOs) and community-based organisations (CBOs), operate and on which they base their existence as a matter of right. Indeed, freedom of expression has been highlighted as the cornerstone of democracy as the latter essentially is based on free debate and open discussion.³² Democracy demands that every citizen is entitled to participate in democratic processes to enable him or her intelligently to exercise the right of making free choices and generally participate in the discussion of public matters.³³

Freedom of expression and association are rights recognised by the international and regional human rights framework. The International Covenant on Civil and Political Rights (ICCPR) recognises the right of everyone to hold opinions without interference.³⁴ The right to freedom of expression entails the right to seek, receive and impart information including ideas of all kinds in any form.³⁵ The ICCPR also recognises the right to freedom of peaceful assembly in article 21 and freedom of association in article 22. These rights are also protected in the African Charter on Human and Peoples' Rights (African Charter).³⁶ Suffice to note that these rights are not absolute and can be limited for purposes of security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.³⁷ However, the restrictions placed on these rights must be prescribed by law and must be necessary and justifiable in a democratic society.³⁸

The Ugandan Constitution is in line with the ICCPR and the African Charter in as far it protects the above rights in article 29 and prescribes allowable limitations on derogable rights.³⁹ Notwithstanding these constitutional guarantees, civic space in Uganda is circumscribed with CSOs encountering a myriad of obstacles in the course of their operations. These obstacles cumulatively have shrunk the space within which the CSOs operate. The obstacles, among others, stem from legislation that both directly and indirectly govern the activities of CSOs. The impediments in the law include hurdles in the form of procedural setbacks that affect efforts by CSOs to foster

32 *Manika Gandhi v Union of India* [1978] 2 SCR 621.

33 As above.

34 Art 19(1) ICCPR.

35 Art 19(2) ICCPR.

36 See arts 9 and 10 of the African Charter.

37 Art 22(2) African Charter.

38 Art 22 African Charter

39 Art 43(1) Constitution.

democratic governance. The weight of overcoming these hurdles primarily is felt by pro-democracy and anti-corruption CSOs, as well as those working on crucial and sensitive issues such as oil and gas that call for accountability from government.⁴⁰ This kind of working environment has orchestrated a difficult and suspicious relationship between the organisations and the state.⁴¹ There is limited co-operation between the government and organisations working in areas that demand accountability from the state.⁴² Indeed, the relationship of suspicion has seen CSOs accuse government of being responsible for over 13 office break-ins that some NGOs, especially around Kampala, have suffered in recent times.⁴³

4 Legal regime governing civil society organisations in Uganda

Prior to the enactment of the 2016 NGO Act CSOs were governed by the Non-Governmental Organisations Registration Act, an Act that had been in force since 1989, undergoing major amendment in 2006. The 1989 Act as it stood was specifically intended to provide for the registration of NGOs. All NGOs were required to register with the National Board of Non-Governmental Organisations (NGO Board) prior to their operation. The rest of the Act was focused specifically on the establishment of the Board and providing for its functioning. The 2006 amendments were intended to provide for closer monitoring of NGOs by the state. To this end the composition of the NGO Board was reviewed to include state security representatives from the internal security organisations (ISOs) and external security organisations (ESOs).⁴⁴ The presence of these security officials on the Board was perceived to subject CSOs to continuous and intrusive monitoring by the state. This situation had the potential of coercing self-censorship in calling for state accountability and of curtailing their freedom of expression.⁴⁵ The 2006 amendment also introduced vague provisions that gave the NGO Board discretionary powers such as the refusal to register an organisation if its constitution was in contravention of the law.⁴⁶ It has been argued, however, that the Act

40 Interview with Nicholas Opiyo, Executive Director, Chapter Four Uganda, held on 31 February 2017.

41 As above.

42 Interview with Patrick Tuwmine, Board member, Global Rights Alert, held on 30 January 2017.

43 On 15 May 2014, the offices of Hurinet were broken into; <https://www.hurinet.or.ug/wp-content/uploads/2015/press%20releases.php> (accessed 20 February 2017). On 22 May 2016, the Human Rights Awareness and Promotional Forum (HRAPE) offices were broken into; <http://hrapf.org/press-release-violent-break-in-at-hrapf-offices/> (accessed 20 February 2017).

44 Secs 4(2)(e) & (d) NGO Registration Act Cap 113.

45 Human Rights Watch Uganda 'Freedom of association at risk. The proposed NGO Bill and current restrictions on NGOs in Uganda' <https://www.hrw.org/legacy/backgrounder/africa/uganda/> (accessed 4 January 2017).

also introduced some progressive provisions, which included providing for gender representation on the Board and giving NGOs automatic legal personality on registration.⁴⁷

The 2006 amendment and its attendant regulations posed serious challenges to CSOs and were the subject of a court battle challenging their constitutionality.⁴⁸ However, the constitutional petition challenging the expunged law and its regulations remained unheard in the Constitutional Court and undecided since its filing in 2009.⁴⁹ In these circumstances a new law was proposed in 2015.⁵⁰ Judgment was delivered in April 2016, a month after the NGO Act 2016 had been passed.⁵¹ By this time the case was moot.

The government, through the NGO Board, justified the Bill on the ground that it was intended to effect the Non-Governmental Organisation Policy of 2012, which was adopted after promulgation of the 1989 Act and its 2006 amendments, which called for harmonisation.⁵² However, CSOs were of the view that the Bill to some extent was inconsistent with the spirit of the policy, which was chiefly concerned with the promotion and acknowledgment of the role of NGOs.⁵³ The Bill was perceived as being intended to stifle rather than promote civil society work. For instance, it was felt that the Bill had been designed to legislate the draconian provisions of regulations promulgated after the 2006 amendment.

Resilient civil society efforts called for the revision of several provisions in the proposed law. This included clause 33(1)(d) of the Bill that provided for the revocation of a permit of any organisation if in the opinion of the NGO Bureau it was in the public interest to do so.⁵⁴ Following stern lobbying efforts by CSOs, a number of provisions were later removed from the proposed legislation when it

46 Sec 2(d) of the Non-Governmental Organisations Registration (Amendment) Act 2006.

47 M Nassali 'NGOs, politics and governance in Uganda: A dicey relationship' (2013) 19 *East African Journal of Peace and Human Rights* 417.

48 HRAFP Position paper on the Non-Governmental Organisations Act 2016 (2016) 2, <http://hrapf.org/research-papers/> (accessed 31 January 2017).

49 *Human Rights Network & 7 Others v Attorney-General*, Constitutional Petition 5 of 2009.

50 As above.

51 The case essentially challenged the expunged law in so far as it set burdensome encumbrances on NGOs, such as compulsory registration; the requirement under the regulations to present work plans; budgets to the NGO Board as part of the registration process; and the unfettered power of the Board to annually renew permits. The petitioners argued that these were unnecessary restrictions on the freedom of association of CSOs. However, the Court ruled in favour of the respondents and stated that all restrictions on freedom of association under the expunged NGO law were necessary in a free and democratic society.

52 Chapter Four 'Position paper and clause by clause analysis of the NGO Bill 2015', <http://chapterfouruganda.com/sites/default/files/downloads/CSO-Position-Paper-on-the-NGO-Bill-2015.pdf> (accessed 27 March 2017).

53 As above.

54 HRAFP *Commentary on the recently-passed NGO Bill 2015 and its implications on organisations working on the rights of marginalised persons* (2015) 7.

was passed by Parliament. Nevertheless, the Act as passed still poses a number of threats to the operations of CSOs, more especially to those pro-democracy organisations that seek accountability from the government and those working in sensitive areas such as the oil and gas sector.

4.1 NGO Act 2016

Unlike the repealed legislation the 2016 Act has a wide array of objectives, which include providing a conducive and enabling environment for the NGO sector; strengthening and promoting the capacity of NGOs and their mutual partnership with the government; making provision for the corporate status of the National Bureau of NGOs (Bureau); and providing for its capacity to register, regulate, co-ordinate and monitor NGO activities.

Section 7 of the Act grants wide and discretionary powers to the Bureau. These include the power to discipline an NGO by 'blacklisting' or 'exposing an affected organisation to the public' or even the revocation of the permit of an organisation. The Act does not define what is meant by 'blacklisting' or how long blacklisting as a proposed form of disciplinary action should last and its implications for the organisation affected. Furthermore, the Act and its proposed regulations do not specify at what stage each of the powers of the Bureau specified under section 7(1)(b) of the Act can be invoked or what should be adopted as a disciplinary form of action of last resort. Rather, these powers are open to be exercised by the Bureau at its discretion at any given time as a disciplinary measure and, based on the Bureau's discretion, it can exercise any of its powers under section 7, including the revocation of an organisation's permit at any time. Equally, the power of the Bureau to expose an affected organisation to the public has the overall potential effect of discrediting CSO efforts in seeking accountability from the state or in advocating human rights.

Unlike the expunged legislation where state security officials of ISOs and ESOs were members of the NGO Board, the new Act has moved these officials to the district and sub-county committees. Sections 20(2)(d) and 21(2)(d) of the Act respectively provide for the presence of state security officials on district non-governmental organisations monitoring committees (DNMCs) and sub-county non-governmental organisations monitoring committees (SNMCs). The SNMCs have power under section 20(3)(e) to report to DNMCs on matters of organisations in the sub-county. The DNMCs, in turn, monitor and provide information to the Bureau regarding the activities and performance of organisations in the district under article 20(4)(f). Suffice to note, most activities by NGOs working on oil and gas issues take place at the community level in the districts and sub-counties in the Albertine Graben. Therefore, the presence of state security officials on DNMCs and SNMCs creates a platform for continuous security-based monitoring of NGO activities by the state. This brings into issue

its potential impact, considering the perception by the public of security agencies. It creates the potential for the security apparatus to be used to coerce CSOs and even force them into self-censorship in the exercise of their freedom of peaceful assembly and expression due to fears of reprisal.

In addition, the Act appears to create a long and tedious registration process under part VIII. This requirement has the potential of making registration of new NGOs unnecessarily difficult and could stifle operations of NGOs and CBOs working in various parts of the country. During the application and issuing of a permit for an NGO, the Act requires an organisation to specify the areas under which it will carry out its activities, as well as the geographical area of coverage of the organisation. This implies that an organisation cannot operate or carry out any of its activities outside the areas prescribed in its permit. Moreover, the section ignores the nature of NGO work, of which for the most part the activities and areas of operation are flexible, affected by the project-based nature of funding. This section has the potential to limit geographically NGO operations as well as to curtail their constitutionally-established freedom to work in any part of the country. The section also creates a protracted requirement that every time an NGO commences a new project which requires the organisation to expand its areas of operation, it should go through the process of acquiring authorisation from the Bureau through the DNMC of the specific area, as is seen in section 44(b).

The Act further reinforces the state's grip on CSOs by providing for inspections of NGO premises and their archives. The Act grants powers to an inspector, after giving notice of at least three working days to an organisation,⁵⁵ to inspect the premises of the organisation and to request 'any information' which appears necessary 'for purposes of giving effect to the Act'. The inspection powers under section 41 of the Act are wide and discretionary and present the effect of unwarranted searches of NGOs working on sensitive areas such as oil and gas. These powers equally have the effect of establishing an opening for unfounded disciplinary action against these organisations and which is aimed merely at crippling their activities.

The Act in section 44 creates vague and open-ended 'special obligations' on the part of NGOs that can be given any convenient interpretation by the state. Some of these obligations include the prohibition of organisations from engaging in any acts that would be prejudicial to the security and laws of Uganda under section 44(d) of the Act. The Act equally prohibits organisations from engaging in any act which is prejudicial to the 'interests of Uganda and the dignity of the people of Uganda' in section 44(f). The effect of this provision is discussed in part 5 below.

55 The notice should specify the time and purpose of the inspection.

The Act further obliges organisations to be non-partisan in section 44(g). This obligation equally poses a threat to NGO activities and has the potential to curtail meaningful collaboration between NGOs and pertinent opposition stakeholders as these collaboration efforts will be viewed as 'political' or 'partisan'.

4.2 Public Order Management Act

In addition to the principal NGO legislation, recently retrogressive and draconian legislation, at the very least in their implementation, have been adopted.⁵⁶ The legal regime has created an environment where CSOs cannot objectively interrogate issues without fear of reprisal or prosecution. Among these is the POMA, which in itself presents impediments to the exercise of the right to freedom of peaceful assembly. A number of activities by CSOs involve what would constitute a public meeting under the POMA.

The POMA has generally been criticised for its failure to create a presumption in favour of the exercise of the right to freedom of peaceful assembly or the duty of the state to facilitate peaceful assemblies. The Act does so by creating a *de facto* authorisation procedure for peaceful assemblies, which is unnecessarily bureaucratic with a broad discretion for the state to refuse notification.⁵⁷ The Act further grants law enforcement authorities the mandate to use force to disperse assemblies, without proper guidance for alternative methods of managing public order disturbances.⁵⁸ It equally criminalises the organisers of assemblies for the unlawful conduct of third parties.⁵⁹ The Act has the effect of shrinking civic space in Uganda and stifling civil society efforts in the discussion of governance, accountability, the rule of law and human rights.

4.3 Law and policy on petroleum

The National Oil and Gas Policy is commendable for recognising the role that CSOs can play in advancing human rights in the oil and gas sector. It recognises that CSOs can promote and protect human rights in the sector through advocacy, mobilisation and dialogue with communities and holding different players accountable with regard to oil and gas issues. This role is in addition to amplifying the voices of

56 Keynote address on the Global Day of Citizen Action by the Centre for Constitutional Governance (CCG) titled 'The shrinking civic space in Uganda undermines human rights and governance' delivered by Joshua Joseph Niyo on 16 May 2015.

57 As above.

58 Article 19 'Legal analysis of Uganda's Public Order Management Act' <http://www.article19.orf/resources.php/resources.php/resource/37331/en/uganda:-public-order-management-act> (accessed 30 January 2017).

59 As above.

the poor in the design, monitoring and implementation of programmes in the oil and gas sector.⁶⁰ The Policy provides:⁶¹

Civil society organisations (CSOs) and cultural institutions can play a role in advocating, mobilising and holding dialogue with communities; contributing to holding the different players accountable with regard to oil and gas issues; participating in getting the voices of the poor into designing, monitoring and implementation of programmes in the oil and gas sector. CSOs may also be contracted in the delivery of various services, especially in the communities where oil and gas activities will be undertaken.

Indeed, CSOs working in the oil and gas sector have undertaken numerous activities in advocating human rights in the sector. For example, Global Rights Alert has spearheaded the inclusion of women and the youth in natural resource governance in the districts of Buliisa, Hoima, Mubende and Tororo.⁶² The CSCO has participated in legislative advocacy with reference to different pieces of legislation on natural resource governance. They have, for example, appeared before the Parliamentary Committee on Natural Resource Governance to make submissions on the the National Environment Bill of 2017.⁶³ Nonetheless, despite the foresight of the policy with regard to the CSO role in the sector by the National Oil and Gas Policy, these organisations have experienced many difficulties in carrying out their activities.

Some NGOs in the past have reported experiencing incidents of being summoned after holding meetings with communities, and on some occasions their meetings have been stopped by resident district commissioners (RDCs) even when they were sanctioned by the police.⁶⁴ This has occurred even in the case of meetings attended by security officials, and unsubstantiated accusations of inciting people have been made against CSOs. Other incidents included RDCs stopping meetings and demanding clearance from the Permanent Secretary Ministry of Energy even if there is no law requiring this.⁶⁵ Indeed, there are no criteria presented by the Ministry, and obtaining

60 Ministry of Energy and Mineral Development, sec 7(3) of the National Oil and Gas Policy – Popular Version, April 2014, <http://www.eisourcebook.org/cms/January%202016/Uganda%20National%20Oil%20and%20Gas%20Policy%202014.pdf> (accessed 20 March 2017).

61 Ministry of Energy and Mineral Development (n 60 above) para 3.3.

62 Website of Global Rights Alert <https://globalrightsalert.org/what-we-do/gender-and-extractives> (accessed 13 April 2018).

63 Website of the Civil Society Coalition on Oil and Gas sco.ug/data/mreports/77/CSCO%20APPEARS%20BEFORE%20THE%20PARLIAMENTARY%20COMMITTEE%20ON%20NATURAL%20RESOURCES%20TO%20MAKE%20SUBMISSION%20ON%20THE%20NATIONAL%20ENVIRONMENT%20BILL,%202017%20.html (accessed 13 April 2018).

64 Interview with Winfred Ngabiirwe, Executive Director, Global Rights Alert, 5 March 2016 at GRA Office, Kampala, Uganda.

65 As above.

authorisation is difficult.⁶⁶ Although the situation appears to have improved, the 2016 Act appears to review the obstructive course.

4.4 Access to Information Act 2005

The main objective of this Act is to provide for the modalities for access to information pursuant to article 41 of the Constitution. According to the Constitution, every citizen has the right of access to information in the possession of the state or any public body. The exception is with respect to information that has the potential to prejudice the security or sovereignty of the state or to interfere with the right to privacy of another person if released.⁶⁷ The National Oil and Gas Policy highlights the need to promote high standards of transparency and accountability in licensing, procurement, exploration, development and production operations as well as the management of revenues from oil and gas.⁶⁸ However, the sector is tainted with so much secrecy and bureaucratic obstacles that make it difficult for CSOs to access information on oil and gas. The challenges in accessing information are associated with the fact that at government level issues related to oil and gas are highly centralised and bureaucratic, thus making it difficult for most people to gain access.⁶⁹ The sector has been described as 'opaque' as far as information is concerned.⁷⁰ The secrecy surrounding the sector also prompted a group of CSOs working on oil governance to petition the Parliamentary Committee on Commission Statutory Authorities and State Enterprises (COSASE). COSASE is the Parliamentary Standing Committee that investigated the controversial oil cash pay-outs to 42 state officials after the government had won a legal tax dispute against the Tullow oil company. The CSOs have argued that increased secrecy in the oil sector is likely to trigger the situation of an 'oil curse' in the country.⁷¹

Although it has been reported that the situation of CSOs working in the oil sector has gradually been improving, oil-related issues remain sensitive, with CSOs experiencing problems accessing information on these issues in the Albertine region.⁷²

66 As above.

67 Sec 5(1) Access to Information Act 2005.

68 Guiding Principle 5.1.3 of the National Oil and Gas Policy of Uganda.

69 Interview with Francis Mugerwa, journalist reporting on oil and gas issues for the *Daily Monitor*, conducted in Hoima on 17 February 2017.

70 Interview with Onesmus Mugenyi, Deputy Executive Director, Advocates Coalition for Development and Environment, conducted on 16 March 2017.

71 Oil in Uganda 'CSOs call for end of secrecy in oil deals in a petition to parliament' <http://www.oilinuganda.org/features/civil-society/csos-call-for-end-of-secrecy-in-oil-deals-in-a-petition-to-parliament.html> (accessed 13 April 2018).

72 Focus Group discussions in Hoima on 17 February 2017.

5 2016 NGO Act and potential impact on civil society organisations working in oil and gas

As illustrated, fears that the NGO Act would negatively impact on CSOs in Uganda were raised from the time the Bill that birthed the Act was published on 10 April 2015. It has been reported that concerted advocacy resulted in a review of the Bill to remove some provisions considered repressive.⁷³ CSO lobbying saw the removal of clauses that would have required all NGOs to re-register when the Act came into force. The initial Bill had also given the NGO Bureau substantial power, and in some clauses these were judicial powers.⁷⁴ Nonetheless, the Bill was passed with some contentious clauses which have now become law. It has been argued that the major thrust of the Act is to establish a dense regulatory framework. Under this broad discretion and subjective rules, even the most compliant organisation could be warned, sanctioned or ultimately deregistered.⁷⁵ This aim has partly been achieved through what has been described as a 'thick bureaucracy'.⁷⁶ The bureaucracy has various regulatory structures, from the national level in the form of the National Bureau for Non-Governmental Organisations through to structures at district and sub-county levels.

The government has argued that the Act was created to help improve and harmonise the operations of NGOs and is not intended to target any NGOs as government acknowledges and appreciates the good work NGOs are doing.⁷⁷ Unfortunately, this is not how CSOs interpret the Act. It has been argued that the Act was not drawn up in good faith and with good intentions; rather that the law was promulgated to increase the avenues and processes that could be used to 'deal' with CSOs. This is why the Act creates many opportunities for the state to attack CSOs at various levels, from national and through to local bureaucracies.⁷⁸ Although it has been acknowledged that there was misconduct, among others, the presence of briefcase CSOs that were exploiting people, the Act went far beyond dealing with this problem and instead punishes legitimate CSOs.⁷⁹ As a matter of fact the CSOs view the Act as imposing a

73 A Jjuuko 'Speaking out against the Non-Governmental Organisations Act, 2016 so that we may keep our voice' in Human Rights Awareness and Promotion Forum *The potential impact of the Non-Governmental Organisations Act 2016 on marginalised groups* December 2016, 8.

74 As above.

75 K Busingye 'Forest from trees: Placing the Non-Governmental Organisations Act 2016 in context' in HRAPF (n 48 above) 18.

76 As above.

77 Interview with Okello Stephen, Acting Executive Director, NGO Bureau, 8 February 2017.

78 Interview with Bashir Twesigye, Executive Director, Civil Response on Environment and Development (CRED), conducted on 15 March 2017.

79 Interview with Peter Magala Peter Gwayaka, Programme Office, Chapter Four, on 20 March 2017.

tedious registration process and creating a thick layer of bureaucracy that could negatively impacts on their operations.

5.1 Tedious registration processes

The thick bureaucracy is characterised by tedious procedures and requirements for registration and obtaining a permit to operate. In the first place an organisation has to be incorporated under a legal regime that provides for incorporation, which could be for companies, trustees or other form of incorporation. Only after this procedure may the organisation apply to be registered by the Bureau.⁸⁰ Indeed, to be registered the Act requires the organisation to make an application accompanied by a certificate of incorporation, a copy of the organisation's constitution and 'evidence of statements made in the application as the Minister may prescribe'.⁸¹

The above restrictions have been bolstered by the recently-promulgated Non-Governmental Organisations Regulations.⁸² For instance, the Regulations require an application for registration, in addition to the above documents stipulated in the Act, to be accompanied by a chart showing the governance structure of the organisation; a copy of valid identification documents of at least two founder members; a workplan and budget; minutes and resolutions of the founders of the organisation; a statement complying with section 45 of the Act;⁸³ and recommendations by the district NGO monitoring committee of the district where the organisation is headquartered, or a responsible ministry or ministries.⁸⁴

5.2 Permission to operate and reporting obligations

Even after fulfilling the above registration requirements an organisation has to apply for a permit from the Bureau, a process which involves paper work and comes with a number of obligations.⁸⁵ An applicant for a permit has to supply information in a number of areas, including the operations of the organisation; its areas of operation; the areas in which the organisation may carry out activities; the staffing of the organization; the geographical area of coverage; and the location of the organisation, in addition to paying the prescribed fees.⁸⁶ It has been argued that it is not proper that an entity which has been incorporated, which in itself amounts to

80 Sec 29.

81 Sec 29(2)(a).

82 Non-Governmental Organisations Act, Statutory Instrument 22 of 2017.

83 Sec 45 has various requirements pertaining to the staffing of an organisation.

84 See Regulation 4.

85 Sec 31.

86 As above.

authorisation to operate countrywide, is required to obtain a permit and obtain approval from other local government structures.⁸⁷

The bureaucratic maze continues. As illustrated above, an organisation wishing to carry out activities in any part of the country has to get approval from the District NGO Monitoring Committee from each district where it wishes to operate, as well as to enter into a memorandum of understanding with the district.⁸⁸ CSOs working on oil and gas issues in the Albertine region have argued that this requirement escalates the challenges they already face as it may be manipulated by some districts to make operations difficult for CSOs. Indeed, a close scrutiny of the process shows that the permit obtained from the Bureau is useless since it can be defeated by a district refusing to enter into a memorandum of understanding with a CSO.⁸⁹

To illustrate the potential effect of the section 44(a) bureaucracy, Busingye argues as follows:⁹⁰

For instance, to take but one example, in terms of section 44 of the Act no organisation may carry out activities in any part of the country unless it has received the approval of the District NGO Monitoring Committee and Local Government of that area and has signed a memorandum of understanding with the Local Government to that effect. The essence of this provision is that, in addition to the requirement to register with the NGO Bureau, an NGO wishing to operate throughout Uganda would be required to seek and obtain the permission of 112 District NGO Monitoring Committees and as many Local Governments. The difficulty of such an undertaking, even for the better-resourced NGOs, cannot be over-exaggerated.

It has been argued that the requirement for memoranda can be abused by local leaders who may want to avoid public scrutiny and accountability by locking out CSOs they consider aggressive and those working against their interests. For instance, a leader who gets a negative review from a CSOs may work to ensure that the memorandum of understanding is not renewed.⁹¹ Indeed, some CSOs working on oil and gas also work on other accountability and governance issues. The example here includes those CSOs which, for instance, have a local government performance scorecard programme under which the performance of district councils and local leaders are assessed. It is feared that local leaders who are not satisfied with the scorecard project may decide not to sign a memorandum of understanding.⁹²

87 Interview with Gad Benda, Chairperson, PWYP-Uganda and Executive Director, World Voices, on 15 March 2017.

88 Sec 44(a).

89 Interview with Peter Magela Peter Gwayaka (n 79 above).

90 As above.

91 As above.

92 Interview with Onesmus Mugenyi (n 70 above).

Furthermore, it is not clear what misconduct the requirement to sign memoranda was designed to deal with.⁹³ In addition, it has been reported that some district officials are abusing the law by reminding CSOs that their memoranda with the districts are about to expire and have demanded bribes to facilitate renewal.⁹⁴ This activity is suspected to arise from the fact that the requirement for memoranda is now legislated. Previously some CSOs had entered into memoranda with some districts on a purely voluntary basis as a way of promoting collaboration. With the new law in place, the districts have been given power over CSOs, which explains why some officials are now demanding bribes.⁹⁵ It is feared that the Act and the influence of security personnel and members of the DNMCs and SNMCs may result in previously co-operative districts shunning the work of CSOs working on oil and gas.⁹⁶

A further level of bureaucratic control lies with section 39 reporting requirements. The provision requires organisations to declare and submit to the district technical planning committees, the DNMCs and the SNMCs details about the areas in which they operate, estimates and sources of their funds.⁹⁷ In addition, the provision in an open-ended manner requires the organisation 'to submit to the Bureau, DNMC and SNMC in the area of operation, *any other information that may be required*.'⁹⁸ This demand adds to the layers of bureaucracy and administrative requirements that are likely negatively to impact on CSOs, and a failure to comply may be used to deny an organisation a permit or to revoke the same.⁹⁹ To understand the magnitude of this burden, the Albertine region, for instance, has up to 22 districts, meaning that an organisation working in this area would have to prepare 42 returns. This duty is not only tedious but resource-consuming, and eats into the administrative time a CSO allocates for its activities.¹⁰⁰

It should be noted that some organisations working on oil and gas, in addition to grassroots work, also operate at the national level. The levels of administrative bureaucracy that runs through the local government structures creates the potential of stifling the work of organisations that are more difficult to stifle at the national level. The bureaucracy could be used to make it impossible for them to operate at local level, which would deny them access to communities.¹⁰¹

93 Interview with Gad Benda (n 87 above).

94 Interview with Bashir Twesigye (n 78 above).

95 As above.

96 Interview with Richard Orebi, Hoima Field Officer for Global Rights Alert, on 16 March 2017.

97 Sec 39(2)(b).

98 Sec 39(2)(c) (our emphasis).

99 Interview with Onesmus Mugenyi (n 70 above).

100 Interview with Peter Magela Peter Gwayaka (n 79 above).

101 As above.

5.3 Public interest and security

Among the provisions described as disquieting are sections 44(d) and (f). These provisions are set out *verbatim*:

- 44 Special obligations
An organisation shall –
- ... (d) not engage in any act which is prejudicial to the security and laws of Uganda;
 - ... (f) not engage in any act which is prejudicial to the interests of Uganda and the dignity of the people of Uganda ...

CSOs have faulted the above provisions on the ground that they are vague and could be abused in ways which negatively impact on CSO work. It has been argued that the provisions use words that are broad and undefined and could be used to limit the enjoyment of the right to freedom of association.¹⁰² Indeed, the use of such vague provisions is not uncommon. The phrase ‘prejudicial to security’, for instance, could be used to clamp down on freedom of expression. It is also demonstrated that the phrase ‘laws of Uganda’ could be abused.

Jjuuko has argued that the terms ‘prejudicial’ and ‘interests of Ugandans’ can be interpreted very broadly and are malleable according to the purpose and motive of the interpreter.¹⁰³ To quote Kabumba, ‘[t]hese apparently benign words in essence incorporate into the NGO regulatory regime the whole gamut of laws increasingly used to restrict not only civic space but human rights generally in Uganda’.¹⁰⁴ It has been argued that there is a risk that security personnel could abuse this provision for their selfish benefit since some of them are involved in aggressions such as land-grabbing in the oil-rich region.¹⁰⁵ It has been argued further that the section was deliberately crafted in a vague manner so that it at any time can be ‘bent’ and used against CSOs if deemed necessary by the state.¹⁰⁶ Although there is no evidence of the Act being used for these purposes, it has been argued that this is because at the moment there is no serious activity stirring controversy. It is feared that when serious activities such as the pipeline and refinery works start, the Act will be dusted off and used against CSOs setting out to scrutinise the impact of these activities.¹⁰⁷ As has been the case, this action is likely to target those organisations seeking to interface with communities at the grassroots level. It is reported that some organisations fearing the

102 Human Rights Awareness and Promotion Forum *The NGO Bill 2015 and its practical and human rights implications on organisations working on the rights of marginalised persons* (May 2015).

103 Jjuuko (n 73 above) 8.

104 Busingye (n 75 above) 19.

105 Interview with Gad Benda (n 89 above).

106 Interview with Bashir Twesigye (n 80 above).

107 Interview with Dickens Kamugisha, CEO, African Institute for Energy Governance (AFIEGO), on 20 March 2017.

effects of the law have decided to stop activities in the sector of oil and gas.¹⁰⁸

Organisations working on oil and gas issues in the Albertine area have testified that for a long time working on oil and related issues has been considered sensitive and taboo. This was the case even with organisations engaged in activities such as empowering people to demand adequate and prompt compensation.¹⁰⁹ At a certain point, government threatened to revoke the permits of some organisations.¹¹⁰ Indeed, the perception of many government agencies, including security personnel, is that CSO work is intended to oppose government and interferes with government programmes, in addition to promoting donor interests.¹¹¹

What makes the oil sector unique arises from the fact that this industry is globally characterised by serious rights violations, including land grabbing and environmental degradation. In addition, the sector is controlled by giant actors such as multi-national corporations and powerful state agencies. Also involved are individuals who appear to have a vested interest in the sector, which the state has positioned as the country's 'saviour'.¹¹² An example is the recent fracas dubbed the 'golden handshake', where government officials shared millions in oil money for 'winning' an oil tax dispute. Evidence emerging shows that laws on rewarding civil servants were not followed. Another good illustration of this is the outburst by the President of Uganda, Yoweri Kaguta Museveni, in 2012, when he accused some organisations working on oil and gas as being purveyors of foreign interests. This followed advocacy work by these organisations around draft laws in this sector that were intended to ensure that the laws promote transparency. Indeed, following some engagements with members of parliament, the legislature appeared to see the need for this transparency. This development angered the President, who indicated that he had written to the Inspector-General of Government to investigate some CSOs that had led the advocacy.¹¹³ This attitude flies in the face of the National Oil and Gas Policy for Uganda which recognises the role of civil society in the oil and gas sector, as discussed earlier.¹¹⁴

It has been established that with or without the 2016 Act, CSOs working in the Albertine region have been facing challenges accessing

108 As above.

109 Focus Group discussions in Hoima on 17 February 2017.

110 Interview with Benon Tusingwire, Executive Director, Navigators of Development Association (NAVODA), on 15 March 2017.

111 Confirmed eg in an interview with retired Assistant Superintendent of Police, Stephen Kamanyiro, until December 2016 Community Liaison Officer, Oil and Gas police, conducted in Hoima on 17 February 2017.

112 Interview with Winfred Ngabiirwe (n 64 above).

113 See National Association for Professional Environmentalists (NAPE) 'MPs were bribed to fail Oil Bill says President Museveni'.

114 See sec 4.3 of this article.

communities mainly as a result of the application of the POMA. As illustrated above, although the POMA does not give the police powers to authorise public meetings and only requires notice, these provisions have been misinterpreted by the police to mean that every person organising a public meeting must seek the permission of the police to do so.

Based on experience with the POMA, there is a real threat that the NGO Act could also be misinterpreted by authorities in the chain of bureaucracy which may result in abuse. CSOs in the Albertine region are concerned that if they engage in activities the authorities do not approve of, it may compromise their chances of having their operational permits renewed.¹¹⁵ For instance, it is feared that although the Act does not appear to give RDCs a role in the bureaucracy for the supervision of CSOs, there is the fear that RDCs may still interfere in the operations of legitimate structures. This is based on the previous conduct of some RDCs and their 'bullish' style of work.¹¹⁶

Some government officials have acknowledged that weaknesses at the local level may result in some officials abusing their positions to intimidate CSOs. According to this line of argument, this is a matter requiring capacity building in the local structures which should be continuous and open to all stakeholders to enable every person to understand.¹¹⁷ Indeed, there is a fear that even when the Act is properly interpreted and applied, the POMA still can be misapplied, in addition to the possibility of other laws being promulgated and existing laws in areas such as terrorism and money laundering being used to clamp down on CSO work.¹¹⁸

5.4 Other issues of concern

Part IX of the Act, which deals with 'self-regulation', can also cause problems for CSOs working on oil and gas. Section 38 provides that a self-regulatory body shall inform the Bureau of its existence and mode of operations. Section 36(a) defines a 'self-regulatory body' as referring to a body set up by registered organisations that have come together and agreed that the body exercises some degree of regulatory authority over them upon consenting, or resolving that they would abide by a set code of conduct, rules and procedures. It is not very clear what the purpose of this provision is and the misdemeanour with which it deals. What is the purpose of registering the body? The danger with this provision is that it could be used to stifle the coalitions and networks which organisations working on oil and gas have formed, such as CSCO and PWYP.¹¹⁹ The effect of this is

115 Focus Group discussions in Hoima on 17 February 2017.

116 Interview with Winfred Ngabiirwe (n 64 above).

117 Interview with Stephen Okello, 8 February 2017.

118 Interview with Winfred Ngabiirwe (n 64 above).

119 Interview with Peter Magala Peter Gwayaka (n 79 above).

that it may discourage organisations from forming coalitions and networks.

Section 45(c) deals with the issue of employment of non-citizens, who are not to be employed before proceeding to Uganda for the purpose of employment by an organisation that has submitted to the diplomatic mission of Uganda in their country certain credentials, including academic papers and recommendations as well a certificate of good conduct. This provision in the first place is discriminatory in that it imposes such conditions only on non-citizens seeking to work with CSOs. Second, the provision could be used to keep certain non-citizens from working with organisations in Uganda. This is likely to affect CSOs working on oil and gas to the extent that, being a new sector, CSOs in Uganda are yet adequately to build their expertise and now and again rely on foreign experts.¹²⁰ Third, the provision could be used to stifle the activities of an organisation by refusing entry to foreign experts.¹²¹

6 Conclusion

The relationship between the government of Uganda and CSOs, mainly NGOs, has been described as 'dicey'.¹²² This is because, although government appears to appreciate the role of NGOs in the socio-economic development of the country, it has taken steps to closely monitor NGOs, to some extent in ways that interfere with the work of the organisations. Among others, control has been exerted using laws that govern the registration of NGOs, in addition to laws on public order management and security. It is in light of this issue that CSOs in the country received the 2016 NGO Act, a law which was promulgated amidst controversy. The Act imposes tedious processes of registration, defined by a number of pre-requisite documents. Yet, the registration is dual in nature, characterised by incorporation and subsequent registration with the NGO Bureau. The Act creates a thick layer of bureaucracy, which includes obtaining operational permits and entering into memoranda of understanding with districts.

It is feared that among those affected most by the 2016 Act are CSOs working on oil and gas issues. This fear is because of the sensitivity of this sector, which previously has seen government closely monitoring their activities and imposing stringent requirements in accessing the community, especially in the Albertine region. It is on this basis that the CSOs in the sector have expressed their fears with regard to the likely impact of the Act, which they suspect could be used to clamp down on their activities and interfere with their work.

¹²⁰ As above.

¹²¹ As above.

¹²² Nassali (n 47 above).

This fear is the result of the possibility of misusing bureaucratic procedures to obtain a permit and permission to work in districts. The provisions prohibiting activities that are prejudicial to security and peace can be used with the same effect.

A critique of the judicial attitude towards matrimonial property rights under customary law in Nigeria's southern states

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Summary

Thus far, recent judgments on women's property rights delivered by the Nigerian Supreme Court have been perceived as a development of customary law. The article argues that these judgments mask the indifferent attitude of apex courts to women's matrimonial property rights under customary law. This indifference is evident from the Supreme Court's failure to address the preservative philosophy of property rights and the unsuitability of this philosophy to contemporary conditions. To bring this failure into critical focus, the article primarily uses case analyses to critique divorce and succession judgments delivered by the Supreme Court and the Court of Appeal. It finds that apex courts prefer the repugnancy test over the Bill of Rights, using a balancing act that shields the customary law of matrimonial property from constitutional scrutiny. Among other measures, the article suggests that customary law should be unequivocally subjected to the Bill of Rights, and legislation should be enacted to regulate customary laws of succession, marriage and divorce.

Key words: *customary law; matrimonial property rights; Southern Nigeria; Bill of Rights*

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1 Introduction

Unlike countries such as South Africa, Ghana, Kenya and Uganda, the co-existence of customary law and state law in Nigeria is not constitutionally defined.¹ Customary law is neither directly subjected to the Bill of Rights,² nor are its laws of succession, marriage and divorce statutorily regulated.³ The only provisions that resemble statutory regulation are court laws, which provide that a custom shall not be 'enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience'.⁴ Notably, customary law is non-uniform and largely unwritten, while state law essentially is transplanted English laws and domestic laws that imitate them. This socio-legal situation has two practical effects on judicial attitude to the customary law of matrimonial property.

First, the application of customary law in the courts is broadly determined by choice of law rules.⁵ Thus, where a man dies intestate, his personal customary law regulates the distribution of his estate unless he was married under the Marriage Act or his property was not subject to customary law.⁶ Second, judges have no firm constitutional basis upon which to adjudicate matrimonial property disputes. For example, a divorcing wife has no legal platform to claim matrimonial property under customary law.⁷ Similarly, she is not empowered to claim maintenance rights as these are regarded as unknown to customary law.⁸ Her lack of entitlement to maintenance is traceable to ancient agrarian settings in which she usually returned to her family

1 'Customary law' is used here to denote, in a broad sense, the various forms of norms which a given population uses to conduct its affairs. It is also referred to as 'people's law, folk law, traditional law' and 'indigenous law'. See BW Morse & GR Woodman (eds) *Indigenous law and the state* (1988); A Allot & GR Woodman *People's law and state law: The Bellagio Papers* (1985); T Elias *The nature of African customary law* (1955) 55. Note that, generally, Islamic law is not regarded as customary law in Nigeria. See *Alkamawa v Bello* (1998) 6 SCNJ 127 129; A Oba 'Islamic law as customary law: The changing perspective in Nigeria' (2002) 51 *International and Comparative Law Quarterly* 817 849.

2 Secs 33-44 of the Constitution of the Federal Republic of Nigeria 1999, as amended.

3 A possible exception to statutory regulation is the Limitation of Dowry Law, Eastern Region Law 23 of 1956, which limits the amount of bride wealth.

4 See, eg, sec 16 of the Customary Court Edict of Imo State. See, generally, A Kolajo *Customary law in Nigeria through the cases* (2000) 13-14.

5 ES Nwauche 'The constitutional challenge of the integration and interaction of customary and the received English common law in Nigeria and Ghana' (2010) 25 *Tulane European and Civil Law Forum* 37.

6 In *Obusez v Obusez* (2001) FWLR (Pt 73) 40, Aderemi JCA stated: 'Where however, a person subject to customary law went on to transact a marriage under the Act, this raises a presumption that the distribution of his estate shall be regulated by the Marriage Act. This presumption can be rebutted if the manner of life of the deceased is suggestive that the deceased wanted customary law to apply.'

7 A Osondu *Modern Nigerian family law and practice* (2012) 100. Judges interviewed affirmed that women may only claim property purchased with their own funds using receipts, or marriage gifts given in their (maiden) names.

8 As above.

for sustenance.⁹ To compound her weak legal position, judges tend to apply the customary law captured in precedents with little regard to evolutions in the social settings of the precedents.¹⁰

Despite the constitutional right to equality, therefore, women were not entitled to inherit property because of a porous legal framework and the custom of male primogeniture – that is inheritance through the eldest male child or relative of a deceased person. This was until the Supreme Court invalidated the male primogeniture custom in April 2014 (April judgments).¹¹

The April judgments have been hailed as a development of customary law.¹² However, this article argues that they merely mask the indifferent attitude of apex courts towards women's matrimonial property rights. This indifference is evident from the Supreme Court's failure to address the social context of property rights under customary law. The agrarian societies in which these rights emerged were founded on families living in close-knit units.¹³ This arrangement was mainly for agricultural and defence purposes, given that family wealth was jointly generated.¹⁴ In this setting, the best interests of the family were paramount.¹⁵ To perpetuate clan lineage and keep wealth within the family, therefore, heirs inherited not only the property of deceased persons, but also the responsibility to maintain their dependants. Accordingly, the male primogeniture custom was aimed at caring for the family.¹⁶ However, today it negatively affects women's matrimonial property rights due to its preservative philosophy, the patrilocal nature of customary marriage,¹⁷ and the influence of socio-economic changes such as urbanisation,

9 While she could return to her father's house in the pre-colonial era, the diminishing concept of extended families today makes this return difficult. See C Ajaero & P Onokala 'The effects of rural-urban migration on rural communities of South-Eastern Nigeria' (2013) *International Journal of Population Research* 1.

10 Eg, in April 2013 the Court of Appeal affirmed that under Abagana customary law, women have no right of inheritance in their late father's estate. See *Eucharika Nwinyi v Anthony Ikechukwu Okonkwo* (2013) LPELR-21216 (CA).

11 *Ukeje v Ukeje* (2014) 11 NWLR (Pt 1418) 384-414; *Onyibor Anekwe v Maria Nweke* (2014) All FWLR (Pt 739) 1154.

12 Eg, see N Chinwuba 'Ending inequality in Nigeria: A refreshing approach from the nation's judiciary' (2015) 29 *International Journal of Law, Policy and the Family* 341; O Edu 'A critical analysis of the laws of inheritance in the southern states of Nigeria' (2015) 60 *Journal of African Law* 149.

13 V Uchendu *The Igbo of Southeast Nigeria* (1965) 22-25; J Barton et al *Law in radically different cultures* (1983) 41-42.

14 Uchendu (n 13 above) 22.

15 T Nhlapo 'The African family and women's rights: Friends or foes' (1991) *Acta Juridica* 138 141 145-146 (explaining implications of 'the values underlying the African family').

16 N Okoro *The customary laws of succession in Eastern Nigeria and the statutory and judicial rules governing their application* (1966) 4.

17 This is evident from women joining their husbands' families after their bride wealth has been paid. See JU Ogbu 'African bride wealth and women's status' (1978) 5 *American Ethnologist* 241.

acculturation and independent income.¹⁸ This patriarchy-patrilocal philosophy of matrimonial property rights, evident from the fact that customary marriage transports and subsumes a women's legal identity into that of her husband, has not been analysed by Nigeria's apex courts.

To bring the attitude of these courts into critical focus, the article analysed 30 notable divorce and succession judgments delivered by the Supreme Court and Court of Appeal since self-governance. It supports this analysis with insight gained from discussions with widows, divorcees, judges, traditional leaders, the staff of non-profit organisations, and social welfare officials in South-East Nigeria.¹⁹ These discussions, which were accompanied by archival searches, were held between June 2014 and January 2015. The article's focus on apex courts is due to the doctrine of judicial precedent. Given that their decisions bind all other courts, the Supreme Court and Court of Appeal, in a sense, are judicial policy makers.

Following this introduction, the second section of the article describes its analytical framework. It first explains the philosophy of women's matrimonial property rights under customary law. Next it discusses the problematic interaction of normative orders in Nigeria's legal framework, highlighting how this interaction fails to deal with women's inability to legally assert matrimonial property rights. Finally, it explains the flexible nature of customary law and the need for judges to avoid a rule-based approach to customary law adjudication. Using case analysis, the third section critiques the Supreme Court and Court of Appeal's attitude to matrimonial property rights, highlighting their preference of the repugnancy test over the Bill of Rights. The fourth section concludes the article and makes remedial recommendations.

2 Contextual framework

As a patrilocal society,²⁰ customary law in Southern Nigeria limits women's matrimonial property rights far more than in other regions. Several informants interviewed for this study explained the philosophy of matrimonial property rights under customary law with the following story:

In the days when trees were the playgrounds of squirrels, a chief lay dying. He called a meeting of his clan elders and gave them instructions for the disposition of his vast estate. Among other things, he decreed that his only

18 See, generally, P Iroegbu *Marrying wealth, marrying poverty: Gender and bride wealth power in an African society: The Igbo of Nigeria* (2007).

19 The research area has a population of about 20 million and a generally homogenous demography. It was chosen as customary law in this region highly restricts women's property rights, unlike in Northern and Western Nigeria.

20 M Green *Igbo village affairs: Chiefly with reference to the village of Umueke Agbaja* (1947) 155 165.

son should choose just one portion out of his numerous lands and livestock, while his head slave should inherit the rest. Wondering why he made such a strange will, the shocked villagers concluded that he hated his son.

Later, the chief died. On the chosen day for sharing his estate, a large crowd gathered. The son, looking depressed, declined to choose anything until the slave had chosen all he wanted. The slave took everything except the ancestral home, which he wisely left for the son. The villagers praised the slave and pitied the son. As they were about to disperse, the son quickly walked up to the slave, threw his arms around his waist and declared, 'Since you are part of my father's properties, I choose you!'

This story sheds light on the philosophy of women's matrimonial property rights under customary law. Here, the son represents men's matrimonial property rights, while the slave represents married women's property rights. In other words, women's matrimonial property rights are subsumed in their husbands' rights. As outlined in the introduction, in the agrarian past family income was produced jointly, thus giving women neither the need nor the opportunity for independent property acquisition. After observing this social setting, colonial courts concluded that women's matrimonial property rights were subsumed in their husbands' rights, thereby producing the official customary law that women may exit marriage only with their clothes and cooking utensils.²¹ Today, not only has independent income largely replaced group production of family wealth, the nature of matrimonial property has changed from functional to include sophisticated gadgets. Unfortunately, judges have not addressed these changes, thereby causing hardship to women in cases of divorce and inheritance.²² While in the past agrarian values and the natural pace of socio-economic changes arguably ameliorated the harsh aspects of patriarchy, Nigeria's colonial experience overturned customary law's agrarian setting and introduced new values that eroded communitarian interests.²³

Regrettably, the post-colonial legal framework fails to recognise that the customary law of matrimonial property is unsuited to contemporary conditions.²⁴ As illustrated by paragraph 3 below, women who contributed to their husbands' economic advancement are left with no financial protection after divorce. For example, where a woman contributed to the improvement of a building in a rural area, she may not recover her contributions.²⁵ Indeed, the Supreme Court has affirmed that improvements to such property do not divest

21 *Duruaku v Duruaku & Another* (unreported) Suit CC/EZ/IK/2D/2004 Judgment of 26 March 2009 2, citing SNC Obi et al *The customary law manual* (1977).

22 AC Diala 'Judicial recognition of living customary law in the context of matrimonial property rights in South-East Nigeria' unpublished PhD thesis, University of Cape Town, 2016 115.

23 See, eg, *Agwu v Neziyanya* (1949) 12 West African Court of Appeal Report 450 (ruling that family property is disposable).

24 U Ewelukwa 'Post-colonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 427-428 446.

it of its original character of family ownership.²⁶ This situation is aggravated by the patriarchal attitude of many judges.²⁷ What then is the legal framework in which judges adjudicate matrimonial property disputes?

2.1 A problematic legal framework

As stated in the introduction, the interaction of state law and customary law is problematic.²⁸ The non-subjection of customary law to the Bill of Rights, and the non-statutory regulation of marriage and succession under customary law inhibit judges from invoking the Bill of Rights.²⁹ Given the supremacy of the Constitution, this, arguably, would not have been the case had the Constitution mandated judges to apply and develop customary law.³⁰

Other than the Constitution, statutory laws studiously avoid customary law. For example, section 69 of the Matrimonial Causes Act (MCA), the only law providing for financial relief during divorce, excludes marriages 'entered into according to ... customary law'.³¹ This exclusion of customary law marriages from statutory protection ignores the fact that it is the most common form of marriage in Nigeria.³² In any case, laws relating to matrimonial property offer scant protection to women. On the one hand, these laws lack provisions for community of property,³³ unlike the case in England. On the other hand, they have not been reformed to address the doctrine of marital unity, which subsumes a woman's legal identity into that of her husband.³⁴

Furthermore, there is undue deference to customary law in legislation relating to property. For example, most succession laws incorporate the provisions of section 3(1) of the Wills Law of 1958.³⁵ This clause excludes statutory law from regulating the distribution or inheritance of land subject to customary law. It thereby restricts testators' rights to dispose of property in rural areas. This undue

25 A Atsenuwa 'Custom and customary law: Nigerian courts and promises for women's rights' in A Obilade (ed) *Contemporary issues in the administration of justice: Essays in honour of Justice Atinuke Ige* (2001) 344.

26 *Rabiu v Absi* (1996) 7 NWLR (Pt 462) 505 SC (69-70).

27 In fact, the old judicial opinion was that women were inheritable chattel. See *Amusa v Olawumi* (2002) 12 NWLR (Pt 780) 30; *Akinnubi v Akinnubi* (1997) 2 NWLR (Pt 486) 144; *Folami v Cole* (1990) 2 NWLR (Pt 133) 445; *Aileru v Anibi* (1952) 20 NLR 45.

28 Nwauche (n 5 above).

29 Judges confirmed this difficulty during the author's fieldwork.

30 Secs 1(1) & (3) Constitution.

31 The Matrimonial Causes Act, Cap 220, Laws of the Federation of Nigeria 1990; M7, LFN 2004. See *Enweozor v Enweozor* (2012) LPELR-8544 (CA).

32 IO Agbade 'Recognition of double marriage in Nigerian law' (1968) 17 *International and Comparative Law Quarterly* 735.

33 A marriage in community of property is one of equal division of property.

34 See, eg, L Holcombe *Wives and property: Reform of the Married Women's Property Law in nineteenth-century England* (1983).

35 Cap 133, Laws of Western Nigeria 1958.

deference to customary law is probably due to *verbatim* reproductions of English law, which sought to avoid open conflict with customary law.³⁶ In sum, Nigeria's legal framework fails to deal with the hardships caused by the application of customary law in modern societies. Faced with this situation, judges apply customary law with their understanding of law and its role in society. However, this understanding tends to be positivist which, as argued below, is unsuited to the nature of customary law.

2.2 Nature of customary law

The judicial process often involves questions about the nature and sources of the norms that people contest as law. The approach that judges adopt to answer these questions largely depends on their legal background.³⁷ In Nigeria, as in many Anglophone post-colonial states, the training of judges is skewed in favour of a positivist English legal tradition, to the detriment of customary law.³⁸ It is necessary to briefly explore legal positivism to understand its impact on customary law adjudication.

Up to the mid-twentieth century, the idea that law is the command of a sovereign, which is backed by force, dominated English philosophical views of law.³⁹ Although this command theory was later replaced by a focus on the normative character of law and the institutions that apply it, law never lost a rule-based foundation. In essence, legal positivism, or the notion that law should be disassociated from morality and possess some element of a coercive character, survived the decline of the command theory.⁴⁰ Its survival owes much to Hart's *Concept of law*, which ameliorated positivist extremities by broadly situating law in a social context.⁴¹ The key aspects of Hart's ideas are his primary and secondary rules, as well as his 'rule of recognition'. As he famously put it, law is 'the union of primary and secondary rules'.⁴² Primary rules are those rules that people owe a duty to obey, while secondary rules are mere social habits, which people may violate without condemnation. Whereas primary rules satisfy the command theory of law as they focus on the

36 Sec 45(1) of the Interpretation Act, Cap 89, Laws of Nigeria and Lagos 1958.

37 J Stewart 'Why I can't teach customary law' in J Eekelaar & T Nhlapo (eds) *The changing family: International perspectives on the family and family law* (1998).

38 O Abdulmumini 'Lawyers, legal education and the Shari'a courts in Nigeria' (2004) 36 *Journal of Legal Pluralism* 114.

39 L Green 'Legal positivism' in EN Zalta (ed) *The Stanford encyclopaedia of philosophy* (2009) <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/> (accessed 23 June 2016).

40 J Gardner 'Legal positivism: 5½ myths' (2001) 46 *American Journal of Jurisprudence* 199. The chief proponents of the command theory include John Austin, Thomas Hobbes and Jeremy Bentham.

41 HLA Hart *The concept of law* (1994).

42 Hart (n 41 above) 107.

actions that individuals must or must not take, secondary rules deviate from it because they hint at other sources of law than a sovereign.⁴³

Considering that most customs do not owe their legal status to a law-making authority, Hart's work on the interaction of primary and secondary rules is significant for the judicial recognition of customs as law.⁴⁴ When judges – especially Nigerian judges – say that custom is a source of law, they usually mean those customs that they consider compatible with primary rules – that is recognised state (positivist) law. This creates a problem, given that 'law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control'.⁴⁵ In other words, a positivist or rule-based idea of law is incompatible with the nature of customary law, especially in post-colonial countries.⁴⁶

Customary law has long been acknowledged as a flexible normative system. Its flexibility flows from 'interactive social, economic and legal forces', which compel it to adjust to socio-economic changes.⁴⁷ As Moore showed, these forces interact in a social field containing several normative orders, which may be state, semi-state, or non-state law such as customary law.⁴⁸ Their interactions feed into a norm-creation process, during which various customs, norms or rules compete with state law as 'means of coercing or inducing compliance'.⁴⁹ Arguably, the interaction of customary law with state law results in normative adaptations capable of creating new norms. For example, normative adaptations take place when people agree, negotiate, or reject instructions to register lands or limit amounts payable as bride wealth.⁵⁰ Similarly, normative adaptations occur when the state explicitly or tacitly approves curfews imposed by communities in order to curb crime, or abolishes an animal-inclusive tax policy because it offends customary law. In effect, the competitive interaction of norms in social fields leads to normative adaptations and, subsequently, changes in customary law, of which judges are the arbiters. In essence, normative adaptations to socio-economic changes

43 J Hund "'Customary law is what people say it is'" – HLA Hart's contribution to legal anthropology' (1998) 84 *Archives for Philosophy of Law and Social Philosophy* 420.

44 Hart (n 41 above) 48–92. This does not mean an endorsement of Hart's confinement of customary law to a 'pre-legal form of government'. See Hart 116.

45 GR Woodman 'Ideological combat and social observation: Recent debate about legal pluralism' (1998) 42 *Journal of Legal Pluralism* 45.

46 See, generally, D Pimentel 'Legal pluralism in post-colonial Africa: Linking statutory and customary adjudication in Mozambique' (2014) 14 *Yale Human Rights and Development Journal* 59.

47 C Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: Problems solved or just beginning' (2000) 117 *South African Law Journal* 319.

48 S Moore 'Law and social change: The semi-autonomous social field as an appropriate subject of study' (1973) 7 *Law and Society Review* 719.

49 S Moore *Law as process: An anthropological approach* (1978) 56–57. Even within a social field, there may be normative variations (cultural pluralism). See, eg *Egharevba v Orunonghae* (2001) 11 NWLR (Pt 724) 318 [CA] 337 per Ibiyeye JCA.

50 See, eg, the Limitation of Dowry Law, Eastern Region Law 23 of 1956.

underlie customary law's flexibility. The problem seems to lie in recognising when these adaptations acquire the character of law.

Hund's distinction between social habits and social rules offers help for this problem.⁵¹ A social rule has 'internal' and 'external' aspects. The external aspect is phenomena that are easily observable. While not easily observable, the internal aspect refers to conscious attitudes towards acceptable behaviour, which examine human conduct in order to determine whether a sense of obligation is involved. As Hart put it, it is 'a critical reflective attitude to certain patterns of behaviour as a common standard'.⁵² In other words, deviation from a social habit or custom does not need to attract criticism unless there is a sense of obligation attached to the custom. This sense of obligation gives custom the legal character it requires for its judicial recognition. As Fuller argued, an obligation is not incurred in human actions 'simply because a repetitive pattern can be discerned Customary law arises out of repetitive actions when and only when such actions are motivated by a sense of obligation'.⁵³ Thus, where threatened deviations meet with pressure for conformity, and actual deviations are seen as violations of acceptable conduct, the custom in question should be regarded as law. Hund rightly argues that 'it is the existence of this critical reflective attitude which distinguishes custom simpliciter from customary law'.⁵⁴

In the above sense, the internal aspects of customs serve as guides to the conduct of social life.⁵⁵ This internal aspect is flexible as it is dependent on contemporary social ideas of acceptable conduct. If only the external aspects of customs are observed by scholars or applied by judges, the result is likely to be what scholars refer to as official customary law.⁵⁶

This brand of customary law covers external perceptions of customs, as reflected in court judgments, textbooks, codifications and restatements. It gives an incomplete picture of customary law as it neglects the foundational values that inform customs.⁵⁷ These values, which underpin the internal aspects of customs, are what explain the manners in which members of a social group view their normative behaviour. Their critical reflective attitude to their rules enables them

51 Hund (n 43 above).

52 Hart (n 41 above) 54.

53 L Fuller 'Human interaction and the law' (1969) 14 *American Journal of Jurisprudence* 16.

54 As above.

55 Hund (n 43 above) 424.

56 TW Bennett 'Re-introducing African customary law to the South African legal system' (2009) 57 *American Journal of Comparative Law* 3; Himonga & Bosch (n 47 above); GR Woodman 'Some realism about customary law – The West African experience' (1969) *Wisconsin Law Review* 128.

57 Stewart and others referred to these values as underlying general principles. See J Stewart 'Why I can't teach customary law' (1997) 14 *Zimbabwe Law Review* 18; Nhlapho (n 15 above) 138 141 145-146; Dengu-Zvobgo et al *Inheritance in Zimbabwe: Law, customs and practices* (1994) 252 254.

to determine when a custom has outlived its usefulness or when it needs to be modified to suit socio-economic changes. Therefore, it is important for judges to consider not only the external, but also the internal aspects of customary law. If they focus only on the external aspects, they might miss the values that underpin people's adaptation of customs to socio-economic changes, thereby denying women matrimonial property rights. On the other hand, a holistic approach, which includes both the internal and external aspects of customs, will enable judges to interpret customs in ways that reflect the changed social realities surrounding matrimonial property acquisition.

Unfortunately, Nigerian judges often adopt a positivist approach to customary law by assessing it only from an external point of view – that is a rule-based system of law.⁵⁸ The problem with this approach is that it could perpetuate distorted versions of customary law. As scholars revealed, colonial judges generally relied on versions given to them by interpreters and community representatives such as chiefs and elders, some of whom had vested interests in the subject matter in question.⁵⁹ These vested interests ranged from property to political power and gender dominance.⁶⁰ Indeed, African customary law became so distorted that it was described as a “construction” of the colonial judiciary in complicity with (African) elders.⁶¹

The probability of judicial recognition of distorted versions of customary law is heightened by the doctrine of precedent, which stifles the dynamism of customary law.⁶² As a Supreme Court judge observed, ‘customary laws were formulated from time immemorial. As our society advances, they are removed from their pristine social ecology. They meet situations which were inconceivable at the time they took root.’⁶³ The positivist attitude of judges is worsened by the means of proving customary law.

2.3 Proof of customary law

The proof of customary law in Nigeria is bedevilled by several challenges. These include the orality of customs; the technical nature of rules of pleadings; the competence of parties' legal representation; and the legal background of judges. For issues of customary law, the Supreme Court and Court of Appeal may only adjudicate appeals

58 See the discussion in sec 3.

59 See, eg, ML Chanock *Law, custom and social order: The colonial experience in Malawi and Zambia* (1998); ML Chanock ‘Neither customary nor legal: African customary law in an era of family law reform’ (1989) 3 *International Journal of Law and Family* 76; F Snyder ‘Colonialism and legal form: The creation of “customary law” in Senegal’ (1981) 19 *Journal of Legal Pluralism* 49.

60 As above. See also *Okanlawon v Olayanju* (unreported) Suit H05189176, Oshogbo High Court, 24 August 1978, per Sijuwade J.

61 W Ncube ‘The white paper on marriage and inheritance in Zimbabwe: An exercise in superfluity and mischief’ (1993) 5 *Legal Forum* 12.

62 *Agbai v Okogbue* (1991) 7 NWLR (Pt 204) 417.

63 *Agbai v Okogbue* (n 62 above) per Nwokedi JSC.

arising from the High Court or customary courts of appeal in Nigeria's federating states. Customary courts which have original jurisdiction over customary law are constituted by a panel of three judges.⁶⁴ The panel presidents are legal practitioners, while other members are drawn from elderly, mostly retired senior public officers, who are deemed to be knowledgeable in the customs of their respective communities. Unlike the case in appellate courts, the Evidence Act is not applicable in customary courts.⁶⁵ Section 16(1) of this Act states that '[a] custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence'. From this provision, two means of proving customary law in appellate courts are discernible.

The first is by evidence, and the other is by judicial notice. Section 16(1) of the Evidence Act and customary court laws place the burden of proving a custom on the person relying on it.⁶⁶ Section 17 states that 'a custom may be judicially noticed when it has been adjudicated upon once by a superior court of record'. Notably, judicial notice inhibits litigants from showing how their way of life adjusts to socio-economic changes.⁶⁷ It is only through proving customs that their past and present social settings may be properly articulated and their foundational values revealed. For example, on several occasions, the Supreme Court has declared that the denial of widows' rights of succession to their husbands' estates enjoys judicial notice because of its notoriety.⁶⁸

However, judicial notice robs widows of at least three things. The first is an opportunity to explain the foundations of the male primogeniture custom and how this custom is accompanied by heirs' duty to support a deceased person's dependants.⁶⁹ The second is an opportunity to explain how acculturation, urbanisation and other socio-economic changes make it difficult for heirs to fulfil this duty of care. In other words, widows lack a platform to explain the disappearance of a correlation between inheritance and heirs' responsibility to care for deceased persons' dependants.⁷⁰ Finally, women are unable to assert the unsuitability of customary law to their contributions to matrimonial property through their independent income. The best means of establishing customary law thus is by placing the burden of proof on the party asserting a custom's continued relevance.

64 The Panel may sit with two members: sec 3 of the Abia State Customary Courts Law 6 of 2011.

65 Evidence Act of 2011, which repealed the Evidence Act Cap E14, LFN 2004.

66 The Supreme Court has affirmed this position in *Sokwo v Kpongbo* (2008) 34 WRN 8.

67 *Olabanji v Omokewu* (1992) 7 SCNJ 266 281.

68 *Nzekwu v Nzekwu* (1989) NWLR (Pt 104) 373; *Osilaja v Osilaja* (1972) 10 SC 126.

69 Okoro (n 16 above).

70 AC Diala 'Reform of the customary law of inheritance in Nigeria: Lessons from South Africa' (2014) 14 *African Human Rights Law Journal* 637.

Notably, the main mode of proof in divorce matters is oral evidence, in which a party must demonstrate the existence of a marriage and why the marriage has broken down. Oral evidence could enable a woman to claim matrimonial property or compensation by showing her contributions to its acquisition. It could also enable her to explain the changing nature of property and the influence of socio-economic changes, such as labour migration and independent income on property acquisition. Accordingly, the proof of customs by evidence is preferable to proof by judicial notice.⁷¹ This background informs the analysis below of the attitude of Supreme Court and Court of Appeal judges towards women's matrimonial property rights under customary law.

3 Judicial attitude towards matrimonial property rights

Rather than the Bill of Rights, the thread running through the cases analysed here is the repugnancy test. The original aim of this test was to ensure that customs did not offend English law and its associated Christian notions of morality.⁷² In *Eshugbayi Eleko v Officer Administering the Government of Nigeria*,⁷³ Lord Atkins declared that a barbarous custom is one that is repugnant to natural justice, equity and good conscience. However, the phrase 'natural justice, equity and good conscience' has never been defined, nor have judges attempted to clearly articulate its meaning.⁷⁴ As Elias put it, in 'many of the cases decided on this principle, no consistent principle is discernible and some of the decisions are hard to justify'.⁷⁵ This conclusion remains valid today, as the discussion below illustrates.

3.1 Judicial use of the repugnancy test

The decision that typifies the attitude of Nigeria's apex courts to matrimonial property is *Nezianya v Okagbue*.⁷⁶ After the death of her husband, a widow began letting his houses to tenants. Later on, she sold a portion of the land and, with the proceeds, built two huts on another portion of the land. When she wanted to sell more parcels of land, her husband's family objected. She devised the disputed land to her late daughter's child, Mrs Julie Nezianya, who sued the husband's family. Julie sought exclusive possession of the land, claiming that her grandmother had had long, adverse possession of it. The trial court

71 R Nwabueze 'The dynamics and genius of Nigeria's indigenous legal order' (2002) 1 *Indigenous Law Journal* 173.

72 Nwabueze (n 71 above) 176; *Laoye v Oyetunde* (1944) AC 170; T Elias *Law and social change in Nigeria* (1972) 270-271.

73 (1931) AC 662 673.

74 A Obilade *The Nigerian legal system* (1990) 100.

75 T Elias *The judicial process in Commonwealth Africa* (1977) 53.

76 (1963) 1 ANLR 352.

held that possession by a widow of her husband's land cannot negate the rights of her husband's family as to enable her acquire an absolute right of possession against the family. Julie appealed to the Supreme Court.

Here, the key question was twofold. The first is the ambit of a widow's right to her late husband's estate under Onitsha customary law. The second is the custom of male primogeniture which gives the first son (*Okpala*) the right to alienate his late brother's property during his widow's lifetime. In declaring the respondent's alienation of his brother's property as failing the repugnancy test, the Court stated:⁷⁷

The essence of possession of the wife in such a case is that she occupies the property or deals with it as a recognised member of her husband's family and not as a stranger; nor does she need express consent or permission of the family to occupy the property so long as the family make no objection ... The consent, it would appear, may be actual or implied from the circumstances of the case, but she cannot assume ownership of the property or alienate it. She cannot, by the effluxion of time, claim the property as her own. If the family does not give their consent, she cannot, it would appear, deal with the property. She has, however, a right to occupy the building or part of it, but this is subject to good behaviour.

The Supreme Court did not examine the philosophical foundations of the male primogeniture custom. By subjecting a widow's possessory right to good behaviour, it sought a balance between preserving this custom and curbing its hardship on widows.⁷⁸ Twenty-seven years later it clarified this decision in *Nzekwu v Nzekwu*.⁷⁹

Here, the deceased had died intestate, leaving a wife, Mrs Christina Nzekwu, and two female children. Mrs Nzekwu's in-laws sold the disputed house and the purchaser gave it out to tenants. The Court of Appeal held that a widow without a male child who chooses to retain her husband's name has the right to reside in the matrimonial home even if she is childless. She also has the right to use her matrimonial property as long as her rights do not negate the rights of her late husband's family.

On appeal, the Supreme Court ruled that a widow has the right to reside in the matrimonial home, to be given farm land for cultivation, and to be supported by her husband's family. However, it upheld the lower court's validation of the male primogeniture custom and affirmed that a widow's matrimonial property rights are relative. Delivering a 74-page judgment, Nnamani JSC declared:⁸⁰

The rights of a widow in her husband's property in customary law have been settled. A widow who chooses to remain in the husband's house and in his name is entitled, in her own right and notwithstanding that she has no children to go on occupying the matrimonial home and to be given

⁷⁷ *Nezianya v Okagbue* (n 76 above) per Ademola CJN 356-357.

⁷⁸ See also *Odiari v Odiari* (2009) 11 NWLR (Pt1151) 26 37.

⁷⁹ (1989) NWLR (Pt 104) 373.

⁸⁰ *Nzekwu v Nzekwu* (n 79 above) 395.

some share of his farmland for her cultivation and generally to maintenance by her husband's family. Should her husband's family fail to maintain her, it seems that she can let part of the house to tenants and use the rent obtained thereby to maintain herself. Her interest in the house and farmland is merely possessory and not proprietary, so that she cannot dispose of it out-and-out.

Nnamani JSC cited with approval the conclusion of the trial judge, Nwokedi J:⁸¹

Subject to good behaviour, plaintiff in this case has the right of possession of her late husband's property and no member of her husband's family has the right to dispose of the property at least whilst she is still alive ... Any Onitsha custom which postulates that the 1st defendant has the right to alienate, as the Okpala, property of a deceased person in the lifetime of his widow, is in my view a barbarous and uncivilized custom, which, in my view, should be regarded as repugnant to equity and good conscience.

The *Nzekwu* judgment showed the Supreme Court's unwillingness to directly confront the male primogeniture custom by analysing its foundational value and relevance to contemporary conditions. Aware that invoking the Bill of Rights would imply a striking down of this custom it resorted to the repugnancy test. Notably, Craig JSC and Nnaemeka-Agu JSC dissented in the *Nzekwu* case on two grounds. First, they held that Mrs Nzekwu had failed to prove that the disputed property was partitioned to her late husband. Second, they held that her conduct, just like Mrs Neziyanya's conduct, was a denial of the family's title, which amounted to bad behaviour. Their reasoning ignores the reality that greedy brothers-in-law could appropriate widows' matrimonial properties on the ground that they had abused their possessory rights.

The Supreme Court's balancing act was bound to lead to inconsistencies, given that the primogeniture custom does not manifest only in matrimonial property disputes. This was the case in *Ejiamike v Ejiamike*.⁸² Here, the plaintiff claimed that the defendants were jointly managing the property of their late father in disregard of his right as the family head (*Okpala*). Conversely, the defendants claimed that the custom of male primogeniture relied on by the plaintiff was repugnant to natural justice, equity and good conscience. The trial judge rejected this claim, holding that the onus is on the defendants to establish that the custom relied on by the plaintiff failed the repugnancy test.⁸³

Twenty-two years later an opportunity to correct this decision and strike down the custom of male primogeniture arose in *Okonkwo v Okagbue*.⁸⁴ Here, Mr Nnayelugo Okonkwo of Ogbotu village died in 1931, survived by five sons, including the plaintiff. He was also survived by two sisters who were the first and second defendants.

81 Record of appeal 65.

82 (1972) ECSNLR 130 (High Court).

83 As above.

84 (1994) 9 NWLR (Pt 368) 301.

These childless women had separated from their husbands and returned to their family home at Ogbotu. About 30 years after Okonkwo's death the sisters, acting under Onitsha customary law, married the third defendant for their deceased brother with the consent of some family members and village elders. The third defendant gave birth to six sons, all in Okonkwo's name. The plaintiff and his brothers refused to acknowledge these children.

Interestingly, both the High Court and the Court of Appeal upheld the custom of marriage to a deceased person. On appeal, the Supreme Court declared that the disputed custom not only failed the repugnancy test, but it also contradicted public policy. In a remarkable philosophical turn, the Court declared:⁸⁵

A conduct that might be acceptable a hundred years ago may be heresy these days and *vice versa*. The notion of public policy ought to reflect the change. That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the court. But this must objectively relate to contemporary mores, aspirations, expectations and sensitivities of the people of this country and to consensus values in the civilised international community ... We are a part of that community and cannot isolate ourselves from its values. Full cognisance ought to be taken of the current social conditions, experiences and perceptions of the people. After all, custom is not static.

The Court's reference to 'contemporary mores, international community' and changing customary law is worth noting, given its reasoning in the *Mojekwu* case below.⁸⁶

3.2 Supreme Court's use of the Bill of Rights

The Supreme Court's use of the Constitution in customary law issues is staggeringly conservative. The *Mojekwu* case illustrated that prior to April 2014, the Court's deference to the male primogeniture custom was justified on the need to respect the customary law of communities.⁸⁷ The Court did not seem to mind that its attitude infringed the Constitution's anti-discrimination clause.⁸⁸ The appellant, Mr Iwuchukwu, sued Mrs Mgbafor Mojekwu who, following her death, was substituted by her daughter, the respondent. Mr Iwuchukwu claimed right of occupancy over a property at 61 Venn Road, Onitsha. He claimed that under the *oli-ekpe* (primogeniture) custom of Nnewi, the brother of a man without a male child inherits his estate, even where the deceased had female children. The High Court dismissed his suit. Notably, the parties did not request the invalidation of the *oli-ekpe* custom, nor did the trial

85 As above.

86 See also *Akpalakpa v Igbaibo* (1996) 8 NWLR (Pt 468) 553 (CA), which struck down a custom for allegedly militating against the economic, political and social development of a community.

87 *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt 512) 283. Following the substitution of the deceased respondent on appeal to the Supreme Court, the case became *Mojekwu v Iwuchukwu* (2004) 11 NWLR (Pt 883) 196.

88 See also *Ejiamike v Ejiamike* (n 82 above).

court address it. In dismissing Mr Iwuchukwu's appeal the Court of Appeal, on its own, invalidated the *oli-ekpe* as repugnant to natural justice, equity and good conscience.⁸⁹

The first issue on appeal in the Supreme Court was the propriety of the Court of Appeal's unsolicited invalidation of the *oli-ekpe* custom. The Supreme Court held that in the circumstances, the invalidation was wrong. It based this reasoning on the need for judicial declarations to be founded on the claims of the parties. This finding on pleadings, a well-known judicial principle,⁹⁰ is significant for women's access to justice. Women who cannot afford lawyers, or whose lawyers are incompetent, are adversely affected by a strict adherence to rules of pleadings. In attempting to avoid the Bill of Rights and subjectively utilise the repugnancy test, the Supreme Court contradicted itself as follows:⁹¹

A custom cannot be said to be repugnant to natural justice, equity and good conscience just because it is inconsistent with English Law concepts or some principle of individual rights as understood in any other legal system ... Admittedly, there may be no difficulty in reaching a decision in some obviously outrageous or needlessly discriminatory customs. In some other cases, it may not be so easy.

Given the Court's attitude in issues such as in the *Mojekwu* case it is difficult to imagine a custom more discriminatory than the *oli-ekpe*. As if its justification for condemning the invalidation of this custom is not unfortunate enough, the Court went on to make the following astonishing statement:⁹²

The (lower court) was no doubt concerned about the perceived discrimination directed against women by the said Nnewi *oli-ekpe* custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against all customs which fail to recognise a role for women – for instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practise by the system by which they run their native communities. It would appear for these reasons that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties, or properly raised and argued.

The Court's reasoning belittled the supremacy of the Constitution, which imposes a duty on the courts to strike down any law that contradicts the Bill of Rights.⁹³ This conservative attitude to women's

89 Per Tobi JCA 304-305.

90 *Atoyebi v Odudu* (1990) 6 NWLR (Pt 157) 384; *Ude v Chimbo* (1998) 12 NWLR (Pt 577) 169; *Oyekanmi v NEPA* (2000) 15 NWLR (Pt 690) 414.

91 *Mojekwu v Iwuchukwu* (2004) per Uwaifo JSC.

92 As above.

93 Secs 1(1) & (3) Constitution.

property rights may be contrasted with the attitude of the Court of Appeal.

3.3 Use of the Bill of Rights by the Court of Appeal

In *Mojekwu v Ejikeme*,⁹⁴ Reuben Mojekwu died intestate in 1996 without any surviving male children. However, he had a daughter named Virginia who gave birth to two daughters. In turn, these daughters gave birth to two sons who, with their mother, constituted the appellants. The appellants claimed that Virginia had undergone the Nnewi custom of *Nrachi*, thereby entitling her to inherit Reuben's property. The *Nrachi* custom enabled a daughter to remain unmarried in order to raise male children to succeed her father. Any such daughter assumed the position of a man in her father's house, and was entitled to inherit his property. A key issue for the Court's determination was the validity of the *Nrachi* custom, which indirectly forbids a widow from inheriting her husband's estate. The Court of Appeal held that the custom failed the repugnancy test because children born to a woman who had undergone this ceremony are denied the paternity of their natural father.⁹⁵ Interestingly, the Court also held that the custom offended section 39(2) of the 1979 Constitution, which prohibited discrimination on the grounds of circumstance of birth. Unlike the Supreme Court it did not hesitate to invoke the Constitution. The following cases show its willingness to invoke the Constitution to protect women.

In *Asika v Atuaya*⁹⁶ the defendant argued that his siblings were only entitled to inherit their husbands' properties, not their father's estate. The trial court found that under Onitsha customary law women, including the female children of a deceased person, could not inherit their father's land. In partly granting the plaintiffs' claims, it found that where the land is situated in an urban area, the testator may devise it by will to his children, irrespective of their gender. The Court of Appeal ruled that the impugned custom was discriminatory and offended sections 42(1) and (2) of the Constitution.⁹⁷ As the Court put it, 'customary laws and statutory provisions cannot, in any way, render constitutional provisions nugatory'.⁹⁸

Notably, the Court of Appeal's stance on the male primogeniture custom contradicted the Supreme Court's decision in *Mojekwu v Iwuchukwu*, which had overruled the Court of Appeal's invalidation of this custom. In fact, it appears that the Court of Appeal tactfully ignores the Supreme Court's ruling in *Mojekwu* in favour of its own decision.⁹⁹ In the well-known case of *Uke v Iro*,¹⁰⁰ it employed the Bill of Rights to rule that any custom that relegates women to second-

94 *Mojekwu v Ejikeme* (2000) 5 NWLR 402.

95 The Court with approval cited *Edet v Essien* (1932) 11 NLR 47 (Nig DC).

96 (2008) 17 NWLR (Pt 1117) 484.

97 *Asika v Atuaya* (n 96 above) 1313-1314.

98 *Asika v Atuaya* per Olukayode Ariwoola JSC.

class citizens is unconstitutional. In *Ihejiobi v Ihejiobi*,¹⁰¹ the Court held that the eviction of Mrs Ihejiobi from her matrimonial home 'in a wheelbarrow in the full view of members of the public is totally inconsistent' with her constitutional rights and 'repugnant to natural justice'.¹⁰² It affirmed the judgment of the High Court, which had restrained the appellants from disturbing Mrs Ihejiobi's use of her matrimonial property. In *Ezeibe v Ezeibe*, it imported principles of procedural fairness into customary law in order to protect the rights of a divorced woman.¹⁰³

These contrasting judgments of the Supreme Court and the Court of Appeal do not mean that the latter is not sometimes afflicted with the inconsistency and conservatism of the Supreme Court.

3.4 Attitude of apex courts to divorce

With respect to the division of matrimonial property upon marriage dissolution, both courts fail to invoke the Bill of Rights to remedy discrimination against women. This was clearly evident in the case of *Onwuchekwa*.¹⁰⁴ Here, a woman claimed a share of her matrimonial property on the ground that she had contributed to the purchase of the land on which the disputed building was erected, as well as to the erection of the building. The Court of Appeal held that she must show sufficient proof of direct financial contribution in order to entitle her to a share of the property. Strangely, it affirmed an *Isuikwuato* custom which holds that a wife and her properties are chattel owned by her husband.¹⁰⁵ Instead of declaring this custom unconstitutional, the Court of Appeal stated:¹⁰⁶

The determining factor or factors should not be the English common law but Nigerian law. It is good law that customary law cannot be said to be repugnant to natural justice, equity and good conscience merely because it is inconsistent with or contrary to English law, as the test of the validity of customary law is never English law.

As seen in *Okwueze v Okwueze*,¹⁰⁷ a case decided two years before the *Onwuchekwa* case, the Court of Appeal played the ostrich with respect to the application of English law to customary law. There, the Supreme Court had imported the English practice of denying custody orders for children below the age of 16.¹⁰⁸

99 *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Ojukwu v Ojukwu* (2000) LPELR-10566 (CA) paras A-D.

100 (2001) 11 NWLR 196.

101 *Romanus Ihejiobi v Grace Ihejiobi* (2013) LPELR-21957 (CA) 23.

102 *Romanus Ihejiobi v Grace Ihejiobi* (n 101 above) per Philomena Ekpe paras F-G.

103 *Maduike Ezeibe v Adaku Ezeibe* (2013) LPELR-21907 (CA).

104 *Onwuchekwa v Onwuchekwa and Obuekwe* (1991) 5 NWLR (Pt 194) 739.

105 *Isuikwuato* is in Abia State.

106 *Onwuchekwa v Onwuchekwa and Obuekwe* (n 104 above).

107 (1989) 3 NWLR 321.

108 *Hall v Hall* (1945) 62 TLR 151 (CA).

In *Amadi v Nwosu*¹⁰⁹ the Court of Appeal hid behind technicalities to rule that it cannot fairly assess the separate beneficial interests of a couple by reference to their contributions to the purchase of a house. Mrs Amadi had sued the respondent who had purchased the disputed building from her estranged husband. The Supreme Court affirmed the Court of Appeal's finding, holding that Mrs Amadi's evidence that she 'paid for labour and sand when the house was built' was 'evidence on a matter which was not pleaded ... [and] ought to be disregarded'.¹¹⁰ The Court affirmed that a woman cannot claim a share in the division of matrimonial property under customary law, nor can she recover contributions to matrimonial property.¹¹¹ This decision demonstrates the unwillingness of the apex courts to acknowledge the unsuitability of the customary law of matrimonial property to modern conditions. The Supreme Court could have invoked the rights to property, equality and even human dignity to invalidate this law. Just as in numerous cases involving the male primogeniture custom, it failed to do this. It was only in April 2014 that it invalidated this custom. This occurred in the April judgments.

3.5 April judgments

In *Anekwe v Nweke*¹¹² a widow, Maria Nweke, sought a declaration of entitlement to a statutory right of occupancy of a parcel of land or, alternatively, a share of the proceeds of its sale. She also sought a restraining order against her eviction by the defendants. In sum, she claimed that she had been disinherited by her late husband's family because she had only (six) female children. She contended that the customs of Awka (in Anambra State) allow a woman to inherit the property of her husband whether she has a male child or not. Interestingly, she relied on an arbitration order by the Ozo Awka Society, which appears to indicate that the custom of primogeniture has adapted to allow a widow to inherit her husband's landed property irrespective of her bad behaviour. A member of this society, Ozo Nwogbo Okafor, stated: 'Under Awka custom, if a man dies without a male child, the wife will not be driven away from her husband's compound.'¹¹³ This testimony was a clever way of saying that a widow's right to her matrimonial property was no longer dependent on her good behaviour. As the *Nezianya v Okabgue* case showed, a widow who contests land title with her husband's family opens herself up to accusations of bad behaviour and subsequent disinheritance. This is evident in the aspersions that the defendants cast on Maria's character.¹¹⁴ Both the High Court and the Court of Appeal upheld Maria's claims.

109 *Adaku Amadi v Edward Nwosu* (1992) NWLR (Pt 241) 273; (1992) LPELR-442 (SC).

110 *Adaku Amadi v Edward Nwosu* (n 109 above) per Kutigi, JSC paras 15F-16F.

111 As above.

112 *Anekwe v Nweke* (n 11 above) 1154.

113 Record of appeal 106-107.

114 Para 16 of the amended statement of defence.

On further appeal, the Supreme Court noted that the defendants seemed concerned with preserving 'the age-old, male dominated custom and cultural practices of Awka people on inheritance'.¹¹⁵ Reading the lead judgment, Ogunbiyi JSC dismissed the appeal in favour of Maria as follows:¹¹⁶

A custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property ... should be punitively and decisively dealt with ... Such a custom, which militates against women, particularly widows who are denied their inheritance ... [is] repugnant to natural justice, equity and good conscience.

Just as in the judgments discussed above, the apex courts failed to analyse how the customary law of succession has departed from its foundational values. Incredibly, the Supreme Court mentioned neither the equality clause nor the right to property, nor even the right to human dignity. In fact, it studiously avoided the Bill of Rights. It was only in the second April judgment, *Ukeje v Ukeje*,¹¹⁷ that it deployed the Constitution against the male primogeniture custom. The Court ruled:¹¹⁸

The Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian.

However, *Ukeje* was not a matrimonial property rights dispute. In any case, it merely affirmed a decision of the Court of Appeal, the relevant aspect of which was uncontested on appeal. Indeed, the Supreme Court affirmed it in a nonchalant manner:¹¹⁹

Agreeing with the High Court, the Court of Appeal correctly found that the Igbo native law and custom which disentitles a female from inheriting her late father's estate is void as it conflicts with sections 39(1)(a) and (2) of the 1979 Constitution (as amended). This finding was affirmed by the Court of Appeal. There is no appeal on it. The finding remains inviolate.

In affirming the applicability of the Bill of Rights the Supreme Court failed to indicate whether the *Ukeje* decision could be extrapolated to women's matrimonial property rights. Perhaps it was conscious that such clarification would have overruled its precedents on the subject.

115 *Anekwe v Nweke* (n 11 above) para 21.

116 Justices Tanko Muhammad, Muhammad Muntaka-Coomasie, Nwali Sylvester Ngwuta and Olukayode Ariwoola supported the lead judgment.

117 *Ukeje v Ukeje* (2014) 11 NWLR (Pt 1418) 384-414.

118 *Ukeje v Ukeje* (n 117 above) per Ogunbiyi JSC 33 paras A-G.

119 *Ukeje v Ukeje* per Olabode Rhodes-Vivour 32-33 paras E-G.

3.5.1 A balancing act

The April decisions are missed opportunities for the Supreme Court to address the question of how some aspects of customary law no longer suit modern conditions. Notably, in the *Nweke* case it failed to address the unsuitability of the primogeniture custom to women's independent income and contribution to matrimonial property. Such analysis would have provided a platform for invoking the Bill of Rights.¹²⁰ Among other general pronouncements, it merely declared that 'the custom and practices of Awka people upon which the appellants have relied for their counter claim is hereby out rightly condemned in very strong terms'.¹²¹ The Court also failed to invite *amicus curiae* evidence from research institutes and non-governmental agencies to shed light on the challenges of applying customary law outside the social settings in which it emerged. To date such bodies have not appeared in any notable customary law litigation.

Given the Supreme Court's jurisprudence on women's property rights, an obvious conclusion presents itself. Aware that invoking the right to non-discrimination or human dignity would imply a striking down of the male primogeniture custom, the Supreme Court routinely used the repugnancy test. This option enabled it to make subjective judgments on a case-by-case basis, in what is obviously a balancing act. Fortunately for women affected by the male primogeniture custom, there was nothing to balance in the *Ukeje* case as the constitutional legitimacy of children born out of wedlock was not contested on appeal. As for the *Nweke* case, the Supreme Court merely affirmed precedents it had established in the *Nezianya* and *Nzekwu* cases. The only difference is that it quietly abandoned its subjection of widows' possessory rights over matrimonial property to good behaviour.

4 Conclusion and the way forward

The April judgments mask the Supreme Court's indifferent attitude to women's matrimonial property rights. While the *Nweke* case completely failed to mention the Constitution, the *Ukeje* case arose from a claim of child legitimacy, not matrimonial property. The Court's attitude helps to explain why it has never invoked the Bill of Rights in matrimonial property disputes. It also has yet to acknowledge or probe adaptations occurring in matrimonial property rights and the dissonance between customary law and its foundational values.

Generally, apex judges are unsympathetic to women's matrimonial property rights.¹²² They often insist that women must prove their

120 *Anekwe v Nweke* (n 11 above) 36-37 paras A-G. For criticism of the judgment, see *Diala* (n 70 above) 652.

121 *Anekwe v Nweke* 36.

monetary contributions to matrimonial property with cogent evidence such as receipts, and in strict accordance with the rules of pleadings.¹²³ Moreover, they surreptitiously ignore the philosophy of matrimonial property rights, which is no longer suited to socio-economic realities of urbanisation, acculturation and women's independent income.

Judges' attitudes to matrimonial property rights are encouraged by Nigeria's legal framework which neither subjects customary law to the Bill of Rights, nor regulates customary laws of succession and marriage. As Ewelukwa remarked, the unregulated 'coexistence of modern, statutory laws with traditional customary laws and practices – has created a complex and confusing legal regime under which women generally are denied adequate legal protection'.¹²⁴ What then is the way forward in this situation?

4.1 Recommendations

The article suggests three remedial measures. First, the status and ambit of customary law need to be defined in the Constitution. It goes without saying that the application of customary law should be unequivocally subjected to the Bill of Rights. It is significant that judgments, in general, rarely use the Bill of Rights to evaluate the validity of customs.¹²⁵ Nigeria's failure to subject customary law to the Bill of Rights perhaps explains why judges prefer to use the repugnancy test. Regrettably, they use it without a discernible judicial philosophy, resulting in an insufficient and incoherent protection of women's matrimonial property rights. Pending constitutional reform, judges should read in the rights to equality, property and human dignity into matrimonial property disputes.

Second, the Matrimonial Causes Act should be amended to turn the legal status of couples into community of property and profit and loss. Presently, this Act merely requires the court to compel couples to make 'a settlement of property ... as the court considers just and equitable in the circumstances of the case'.¹²⁶ Although the Matrimonial Causes Act does not apply to customary marriages, the high frequency of double marriage will positively impact on women's matrimonial property rights.

Third, succession, marriage and divorce under customary law need to be statutorily regulated after widespread consultations and

122 On the Supreme Court's attitude, see E Uzodike 'Developments in Nigerian family law: 1991-1997' in A Bainham (ed) *The international survey of family law 1997* (1999) 325-344, who noted the Court's 'cold feet' over discriminatory customs against women.

123 Indeed, judges routinely state that they are not 'Father Christmas'. Eg, see *Ugo v Obiekwe* (1989) NWLR (Pt 99) 566 31-32; *Ekpenyong v Nyong* (1975) 2 SC 71 80.

124 Ewelukwa (n 24 above).

125 The few exceptions are when the claims of the litigants involve the Bill of Rights, eg *Ezeibe v Ezeibe*; *Ihejiobi v Ihejiobi* and *Uke v Iro*.

126 Sec 72(1) Matrimonial Causes Act.

awareness campaigns. Furthermore, section 17 of the Evidence Act should be amended to remove the requirement of judicial notice of customs based on a single decision of a superior court. As argued in paragraph 3 above, judicial notice is incompatible with customary law's flexibility. Because of judicial notice it took the Supreme Court 51 years to overturn *Nezianya v Okagbue* and stop subjecting widows' matrimonial property rights to good behaviour.

Ultimately, judges should avoid an overly rule-based approach to customary law, as evident in the heavy reliance on precedents. Such reliance undermines customary law's flexibility, which thrives on people's adaptation to socio-economic changes.

Implementing legal accountability to reduce maternal mortality and morbidity in Uganda

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Summary

Accountability is a vital human rights principle to address preventable maternal morbidity and mortality in Uganda. The continuous use of 'accountability' as a term without elaborating on it gets in the way of using its underlying principles to improve laws and policies. The implementation of legal accountability requires creating avenues through which women whose maternal health rights have been violated may access legal remedies. The existence of adequate legal remedies is vital not only for redressing violations of rights but also for identifying and proposing strategies towards addressing the bottlenecks in health systems. Courts of law are principal judicial mechanisms and, therefore, it is incumbent upon courts to expand rather than limit maternal health-related rights. The Uganda Human Rights Commission is another body which is empowered with a protective and promotional mandate that should be used to promote and protect reproductive health rights. It is further emphasised that accountability is not a tool to be understood and interpreted only by legal practitioners. Rather, various forms of accountability, including social and administrative forms, are vital for complementing legal accountability in reducing preventable maternal mortality and morbidity.

Key words: *accountability; human rights; maternal mortality and morbidity; access to justice*

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1 Introduction

Despite various programmatic and legislative strategies, maternal mortality and morbidity rates in Uganda remain unacceptably high and need to be addressed urgently. The most recent official statistics put the rates at 368 per 100 000 live births, a reduction from 438 recorded in 2011.¹ These numbers are still much higher than the Sustainable Development Goal (SDG) target of 70 per 100 000 live births that is envisioned by 2030.² These statistics should also be viewed with caution as they often mask deep regional in-equalities, with some areas recording considerably higher ratios than those reported officially.³ The direct causes of high maternal mortality and morbidity rates are well known, and include sepsis; unsafe abortions; haemorrhage; obstructed labour; and hypertensive disorders. Unsafe abortions have also been noted to be very common among teenagers, especially those living in rural areas.⁴

Furthermore, pregnancy increases the risk of maternal deaths from HIV/AIDS, hepatitis, anaemia and malaria. While the prevalence rate of HIV stands at 7,3 per cent, it is estimated that 3,1 per cent of HIV/AIDS deaths are directly related to maternal causes.⁵ HIV affects women in several ways. HIV infection among pregnant women increases the risk of obstetric complications; the incidence of HIV as well as its progression may be aggravated by pregnancy; and illnesses related to HIV, such as tuberculosis and anaemia, might be worsened by pregnancy. The quality of care for women whose HIV-positive status is known may also be lower than the care for those who are not HIV positive.⁶ Other factors include the lack of access to much-needed contraceptives that are vital to reduce exposure to incidences of unplanned, unwanted pregnancies and reduce vulnerability to unsafe abortion, thus contributing to maternal death and morbidity.⁷

The unmet need for family planning is estimated at 34 per cent, while the availability of skilled birth attendants at health facilities is 55 per cent.⁸ Delays, namely, a delay in seeking care; a delay in reaching

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- 1 Uganda Demographic and Health Survey (UDHS) Key Indicators Report, Uganda Bureau of Statistics (2016) 58.
 - 2 World Health Organisation 'SDG3: Ensure healthy lives and promote wellbeing for all ages' <http://www.who.int/sdg/targets/en/> (accessed 1 February 2018).
 - 3 UDHS (n 1 above) 58.
 - 4 CEDAW Concluding Observations on the combined 4th, 5th, 6th and 7th Report of Uganda, 47th session, C/UGA/CO/7, 4-22 October 2010 para 35.
 - 5 D Kibira et al 'Availability, prices and affordability of UN Commission's lifesaving medicines for reproductive and maternal health in Uganda' (2017) 10 *Journal of Pharmaceutical Policy and Practice* 2.
 - 6 C Ronsmans & WJ Graham 'Maternal mortality: Who, when and why' (2006) 368 *Lancet* 1194.
 - 7 S Ahmed et al 'Maternal deaths averted by contraceptive use: Results from global analysis of 172 countries' Population, Family and Reproductive Health Department, John Hopkins University of Bloomberg School of Public Health (2012).

facilities; and a delay to receive much-needed care, also contribute to the high rate of maternal deaths.⁹ Similarly, the measures that need to be taken to reduce maternal mortality and morbidity, including skilled birth attendance; emergency obstetric care; safe abortion services; functional referral systems; and access to good quality and acceptable family planning services, have been set out in maternal health-related plans, policies and programmes.¹⁰ Yet, maternal mortality and morbidity rates remain unacceptably high.

This article argues that the strengthening of legal accountability mechanisms is vital to address maternal mortality and morbidity in Uganda. It addresses the position upon termination of pregnancy in Uganda and how restrictive and confusing laws contribute to elevate the rate of unsafe abortions. The article explores the available legal avenues in line with maternal health care as well as their shortcomings. It employs the main cases that have been brought before Ugandan courts and how these have been addressed. The article briefly examines the role of the Uganda Human Rights Commission in addressing maternal health care. The role of other forms of accountability in improving legal accountability is also examined, specifically social and administrative accountability.

2 Termination of pregnancy

As mentioned above, unsafe abortion is one of the leading causes of maternal mortality and morbidity in Uganda. Thus, the termination of pregnancy merits some special attention before delving into the discussion on legal accountability. Approximately 13 per cent of maternal deaths are attributed to unsafe abortions.¹¹ About 1 200 women die from unsafe abortion, and 85 000 seek treatment for abortion-related complications.¹² It is estimated that 54 out of 1 000 abortions occur under unsafe conditions among women in their reproductive age. As a consequence, 148 500 women experience abortion-related complications annually.¹³ The Committee on Economic, Social and Cultural Rights (ESCR Committee) condemned the high rates of unsafe abortions, especially among Ugandan teenagers, and recommended increased access to sexual and

8 Uganda Human Rights Commission 'The 19th Annual Report to the Parliament of the Republic of Uganda' 2016 117 124.

9 S Thadeus & D Maine 'Too far to walk: Maternal mortality in context' (1994) 38 *Social Science and Medicine* 1091-1110.

10 S Lobis 'The role of indicators and benchmarks in reducing maternal mortality: The case of emergency obstetric care indicators' in P Hunt & T Gray (eds) *Maternal mortality, human rights and accountability* (2013) 31-37.

11 Republic of Uganda, Ministry of Health 'Reducing morbidity and mortality from unsafe abortion in Uganda: Standards and Guidelines' (2015).

12 As above.

13 AM Moore et al 'Ugandan opinion leaders' knowledge and perceptions on unsafe abortions' (2013) *Health Policy and Planning* 1.

reproductive health information and services targeting schools and adolescents.¹⁴

Uganda's stance on the termination of pregnancy is a restrictive one. Article 22(2) of the Ugandan Constitution provides that no one shall terminate the life of an unborn child except when authorised by law. Furthermore, the Penal Code states that any person or any woman with child who uses any means to procure a miscarriage commits a felony and is liable to imprisonment. It further outlaws the supply of any substance for purposes of procuring a miscarriage.¹⁵ Conversely, section 224 of the Penal Code provides:

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his or her benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

This section can protect a health worker if he or she can prove that the medical abortion was carried out with reasonable care and in good faith to save the life of the mother.

Nevertheless, these Penal Code provisions are restrictive and archaic. The provisions of Uganda's Penal Code Act were imported from the Penal Code of India in 1950, which was an improvement on the eighteenth century British penal law. However, while colonial masters such as Britain have struck out such provisions from their penal laws, they remain firmly entrenched in Uganda's Penal Code.¹⁶ Ngwena points out the irony in the fact that African countries clamoured for self-rule and autonomy but have maintained restrictive abortion provisions.¹⁷ Furthermore, the case of *Rex v Bourne*,¹⁸ decided in 1938, ruled that the performance of an abortion to preserve both the life and physical and mental health of a pregnant woman was within the realm of lawful abortion.¹⁹ Subsequently, the British Abortion Act of 1967 took into consideration the grounds established by the *Rex v Bourne* decision, but also recognised socio-economic circumstances as grounds for abortion. However, despite being a British colony and thus adhering to common law system, former British colonies such as Uganda have not revised their laws to reflect such developments in the laws they inherited.²⁰ Additionally, activists assert that such ambiguous and archaic provisions create

14 ESCR Committee 'Concluding Observations to Uganda' E/C.12/UGA/CO/1, 8 July 2015.

15 Secs 141-143 of the Penal Code Act 1950, Cap 120.

16 S Tamale 'Exploring the contours of African sexuality: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 163.

17 C Ngwena 'An appraisal of abortion laws in Southern Africa from a reproductive health rights perspective' (2004) 32 *Journal of Law, Medicine and Ethics* 708-717.

18 (1939) 1 KB 687 or 3 All ER 615 (1938).

19 *Rex v Bourne* 1 King's Bench 687, 3 All ER 615 (Central Criminal Court, London 1938).

20 Ngwena (n 17 above).

room for confusion and uncertainty, and may discourage many health workers from conducting medical abortions for fear of being imprisoned.²¹

Upon ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), Uganda entered reservations to article 14(1)(a) which calls upon states to respect and protect women's rights to control their fertility, and article (2)(c) of the Protocol, on medical abortion mentioned above.²² Uganda interpreted article 14(1)(a) to mean that women have the right to control their fertility regardless of their marital status, while article 14(2)(c) was interpreted as conferring an individual right to abortion, thus requiring the state party to provide access to the procedure. Thus, Uganda maintained that it was not bound by this article unless it complied with domestic legislation pertaining to abortion.²³ Despite recommendations requesting Uganda to withdraw this reservation and to revise its legislation on termination of pregnancy, to date Uganda has not withdrawn its reservation to the Protocol.²⁴ Ngwena argues that the reservations to the African Women's Protocol do not restrict abortion beyond the grounds already laid out in domestic law, including the Penal Code. Furthermore, the reservations to article 14 do not preclude the application of other provisions in the Protocol as well as other treaties that Uganda has ratified without reservations which address themselves to issues of safe abortion.²⁵

Despite the vagueness of and confusion about the legal position, in some instances abortion laws are actively enforced, leaving women, girls and health workers vulnerable to law enforcement, with some facing arrest, imprisonment and prosecution. According to a report released by the Human Rights Awareness and Promotion Forum in 2016, at least 182 arrests were made on abortion-related charges

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- 21 Guttmacher Institute 'Abortion in Uganda, Fact sheet' January 2013, <https://www.guttmacher.org/fact-sheet/abortion-uganda> (accessed 1 February 2018).
 - 22 Statement by Ms Hannah Forster, Executive Director, African Centre for Democracy and Human Rights Studies and Chairperson of the NGO Forum Steering Committee, at the official opening of the 50th ordinary session of the African Commission on Human and Peoples' Rights, The Gambia, 24 October 2011.
 - 23 JL Asuagbor 'Status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', Commissioner, Special Rapporteur on the Rights of Women in Africa, African Commission on Human and Peoples' Rights 60th Meeting-Commission on the Status of Women 18 March 2016 para 5.
 - 24 Report of the joint promotion mission undertaken to the Republic of Uganda 25-30 August 2013, presented at the 55th ordinary session of the African Commission on Human and Peoples' Rights, held from 28 April to 12 May 2014 in Luanda, Angola 60.
 - 25 C Ngwena 'Taking women's rights seriously: Using human rights to require state implementation of domestic abortion laws in African countries with reference to Uganda' (2016) 60 *Journal of African Law* 129-131.

from 2011 to 2014.²⁶ The categories of people arrested included women and girls who had undergone abortions; health workers who had performed the abortions; and men who were involved in procuring the abortion. Of the reported cases, very few are prosecuted due to the difficulty in investigating abortion cases as well as the fact that complainants lose interest or are paid off.²⁷

Durojaye and Ngwenya emphasise that the human right to reproductive health is meaningless if women faced with unwanted pregnancies are forced to either become mothers or to resort to unsafe abortions.²⁸ It is also important to note that restricting abortion does not reduce or stop it, but rather drives it underground, thus elevating maternal mortality and morbidity rates as a result of unsafe abortion.²⁹ It is for reasons such as these that the abortion figures are staggering. In 2015 the Standards and Guidelines on Reducing Maternal Morbidity and Mortality from Unsafe Abortions in Uganda were issued by the Ministry, aimed at ensuring access to contraceptives, in this way preventing unsafe abortion.³⁰ The Guidelines were also aimed at laying down provisions for the safe termination of pregnancy and post-abortion care. However, their dissemination was put on hold as the Ministry of Health felt that it was necessary to consult with various stakeholders, especially religious leaders.³¹

Therefore, the law should be revised and clarified so as to directly respond to and address unsafe abortions as a cause of maternal mortality and morbidity in Uganda. Understandably, in 2017 a petition was brought before the Constitutional Court challenging the failure of the state of Uganda to make a law regulating the termination of pregnancy. The petitioners alleged that the existing law did not protect young girls and women who found themselves with unwanted pregnancies, thus prompting them to resort to unsafe abortions. The petitioners demanded the interpretation of article 22(2) on termination of pregnancy as well as the creation of a framework which would enable Parliament to discuss, formulate and enact a law on termination of pregnancy.³² The petition is yet to be addressed. Finally, when seeking to reform abortion laws, the focus

26 Human Rights Awareness and Promotion Forum 'The enforcement of criminal abortion laws in Uganda and its impact on the human rights of women and health workers' Final Version, December 2016, IX-XI.

27 As above.

28 C Ngwenya & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 5.

29 C Zampus & J Todd-Gher 'Abortion and the European Convention on Human Rights: A lens for abortion and advocacy in Africa' in Ngwenya & Durojaye (n 28 above) 80.

30 Human Rights Awareness and Promotion Forum (n 26 above) 16.

31 As above.

32 *Centre for Health, Human Rights and Development (CEHURD) Prof Ben K Twinomugisha & Dr Rose Nakayi v Attorney-General of Uganda Constitutional Petition 10 of 2017.*

should go beyond merely reforming the law to their implementation. Otherwise, legalising abortion without putting in place an elaborate implementation framework, especially for women who are socio-economically challenged or who lack adequate knowledge and autonomy, often proves to be mere tokenism.³³ Therefore, beyond adopting laws, steps should be taken to train health care professionals in the provision of accessible services; to allocate sufficient resources based on availability; to de-stigmatise and eliminate discrimination around abortion-related services; and to provide community education on safe abortion and the availability of safe abortion services.³⁴

3 Legal accountability

Accountability is a word that is commonly used even though its use often does not translate into elaboration or implementation. As put by Boven, the term 'accountability' always is reserved for the titles of governance texts and often is not even mentioned in the texts. He compares it to a 'garbage can filled with good intentions' as it is often not used for purposes of analysis but rather for vague aspirations of governance.³⁵ Accountability has three vital elements, namely, responsibility, answerability and enforcement.³⁶ Schedler asserts that accountability is the requirement that power should be exercised in a transparent manner as well as demanding that those in power justify their acts;³⁷ that answerability involves the right to receive all necessary information and the duty of those in power to justify their actions. Furthermore, enforcement is an integral aspect of accountability as it emphasises that improper behaviour should not go unpunished, otherwise accountability would be viewed merely as window dressing and not as a real restraint on power.³⁸ In defining accountability, Joshi and Houtzager emphasise that some form of agreement has emerged about the vital elements that make up the accountability relationship, namely, the set of standards upon which performance is measured; information and justification for actions taken; and sanctioning or recognising behaviour where appropriate.³⁹

33 Ngwena (n 25 above) 113.

34 Ngwena 131.

35 M Bovens 'Public accountability: A framework for the analysis and assessment of accountability arrangements in the public domain' unpublished paper, Utrecht School of Governance, Utrecht University, The Netherlands, 2005 4.

36 Office of the United Nations High Commissioner for Human Rights 'Who will be accountable: Human rights and the post-2015 development agenda' New York and Geneva 2013.

37 A Schedler et al (eds) *The self-restraining state: Power and accountability in new democracies* (1999).

38 Schedler et al (n 37 above) 14-17.

39 A Joshi & PP Houtzager 'Widgets or watchdogs? Conceptual explorations in social accountability' (2012) 14 *Public Management Review* 151.

Hunt explains that accountability allows individuals and communities to understand how those with responsibilities have implemented their duties, enables those with power to explain and justify the actions they have taken and, where shortcomings have been identified, accountability calls for them to be redressed.⁴⁰ Yamin cautions that accountability goes beyond merely apportioning blame and punishing those responsible to developing a dynamic system comprising shared roles and responsibilities between rights holders and duty bearers, where shortcomings can from time to time be reviewed and remedied.⁴¹

Accountability necessitates numerous forms of oversight and review, including administrative, social, political, international and national legal accountability.⁴² National legal accountability is a vital form of accountability. The ability of people to seek remedies to correct violations is the benchmark of accountability. The realisation of legal accountability requires that public authorities and institutions put in place adequate remedial and corrective measures for those whose rights have been violated. In the case of *LC v Peru*, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) noted that even though the CEDAW does not expressly mention the 'right to a remedy', it is implicit in articles 12 and 2(c) which provide that state parties should put in place procedures aimed at the protection of women's rights on an equal basis with those of men. These should include legal avenues, national tribunals as well as public institutions aimed at protecting women against any form of discrimination. Furthermore, article 2(f) calls upon the state to take all necessary measures, including legislation, to modify and abolish existing laws, customs, practices and regulations that are discriminatory towards women.⁴³ Similarly, in the case of *Alyne v Brazil*, the Committee pointed out that the state had failed to provide adequate judicial remedies and protection by not initiating proceedings to hold responsible those who had failed to provide timely and adequate medical care for Ms Alyne da Silva. The Committee emphasised that adequate sanctions must be imposed on health professionals who violate women's reproductive health rights.⁴⁴

40 P Hunt & G Backman 'Health systems and the right to the highest attainable standard of health' (2008) 10 *Health and Human Rights* 80 at 89.

41 AE Yamin 'Towards transformative accountability: Applying a rights-based approach' (2010) 7 *International Journal of Human Rights* 97.

42 United Nations General Assembly 'Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality' Human Rights Council, 20th session, A/HRC/21/22, 2 July 2012 paras 74-75.

43 CEDAW Committee *LC v Peru*, C/50/22/2009, 4 November 2011 para 8.16-9.

44 CEDAW Committee *Alyne da Silva Pimentel Teixeira v Brazil* C/49/D/17/2008, 10 August 2011 paras 7(8) & 8(2).

3.1 Adjudication of maternal health cases in Ugandan courts

The judicial sector has a pivotal role to play in upholding accountability. Article 137(1) of the Constitution provides that '[a]ny question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court'. Article 137(3) states that any person who claims that an Act of Parliament or any other law or anything done by a person or authority is not in line with the constitutional provisions may petition the Constitutional Court for a declaration to the effect or for redress. Article 137(4) states that, if after the determination of the petition under clause (3), the Constitutional Court considers that there is a need for redress, the Court may grant an order for redress or refer the matter to the High Court to determine the suitable redress. The Constitutional Court's jurisdiction in line with article 137 as well as article 50, which is discussed in greater detail below, has been the subject of several cases. In *Attorney General v Major General David Tinyefuza*,⁴⁵ Justice Kanyeihamba stated:

In my opinion there is a difference between applying and enforcing the provisions of the Constitution and interpreting it. Whereas any court of law and tribunals with competent jurisdiction may be moved by litigants in ordinary suits, applications or motions to hear complaints and determine the rights and freedoms enshrined in the Constitution and other laws under article 137, only the Court of Appeal sitting as the Constitutional Court may be petitioned to interpret the Constitution with a right to appeal to this Court as the appellate court of last resort ... the concurrent original jurisdiction of the Constitutional Court can only arise and be exercised if the petition also raises questions as to the interpretation of the Constitution as the primary objective or objectives of the petition. To hold otherwise might lead to injustice and some situations manifest absurdity.

In *Ismail Serugo v Kampala City Council*,⁴⁶ the Court held that the Constitutional Court should normally be involved only in matters requiring the interpretation of the Constitution under article 137 of the Constitution. The same position was taken in *Dr James Rwanyarare & Others v Attorney-General*,⁴⁷ where the Court noted:

In our view petitions for enforcement of rights and freedoms under article 50 do not belong to this Court ... It seems clear that this court will deal with matters falling under article 50 only by way of reference made to it under article 137(6) which states that '[w]here any question is referred to the Constitutional Court under article 137(5) the Constitutional Court shall give its decision on the question and the Court in question shall dispose of the case in accordance with that decision ...' This court has no jurisdiction in matters not covered under article 137 of the Constitution.

The *CEHURD* case⁴⁸ was brought in terms of article 137 of the Constitution. The case concerned the death of two women from

45 Supreme Court Constitutional Appeal 1 of 1997.

46 Constitutional Appeal 2/98 SC (1998).

47 Constitutional Petition 7 of 2002 [2004] UGCC 5 (16 November 2004).

48 *Centre for Human Rights and Development (CEHURD) & Others v Attorney-General* UGCC Constitutional Petition 16 of 2011, decided 5 June 2012.

maternity-related causes in two different hospitals.⁴⁹ CEHURD alleged that the failure by the government to provide basic medical services in the two hospitals, leading to the avoidable death of the two mothers, was a violation of their right to life (article 22); respect for human dignity and protection from inhuman treatment (article 24); women's rights (article 33); amendment 8A; as well as the various health provisions set out in the National Objectives and Directive Principles of State Policy. The court also sought to establish whether the case fell under article 45 which prescribes that '[t]he rights, duties, declarations and guarantees related to fundamental and other human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned'.

While raising preliminary objections, the state maintained that the case could not be decided by the court as it asked 'political questions' that were in the jurisdiction of the legislature and the executive. Thus, by adjudicating the case, the court would be concerning itself with issues that were not in their jurisdiction and, thus, would infringe on the principle of separation of powers. The court agreed with the state and dismissed the case.

As a result of the dismissal of the *CEHURD* case by the Constitutional Court, it was appealed to the Supreme Court.⁵⁰ The Supreme Court reiterated the role of the Constitutional Court as per article 137. On the issue that the petition did not raise issues calling for constitutional interpretation, the Supreme Court pointed out that according to their pleadings, the appellants had clearly specified the acts and omissions by the government and the health workers which they maintained were inconsistent with the Constitution. The particular provisions of the Constitution that the government and its health workers were alleged to have violated were also spelt out. The appellants further asked for specific declarations as well as redress. The Supreme Court ruled that the matters raised competent questions for the Court to hear and interpret, to ascertain whether the petitioners' allegations warranted the Constitutional Court to issue the declarations or grant the redress sought for by the petitioners as per article 137 of the Constitution. On this ground, the Supreme Court noted that the Constitutional Court had erred in its decision.⁵¹

The other issue, which was the main bone of contention, was that of the 'political question'. The judge referred to article 137(1) of the Constitution. For emphasis, she cited *Paul Semwogerere & Others v Attorney-General*,⁵² where it was decided that article 137(1) empowers the courts with unreserved jurisdiction to entertain any

49 *CEHURD & Others v Attorney-General* (n 48 above).

50 *Centre for Human Rights and Development (CEHURD) & Others v Attorney-General* UGSC Constitutional Appeal 1 of 2013, decided 30 October 2015.

51 As above.

52 *Paul K Semwogerere & Others v Attorney-General* (Constitutional Appeal 1 of 2002) (2004) UGSC 10 (28 January 2004).

question pertaining to the interpretation of any constitutional provision. Thus, with regard to interpretation, the Court's powers are unlimited and unencumbered. She further added that article 137(3)(b) stated that any person who claims that any act or omission by any person or authority contravenes a provision of the Constitution may petition the Constitutional Court for redress or a declaration to that effect where applicable. Therefore, based on these grounds, the Supreme Court unanimously ruled on 30 October 2015 that the Constitutional Court hear the petition based on its merits.⁵³

The inclusion of other violated rights in the case is based on the principle of the interrelated nature of rights which presupposes that rights are interdependent and, therefore, the violation of one right often inevitably triggers the violation of several others. This approach is even more vital in cases where the main right in question is not provided for in the Bill of Rights. The right to health is not provided for in Chapter 4 (fundamental and other human rights and freedoms) but rather is reserved for the section on National Objectives and Directive Principles of State Policy. In its first Concluding Observation to Uganda, the ESCR Committee clearly pointed out the need for the inclusion of the right to health in Uganda's Bill of Rights as well as in other laws where necessary.⁵⁴ The Technical Guidance on Maternal Mortality and Morbidity also emphasised that among the steps that need to be taken in order to empower women to claim their rights is the express recognition of the right to health, including sexual and reproductive health, in constitutions and other legislations. This should be accompanied by the putting in place of effective accountability mechanisms in case these rights have been violated.⁵⁵ Similarly, the recently-adopted General Comment 22 on Sexual and Reproductive Health Rights calls upon states to enshrine the right to sexual and reproductive health in the justiciable parts of the Constitution at the national level, pointing out to lawyers, judges and prosecutors that this right can be enforced.⁵⁶

Another issue that courts tend to side-line is the position of article 8A of the Constitution. In order to elevate the status of the Directive Principles, an amendment to the Constitution in terms of article 8(A)(1) was added in 2005. The amendment points out that 'Uganda shall be governed based on principles of national interest and common good enshrined in the National Objectives and Principles of State Policy'.⁵⁷ Margaret Zziwa justified the inclusion of this clause by

53 As above.

54 ESCR Committee Concluding Observations to Uganda (n 14 above).

55 United Nations General Assembly (n 42 above) para 12.

56 ESCR Committee General Comment 22 on the Right to Sexual and Reproductive Health (art 12 of the ICESCR) E/C 12/GC/22, 2 May 2016, para 64.

57 The Constitution (Amendment) Act 2005 insertion of art 8A.

stating:⁵⁸

In order to strengthen the culture and spirit of nationalism, it is important to have the minimum interests or the minimum elements ... to be the guiding principles of state policy. And these interests must be stated in the justifiable part of the Constitution in order to give them a permanent feature, which must be implemented by all government agencies.

The issue of National Objectives and Directive Principles of State Policy is not restricted to Uganda. Elsewhere courts have used the principle of the interdependent nature of rights to argue cases usually reserved for this section. Okeke argues that in an ideal situation, all the constitutional provisions should be justiciable as well as enforceable.⁵⁹ In the case of *Olga Tellis*,⁶⁰ concerning the forceful eviction as well as the demolition of the structures of slum dwellers, the Indian Supreme Court maintained that the right to life was inclusive of the right to livelihood because no person can live without the basic means of living. Thus, the Court turned the right to livelihood, which appears in the Directive Principles of State Policy, into an enforceable right. Even though the Court declined to provide the remedies requested by the applicants, this is an example of using constitutionally-recognised civil and political rights in advocating social rights. Similarly, in the *Nayadu* case,⁶¹ the Court broadly interpreted article 21 (the right to life) of the Indian Constitution as encompassing the right to water. The Court emphasised that it was incumbent upon the state under article 21 of the Indian Constitution to ensure access to clean drinking water for the Indian population. Ghana took a much bolder step by directly declaring that the Directive Principles of State Policy were justiciable in the case of *Ghana Lotto Operators Association*, which had been decided by the Supreme Court in 2008.⁶² The Court held that the economic, social and cultural rights spelt out in Chapter six of the Ghanaian Constitution, which provides for the Directive Principles of State Policy, are themselves assumed to be justiciable.⁶³

The *CEHURD & Others v Attorney-General* case sought to resolve issues such as the position of article 8A (on National Objectives and Directive Principles of State Policy). By dismissing the case, the opportunity to elaborate on such issues was lost. It remains to be seen how the Constitutional Court will resolve the case. It is hoped that it

58 Parliament of the Republic of Uganda (2005) *Hansard Report* 15 August 2005, <http://www.parliament.go.ug/new/index.php/documents-and-reports/daily-hansard> (accessed 20 October 2013).

59 GN Okeke & C Okeke 'The justiciability of the non-justiciable constitutional policy of governance of Nigeria' (2013) 7 *IOSR Journal of Humanities and Social Sciences* 11.

60 *Olga Tellis & Others v Bombay Municipal Corporation & Others* ETC 10 July 1985 SCR 51 2.1-2.2.

61 *AP Pollution Control Board v Prof MV Nayudu* 2000 SCALE 354 para 3.

62 *Ghana Lotto Operators Association & Others v National Lottery Authority* (2009) 3 SCGLR 235.

63 As above.

will take a broad rather than a restricted understanding of the position of maternal health rights in the Constitution and other related legislation.

Another important case was brought before the High Court by CEHURD (*CEHURD & Others v Nakaseke District Local Government*).⁶⁴ In this case, Mugerwa David together with CEHURD accused Nakaseke District Local Government of negligence which had led to the death, caused by obstructed labour, of his wife, Nanteza Irene, leaving behind three dependants. It was alleged that Nanteza had come to the hospital in the advanced stages of labour and after observation she was found to be undergoing obstructed labour. However, the doctor on duty was not at the hospital and only returned after more than four hours from the time when the mother was diagnosed. As a result, eight hours after she had arrived at the hospital, Nanteza passed away before surgery could be performed. The judge ruled that the failure to promptly attend to Nanteza, as a result of the absence of the doctor on duty, was a violation of her right to basic medical care. The hospital was ordered to pay damages to her family in the amount of 35 million shillings.

The *Nakaseke* judgment was a mixture of a cause of action based on negligence and an action based on the violation of constitutionally-guaranteed rights provided for under article 50 of the Constitution dealing with the enforcement of rights.⁶⁵ Therefore, the Court could have ruled on the matter by solely relying on the cause of action in negligence. Indeed, the Court found that the doctor had caused the death of the deceased by neglecting his duty to care for her. However, the judge also ruled that the failure to promptly provide medical care to the deceased was a violation of her maternal health rights as well as her right to basic medical care.

Article 50 is another important provision as far as ensuring access to justice as well as strategic litigation are concerned. Article 50(1) provides that '[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation'. It also gives the courts the power to provide redress, including compensations, declarations and damages.⁶⁶ Article 50(2) empowers both individuals and organisations to bring an action on the ground of the violation of another person's human rights. Indeed, the maternal health cases

64 *Centre for Health, Human Rights and Development & Others v Nakaseke District Local Government* UHC Civil Suit 111 of 2012, decided 30 April 2015.

65 'Ugandan High Court finds human rights violations where a pregnant woman died of a ruptured uterus and blood loss while in labour' Legal Grounds III, Case 20, http://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/lg-20_cehurd_nakaseke_uganda.pdf (accessed 10 December 2017).

66 CEHURD 'Litigating maternal health rights in Uganda: What civil society groups must know' September 2013 15.

mentioned above were brought by a civil society organization (CEHURD) on behalf of vulnerable individuals.

Article 50(4) states that Parliament shall make laws for the enforcement of rights and freedoms in this chapter. The fact that Parliament has not yet enacted a comprehensive law on the enforcement of rights has posed a challenge. In the *Bukenya* case⁶⁷ the petitioners were appealing the Constitutional Court decision which had declared the Fundamental Rights and Freedoms (Enforcement Procedures) 2008 unconstitutional on the basis that they had been produced by the Rules Committee rather than Parliament, thus contravening article 50(4) of the Constitution. The Supreme Court ruled that the Procedures were constitutional and that the Rules Committee had acted within its powers in providing for a procedure to seek redress for violations of fundamental rights and freedoms under article 50(1). The Court also stressed that by invalidating the Procedures, the Constitutional Court had created a scenario where anyone who wanted to seek redress under article 50(1) for human rights violations had no recourse to courts until Parliament enacted a law under article 50(4). At the same time, the Court was exasperated by the fact that 22 years after the enactment of the Constitution, Parliament had not yet enacted a comprehensive law for the enforcement of rights.

Another issue of contention is the procedure to be followed in bringing cases under article 50 of the Constitution. Normally the procedure for bringing cases to the High Court is by plaint. This procedure is quite lengthy as it has to be supported by a summary of evidence; a list of authorities to be relied on; a list of witnesses; and any documents relating to the violation should be availed to support the claim.⁶⁸ However, in the *Charles Harry Twagira* case,⁶⁹ the Supreme Court overturned the Constitutional Court ruling which had held that an action could only go to the High Court under article 50 of the Constitution on a plaint. The judge stated:

In my considered opinion, a person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed can institute an action in a competent court by plaint or can seek declarations by notice of motion depending on the facts of complaint within the meaning of article 50.

Nonetheless, all these contentions and positions can be confusing to those wishing to bring human rights cases before courts. This calls for the speedy enactment of a comprehensive law on the enforcement of fundamental rights and freedoms by Parliament as required by article 50(4) of the Constitution and as emphasised in the *Bukenya* case. In

67 *Bukenya v Attorney-General* UGSC Constitutional Appeal 3 of 2011 [2017] 18 (22 May 2017).

68 As above.

69 *Charles Harry Twagira v Uganda* UGSC Criminal Appeal 27 of 2003 [2005] 14 (3 August 2005).

the meantime, courts should ensure that the position taken serves the purpose of expanding rather than limiting access to courts of people whose rights have been violated.

Ultimately, the adjudication of cases pertaining to maternal death and morbidity is an uphill task, especially in the context of Uganda where the justiciability of the right to health remains in question. As highlighted by Ngwena, in the absence of a succinct constitutional mandate, courts are in murky waters when it comes to the adjudication of the right to health. Even where there is a constitutional mandate, courts may be restrained in order not to seem to be entering into the realm of the executive.⁷⁰ The prioritisation of economic, social and cultural rights also starts from the curriculum for legal practitioners. As noted by Onyango, the challenge with the enforcement of economic, social and cultural rights starts with law schools where the field hardly features in regular curricula. This creates a challenge of lawyers who lack the required skills to successfully litigate economic, social and cultural rights cases.⁷¹

Furthermore, formal judicial structures such as courts of law are often perceived by rural or local communities as removed from their daily-lived experiences. A series of factors, such as high illiteracy, a lack of awareness about court operations, high poverty levels (the inability to afford legal fees) and accessibility to courts, especially in the rural areas, prevent women from accessing the legal structures.⁷² It is estimated that over 85 per cent of lawyers are concentrated in Kampala, leaving about 84 per cent of the population without adequate access to legal representation. The majority have to rely on other forms, such as the Local Council Courts.⁷³ The courts at the lower levels (Local Council Courts and Magistrate's Courts), which are often more accessible to the communities, are fraught with numerous challenges including understaffing, underqualified staff, insufficient physical structures and pervasively high levels of corruption.⁷⁴ Ultimately, for judicial accountability to be realised, courts should develop both the constitutional but, more importantly, the institutional capability to adjudicate maternal health issues.⁷⁵

70 C Ngwena 'Scope and limits of judicialisation of the constitutional right to health in South Africa: An appraisal of key cases with particular reference to justiciability' (2013) 14 *Journal of Health Law* 43-64.

71 J Oloka-Onyango *When courts do politics: Public interest law and litigation in East Africa* (2017) 180.

72 'Rural women and access to justice' FAO's contribution to a Committee on All Forms of Discrimination against Women (CEDAW) half-day general discussion on access to justice, Geneva, 18 February 2013 5. Action Aid 'Strategies for success access to justice for women' (2011) 8, <http://www.actionaid.org/publications/strategies-success-access-justice-women?width=960&inline=true> (accessed 11 July 2016). Uganda, Draft National Legal Aid Policy, 2012 para 2.

73 Draft National Legal Aid Policy (n 72 above) para 25.

74 'The hierarchy composition and functions of courts in Uganda' <http://lawschoolguide.blogspot.co.za/2011/03/heirachy-composition-and-function-of.html> (accessed 5 July 2016).

75 Ngwena (n 70 above) 43-64.

3.2 Role of the Uganda Human Rights Commission in promoting legal accountability

Apart from the courts, the Uganda Human Rights Commission (Commission) is an essential accountability organ with a protective and promotional mandate.⁷⁶ A vital contribution by a human rights commission is that it provides for more innovative ways of upholding human rights.⁷⁷ Some consider courts of law as too formal, following strict bureaucratic guidelines, being costly and time-consuming, all of which can become impediments to accessing justice. On the other hand, human rights commissions employ numerous methods such as mediation, the formal court system procedures and awareness raising, and often are more accessible and affordable to a greater part of the population. Some of the remedial measures used, such as mediation, have similarities to the African conflict-resolution approach.⁷⁸

The Guidelines establishing the Commission state that its decisions shall have the same effect as that of the court and shall be enforced in the same manner.⁷⁹ Therefore, article 53 of the Constitution sets out that upon a determination that there has been an infringement of any human right, the Commission may order the release of an imprisoned/detained person; compensation; or any legal redress or remedy. A person who is dissatisfied with the order of the Commission may appeal before the High Court and the Commission may not investigate any matter pending before a court or judicial tribunal.

The Commission has a tribunal which receives, investigates, hears and resolves complaints, a mandate bestowed upon it by article 52(1) of the Constitution. In 2014/2015, it resolved 138 complaints in favour of the complainants and dismissed 68. In line with the right to health, all 12 complaints received were based on discrimination on the grounds of HIV. The Commission attributed the increase in complaints from the five recorded in the previous year to awareness as a result of improved sensitisation on the right to health. The prioritisation of the right to health through measures such as functionalising a right to health unit has increased awareness of health as a right and not simply a commodity, leading to the gradual increase in health-related complaints to the Commission. In 2016, a complaint was lodged with the Commission against Kiboga Local Government, alleging its failure to avail timely emergency obstetric

76 Art 52 Constitution of the Republic of Uganda, 1995.

77 CP Maina 'Human rights commissions in Africa: Lessons and challenges' in A Bösl & J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) 351.

78 Uganda Human Rights Commission 17th Annual Report to the Parliament of Uganda (2014) 30-32.

79 J Hatchard 'A new breed of institution: The development of human rights commissions in Commonwealth Africa with particular reference to the Uganda Human Rights Commission' (1999) 32 *Comparative and International Law Journal of Southern Africa* 41-46.

care to the complainant's spouse, thereby violating her right to health and life.⁸⁰

Upon receipt of a complaint, the Commission gathers information either from individuals or organisations working at grassroots level in a bid to verify the information, and then proceeds to resolve the issue. In order to effectively reach the general population, the Commission has opened up branches and established toll-free lines in all its regions of operation, which people can use to report any type of complaint.⁸¹ It thus operates as a channel between the people and the government. The Commission then provides feedback to those who have forwarded complaints either by holding legal proceedings and mediation or contacting the purported violator.

In fulfilling its promotional mandate, the Commission in 2008 established a right to health unit which is charged with sensitising citizens on the right to health, monitoring violations in the health sector and ensuring that those whose rights have been violated have access to adequate remedies.⁸² In 2016 the Commission dedicated its most recent annual report to maternal and reproductive health in contrast to previous reports which focused generally on the right to health. It has also annually increased the number of health facilities that it monitors although the number reduced considerably in 2016 as a result of a reduction in funding for the operations of the Commission.⁸³

The Commission has also taken to informing stakeholders on the right to health through workshops and conferences. For instance, towards the end of 2015 it organised a multi-stakeholder meeting aimed at discussing the status of implementation of the Universal Peer Review (UPR) recommendations pertaining to the right to health.⁸⁴ As a result of that and other related fora, in preparation for the upcoming UPR review of Uganda in 2016, the commission prepared a report on the implementation of UPR recommendations as well as the remaining issues or gaps that need to be addressed. In line with maternal health, the Commission pointed out the inadequate funding of the health sector budget which affects the number of skilled birth attendants, especially in the hard-to-reach areas, the unavailability of

80 Uganda Human Rights Commission 19th Annual Report to the Parliament of Uganda (2016) 117.

81 Uganda Human Rights Commission Report (n 80 above) VI 15.

82 C Businge 'Health unit launched' *The New Vision* 30 September 2008, http://www.newvision.co.ug/new_vision/news/1180102/health-rights-unit-launched (accessed 11 July 2016).

83 Uganda Human Rights Commission (n 80 above) 116.

84 Uganda Human Rights Commission 'UNHRC holds a multi-stakeholder meeting on the status of implementation of the Universal Periodic Review Recommendations on the Right to Health' 27 November 2015, <http://uhrc.ug/uhrc-holds-national-multi-stakeholder-meeting-status-implementation-universal-periodic-review> (accessed 11 July 2016).

emergency obstetric care services in health facilities and the non-reporting of maternal deaths, especially in private facilities.⁸⁵

However, the Commission is not without challenges, among which are the limited resources availed to it by the government in order to conduct its country-wide operations; insufficient human rights personnel (commissioners) to hear cases; and the very slow or sometimes non-payment of compensation to victims of human rights violations.⁸⁶ These challenges get in the way of the effective fulfilment of its mandate towards reducing preventable maternal mortality and morbidity.

4 Role of other forms of accountability

The emphasis of human rights accountability has been on remedying violations through formal justice systems, which forms a vital aspect of horizontal accountability. It is for this reason that rights holders will primarily consider going to courts of law when their rights have been violated.⁸⁷ With the increasing judicialisation of economic, social and cultural rights, such as the right to health, courts have been able to receive cases and provide remedies. However, human rights accountability should not be perceived as a product only to be understood and interpreted by lawyers. This is because law is derived from and interlinked with social, cultural and political developments and, thus, should be interpreted in terms of the interrelationships between law, social sciences, and political and cultural fields.⁸⁸ In applying accountability, various forms of accountability need to complement legal accountability to address maternal mortality and morbidity. Some of the most vital forms are administrative and social accountability.

4.1 Administrative accountability

Administrative accountability entails the establishment of standard guidelines and norms within the health facilities and within the Ministry of Health aimed at making subordinates accountable to their superiors, and these should often be monitored by an institution with no conflict of interest. Administrative accountability aims at improving the performance of health systems. While other forms of accountability, such as legal, political and social accountability, are external, administrative accountability allows for the direct interaction with systems to improve their operation. The implementation of this

85 Uganda Human Rights Commission 'NHRI submission for Uganda's second Universal Periodic Review' October 2016, para 15.

86 Maina (n 77 above) 361-362.

87 OHCHR (n 36 above) 39-42.

88 M Darrow & A Tomas 'Power, capture and conflict: A call for human rights accountability in development co-operation' (2005) 27 *Human Rights Quarterly* 484-485.

form of accountability requires the setting up of structures right from the Ministry to the lowest health facility to ensure that the policies in place are being implemented, the allocated funds are put to their most appropriate use and identified shortcomings are remedied.

Regulatory institutions, such as Health Service Commission; the Uganda Medical and Dental Practitioners Council (UMDPC); the Uganda Nurses and Midwives Council (UNMC); the Allied Health Professional Council (AHPC); and the Pharmacy Council of Uganda also have a vital role to play in upholding accountability. From time to time, the Uganda Medical and Dental Practitioners Council has used its quasi-judicial role to investigate and give rulings on allegations of professional misconduct against medical practitioners.⁸⁹ However, these regulatory institutions report challenges of being underfunded and under-facilitated, which limits the effective execution of their accountability role.⁹⁰

The functionalisation and improvement of various complaints mechanisms at the health facilities is another way of improving administrative accountability. Government has established complaints mechanisms at various health facilities, such as suggestion boxes, toll-free lines and email addresses, through which complaints should be addressed. However, these are almost non-operational. A survey conducted in Uganda on client satisfaction with services in Uganda's public health facilities in 27 districts revealed that in most districts there is an absence of a co-ordinated or institutional approach of dealing with complaints by health facilities.⁹¹ It further revealed that only 27 per cent of the respondents had at one time made a complaint using the formal channels for conveying grievances. There are numerous instances where the complaints are not addressed by the health system, which greatly discourages communities from expressing their grievances.⁹²

Private actors are also a vital aspect of administrative accountability. Article 20(2) of the Constitution provides that all organs of government, agencies and all persons shall respect, promote and uphold the rights and freedoms enshrined therein. In 2010 it was estimated that private health providers constituted 22,5 per cent of all health care providers in Uganda, most of them located in towns, and the number of private hospitals was considerably on the increase, with 23 recorded in 2012 compared to nine in 2011.⁹³ Half of the doctors working in the private sector were also working in government

89 BK Twinomugisha *Fundamentals of health law in Uganda* (2015) 150-156.

90 Ministry of Health 'Road map for accelerating the reduction of maternal and neonatal mortality and morbidity in Uganda' 2007-2015 11.

91 Uganda National Health Consumer/Users Organisation 'Client satisfactions with services in Uganda's public health facilities: A study by the Medicines Transparency Alliance (MeTA)' Uganda, February 2014 VII.

92 Uganda National Health Consumer/Users Organisation (n 91 above) 7.

93 SWECARE Foundation 'Uganda health and partnership opportunities' August 2013 30-32.

hospitals, while the majority of nurses worked full-time in the private sector.⁹⁴ Of concern is the fact that households contributed the largest proportion of health expenditure through out-of-pocket expenditure.⁹⁵ With the exception of non-profit organisations, the aim of private-profit entities is to make money and not to provide for affordable health care. As a result, the privatisation of health services has increased costs, thus decreasing access to health care.⁹⁶ This is characterised by a reliance on private providers as well as out-of-pocket payments at the point of service.⁹⁷ The complexity of the private sector in Uganda also poses a challenge in its classification with some informal for-profit and small-scale providers who are often unlicensed, untrained, unregulated and uninspected.⁹⁸

The *Alyne v Brazil* case mentioned above emphasised the government's oversight role with regard to private health practitioners by refuting the state's claim that it could not be held liable for the inadequacy and the poor quality of care at the private health care institution in question. It emphasised that the state was directly responsible for the actions of private institutions and, thus, it had the duty to monitor and regulate these. The state was also reminded of article 2(e) of the CEDAW, which emphasises that it has an obligation to take measures towards ensuring that private actor activities, in line with health policies, are appropriate. Subsequently, the Committee recommended that the state ensures that private health facilities comply with international and national standards on reproductive health care.⁹⁹

4.2 Social accountability

Social accountability includes initiatives by citizens, as well as civil society, aimed at holding duty bearers (government officials, service providers and politicians) responsible for providing services that they have committed to avail to the community.¹⁰⁰ There is the implication that the increased involvement of citizens will foster public actors to be answerable to citizens for action taken or not taken and may be sanctioned in cases of failure to respond to these demands (enforcement).¹⁰¹ Joshi and Houtzager state that social accountability

94 As above.

95 As above.

96 A Chapman 'The impact of reliance on private sector health services on the rights to health' (2014) 16 *Health and Human Rights* 122-134.

97 As above.

98 Chapman (n 96 above) 120.

99 *Alyne da Silva v Brazil* (n 44 above) paras 7(5) & 8(2).

100 E Peruzzotti & C Smulovitz (eds) *Enforcing the rule of law: Enforcing social accountability in new Latin American democracies* (2006) 9-11; NG Jayal 'New directions in theorising social accountability?' (2008) 38 *Institute of Development Studies* 107.

101 V Boydell & J Keesbury J 'Improving family planning and reproductive health programmes? A review of the literature' *The Evidence Project* October 2014 1-2 6.

is an ongoing or sustained engagement of policy makers or state agencies by collective actors for actions taken or not taken, which is influenced by historical as well as current factors.¹⁰²

Citizens as well as civil society may undertake a series of strategies together to ensure that policy makers are responsive to challenges raised, including social mobilisation media and complaints mechanisms at health facilities.¹⁰³ In addition to seeking legal remedies in the *CEHURD* case, CEHURD utilised massive social mobilisation, including various members of civil society, such as the Coalition to End Maternal Mortality in Uganda, the media, members of the academia, as well as the general public, to seek justice for thousands of vulnerable women who die from preventable causes while attempting to give birth.¹⁰⁴ Social mobilisation is especially important in the Ugandan context where access to courts faces several challenges, ranging from the non-provision for socio-economic rights as fully justiciable rights; compliance with court judgments; poverty; ignorance (lack of access to information); and high legal fees that prevent marginalised sections of the population from accessing the courts.¹⁰⁵ Even in countries such as South Africa that have made socio-economic rights fully justiciable, litigation on its own, without social mobilisation, may not bring about the required change.¹⁰⁶ For example, in the ground-breaking case of *Grootboom*,¹⁰⁷ despite success in Court, the applicant died seven years after the handing down of the judgment, without a home but still in a shack in Wallacedene.¹⁰⁸

One success story of combining litigation with social mobilisation is the South African *TAC* case,¹⁰⁹ in which the government was ordered not to restrict the availability of a certain drug to a few research

102 Joshi & Houtzager (n 39 above) 146 150.

103 S Ray et al 'Activism: Working to reduce maternal mortality through civil society and health professional alliances in sub-Saharan Africa' (2012) 20 *Reproductive Health Matters* 40-49.

104 A Russell 'Real justice could finally be delivered in Uganda by key ruling on maternal health' 2 November 2015 <http://www.theguardian.com/global-development/2015/nov/02/real-justice-could-finally-be-delivered-uganda-key-ruling-maternal-health> (accessed 28 March 2018).

105 Guttmacher Institute 'Contraception and unintended pregnancy in Uganda' Fact Sheet, <https://www.guttmacher.org/fact-sheet/contraception-and-unintended-pregnancy-uganda> (accessed 13 February 2018); 'Rural women and access to justice: FAO's contribution to a Committee on All Forms of Discrimination against Women (CEDAW) half-day general discussion on access to justice, Geneva, 18 February 2013 5.

106 M Heywood 'South Africa's *Treatment Action Campaign* case: Combining law and social mobilisation to realise the right to health' (2009) 1 *Journal of Human Rights Practice* 14-36.

107 *Government of the Republic of South Africa & Others v Grootboom & Others* (CCT11/00) (2000) ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

108 M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187-188.

109 *Minister of Health & Others v Treatment Action Campaign & Others (TAC)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002).

centres, but to ensure that all expectant mothers living with HIV have access to this essential drug. Beyond the case, the TAC campaign mobilised a social movement inclusive of poor and black people living with HIV which attracted massive media coverage, enabling the amplification of the issues to a national as well as international case.¹¹⁰ The campaign also worked with researchers in the development of alternative policies and plans that would meet the 'reasonableness' criteria that have been emphasised in South African courts. These factors have been lauded for having contributed to the compliance with the judgment as well as the success of the campaign. Subsequently, poor people became personally and socially empowered and thus were in position to advocate their rights. As a result of litigation, coupled with the social mobilisation strategies mentioned above, South Africa adopted an inclusive anti-retroviral treatment programme that is said to be the fastest-growing programme in the world.¹¹¹ Other methods used under social accountability may include community dialogues; the issuing of press statements; budget tracking; advocacy campaigns; public interest law suits; investigative journalism; and demonstrations or protests.¹¹²

5 Conclusion

Accountability is vital for the improvement of laws and policies towards combating preventable maternal mortality and morbidity. It is emphasised that the confusing and limited nature of abortion rights in the law creates a fearful and uncertain environment for women and girls who find themselves pregnant, as well as the health workers who conduct safe abortions. This increases the number of clandestine and unsafe abortions which lead to lifelong illnesses and, in some cases, mortality. Therefore, Parliament should enact a comprehensive law regulating safe abortions but also to put in place actions/reforms to combat unsafe abortions. It is further proposed that steps should be taken to include the right to health, including reproductive health rights, in the Bill of Rights. Maternal morbidity and mortality violate several rights. Therefore, even in the absence of a clear constitutional provision, it can be litigated on the principle of the interrelated nature of rights using rights that are provided for in the fundamental rights and freedoms section of the Constitution. It is also emphasised that accountability extends beyond legal to social, administrative and other forms of accountability. With the weaknesses outlined in formal judicial systems, social mobilisation, administrative regulatory

110 Heywood (n 106 above) 14-36.

111 Heywood (n 106 above) 14-36 16-19 25-26.

112 Women's Democracy Network-Uganda Chapter 'Best practices for enhancing social accountability in Uganda. Lessons from Uganda' April 2014 6; E Lodenstein et al 'A realist synthesis of the effect of social accountability interventions on health service providers' and policy makers' responsiveness' (2013) 2 *Systematic Reviews* 1-10.

mechanisms, and increasing community awareness of reproductive health rights play an important role in the reduction of preventable maternal morbidity and mortality in Uganda.

Boko Haram and the child's right to education in Africa: Examining the accountability of non-state armed groups

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Summary

This article discusses the accountability debate surrounding the activities of non-state actors and its impact on the realisation of the child's right to education. It examines the legal framework for the protection of the right to education during emergencies and armed conflicts. The article focuses on Boko Haram as an example of a non-state armed group. In this respect, it considers the sect's history and its ideological beliefs, and shows that its activities are a result of its ideologies. It delves into the accountability debate and suggests various approaches towards holding faceless armed groups accountable for rights violations, generally, and the violation of the child's right to education, in particular.

Key words: *accountability; non-state actors; children's rights; armed conflict; armed groups; education; Boko Haram*

* LLB (Obafemi Awolowo) LLM (Human Rights and Democratisation in Africa) (Pretoria); s.s.bakare@law.leidenuniv.nl. This article is substantially based on the author's LLM dissertation written at the School of Law, University of Venda, under the supervision of Prof GNK Vukor-Quarshie and Ms Puleng Letuka, and submitted to the Centre for Human Rights, Faculty of Law, University of Pretoria. Errors and omissions are entirely mine.

1 Introduction

The accountability debate in respect of non-state armed groups has been a regular feature of international law, since it was observed that the nature of warfare has gradually changed from the previous understanding that warfare implies a military engagement between two or more states, to a more modern view that involves the participation of non-state armed groups, mostly in intra-state armed conflicts.¹ This change in the nature of warfare has accounted partly for the increased call to strengthen existing legal and institutional frameworks towards ensuring the accountability of non-state armed groups for rights violations, in general, and the violation of the child's right to education, in particular. A peculiar and rather disturbing feature of this change in warfare is the deliberate targeting of

1 J Odermatt 'New wars and the international/non-international armed conflict dichotomy' <http://www.isisc.org/dms/images/stories/PDF/Paper%20Odermatt.pdf> (accessed 7 August 2014). In conventional wars, the combatants are identifiable, and there probably is a battlefield or territory, direction, and goals for engaging in the war. Their intentions are often clear-cut and understood by both parties. In the case of this 'asymmetric warfare', however, the same cannot be said. Combatants attack places that are not necessarily warzones and places of learning are fast becoming their primary targets. In M Kaldor *New and old wars: Organised violence in a global era* (1999), it is generally argued that a new type of organised violence has surfaced in the period between the 1980s and the 1990s. The author describes these as the 'new wars' and submits that a major distinguishing factor between the new wars and the old wars is that the boundaries between wars that involve states, on the one hand, and organised crimes, which usually involve private or non-state actors, on the other, has become blurred. In essence, she argues that war no longer is an affair conducted solely between states, and that a major factor responsible for the shift in this understanding is globalisation. See also, generally, S Kalyvas "'New" and "old" civil wars: A valid distinction?' (2001) 54 *World Politics* 99; I Hermann & D Palmieri 'Les nouveaux conflits: Une modernité archaïque?' (2003) 85 *International Review of the Red Cross* 849. See also L Reydam's 'A la guerre comme à la guerre: Patterns of armed conflict, humanitarian law responses and new challenges' (2006) 88 *International Review of the Red Cross* 864, who argues that 'guerrilla-terrorist wars [will] determine the course of violence in the twenty-first century in many parts of the world'. The other change that is easily noticeable is how difficult it has become to classify conflicts into strict categories of international and non-international armed conflict. Eg, while the Boko Haram sect is primarily involved in attacking targets within Nigeria, it has on several occasions made incursions into Chad, Cameroon, Niger and Benin where it has been alleged that the sect maintains training camps for its combatants. There are also allegations of logistical and financial support for the group by neighbouring state actors. The challenge, therefore, is how to properly classify the armed conflict into international or non-international armed conflict, considering that there is unclear involvement of 'state actors' on either side. See generally <http://www.economist.com/news/middle-east-and-africa/21608808-boko-haram-thrives-weakness-governments-reg-ion-lake> (accessed 7 August 2014). In C Bassiouni 'The new wars and the crisis of compliance with the law of armed conflict by non-state actors' (2008) 98 *Journal of Criminal Law and Criminology* 748, the author argues that 'the conflict in Rwanda and in the Great Lakes area of Africa, including the Congo and Uganda, are characterized as internal ethnic and tribal warfare, notwithstanding the involvement of combatants from several states'.

civilians² by armed groups. This was again emphasised in 2014 when the Boko Haram sect³ abducted more than 230 young girls from their school hostel in the town of Chibok in Northern Nigeria.⁴ In February 2018 the same sect abducted more than 100 schoolgirls from Dapchi, another town in Northern Nigeria.⁵

The article examines the accountability debate regarding non-state armed groups, considering that the renewed attacks on education and educational facilities around the globe necessitate a re-examination of the debate. Scholars generally concur that there is no agreement on a clear approach towards bringing such groups to accountability under the present frameworks in international law.⁶ The article discusses approaches towards engaging armed groups in line with human rights and humanitarian norms and standards. It focuses on Boko Haram as a classic example of a non-state armed group with a peculiar emphasis on its activities, which constitute direct violations of the right to education. The article begins with a brief overview of the legal frameworks on the child's right to education and its protection during armed conflict. It thereafter focuses on Boko Haram: its origins, ideologies, activities and impact on the child's right to education. Further, it discusses the need for strengthening existing frameworks as well as recommendations on the necessity of actively engaging armed groups within the boundaries of international human rights and humanitarian law.

2 Overview of the legal framework on the right to education and its protection during armed conflict

In international law, the collective body of laws that governs armed

2 GJ Andreopolous 'On the accountability of non-state armed groups' in GJ Andreopolous et al (eds) *Non-state actors in the human rights universe* (2006) 141.

3 Boko Haram is the popular media appellation for a Nigerian armed group known as *Jama'atul Alhul Sunnah Lidda'wati wal Jihad*, or 'People Committed to the Propagation of the Prophet's Teachings and Jihad'. Boko Haram as an appellation translates literally to 'Western education is forbidden' and this is a pointer to the ideology that propels the group into action. In the US House of Representative's Committee on Homeland Security's 'Boko Haram: Growing threat to the US homeland' (2013) <http://homeland.house.gov/sites/homeland.house.gov/files/documents/09-13-13-Boko-Haram-Report.pdf> (accessed 8 November 2014), the report identifies how the group has gone through several phases of change in addition to the emergence of splinter groups which have become more radical and violent.

4 'Chibok abductions in Nigeria: "More than 230 seized"' *BBC News* <http://www.bbc.com/news/world-africa-27101714> (accessed 8 November 2014).

5 S Busari & B Adebayo 'Most of kidnapped schoolgirls freed, Nigeria says' <https://edition.cnn.com/2018/03/21/africa/nigeria-kidnapped-girls-boko-haram-intl/index.html> (accessed 30 April 2018).

6 A Clapham *Human rights obligations of non-state actors* (2006).

conflicts are international human rights law,⁷ international humanitarian law⁸ and international criminal law.⁹ While these laws differ in certain respects, they share 'the goal of preserving the dignity and humanity of all',¹⁰ while at the same time seeking to punish the violators of human rights. Before recent developments under international law, it was erroneously believed that international human rights law applied only in times of peace and for the regulation of the relationship between states and their nationals, while international humanitarian law applied only in times of war and concerns the treatment of combatants and non-combatants by the other party to a conflict. In this respect, international human rights law did not seem to accommodate any notion of loss of life, as the sanctity of life and the guarantee of the right to life were considered the most important requirements for the enjoyment of other rights.¹¹ International humanitarian law, for its part, was known to consist of norms that regulated the loss of the lives of combatants and, to a certain extent, it provided for and envisaged the loss of lives of non-combatants or 'civilian casualties [as] lawful collateral damage'.¹² These erroneous views have been abandoned, and currently it is firmly established that international human rights law also applies in situations of armed conflict.¹³ A recent example is the jurisprudence of the International Court of Justice (ICJ), which reads that 'the protection of ICCPR does not cease in times of war'.¹⁴

This body of laws provides three broad categories in which children's rights to education may be challenged. These are instances where children live in conflict zones, where children are internally displaced and where they cross international borders as refugees.¹⁵

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- 7 It is defined as 'a system of international norms designed to protect and promote human rights of all persons'. See generally UN Doc HR/PUB/11/01 *International legal protection of human rights in armed conflict* (2011) 5.
 - 8 Sometimes referred to as 'the law of armed conflict', they are a set of rules that seek to limit the effects of armed conflicts, purely on humanitarian grounds. See Clapham (n 6 above).
 - 9 They refer to 'those offences over which international courts or tribunals have been given jurisdiction under general international law. They comprise the so-called 'core' crimes of genocide, crimes against humanity, war crimes and the crime of aggression (also known as the crime against peace).' See generally R Cryer et al *An introduction to international criminal law and procedure* (2010) 4. See also D Akande 'Sources of international criminal law' in A Cassese (ed) *The Oxford companion to international criminal justice* (2009) 41-53.
 - 10 Clapham (n 6 above) 1.
 - 11 It is for this reason that proponents of human rights and international human rights law often campaign and argue for the abolition of the death penalty.
 - 12 Andreopolous (n 2 above) 143.
 - 13 Clapham (n 6 above) 5. See generally L Doswald-Beck & S Vité 'International humanitarian law and human rights law' (1993) 33 *International Review of the Red Cross* 94. See also C Droege 'The interplay between international humanitarian law and international human rights law in situations of armed conflict' (2007) 40 *Israel Law Review* 310.
 - 14 'The legality of the threat or use of nuclear weapons' International Court of Justice, advisory opinion, 1996 ICJ Reports 226 para 25.
 - 15 P Hyll-Larsen *The right to education for children in violent conflict* (2010).

However, the article concerns itself with the first and second categories, namely, children who live in conflict zones and those displaced as a result of armed conflict.¹⁶ According to the Committee on Economic, Social and Cultural Rights (ESCR Committee), the right to education 'has a minimum core content that applies even in insecurity and armed conflict'¹⁷ and, as such, conflict is not a ground for state parties to derogate from their obligations to protect education and educational facilities.¹⁸ The United Nations (UN) Committee on the Rights of the Child affirmed this position during its Day of General Discussion on the Right of the Child to Education in Emergency Situations'.¹⁹ This flows from an understanding that the right to education is a fundamental or basic right²⁰ as it is also an empowerment right.²¹ As a result of its primary nature, parties to a conflict owe a duty to preserve and respect education during armed conflict. It is not in doubt that non-state armed groups also have an obligation to respect human rights²² as 'all parties to a non-international armed conflict, including non-state armed groups, must respect and ensure respect for the rules of international humanitarian law'²³ and, by extension, other legal obligations. These obligations are codified in international and regional instruments and they are

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- 16 As a result of the Boko Haram conflict in Northern Nigeria, the Nigerian Emergency Management Authority (NEMA) has said that more than 400 000 people, most of them children, have been displaced since the beginning of fresh hostilities. See '400 000 persons displaced by Boko Haram says NEMA' *The Punch* 14 August 2014 8. See also 'Internal displacement in Nigeria worst ever – UN' *The Punch* 5 October 2014.
 - 17 In its General Discussion Day, the ESCR Committee points out that the ICESCR identifies the 'minimum core content of the right to education protected at all times and of immediate application'. A fundamental obligation of this core content is states' duty 'to ensure free choice of education without interference from the state or third parties'. See generally 'General Discussion Day: The right to education (articles 13 and 14 of the Covenant)' UN Doc E/C.12/1998/SR.49, 2 December 1998 and General Comment 13 of the ESCR Committee.
 - 18 An examination of the CRC reveals that the Convention is the first international instrument to incorporate the rules of international humanitarian law and international human rights law in one single document and does not allow for derogation in times of conflict. See generally C Hamilton & T El-Haj 'Armed conflict: The protection of children under international law' (1997) 5 *International Journal of Children's Rights* 1. The African Charter, unlike other international human rights instruments, contains no derogation clause and sufficiently shows that parties cannot derogate from their obligations to provide and protect education, even in situations of emergency or armed conflict.
 - 19 49th session held from 15 September to 3 October 2008.
 - 20 F Veriava 'The right to education' in D Brand et al (eds) *Socio-economic rights in South Africa* (2005) 57.
 - 21 F Coomans 'The core content of the right to education' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* 182.
 - 22 A Cassese 'The status of rebels under the 1977 Geneva Protocol on Non-International Armed Conflict' (1981) 30 *International and Comparative Law Quarterly* 424; see also UNSC Resolution 1214 (1998), 8 December 1998 para 12.
 - 23 T Pfanner 'Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims' (2009) 874 *International Review of the Red Cross* 279 281. See also K Hausler et al *Protecting education in insecurity and armed conflict: An international law handbook* (2012) 44.

generally known as international and regional frameworks for the protection of human rights, particularly the right to education, during armed conflict.

The next sections first examine the general provisions on the right to education and, thereafter, discuss the specific provisions that relate to the protection of education during armed conflict.

2.1 International legal frameworks

In a general sense, the right to education is guaranteed in the Universal Declaration of Human Rights (Universal Declaration),²⁴ the Convention Against Discrimination in Education,²⁵ as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁶ In a more specific sense, however, the right is guaranteed for certain vulnerable groups in instruments that are group-specific. These include the Convention on the Right of the Child (CRC);²⁷ the Optional Protocol to the CRC on Children in Armed Conflict (OPAC);²⁸ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);²⁹ and the Convention on the Rights of Persons with Disabilities (CRPD).³⁰

Additionally, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 1949 and its two additional Protocols of 1977, the Rome Statute of the International Criminal Court (ICC) of 1998, as well as the International Labour Organization (ILO) Convention 182 on Child Labour of 1999 are relevant for the protection of education and the preservation of places of learning during armed conflict and emergencies.

2.1.1 General provisions on the right to education

Although non-binding, the Universal Declaration is the source of inspiration for most post-World War II international instruments within the UN mechanism.³¹ It lays the template³² and serves as guiding principles for many other subsequent instruments that include binding provisions on the right to education. Article 26 places the right to education at the forefront of the promotion and protection of

24 Adopted by UN General Assembly on 10 December 1948.

25 Adopted in Paris by the General Conference of UNESCO on 14 December 1960.

26 Alongside the ICCPR, the UN General Assembly adopted it on 16 December 1966.

27 Adopted by the UN General Assembly in 1989.

28 Adopted and opened for signature, ratification and accession by the UN General Assembly Resolution A/RES/54/263 of 25 May 2000. It entered into force on 12 February 2002.

29 Adopted by UN General Assembly in 1979.

30 Adopted by UN General Assembly on 13 December 2006.

31 Vienna Declaration and Programme of Action para 8. The World Conference on Human Rights adopted the Vienna Declaration on 25 June 1993 in Vienna, Austria.

32 J Dada 'Human rights under the Nigerian Constitution: Issues and problems' (2012) 2 *International Journal of Humanities and Social Science* 12.

other rights. Not only does it provide that 'everyone has the right to education',³³ but it further provides that 'education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'.³⁴ Subsequent instruments on the right to education at the international and regional levels have drawn inspiration from these provisions in the Universal Declaration. One such instrument is the Convention Against Discrimination in Education, which generally seeks to promote the right to education for all, and to ensure that there is no discrimination in its provision and availability.³⁵

It has also been argued that the Universal Declaration played a vital role in the adoption of the two covenants of 1966; the International Convention on Civil and Political Rights (ICCPR) and the ICESCR.³⁶ Article 13 of the ICESCR, which extensively provides for the right to education, has been interpreted as protecting the right to education even during armed conflict. For instance, the ESCR Committee alluded to this right when it declared in General Comment 13 that 'the obligation to protect requires state parties to take measures that prevent third parties from interfering with the enjoyment of the right to education'.³⁷ These third parties obviously include non-state armed groups. Also, paragraph 6 in part addresses 'certain interrelated and essential features of education',³⁸ and, to this end, it identifies accessibility to education as an essential feature. Paragraph 6(b)(ii) on the subject of physical accessibility provides that 'education has to be within safe physical reach', which presupposes that the safety and protection of learners is a fundamental element of the protection of the right to education.

2.1.2 Class-specific instruments

In the UN system there are treaties that are class-specific. As such, these treaties apply primarily to members of a specific age, class or gender group. Some of these treaties also contain provisions on the right to education. The CRC, which applies to 'every human being below the age of eighteen years',³⁹ is a classic example of a treaty that is class-based. It provides for the right to education in article 28. Article 10 of CEDAW, a gender-based instrument, provides for equal rights to education for women, while article 24 of the CRPD provides for the right to education for persons living with disabilities.

33 Art 26(1).

34 Art 26(2).

35 H Espiell *Significance of the Convention against Discrimination in Education (1960)* (2005) 4.

36 As above.

37 General Comment 13 para 47.

38 ICRC 'Promoting and protecting education in situations of armed conflict' <http://www.icrc.org/eng/resources/documents/event/2014/01-10-humanitarian-promoting-protecting-education.htm> (accessed 1 June 2014).

39 Art 1.

2.1.3 Protection of the right to education during armed conflict

Primarily, the right to education in armed conflict is protected under the Fourth Geneva Convention and its two Protocols.⁴⁰ The protection of education during armed conflict, however, is not limited to the Geneva Convention of 1949 and its Protocols. The same protection can be gleaned from other provisions in certain instruments relating to international humanitarian law, international human rights law and international criminal law which do not specifically address the right to education during armed conflict. For instance, article 8(2)(e)(iv) of the Rome Statute makes it a war crime to 'intentionally direct attacks against buildings dedicated to religion, education, art, science or charitable purposes ... provided they are not military objectives'. The events in Northern Nigeria readily come to mind when examined against this provision. The consistent attacks on schools, among other targets, by the Boko Haram sect reveal a gross violation of international criminal law, as contained in the provisions above. For its part, article 3(a) of the ILO Convention 182 on Child Labour outlaws the forced or compulsory recruitment of children for use in armed conflict. In Nigeria there are speculations that the secondary school students who were kidnapped from their hostel in April 2014 were being used as suicide bombers.⁴¹ This is a clear violation of the ILO Convention, more so because these students were abducted from their educational institution.

2.2 African regional frameworks

Unlike the situation at the UN level, Africa has no specific instrument that is wholly devoted to the right to education. However, there are provisions scattered in different instruments for the protection and guarantee of this right. Article 17 of the African Charter on Human and Peoples' Rights (African Charter)⁴² provides that 'every individual shall have the right to education'. 'Every individual' refers to people of

40 It is generally called the Law of Armed Conflict and it was adopted in 1949. Art 24 of the Convention provides that 'parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances'. This implies that even in circumstances of armed conflict, this provision envisages and requires that education must continue. Art 50 requires that parties to a conflict must 'facilitate the proper working of all institutions devoted to the care and education of children'. Art 94 provides that 'the education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside'. Also, in Protocol II to the Convention, relating to the Protection of Victims of Non-international Armed Conflict (1977), art 4 fundamentally guarantees that 'children receive an education'. Protocol 1 offers an interesting perspective in that it clearly dictates in art 52 that 'attacks shall be limited strictly to military objectives', and schools or educational facilities are not regarded as military objectives.

41 'Chibok girls fingered as suicide bombers' *Vanguard* 3 August 2014.

42 Adopted by the OAU in Kenya on 27 June 1981.

all ages and, as such, this provision is interpreted as accommodating the child's right to education. Article 11 of the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁴³ provides that 'every child shall have the right to an education'. Article 12 of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)⁴⁴ provides for the right to education and training for women and the girl child. Article 13 of the African Youth Charter⁴⁵ provides that 'every young person shall have the right to education of good quality'.

In terms of the protection of education in times of armed conflict or emergency, the provisions of article 9(2)(b) of the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009)⁴⁶ are provisions that may be interpreted to accommodate the protection of the right to education in cases of emergency. Article 9(2)(b) provides that state parties shall

provide internally-displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate, extend such assistance to local and host communities.

It must be noted, however, that the African Charter does not allow for derogation of any of its rights, even during emergency and armed conflict. The African Commission on Human and Peoples' Rights (African Commission) emphasised this in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*⁴⁷ as follows:

The 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 situation of civil war cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

The implication of this is that the right to education, which is provided for in article 17 of the African Charter, cannot be derogated from in times of armed conflict. States owe a duty to continuously guarantee the right to education in times of armed conflict and other emergencies.

2.3 Domestic legislative frameworks

State parties to international treaties owe a duty to give effect to their international obligations through their national laws.⁴⁸ In recognition

43 The adoption of the African Children's Charter in 1990 makes Africa the only continent in the world with a children-specific international instrument.

44 Adopted on 11 July 2003.

45 Adopted on 2 July 2006.

46 Adopted on 23 October 2009.

47 (2000) AHRLR 66 (ACHPR 1995) para 21.

48 UN Doc A/HRC/23/35 (2003), Report of the Special Rapporteur on the Right to Education, Kishore Singh.

of this duty, Nigeria has not only ratified international treaties containing provisions on the right to education, but has also domesticated some international instruments in this respect, considering that Nigeria, being a dualist state, requires the domestication of foreign treaties before it is applicable in its national courts.

Traditionally, the interrelationship between national law and foreign treaties has always been discussed from a monist or dualist perspective. While there are debates as to the veracity of this interrelationship, a country's approach to the use of foreign laws has a great impact on the entire legal system. Also, 'the extent to which international human rights law becomes part of a country's domestic law correlates with the status international law enjoys under that country's domestic law'.⁴⁹ While monists perceive foreign law as a part of a single legal system and as such apply its provisions directly in their national courts, the dualists proceed otherwise. They posit that these two regimes are distinct and the inroad of foreign law into the state must be clearly provided for in the national laws.⁵⁰ Nigeria is a clear example of a dualist state and, as such, it is 'the only dualist country in Africa to have formally incorporated an international human rights treaty *verbatim*, the African Charter on Human and Peoples' Rights'⁵¹ and, by so doing, the Charter became part of its national laws and thus is enforceable in Nigerian courts. In addition to the provisions of Chapter 4 of the 1999 Constitution, the provisions of the African Charter are now regarded as part of Nigeria's domestic laws. It was for this reason that the Nigerian Court of Appeal decided in *IGP v ANPP & Others* that 'the African Charter is 'part of the laws of Nigeria and ... courts must uphold it'.⁵²

However, it should be noted that the domestication of the African Charter was in deference to section 12(1) of the 1999 Constitution, which provides that 'no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. This implies that a treaty is without the force of law in Nigeria unless the National Assembly has domesticated it. The effect of this provision is that treaties have the same status as acts of parliament, in other words they are lower in status compared to the Nigerian Constitution.⁵³ The Supreme Court has repeatedly harped on the importance of this

49 F Viljoen *International human rights law in Africa* (2012) 518.

50 H Kelsen *The pure theory of law* (1934) 328-347 trans M Knight (1967).

51 M Killander 'The role of international law in human rights litigation in Africa' in EK Quansah & W Binchy (eds) *Judicial protection of human rights in Botswana: Emerging issues* (2009) <http://ssrn.com/abstract=1438556> (accessed 1 April 2014).

52 Appeal CA/A/193/M/05.

53 Sec 1(1) of the 1999 Constitution establishes the supremacy of the Constitution and subsec (3) provides that 'if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.

constitutional provision. In *Oloruntoba Oju v Dopemu*,⁵⁴ the Nigerian Supreme Court held that ‘any provision of an existing law which is in conflict with the provisions of the 1999 Constitution must be pronounced void to the extent of such inconsistency’.

2.3.1 Nigerian Constitution

Chapter 4 of the Nigerian Constitution contains core fundamental rights.⁵⁵ Curiously, the right to education is not included as one of these core fundamental rights. The right to education, as well as other socio-economic rights, rather are contained in Chapter 2 of the Constitution and are referred to as ‘fundamental objectives and principles of state policy’. The provisions in Chapter 2 are non-justiciable⁵⁶ and, as such, citizens cannot legally hold the government accountable for a violation of the right to education and other socio-economic rights solely on the basis of the Constitution.

However, in *Odafe & Others v Attorney-General & Others*⁵⁷ and *Gbemre v Shell Petroleum Development Company Nigeria Limited & Others*⁵⁸ Nigerian courts held that a declaration of the socio-economic rights violations sought by the applicants in the two cases⁵⁹ succeeded in spite of the fact that these rights are non-justiciable in the context of the Nigerian Constitution.

Additionally, the right to education was specifically held to be enforceable and thus justiciable by the Nigerian Federal High Court on 1 March 2017. In the case of *Legal Defence and Assistance Project (LEDAP) v The Federal Ministry of Education*⁶⁰ the Court held that the combined effect of section 18(3) of the Nigerian Constitution and section 1 of the Compulsory Free Universal Basic Education Act of 2004 was that the right to basic education is enforceable in Nigeria.⁶¹

54 (2008) All FWLR Part 411, 810.

55 Dada (n 32 above) 43.

56 Sec 6(6)(c) of the Constitution of the Federal Republic of Nigeria.

57 (2004) AHRLR 205 (NgHC 2004).

58 (2005) AHRLR 151 (NgHC 2005).

59 The right to health in art 16 and the right to a satisfactory environment in art 24 respectively were the crux of the matter in the two cases, and the Nigerian High Court allowed the invocation and justiciability of these rights solely on account of the provisions of the African Charter.

60 Suit FHC/ABJ/CS/978/15.

61 ‘In that case, the Plaintiff contended that although Section 6(6)(c) renders the provisions of Chapter 2 of the 1999 Constitution unenforceable, however, once a legislation is enacted to give legal effect to any of the provisions of the said Chapter 2 of the 1999 Constitution, the right contained in such provisions become enforceable notwithstanding section 6(6)(c) of the Constitution. The Plaintiffs further contended that having enacted the Compulsory, Free Universal Basic Education Act, 2004, the National Assembly has given legal effect to rights to free universal primary education and free junior secondary education for every Nigerian child in line with the joint provisions of Section 2 and 3 of the Compulsory, Free Universal Basic Education Act, 2004 as well as Section 18(3)(a) of the 1999 Constitution.’ See Y Adegboye ‘The right to education under Nigerian law’ <https://www.lawyerd.ng/the-right-to-education-under-nigerian-law-by-yinka-adeboye/> (accessed 30 April 2018).

Furthermore, in *The Registered Trustees of the Socio-Economic Rights Accountability Project v the Federal Republic of Nigeria*⁶² the ECOWAS Court of Justice held that the right to education was directly enforceable.⁶³

The political history of Nigeria has had a significant impact on its legal system considering that Nigeria domesticated the African Charter at a time of military rule and subsequent suspension of the Constitution.⁶⁴ The ratified African Charter, alongside Chapter 4 of the Nigerian Constitution, has been useful in the protection of the rights of citizens. While the Constitution has been suspended severally, the operation of the African Charter 'has never been suspended, leaving the door open for their judicial application'.⁶⁵ Thus, in the case of *Garba v Attorney-General of Lagos State*,⁶⁶ the Court held that 'even if [any] aspect of our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot unilaterally be abrogated'. The Court proceeded to rely on the provisions of the African Charter to assume jurisdiction over the matter.⁶⁷

2.3.2 Compulsory Free Universal Basic Education Act of 2004

As the name suggests, this Act seeks to make the basic education of a child not only compulsory but also free and accessible. The Act places the duty of providing basic education on all state governments in Nigeria, and clearly provides that 'the Federal Government's intervention under this Act shall only be an assistance to the states and local governments in Nigeria'.⁶⁸ It further makes it a crime for parents to refuse to send their wards and children to school. It seeks the co-operation of parents in the implementation of the Act.

After the brief analysis of the provisions relating to the child's right to education and its protection during emergencies at the international, regional and domestic levels, it is necessary to focus on the Boko Haram sect in Northern Nigeria. The next sections consider the history, ideology, activities and impact of the sect on children's rights to education.

62 Suit ECW/CCJ/APP/0808 delivered on 27 October 2009.

63 See A Skelton & S Kamga 'Broken promises: Constitutional litigation for free primary education in Swaziland' (2017) 61 *Journal of African Law* 434.

64 Nigeria ratified the African Charter on 22 June 1983.

65 Viljoen (n 49 above) 534.

66 Suit ID/599M/91 (31 October 1991).

67 F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1.

68 PA Arhedo et al 'School counsellors' roles in the implementation of Universal Basic Education (UBE) scheme in Nigeria' (2009) 2 *Edo Journal of Counselling* 60.

3 Activities of Boko Haram and impact on education

By their nature armed conflicts have catastrophic and far-reaching consequences. Considering the fact that the impact of war and armed conflict extends beyond the period of the conflict itself, it is not difficult to understand why war is described as 'development in reverse'.⁶⁹ The capacity of conflicts to reverse gains of many years is well known, irrespective of whether the conflict continues for a lengthy period or not. The impact is graver and more severe in African countries, where the capacity to withstand the effect of conflict is stifled by mass poverty and underdevelopment.⁷⁰

While the above position generally is true, it appears that the sector most often affected by the reverse in gains and development as a consequence of armed conflict is the educational sector. 'Armed conflict is destroying not just school infrastructure, but also the hopes and ambitions of a whole generation of children.'⁷¹ The disruptive impact of armed conflict on education 'represents one of the greatest developmental setbacks for countries affected by conflict'.⁷² The long and short-term effects of the disruptive impact of armed conflicts on education are the focus of this article. It focuses on the activities of Boko Haram as an example of an armed group waging modern armed conflict against a state. It is evident that attacks on schools, educational infrastructures, educators and learners are fast becoming a reality of modern conflict,⁷³ and the article attempts a chronological outline of these forms of attacks and their overall effect on the educational system.

3.1 History and ideology of Boko Haram

In an attempt to use Boko Haram as an example of a modern armed group waging a modern armed conflict, this study examines its history and ideology as necessary determinants of its activities.

3.1.1 History of the sect

The precise date of Boko Haram's emergence in the polity and political life of Nigeria is mired in controversy.⁷⁴ This is so because violent armed groups by their nature often originate in secrecy and

69 P Collier *The bottom billion: Why the poorest countries are failing and what can be done about it* (2007).

70 UNESCO commissioned report titled 'The hidden crisis: Armed conflict and education' (2011) 131 <http://unesdoc.unesco.org/images/0019/001907/190743e.pdf> (accessed 10 August 2014).

71 As above.

72 UN Doc A/51/306 (1996) 'Promotion and protection of the rights of children: Impact of armed conflict on children' para 186.

73 M Wessel & R Hirtum 'Schools as tactical targets in conflict: What the case of Nepal can teach us' (2013) 57 *Comparative Education Review* 1.

74 J Adibe 'What do we really know about Boko Haram' in I Mantzikos (ed) *Boko Haram: Anatomy of a crisis* (2013) 11.

the usual manner of learning about them is through unreliable media accounts.⁷⁵ While most media accounts trace its origin back to 2002 when its activities became known, particularly with the emergence of Mohammed Yusuf as its leader, other sources in Nigerian security circles date the origin back to 1995. The group was started as a non-violent religious sect known as *Ahlulsunna wal'jama'ah hijra* in the University of Maiduguri in Borno State.⁷⁶ It only began to show violent tendencies when the founding leader; Abubakar Lawan, exited the sect and Yusuf became its new leader in 2002.⁷⁷

From 2002 to date the sect has operated under various names that include *Muhajirun*, *Yusufiyyah*, Nigerian Taliban, Boko Haram and *Jama'atu Ahlissunnah lidda'awati wal Jihad*.⁷⁸ The current appellation, Boko Haram, is a Hausa language designation that literally translates to 'Western education is forbidden', and this is a pointer to one of the driving objectives of the group. Its official name, however, is *Jama'atu Ahlissunnah lidda'awati wal Jihad*, which in English means 'People committed to the propagation of the prophet's teachings and Jihad'.⁷⁹ In 2004 the sect migrated from Borno State to Yobe State and established a 'kingdom' for itself. This 'kingdom' was called Afghanistan.⁸⁰ From this 'kingdom', the sect planned to export the imposition of Islamic rule on Northern Nigeria, as a response to what it calls the corrupt establishment known as the Nigerian state. According to Yusuf, its goal was that 'a Shari'a state should be established in Nigeria, and if possible all over the world, through preaching the faith (*Da'wah*)'.⁸¹ However, Yusuf was captured and extra-judicially killed in 2009⁸² alongside more than 1 000 members of the sect in a four-day battle with Nigerian security forces.⁸³ Many believe that Yusuf's extra-judicial killing is the major factor for the escalation of the Boko Haram insurgency. Indeed, one of the immediate consequences was the fragmentation of the sect and the

75 FC Onuoha 'Boko Haram: Nigeria's extremist Islamic sect' (2012) 2, Report commissioned by Aljazeera Centre for Studies.

76 As above.

77 F Onuoha 'Understanding Boko Haram's attacks on telecommunication infrastructure' in Mantzikos (n 80 above) 18.

78 Onuoha (n 77 above). See also R Loimeier 'Boko Haram: The development of a militant religious movement in Nigeria' (2012) 47 *Africa Spectrum* 2-3.

79 See generally A Murtada *Boko Haram in Nigeria: Its beginnings, principles and activities in Nigeria* (2013).

80 O Patrick & O Felix 'Effect of Boko Haram on school attendance in Northern Nigeria' (2013) 1 *British Journal of Education* 1-9.

81 'Boko Haram' in 'Almanac of Islamism; American Foreign Policy Council Report August 2014' <http://almanac.afpc.org/boko-haram> (accessed 3 October 2014). See also JF Forest 'Confronting the terrorism of Boko Haram in Nigeria' (2012) Joint Special Operations University (JSOU) Report 12-5.

82 E Ojo 'Boko Haram: Nigeria's extra-judicial state' (2010) 12 *Journal of Sustainable Development in Africa* 2. See also D Agbibo 'Peace at daggers drawn? Boko Haram and the state of emergency in Nigeria' (2014) 37 *Studies in Conflict and Terrorism* 41-67.

83 D Agbibo 'Why Boko Haram exists: The relative deprivation perspective' (2013) 3 *African Conflict and Peacebuilding Review* 144-157.

enthronement of the hawks within the sect, led by Abubakar Shekau, an erstwhile deputy of Yusuf.⁸⁴

In July 2010, one year after the death of Yusuf, Shekau announced that he had assumed leadership of the sect. This was a turning point, as it became a rebranded violent sect.⁸⁵ Scholars have described this turn as one 'from peaceful origin to violent extremism'.⁸⁶ While Yusuf had sought to establish his 'Islamic State' through preaching the faith, Shekau opted for a more violent means of Jihad.⁸⁷

Shekau believes that Boko Haram cannot negotiate any final solution to the conflict with the Nigerian government until Boko Haram has created an Islamic state or Nigeria adopts a Boko Haram-approved version of Shari'a law.

It is for this reason that the new and current official name, *Jama'atu Ahlissunnah lidda'awati wal Jihad*, incorporates Yusuf's idea of *Da'wah* or preaching the faith, and Shekau's concept of Jihad. Since 2009, the group has carried out more than 1 000 attacks that have led to the deaths of thousands of people.⁸⁸ It has also evolved considerably from a local threat to a regional menace,⁸⁹ maintaining camps in several countries,⁹⁰ receiving funds from external sources and being rumoured to have links with Al-Qaeda, the Afghan Taliban, the Somalian Al Shabbab and other international terrorist organisations.⁹¹

84 Several splinter groups have emerged from the fragmented Boko Haram, the most prominent being the Ansaru group which was founded in 2011 by Abubakar Adam Kambar. He was killed in 2012 by Nigerian security forces and was replaced by Khalid Barnawi who is rumoured to have linked the group with Al-Qaeda in the Islamic Maghreb (AQIM). The Ansaru is said to be a more professional group consisting of trained combatants, unlike the mainstream Boko Haram that thrives on recruiting disgruntled and untrained elements in society. Ansaru regularly criticises Shekau and his group for their wanton destruction and killings of innocent Muslims. See generally M Perouse de Montclos 'Nigeria's interminable insurgency? Addressing the Boko Haram crisis' A Chatham House Research Paper, September 2014.

85 'Curbing violence in Nigeria (II): The Boko Haram insurgency' International Crisis Group Report 216, April 2014, <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/216-curbing-violence-in-nigeria-ii-the-boko-haram-insurgency.pdf> (accessed 3 October 2014).

86 J Barna 'Insecurity in context: The rise of Boko Haram in Nigeria' [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/536393/EXPO-AFET_NT\(2014\)536393_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/536393/EXPO-AFET_NT(2014)536393_EN.pdf) (accessed 4 October 2014).

87 n 85 above.

88 <http://www.romereports.com/pg157728-human-rights-watch-releases-boko-haram-death-toll-in-2014-en> (accessed 7 October 2014).

89 JP Pham 'Boko Haram's evolving threat' (2012) 20 *Africa Security Brief* 1-7.

90 Barna (n 86 above).

91 Al Ajayi 'Boko Haram and terrorism in Nigeria: Exploratory and explanatory notes (2012) 1 *Global Advanced Research Journal of History, Political Science and International Relations* 103-107. See also SM Gourley 'Linkages between Boko Haram and al Qaeda: A potential deadly synergy' (2012) 3 *Global Security Studies* 1-14. Also see generally V Thomson 'Boko Haram and Islamic fundamentalism in Nigeria' (2012) 3 *Global Security Studies* 46-60.

Its members traverse many national boundaries in the West African sub-region, carrying out attacks at will.⁹²

3.1.2 Ideology of the sect

The sect's ideology or philosophy is founded upon the practice of orthodox or conservative Islam and 'an attempt at imposing a variant of Islamic religious ideology on a secular state'.⁹³ Conservative Islam, by its very nature, abhors Western civilisation and all its paraphernalia.⁹⁴ Education is one of these paraphernalia and, as such, this brand of Islamism abhors Western education. The current political structure in Nigeria is also seen as an offshoot of Westernisation, hence the call for the abolition of the present governance structure and the imposition of Shari'a law. The sect calls for the abolition of 'a Western way of life, democratic institutions, constitutional laws and the institutions of the Nigerian state'.⁹⁵ The sect's consistent attacks on Christians and their places of worship also speak volumes about their abhorrence of the Christian faith, which they perceive as an offshoot of Western civilisation. This ideology also explains why it directs its attacks on government buildings and officials, as well as civilians that are caught in between. As such, the sect seeks the overthrow of the current Nigerian governance structure and the imposition of Shari'a law. It seeks to do this through a combination of *Dawa'a* (preaching the faith) and Jihad (waging a holy war).

The sect also believes that a true Islamic state ought to be established out of the ruins of the destruction of the present Nigerian state. This is why it migrated several thousands of its members to Yobe State in 2004 to establish its kingdom.⁹⁶ Non-members are considered infidels, unbelievers or wrongdoers.⁹⁷ Its main guiding principles are abhorrence of democracy as it conflicts with Islam; the prohibition of studying in educational systems as it opposes Islamic education; and the rejection of employment under the current Nigerian state.⁹⁸

92 UNESCO (n 70 above) 5-6.

93 A Adesoji 'The Boko Haram uprising and Islamic revivalism in Nigeria' (2010) 45 *African Spectrum* 95. See also M Opeloye & FISN 'The Boko Haram insurgency in Nigeria: A critical study of the movement's ideological posture and implications' (2012) 51 Doi: 10.7763/IPEDR 38 172-181.

94 E Onyebuchi & C Chigozie 'Islamic fundamentalism and the problem of insecurity in Nigeria: The Boko Haram phenomenon' (2013) 15 *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 43-53.

95 As above.

96 Patrick & Felix (n 80 above).

97 Onuoha (n 77 above).

98 Murtada (n 79 above) 16-18.

The importance of examining the sect's origin and ideologies is to be able to properly contextualise its activities. As a modern armed group, Boko Haram, like the Afghan Taleban,⁹⁹ has consistently attacked schools and learners, simply because of their connection to education, and the abduction of 234 schoolgirls on 14 April 2014 is in furtherance of its ideologies. The next section focuses on the impact of modern armed conflicts on the realisation of the right to education.

3.2 Impact of modern armed conflicts on the right to education

This section examines the precise impact that activities of armed groups have on the realisation of the right to education. It does this by examining the changing nature of armed conflict, in order to justify the claim that Boko Haram is a modern armed group. It further chronicles the effect of their activities and attacks on the realisation of the right to education.

The traditional notion of war is the idea of armed conflict between two or more states or, even better, fighting between armies of different states, usually after a formal declaration of hostility or war. Classic examples are World Wars I and II, and almost all the wars before then. In those wars, attacks are directed at military targets, battlegrounds that are far removed from the civilian population. While not always respected, such wars had strict rules that govern them, and the parties in the conflict were always aware of these rules. A peculiar characteristic of these rules was that they changed from time to time. For instance, there was a time when hoisting a white flag signified surrender, and combatants not only ceased attacks at dusk, but they also surrendered to the opposing forces if a key leader was captured. Parties strive hard to respect these codes and their desecration, particularly during World War II, accounted for the adoption of codified international humanitarian and human rights law rules.¹⁰⁰

One of the consequences of these codifications was that the term 'war' was replaced by the term 'armed conflict', which is loosely defined as the use of arms, in a conflict, between two or more parties.¹⁰¹ The difference is that while war used to be construed as a military engagement between two or more states, armed conflict has a wider scope, as there is no requirement for the parties to be states, properly so called. Armed conflict can be either international or non-international. International armed conflict is strictly between states,

99 The attacks by the Taleban on Malala Yousufzai and other children in Pakistan and Afghanistan are reminders of the plight of children in the hands of such armed groups; <http://www.bbc.com/news/world-asia-19882799> (accessed 7 October 2014).

100 See generally IBCR *Children and armed conflict: A guide to international humanitarian and human rights law* (2010).

101 J Mrazek 'Armed conflicts and the use of force' (2010) 1 *Czech Yearbook of Public and Private International Law* 95.

while non-international armed conflict is between states and non-state entities.¹⁰²

Some distinguishing characteristics of this contemporary armed conflict are intentional attacks on civilian population; the prolonged duration of the conflict; a loose military command structure; a link between armed groups and criminal networks; unclear and nebulous motivation for fighting; easier access to small arms; the use of terror tactics; as well as building the group around a leader.¹⁰³

3.3 How Boko Haram's attacks fit into the description of modern armed conflict

Whether one calls it 'informal war',¹⁰⁴ 'the new war',¹⁰⁵ 'contemporary armed conflict',¹⁰⁶ 'asymmetry warfare',¹⁰⁷ 'irregular or hybrid warfare',¹⁰⁸ or even 'terrorism',¹⁰⁹ one golden thread runs through them all, namely, the fact that they refer to armed conflicts between a state and non-state entities, with the latter adopting various unconventional approaches to the warfare.¹¹⁰ Such approaches include guerilla tactics that involve surprise attacks in places that are not declared battlegrounds or war zones. In this respect the targets usually are civilians and/or infrastructures that are generally meant for use by the civil populace. This presupposes that there is a difference between these types of conflicts and other types where one state wages war against another, and the targets in such conventional wars usually are military targets. The death of civilians is classified as collateral damage as they really are exceptions to the rule.¹¹¹

Kaldor identifies certain other distinguishing characteristics of these new wars. She calls them globalised wars that 'involve the fragmentation and decentralisation of the state'.¹¹² The recent bold attacks by Boko Haram and annexation of territories within the

102 See generally N Balendra 'Defining armed conflict' (2008) 29 *Cardozo Law Review* 2461.

103 M Kaldor *New and old wars* (2007).

104 S Metz *Armed conflict in the 21st century: The information revolution and post-modern warfare* (2000) xii.

105 Kaldor (n 103 above).

106 IBCR (n 100 above) 31.

107 See generally D Buffaloe 'Defining asymmetric warfare' (2006) 58 *The Land Warfare Papers*.

108 F Hoffman 'Hybrid warfare and challenges' (2009) 52 *Joint Force Quarterly* 3.

109 G Chaliand & A Blin (eds) *The history of terrorism from antiquity to Al Qaeda* trans E Schneider et al (2007).

110 K Coons & G Harned 'Irregular warfare is warfare' (2009) 1 *Joint Force Quarterly* 97.

111 IBCR (n 100 above).

112 Kaldor (n 103 above) 95.

territorial enclave of Nigeria¹¹³ fit into this characteristic of the new war, as described by Kaldor. Furthermore, these groups often receive external support and their attacks are directed against civilians, among other targets. Also, the wars are political conflicts that are often waged as a result of underlying economic dissatisfaction. Boko Haram has often claimed that their agitation is against the corruption and economic neglect by the northern elites and the Nigerian government. Other noticeable characteristics are the presence of splinter groups, 'autonomous groups of armed men centred around a leader', the use of child soldiers and foreign mercenaries as well as a unique pattern of violence with the ultimate goal of spreading fear and terror amongst the populace. It is necessary to state that all these characteristics are apparent with Boko Haram and, as such, it is appropriate to conclude that Boko Haram fits into the description of a modern armed group, waging the 'new war'.

4 Impact of modern armed conflict on education

In various ways conflicts affect education in manners that are often intractable. The death of teachers and students as well as the destruction of educational facilities are some of the gravest impacts that armed conflicts have on education. An immediate observation is that apart from making schools their primary targets for attacks, the Boko Haram ideological opposition to schooling, particularly that of girls, is a further reason for the attacks. Needless to say, these attacks, while limiting access to school, serve to increase the absence of teachers and students from school.¹¹⁴ Conflicts also increase the tendency of dropping out of school, the military recruitment of child soldiers and also economic hardship. The quality and standard of education usually are lowered during armed conflict and the shortening or permanent disruption of the academic calendar evidences this.¹¹⁵ Conflicts further widen the economic inequality in society, thus ensuring that the need to drop out of school is heightened for the poorer section of the community.

The peculiar circumstances of the girl child deserves to be mentioned. The situation in Northern Nigeria has a grave impact on the plight of the girl child. Conflicts serve to exacerbate gender disparities as most parents now keep their girl children at home. The dangers of sexual exploitation, rape and early pregnancy are rife.¹¹⁶ This is a dimension of the general low rate of enrolment in schools in

113 'Boko Haram annexes town' *The Times* 25 August 2014 <http://www.the-times.co.uk/tto/news/world/africa/article4185850.ece> (accessed 7 October 2014).

114 UNESCO Doc 2011/ED/EFA/MRT/PI/50 'The quantitative impact of conflict on education' Think piece prepared for the Education for All Global Monitoring Report 2011.

115 O Shemyakina 'The effect of armed conflict on accumulation of schooling: Results from Tajikistan' (2011) 95 *Journal of Development Economics* Elsevier 186.

places affected by conflict. The school enrolment rate has reduced radically and is on the decline in Northern Nigeria. This is a region that characteristically has the lowest percentage of school enrolment in Nigeria and, consequently, as reported by the UN, the highest number of out-of-school children in the world.¹¹⁷ This is directly tied to poor performance in education and the unequal literacy rate between the northern and southern parts of Nigeria.¹¹⁸ The overarching effect of armed conflict is that it drains funds and financial resources that should have been ploughed into human development through education. In states such as Nigeria, money is devoted to procuring military equipment to wage war during the duration of the conflict. After the conflict, money is also committed to rebuilding society. These funds can judiciously be used to promote and provide education in the absence of conflict. The situation is more disturbing in most African countries where powerful individuals benefit from the large amounts of money budgeted for the prosecution of the war, and they consequently promote these wars.

To recap, armed conflict impacts on education by reducing the standard of education; by the destruction of educational facilities; the promotion of inequality; the exposure of learners and educators to attacks, rape and other sexual violence; the exposure of children to abductions and kidnapping and recruitment as child soldiers; by reinforcing poverty; causing a diversion of finance from education to military expenditure; and large-scale internal displacement.

After a thorough examination of the impact of armed conflict on education, and in light of the legal frameworks discussed earlier, it is appropriate to ask whether these frameworks are sufficient, adequate or efficacious in protecting the right to education during armed conflict.

5 Accountability debate

As noted earlier, the need to revisit the accountability debate of non-state armed groups has arisen because of renewed attacks on education and educational facilities around the globe. This is further compounded by the fact that there is no agreement on a clear approach towards bringing such groups to book under the present frameworks in international law.

116 Save the Children UK 'Forgotten casualties of war: Girls in armed conflict' (2005) <https://childhub.org/en/child-protection-online-library/save-children-uk-2005-forgotten-casualties-war-girls-armed-conflict> (accessed 30 June 2018).

117 A Abdulmalik 'Shocking: Nigeria holds world record in number of children out of school' *Premium Times* 11 June 2013.

118 Patrick & Felix (n 80 above). See also AS Ekereke 'The effects of Boko Haram insurgency and the school system: A case study of selected states in Northern Nigeria' (2013) *Science Journal of Sociology and Anthropology* 1.

5.1 An investigation into the efficacy of the existing legal frameworks for protection of the right to education during armed conflict

Given the international, regional and domestic frameworks discussed earlier, it is appropriate to ask whether these frameworks are sufficient, adequate or efficacious in protecting the right to education during armed conflict. Clapham argues that although non-state actors are among the greatest violators of human rights,¹¹⁹ there are no treaty obligations under international human rights law to hold them accountable. 'The universal and regional human rights instruments are all formulated in terms of states' obligations.'¹²⁰ This is without prejudice to the fact that 'international humanitarian law applies to each party to a non-international armed conflict and that each party to the conflict must respect and ensure respect for international humanitarian law'.¹²¹ For its part, international criminal law imposes individual criminal liability upon those who commit international crimes.¹²² These crimes are those referred to in article 5 of the Rome Statute. They include genocide, crimes against humanity, war crimes and the crimes of aggression. These are crimes that are generally committed in the context of armed conflict. The overall effect of these limited treaty obligations that are not applicable to non-state actors is a weakening of the frameworks for addressing the challenges to education during armed conflict.

For one, Nigeria's efforts at holding Boko Haram accountable has been everything but impressive. A major limitation of the legal system in Nigeria is that 'criminal law is the responsibility of each state in the federation as it is not in the exclusive and concurrent legislative list'.¹²³ The implication of this is that 'every state in Nigeria has the power to regulate the administration of criminal justice in its jurisdiction'.¹²⁴ Therefore, it has been argued that this individualistic

119 A Clapham 'Human rights obligations of non-state actors in conflict situations' (2006) 88 *International Review of the Red Cross* 863; see also O Bangerter 'Talking to armed groups' (2011) *Forced Migration Review* 37.

120 Y Ronen 'Human rights obligations of territorial non-state actors' (2013) 46 *Cornell International Law Journal* 35.

121 A Cassese 'The status of rebels under the 1977 Geneva Protocol on Non-International Armed Conflict' (1981) 30 *International and Comparative Law Quarterly* 424, also see UNSC Resolution 1214 (1998), 8 December 1998, para12; T Pfanner 'Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims' (2009) 874 *International Review of the Red Cross* 279 281. See also K Hausler et al *Protecting education in insecurity and armed conflict: An international law handbook* (2012) 44. See also J Kleffner 'The applicability of international humanitarian law to organized armed groups' (2011) 93 *International Review of the Red Cross* 444.

122 R Vark 'Superior responsibility' http://www.ksk.edu.ee/wp-content/uploads/2012/12/KVUOA_Toimetised_15_7_Vark.pdf (accessed 27 June 2014).

123 B Olugbuo 'Acceptance of international criminal justice in Nigeria: Legal compliance, myth or reality?' *International Nuremberg Principles Academy* <https://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Nigeria.pdf> (accessed 30 April 2018).

124 As above.

approach has affected the effective national implementation of the Rome Statute and, consequently, the acceptance of international criminal justice.¹²⁵ This has undoubtedly impacted on Nigeria's ability to hold members of the Boko Haram sect accountable.

Nigeria is a party to the Rome Statute. The Prosecutor of the ICC has identified six possible cases of crimes against humanity and war crimes committed by Boko Haram in the northeast insurgency.¹²⁶ Accordingly, individual members of Boko Haram can be charged with war crimes or any of the crimes in the ICC Statute. While this does not hold the entire armed group accountable, it must be stressed that this form of accountability, however inadequate, could serve as a deterrent as this is one of the overall goals of international criminal law, in general, and the ICC, in particular.¹²⁷

It must also be understood that even the rules of international humanitarian law that are generally applicable to states and non-state actors have their implementation mechanisms still 'mainly geared towards states'.¹²⁸ While international humanitarian and human rights law are mainly state-based, the reality of armed conflict today is less and less state-centred. The overall outcome is that international law, as presently conceived, does little or nothing to prevent the occurrence of armed conflicts, in so far as it relates to the activities of armed groups. 'It deals with armed groups, not to regulate [or forestall] their activities, but to fight them, to calm the situations they create, or to manage the consequences of their disruptive existence.'¹²⁹ In this respect, it is argued that a more effective framework is one that strives to forestall the occurrence of armed conflict, thereby helping to avoid their disruptive impact on education. The present frameworks can best be described as medicine after death and, as such, they only attempt to offer solutions after the problems of emergencies and armed conflict have been created. The Nigerian government's efforts at combating the Boko Haram insurgency reflects the same approach.

Further, as established earlier, international human rights law has no mechanism for holding armed groups accountable, as its rules are state-based and are focused on states. The reality of modern warfare, however, is that more conflicts are caused and perpetrated by armed groups fighting against themselves or against the armed forces of a state or states. Boko Haram, for example, has been involved in military

125 As above.

126 Human Rights Watch 'They set the classrooms on fire' (2016) 81 https://www.hrw.org/sites/default/files/report_pdf/nigeria0416web.pdf (accessed 30 April 2018).

127 C Hillebrecht 'The deterrent effects of the International Criminal Court: Evidence from Libya' (2016) 42 *International Interactions* 616.

128 M Sassoli 'Taking armed groups seriously: Ways to improve their compliance with international humanitarian law' (2010) 1 *International Humanitarian Legal Studies* 5.

129 Z Dabone 'International law: armed groups in a state-centric system' (2011) 93 *International Review of the Red Cross* 882.

attacks against the armed forces of Nigeria, Cameroon, Chad and even Niger. Hence, the argument is that since armed conflicts affect human rights and their actions violate international human rights law, armed groups should be held accountable under that particular body of law. Their acts often are a direct violation of one or other right. In this instance their actions violate the rights to education. In so far as their actions violate international obligations under these collective bodies of law, in the same manner they should without exception be held accountable under all these bodies of law.

Lastly, as argued earlier, the nature of warfare has changed. It is not the same warfare that was envisaged in the 1960s and 1970s, when these rules of international law on armed conflict were formulated, that is still being waged in the twenty-first century. However, international law has not evolved in a corresponding fashion to appropriately address the challenges brought about by the new wars.¹³⁰ Most of the obligations under international humanitarian law were formulated with the understanding that war was primarily between two or more states. The reality today is different. This has accounted for the weakness of international law to hold faceless armed groups accountable for the violation of the right to education.

A pertinent question that has arisen relates to what impact a change in the framework will have on armed groups such as Boko Haram, that clearly have a disregard for international and domestic law in the first place. The proper response is that international law and all its branches, including international criminal law, continues to grow and expand. As such, a strengthening of the existing legal frameworks may not end all the complications attached to the violations of the child's rights to education during armed conflicts or other emergencies. It will, however, serve the purpose of bringing humanity closer to the goal of ending impunity and punishing crimes of atrocity.

130 In the last few decades, the term 'armed conflict' has replaced the concept of war. The present rules of international humanitarian law were formulated to address the challenges of war and, thus, its limitations in addressing the new war or armed conflict as it is properly called. The term obviously is broader than the concept of war, and it accommodated the fluidity and fragmentation that is a major characteristic of modern armed conflict. The deliberate targeting of civilians and places of education is an offshoot of these 'new wars'. One-sided violence, terrorism, asymmetric conflict and other noticeable characteristics are the hallmark of the new war. The players often are faceless and the hierarchical structure of the armed group often is unknown to outsiders. In fact, there often is a strong link between the armed groups and transnational criminal networks, often acting as mercenaries. The delineation are not as clear as the existing frameworks envisage. See generally IBCR 'Children and armed conflict: A guide to international humanitarian law' (2010) www.ibcr.org. See also Y Dinstein *War, aggression and self-defence* (2001); E Stepanova 'Trends in armed conflicts: One-sided violence against civilians' (2009) *Stockholm International Peace Research Institute Yearbook* 39.

5.2 Recommendations on accountability

The weakness of international law to effectively respond to the 'new war' readily accounts for different scholars' positions and recommendations on the issue. While arguing that non-state actors are among the greatest violators of human rights, Clapham suggests that they should also be held accountable under applicable rules of international law. He admits that 'the threats posed by non-state actors is of increasing concern',¹³¹ hence the need for accountability. He goes further by recommending approaches towards holding such non-state actors accountable as they are all 'expected to comply with principles of international human rights law'.¹³² In his opinion, there have been times when parties to a conflict entered into some sort of written agreement, not only to respect the rules of the conflict but also to outrightly uphold and respect human rights during the period of the conflict and thereafter. His argument is that such approaches can be recalled.¹³³ This helps to put the protection of the rights of all parties, including those of civilians, at the centre of the conflict. It also helps to extend the obligations of the armed groups beyond the period of the armed conflict, thus ensuring accountability even after the timeline of the conflict.

Sassoli advocates approaches that involve educating armed groups on the provisions of international law, allowing and encouraging them to commit to respect international humanitarian law and also assisting them to implement the law. He favours self-reporting and external reporting through the use of UN Charter and treaty-based human rights mechanisms as viable approaches towards accountability. In a more controversial submission, he entertains the idea of establishing a body of experts by states for the periodic review of compliance to international law by armed groups. However, he was quick to point out the danger of states politicising such a body, and this remains a fundamental flaw in the idea. Finally, he suggests the establishment of an audit body by armed groups themselves.¹³⁴

For his part Andreopolous recommends engagement practices and activities that include 'constructive dialogue, adoption of codes of conduct, shaming through media attention, sanctions, accountability mechanisms and UN Security Council-authorized enforcement measures'.¹³⁵

Specifically in relation to Boko Haram, Nigeria deserves to improve its response to the insurgency. Given the earlier identified lapse in its legal system, especially the need to domesticate all international treaties, there is a dire need for the country to accelerate its efforts in domesticating the Rome Statute. A draft of the Crimes Against

131 Clapham (n 119 above).

132 As above.

133 Clapham (n 119 above) 493.

134 Sassoli (n 128 above) 30-32.

135 Andreopolous (n 2 above) 142.

Humanity, War Crimes, Genocide and Related Offences Bill, 2012 has already been submitted to the National Assembly for translation into national law. Domesticating the Rome Statute will strengthen Nigeria's legal framework in order to properly respond to the insurgency in accordance with its obligations under various international treaties and agreements.

Again, the inability of the Nigerian government to impartially investigate and appropriately prosecute Boko Haram leaders has become inexcusable. Under its current flawed legal system, Nigeria can indeed still hold the members of the group accountable. The failure to achieve this needs to be addressed. While the President has promised to grant amnesty to any member of the sect who willingly surrenders and lays down his arms, it is recommended that this approach should not jeopardise the need for justice through the country's legal system.

6 Conclusion

The article has discussed the accountability debate that surrounds the activities of non-state actors and their impact on the realisation of the child's right to education. It has also examined the legal framework for the protection of the right to education during emergencies and armed conflicts. It thereafter focused on Boko Haram as an example of a non-state armed group. In this respect it considered the sect's history and its ideological beliefs and sought to show that their activities are a result of their ideologies. It thereafter delved into the accountability debate and suggested various approaches towards holding faceless armed groups accountable for rights violations, generally, and the violation of the child's right to education, in particular. It found that there is a need to strengthen the domestic and international frameworks for holding non-state actors accountable for rights violations, in general, and the violation of the right to education, in particular. This need has arisen because of the changing nature of warfare. As such, the need for a continuous adaptation of international frameworks that adequately respond to the changing nature of warfare cannot be overemphasised.

Payment obligations of taxpayers pending dispute resolution: Approaches of South Africa and Nigeria

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Summary

Taxpayers are obliged by law to pay taxes, yet both South Africa and Nigeria afford persons the right to have a dispute adjudicated by an impartial forum. This article examines the interplay in South Africa and Nigeria between a taxpayer's right to access the courts and his or her duty to pay an assessed tax, the purpose being to determine whether the manner in which these countries approach this issue is constitutionally sound. The article demonstrates that Nigeria's general approach ensures that a taxpayer's right of access to the courts remains intact. However, it is illustrated that the South African 'pay now, argue later' rule unreasonably and unjustifiably limits a taxpayer's right of access to the courts.

Key words: *tax payment obligation; right of access to courts; tax administration; taxpayers' rights; 'pay now, argue later' rule*

1 Introduction

The Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution)¹ and the Constitution of the Republic of South Africa, 1996 (South African Constitution)² provide that a person has the

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1 Secs 1(1) and 1(3) of the Nigerian Constitution confirm the supremacy of the Constitution and stipulate that all law and conduct must be in accordance with the Constitution.

2 Sec 2 of the South African Constitution provides that the South African Constitution is the supreme law of South Africa and that any law or conduct that is contrary to the Constitution will be invalid.

right to have his or her disputes adjudicated by an impartial forum. This right is provided for in section 36(1) of the Nigerian Constitution and in section 34 of the South African Constitution.

Furthermore, both Nigeria and South Africa have ratified the African Charter on Human and Peoples' Rights (African Charter),³ which aims 'to promote and protect human rights and basic freedoms on the African continent'.⁴ In terms of article 1 of the African Charter, this means that South Africa and Nigeria must 'adopt legislative and other measures' that will give effect to the rights and duties provided for in the African Charter. Consequently, in terms of the African Charter, South Africa and Nigeria must ensure that every individual's case be heard,⁵ that is, that an individual has the right to appeal to a competent forum when a fundamental right has been violated,⁶ and to be presumed innocent until proven guilty by a competent court.⁷ Therefore, South Africa and Nigeria have similar obligations in relation to providing access to the courts.

In turn, article 29(6) of the African Charter stipulates that individuals have a duty to pay taxes that are imposed by law as this obligation is in the interests of society.

Therefore, countries that have adopted the African Charter may be confronted with a possible conflict when a taxpayer disputes an assessed tax. Will the taxpayer be able to first have this dispute heard by an impartial forum to give effect to the rights provided for in the African Charter, or will she or he have to comply with the duty to pay the assessed tax, which is also provided for in the African Charter?

This article addresses the interplay in South Africa and Nigeria between the right of access to the courts and a taxpayer's duty to pay an assessed tax in order to determine whether the manner in which these countries approach this issue is constitutionally sound. This interplay is addressed from a legal pragmatic perspective.

A comparison between South Africa and Nigeria is beneficial for two reasons. First, although both countries interpret the right to adjudication by an impartial forum in the same manner and their revenue agencies are obliged to collect taxes, they have divergent approaches as to how to deal with the interplay that arises when a taxpayer disputes his or her tax obligation. Therefore, in considering the constitutionality of both these approaches, one inevitably needs to consider whether there are any lessons the one country can learn from the other's approach. Second, there currently is a dearth of scholarly

3 African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights (2016) <http://bit.ly/1IObnUQ> (accessed 20 May 2016).

4 African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples' Rights' <http://bit.ly/QlZRuG> (accessed 20 May 2016).

5 Art 7 African Charter.

6 Art 7(1)(a) African Charter.

7 Art 7(1)(b) African Charter.

work and case law in respect of the Nigerian approach, which may be because the Nigerian approach is not considered to affect taxpayers' rights. Nonetheless, Nigeria's reliance on crude oil as a means of revenue⁸ is declining,⁹ and the country has started to rely on other sources of revenue.⁹ As such, a need for prompt and effective tax collection may result in the current approach requiring a complete overhaul. Comparing the Nigerian approach to that of South Africa thus can assist in indicating whether adopting South Africa's approach would be workable for Nigeria in case of an overhaul. Consequently, it is envisaged that this comparison stimulates debate regarding the way in which Nigeria should in future deal with disputed taxes pending dispute resolution.

The article first considers the right of access to the courts in relation to tax disputes in both South Africa and Nigeria. Thereafter, the South African and Nigerian approaches to such disputes are discussed in order to ascertain whether these approaches pass constitutional muster.

2 Right of access to the courts

2.1 South Africa

Section 34 of the South African Constitution provides:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In *Bernstein v Bester (Bernstein)*,¹⁰ the Court indicated that the purpose of the right to access the courts is to separate 'the judiciary from the other arms of the state'.¹¹ As a result of this separation, the legislature is prevented from becoming the judge, and the rule of law is upheld.¹² Similarly, in *Chief Lesapo v North West Agricultural Bank (Chief Lesapo (CC))*,¹³ the Court acknowledged the link between

8 JU Madugba et al 'Evaluation of the contribution of oil revenue on economic development in Nigeria' (2016) 8 *International Journal of Economics and Finance* 210. According to these authors, almost 80% of Nigeria's government revenue comprises income earned from the sale of crude oil.

9 E Uzor 'Enhancing tax collection efficiency and compliance in Nigeria: The role of behavioural economics' 20 March 2017 <http://bit.ly/2uAqEZ0> (accessed 31 March 2018).

10 1996 (2) SA 751 (CC).

11 *Bernstein* (n 10 above) para 105.

12 As above. Even though *Bernstein* dealt with the right of access to the courts in terms of sec 22 of the interim Constitution 200 of 1993, this case remains relevant, as the wording contained in sec 22 of the interim Constitution was similar to the wording contained in sec 34 of the South African Constitution.

13 1999 (12) BCLR 1420 (CC) 1429.

section 34 of the South African Constitution and the rule of law.¹⁴ The Court held that the right to access the courts prevents a person from taking the law into his or her own hands, which is inimical to a legal system founded on the rule of law.¹⁵

In *Chief Lesapo v North West Agricultural Bank (Chief Lesapo (HC))*,¹⁶ the High Court highlighted another aspect of the right to access the courts. The Court indicated that section 34 of the South African Constitution embodied the *nemo iudex idoneus in propria causa est* rule,¹⁷ which means that 'no one may be a judge in his or her own case'.¹⁸ Thus, one of the aims of section 34 of the South African Constitution is to prevent a person from being a judge in a matter to which he or she is a party. However, it must be borne in mind that the right to access the courts in South Africa is not absolute and may be limited if the limitation is reasonable and justifiable.¹⁹

In South Africa a dispute resolution procedure, which is one way of giving effect to the right to access the courts, is available to a taxpayer who is not satisfied with his or her tax liability. If a taxpayer disputes an income tax or a Value-Added Tax (VAT) liability, section 104 of the Tax Administration Act (TAA)²⁰ provides that the taxpayer may object to the assessment. If the South African Revenue Service (SARS) disallows the objection, the taxpayer may lodge an appeal with the Tax Court²¹ or, if the amount in dispute is less than R1 million and both the taxpayer and a senior SARS official agree thereto, the matter may be heard by the Tax Board.²² If a taxpayer still is dissatisfied after

14 The rule of law entails that conduct must be in line with 'pre-announced, clear and general rules'. See in this regard AV Dicey *Introduction to the study of the law of the constitution* (1959) 193; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) 1482; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (5) BCLR 837 (CC) 842; *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC) paras 19-20; *Affordable Medicines Trust v Minister of Health of the RSA* 2005 (6) BCLR 529 (CC) para 108; B Bekink *Principles of South African constitutional law* (2012) 62.

15 *Chief Lesapo* (n 13 above) para 11.

16 [1999] JOL 5319 (B).

17 *Chief Lesapo* (n 13 above) para 13.

18 Y Burns & M Beukes *Administrative law under the 1996 Constitution* (2003) 197.

19 Sec 36(1) of the South African Constitution indicates that in establishing whether a limitation is reasonable and justifiable, the following factors must be considered: '(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

20 Act 28 of 2011.

21 Sec 116 TAA.

22 Sec 109(1) TAA. Sec 109(1) of the TAA provides that an appeal may be heard by the Tax Board if the amount of tax in dispute does not exceed the amount determined by the Minister of Finance. In terms of GN 1196 in *Government Gazette* 39490 (17 December 2015), from 1 January 2016 the amount is R1 million. For a discussion relating to the dispute-resolution procedures pertaining to customs duty, see SARS 'Customs external guide overview of customs procedures' 28 March 2013; T Colesky & R Franzsen 'The adjudication of customs tariff classification disputes in South Africa: Lessons from Australia and Canada' (2015) 48 *Comparative and International Law Journal of Southern Africa* 259-264.

these forums have heard the appeal, the taxpayer may lodge an appeal with the High Court of South Africa.²³ Further recourse may be sought from the Supreme Court of Appeal²⁴ and the Constitutional Court.²⁵

2.2 Nigeria

Section 36(1) of the Nigerian Constitution provides that 'a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality'.

This right encapsulates two rules of natural justice, namely, *audi alteram partem*, meaning to 'hear the other side',²⁶ and the *nemo iudex* rule.²⁷ However, section 36(2) of the Nigerian Constitution qualifies this right by providing that a law will not be invalid merely because the government is empowered to make administrative decisions that affect the rights and obligations of a person. Such a law would still be valid if the person who is to be affected by the decision has the opportunity to make representations before the decision is made²⁸ and if the decision is not regarded as being final and conclusive.²⁹

The Nigerian Constitution also provides avenues for dispute resolution by impartial forums.³⁰ The forums relevant to federal tax

See C Fritz 'An appraisal of selected tax enforcement powers of the South African Revenue Service in the South African constitutional context' unpublished LLD thesis, University of Pretoria, 2017 179-187, where South Africa's approach to the payment obligation pending dispute resolution in relation to customs duty is discussed.

- 23 In terms of sec 169(1) of the South African Constitution, the High Courts of South Africa may hear any constitutional matter if it is not heard by the Constitutional Court directly or falls within the jurisdiction of a court that has a status similar to a High Court.
- 24 In terms of sec 168(3)(a) of the South African Constitution, the Supreme Court of Appeal may decide appeals emanating from the High Court of South Africa or a court with a similar status, except labour or competition law matters.
- 25 Sec 167(3) of the South African Constitution stipulates that the South African Constitutional Court is the highest court in South Africa.
- 26 Y Burns *Administrative law* (2013) 352.
- 27 *Awazurike v Attorney-General of the Federation* [2009] ALL FWLR (Pt. 489) 549 553; *Olufeagba v Abdur-Raheem* [2010] ALL FWLR (Pt. 512) 1033 1042.
- 28 Sec 36(2)(a) Nigerian Constitution.
- 29 Sec 36(2)(b) Nigerian Constitution.
- 30 Sec 69(1) of the Companies Income Tax Act Cap C21 LFN, 2004 and sec 66 of the Personal Income Tax Act 104 of 1993 provide for a taxpayer to first lodge an objection against an assessment before commencing with appeal proceedings. However, in terms of secs 2, 25 and 68 of the Federal Inland Revenue Service (Establishment) Act 2007 (FIRSEA), the tax-resolution proceedings should be conducted in accordance with the provisions of the FIRSEA. The FIRSEA does not provide for an aggrieved taxpayer to lodge an objection with the FIRS. A Elebiju 'Tax litigation: Paradigm shift on notice of refusal to amend assessment (NORA)' *This Day Lawyer* 6 September 2011 6 submits that procedures (in this instance the objection procedure) that existed prior to the enactment of the FIRSEA should still be available, on condition that this is not inconsistent with the FIRSEA.

disputes are the Supreme Court of Nigeria;³¹ the Court of Appeal;³² the Federal High Court;³³ and the Tax Appeal Tribunal (TAT).³⁴

3 Approaches to a payment obligation pending dispute resolution

3.1 South Africa

3.1.1 Relevant provisions

Section 164(1) of the TAA provides as follows:

Unless a senior SARS official otherwise directs in terms of sub-section (3) –

- (a) the obligation to pay tax; and
- (b) the right of SARS to receive and recover tax will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

Section 164(1) stipulates that a taxpayer needs to ‘pay now, argue later’. If the ‘pay now, argue later’ rule did not exist, there would be an incentive for a taxpayer to dispute a tax obligation. This could lead to frivolous objections that may cause SARS and the South African government to experience dire financial constraints.³⁵ In *Capstone*

31 This Court is established in terms of sec 230(1) of the Nigerian Constitution. Sec 233 of the Nigerian Constitution provides that the Supreme Court of Nigeria has jurisdiction to hear matters pertaining to the federation and states, or between states, and matters that are specifically provided for in terms of legislation (which matters fall within the original jurisdiction of this Court). J Sokefun & NC Njoku ‘The court system in Nigeria: Jurisdiction and appeals’ (2016) 2 *International Journal of Business and Applied Social Science* 5 state that the Supreme Court of Nigeria, the highest court, is the court of last resort in Nigeria.

32 This Court is established in terms of sec 237(1) of the Nigerian Constitution. In terms of secs 239(1) and 240 of the Nigerian Constitution, the Court of Appeal has jurisdiction to hear matters relating to the validity of presidential elections and to determine appeals from courts below it.

33 The Federal High Court is established in terms of sec 249(1) of the Nigerian Constitution. In terms of sec 251(1) of the Nigerian Constitution, this Court has jurisdiction over matters relating to, amongst others, national revenue and the taxation of companies.

34 The TAT is established in terms of sec 59(1), read with para 13(1) of the Fifth Schedule to the FIRSEA. In terms of the First Schedule to the FIRSEA, the TAT has jurisdiction to consider disputes pertaining to company income tax, personal income tax, petroleum income tax, capital gains tax and VAT. See AJA Achor ‘Tax dispute resolution in Nigeria: A storm in a teacup’ (2014) 29 *Journal of Law, Policy and Globalisation* 150 for a discussion regarding the overlapping jurisdiction of the TAT and the Federal High Court. See A Aniyie ‘Taxpayers’ rights in Nigeria’ unpublished MPhil dissertation, University of Pretoria, 2015 55-56 for a brief discussion of the setup and structure of the TAT.

35 *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2000 (2) SA 232 (W) 243 (*Metcash Trading*).

556 (Pty) Ltd v Commissioner for SARS (Capstone),³⁶ the Court encapsulated the rationale of this rule as follows:

The considerations underpinning the 'pay now, argue later' concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes.

It should be noted that the 'pay now, argue later' rule in itself does not have a significant bearing on taxpayers' rights as they simply may decide not to pay the disputed tax until the dispute has been resolved. Rather, it is the effect of this rule that has a substantial impact. First, the fact that the payment obligation is not suspended means that interest, currently at 10,5 per cent per annum,³⁷ will accrue on the outstanding tax from the date the tax was payable,³⁸ either until the dispute is resolved in favour of the taxpayer or the taxpayer pays the assessed tax.³⁹

Second, SARS may enforce the collection of taxes. Thus, if the taxpayer elects not to pay the tax which is subject to dispute resolution, the so-called 'statement procedure' may be implemented.⁴⁰ In terms of this procedure SARS may file a statement, indicating the outstanding tax as well as any interest and/or penalty payable, with the clerk or registrar of a competent court. The filing of the statement has the effect of a civil judgment, which enables SARS to obtain a writ to attach and sell the property of the taxpayer.⁴¹ An alternative enforcement action at the disposal of SARS is to appoint a third party on behalf of the taxpayer. The third party will then be required to make payment of the taxes from money held by the third party on behalf of the taxpayer or due to the taxpayer.⁴²

However, a taxpayer may request a suspension of a payment obligation if he or she intends to lodge an objection to or an appeal against an assessment.⁴³ In terms of section 164(3) of the TAA, the senior SARS official must then consider the following factors when exercising this discretion to suspend or not to suspend:

- (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;

36 [2011] ZAWCHC 297 para 9.

37 SARS 'Table 1 interest rates in respect of the various Acts administered by SARS' June 2016 <http://bit.ly/1RLuT58> (accessed 30 March 2017).

38 B Croome & L Olivier *Tax administration* (2015) 371.

39 The accrual of interest will be subject to the *in duplum* rule. As stated in *Union Government v Jordaan's Executors* 1916 TPD 411 413, this rule prohibits interest from accruing 'after the amount is equivalent to the amount of the capital'. Consequently, the interest on the outstanding tax will accrue only until it is equal to the amount of tax disputed.

40 See in this regard sec 172 of the TAA.

41 *Capstone* (n 36 above) para 37.

42 This power is provided for in sec 179 of the TAA.

43 Sec 164(2) TAA.

- (b) the compliance history of the taxpayer with SARS;
- (c) whether fraud is *prima facie* involved in the origin of the dispute;
- (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or
- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.

Some factors contained in section 164(3) of the TAA require further scrutiny. In relation to the first factor the TAA does not specifically indicate when recovery of tax will be in jeopardy. Nonetheless, the Short Guide to the Tax Administration Act, 2011 provides some guidance in this regard. According to the Guide, the recovery of tax will be in jeopardy when there is some risk that the tax may be lost if collection thereof is delayed.⁴⁴

The inclusion of the words *prima facie* in relation to the factor dealing with fraud is of some concern. A taxpayer will not yet have had the opportunity to defend herself or himself against the allegation of fraud.⁴⁵ Furthermore, an adverse finding by SARS based on whether fraud was *prima facie* involved conflicts with section 35(3)(h) of the South African Constitution, which provides that an accused person has the right to be presumed innocent until proven guilty.⁴⁶

The factor relating to irreparable hardship, in essence, appears to be subjective in nature. Also, this factor does not simply consider the taxpayer's hardship, but rather weighs it up against the interests of SARS and the fiscus.⁴⁷ It is impossible to understand how SARS can act in an objective manner when weighing the taxpayer's hardship against its own interests. This proposal is also in conflict with the *nemo*

44 SARS 'Short guide to the Tax Administration Act, 2011 (28 of 2011)' 5 June 2013 36. This guide deals with jeopardy in terms of jeopardy assessments as envisaged in sec 94 of the TAA. In terms of this section SARS may make a jeopardy assessment before a return is due if the commissioner is satisfied that it is necessary to secure the collection of tax which would otherwise be in jeopardy. An example of when a jeopardy assessment would be appropriate is when a taxpayer is on the brink of leaving South Africa without paying her or his outstanding taxes. See also T Solomon "'Pay now argue later'" – Recent amendments to section 164 of the Tax Administration Act no 28 of 2011' 22 April 2015 *Tax ENSight* <http://bit.ly/1OdGCes> (accessed 9 November 2016).

45 L Rood 'Pay now, argue later' *Finweek* 13 August 2009 44. Although Rood's concern relates to the repealed sec 88 of the Income Tax Act 58 of 1962 and sec 36 of the Value-Added Tax Act 89 of 1991 (VAT Act), it is submitted that this concern also relates to the current similar provision of the TAA.

46 It is submitted that other instances where an adverse finding is made based on an allegation of a crime being committed, the matter must be considered by an impartial party. Eg, when a judge or magistrate considers a bail application, sec 60(5) of the Criminal Procedure Act 59 of 1977 allows an impartial presiding officer to consider the crime that has allegedly been committed.

47 H Louw 'Changes to the criteria considered by SARS when suspending payment of tax' 30 January 2015 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2015/tax/30-january-changes-to-criteria-considered-by-sars-when-suspending-payment-of-tax.html> (accessed 30 June 2018).

iudex rule. Therefore, the fact that SARS has to exercise its discretion in taking its own interests into consideration infringes on a taxpayer's right of access to the courts.

Further, as regards this factor, Williams questions whether financial hardship⁴⁸ can ever be considered to be irreparable, as it could be remedied by an award of damages.⁴⁹ However, an award of damages may not remedy the situation where a taxpayer is rendered insolvent or liquidated and a court only thereafter finds in favour of the taxpayer.⁵⁰

Also, Du Plessis and Dachs point to a 'catch-22'⁵¹ situation relating to whether irreparable financial hardship is present. If the taxpayer argues that the payment of tax would not result in irreparable financial hardship, SARS in all likelihood would not suspend the payment of tax. Conversely, if the taxpayer argues that the payment of tax pending an objection or appeal would lead to irreparable financial hardship, SARS might be concerned that the taxpayer would not be able to pay the tax at a later stage and, accordingly, decide not to suspend the payment of the assessed tax.⁵²

With regard to the last factor listed in section 164(3) of the TAA, namely, the taxpayer's ability to furnish security, the question might arise as to when it would be more beneficial to accept security over the payment of assessed taxes. If SARS rejects the request to suspend the payment obligation, this does not automatically mean that it would receive the outstanding disputed tax as it might need to use its enforcement powers to obtain such tax. Consequently, SARS needs to weigh up the certainty of furnished security against the probability that it might need to enforce collection of the outstanding tax.

Furthermore, section 164(6) provides:

During the period commencing on the day that –

- (a) SARS receives a request for suspension under subsection (2); or

48 Before 20 January 2015, this factor was concerned with 'financial hardship'. However, sec 5 of the Tax Administration Laws Amendment Act 44 of 2014 amended this factor to refer only to 'hardship'. Solomon (n 44 above) understands this to mean that the legislature recognises that a taxpayer may suffer hardship in relation to the 'pay now, argue later' rule that is not financial in nature. However, it is difficult to offer an example that does not indirectly relate to a financial aspect. It may be that the legislature meant that the hardship does not need to be directly related to a person's finances.

49 RC Williams 'Unresolved aspects of the "pay now, argue later" rule' *Synopsis* January 2012 6.

50 C Keulder "'Pay now, argue later" rule – Before and after the Tax Administration Act' (2013) 16 *Potchefstroom Electronic Law Journal* 144.

51 *Collins dictionary* <http://bit.ly/1dpX2zH> (accessed 9 November 2016) defines the phrase 'catch-22' as 'a situation in which any move that a person can make will lead to trouble'.

52 B du Plessis & P Dachs 'Pay now argue later' 23 July 2014 *Tax ENSight* <http://bit.ly/1FB3OZW> (accessed 3 June 2015).

- (b) a suspension is revoked under subsection (5), and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.

The effect of this section is that there is an automatic suspension of a taxpayer's payment obligation if SARS fails to deliver its decision as to whether the obligation has been suspended or not. Nevertheless, SARS is allowed to continue with the collection procedures in the absence of delivering its decision if it has a reasonable belief that the taxpayer may alienate assets.

Section 164(6) of the TAA provides a taxpayer with a degree of certainty, as she or he is guaranteed that SARS will not continue with any collection steps during the time that the collection of tax is stayed, unless SARS believes that the taxpayer may alienate assets. As a result, SARS will do its utmost to reach a decision as soon as possible regarding the request for suspension of the obligation to pay taxes pending dispute resolution in order to ensure that it is able to continue collecting taxes swiftly. This situation provides an incentive for SARS to reach a quick decision or to provide reasons why it believes the taxpayer may alienate assets. However, this need for haste may result in senior SARS officials not taking into account all relevant considerations in determining whether payment pending an objection or an appeal may be suspended. If this indeed is the case, taxpayers would have to take the decision on review in order to have it re-evaluated⁵³ which, in turn, may have severe financial and time implications for the taxpayer.

Furthermore, in terms of section 256(3)(a) of the TAA, SARS may provide a tax clearance certificate only if the taxpayer does not have an outstanding tax debt, unless the tax debt is subject to an instalment payment agreement,⁵⁴ has been compromised⁵⁵ or has been suspended in terms of section 164 of the TAA. Thus, if SARS fails to deliver a decision in relation to the suspension request, a tax clearance certificate cannot be issued. It should be noted that this certificate is essential, as businesses frequently require it in tender processes or before a particular service can be rendered.⁵⁶

In the case of either a senior SARS official rejecting the request for suspension or the taxpayer not requesting such a suspension and proceeding to pay the outstanding tax pending dispute resolution, the amount in excess plus interest must be refunded to the taxpayer if the matter is later adjudicated in favour of the taxpayer.⁵⁷ The

53 In terms of sec 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000, this will constitute a ground for judicial review.

54 In terms of sec 167 of the TAA.

55 In terms of sec 204 of the TAA.

56 Aucamp Scholtz Lubbe Chartered Accountants 'Tax clearance certificates' 5 June 2013 <http://bit.ly/2vk5Znu> (accessed 14 July 2017).

57 Sec 164(7) of the TAA.

interest, calculated at 9,75 per cent per year,⁵⁸ accrues from the date on which the payment was received until the refund is made.⁵⁹ This amount appears to compare negatively with the interest rate applicable to other debts, which is currently 10,5 per cent per year.⁶⁰ However, interest in relation to other debts is calculated from the date a demand for payment is made or a summons issued, whichever occurs first.⁶¹ Consequently, interest in relation to a repayment by SARS could accrue before interest in relation to other debt would start to accrue. Nonetheless, in some instances the payment of interest to a taxpayer may not be enough to prevent the taxpayer from experiencing financial ruin.⁶²

3.1.2 Constitutional considerations relating to the South African approach

The case of *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance (Metcash Trading (HC))*⁶³ challenged the constitutionality of the 'pay now, argue later' rule contained in section 36 of the VAT Act on the grounds that it violated the taxpayer's right of access to the courts.⁶⁴ Although this provision (section 36) has been repealed and replaced by section 164 of the TAA, it remains essential to consider this case, as the provisions contained in the erstwhile section resemble the current provisions.⁶⁵ As such, *Metcash Trading (HC)* and its subsequent appeal to the

58 SARS (n 37 above).

59 Sec 164(7) TAA. Sec 164(7) provides that this interest is calculated in terms of sec 187(1) of the TAA. Sec 187(1), in turn, refers to secs 188 and 189 of the TAA to calculate the interest. However, the relevant subsection has not yet come into operation and is awaiting proclamation by the President (GN 51 in *Government Gazette* 35687 14 September 2012). As the relevant provisions of the TAA relating to interest have not yet come into operation, the accrual of interest must be regulated in terms of the specific tax Act.

60 Sec 1 of the Prescribed Rate of Interest Act. GN 461 in *Government Gazette* 39743 22 April 2016 provides that the prescribed rate of interest from 1 May 2016 is 10,5% per annum.

61 Sec 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975.

62 South African Institute for Chartered Accountants 'Taxpayers may be at risk with new "pay now, argue later" rule' 15 February 2011 <http://bit.ly/1lk6BxF> (accessed 21 April 2016).

63 2000 (2) SA 232 (W). For a discussion of *Metcash Trading* (n 35 above), see L Olivier 'Tax collection and the Bill of Rights' (2001) 1 *Journal of South African Law* 194; J Silke 'Taxpayers and the Constitution: A battle already lost' (2002) 17 *Acta Juridica* 310; Croome & Olivier (n 38 above) 372; Keulder (n 50 above) 135-136.

64 *Metcash Trading* (n 35 above) 237. Initially, the taxpayer also considered this rule to violate his right to property as envisaged in sec 25(1) of the South African Constitution. However, he did not pursue the argument regarding the possible infringement of sec 25(1) of the Constitution further. See C Fritz (n 22 above) 160 where it is indicated why a constitutional attack based on the right to property would have been unsuccessful.

65 See Keulder (n 50 above) 148 where the differences regarding the provisions in the repealed VAT Act and the provisions in the TAA are indicated.

Constitutional Court (*Metcash Trading (CC)*)⁶⁶ provide valuable insight into the constitutionality of the 'pay now, argue later' rule.

In *Metcash Trading (HC)*, Snyders J held that the 'pay now, argue later' rule violated a taxpayer's right to access the courts, as SARS acts as a substitute for the court by determining every component of the vendor's liability and the enforcement thereof.⁶⁷ The Court also held that '[t]he prospect that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then'.⁶⁸ The Court rejected the commissioner's argument that the limitation placed on a taxpayer's right of access is reasonable and justifiable,⁶⁹ and held that the limitation on a person's right of access to the courts was extensive and, although it may only be temporary in nature, that the effect thereof can be permanent.⁷⁰ Accordingly, the limitation was held to be unreasonable and unjustifiable. The High Court referred the matter to the Constitutional Court to confirm its declaration of invalidity.⁷¹

In *Metcash Trading (CC)*, the Minister of Finance and the commissioner contended that the limitation imposed by the 'pay now, argue later' rule was not unreasonable and unjustifiable as a taxpayer has several opportunities for a 'hearing' with regard to the assessment.⁷² Metcash considered this to be insufficient as the taxpayer would still be required to pay before she or he could avail herself or himself of these opportunities.⁷³ Moreover, Metcash was of the view that there were less invasive means available to effect a speedy collection of taxes,⁷⁴ such as the furnishing of security and higher interest rates.⁷⁵

The Constitutional Court held that the 'pay now, argue later' rule had two objectives, namely, to ensure that the payment obligation pertaining to a disputed tax was not delayed while a taxpayer pursued remedies in this regard; and to provide that the required refunds would be made at a later stage.⁷⁶ The Court concluded that the 'pay

66 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2001 (1) SA 1109 (CC).

67 *Metcash Trading* (n 35 above) 242.

68 As above.

69 *Metcash Trading* (n 35 above) 243.

70 *Metcash Trading* 244.

71 *Metcash Trading* 246.

72 *Metcash Trading* (n 66 above) 1118. According to the Minister and the commissioner, these opportunities are objecting to the assessment; requesting an extension to pay, and, if this request is refused, taking the matter on review; as well as appealing to the Tax Court. See Keulder (n 50 above) 137-138 for a discussion of the Constitutional Court decision.

73 *Metcash Trading* (n 66 above) 1119.

74 As above.

75 *Metcash Trading* (n 35 above) 244.

76 *Metcash Trading* (n 66 above) 1130.

now, argue later' rule did not limit a taxpayer's right of access to the courts, and, consequently, the rule was held to be constitutional.⁷⁷

In considering the Constitutional Court's decision, it appears that not suspending a payment pending dispute resolution does not, in an unconstitutional manner, limit a taxpayer's right to access the courts. Nonetheless, commentary and criticism concerning this decision point to the contrary. The taxpayer contended in *Metcash Trading* that the court's jurisdiction was excluded when the 'pay now, argue later' rule was invoked, not that the court's jurisdiction was entirely disregarded.⁷⁸ Thus, it may be argued that the 'pay now, argue later' rule infringes on the right of access to the courts, as it promotes 'self-help' by SARS.⁷⁹ Accordingly, the question before the court should

not be whether the taxpayer will have access to the courts at some stage, but rather whether the taxpayer will have the opportunity to access the courts before being obliged to pay the assessed amount.⁸⁰

Furthermore, in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs (Dawood)*,⁸¹ the Court held that

the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example [because] it was not reasonable, [or] does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights.

Consequently, the legislature must ensure that provisions are constitutional despite the fact that a decision may be subject to review.⁸² Therefore, the mere fact that the decision of SARS not to suspend a payment obligation can be taken on review is not sufficient to ensure that the 'pay now, argue later' rule would pass constitutional muster.

Olivier also notes that the Court did not deal with the applicant's argument that there are less invasive ways to ensure the efficient collection of taxes.⁸³ This consideration is important in view of the fact that one of the factors the Court had to consider when determining whether a limitation is reasonable and justifiable in terms of section 36(1) of the South African Constitution is whether there are less invasive ways to achieve the objective of SARS.

There is also some debate as to whether the Court would have held the 'pay now, argue later' rule to be constitutionally sound if the matter before the Court had concerned income tax instead of VAT.

77 *Metcash Trading* (n 66 above) 1132.

78 Olivier (n 63 above) 196.

79 Keulder (n 50 above) 140.

80 As above.

81 2000 (8) BCLR 837 (CC) para 48. See also Olivier (n 63 above) 198 in this regard.

82 Keulder (n 50 above) 140.

83 Olivier (n 63 above) 199.

Croome is of the view that the Court would have come to the same conclusion.⁸⁴ Williams, on the other hand, states that the Court would not necessarily have held the rule to be constitutional had the matter concerned income tax.⁸⁵ Possible support for Williams's view is to be found in *Metcash Trading (CC)* where the Court explicitly distinguished between VAT and income tax.⁸⁶ The Court stated that a VAT liability arises continuously, whereas an income tax liability arises when an assessment is issued.⁸⁷ Moreover, a taxpayer who is a VAT vendor⁸⁸ collects money as an agent of SARS,⁸⁹ as the vendor may set off 'tax incurred on enterprise inputs (input tax) from the tax collected on supplies made by the enterprise (output tax)'.⁹⁰ Furthermore, the Court held that the calculation of VAT payments was less complicated than that of income tax.⁹¹ For that reason, the Court held that, in the case of income tax, room for dispute regarding the interpretation of the statute or accounting practices is far greater than in the case of VAT.

It is submitted that the distinction made by the Court in relation to income tax and VAT is flawed. First, the income tax liability, which is similar to that in respect of VAT, depends on an activity that triggers the levying of the specific tax. Hence, in both instances the liability arises as often as an activity occurs which triggers tax liability. Second, the Court's argument that the taxpayer acts as a collection agent is of no relevance. In *Director of Public Prosecutions, Western Cape v Parker (Parker)*,⁹² the Court recognised that a VAT vendor and SARS have a debtor-creditor relationship.⁹³ Consequently, the fact that a vendor holds money on behalf of SARS as an 'agent' does not change the nature of the relationship between the (vendor) taxpayer and SARS. Third, the Court's broad statement regarding room for dispute is

84 B Croome 'Paying up or arguing first' (2001) *Business Day Professional* 6; BJ Croome 'Taxpayers' rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the constitutional rights to property, privacy, administrative justice, access to information and access to courts' unpublished PhD thesis, University of Cape Town, 2008 173; B Croome *Taxpayers' rights in South Africa* (2010) 40.

85 Williams (n 49 above) 4.

86 *Metcash Trading* (n 66 above) 1121-1122. See also Croome & Olivier (n 38 above) 372.

87 *Metcash Trading* (n 66 above) 1121.

88 See sec 1, read with secs 23 and 50A of the VAT Act, in relation to when a person would be a vendor for VAT purposes.

89 *Metcash Trading* (n 66 above) 1122.

90 SARS 'VAT 404 Guide for vendors' 31 March 2015 2. See M Silver *Deloitte VAT handbook* (2017) 14 for a discussion of input and output tax.

91 *Metcash Trading* (n 66 above) 1125.

92 2015 (4) SA 28 (SCA).

93 *Parker* (n 92 above) para 9. The Court indicated that it is a relationship of debtor-creditor because, when a VAT vendor fails to pay over the tax that is due and payable, SARS may sue the vendor for payment. Also, this non-compliance would constitute a non-compliance offence as opposed to common law theft of which a person would be guilty if the relationship was one of trust.

incorrect. Calculating an income tax or VAT liability would depend on the complexity of specific transactions.

In *Capstone*, a case similar to that of *Metcash Trading (CC)*, the Court endeavoured to differentiate between the 'pay now, argue later' rule in relation to VAT and income tax. The Court remarked:⁹⁴

There are material differences distinguishing the position of self-regulating vendors under the value-added tax system and taxpayers under the entirely revenue authority-regulated income tax dispensation. Thus the considerations which persuaded the Constitutional Court to reject the attack on the aforementioned provisions of the VAT Act in *Metcash* might not apply altogether equally in any scrutiny of the constitutionality of the equivalent provisions in the IT Act. In this respect I have the effect of the 'pay first, argue later' provisions pending the determination of the Commissioner of an objection (as distinct from pending the determination by the Tax Court of an appeal) to an income tax assessment particularly in mind as an aspect that might well receive a different treatment if challenged, particularly in the context of the fundamental right to administrative justice.

From this *dictum*, it appears that *Metcash Trading (CC)* might have been considered differently had it related to income tax, as VAT is self-assessed and income tax is not. However, the Court did not elaborate on this aspect, as it did not have to be considered in the specific matter.⁹⁵ It is possible that the Court made this remark because, in the case of VAT, the taxpayer, to a certain extent, would have had an opportunity to state her or his case as she or he is responsible for assessing her or his own VAT liability. In contrast, with regard to income tax a taxpayer does not have the same opportunity as she or he has to pay tax as assessed by SARS. However, such an argument would be unsound. Generally, a taxpayer submit informations, be it by way of self-assessment of the VAT liability or a return⁹⁶ relating to income tax liability. This information then is used to determine the taxpayer's liability.⁹⁷ Accordingly, the taxpayer has the same opportunity to provide SARS with information, irrespective of whether it relates to income tax or VAT.

Consequently, the arguments espoused by the courts in *Metcash Trading (CC)* and *Capstone* do not hold water. However, it is submitted that the arguments of tax scholars pertaining to the fact that the Court erred in declaring the 'pay now, argue later' rule constitutional are valid.

94 *Capstone* (n 36 above) pars 9.

95 As above.

96 According to sec 1 of the TAA, a 'return' refers to information submitted to SARS which forms the basis of an assessment.

97 This does not apply to instances where SARS has furnished an additional assessment based on information obtained by, eg, conducting an audit.

3.2 Nigeria

3.2.1 Relevant provisions

In terms of an information circular issued by the Federal Inland Revenue Service (FIRS), an assessed tax that is subject to an appeal will become payable only within one month after the dispute has been finalised.⁹⁸ This means that a taxpayer's payment obligation is suspended pending dispute resolution.

However, in terms of paragraph 15(7) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act (FIRSEA), this approach does not apply in all circumstances. When an appeal is brought before the TAT, the Tax Appeal Commissioner may adjourn the appeal and order the taxpayer to satisfy a part of the assessed tax before the matter can proceed if FIRS can prove that

- (a) the appellant has for the year of assessment concerned, failed to prepare and deliver to the Service returns required to be furnished under the relevant provisions of the tax laws mentioned in paragraph 11;
- (b) the appeal is frivolous or vexatious or is an abuse of the appeal process; or
- (c) it is expedient to require the appellant to pay an amount as security for prosecuting the appeal.

It is submitted that the first ground on which the TAT may make an order for the partial payment of a disputed tax does not give rise to any concern as this can be established objectively. However, the same cannot be said of the other two grounds. First, when can it be said that an appeal has been brought frivolously or is an abuse of the appeal process? In order for the TAT to be satisfied that this is indeed the case, the tribunal would have to consider the merits of the dispute as a whole and not simply the version of FIRS. Second, when would it not be considered expedient for the taxpayer to rather pay the disputed tax as security?

When the Tax Appeal Commissioner decides to adjourn the matter and order the payment of a portion of the disputed tax, the taxpayer will have to pay the lesser of an amount equal to the assessed amount in respect of the previous year of assessment or half of the assessed amount that is currently subject to appeal plus 10 per cent of the amount.⁹⁹ If the taxpayer fails to pay the amount determined by the TAT, the assessment will be confirmed and the taxpayer may not continue with an appeal in relation to that assessment.¹⁰⁰

⁹⁸ FIRS 'Information circular: Collection procedure' 25 March 1993 para 1.4.

⁹⁹ Para 15(7) of the Fifth Schedule to the FIRSEA. Aniyie (n 34 above) fn 180 states that the deposit is paid in the same manner as an assessed tax, namely, by paying it into the FIRS account. The taxpayer then has to present proof of payment to the TAT.

¹⁰⁰ Para 15(7) of the Fifth Schedule to the FIRSEA.

3.2.2 Constitutional considerations relating to the Nigerian approach

The general approach in Nigeria results in a taxpayer's right of access to the courts remaining intact, as a taxpayer is required to fulfil her or his payment obligation only once the dispute has been resolved. As a result, there is no Nigerian case law or scholarly work dealing with the interplay between a taxpayer's right of access to the courts and such taxpayer's duty to pay an assessed tax.

However, this seemingly faultless protection of a taxpayer's right of access to the courts is deceptive if one considers paragraph 15(7) of the Fifth Schedule to the FIRSEA. Whilst ordering a taxpayer to pay a portion of the amount in question ensures that the FIRS is able to collect some of the taxes in an effective manner, it precludes a taxpayer with insufficient financial resources from exercising her or his right to appeal and to have a fair hearing. When the TAT exercises this power, it limits the right of access to the courts only to taxpayers with sufficient financial means. Consequently, it is submitted that this power is contrary to the section 36 constitutional right and cannot fall within the qualification contained in section 36(2) of the Nigerian Constitution, as it has a final and conclusive effect on a taxpayer's tax dispute.

4 Conclusions and recommendations

Nigeria and South Africa endeavour to achieve the same aim in relation to the right of access to the courts, namely, to ensure that a party to a matter does not adjudicate a dispute in relation to that matter. However, in considering the situation where a dispute arises regarding an assessed tax, these two countries have divergent approaches in relation to this aim.

The South African approach of 'pay now, argue later' results in the effective and efficient collection of taxes, whereas the Nigerian approach of suspending the payment obligation pending dispute resolution need not be as effective from a revenue collection point of view.

From a taxpayer's rights point of view, the Nigerian approach is more appropriate as a taxpayer's right of access to the courts generally remains completely intact. Nevertheless, it is submitted that the power assigned to the TAT to adjourn a matter until a portion of the assessed tax is paid is unconstitutional and should be done away with.

It is understandable that South Africa is not in a position to provide the same unhindered protection of the right of access to the courts when an assessment is disputed as it does not rely on a resource similar to Nigeria's crude oil. However, on the basis of the taxpayer's argument in *Metcash Trading (CC)* and Olivier's criticism, South Africa should consider whether there are not less invasive alternatives to

effect the speedy collection of taxes whilst ensuring that a taxpayer's right of access to the courts is not unreasonably and unjustifiably limited.

In addition to revealing that South Africa should consider less invasive alternatives, the arguments in *Metcash Trading (CC)* and Olivier's criticism reveal that when Nigeria reconsiders its approach, as it now needs to focus on the effective and efficient collection of taxes, it should steer clear of an approach similar to that of South Africa as this may lead to related constitutional problems.

Consequently, this article has revealed that both approaches are inadequate to ensure optimal tax collection and at the same time respect a taxpayer's right of access to the courts, and require reconsideration.

Does the Mauritian Constitution protect the right to privacy? An insight from *Madhewoo v The State of Mauritius*

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Summary

This article analyses the substantive content of the right to privacy in Mauritius pursuant to the Supreme Court's decision regarding proposed biometric identity cards. It provides for an overview of this critical decision from both a factual and legal point of view before assessing the way in which the Supreme Court has evaluated the limitation of rights to justify a restriction on the right to privacy in Mauritius. The article focuses on statements made by the judges from which inferences may be made on the content of the right to privacy and the degree of judicial activism shown in the case. The decision indicates that the Constitution of Mauritius only provides for a limited and incomplete right to privacy – of the home, body and property. This position is not in line with the international obligations of Mauritius under the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights, in terms of which the right to privacy should be interpreted more broadly. While the Supreme Court has carried out the exercise of the limitation of rights correctly, its approach in the interpretation of the right to privacy has been restrictive and not generous and purposive. The judicial restraint shown by the apex court is of concern for human rights law interpretation in Mauritius.

Key words: *Mauritius; right to privacy; Supreme Court; Constitution*

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1 Introduction

As the Republic of Mauritius prepares to celebrate the 50th anniversary of its Constitution in March 2018, it is inevitable that debates and discussions around the Constitution are frequent. The Constitution has accompanied Mauritius on its journey from an under-developed state to an emerging economy. The Constitution's restricted Bill of Rights and the potential for improvement to ensure a better future for the country attract the attention of many citizens and international observers. Indeed, the Mauritian Constitution has proved to be decisive in many spheres of the political, social, cultural and economic lives of Mauritians. For instance, the 'best loser' system embodied in one of its schedules has played a major role in ensuring the political representation of racial minorities in the National Assembly in Mauritius.¹ It has provided a constitutional guarantee for Mauritius to be a democratic state based on the rule of law, and the principle of separation of powers has been constitutionally entrenched.² At the same time, the Constitution has retained an unchanged Bill of Rights which provides only for civil and political rights.

The Bill of Rights again came under the spotlight with the introduction in 2013 of the new smart national identity card (ID card) which incorporates a citizen's fingerprints and biometric information related to his or her external characteristics. Questions were raised on numerous human rights, and in particular on the right to privacy, considered later in the article. There was a constant fear that an ID card which contains so much personal information would prove to be too intrusive and in violation of one's right to privacy. Mr Maharajah Madhewoo, a Mauritian citizen, challenged the constitutionality of the law allowing the introduction of the smart ID card. As a result, the Supreme Court of Mauritius had the opportunity to once again interpret the Constitution and to prove whether it is a living document or not.

The article aims to critically analyse the case of *Madhewoo v The State of Mauritius (Madhewoo case)*³ and its implications for the rights to privacy of Mauritians. It contributes towards a knowledge of the interpretation of the Bill of Rights in Mauritius and the overarching corpus of human rights in Mauritius. The introduction precedes the next section that provides for a general overview of the right to privacy in order to highlight its importance as has been done by

1 R Mahadew 'The best loser system in Mauritius: An essential electoral tool for representing political minorities' in E Durojaye et al (eds) *Constitutional building in Africa* (2015) 160.

2 *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 302-303; *The State v Khoyratty* [2006] UKPC 13.

3 *Madhewoo v The State of Mauritius & Another* 2015 SCJ 177 ionnews.mu/wp-content/uploads/2015/.../Biometric-ID-Card_Madhewoo-vs-State.pdf (accessed 15 June 2018).

global and regional human rights systems. This is followed by a summary of the facts and the legal reasoning of the aforementioned case. A few words are reserved for the decision of the Judicial Committee of the Privy Council to which the case of *Madhewoo* went on appeal from the Mauritian Supreme Court in 2016. In the end, the implications of the *Madhewoo* case are analysed, providing the platform for a conclusion and some recommendations.

2 Right to privacy as interpreted by the global human rights architecture

2.1 What is the right to privacy?

Privacy is regarded as a fundamental right which is essential for the autonomy and human dignity of individuals. It is a critical right since other human rights are founded on the right to privacy or its derivatives, such as the right to a private life or secrecy of the home.⁴ It acts as a guarantee against unwarranted interference in the lives of individuals by permitting the setting up of boundaries and creating barriers. It provides the foundation based for boundaries to be established to restrict who has access to one's place, things and body, as well as one's communications and information.⁵ The right to privacy also allows individuals to assert their rights, especially in the face of imbalances in power.⁶ It is an essential means by which individuals protect themselves and society in general from the arbitrary and unjustified use of power.

The right to respect privacy reflects the liberal concept of the individual as independent and self-governing, who has the freedom to enjoy and exercise all his or her rights without interfering with the rights of others. It implies that any state interference with a right that only concerns the individual – such as the right to choose a marriage partner or the number of children to have as a couple – amounts to a violation of privacy.⁷ The right to privacy entails the right to protect an individual's identity, intimacy, gender, name, honour, dignity, sexual orientation, feelings and appearance.⁸ It is a right that extends to the family, home and correspondence. 'Family' has been interpreted as relating to blood ties, economic ties, acquired by

4 Privacy International 'What is privacy?' <https://www.privacyinternational.org/node/54> (accessed 2 January 2017).

5 D Solove 'Conceptualising privacy' (2002) 90 *California Law Review* 1092.

6 K Hurwitz K 'Imbalances in power' (2003) <https://www.humanrightsfirst.org/wp-content/uploads/pdf/powers.pdf> (accessed 2 January 2017).

7 J Pull 'Questioning the fundamental right to marry' (2006) *Yale Law School Legal Scholarship Repository* 41 http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1026&context=student_papers (accessed 21 June 2018).

8 Icelandic Human Rights Centre 'The right to privacy and family life' <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-privacy-and-family-life> (accessed 2 January 2017).

adoption or marriage.⁹ Privacy of the home includes a place of business, and privacy of correspondence includes protection from secret surveillance and censorship of the correspondence of prisoners.¹⁰ However, the right to privacy is not an absolute right as it can be limited under specific conditions, provided that such intervention by the state is not unlawful or arbitrary.¹¹

2.2 International standards protecting the right to privacy

The right to privacy is enshrined in both the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (ICCPR) in the following terms, that '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation' and that '[e]veryone has the right to protection of the law against such interference or attacks'.¹² Similar wording has been used to provide for the same right by the Convention on Migrant Workers in article 14 to protect migrant workers from interference in their private lives and families. The Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) guarantee privacy to children and persons living with disabilities in articles 16 and 22 respectively.

The European Convention on Human Rights (European Convention) focuses specifically on possible limitations to the right to privacy. Article 8 provides that the authority may not interfere with this right except in accordance with the law and when it is necessary in the interests of a democratic society; in the interests of national security, public safety or economic well-being of the country; for the prevention of disorder or crime; for the protection of health and morals; or for the protection of the rights and freedoms of others.¹³ The American Convention on Human Rights provides for the right to privacy, honour and dignity in article 11 and prohibits arbitrary interference with these rights. In contrast, the African Charter on Human and Peoples' Rights (African Charter) does not explicitly establish the right to privacy. However, article 18 emphasises the state's duty to protect the family. In direct or indirect ways, the right to privacy is provided for in numerous international instruments as well as in various constitutions around the world.¹⁴

9 Icelandic Human Rights Centre (n 8 above).

10 See Liberty 'Article 8 Right to a private life and family life' <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-8-right-private-and-family-life> (accessed 2 January 2017).

11 K Himma 'Privacy versus security: Why privacy is not an absolute value or right' (2007) 44 *San Diego Law Review* 857.

12 Art 12 Universal Declaration; art 17 ICCPR.

13 R Pati 'Rights and their limits: The constitution for Europe in international and comparative perspective' (2005) 23 *Berkeley Journal of International Law* 268.

14 Art 14 United Nations Convention on Migrant Workers; art 10 African Children's Charter; art 16 CRC; art 4 African Union Principles on Freedom of Expression; art 5

The right to protection of personal data is an essential element of the right to privacy. The right to data protection normally can be inferred from the general and overarching right to privacy. However, because of its utmost importance in a technologically-advanced world, several international and regional instruments stipulate the specific right to protection of personal data. These include the Guidelines on the Protection of Privacy and Trans-Border Flows of Personal Data of the Organisation for Economic Co-operation and Development (OECD); the Council of Europe Convention 108 for the Protection of Individuals with Regard to Automatic Processing of Personal Data; the Asia-Pacific Economic Co-operation Privacy Framework 2004; and the Economic Community of West African States (ECOWAS) Supplementary Act on Data Protection of 2010.¹⁵

2.3 Interpretation of the right to privacy by judicial and quasi-judicial bodies

The United Nations (UN) Human Rights Committee, the body responsible for monitoring the implementation of the ICCPR, has been active in interpreting the right to privacy. In *Coeriel and Aurik v The Netherlands*¹⁶ it found that the right to privacy had been violated when individuals were prohibited from changing their names for religious reasons. In *Toonen v Australia*,¹⁷ a blanket prohibition on homosexuality was held to be in violation of the right to privacy. Furthermore, the state's action of dispossessing indigenous persons of their ancestral burial ground was held to be violating privacy in the case of *Hopu and Bessert v France*.¹⁸ With regard to control and censorship of correspondence, the Human Rights Committee adjudicated in the case of *Estrella v Uruguay*¹⁹ that excessive control over and actions of censoring the correspondence of prisoners may amount to a violation of the right to privacy. In contrast, in the case of *Van Hulst v The Netherlands*²⁰ the Committee held that where taped conversations between a complainant and the lawyer were admitted as evidence in criminal proceedings, this did not amount to a violation of the right to privacy.

American Declaration of the Rights and Duties of Man; art 21 Arab Charter on Human Rights; art 21 ASEAN Human Rights Declaration.

- 15 See P de Hert 'The right to protection of personal data: Incapable of autonomous standing in the basic EU constituting documents?' (2015) 31 *Utrecht Journal of International and European Law* 4.
- 16 Communication 453/1991 UNHR Committee UN Doc CCPR/C/52/D/453/1991 (1994) 9 December 1991.
- 17 Communication 14/1991 UNHR Committee UN Doc CCPR/C/50/D/488/1992 (1994) 4 April 1991.
- 18 *Francis Hopu and Tepoaitu Bessert v France* Communication 549/1993 UNHR Committee UN Doc CCPR/60/D/549 1 August 1997.
- 19 *Miguel Angel Estrella v Uruguay* Communication 74/1980 UNHR Committee UN Doc CCPR/C/OP/2 (1990) 29 March 1983.
- 20 *Antonius Cornelis van Hulst v The Netherlands* Communication 903/1999 UNHR Committee UN Doc CCPR/C/82/D/903/1999 (2004) 5 November 2004.

The decisions of the European Court of Human Rights (European Court) on the issue of privacy are diverse, which is testimony of the fact that the right to privacy is subject to interpretation and relatively wide-ranging and expansive in nature. For instance, in *Huvig v France*,²¹ the European Court held that the tapping of telephone conversations 'not in accordance with the law' created a violation of privacy. The search of journalists' homes and the seizure of their documents were held to be in contravention of privacy as decided in the case of *Ernst & Others v Belgium*.²² The right to privacy has also been used in the context of abortion in the case of *Tysiak v Poland*.²³ The European Court held that the state's refusal to perform a therapeutic abortion despite a serious risk of deterioration in the mother's eyesight amounted to a transgression of the right to privacy.

An overview of the judicial and quasi-judicial bodies of the world reveals that the right to privacy is crucial. This right is so important that in some cases, despite not being clearly or directly stipulated by the law – in international human rights treaties or domestic constitutions – courts have played an essential role in adjudicating that the right to privacy does exist in the formulation of other concepts, such as liberty or freedom or the right to life, by using the implied rights theory of interpretation. The Constitution of the United States of America is relevant here. The US Constitution does not expressly provide for the right to privacy. The question whether the US Constitution confers protection of privacy in ways not explicitly mentioned in the Bill of Rights has always been a controversial matter.²⁴ Robert Bork J decided that no general right to privacy existed in the case of *Dronenburg v Zech*.²⁵ However, in the case of *Lawrence v Texas*²⁶ the US Supreme Court reaffirmed the Constitution's protection of privacy, despite it not being explicitly provided for in the Constitution, in the following terms:²⁷

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life ... The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of

21 (1990) 12 EHRR 528.

22 (2003) 39 EHRR 35.

23 (2007) 45 EHRR 42.

24 See Exploring Constitutional Conflicts 'Does the Constitution protect the right to privacy?' <http://law2.umkc.edu/faculty/projects/ftirls/conlaw/rightofprivacy.html> (accessed 6 January 2017).

25 741 F.2d 1388 (DC Cir 17 August 1984).

26 539 US 558 (2003) (Texas).

27 See C Dailard 'What *Lawrence v Texas* says about the history and future of reproductive rights?' (2003) 31 *Fordham Urban Law Journal* 717.

the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'

It is evident that the US Supreme Court has not shied away from interpreting the right to privacy from broader concepts of the US Constitution such as liberty and dignity. It moved from a position where a blatant 'no right to privacy is provided' to rules of interpretation that can be used to protect the right to privacy. Such a stand is in contrast to the decision of the Supreme Court of Mauritius in the *Madhewoo* case, where the Court held that '[a]s opposed to those countries where the right to privacy or the respect for one's private life is constitutionally entrenched, in Mauritius the right to privacy is not provided for in the Constitution'.²⁸ The following section of the article focuses on the *Madhewoo* case's facts and the decision, analysing the implications of the aforementioned statement by the Supreme Court. What are the implications of the deliberation that the right to privacy is not provided for in the Constitution? An attempt is made to shed light on this important section.

3 Overview of the *Madhewoo* case

According to the National Identity Card Act 1985 (1985 Act), all Mauritian citizens are legally obliged to carry an identity card bearing their name, picture and signature. In 2013 the former government (which changed after the 2014 general elections) proposed the introduction of a new smart identity card, incorporating an individual's fingerprints and other biometric information related to their external traits and characteristics. An amendment of the 1985 Act was required for the materialisation of the project. The National Identity Card (Miscellaneous Provisions) Act 2013 (2013 Act) was enacted. The project met with significant opposition and criticism from various sections of Mauritian society.²⁹ Mr Maharajah Madhewoo, a Mauritian citizen, challenged the constitutionality of the 2013 Act as the legislative vehicle for the new smart ID project. He sought redress under section 17 of the Constitution of Mauritius (Constitution) allowing citizens to apply to the Supreme Court in cases of violations of the provisions of sections 3 to 16 of the Bill of Rights.

After the amendment, the 1985 Act stipulates in section 3 that the Registrar of Civil Status shall keep a register, electronic or otherwise, in which a citizen's particulars are recorded. Furthermore, section 3(2) enumerates these particulars as follows: sex, names and 'such

28 *Madhewoo* case (n 3 above) 15.

29 D Battu 'The fight against biometric ID card in Mauritius' <http://www.smart-webzine.com/en/la-lutte-contre-la-carte-didentite-biometrique-a-lile-maurice-6802> (accessed 6 January 2017); D Lallah 'The slippery national identity card' *Le Mauricien* 14 October 2015 <http://www.lemauricien.com/article/slippy-national-identity-card> (accessed 6 January 2017).

reasonable or necessary information as may be prescribed regarding the identity of the person'. The prescribed particulars in turn are provided for by the National Identity Card (Particulars in Register) Regulations 2013 (2013 Regulations) as being fingerprints and encoded minutiae of fingerprints. Section 4(2)(c) of the 1985 Act provides that every citizen within six months of attaining the age of 18 must apply for an identity card and must 'allow his fingerprints, and other biometric information about himself, to be taken and recorded'. In addition, the ID card containing biometric information of the individual must be produced by him upon request in (1) reasonable circumstances and for the purpose of ascertaining his identity; and (2) where the requestor is empowered by law to ascertain his identity.³⁰ The fact that the laws on the new smart ID card require that fingerprints and other biometric information should be compulsorily given while applying for an ID card and that this biometric information would then be stored in a register by the Registrar of Civil Status was challenged in the Supreme Court as contravening various human rights, as considered below.

3.1 Alleged breach of the right to life – Section 4 of the Constitution

Counsel for the plaintiff contended that the right to life subsumed the right to privacy. He based this on the famous Indian case – the Aadhaar Scheme – whereby the applicants were compelled to give iris and fingerprints as biometric information to be used in the Aadhaar cards. The Supreme Court of India adjudicated that extracting such biometric information from an applicant infringed their right to privacy which is part of their right to life, as provided for by section 21 of the Indian Constitution.³¹

The Supreme Court of Mauritius rejected this contention on the basis that the wording of the Mauritian Constitution differs from that of the Indian Constitution with respect to the right to life. In a rather restrictive approach, the Mauritian Supreme Court held that life was protected in section 4 in contradiction to death. The Court further added that the circumstances under which the right to life may be infringed would be in relation to a person's death as a result of force that is reasonably justified for certain purposes. Therefore, the Court interpreted the right to life in a very restrictive manner as being a right dealing with life and death in the literal sense. What is required to live that life – dignity, liberty and privacy – has not been deemed to feature in section 4. The Court, therefore, held that 'the law for the implementation of the new biometric card and for the collection and

³⁰ Sec 7 of the 1985 Act.

³¹ See *Binoy Visman v Union of India* No 247 of 2017 <https://indiankanoon.org/doc/51782092/> (accessed 21 June 2018).

storage of personal biometric data does not constitute a breach of the right to life protected by section 4 of the Constitution'.³²

3.2 Alleged breach of the right to liberty – Section 5 of the Constitution

The plaintiff further averred that the right to liberty, protected by section 5 of the Constitution, was infringed in the following terms:

The unilateral decision of Defendants of imposing a legal obligation upon him to submit his fingerprints and this, without his consent and further the collection, processing and/or retention of plaintiff's personal biometric information including his fingerprints constitutes a serious interference by Defendants and/or their agents and/or their employees with plaintiff's basic fundamental constitutional rights amongst the right to liberty and the right to protection of private life.

The plaintiff added that 'the blanket power of collection and the indefinite storage of personal biometric data, including fingerprints, on the biometric identity card of citizens, including plaintiff, are in breach of section 5 of the Constitution'.³³

The Supreme Court examined section 5 of the Constitution and concluded that it only provided for the protection of physical liberty. Apparently, therefore, 'non-physical' liberty was not guaranteed by the supreme law of the land, if one follows the reasoning of the Court. The Court came to this conclusion by referring to the series of circumstances listed in sections 5(a) to (k), according to which the deprivation of liberty is legally allowed. According to the Court, since the exceptions to the right to liberty – for instance, imprisonment after having been found guilty of a criminal offence – are physical in nature, implying that the 'protection which is afforded under section 5 is essentially in respect of the deprivation of the physical liberty of that person'.³⁴ In other words, the exceptions define the nature of the principle right – a rather disturbing proposition.

The Court held that only persons authorised by section 7 of the 1985 Act could ask any individual to produce his ID card. Such a request, according to the Court, did not amount to a deprivation of the physical liberty of the person. The Court added:³⁵

The legal obligation created under section 4(2)(c) of the National Identity Card Act for a person to allow his fingerprints to be taken, and the provision under the Data Protection Act for the collection, retention and storage of personal data cannot be said to amount to an actual physical deprivation of personal liberty in breach of section 5 of the Constitution.

32 *Madheewoo* case (n 3 above) 7.

33 *Madheewoo* 8.

34 *Madheewoo* 9.

35 As above.

3.3 Alleged breaches of constitutional provisions related to privacy

The right to privacy was the main human right on the basis of which the constitutionality of the new smart ID card project was being challenged. The plaintiff averred that sections 3 and 9 of the Constitution had been infringed by the extraction of minutiae from the fingerprints of citizens. The Court explained that by analysing the precise words of section 3, it was clear that the protection did not extend to the physical privacy of the person. It added that section 3 did not contain words or terms which confer a right to privacy of the person and which may encompass any protection against taking the fingerprints of a person.³⁶ According to the Court, section 3 only appeared to confer protection on the privacy of a person's home and property. The Court relied on the Privy Council decision of *Matadeen v Pointu*,³⁷ where it was upheld that section 3 or the subsequent sections of the Constitution could not be interpreted as creating rights which they do not contain.³⁸ The Court concluded that section 3, interpreted in light of its natural and ordinary meaning, did not confer any right of privacy to the person and, in the present case, would not afford constitutional protection against the taking of fingerprints as provided for under the 1985 Act.

The Court also addressed the argument put forward by the defendant as a response to the plaintiff's comparison of sections 3 and 9 of the Constitution with article 8 of the European Convention. The Court was of the view that these two legal provisions were not comparable as article 8 of the European Convention explicitly provides for the right to private life. It considered the various cases from the European Court of Human Rights on article 8 cited by the plaintiff to support his case, and held that they did not find application in view of the difference in the wording of that article when compared to section 9 of the Mauritian Constitution.

Addressing the issue of an infringement of sections 3 and 9 by the new smart ID card, the Court reiterated that constitutions were formulated in different terms and should each be read within its own particular context and framework.³⁹ This statement came as a caution to the approach of comparing seemingly similar provisions in the Mauritian Constitution to that of the American and Indian Constitutions. It concluded that the provisions on privacy-related rights in the Mauritian Constitution did not bear a close resemblance to either the provisions of other cited constitutions or the European

36 *Madhewoo* (n 3 above) 17.

37 1998 MR.

38 *Matadeen v Pointu* (n 37 above) 172. 'Their Lordships would not wish in any way to detract from this statement of principle but it cannot mean that either section 3 or the later sections can be construed as creating rights which they do not contain.'

39 *Union of Campement Sites Owners & Others v The Government of Mauritius* 1984 MR 100.

Convention. The Court pronounced that only article 22 of the Civil Code provided for a right to the protection of private life, and this did not have the status of a constitutional right. Therefore, at this point of the judgment it was made very clear by the judges that there was no constitutional right to privacy in Mauritius.

The Court subsequently focused specifically on section 9 of the Constitution, which states that '[e]xcept with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises'. The judges stated:⁴⁰

Every adult citizen of Mauritius is bound to apply for a national identity card and is mandatorily required, under section 4(2) of the Act, 'to allow his fingerprints, and other biometric information about himself to be taken and recorded'.

In other words, a citizen is under the obligation to allow his fingerprints to be taken and stored, and the non-observance of this provision would amount to a criminal sanction provided for in section 9 of the 1985 Act, thus highlighting the coercive nature of the obligation.

The Court ultimately raised the essential question of whether

in view of the highly personal and private nature of fingerprints which contain sensitive personal information about an individual, the coercive act of taking his fingerprints would tantamount to a breach of the protection of his Constitutional right to privacy within the ambit of Section 9(1) of the Constitution.⁴¹

Put differently, the question was whether the coercive act of taking someone's fingerprints against his will would amount to him being 'subjected to the search of his person' as provided for in section 9.

The Court stated in the decision that a written constitution should not be construed as an Act of Parliament, but rather as a covenant to which a generous and purposive interpretation must be given.⁴² The judges pronounced that article 9 no doubt conferred a 'purposive constitutional protection to the private physical integrity of the person against any form of search'.⁴³ The Court held:⁴⁴

The protection under section 9(1) would clearly be against any form of undue interference by way of a search of any part of the body of a person without his consent. The coercive taking of fingerprints from the fingers of a person and the extracting of its *minutiae* would thus clearly fall within the scope of the protection afforded to the integrity and privacy of the person under section 9(1) of the Constitution.

40 *Madhewoo* case (n 3 above) 20.

41 *Madhewoo* 21.

42 *Olivier v Buttigieg* (1967) AC 115; *Ong Ah Chuan v Public Prosecutor* (1981) AC 648; *Attorney-General of The Gambia v Momodou Jobe* (1984) AC 689 700.

43 *Madhewoo* case (n 3 above) 21.

44 *Madhewoo* 22.

Therefore, it was held that the sections of the 1985 Act and related regulations enforcing the compulsory taking and recording of fingerprints amounted to an interference with the plaintiff's right against the search of his person.

4 Limitation of the right to privacy of the person

The Court subsequently considered the exercise of limitation of the right to protection from the search of his body against his will. The judges outrightly qualified the right provided for in section 9 as one that is not absolute and that a limitation to this right was permissible under section 9(2). Indeed, section 9(2) provides that limiting the right to privacy in the interests of public order and for the purposes of protecting rights and freedoms of others is legal and permissible. The Court first considered whether the taking and recording of fingerprints were done 'under the authority of the law'. It relied on authorities from the European Court to interpret the phrase 'under the authority of the law', which is sometimes also termed 'prescribed by the law'. It cited the case of *Förderkreis v Germany*⁴⁵ to explain what should be understood by 'prescribed by the law'. The Court reiterated its settled case law that the expression 'prescribed by law' required firstly that the impugned measure should have a basis in domestic law. It also referred to the quality of the 'law' in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct.⁴⁶

It was relevant at this point in the judgment for the judges to consider whether the taking and recording of fingerprints were justifiable in the interests of public order. Relying on expert evidence by the project director of the Mauritius National Identity Scheme, Mr Ramah, the Court highlighted the inherent flaws in the previous system with more than 700 cases of applications for the new smart ID card done more than once. Therefore, in the name of national security and the interests of public order, the Court held that, despite the taking and recording of fingerprints being an interference in the enjoyment of the right to privacy, it was something that was necessary in a democratic society. The limitation, therefore, was justifiable.⁴⁷

Turning to the issue of storage of personal biometric data including fingerprints, the judges applied the principle of 'reasonably justifiable

45 *Leela Förderkreis EV v Germany* (2009) 49 EHRR 5.

46 *Förderkreis* (n 45 above) para 113.

47 *Madhewoo* (n 3 above) 27.

in a democratic society', quoting the following passage from *S and Marper v The United Kingdom*:⁴⁸

An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.

The retention and storage of fingerprints were held to be meeting a pressing social need and, therefore, amounted to a permissible derogation. However, the Court was not satisfied with the provisions of the 1985 Act and the Data Protection Act related to the security of the retained and stored fingerprints and other biometric information of citizens. Based on expert evidence, the judges concluded that there was too high a risk of unwarranted access to such highly personal data, especially in this era of cybercrime, cyber attacks and hacking.

The Court was of the view that 'the potential for misuse or abuse of the exercise of the powers granted under the law would be significantly disproportionate to the legitimate aim which the defendants have claimed in order to justify the retention and storage of personal data under the Data Protection Act'.⁴⁹ The Court therefore held that the retention and storage of personal data under the Data Protection Act were not reasonably justifiable in a democratic society. The provisions in the 1985 Act and the Data Protection Act allowing for the retention and storage of fingerprints and other biometric information were held to be unconstitutional.

In summary, the Court allowed the taking of fingerprints for the purpose of the new smart ID project. It agreed with the plaintiff that this action amounted to interference with the right to privacy conferred by section 9. However, it adjudicated that such interference was permissible under the same section based on the interests of public order. As for the retention and storage of fingerprints after having been taken for the smart ID cards, this was held to be unconstitutional as it was not reasonably justifiable in a democratic society.

5 Insights from the judgment

5.1 No constitutional guarantee for a general right to privacy

The case has shed some much-needed light on the scope of the right to privacy in Mauritius. The Court has made it clear that this particular right encompasses only privacy of the home and property and protection from the bodily search of a person. Other essential components of the right to privacy, such as protection of the private life, family life and correspondence, arguably do not find any

48 [2008] ECHR 1581 para 101.

49 *Madhewoo* (n 3 above) 32.

constitutional guarantee under the Constitution unless, based on facts, a connection can be established with the home, property and body of a person.

It is argued that complete protection of the right to privacy can only be conferred on people when the supreme law of the land provides for the right to privacy and private life. As matters stand, the Mauritian Constitution only seems to provide for a limited right to privacy as interpreted by the Court in the present case. It is reiterated that the Civil Code does provide for the respect of private life, but not to the degree of providing a constitutional guarantee. The Civil Code can easily be amended by a simple majority vote by Parliament while provisions of the Bill of Rights are generally entrenched, thus conferring a higher degree of protection and guarantee to citizens.

5.2 Judicial activism of the Supreme Court

In this case, the Supreme Court has unquestionably given a logical decision. The right to privacy or its components is not absolute and is subject to the exercise of limitation of rights under correct conditions. Therefore, the taking of fingerprints for purposes of the ID card amounted to an interference with the privacy of a person, but one which is reasonably justified in a democratic society, whereas the retention and storage of those fingerprints were not. However, what was disturbing in the judgment was the pronouncement by the judges to the effect that there is no general right to privacy in the Bill of Rights. Such a pronouncement makes complete sense, as sections 3 and 9, indeed, literally provide for privacy in relation to the home, property and body of a person.

Nevertheless, the Court's decision that there is no general right to privacy conferred on Mauritian citizens does show a lack of judicial activism on the part of the Court. In any progressive democracy, the role of the judiciary in giving a new dimension to human rights through judicial activism is essential and cannot be ignored.⁵⁰ *Black's law dictionary* defines judicial activism as a judicial philosophy which motivates judges to depart from their traditional precedents in favour of progress and social policies.⁵¹ This judicial philosophy has been applied extensively by the Indian Supreme Court, *inter alia*, in connection with the right to life, to which a new dimension has been given and interpreted to include the variety of rights essential for the enjoyment of the right to life. For instance, it has been held that the right to life includes the right to adequate nutrition, clothing and shelter;⁵² the right to a wholesome environment;⁵³ the right to a

50 N Kamboj 'Human rights and judicial activism' The Indian Law Institute [http://14.139.60.114:8080/jspui/bitstream/123456789/17749/1/019_Human%20Rights%20and%20Judicial%20Activism%20\(110-115\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/17749/1/019_Human%20Rights%20and%20Judicial%20Activism%20(110-115).pdf) (accessed 6 January 2017).

51 *Law dictionary* http://law.academic.ru/12129/judicial_activism (accessed 6 January 2017).

52 *Francis Coralie v Union Territory of Delhi* AIR 1987 SC 746.

53 *MC Mehta v Union of India* AIR 1987 SC 1086.

speedy trial;⁵⁴ the right to free legal aid to the poor;⁵⁵ and the right to know.⁵⁶

The Supreme Court of Mauritius has often practised judicial restraint, which is not always suitable for the interpretation and protection of human rights. For instance, the Court had the opportunity to adjudicate that a general right to privacy exists, which can be inferred by reading it into the right to life, as has been done by the Indian Supreme Court. This would not have prevented the judges to eventually find that this right is not absolute and can be reasonably restricted in a democratic society. This would have led to the same decision of allowing the taking of fingerprints for the purposes of ID cards, but not retaining and storing these. At least it would have contributed to establish the right to privacy under the Constitution by way of judicial activism.

It is argued that a certain degree of judicial activism is essential, especially in a jurisdiction such as Mauritius. For instance, the Constitution only provides for civil and political rights, while socio-economic rights and third generation rights (the rights to development and the environment) are not provided for. It is essential that judges wear the hat of activists and interpret existing rights in a way that would uphold and equally protect second and third generation rights.

5.3 Reference to the ICCPR

It is noted that little or no reference has been made to the ICCPR which protects the right to privacy in article 17. Even the plaintiff seemed to have only relied on article 8 of the European Convention on Human Rights. Mauritius is a state party to the ICCPR and has the legal obligation to respect, promote and protect its provisions. Article 17 of the ICCPR clearly provides for the right to privacy and private life which could have supported the argument of the plaintiff. It is trite law that states must endeavour to harmonise its domestic laws, including the Constitution, with international legal standards. With reference to the right to privacy, the ICCPR indeed is a standard that ought to be achieved and matched by the state of Mauritius.

The Court was silent over the fact that the legislature needed to legislate and provide for a more general and effective right to privacy compared to the restricted right currently conferred on Mauritian citizens. The Court also did not consider the fact that, as signatory to the ICCPR, there is a need to harmonise domestic and international law. No doubt, this could have been done while respecting the principle of separation of powers. One may argue that being a dualist state, the ICCPR needs domestication to find application in domestic

54 *Hussainara Khatoon v Home Secretary, Bihar* (1980) 1 SCC 91.

55 *MH Hoskot v State of Maharashtra* AIR 1978 SC 155.

56 *Rudal v State of Bihar* (1983) 4 SCC 141.

courts. However, it is judicial practice to cite provisions from the ICCPR, especially since it forms part of the International Bill of Rights. In plain words, the ICCPR requires no domestication to find application in the Supreme Court of Mauritius.

6 Conclusion

The right to privacy is an essential right which every individual should enjoy. At the same time this right can be limited where necessary in the public interest and for the preservation of public order. The Mauritian Supreme Court carried out the exercise of the limitation of rights in the *Madhewoo* case. Some of the legislative instruments used for purposes of the new smart ID card were held to have been fairly and legally enacted, while the provisions relating to the retention and storage of fingerprints were held to be unconstitutional. The case has also provided for the status the right to privacy enjoys under the Constitution, with the Supreme Court clearly stating that only privacy in relation to the home, property and body of a person carries a constitutional guarantee.

While the substance of the decision is correct and well founded, the general approach based on judicial restraint diametrically opposed to the principles of implied rights theory, is of real concern. As matters stand, Mauritians only enjoy a segmented right to privacy despite the fact that Mauritius is a state party to the ICCPR. Therefore, there is a need for the Court to draw inspiration from the Indian Supreme Court and other applicable jurisdictions to practise judicial activism where possible in order to be able to imply and infer rights that may not clearly or explicitly be provided for by the Constitution.

In conclusion, the *Madhewoo* case was correctly decided, but the judgment was based on a surprising ground, namely, that there is no constitutionally-protected right to general privacy and private life in Mauritius.

Editorial introduction to special focus: The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects

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Serious efforts to entrench the rule of law in Africa came with the so-called third wave of democratisation in the 1990s. This democratic revival raised hopes of a new era of governance guided by the basic principles of constitutionalism, democracy, good governance, respect for human rights and respect for the rule of law. Promising signs of some progress have been overtaken by a steady decline, particularly in the last two decades.

For example, in the 2016 Ibrahim Index of African Governance Report, it is stated that, although during the last decade overall governance on the continent has improved, there has been a 'pronounced and concerning drop in safety and rule of law, for which 33 out of the 54 African countries – home to almost two-thirds of the continent's population – have experienced a decline since 2006, 15 of them quite substantially'.¹ The conclusions arrived at in the Ibrahim Index of African Governance is largely supported by similar surveys, such as Freedom House's Freedom in the World Survey; the World Justice Project Rule of Law Index; the World Bank's World Governance Indicators; and Transparency International's Corruption Perception

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1 See http://s.mo.ibrahim.foundation/u/2016/10/01184917/2016-Index-Report.pdf?_ga=1.210164309.1550746377.1489484030 (accessed 20 March 2018).

Index. In fact, in the latest Freedom in the World 2017, Freedom House notes that of the 11 countries in the world with the worst aggregate scores for political and civil liberties, six of these (Eritrea, South Sudan, Somalia, Sudan, Equatorial Guinea and the Central African Republic) are from sub-Saharan Africa.² In a poll jointly conducted by *The New York Times* and the Pew Global Attitudes Project in 2006, a majority of Africans polled in ten sub-Saharan African countries indicated that they had been better off five years prior to the survey.³ Afrobarometer in its latest survey report on access to justice reveals that substantial barriers still inhibit citizens' access to justice in most African countries. While noting that countries differ greatly in the extent and quality of their citizens' access to justice, Afrobarometer points out that even the best-performing states have substantial work to do before they can claim to meet the call of the United Nations (UN) Sustainable Development Goal 16 for 'access to justice for all'. It notes that, for example, South Africa, which could be regarded as among the better performers, recorded a drop to 56 per cent (from 69 per cent ten years ago) of trust in courts.⁴

In light of such evidence, one can no longer be complacent about the dark clouds that are beginning to gather to imperil the few gains in terms of constitutionalism, democracy, good governance and respect for the rule of law that the 'third wave' brought. Given the importance of the rule of law as an instrument for promoting social, political, economic and social development, all of which are critical to peace and stability, the ominous decline in respect for the rule of law cannot be ignored. A two-day conference that took place at the Faculty of Law, University of Pretoria, South Africa, from 29 to 30 June 2017, jointly organised by the Institute for International and Comparative Law at the University of Pretoria and the Konrad Adenauer Stiftung Rule of Law Programme for Sub-Saharan Africa, Kenya, examined various aspects of the rule of law challenges facing Africa. A few selected papers presented during this conference appear in this section of the *Journal*. These start with an overview of the rule of law crisis. The articles deal with other topical issues, such as the rule of law and democracy; the rule of law and access to justice; the rule of law, discriminatory practices and social equalities; the rule of law and

2 See https://freedomhouse.org/report/freedom-world/freedom-world-2017?gclid=CjwKEAjwqZ7GBRC1srKSv9TV_iwSJADKTjaDBs23e9DVyVCU0xsjB-9nJ1l-C0_Z5scit0HoNO3tProCN4_w_wcB (accessed 20 March 2018).

3 See P Shivute 'The rule of law in sub-Saharan Africa – An overview' <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/shivute2.pdf> (accessed 20 March 2018).

4 See Afrobarometer Policy Paper 39, 'Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans' http://afrobarometer.org/sites/default/files/publications/Policy%20papers/ab_r6_policypaper39_access_to_justice_in_africa_eng.pdf (accessed 20 March 2018).

surveillance; and some aspects of monitoring and enforcing the rule of law in Africa.

In the introductory overview of the crisis of the rule of law in Africa that provides a general context of the challenges that Africa faces, Fombad starts by providing a detailed analysis of the meaning of the concept of the rule of law. He points out that because of its broad nature, there is no generally-agreed meaning of the concept of the rule of law. Nevertheless, Fombad indicates that there is now general recognition of the fact that it is a critical bulwark against insecurity, poverty and capricious and arbitrary government, and entails the observance of good laws that demand, at a minimum, good governance, accountability and the protection of human rights. Drawing from published surveys on the rule of law, Fombad demonstrates that for nearly two decades, there has been a steady decline in the state of the rule of law in Africa. This is of concern especially considering that even in countries that had recorded significant gains as far as the rule of law is concerned, there has been a steady decline, while some countries have consistently scored poorly over the years. Fombad recommends the enhancement of mechanisms for monitoring compliance and enforcement. He suggests that this should be done within the existing legal framework of the African Union (AU), such as the African Union Commission, the Peace and Security Council, and the African Peer Review Mechanism.

The rule of law is the bedrock on which democracy and democratic practices are supposed to be anchored. Although democracy in one form or another is well established through the regular holding of multiparty elections in sub-Saharan Africa, there are many signs of creeping authoritarianism. This is so not only in countries with a good record on democracy, such as Botswana and South Africa, but also in those countries that have used democracy as a charade behind which to dissimulate their despotism, such as Cameroon and Zimbabwe. Frimpong and Agyeman-Budu use the Ghanaian experience from independence to date as a case study for democracy and the rule of law. Their article takes us on a journey through the various phases of the rule of law and democracy situation in Ghana, from independence in 1957, through the period of military regimes, to date. The article exposes two problems facing the rule of law and democracy in contemporary Ghana: the security of tenure of judges and the appointment of members of parliament as ministers of state. The authors illustrate how the reasoning by the judges of the Supreme Court in the presidential election petition challenging the election of John Mahama failed to uphold the Constitution. The Court instead chose the convenient option and upheld the election of Mahama rather than to uphold the law and the cardinal democratic principle that elections must always reflect the wishes of the people. The authors argue that the Ghanaian courts on numerous occasions when given the opportunity to do so have failed to uphold the rule of law in their decisions. The article also raises an interesting point in its claim that the Constitution of Ghana inherently undermines the rule of law

in Ghana in its indemnity clauses that bar the courts from challenging the actions of the military regimes. In conclusion, the authors suggest that there is need for a complete overhaul of the constitutional order if the rule of law is to be secured in Ghana.

Although access to justice has long been regarded as one of the important cornerstones of the rule of law, democracy, good governance and effective and equitable development, it unfortunately remains elusive to many ordinary citizens in sub-Saharan Africa. There are numerous causes of the challenges to access to justice. One dimension of this is explored in the article by Inman and Magadju, who examine international crimes, national trials and victim participation as an avenue to enhance the rule of law and addressing impunity in the Democratic Republic of the Congo (DRC). The article traces the origin of the right to victim participation and explores the position under the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law; the European Convention on Human Rights (as interpreted by the European Court of Human Rights); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; the American Convention on Human Rights (as interpreted by the Inter-American Court of Human Rights); and the practice before the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the military tribunals in the DRC. The authors observe that the participation of victims is essential as it recognises the victim's rights to retribution and enhances the notion of access to justice by victims. The article examines the practice of participation of victims before the ECCC, and suggests that the system provides a good model for the trials before the military tribunals trying international crimes committed during the conflicts in the DRC as it is based on the civil law tradition that is similar to that in the DRC. Furthermore, the article identifies various challenges that the trials before the military tribunals in the DRC face. This includes poor or a complete lack of representation of victims by competent lawyers; a lack of effective witness and victim protection; and high court fees, which make it impossible for many victims to realise reparations ordered by the courts. This, the authors observe, undermines access to justice by the victims of crimes and perpetuates the high level of impunity in the DRC as far as international crimes are concerned.

Another perspective to this is provided by Moyo in his article on standing, access to justice and the rule of law in Zimbabwe. Moyo evaluates the position of the law in Zimbabwe in respect of standing and how it affects access to justice and the rule of law broadly. He traces the rules of standing for constitutional claims under the now defunct Lancaster House Constitution, and shows how both the text of the Constitution as well as judicial declarations took very narrow and restrictive positions that effectively locked out legitimate claims for reasons that claimants did not have a 'direct and substantive' interest. The article uses several examples to illustrate how this

position on standing resulted in cases being defeated and the courts failing to uphold constitutional rights on the basis of procedural technicalities. The article subsequently shows how the enactment of the current Constitution has largely cured this problem through broadening the scope of *locus standi*. Moyo shows that, under the current Constitution, courts can entertain claims for violations or threats of the violation of rights from persons who are directly affected as well as those suing on behalf of others or in the interests of the public. The article argues that this enhances access to justice, the protection of human rights and the rule of law.

Minorities – racial, religious, ethnic or others, such as foreigners – have become targets in many instances when the rule of law is disregarded. This has raised complex issues of discrimination, marginalisation and social inequalities. Two articles discuss some aspects of these complex issues. Rudman looks at the position of women in the article ‘Women’s access to regional justice as a fundamental element of the rule of law: The absence of a committee on the rights of women in Africa and its effects on the enforcement of the African Women’s Protocol’. The article focuses on the challenges facing the enforcement of women’s rights in Africa before regional human rights enforcement institutions, such as the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights. After pointing out that the concept of the rule of law entails several aspects of human rights, Rudman focuses on women’s rights as a special feature of human rights that has received a significant boost in Africa through the adoption and wide ratification of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol). She then goes on to expose the internal and external weaknesses undermining the realisation of women’s rights as guaranteed in the Women’s Protocol. The emphasis is on the protection and enforcement of women’s rights as an aspect of human rights guaranteed under African regional law. Rudman puts forward some practical ideas on what should be done to enhance respect for the rule of law as far as women’s rights are concerned. She proposes amendments to the Protocol to create a Committee on the Rights of Women within the African Women’s Protocol modelled after the CEDAW Committee. She also proposes that the African Commission should reconceptualise its approach to women’s issues. Furthermore, she recommends amendments to allow the African Committee of Experts on the Rights of the Child to refer cases before it to the African Court. This, the article argues, would promote the enforcement of women’s rights, as the Committee will act as a receiver of complaints with respect to violations as well as a driver or champion of the enforcement of the rights before the relevant institutions.

Hindeya examines the rule of law and the challenges that the rule of law in Ethiopia faces in respect of land rights of minority communities. He demonstrates that although the Constitution of Ethiopia protects the land rights of minority communities and gives

regional states the power to manage land resources, the practice is at variance with these guarantees. Through the delegation of power by regional state government to the federal government as well as the far-reaching power and patronage of the ruling party, the federal government enjoys wide powers to deal with land. This purported delegation of powers, the article argues, is contrary to the letter of the Constitution and lacks basis in law. Pursuant to delegated powers, the article illustrates that the federal government in the recent past has transferred huge tracts of land to foreign investors without the consent or involvement of local communities. As a result, ethnic minorities in the Gambella and Benishangl-Gumuz regions of Ethiopia have been dispossessed and deprived of their land rights, with little or no recourse to justice, since the public generally have no confidence in the courts, especially on matters where the executive is the violator of the law.

One of the greatest threats posed to democracy and respect for the rule of law today is the misuse of personal data and the illegal use or misuse of information collected legally or illegally through surveillance. Most of the abuses have been associated with the fight against terrorism, which has been used as a pretext for frequent flagrant violations of human rights and the clamping down on legitimate opposition activities. Abdulrauf provides a general overview of this problem. Focusing on electronic surveillance and its legal framework in sub-Saharan Africa, Abdulrauf shows how electronic surveillance undermines the right to privacy and other human rights guaranteed by the law. He argues that electronic surveillance have more implications for the rule of law beyond the violation of the right to privacy. The article demonstrates that electronic surveillance also fosters serious abuses of power by the state, and often has a negative effect on the independence of the judiciary, among other tenets of the rule of law. After examining some of the measures necessary to entrench the rule of law in the use of electronic surveillance in the sub-Saharan region, Abdulrauf points out that there now is a commendable trend towards the development of *sui generis* laws to regulate electronic surveillance since privacy laws clearly are inadequate. Another dimension of this problem is examined by Gebreegziabher whose article looks at the right to privacy in the age of surveillance to counter terrorism in Ethiopia. He points out that in spite of being a useful tool to prevent and prosecute terrorism, surveillance is increasingly being utilised as an excuse for infringements on privacy in several jurisdictions. The article identifies legal and practical problems causing violations of the right to privacy while countering terrorism in Ethiopia. The analysis is substantiated by an empirical study involving key informant interviews and case file reviews from Ethiopian courts. His analysis suggests that there is widespread use of warrantless interceptions that are used as prosecution evidence in defiance of the law. He concludes that there is a need to ensure that counter-terrorism surveillance in Ethiopia is carried out in conformity with the law to reflect the values of a

democratic society based on the rule of law and respect for the right to privacy.

The final article deals with the issue of monitoring and enforcing the rule of law in Africa. The contextual elements of the rule of law suggest that certain standards could be developed for assessing the rule of law at the level of the AU, regional economic communities and other international organisations. Hansen and Mue explore one of the possibilities for doing this. Their article is based on draft principles that, it is argued, can be beneficial to the International Criminal Court (ICC), civil society and other role players in the international criminal justice system. These draft principles are drawn from the experiences of the failed attempts to prosecute Kenyan cases linked to the post-election violence of 2007 before the ICC. The article shows how co-operation among member states is an obligation that cannot be assumed simply because it is required by the Rome Statute of the ICC. The authors demonstrate how co-operation with Kenya became a huge challenge during the proceedings as key suspects held powerful positions in the Kenyan government. It is worth noting that despite the referral by Kenya to the Assembly of State Parties (ASP) by the Court for non-co-operation, the ASP has not had and is unlikely to have the item on its agenda. The article also shows how the immunity of state officials is a complex issue. Whereas the position of suspects is irrelevant under the Statute, the article demonstrates how the cases against President Kenyatta and Vice-President Ruto became complicated because of their powerful official positions. The article compares this position with the proposals under the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) of the AU to grant immunity to heads of state and senior government officials, and notes that in reality there may be no practical differences between the position of the Malabo Protocol and the Rome Statute, given the experiences of the Kenyan cases. On complementarity, the article points out how this principle faces serious challenges in view of the fact that states may not be interested in accountability for international crimes. The article also draws attention to the challenges experienced as far as witness protection and the participation of victims are concerned, and offers suggestions on how the situation could be improved. In setting out the Nairobi Principles on Accountability, the article shows how it offers practical training, advocacy and practical tools for role players in international criminal justice, such as the ICC, the AU, state parties and civil society. This, they conclude, would help to advance the cause of justice in Africa as far as accountability for international crimes is concerned, thereby reducing impunity and promoting respect for the rule of law.

A number of important conclusions may be drawn from these articles about the state of the rule of law in Africa. First, it is clear that there has been and continues to be a steady decline in the state of the rule of law in sub-Saharan Africa. This conclusion is based on and supported by various empirical studies and case studies presented in

the articles. Second, the decline in the rule of law goes hand in hand with the reversal of democratic gains in various countries, such as the DRC, where the constitutional and democratic order has stalled. The trend is also characterised by violations of human rights and a corresponding inability of courts to intervene in an effective and meaningful manner. Third, the problem generally is not necessarily one of deficiency in the law to support the rule of law. The problem often is one of weakness in the enforcement framework and subservience or weakness of the judiciary in other situations. To address these challenges, there is a need for a more proactive engagement by the international community generally, but more specifically at the level of the AU and regional economic communities. Anticipating conflict situations and taking decisive action will go a long way towards arresting the decline in respect for the rule of law in African states. The experiences of the European Union framework provide a useful model to adopt, but this will require greater political will from the AU and member states of regional economic communities. Whilst arresting the continuing deterioration in respect for the rule of law will demand serious action by individual African states supported by the AU, ordinary citizens also have a special responsibility to actively monitor and put pressure on their governments to respect their national constitutions and relevant laws as well as their international commitments.

An overview of the crisis of the rule of law in Africa

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Summary

After the wave of democratic and constitutional reforms in the 1990s, the rule of law appeared to have enjoyed a revival in Africa. Apparently there were strong constitutional commitments by African countries for respect for the rule of law, backed by the signature and ratification of international and regional treaties imposing this obligation. However, the last two decades have seen a steady weakening of this commitment. It is argued that developing an appropriate strategy for dealing with the persistent, systemic and systematic threats to the rule of law in Africa requires an understanding of the nature and extent of the crisis. The critical question is whether the proper tools are available at national and continental level to monitor and deal with these threats. After exploring the meaning and scope of the concept of the rule of law, this article, guided by a number of regional and international indicators, assesses the extent of Africa's rule of law problems. It then examines the various options for facilitating systematic monitoring of the enforcement of rule of law standards. Based on the approach adopted by the Council of Europe and the European Union, it is argued that the African Union and regional economic communities must develop a well thought-out strategy within the existing normative frameworks to address the present problems of systemic threats to and persistent breaches of the rule of law.

Key words: constitutionalism; democracy; human rights; rule of law

1 Introduction

The rule of law, generally regarded as essential to modern constitutional democracy, appeared to have enjoyed a revival in Africa during the so-called 'third wave' of democratisation in the 1990s.

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There were promising signs that the days of repressive military or one-party dictatorship were over and that a new era of governance had been ushered in, one guided by the principles of constitutionalism, democracy, good governance and rule of law. However, despite the commitment by African states to respect the rule of law – a commitment which is evident in their constitutions and in their signature and ratification of international and regional instruments imposing this obligation – the last decade has seen this commitment steadily weaken. Today, there is growing uncertainty as to whether the post-1990 constitutions indeed can enable the continent to avoid a resurgence of authoritarianism.

The maintenance of the rule of law is of critical importance: It is the bedrock on which the democracy and democratic practices needed for political stability and economic growth are founded. In spite of the euphoria of the early 1990s, presently too many countries, such as Burundi, the Democratic Republic of the Congo (DRC), Somalia and South Sudan, are in turmoil. It may be argued that the crisis around the rule of law is at the heart of many of Africa's present developmental predicaments, such as political instability, economic decline, poverty, unemployment and endemic corruption. Therefore, it is imperative to develop effective strategies to deal with this problem. However, developing an appropriate strategy for dealing with the persistent, systemic and systematic threats to the rule of law in Africa requires an understanding of the nature and extent of the crisis. There are also questions as to whether the proper tools are available at national and continental level to monitor and deal with these threats.

The article is divided into five sections, including this introduction. The second section considers the meaning and scope of the concept of the rule of law. The third assesses the extent of Africa's rule of law problems by examining a number of regional and international indicators. Section four looks at the various options for facilitating the systematic monitoring of the enforcement of rule of law standards in Africa. The concluding remarks emphasise that there is no room for complacency, given the overwhelming evidence of a decline in respect for the rule of law in almost all African countries, including those that in the past were hailed for their performance in promoting constitutionalism, democracy, good governance and respect for the rule of law. It is, therefore, argued that the African Union (AU) and regional economic communities (RECs) must develop a well-thought-out strategy within the existing normative frameworks to address all cases of systemic threats or serious and persistent breaches of the rule of law.

First, what do we mean by the rule of law and what is its scope?

2 Meaning and scope of the rule of law

The rule of law, for reasons which will become obvious, has been described as a 'contested concept' or as 'work in progress'.¹ Whilst the concept is usually associated with the famous English constitutional scholar Dicey,² the idea goes back as far as Aristotle.³ However, the modern concept has been influenced by other legal doctrines, such as the German *Rechtsstaat*, the French *Etat de droit* and developments in international law.⁴

The effective enforcement of the rule of law depends on clarity about what it means and its fundamental features, nature and scope. Is there such clarity? While there is consensus that the rule of law is one of the most important bulwarks against dictatorship and arbitrary governance, divergent views exist on the exact meaning of the concept. This is surprising given that the obligation to comply with the rule of law has become 'a global ideal and aspiration',⁵ one that appears not only in national constitutions but in many international instruments, for example the Preamble to the Universal Declaration of Human Rights (Universal Declaration).⁶ The need for universal adherence to the rule of law at both national and international levels was endorsed by all the members of the United Nations (UN) in the 2005 Outcome Document of the World Summit.⁷

At the regional level, there are references to the rule of law in at least two important documents of the AU. The Preamble to the 2002 Constitutive Act of the AU underlines 'the determination of the member states to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'. In article 4(m), it goes on to state as one of its fundamental principles the 'respect for democratic principles, human rights, the rule of law and good governance'. The 2012 African Charter on Democracy, Elections and Governance (African Democracy Charter) elaborates even further. In its Preamble, the member states reiterate their 'collective will to work relentlessly to

1 See Bingham Centre for the Rule of Law 'Short course: Introduction to the rule of law', https://www.biicl.org/documents/1297_introduction_to_the_rule_of_law_programme_1.pdf?showdocument=1 (accessed 30 June 2017).

2 See AV Dicey *An introduction to the study of the law of the constitution* (1945) 188.

3 See T Bingham *The rule of law* (2010) 3.

4 See generally P Costa & D Zolo *The rule of law history, theory and criticism* (2007).

5 See R Janse *Rule of law. A guide for politicians* (2012) 6.

6 The Preamble states, *inter alia*, that '[w]hereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.

7 Clause 11 of the final resolution states: 'We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.' The rule of law is also mentioned in clauses 16, 21, 24(b) and 25(a), and human rights and the rule of law are highlighted as one of the four priority areas for action in Part 1V and clause 34.

deepen and consolidate the rule of law, peace, security and development'. In article 2(2) the Democracy Charter states as one of its objectives the desire to 'promote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the state parties'. It devotes the whole of chapter 4 to 'democracy, rule of law and human rights'. Article 32 calls on state parties to strive to institutionalise good political governance through 'entrenching and respecting the principle of the rule of law'.

It is clear not only from these UN and African instruments but other regional instruments⁸ that there is an international consensus that the rule of law is a fundamental concept of universal application. The global recognition of the rule of law as an important principle of modern constitutional governance is underscored by its explicit recognition in the constitutions of at least 23 African countries.⁹ This raises the question of whether those countries whose constitutions do not expressly, or only implicitly, entrench the concept in their constitutions are bound to comply with the imperatives of the rule of law. The answer will depend on the meaning and scope of this concept. In this regard, it is particularly conspicuous that no provision in any of these international instruments or in the national constitutions that refer to the rule of law makes any serious attempt to define the concept. This is not surprising, as the rule of law is notoriously difficult to define, let alone measure. As Bingham has rightly pointed out, this is no reason to conclude that the concept is 'too uncertain and subjective ... to be meaningful'.¹⁰

There probably are as many definitions of the concept as there are writers on the subject. Although Dicey is regarded as having coined the expression 'rule of law', his threefold definition of the concept is fairly outdated.¹¹ After analysing definitions proposed by various

8 For the position under other regional instruments, see the European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist, adopted by the Venice Commission in 2016 (Venice Commission Rule of Law Checklist), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e) (accessed 30 June 2017).

9 See the Constitutions of Algeria (Preamble and art 203); Angola (arts 2, 6, 11, 129, 174, 193, 202, 211, 212 & 236); Cameroon (Preamble); Cape Verde (Preamble and arts 2 & 7); Central African Republic (Preamble and art 18); Chad (Preamble); Comoros (Preamble); Egypt (arts 1, 94, 198 and the whole of chapter 4); Ethiopia (Preamble and art 52); Madagascar (Preamble, arts 1, 43, 107, 112, 113, 118 & 136); Gabon (art 9); The Gambia (sec 60); Ghana (Preamble and art 36); Kenya (Preamble, arts 10, 91, 146, 238 & 258); Lesotho (sec 154); Namibia (art 1); Nigeria (sec 315); Rwanda (Preamble and art 10); Senegal (Preamble); South Africa (sec 1); South Sudan (Preamble, secs 46, 48, 125, 151, 156, 157 & 159); Tanzania (Preamble, arts 1, 6, 8 & 265); and Zimbabwe (Preamble, arts 3, 90, 114, 164, 165 & 206).

10 See Bingham (n 3 above) 6.

11 These may be summarised as follows: first, the principle of legality; and, second, the principle of equality of all before the law. The third component of the definition is a dismissive reference to foreign constitutions and the role of administrative courts. See further Dicey (n 2 above) 188-196.

authors from different systems of law and state organisations as well as diverse legal cultures, the Venice Commission concludes that the notion of the rule of law

requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.¹²

The World Justice Project, which describes itself as 'the world's leading source for original, independent data on the rule of law', uses what it refers to as 'a working definition of the rule of law based on four universal principles, derived from internationally accepted standards'.¹³

For our purposes, what could be considered as the most widely-accepted modern conceptualisation of the rule of law was formulated by the UN Secretary-General in 2004. This UN formulation defines the rule of law as

a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards'. It also points out that as a principle, the rule of law ... requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁴

In spite of the differences of opinion over its precise definition and nature, there is now reasonable consensus about what could be considered to be the core elements of the rule of law. These consist of the following:

- (i) the principle of legality, which includes the requirement of a transparent, accountable and democratic process for enacting laws;

12 See Venice Commission Rule of Law Checklist (n 8 above) 6.

13 These are stated as follows: '(i) The government and its officials and agents as well as individuals and private entities are accountable under the law. (ii) The laws are clear, publicised, stable and just; are applied evenly; and protect fundamental rights, including the security of persons and property. (iii) The process by which the laws are enacted, administered, and enforced is accessible, fair and efficient. (iv) Justice is delivered in a timely manner by competent, ethical, and independent representatives and neutral parties who are of sufficient number, have adequate resources and reflect the make-up of the communities they serve.' See World Justice Project Rule of Law Index 2016 9, <http://data.worldjusticeproject.org/> (accessed 30 June 2017).

14 See Report of the Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-conflict societies' http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.ipu.org%2Fsplz-e%2Funga07%2Flaw.pdf&ei=IHODUri_NM-QhQfv04HoBQ&usq=AFQjCNH4tfk4EZdh3JzfjaOMTYlL777RA&sig2=_51SuV7GbBdRzWVgX16iNg&bvm=bv.56343320,d.ZG4 (accessed 30 June 2017).

- (ii) the principle of non-discrimination and equality before the law, which means that government and its officials and agents as well as individuals and private entities are accountable under the law;
- (iii) legal certainty and prohibition of arbitrariness, which requires that laws are clear, publicised, stable, and just, are applied evenly, and protect fundamental rights, including the security of persons and property;
- (iv) the process whereby the laws are enacted, administered and enforced is accessible, fair and efficient;
- (v) justice delivered in a timely manner by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the make-up of the communities they serve; and
- (vi) respect for human rights.

This list of core elements is not exhaustive, nor is it final and valid for all time. Nevertheless, it does provide a reasonably good indication of a global model the application of which is inevitably affected by each country's constitutional and legal traditions. In this broad sense, the rule of law can apply only in a liberal constitutional democracy. It is now necessary to examine the rule of law challenges in Africa in light of this broad understanding of the concept.

3 Assessing the evidence of the rule of law crisis in Africa

Assessing the state of the rule of law inevitably requires an evaluation of the extent of compliance with all or some of the core elements identified above. There is no generally-agreed universal standard for conducting such an assessment. Nevertheless, several international non-governmental organisations (NGOs) have attempted to develop indicators for evaluating and measuring compliance with one or more of these rule of law components. While most of these assessments have been global, some have focused on Africa. The evidence gathered by these bodies, at both international and regional levels, are now examined.

3.1 International indicators of the rule of law crisis in Africa

Several international surveys are regularly conducted to assess the performance of countries in one or more of the components of the rule of law. These include the World Justice Project, which focuses exclusively on the rule of law, as well as others, such as Freedom House (which carries out annual surveys and reports on freedom of the press, freedom of the world, and freedom on the internet);¹⁵

15 <https://freedomhouse.org/reports> (accessed 30 June 2017).

Transparency International's annual Corruption Perception Index;¹⁶ and the fragile state index.¹⁷ This discussion will concern only three of these: the World Justice Project, Freedom House's freedom of the world and the fragile state index.

3.1.1 Evidence based on the World Justice Project's Rule of Law Index

The Rule of Law Index published by the World Justice Project since 2011 is the only such project devoted exclusively to the rule of law as broadly defined above.¹⁸ It provides scores and rankings for the rule of law in each country in respect of eight factors or themes: constraints on government powers; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice; and criminal justice.¹⁹ The factors are intended to reflect the way in which people experience the rule of law in their daily lives, thereby providing a basis for measuring a country's adherence to the rule of law. In this way, areas of strength and weakness are identified. The scores and rankings are based on 44 sub-factors.²⁰

Although the World Justice Project reports date back to 2006, it is only the analysis for the periods 2012/2013, 2014, 2015 and 2016 that provide some evidence of trends in Africa. The 2012/2013 report reveals that Africa lags behind other regions around the world in nearly all dimensions of the rule of law.²¹ Of the 18 African countries surveyed during this period, Botswana, Ghana and South Africa came out on top, whereas Nigeria, Cameroon and Zimbabwe were at the bottom. The same 18 countries were assessed in 2014 with the same results, namely, with Botswana, Ghana and South Africa being the overall top rule of law performers but with global rankings of twenty-fifth, thirty-seventh and fortieth, respectively, showing that countries in the region still were not performing well.²² The same three countries, namely, Nigeria, Cameroon and Zimbabwe, were the weakest performers; their global ranking of ninety-third, ninety-fifth and ninety-seventh, respectively, from the 99 countries in the world reviewed underscores the problem around the rule of law in Africa. In 2015, 21 African countries were assessed out of 102 globally, and the

16 https://www.transparency.org/news/feature/corruption_perceptions_index_2016 (accessed 30 June 2017).

17 <http://reliefweb.int/report/world/fragile-states-index-2016> (accessed 30 June 2017).

18 See generally World Justice Project Rule of Law Index 2016 (n 13 above).

19 A 9th factor, informal justice, is measured but not included in the aggregated scores and rankings.

20 For a detailed description of the processes and methodology of collecting data for the information, see World Justice Project Rule of Law Index 2016 (n 13 above).

21 https://worldjusticeproject.org/sites/default/files/documents/WJP_Index_Report_2012.pdf (accessed 30 June 2017).

22 https://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf (accessed 30 June 2017).

pattern of strong and weak rule of law performers in Africa remained exactly the same.²³ The overall global performance of African countries showed a slight deterioration in rule of law performance.²⁴

A recent report, based on 2016 data, shows that the same three countries were the strongest performers in Africa. Their global ranking, with South Africa ranked forty-third (a drop of seven positions), Ghana, forty-fourth (a drop of 10 positions) and Botswana, forty-fifth (a drop of 14 positions), points to an alarming drop in adherence to the rule of law in Africa.²⁵ The decline in rule of law adherence is also evident amongst the group of poorly-performing countries. This consists of Egypt, ranked at one-hundred-and-tenth (a drop of 24 positions); Cameroon, at one-hundred-and-ninth (a drop of 12 positions), and Zimbabwe, at one-hundred-and-eighth (a drop of eight positions). Even if one takes into account that 113 as compared to 102 countries were surveyed in 2016, the deterioration is still dramatic and significant.²⁶ Finally, it is also worth noting that for the two years during which the average regional rule of law rankings for each factor were assessed, Africa's poorest-performing areas for 2012/2013 were in civil justice, constraints on government and corruption. In the 2014 index, the lowest-performing area remained civil justice, followed by constraints on government and the state of criminal justice.

The first, and obvious, observation to be made is that respect for the rule of law in Africa has been progressively declining. The effective rule of law requires consistent compliance with its various component elements. The second observation is that of the 18 to 21 African countries that have been surveyed since the World Justice Project started, some countries have consistently performed well, such as Botswana, Ghana and South Africa, whereas others, such as Cameroon, Nigeria and Zimbabwe, have consistently shown low levels of adherence to the rule of law.

The next section deals with surveys that focus on one or more of the individual components the rule of law outlined above. It first

23 https://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf (accessed 30 June 2017).

24 Botswana was ranked 31st (a drop of six positions); Ghana, 34th (an improvement of 3 positions); and South Africa 36th (an improvement of four positions). In the case of the regularly underperforming countries, Nigeria is in 96th position (a drop of three positions); Cameroon in 95th position (a drop of two); and Zimbabwe in 100th position (a drop of three positions).

25 https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (accessed 30 June 2017).

26 The increase in numbers does not explain this as the scores themselves also show a remarkable decrease. Eg, Botswana scored 0,64 in 2015 but only 0,58 in 2016; Ghana scored 0,60 in 2015 but only 0,58 in 2016; and South Africa scored a mere 0,58 in 2015 and 0,59 in 2016, claiming the top spot in Africa. For the underperforming countries, the trend is similar. In 2016, Egypt, Cameroon and Zimbabwe all scored 0,37, but in 2015, Egypt scored 0,44 and Cameroon 0,40, while Zimbabwe had a similar score of 0,37.

attends to these specific components and thereafter provides an overall account of the performance of African states.

3.1.2 Evidence based on the Freedom House Freedom in the World surveys

Freedom House's Freedom in the World survey is a long-standing and widely-consulted annual survey on the state of political and civil rights around the world. It tracks the trends in 209 countries and territories and has been published regularly in its present comprehensive form since 1973.²⁷ The Freedom of the World rating process uses a three-tiered system consisting of scores, ratings and status.²⁸ The scores are awarded to each country or territory based on 10 political rights indicators and 15 civil rights indicators.

To enable one to appreciate the evolving trends in political and civil rights, we extracted and analysed the scores for African countries from the global scores for three different periods. The first period, 1973-1982, arguably reflects the lowest point of constitutionalism and the peak of post-independence authoritarianism. The second period, 1991-2000, marks the beginning of democratic revival and a wave of constitutional modernisation. The final period, 2007-2017, is characterised by a decline.

Two observations may be made about the evolution of civil and political rights from 1972 to the present. First, during 1973-1982, the majority of African countries were classified as 'not free' (34 out of the 52 countries surveyed, or 65 per cent). Whilst a few in this group on occasion moved in or out of this category, others – such as Algeria, Angola, Benin, Burundi, Central African Republic, Chad, DRC, Equatorial Guinea, Guinea, Guinea Bissau, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Niger, Somalia, Tanzania and Togo – did not improve at all. On the other hand, 15 (28,8 per cent) of the countries were classified as 'partly free', and only three countries (5,7 per cent) were classified as 'free' (these consisted of Botswana, except in 1973; The Gambia, except in 1982; and Mauritius, except in 1979, 1980 and 1981).

For the period 1991 to 2000, there was considerable improvement. The number of countries classified as 'not free' dropped to 21 (40 per cent) and those classified as 'partly free' increased to 23 (43 per cent). However, the most dramatic increase was in the number of countries classified as 'free', which tripled to nine (17 per cent). A pattern begins to emerge with a group of countries that throughout this period were either classified as 'not free' (Cameroon, Chad, DRC, Equatorial Guinea, Libya, Mauritania, Rwanda, Somalia and Sudan);

27 It is worth noting that the reviews started as the Balance Sheet of Freedom in the 1950s.

28 This is explained in depth in Freedom in the World 2017, Methodology, <https://freedomhouse.org/report/methodology-freedom-world-2017> (accessed 30 June 2017).

'partly free' (Central African Republic, Comoros, Gabon, Guinea Bissau, Lesotho, Madagascar, Morocco, Senegal and Zimbabwe) or 'free' (Benin, Botswana, Cape Verde, Mauritius, Namibia and São Tomé and Príncipe).

An analysis of the survey for the period 2007 to 2017 shows a decline in respect of political and civil rights on the continent. The number of countries classified as 'not free' increased marginally to 22 (41 per cent), and those classified as 'partly free' dropped to 22 (41 per cent), and the only improvement was that one more country joined the category of 'free' countries to raise them to 10 (18 per cent). The decline is also reflected in the quality of the performance of countries during this period. Almost the same group of countries were classified throughout this period as either 'not free' (Algeria, Angola, Cameroon, Chad, Congo Republic, DRC, Egypt, Equatorial Guinea, Eritrea, Rwanda, Somalia, South Sudan, Sudan and Swaziland); 'partly free' (Burkina Faso, Comoros, Kenya, Liberia, Madagascar, Malawi, Morocco, Mozambique, Niger, Nigeria, Seychelles, Tanzania, Togo and Zambia); or 'free' (Benin, Botswana, Cape Verde, Ghana, Mauritius, Namibia, São Tomé and Príncipe and South Africa). As in the previous period, in some countries there were a few movements during this period between the different levels of freedom of political and civil rights.

Second, the 2017 Freedom in the World report points out that 2017 marked the eleventh consecutive year in which global declines in political and civil rights outnumbered improvements. An analysis of the global tables reveals that although dramatic declines in freedom were experienced in every region in the world, the largest were in Africa. Of particular concern is the fact that six of the first 10 countries in the world that underwent the largest decline in the last 10 years are from Africa.²⁹ Furthermore, of the 49 countries designated as 'not free', six African countries feature amongst the 11 countries with the worst aggregate scores for political and civil liberties.³⁰ In fact, the 2017 report on Africa underlines the steady decline: Twenty-three countries (43 per cent) are designated as 'not free'; 21 (39 per cent) as 'partly free'; and 10 (18 per cent) as 'free'.

I now turn to the third global study, which focuses on the broader issue of state fragility.

29 These are Central African Republic; The Gambia; Mali; Burundi; Mauritania; and Ethiopia. See further A Puddington & T Roylance 'Freedom in the World 2017. Populists and autocrats: The dual threat to global democracy' 5 https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf (accessed 30 June 2017).

30 Puddington & Roylance (n 29 above) 6. These are Eritrea; South Sudan; Somalia; Sudan; Equatorial Guinea; and Central African Republic.

3.1.3 Evidence based on the Fragile States Index

The Fragile States Index (formerly the Failed States Index) is an annual report produced since 2005 by the United States (US) Fund for Peace and the magazine *Foreign Policy*.³¹ The Index assesses states' vulnerability to conflict or collapse using 12 political, social and economic indicators and more than a hundred sub-indicators that seek to measure factors conducive to conflict. The project is premised on the belief that

it is critically important that the international community understand and closely monitor the conditions that contribute to fragility – and be prepared to take the necessary actions to deal with the underlying issues or otherwise mitigate the negative effects.

Many of these indicators – such as group grievance; uneven economic development; poverty and economic decline; state legitimacy; public services; factionalised elites; and human rights – raise issues relevant to the rule of law, as defined earlier.³²

A study of the 10-year trend of the Fragile States Index provides some useful indications of the state of rule of law compliance in Africa. An analysis of the index for the period 2007-2016 shows that, almost throughout this entire period, 14 African countries featured amongst the 20 most vulnerable states in the world. There are no surprises as to who these are, as the countries include those that have experienced internal conflict and strife.³³ In fact, seven of the eight countries in the 'very high alert' category are in Africa.³⁴ However, the performance of some countries that have progressively worsened over the years deserves attention. It is noted that South Africa, long regarded after the end of apartheid in 1994 as the economic and political engine of Africa, has been demonstrating signs of significantly-worsening trends in line with deepening political divisions and social unease leading to regular service delivery protests and civil disturbances in the country.³⁵ The 2016 report also points to 'significant worsening' of conditions in other African countries, such as Senegal, Guinea Bissau, Mozambique, Gambia, Djibouti and Ghana. The case of Ghana, which in the last two decades 'is often cited as a shining light of democracy and development in a frequently

31 See <http://fundforpeace.org/fsi/> (accessed 30 June 2017).

32 Other indicators include demographic pressures; refugees and internally-displaced persons; human flight and brain drain; security apparatus; and external intervention. See <http://library.fundforpeace.org/library/fragilestatesindex-2016.pdf> 12-14 (accessed 30 June 2017).

33 These are South Sudan; Somalia; Central African Republic; Sudan; DRC; Chad; Guinea; Nigeria; Zimbabwe; Ethiopia; Guinea Bissau; Burundi; Eritrea; and Niger.

34 These are DRC; Chad; Sudan; Central African Republic; South Sudan; and Somalia. See <http://library.fundforpeace.org/library/fragilestatesindex-2016.pdf> (accessed 30 June 2017).

35 See MH Maserumule 'What rising protests in South Africa say about attitudes towards local government' <https://mg.co.za/article/2016-06-21-what-rising-protests-in-south-africa-say-about-attitudes-towards-local-government> (accessed 30 June 2017).

conflicted region', has now reached the point of being a 'cause for alarm'.³⁶

Overall, what the Fragile States Index shows is that failing or critically weak states are concentrated in sub-Saharan Africa. Furthermore, most of the countries in the category of 'high' or 'very high alert' coincide with those noted by the World Justice Project and Freedom House surveys as consistently performing poorly with regard to respecting the basic norms of the rule of law.

Moving away from these global indicators of the state of adherence to the rule of law, I turn to a regional indicator.

3.2 Evidence from a regional indicator: The Ibrahim Index of African Governance

Since it was first published in 2007, the Ibrahim Index of African Governance (Ibrahim Index) has been providing an annual assessment of the quality of governance in every African country based on 90 indicators constituted into 14 sub-categories, four categories and one overall measurement of governance.³⁷ The Ibrahim Index provides the most comprehensive data available on African governance. The four main categories guiding the assessment are safety and the rule of law; participation and human rights; sustainable economic opportunity; and human development. Like the surveys examined above, the Ibrahim Index, through its broad sub-categories and indicators, covers most of the factors identified earlier as critical components of the rule of law. This is particularly so with respect to its 14 sub-categories.³⁸

The 2016 Ibrahim Index Report provides an overall governance report of all African countries for the decade from 2006 to 2015 and contains rich, useful information about trends not only in governance, but also in adherence to the rule of law. As the only comprehensive indigenous index on these issues, it needs to be taken seriously.

The 2015 rankings show that the top 10 performers were Mauritius, Botswana, Cape Verde, Seychelles, Namibia, South Africa, Tunisia, Ghana, Rwanda and Senegal. By contrast, the 10 most underperforming countries were Somalia, South Sudan, Central African Republic, Libya, Eritrea, Sudan, Chad, Equatorial Guinea, DRC

³⁶ Maserumule (n 35 above) 18.

³⁷ See Mo Ibrahim Foundation 'A decade of African governance 2006-2015: 2016 Ibrahim Index of African governance. Index Report' http://s.mo.ibrahim.foundation/u/2016/10/01184917/2016-Index-Report.pdf?_ga=2.79825495.1109521050.1496390149-1550746377.1489484030 (accessed 30 June 2017).

³⁸ The 14 sub-categories consist of the following indicators: (i) under safety and rule of law: rule of law, accountability, personal safety and national security; (ii) under participation and human rights: participation, rights and gender; (iii) under sustainable economic opportunity: public management, business environment, infrastructure and rural sector; and (iv) under human development: welfare, education and health.

and Angola.³⁹ In the sub-category of rule of law, the top 10 performers are almost the same (Mauritius, South Africa, Botswana, Cape Verde, Ghana, Namibia, Senegal, Malawi, Zambia and Seychelles). Likewise, the weakest countries in adhering to the rule of law are nearly identical to the poorest performers in overall governance: Somalia, Eritrea, Libya, Central African Republic, South Sudan, Equatorial Guinea, Burundi, Guinea Bissau and Angola.⁴⁰

However, what is most revealing is the trend emerging from an analysis of the Ibrahim Index in the previous decade, namely, from 2006 to 2015.⁴¹ While the continental average score in overall governance during this period improved by one point, the category of safety and rule of law was the only category that registered a negative trend, falling by 2,8 score points. This decline was driven by negative results across all the four constituent sub-categories of safety and rule of law. In fact, the 2015 Index shows that almost two-thirds of African citizens live in a country where safety and the rule of law has deteriorated over the last ten years.

Moreover, a look at the 10 highest-scoring countries in terms of human rights shows that in six of these countries, over the past decade there has been deterioration regarding respect for rights.⁴² As a result, despite their overall good performance, a general review of the scoring for safety and the rule of law over the last decade shows that good performers, such as South Africa, registered the largest decline during this period, followed by Cape Verde, Botswana, Seychelles and Mauritius. It is also worth noting that two-thirds of the countries on the continent, representing 67 per cent of the population, have also shown deterioration in freedom of expression over the last decade. Overall, the 10-year country trend in the Ibrahim Index, which shows the most improved countries⁴³ and the countries that have deteriorated the most during this period,⁴⁴ presents a rather confusing, unsettled and unpredictable picture.

3.3 Some tentative conclusions

Although the above surveys provide a reasonably clear indication of the extent of the crisis of the rule of law in Africa, a number of caveats

39 Mo Ibrahim Foundation (n 37 above) 18.

40 Mo Ibrahim Foundation 34.

41 See Mo Ibrahim Foundation 2.

42 This is evident when considering significant deterioration since 2006 in four of the five underlying indicators, namely, civil liberties, freedom of association and assembly, human rights violations, and freedom of expression. See further Mo Ibrahim Foundation (n 37 above) 44.

43 These were Côte d'Ivoire; Togo; Zimbabwe; Liberia; Rwanda; Ethiopia; Niger; Morocco; Kenya; and Angola. See Mo Ibrahim Foundation (n 37 above) 19.

44 These were Libya; Madagascar; Eritrea; Central African Republic; Mali; The Gambia; Mauritania; Burundi; Ghana; and South Africa. It is important to note that South Sudan was not included in this 10-year analysis since there was no independent data on the country prior to 2011. See Mo Ibrahim Foundation (n 37 above) 19.

should be borne in mind when interpreting and drawing conclusions from the findings. Two are particularly important.

First, many of the global surveys, such as Freedom House's Freedom in the World and Fragile States Index, have been criticised for their perceived bias towards Western positions, especially those favoured by the US.⁴⁵ In spite of this, the use of several sources, particularly an African resource, such as the Ibrahim Index, could help correct the impact of such biases. Second, the impact of subjective contextual factors in assessing the different indicators is an important factor that could affect some of the results. This is so because the implementation of the various rule of law components is influenced by the judicial, historical, political, social or cultural context of each country. In other words, many of the surveys depend on responses to uniformly-formulated questions, but there is no reason to assume that the local context does not play a part in the responses. This makes it difficult to arrive at an accurate objective conclusion.

For example, in assessing the extent of judicial independence, account must be taken of the fact that judicial independence is not merely an ideal, but that there are differences in approach dictated by the differences in legal traditions.⁴⁶ The same is true in assessing the standards of separation of powers in each country. This often depends on the particular tradition of separation of powers in question. Another example is the issue of corruption. Certain forms of corruption have become so endemic and routinised that in some countries citizens no longer consider this as corruption but rather as a normal way of 'getting things done'. This is illustrated by the public utterances of President Jacob Zuma of South Africa. He has argued that the National Prosecuting Authority was justified in abandoning more than 750 charges of corruption and racketeering against him because corruption is only a crime in a 'Western paradigm'.⁴⁷ In rejecting allegations of impropriety for the use of state funds in upgrading his private residence under the pretext of enhancing his security protection, Zuma also argued that only 'very clever and bright people', and not ordinary South Africans, see anything wrong with this use of taxpayers' money.⁴⁸

45 See 'Criticisms of Freedom House Methodology' http://www.zeeopedia.com/read.php?reports_criticisms_of_freedom_house_methodology_gross_national_happiness_human_resource_development&b=32&c=22 (accessed 30 June 2017).

46 Examples could be multiplied. Eg, different countries use different means and procedures to attain justice. In criminal proceedings, some countries may use the adversarial system, and others the inquisitorial system; some may use juries whereas others rely only on the judge; again, in some countries there is free legal aid but not in others.

47 See 'Zuma wanted charges dropped because corruption is a "Western thing"' <http://www.news24.com/SouthAfrica/Politics/Zuma-wanted-charges-dropped-because-corruption-is-a-Western-thing-20141012> (accessed 30 June 2017).

48 As if to prove Zuma correct, the ruling African National Congress (ANC) went on to win a majority of seats in the parliamentary elections at the peak of the Nkandla scandal, even though with a much reduced majority. See 'Zuma:

Hence, the degree of adherence to, as well as the measurement of compliance with, the rule of law in the various countries is sometimes affected by the local context. Nevertheless, it is debatable whether taking into account such factors could explain significant differences in the level of respect for the rule of law. The combination of different sources, instruments and methods used by the different surveys provides a reasonable basis to draw important conclusions about the state of respect for the rule of law in Africa.

In correlating the conclusions arrived at by the different surveys, it is clear that the levels of respect for the rule of law in Africa vary from country to country. Some countries have performed well in all or some of the core elements identified above, either consistently or intermittently, while others have not. Three important conclusions may be drawn.

First, although the 1990s appeared to have ushered in a new commitment to respect for the rule of law, this seems to have peaked in the early 2000s and since then has gone into a steady decline. Whilst a cursory examination of the various surveys points to the increasing disregard of certain components of the rule of law, further studies are needed to identify exactly what these are.

Second, in spite of the impression of a degree of rule of law revival on the continent, all the surveys show that a number of countries have hardly made any progress at all since the 1990s. In fact, one could argue that at least 20 of Africa's 54 states are unable to provide even the barest minimum standards of the rule of law for their citizens.⁴⁹

Third, all the different surveys and indicators reveal that even countries such as Mauritius, Botswana, Namibia, South Africa, Cape Verde and, more recently, Ghana, Seychelles and Senegal, which are doing well, have been declining in their compliance with the basic standards of the rule of law. This has been alarming in the cases of countries such as South Africa and Ghana, suggesting that the crisis of the rule of law in Africa is not only profound but affects all countries on the continent. Nevertheless, one may argue that in the countries where the rule of law problem has been protracted and persistent, the problem is of a profound nature that goes right to the heart of the constitutional and political system in place. On the other hand, the problem in countries like South Africa and Ghana probably is a reflection of the careless use of law or the abuse of powers that is of a temporary nature and not systemic although, if left unchecked, such

Nkandla not an issue for ordinary voters' <https://www.enca.com/elections-2014-south-africa/zuma-nkandla-not-issue-ordinary-voters> (accessed 30 June 2017).

49 In this group, one can distinguish between those that have seen little or no change since the 1990s, such as Angola; Cameroon; Burundi; Congo Republic; DRC; Guinea Bissau; Equatorial Guinea; Sudan; Libya; South Sudan; and Somalia, and others where there have been occasional periods of improvement, such as Central African Republic; Chad; The Gambia; Zimbabwe; Angola; Niger; Mauritania; Mozambique; and Mali.

abuse runs the risk of becoming protracted: The former (careless use) may be described as constitutional capture and the other (abuse of powers) as constitutional mischief. Therefore, there is no room for complacency or for assuming that it can be dealt with only at national level. How can this crisis be dealt with?

4 Addressing the crisis of the rule of law in Africa

Apart from the Ibrahim Index, there is no other mechanism for monitoring and addressing the persistent threats caused by the non-implementation and non-adherence to the rule of law in Africa. It is argued that there is a need for such a mechanism. Respect for the rule of law entails compliance with international standards of rule of law as laid down in international as well as regional and sub-regional instruments. As noted earlier, the AU, through its Constitutive Act, and the African Democracy Charter both provide for the respect for the rule of law by African countries. Besides this, the AU's Agenda 2063 lists as one of its aspirational goals that Africa will 'be a continent where democratic values, culture, practices, universal principles of human rights, gender equality, justice and the rule of law are entrenched'.⁵⁰ It has been noted that all African countries have in one way or another entrenched various components of the rule of law in their constitutions. Although this may have improved compliance levels in the early 1990s, the recent trend in the last two decades shows that constitutional entrenchment on its own will not suffice.

The AU has a responsibility to ensure that the fundamental values and principles on which the organisation is founded, one of which is the rule of law, and which is inextricably linked with democracy, respect for human rights and constitutionalism, are respected. Compliance with the rule of law at national level is critical to the AU achieving this aspiration. From this perspective, it is argued that it is necessary for the AU to take the lead in setting up measurement systems and for countries to develop their own abilities to monitor progress and identify areas of weaknesses that need to be corrected. In this regard, it is necessary to examine briefly what the AU has been doing, and to assess the weaknesses and strengths thereof to establish whether any lessons could be learnt from the approaches adopted to deal with rule of law issues by the European Union (EU) and the Council of Europe.

4.1 Mechanisms for addressing Africa's rule of law challenges

In the course of the transformation of the Organisation of African Unity (OAU) into the AU, the Heads of State and Government of the AU clearly committed themselves in the strongest possible terms to promote democracy, good governance and the rule of law amongst

50 <https://archive.au.int/assets/images/agenda2063.pdf> (accessed 30 June 2017).

member states. This was against the backdrop of two decades of one-party and military dictatorship that had stifled economic development and had led to political instability, civil strife, wars, unemployment, poverty and other ills. The importance of the rule of law is underscored in the various AU documents that have been adopted since it came into existence. In particular, the 2063 African Development Agenda, as pointed out above, in its aspiration 3, reiterates the dream of implementing good governance, respect for human rights, justice and the rule of law. This vision is driven by a realisation that the rule of law is the only way to stabilise conditions and relations within and between African countries and to provide an appropriate environment for constitutionalism, democracy and respect for human rights to take root and flourish.

The preceding analysis has shown that the AU agenda has not worked. What is worse, the optimism of the 1990s was short-lived. While the situation today may be relatively better than it was before the 1990s, the fact that respect for the rule of law is declining is a major cause for concern. All the results from most of the existing monitoring bodies on either the rule of law or any of its component parts paint a gloomy picture. No country on the continent is immune from this rule of law crisis. There are doubts about whether the AU has made a sufficient effort to deal with the present-day challenges to the rule of law that threaten to undermine the few gains of the post-1990 third wave of democratisation and its ensuing constitutional reforms. The AU's continuing credibility depends on how it deals with these issues.

It may be argued that, given what has occurred in the last two decades, the AU's normative foundation for monitoring and enforcing the rule of law is weak. There seems to be no clear strategy or mechanism provided in any of its instruments for monitoring compliance with or promoting the enforcement of and sanctioning for non-compliance with the rule of law, in general, or any of its critical components, in particular. The crisis of the rule of law on the continent arguably is a reflection of this lacuna. The presumption that recognising the rule of law and other fundamental principles in AU instruments and in national constitutions will solve the problem has not worked. Aspirations that are not matched by clearly-defined strategies to attain these end up as printed futility. The best strategy for dealing with rule of law problems, especially when they are as serious and persistent as they are in Africa, is the double-prong approach. This consists of developing and putting in place strong monitoring mechanisms and then backing them up with mechanisms for promoting enforcement where problems or possible problems are identified. If this were to be adopted by the AU, the question is whether it would require adopting new instruments or conventions or whether this could be accomplished within the existing normative framework of the organisation.

Ideally, in order for the AU to intervene timeously and effectively, it needs a sound normative basis. As pointed out earlier, the present legal framework is rather weak. Whilst a reform of the existing treaties, such as the Constitutive Act of the organisation, will provide the best possible way forward as well as provide legitimacy for AU intervention, this certainly is not a realistic possibility. For one thing, drafting new treaties or amending existing treaties is a slow and cumbersome process. Even if a new instrument were to be adopted, the problem will remain of ratification and effective domestication. Too many AU instruments are languishing in a miserable twilight zone between ratification and effective domestication to warrant attempts to add yet another instrument to this category. Furthermore, it is very easy for the non-complying member states, who make up as much as one-third of the membership, to block any reforms. The important preoccupation today should be to establish how the AU can make the existing legal framework work more effectively.

The first challenge to deal with in this regard is that of devising better strategies to monitor compliance with the existing AU standards and values of the rule of law by member states. How can this best be enhanced? Setting up new oversight mechanisms will certainly enhance the AU's rule of law credibility, but this is not likely to happen in the short or even long term. Therefore, it is better to explore how existing opportunities could best be exploited. In this respect, three organs of the AU could play a role in monitoring rule of law compliance amongst member states, namely, the AU Commission's Peace and Security Council (PSC) and African Peer Review Mechanism (APRM), which has now become an organ of the AU.

The AU Commission, provided for under article 20 of the Constitutive Act, has broad powers which include the power to 'initiate proposals for consideration by other organs'; the power to 'co-ordinate and monitor the implementation of the decisions' of the AU; and the power to 'ensure the promotion of peace, democracy, security and stability'.⁵¹ One of its eight portfolios dealing with political affairs covers several components of the rule of law: human rights; democracy; good governance; electoral institutions; civil society organisations; humanitarian affairs and refugees; returnees; and internally-displaced persons. The AU Commission, therefore, has the potential to monitor rule of law compliance and does this to some extent by working closely with the PSC.

Articles 5 and 20 of the Constitutive Act were amended in 2003 to provide for the PSC. The Protocol Relating to the Establishment of the Peace and Security Council of the AU of 2002 gives it broad powers, to 'promote and encourage democratic practices, good governance

51 See arts 2(a), (g) and (r), respectively, of the Statutes of the Commission of the AU, ASS/AU/2(1)-d, http://www.au2002.gov.za/docs/summit_council/statutes.pdf (accessed 30 June 2017).

and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts'. Article 4(c) states that the PSC shall be guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights, particularly by 'respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law'.⁵²

The PSC was established as a collective security and 'early-warning' body with the ability to facilitate timely and efficient responses to conflict and crisis situations. It meets in continuous session and all its members are required to keep a permanent presence at the AU headquarters. The Protocol gives it considerable powers to monitor the compliance by member states with the rule of law values and principles contained in the AU Constitutive Act and other instruments. It also has the power under article 8(5) of the Protocol to establish subsidiary bodies and seek such military, legal and other forms of expertise that it may require. On the basis of this mandate, it established a Committee of Experts to assist it to elaborate on its draft decisions. A Continental Early Warning System (CEWS) was established under article 12 of the Protocol to 'facilitate the anticipation and prevention of conflicts'. It is part of the African Peace and Security Architecture (APSA),⁵³ the AU's key instrument for promoting peace, security and stability in Africa. The CEWS gathers information about potential conflicts or threats to the peace and security of member states and submits reports to the PSC and the Chairperson of the AU Commission. This is done by collecting, analysing and disseminating early-warning data on current and potential conflicts; preparing policy advice; and supporting political, civilian and military missions. A Panel of the Wise, established under article 11 of the Protocol, supports the PSC and the Chairperson of the AU in the promotion and maintenance of peace, security and stability in Africa, and is also a key component of the APSA. In 2010, the Panel's capacity was enhanced by the establishment of a team, called the Friends of the Panel of the Wise, consisting of five to 10 eminent African personalities. Their task is to support the Panel in its activities, such as fact-finding missions, engagement in formal negotiations and follow-up on recommendations. This was followed by the establishment of the Pan-African Network of the Wise (Pan Wise) in 2013, the objective of which is to strengthen, co-ordinate

52 Art 5(2) of the PSC Protocol lists criteria for members, including contribution to the promotion and maintenance of peace and security in Africa; participation in conflict resolution, peace-making and peace-building at regional and continental levels; the willingness and ability to take up responsibility for regional and continental conflict resolution initiatives; a contribution to the Peace Fund and/or Special Fund; *respect for constitutional governance, the rule of law and human rights*; and commitment to AU financial obligations.

53 See <http://www.peaceau.org/en/topic/the-african-peace-and-security-architecture-apsa> (accessed 30 June 2017).

and harmonise prevention and peace-making efforts in Africa under a single umbrella.

With these broad powers, and the numerous expert committees for supporting it, the PSC therefore has the potential to be an effective body for monitoring numerous issues concerning the violation of the rule of law in a particular country or generally. However, in spite of these powers, its ability to act effectively is limited by the potential for political interference. This is manifested in several ways. For example, although article 5(2) of the Protocol requires that only representatives from states with a good record in, *inter alia*, good governance, respect for the rule of law and human rights, are elected as members, in reality political calculations trump all else. The same applies to appointments to the various committees, where political considerations are often given priority over technical competence. At the end of the day, many of the states that have for the last three decades maintained the worst continental record regarding compliance with the rule of law have been elected to sit on the PSC⁵⁴ or allowed to appoint members to the committees. Although the operating rules of the PSC provide that the inclusion of any item on the provisional agenda may not be opposed by a member state, the fact that so many states with a bad record of governance are members makes it easy for effective action to be blocked.⁵⁵

The other body that deserves mention here is the APRM. This was established in 2003 by the New Partnership for Africa (NEPAD) Heads of State and Government Implementation Committee (HSGIC) as an instrument for monitoring the performance in governance amongst member states. The APRM was an independent self-monitoring body the membership of which was voluntary. However, in 2014 it was integrated into the AU system. The primary objective of the APRM is to foster the adoption of policies, values, standards and practices of political and economic governance that lead to political stability, accelerated sub-regional and continental economic integration, economic growth and sustainable development. Member states that join the APRM undertake to voluntarily and independently review their compliance with African and international governance commitments. Their performance and progress are measured in four thematic areas, namely, democracy and political governance; economic governance and management; corporate governance; and socio-economic development. It is the review in the area of

54 See, eg, Angola (2012-2014); Burundi (2008-2012); Cameroon (2004-2008 and 2012-2014); DRC (2004-2008 and 2012-2014); Egypt (2006-2008 and 2012-2014); Equatorial Guinea (2010-2013); Gabon (2004-2010); The Gambia (2012-2014); Libya (2004-2006 and 2010-2013); Mauritania (2010-2012); Rwanda (2006-2012); Sudan (2004-2006); Swaziland (2008-2010); and Zimbabwe (2010-2013).

55 Eg, 10 of the 14 members of the first PSC consisted of states most of whom had the dubious reputation of having the worst record regarding rule of law compliance on the continent (Algeria; Cameroon; DRC; Ethiopia; Gabon; Kenya; Libya; Mozambique; Sudan; and Togo).

democracy and democratic governance, which includes several areas critical to the rule of law, such as the executive, legislative and judicial branches of government, civil society and the media.⁵⁶ Although reviews are carried out within 18 months of a member state joining the APRM and thereafter every two to four years, the APRM can commission a review at the request of participating Heads of State and Government if there are signs of a political and economic crisis. A national programme of action for the state concerned to address problems identified is prepared after each review. A monitoring body prepares an annual report on progress in implementing the programme of action for the APRM Forum of Heads of State and Government.

It is fair to say that besides the Ibrahim Index, the APRM perhaps is the most comprehensive attempt by African governments to monitor and promote good governance and, in this way, also monitor compliance with many aspects of the rule of law. Although the APRM is now integrated into the AU, there is insufficient commitment and political will at the highest level to enable it to make the impact it could on governance in general and the rule of law, for that matter. First, only 35 AU members (that is, 65 per cent of AU members) have joined the APRM by signing its Memorandum of Understanding. After more than 10 years of its existence, only 17 of these countries have completed their self-assessments and been peer-reviewed by the Forum. It is not clear why the others have not been peer-reviewed. Second, countries are not bound to implement the APRM recommendations; they may even reject some of these as inappropriate. The reports have more moral value than any sort of coercive value. It is thus not surprising that in spite of the fact that some of the continent's most egregious rule of law violators (such as Algeria, Cameroon, Ethiopia, Mozambique and Rwanda) have been reviewed and given important recommendations to improve their performance, this has had hardly any impact on their behaviour, thus calling into question the vast amounts of taxpayer money spent on the review process. Third, the APRM's lack of adequate resources, along with its continual vulnerability to political interference by states, has weakened its ability to act as an effective independent monitoring body.

Nevertheless, the potential positive impact the APRM can have in monitoring and influencing rule of law change in African countries cannot be ignored. Its critical role as an early warning system was

56 There are nine key objectives in this thematic area. These include the prevention and reduction of intra- and inter-country conflicts in constitutional democracy; promoting periodic political competition and opportunity for choice, the rule of law, a bill of rights and supremacy of the constitution; upholding of the separation of powers; protecting judicial independence; ensuring an effective and accountable parliament as well as accountable, efficient and effective public office holders; the fight against corruption in the political sphere; the promotion and protection of the rights of women, children and young persons and vulnerable groups, including displaced persons and refugees.

underscored in 2007 when its reports warned the continent's leaders of the xenophobic violence brewing in South Africa and Kenya. Nothing was done, and the ensuing attacks and loss of life and property in these countries during 2008 and 2007/2008, respectively, were a wake-up call for African leaders. However, it is uncertain whether any lessons were learnt from this experience. This is so not only because of the steady continental decline in rule of law standards, but also because of the fact that even more violent, and equally fatal, xenophobic attacks again erupted in South Africa in 2015.

To turn now to the issue of enforcement of rule of law standards and values, the literature shows that many approaches are possible.⁵⁷ Within the framework of the AU, pressure is often brought to bear on member states to comply with their rule of law commitments in two main areas, namely, human rights and democratic governance. In both areas, its judicial and quasi-judicial institutions, as well as those of its regional economic communities, have been quite active.

The most widely-known quasi-judicial body is the African Commission on Human and Peoples' Rights (African Commission), provided for in the African Charter on Human and Peoples' Rights of 1981 (African Charter). Established under article 30 of the African Charter, the African Commission is charged with the promotion of human and peoples' rights and ensuring their protection.⁵⁸ The Commission has been co-operating with other human rights institutions (inter-governmental or non-governmental) in many areas relating to the promotion and protection of human rights. It has also appointed Special Rapporteurs on Prisons and Other Places of Detention in Africa; on Arbitrary, Summary and Extra-Judicial Executions; and on Human Rights of Women in Africa to research, gather and document information in these areas for use by the African Commission in formulating advice to African states.

The protective mandate of the African Commission requires it to take measures to ensure that citizens enjoy the rights contained in the African Charter. This entails ensuring that states do not violate these rights and that when they do, the victims are reinstated in their rights. To achieve this, the African Commission has instituted a complaints system through which an individual, an NGO or group of individuals who feel that their rights or those of others have been or are being violated, can petition to the Commission about these violations.⁵⁹ Over the years, the Commission has received and reviewed numerous

57 In the context of the EU, see C Closa & D Koschenov (eds) *Reinforcing rule of law oversight in the European Union* (2016).

58 Art 45 of the Human Rights Charter enumerates the functions of the Commission as (i) the promotion of human and peoples' rights; (ii) the protection of human and peoples' rights; (iii) the interpretation of the provisions of the Human Rights Charter; and (iv) any other task assigned to it by the AU Assembly.

59 A petition could also be made by a state party to the Charter which reasonably believes that another state party has violated any of the provisions of the Charter.

complaints and made recommendations to the states concerned and the AU.⁶⁰ The Commission also sends missions to several state parties to investigate allegations of serious human rights violations, to make recommendations to the state concerned to improve the situation. As part of its protective mandate, the African Commission also receives and considers periodic reports submitted by state parties in conformity with article 62 of the African Charter. In addition, article 45(3) of the African Charter mandates the African Commission to interpret the provisions of the Charter. Based on this provision, the Commission has adopted resolutions clarifying ambiguous provisions in the African Charter.⁶¹

The judicial organ of the AU is the African Court on Human and Peoples' Rights (African Court), which was established to complement and reinforce the African Commission.⁶² The ability of this Court to play a significant role in the enforcement of the rule of law in Africa is influenced by two factors. First, its jurisdiction is extended to disputes concerning the interpretation and application of the African Charter and any other relevant human rights instruments ratified by the states concerned. Second, individuals and NGOs can bring matters before the Court only if the state concerned has made a special declaration under article 34(6) recognising the competence of the Court to receive such cases. As of May 2017, only eight of the 30 state parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) had made this declaration.⁶³ It is worth noting some of the continent's good performers in respect of rule of law compliance, such as Botswana, Cape Verde, Namibia and Seychelles, are not parties to this Protocol. Some of the equally highly-rated countries, such as Mauritius and South Africa, have not made

60 Most of these decisions have been published in the series *African Human Rights Law Reports*, published annually by the Pretoria University Law Press (PULP) since 2003. The series is available at <http://www.pulp.up.ac.za/catalogue> (accessed 30 June 2017).

61 Examples of these are the Resolution on Electoral Process and Participatory Governance (1996); the Resolution on Granting Observer Status to National Human Rights Institutions in Africa (1998); the Dakar Declaration and Recommendations on the Right to Fair Trial (1999); the Resolution Urging the States to Envisage a Moratorium on the Death Penalty (1999); the Resolution on the HIV/AIDS Pandemic – Threat against Human Rights and Humanity (2001); the Declaration of Principles on Freedom of Expression in Africa (2002); the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines on Torture); and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003). See generally C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 359.

62 The Court was established by virtue of art 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998, which entered into force on 25 January 2004, http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf (accessed 30 June 2017).

63 These are Benin; Burkina Faso; Côte d'Ivoire; Ghana; Mali; Malawi; Tanzania; and Tunisia.

the article 34(6) declaration. Therefore, it is unlikely that the African Court will have the same impact that the African Commission has had, especially when dealing with human rights violations involving individuals.

Apart from the AU's judicial and quasi-judicial institutions, most of its other organs, such as the AU Commission, the PSC and the Pan-African Parliament, often intervene in one way or another when violations of the rule of law threaten peace and security within, and sometimes between, member states. The African Democracy Charter is perhaps the most comprehensive AU legal instrument covering several aspects of the rule of law. This Charter promotes good governance by advocating democracy, the rule of law and human rights, and providing sanctions in cases of unconstitutional changes of government. The Democracy Charter basically consolidates in one instrument a number of other previous instruments and declarations designed to promote good governance, constitutionalism and the rule of law, and backs this up with a system of sanctions. Although the African Democracy Charter has significantly reduced the incidences of unconstitutional changes of government in Africa and the resulting rule of law violations associated with these, its effectiveness has been limited by a lack of political will to enforce it consistently in every situation where the Democracy Charter has been violated. As a result, it has not had the impact it could have had in promoting good governance, constitutionalism, respect for the rule of law, and human rights.⁶⁴

More generally, the RECs⁶⁵ have also been involved in dealing with crises provoked by violations of one or another aspect of the rule of law in member states. In addition, numerous international non-governmental institutions in Africa play an important role in the enforcement of the rule of law.⁶⁶ These bodies in their different ways intervene to investigate serious cases of systemic violations of the rule of law, and issue statements or recommendations that can bring pressure to bear on governments to change their policies.

Nevertheless, it is not surprising that in spite of all the numerous instruments mentioned above, the rule of law situation in Africa

64 See generally S Saungweme 'A critical look at the Charter on Democracy, Elections and Governance in Africa' http://www.sarpn.org/documents/d0002566/Charter_Saungweme_May2007.pdf (accessed 30 June 2017); PJ Glen 'Institutionalising democracy in Africa: A comment on the African Charter on Democracy, Elections and Governance' (2012) 5 *African Journal of Legal Studies* 149.

65 The main RECs are the Economic Community of West African States (ECOWAS); the East African Community (EAC); the West African Economic and Monetary Union (UEMOA); the Southern African Development Community (SADC); the Intergovernmental Authority on Development (IGAD); and the Arab Maghreb Union.

66 See, eg, the African Election Authorities; the Anti-Corruption and Economic Malpractice Observatory; Corruption Watch; the African Bar Association; the African Association of International Law; the East African Magistrates and Judges' Association; and the Conference of Constitutional Jurisdictions of Africa (CCJA).

remains precarious. The AU and the RECs must do more than what they have done. Once they do so, are there any lessons to be learnt from Europe, particularly considering the fact that the design of the AU was influenced by that of the EU?

4.2 Learning from the Council of Europe and the European Union

Europe has two important institutional frameworks for dealing with rule of law issues, one focused on monitoring and reporting, the other on enforcement. Most of the existing mechanisms focus on the former rather than the latter. The main gaps today involve enforcement mechanisms because of the need to promptly intervene and prevent certain types of rule of law crises from degenerating into generalised civil strife.

4.2.1 Council of Europe framework for monitoring the rule of law

In March 2016, the European Commission for Democracy Through Law, commonly known as the Venice Commission, adopted the Rule of Law Checklist. The checklist provides a tool for assessing the rule of law in a given country from the viewpoint of its constitutional and legal structures, the legislation in force and the existing case law. The objective is to provide an objective, thorough, transparent and equal assessment of the state of the rule of law in a country.

The checklist is meant to be used by a variety of actors that may decide to carry out a rule of law assessment. These can include parliaments, state institutions, civil society organisations, international and regional organisations. Assessments have to take into account the entire context, consider which parameters have been met and to what extent, as well as other similar factors. Although the checklist covers what are regarded as the core elements of the rule of law, it is not exhaustive and is bound to change with time as new issues arise or old issues have to be redefined to meet changing circumstances.

The benchmarks against which the rule of law must be monitored and assessed under the Venice Commission rule of law checklist consist of the following:

- (i) legality;
- (ii) legal certainty;
- (iii) the prevention of abuse (misuse) of powers; whether there are legal safeguards against arbitrariness and abuse of power (*détournement de pouvoir*) by public authorities;
- (iv) equality before the law and non-discrimination;
- (v) access to justice; and
- (vi) examples of particular challenges to the rule of law.

The Venice Commission cannot initiate a rule of law assessment in any country. It acts only when it is requested to do so and will use the checklist to prepare its opinion. It may be asked to carry out a rule of

law assessment by the EU Commission, which may use this as one of the reports to guide its intervention to enforce the EU values and principles on the rule of law in a member state.

4.2.2 European Union framework for enforcing the rule of law

With respect to the EU, article 4 of the Treaty on European Union (EU Treaty) states that the EU is founded on fundamental values, including the rule of law, democracy and fundamental rights. The EU Parliament in July 2013 requested that 'member states be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law'.⁶⁷ In March 2014, in response to a number of 'crisis events' in some member states which suggested that there were 'systemic threats to the rule of law', the EU Commission adopted a new EU framework to strengthen the rule of law. It also established a rule of law dialogue to be held each year among member states to promote and safeguard the rule of law within the EU.

The EU framework is designed to address and resolve a situation where there is a systemic threat to the rule of law. As such, it precedes and complements more specific action that is provided for under article 7 of the EU Treaty. Article 7 aims to ensure that all EU countries respect the common values of the EU, including the rule of law. The preventive mechanism of article 7(1) can be activated only in case of a 'clear risk of a serious breach', and the sanctioning mechanism of article 7(2) only in case of a 'serious and persistent breach by a member state' of the values set out in article 2. The preventive mechanism allows the Council to issue a warning to the EU country concerned before a 'serious breach' actually has materialised. The sanctioning mechanism allows the Council to suspend certain rights deriving from the application of the treaties to the EU country in question, including the voting rights of that country in the Council. In this case, the 'serious breach' must have persisted for some time.

Since 2009, the EU Commission has on several occasions been confronted with crisis events in some EU countries that revealed specific rule of law problems. The Commission has addressed these events by exerting political pressure as well as launching infringement proceedings in case of violations of EU law. The preventive and sanctioning mechanisms of article 7 have so far not been applied. All EU institutions have a complementary role to play in promoting and maintaining the rule of law in the EU. The European Parliament has also on several occasions called for EU countries to be regularly assessed in terms of their continued compliance with the fundamental

67 See 'Communication from the Commission to the European Parliament and the Council. A new EU framework to strengthen the rule of law' 3, http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf (accessed 30 June 2017).

values of the EU and the requirement of democracy and the rule of law.

Because the thresholds for activating both mechanisms of article 7 are very high, thereby underlining that the nature of these mechanisms is to be a last resort, they have not been able to respond quickly to threats to the rule of law in member states.⁶⁸ The New EU Framework to Strengthen the Rule of Law was developed to provide clarity and enhance predictability as to the actions that the EU Commission may be called upon to take in future. The Framework is supposed to be activated where the authorities of a member state are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or proper functioning of institutions, and where safeguard mechanisms established at national level to secure the rule of law are not working. It is not designed to deal with individual breaches of fundamental rights or a miscarriage or miscarriages of justice, which should be dealt with by the national judicial system. The main purpose of the Framework is to address threats to the rule of law which are of a systemic nature. For example, if the political, institutional and/or legal order of a member state, such as its constitutional structure, separation of powers, the independence or impartiality of the judiciary or its system of judicial review, are threatened by new measures or other practices adopted by the public authorities without possibilities for domestic redress, then the Framework will need to be activated.

The framework for addressing systemic threats to the rule of law is based on four principles which guide the action that the Commission will take. These are:

- (i) finding a solution through dialogue with the member state concerned;
- (ii) ensuring an objective and thorough assessment of the situation at stake;
- (iii) respecting the principle of equal treatment of member states; and
- (iv) indicating swift and concrete actions to address the systemic threat and to avoid the use of article 7.

The process itself is composed of at least three stages: a Commission assessment; a Commission recommendation; and a follow-up to the recommendation. The Commission usually starts by collecting and examining all relevant information from diverse sources to determine whether there indeed is a clear indication of a systemic threat to the rule of law. If it considers this indeed to be the case, it will issue a 'rule

68 The art 7 mechanism that can be triggered by the Commission, the European Parliament and one-third of the member states has not always been suited to swift and effective intervention, more specifically those situations that do not fall under the scope of EU law and cannot be said to meet the threshold of art 7 but which do raise concerns regarding respect for the rule of law in a particular member state.

of law opinion' to the member state concerned substantiating its concerns and giving it the opportunity to respond. In line with the 'duty of sincere co-operation' set out in article 4(3) of the EU Treaty, member states are expected to co-operate in the process and avoid any obstruction. During this phase, the Commission may also seek external expertise, the main purpose of which is to provide a comparative analysis of existing rules and practices in other member states.⁶⁹

If the matter is not satisfactorily resolved during the first stage, the Commission during the next stage will issue a 'rule of law recommendation' to the member state if it finds that there is objective evidence of a systemic threat and that the authorities are not taking appropriate action to address it. These recommendations will be guided by the dialogue with the member state and will include specific indications of ways and measures that need to be taken.

The final stage consists of a follow-up to the Commission's recommendations. This basically involves monitoring to see, for example, if some of the practices that have raised concerns continue to occur, or how the state implements the commitments needed to resolve the situation. If there is no satisfactory follow-up to the recommendations within the time limits set, the Commission may then activate one of the mechanisms set out in article 7.

As a rule and in appropriate cases, the Commission may seek the advice of the Council of Europe and its Venice Commission, and will co-ordinate its analysis with them in all cases where the matter is also under their consideration and analysis. In many respects, the Council of Europe and the Venice Commission complement each other in monitoring and enforcing the rule of law in Europe.

The question is whether, given the gravity of its rule of law crisis, Africa can learn from what is presently occurring in Europe.

5 Conclusion

Africa is experiencing a period of great turmoil and political uncertainty. The euphoria of the 1990s reminds us almost of independence ecstasy of the 1960s. The major lesson that can be learned is that the rule of law is as fragile in Africa today as it was at independence in the 1960s. This is holding back the continent's progress, and remains the biggest developmental challenge for the future. Because of the acute rule of law deficit, there is no enabling environment to attract the levels of investment that are needed to

69 The Commission may also decide to seek advice and assistance from members of the judicial networks in the EU, such as the networks of the presidents of Supreme Courts of the EU and the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU.

revive the continent's depressed economies and sustain economic growth.

At the normative level, while impressive steps have been taken at national and regional levels to entrench a culture of respect for the rule of law in Africa, an overview of the trend in the last three decades in the 54 countries on the continent, using several survey indicators and diverse sources of data, shows a steady and disturbing decline in adherence to the rule of law. The cause for alarm is not merely due to the continuous nature of this decline, but also because of the fact that it now affects not only countries well noted for their poor governance record, but also those that for decades have been known for their excellent governance and rule of law records, such as Botswana, Mauritius and Cape Verde and, more recently, Ghana, Namibia and South Africa.

An analysis of the performance of African countries suggests that there are not enough tools available at national and regional levels to deal with the rule of law crisis. How else can the fact be explained that, in spite of considerable efforts over the last few decades to ensure alternation of power and the adoption of the African Democracy Charter, more than 30 per cent of the continent's leaders have been in power for more than 10 years, and that in many of these countries their presidents operate more or less outside national laws and constitutions?⁷⁰ Indeed, democracy and elections have been used, particularly in the last two decades, to distort and undermine the rule of law. To address the problems posed by the deteriorating rule of law situation, it is suggested that a number of measures should be taken.

First, the AU and the RECs must take the lead to ensure that African countries are run by leaders guided by the rule of law and not by soldiers and strongmen guided by their unpredictable impulses – in other words, that Africa is governed by the rule of law and not by the rule by law imposed by dubious majorities. As a global ideal and because of the high level of interdependency, which means that a violation of many of the core elements of the rule of law in one country, especially, was continuous and systemic, is bound to have adverse effects on other states, a collective monitoring and enforcement strategy within the institutional framework of the AU and the RECs is imperative. For example, the forces of bigotry, populism, racism and xenophobia which are on the rise in countries such as

70 The current list of the longest-serving presidents is as follows: Teodoro Obiang Nguema Mbasogo of Equatorial Guinea (38 years); Jose Eduardo Dos Santos of Angola (38 years); Paul Biya of Cameroon (35 years); Yoweri Museveni of Uganda (31 years); Omar Al-Bashir of Sudan (28 years); Idriss Deby of Chad (27 years); Isaias Afwerki of Eritrea (24 years); Denis Sassou Nguesso of Republic of Congo (20 years; but if a previous stint from 1979 to 1992 is included it becomes 34 years); Abdelaziz Bouteflika of Algeria (18 years); Ismail Omar Guelleh of Djibouti (18 years); Paul Kagame of Rwanda (17 years); Joseph Kabila of DRC (16 years); Faure Gnassingbe of Togo (12 years); and Pierre Nkurunziza of Burundi (11 years).

South Africa can have far-reaching consequences for other countries in the Southern African region and beyond. A co-ordinated collective effort by states both within the AU and the RECs stands a better chance of exerting peer pressure for more effective corrective action to be taken.

Second, it is vital for the continent to acquire its own measurement systems and for countries to develop their own strategies to gather and use robust and reliable data to regularly monitor progress in the implementation of the various components of the rule of law in order to identify and deal with problem areas. Addressing the continent's deep-rooted and systemic rule of law failures calls for a state of permanent vigilance and more proactive measures than those that have so far been taken by the AU. The EU framework for enforcing the rule of law provides many workable options which the AU Commission can adopt and implement without the need for amending any existing instrument or even adopting a new instrument.

Finally, there is no urgent need for new monitoring or enforcement mechanisms in either the AU or its RECs. What evidently is needed, however, is a genuine and serious commitment by the AU Commission and the other institutions to fully implement the existing instruments, particularly the African Democracy Charter. If the African Commission had discharged the responsibilities conferred on it by article 44(2)(a), which states that '[t]he Commission shall *develop benchmarks* for the implementation of the commitments and principles of this Charter and *evaluate compliance* by state parties',⁷¹ this would have gone a long way towards exerting pressure on states to implement the numerous components of the rule of law provided for in the African Democracy Charter.

The African Commission's mandate is very clear: Implementing this mandate does not require the approval of member states, although the Commission is required, as with all its other activities, to report to the political bodies of the AU. Its failure to initiate the implementation of the compliance mechanisms in chapter 10 of the African Democracy Charter therefore is inexplicable. This lack of administrative will to implement the Democracy Charter has contributed considerably to the failure of this very progressive instrument to take effect and contribute to entrenching democracy, good governance, respect for the rule of law and human rights on the continent. One may argue that the failure of the AU Commission to discharge its rule of law mandate under the Democracy Charter probably is one of the predictable consequences of having too many illiberal member states whose citizens work in the organisation's numerous institutions. Individuals from such states are unlikely to promote progressive ideas and policies within the AU and its structures. Thus, the continuous disrespect for the rule of law in so

71 My emphasis.

many AU member states may in this indirect manner have a negative impact upon the citizens of other member states.

In the final analysis, there is no denying that the current state of the rule of law in Africa calls for urgent and decisive intervention. Intervention by the AU and its RECs within their existing treaty frameworks is a viable option that needs to be explored. In so doing, it is imperative to adopt the two-prong approach of, in the first place, encouraging monitoring through routine, continuous and systematic collection and analysis of information about the state of adherence to the rule of law and, in the second place, using this information to develop strategies to promote the enforcement of rule of law principles, values and standards.

The rule of law and democracy in Ghana since independence: Uneasy bedfellows?

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Summary

There is irrefutable evidence supporting the assertion that Ghanaians have consistently rejected any form of abuse of power and dictatorial rule. The Bond of 1844 signed on 6 March 1844, for instance, was a climax of agitation against the dictatorial rule of Governor George Maclean. Similarly, the formation of the United Gold Coast Convention, a century later in 1947, was to resist colonial rule and to pave the way for independence from the British. The question that arises is whether post-independence Ghana has lived up to the aspiration of the people to live in freedom from any form of oppression. This article, therefore, seeks to trace Ghana's pursuit of democratic governance and the rule of law since independence and to test whether there has been a recognition of and adherence to the rule of law which the people had consistently yearned for. In doing so, the article examines how the rule of law has fared during each of the four periods of democratic rule in the political history of the country, namely, the immediate post-independence era (1957-1966); the Second Republican era (1969-1971); the Third Republican era (1979-1981); and the present Fourth Republican constitutional era (1993 to date). What emerges is the fact that most of the post-independence successive governments have betrayed the people by failing to live up to the aspirations of the people to live under good governance and the rule of law. The article, therefore, is a critique of Ghana's march towards the entrenchment of the rule of law as the basis of democracy. It, therefore,

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proposes changes that ought to be made to the constitutional structure of Ghana in order to make the democratic system of governance more meaningful and also achieve the progress that adherence to the rule of law inevitably brings.

Key words: *constitutionalism; democratic governance; executive power; human rights; judicial independence; rule of law*

1 Introduction

Ghana, being the first African country south of the Sahara to gain independence, has attracted much attention in terms of its democratic credentials. However, it is worth noting that democracy is not an abstract entity. Its success is measured by a number of factors. Among these are the rule of law, strong institutions and governance structures. It is in this context that we seek to examine how Ghana has fared in its democratic aspirations and respect for the rule of law. This exercise allows us to identify the successes and failures with a view to making recommendations for redressing the shortcomings. To achieve the intended goal, the article traces Ghana's quest for democratic governance since independence. The article, therefore, examines, primarily through case law, how the rule of law has fared during each of the four periods of democratic rule in the political history of the country since independence, namely, the immediate post-independence era (1957-1966); the Second Republican era (1969-1971); the Third Republican era (1979-1981); and the present Fourth Republican constitutional era (1993 to date). Interspersed between these periods of democratic rule were military *coups d'état*, characterised by dictatorial rule. The article is a critique of Ghana's stride towards the entrenchment of the rule of law as the fundamental underlying tenet of democracy. It proposes changes that ought to be made to Ghana's present constitutional structure in order to make the democratic system of governance more meaningful, and entrench the rule of law more effectively.

2 Rule of law and democratic governance in Ghana: 1957 to 1992

2.1 Post-independence era (1957-1966)

On 6 March 1957,¹ the Gold Coast attained independence and

1 This was the 'appointed day' when the Gold Coast was to attain political independence from Great Britain. Thus, sec 5(2) of the Ghana Independence Act of 1957 provided: 'In this Act, the expression "the appointed day" means the

adopted the name Ghana.² Not long after independence, however, it became obvious that the democratic government of Ghana had no interest in upholding the rule of law. This stems from the fact that its legislative agenda betrayed some of the fundamental tenets of the rule of law. For example, in 1958 Parliament enacted the Preventive Detention Act, which sought to detain persons whose future actions were deemed likely to be prejudicial to the security of the state.³ Similarly, several orders were issued pursuant to the Deportation Act,⁴ thereby stripping Ghanaian citizens of their citizenship status for the purposes of deporting them from Ghana. It must be stated that these laws were ostensibly enacted in order to safeguard and maintain security in the newly-independent state. However, it seems as though the government overreacted in the enforcement of these laws, and the judiciary, instead of being a buffer between the executive and the ruled, chose to be an accomplice in the suppression of the fundamental rights of the citizenry. In this regard, four cases stand out, an examination of which reveals the extent of the disregard for the rule of law in Ghana in the immediate aftermath of independence, and the active acquiescence of the courts.⁵ It was at that stage that one would have expected the courts to stand up and defend the rule of law and fundamental freedoms of the people. However, as is demonstrated in the four cases, there was the active acquiescence of the courts to the extent that they became 'more executive minded than the executive', contrary to the admonition of Lord Atkin.⁶ In this sense, the judiciary surrendered its independence to the executive through self-infliction. A fifth case is also briefly considered, as the aftermath of this case shows how the executive capitalised on the self-inflicted wounds of the judiciary, which effectively emboldened the former to overturn a Supreme Court decision and subsequently led to the arbitrary dismissal of the then Chief Justice.

The first case, *Lardan v Attorney-General*,⁷ concerned a deportation order made pursuant to the Deportation Act of 1957. Under this order, the plaintiff was to be deported from Ghana as it was alleged that his continuous presence was not conducive to the public good. He brought an action seeking a declaration to the effect that the order was invalid by virtue of the fact that the Act was not applicable to him

sixth day of March, nineteen hundred and fifty-seven, unless before that date Her Majesty has by Order in Council appointed some other day to be the appointed day for the purposes of this Act.'

2 Ghana was the name of an ancient sub-Saharan African kingdom; and it is widely asserted that Dr JB Danquah was the person who proposed this name for the new country.

3 Preventive Detention Act of 1958.

4 Deportation Act of 1957.

5 These cases have been selected because they represent the major instances when the Ghanaian judiciary was called upon in the immediate post-independence era to uphold the human rights of Ghanaians.

6 *Liversidge v Anderson* [1942] AC 206 244.

7 (No 2) [1957] 3 WALR 114.

since he was a Ghanaian citizen by birth. While the matter was pending in court, Parliament enacted the Deportation (Othman Lardan and Amadu Baba) Act of 1957 which gave power to the Minister of the Interior to specifically deport the two individuals from Ghana. Furthermore, this Act sought to terminate any proceedings in any court instituted for the purpose of challenging the validity of any deportation order made against the persons affected by the Act. Section 4(2) provided as follows:⁸

On any order of deportation being made hereunder, any deportation order made under the Deportation Act, 1957, in respect of the same deportee shall be automatically revoked and if the deportee is in custody under the provisions of the Deportation Act, 1957, he may, notwithstanding any proceedings in any court, whether pending or determined, be retained in custody for the purposes of this Act without being released and such custody shall be deemed to be legal custody; and any proceedings in any court instituted for the purpose of impugning the validity of the Alhaji Alufa Othman Larden Lalemie Deportation Order, 1957, or the Alhaji Amadu Baba Deportation Order, 1957, shall be automatically determined.

The question the Court had to determine was whether the Act was *ultra vires* the Constitution of Ghana. Smith J held as follows:⁹

I have considered all the other authorities cited to me and they illustrate the same point that the words 'peace, order and good government' with no reservation attached, no restriction as to specific subjects and without qualification, give to any country 'the same plenary powers as are possessed by the Imperial Parliament in England'. It was conceded that this Act of Deportation, and that was a momentary indulgence in fantasy, if passed by the Imperial Government would be a matter for Parliament only and the English courts would be powerless to interfere. If, as I hold, the words 'peace, order and good government', unqualified in any way, are plenary powers possessed by Parliament and no less than the powers possessed by the Imperial Parliament, then it follows just as it would in England that the court here has no power to inquire into such an Act. I consider, therefore, that any law which comes within the ambit of the Ghana (Constitution) Order in Council, s 31, and which does not contravene any other provision in the Constitution can only be challenged in a court of law if it violates or purports to violate sub-section (2) or (3) of the section. On that view, the Act deporting these two persons, not being in contravention of any expressed limitation in the Ghana (Constitution) Order in Council, 1957, is a matter for Parliament ... In England it is not open to the court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to the court's notions of justice and, so far as the Ghana (Constitution) Order in Council, s 31(1), is concerned, that is the position in which I find myself. For these reasons I hold that it is not for the court to inquire into this particular Act and the pending actions before the Kumasi Divisional Court are determined under the provisions of section 4(2) of the Act.

The judgment was substantially flawed by the fact that Smith J forgot that Ghana was operating under a written constitution and erroneously relied on the British parliamentary system where supremacy of Parliament operates. If he had considered the new legal

8 Deportation (Othman Lardan and Amadu Baba) Act of 1957.

9 *Lardan* (n 7 above).

system, he should not have decided in favour of the government. Smith J's decision paved the way for the excessive impunity that followed. This observation becomes more poignant as a result of the holding in the second case, and exposes the active acquiescence of the courts in fomenting impunity and disregard for the rule of law in the immediate post-independence era.

The second case, *Balogun v Edusei*,¹⁰ also revolved around the implementation of the Deportation Act of 1957. Four persons, including Wahabi Balogun, were arrested pursuant to a deportation order made under the authority of the Deportation Act. Counsel for the applicants filed an *ex parte* motion for a writ of *habeas corpus* on the ground that the applicants were all Ghanaian citizens and as such could not be the subject matter of the deportation order. The Court therefore directed that a notice of the motion be served on the Minister of the Interior, the Acting Commissioner of Police as well as the Director of Prisons. However, the notice was served on the following day, by which time the applicants had already been deported to Nigeria. The Court, therefore, found the respondents to be in contempt of court, but stayed execution of their committal to prison in the hope that they would be advised to apologise.

However, on the morning of the adjourned date, Parliament held an emergency session where it passed the Deportation (Indemnity) Act 47 of 1958. Section 2 of the Act provided as follows:¹¹

The Honourable Krobo Edusei, formerly Minister of the Interior, and Erasmus Ransford Tawiah Madjitey, Commissioner of Police, shall be indemnified from all penalties for contempt of court and exonerated from all other liabilities in respect of any action taken by them in carrying out the deportation order in the Schedule of this Act after the institution by the persons named in those orders of proceedings by way of *habeas corpus*.

Smith J found himself in a position that he had created by his earlier decision in the *Lardan* case. Obviously appalled by the blatant interference in the administration of justice by the executive and the legislature, he delivered a judgment that was poignant yet totally irrelevant in the grand scheme of things. He must have highly regretted his earlier decision, but it was far too late for his newly-discovered face-saving message:¹²

By the passing of this Act I take it that the court's finding that the respondents are in contempt is not challenged by Parliament, but that the intention is to neutralise any consequential order that I might make. It is plain that Parliament prefers that the respondents should not apologise, and it has passed this Act in order to nullify any order which I might make in the absence of the apology. The courts of justice exist to fulfil, not to destroy, the law, and it would not make sense for me to record an order which is incapable of being carried out. As to the deportations while the applications for *habeas corpus* were still *sub judice*, I cannot over-emphasise

10 [1957] 3 WALR 547.

11 Deportation (Indemnity) Act 47 of 1958.

12 *Balogun* (n 10 above).

the undesirability of interference by the executive with the functions of the court. Persistent indulgence in such a practice could not have any other than the most serious ill-effect on the well-being of the country. Decisions of a court are as binding upon the executive as the laws which Parliament passes are binding upon the ordinary citizen, and it is the court that enforces upon the people obedience to these laws, thereby aiding Parliament in the ordering of the country. In the result, the finding of contempt stands, but I make no further order.

Unfortunately, the learned judge by virtue of his own decision in the earlier *Lardan* case could not have arrived at any other conclusion. These two cases, therefore, laid the foundation for executive impunity in Ghana, for if Smith J had been bold enough to find the actions of the executive and legislature as an affront to the Constitution in the aforementioned cases, especially in the *Lardan* case, the trajectory of the political and legal development of Ghana could have taken a different course from that which eventually emerged – a protracted period characterised by the abuse of human rights and neglect of the rule of law. The third case of *In Re Dumoga & 12 Others*¹³ involved the application of the Preventive Detention Act of 1958. The facts were that, on or about 14 March 1960, Kofi Dumoga and 12 others were arrested and detained by virtue of two preventive detention orders, made under powers conferred by section 2 of the Preventive Detention Act, 1958. On 18 March 1960, the applicants were duly served with the grounds of detention. The applicants applied to the High Court for orders of *habeas corpus* directed to the Minister of the Interior and the Director of Prisons to show cause why they should not be released from detention. However, the Court held that where a person was in lawful custody, an application for *habeas corpus* does not lie and that, 'where a statute confers a discretion upon an executive officer to arrest and detain persons, the court cannot enquire into the exercise of that discretion, provided the officer acts in good faith'.¹⁴ In this case, the Court thus further entrenched the ability of the executive to abuse the rights of individuals without having to provide reasons for the curtailment of these rights, and the final nail in the coffin was provided in the next case.

The fourth case, *In Re Akoto & 7 Others*,¹⁵ has come to epitomise the extent of executive and legislative impunity, and the shameful role that the courts of Ghana played towards it. The appellants in this case were arrested and detained under the Preventive Detention Act of 1958. Subsequently, they applied for a writ of *habeas corpus* but the application was refused by the High Court. An appeal was lodged in the Supreme Court on the grounds, *inter alia*, that the Preventive Detention Act was in excess of the powers conferred on Parliament by the Constitution and contravened article 13 of the 1960 Constitution of Ghana.¹⁶ The Court held that the declaration by the President on

13 [1961] GLR 44.

14 *In Re Dumoga* (n 13 above).

15 [1961] GLR 523.

the assumption of office was similar to the Coronation Oath of the British Monarch. Hence, such a declaration, in the opinion of the Court, did not constitute a Bill of Rights, thereby creating no legal obligations enforceable in a court of law.

The Supreme Court adopted the position previously advanced by Smith J, namely, that Parliament had plenary powers to essentially do whatever it deemed fit, and that courts were not the forum to challenge the constitutionality of Acts of Parliament or actions of the executive. The Court held as follows:¹⁷

This contention, however, is based on a misconception of the intent, purpose and effect of article 13(1) the provisions which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the declaration can be said to have the statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a 'Bill of Rights' in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable ... [I]n our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve ... [T]he declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy from any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts.

This signalled the entrenchment of impunity and unaccountability in the governance of the country. This was a significant contribution to the state of impunity on the part of the executive as it was the decision of the highest court of the land. Such a state of affairs is what led to autocratic rule, which was formalised in 1964 by virtue of the enactment of the Constitution (Amendment) Act 224 of 1964.¹⁸

The fifth case, *The State v Otchere & Others*,¹⁹ is considered not for the merits of the judicial decision, because in fact the Court did justice by acquitting some of the accused persons against whom charges of treason and conspiracy to commit treason could not be substantiated, much to the displeasure of the government. Rather, the reason we consider this case is because of what happened after the Court had reached its decision. The facts were that the accused persons were alleged to have held meetings in Lomé, Togo, between 1961 and

16 On 1 July 1960, Ghana attained Republican status and thus adopted a new Constitution. Art 13 of this Constitution provided for a solemn declaration to be made by the President on assumption of office. These included his adherence to the principles of non-discrimination, freedom of speech and expression, assembly and the right of access to courts of law.

17 *In Re Akoto* (n 15 above).

18 This Act made Ghana a one-party state and provided for other radical powers for the President, including the removal of judges from office without recourse to any laid-down procedure.

19 2 G & G 739 (2d) 739, [1963] 2 GLR 463.

1962 where they agreed to overthrow the government of Ghana by unlawful means. It was further alleged that the assassination attempt on the life of the President in August 1962 as well several bombings that had occurred in the capital city were all carried out in furtherance of the conspiracy. Only the first and second accused were convicted, while the third, fourth and fifth accused were acquitted and discharged as a result of the failure of the prosecution to discharge their burden of proof.

What occurred next was only the logical outcome of the unfettered executive power, which the judiciary had already actively acquiesced to entrenching in our body politic. Thus, by virtue of the Special Criminal Division Instrument, 1963 (EI 161), the President of Ghana, Kwame Nkrumah, unilaterally declared the decision of the Court null and void and ordered the re-arrest and re-trial of the acquitted persons. He also summarily dismissed the Chief Justice, Sir Arku Korsah, who had presided over the case. Such was the sheer impunity existing during this period and, as already noted, it was given constitutional blessing the very next year, by way of a constitutional amendment.²⁰

The blatant abdication of judicial responsibility during the immediate post-independence era that resulted in the dictatorial rule of Nkrumah was tragic as Ghana had hitherto been regarded as a beacon of democracy and hope in the sub-Saharan African region, having been the first country in the region to obtain independence. Thus, the failure of the judiciary, in particular the Supreme Court, to uphold the rule of law during this era is deeply regrettable. That notwithstanding, the political pressures at the time and the apparent instability of the state may have directly influenced how the judges reacted through their decisions. However, it is our position that if the judges were independently-minded and conscientious of their duty to upholding the rule of law as the primary consideration in all cases, a different path would have been carved out for the political and legal development of the country. Thus, the courts actively aided the executive and the legislature in undermining democracy in Ghana, and with that came the total neglect of the rule of law. Therefore, it is not surprising that the Ghanaian army and police service overthrew the Nkrumah regime in February 1966.²¹

Since the country had been declared a one-party state and no other means for removing the oppressive and autocratic regime existed in law, such an outcome (*coups d'état*) must have been foreseeable. As distasteful as this may seem, it represented the only option available

20 Constitution (Amendment) Act (n 18 above).

21 We do not intend to justify the unconstitutional or illegal overthrow of governments generally, but rather seek to point out the fact that it was the neglect of and wanton disregard for the rule of law that manifested as one of the causal factors for the first *coup d'état* in the history of Ghana. In any case, the regime that existed in Ghana after the 1964 constitutional amendment, in our opinion, was an unconstitutional one.

to the people, since the Supreme Court's holding that the enforcement of the fundamental human rights and freedoms contained in article 13 were only moral obligations on the President and that no legal recourse existed except through the ballot box, had been essentially rendered nugatory.²² Nevertheless, the regime that existed from 1964 onwards (and even to some extent from 1960) cannot by any stretch of the imagination be considered a constitutional government of Ghana. To suggest otherwise is to make a mockery out of the ideals of constitutionalism, which has the rule of law as its most fundamental tenet, the absence of which has clearly been demonstrated in the preceding paragraphs.

2.2 Second Republican era (1969-1971)

Before the advent of the Second Republic, a *coup d'état* had taken place on 24 February 1966, as already noted. As a result, Kwame Nkrumah was removed from office as President, and the Constitution of 1960 was abrogated.²³ The National Liberation Council (NLC), made up of members of the security agencies, including the Ghanaian army and police service, administered the affairs of the state between 1966 and 1969. The NLC, therefore, ushered in a new era of constitutional governance, culminating in the adoption of the 1969 Second Republican Constitution and the ascension to political power by a democratically-elected government, headed by Prime Minister Kofi Abrefa Busia.²⁴

One case during the Second Republican era signifies the judiciary's attempt to redeem its image from the immediate post-independence era. The case of *Sallah v Attorney-General*,²⁵ therefore, is of paramount importance in any discussion of democracy and the rule of law during this period of constitutional governance in Ghana. The facts of the case were that Mr EK Sallah had been appointed as manager in the Ghana National Trading Corporation (GNTC) in October 1967. The GNTC was a body corporate originally established as a state trading corporation in 1961 pursuant to Executive Instrument 203 that was issued under the authority of the Statutory Corporations Act 41 of 1961. In 1964, a new Statutory Corporations Act 232 was enacted, and a new Legislative Instrument (LI 395) was made, continuing the existence of the GNTC as a body corporate.

22 This is because after the 1964 constitutional amendments, there was no other way for the people to express their political will through elections and hold the government to account in that way, since the country had been declared a one-party state. In a sense, therefore, Nkrumah himself laid the foundation for his own overthrow, and his dictatorial tendencies are what led to the *coup d'état* of 24 February 1966.

23 National Liberation Council (Establishment) Proclamation 1966.

24 Kofi Abrefa Busia was the leader of the Progress Party (PP) that won the 1969 general elections in Ghana in a landslide victory.

25 2 G & G 739 (2d) 1319, [1970] GLR 55.

On 21 February 1970, Mr Sallah received a letter from the Presidential Commission terminating his appointment with the GNTC in apparent accordance with section 9(1) of the Transitional Provisions of the 1969 Constitution. However, he insisted that his office did not fall within any of the categories of offices contained in section 9(1) as established by the NLC. He therefore brought an action in the Supreme Court for a declaration to the effect that on a true and proper interpretation of section 9(1), the government was not entitled to terminate his appointment. The issues to be determined by the Court were twofold: (i) whether or not the word 'established' should be given its ordinary dictionary meaning or a secondary meaning of 'continuing in force', as was being advanced by the Attorney-General as justification for Mr Sallah's termination; and (ii) whether the actions of the President were immune from question in any court while he remained in office.

In response to the first issue, the Court held:²⁶

The effect of the NLC Proclamation was that it announced to the world that the then government of the First Republic had been overthrown by the NLC. It further disclosed the intentions of the NLC by making it clear that it reserved the right to alter all existing laws by Decree. The Proclamation did not repeal, revoke or abrogate the 1960 Constitution; it merely suspended its operation. The 1960 Constitution itself recognised the existence of certain laws, such as common law and customary law and certain enactments existing at the time of the coming into force of the Constitution, which did not derive authority or validity from it. To recognise the existence of a state of affairs is a far cry from giving that state of affairs its validity.

The Court therefore granted Mr Sallah's application for a declaration that his office had not been 'established' by the NLC. In terms of whether the actions of the President were immune from question in any court during his term of office, it was held as follows:²⁷

Article 36(6) merely provided a procedural not substantive, immunity to the President. It means that the official acts of the President can be challenged but he cannot be made a defendant in judicial proceedings or be made personally liable for the result of the proceedings. By virtue of article 36(7) and (8) the President's personal civil and criminal liability is suspended while he holds the office of President but the liability can be prosecuted within three years after ceasing to hold office.

It is evident that the Supreme Court in this case was in no mood to tolerate the perceived executive overreach in any form or manner. Although in the grand scheme of things it came a decade late, at least to many it signified a new-found resolve of the courts to stand up to the executive and, by extension, Parliament, by playing its watchdog role in the constitutional set-up of the country.

A controversy that arose in the immediate aftermath of the decision in the *Sallah* case was the statement made by the Prime Minister,

26 *Sallah* (n 25 above).

27 As above.

Dr KA Busia, on radio on 20 April 1970.²⁸ In his broadcast, he asserted that no court could enforce a decision that sought to compel the government to employ or re-employ a person. Critics have chastised the Prime Minister for making this so-called 'no court' statement, as being contrary to the rule of law. To some, the Prime Minister deliberately undermined and defied the orders of the judiciary when he made this statement.²⁹ It has, therefore, been suggested that 'his handling of the *Sallah* case leading to the "no-court" pronouncement could have been handled better' and that, were the statement made in recent times, he may have faced impeachment proceedings.³⁰

Unfortunately, such comments fail to appreciate the crux of the decision in the *Sallah* case, and the essence of constitutionalism and the rule of law, for that matter, under the Ghanaian Constitution.³¹ What Busia said in his radio broadcast should not be characterised as defiance and/or a failure to obey an order made by the Supreme Court in the *Sallah* case. This is because Mr Sallah himself did not specifically seek reinstatement, and neither did the Court make any consequential orders pursuant to the granting of the declaration that indeed his office was not one of those offices established by the NLC. The majority in the case held as follows: Archer JA held that

[t]o be established or not to be established by the Proclamation or the National Liberation Council, that is the question. I think the plaintiff succeeds in this action and he is therefore entitled to the declaration he seeks.³²

Sowah JA also held that '[i]n the result, there will be judgment for the plaintiff against the defendant. The plaintiff will have the declaration he seeks.'³³ Finally, Apaloo JA held that

28 Dr Busia's radio broadcast on the *Sallah* Decision, 2 G & G 739 (2d) 1374.

29 I Yeboah 'Arthur K writes on Prof Busia's legacy' 18 July 2013 <http://www.graphic.com.gh/features/features/arthur-k-writes-on-prof-busia-s-legacy.html> (accessed 8 October 2017).

30 As above.

31 Art 2(4) of the 1992 Constitution provides: 'Failure to obey or carry out the terms of an order or direction made or given under clause (2) of this article constitutes a high crime under this Constitution and shall, in the case of the President or the Vice-President, constitute a ground for removal from office under this Constitution.' It must be noted that clause (2) of art 2 gives the Supreme Court the power to make orders and give directions as it considers fit for the purposes of giving effect to any declaration it makes. Therefore, if the Supreme Court makes a declaration that the government was not entitled to dismiss a particular person from office and orders his reinstatement, and the executive fails to obey or carry out the terms of the order so made, it constitutes a high crime and, in the case of the President or Vice-President, is a ground for removal. However, this was not what transpired in the case of Busia's radio broadcast after the *Sallah* case, as no reinstatement order was made. By suggesting that '[n]o court can enforce any decisions that seeks to compel the government to employ or re-employ anyone', Busia himself may have misunderstood the essence of the Court's decision in merely granting the declaration.

32 *Sallah* case (n 25 above).

33 *Sallah* case 1361.

[n]ow that everything that can be said or done has been said and done, truth and justice must have the last word. And that word is that the plaintiff succeeds in this action and is entitled to the declaration which he seeks.³⁴

From the above, it is clear that the majority in the *Sallah* case merely granted the declaration without making any consequential orders for reinstatement, for example. How, therefore, did the Prime Minister defy or disobey the order of the Supreme Court? As a result of this common misunderstanding of the decision in the *Sallah* case, Busia's broadcast has been misconstrued and taken out of context as though he was a despot who had no regard for judicial independence. On the contrary, we believe that his statements, albeit arguably politically unwise in some parts, sought to solidify his government's adherence to the rule of law and democracy by offering a candid critique of the Court's decision. For example, he stated:³⁵

During the period of the National Liberation Council, no public officer derived his position from any source other than from the National Liberation Council. It makes absolute nonsense of the *coup* to maintain that those who held offices in the Nkrumah regime before the *coup*, some of whom Commissions of Enquiry appointed by the NLC confirmed to be corrupt, should be outside the purview of the exercise, whilst those appointed by the NLC to help them carry on the reconstruction are the ones within the purview of the section. Laws do not operate in a vacuum, but within social and historical contexts, and no one can fail to see that the effect of the *coup* of February 24, 1966, and the proclamation and the subsequent decrees was to make clear that all public offices were held as a result of the Act of the National Liberation Council. What I have come to say to the nation is this: that as long as I remain the Prime Minister of this country, *I shall do my best, with the co-operation of my cabinet, to uphold the highest standards of democracy as I understand it, whether in the legislature or the executive, or the judiciary. I cannot be tempted to dismiss any judge. I shall neither honour nor deify anyone with martyrdom. But I will say that the judiciary is not going to hold or exercise any supervisory powers not given to it by the Constitution. This, again, is a well established principle which we must adhere to.*

The Prime Minister's posture can be contrasted with that of Nkrumah in the aftermath of the case of *State v Otchere*,³⁶ which led to Nkrumah declaring the decision null and void,³⁷ and his subsequent unilateral and unconstitutional dismissal of the Chief Justice of Ghana. Thus, faced with unfavourable decisions by the judiciary, Busia strongly disagreed with their decision and addressed the nation to that effect in a harmless radio broadcast where he emphasised his government's respect for the rule of law, while Nkrumah behaved unconstitutionally by nullifying the decision of the Court and also dismissing the Chief Justice.³⁸ The Nkrumah government's posture during its reign, in relation to democracy and the rule of law,

34 *Sallah* case 1373.

35 Dr Busia's radio broadcast (n 28 above) 1378 (our emphasis).

36 *State v Otchere* (n 19 above).

37 Special Criminal Division Instrument, 1963 (EI 161).

generally, as captured by the major court decisions of the time, makes it clear that the rule of law thrived during the Second Republican era of Ghana, as opposed to the immediate post-independence era. Unfortunately, the rule of law was greatly undermined when the democratic government of the Second Republic was overthrown by another military intervention in 1972.

2.3 Third Republican era (1979-1981)

The constitutional path followed by Ghana did not last long, as the Second Republican Constitution and government were overthrown through another military *coup d'état* in 1972. Thus, between 1972 and 1979, Ghana was under military dictatorship. Once more, it was a military regime that ushered in the new era of constitutional governance, although this was also short-lived. President Hilla Liman's ascension to office through the ballot box was a welcome occurrence in the constitutional and political development of the country as it ended the longest period of military rule in the country at the time.

Two cases in this era, however, illustrate the crisis of identity in terms of the role of the judiciary in maintaining the rule of law and democratic governance in Ghana. Arguably, the most important case during this period for the purposes of the advancement of democracy and the rule of law was the case of *Tuffour v Attorney-General*.³⁹ The facts of this case were that, prior to the promulgation of the 1979 Constitution, the highest court of the land was the Court of Appeal. The Chief Justice during this period was Justice Apaloo who was also a member of this court. Following the coming into force of the 1979 Constitution, there now was a Supreme Court and the President sought to re-nominate Justice Apaloo as Chief Justice, whereupon the latter submitted himself for parliamentary approval. However, the transitional provisions of the Constitution provided that certain categories of persons (including justices of the superior courts) holding office prior to the coming into force of the Constitution were deemed to have been appointed to those same offices under the Constitution.

The Court of Appeal, sitting as the Supreme Court, therefore had to determine the meaning of the phrase 'shall be deemed' and thereby decide whether or not Justice Apaloo indeed was the Chief Justice of Ghana upon the coming into force of the Constitution. The Court held as follows:⁴⁰

38 We can confidently make this assertion also because it is on record that Nkrumah's government was a dictatorial one that greatly undermined and disregarded the judiciary and acted unconstitutionally at every turn. The same cannot be said for Busia's government, and the reaction of Busia to the *Sallah* case and that of Nkrumah to the *Otchere* case provide a clear insight as to the nature and temperament of both personalities and their respective regimes.

39 [1980] GLR 637.

40 *Tuffour* (n 39 above).

The duty of the court in interpreting the provisions of article 127(8) and (9) was to take the words as they stood and to give them their true construction having regard to the language of the provisions of the Constitution, always preferring the natural meaning of the words involved, but nonetheless giving the words their appropriate construction according to the context. Thus the phrase 'shall be deemed' in article 127(8), a legislative device resorted to when a thing was said to be something else with its attendant consequences when it was in fact not, had been employed and used in several parts of the Constitution and thus an aid towards ascertaining its true meaning ... applying the definition of 'deemed' to article 127(8), a justice of the Superior Court of Judicature (that one composite institution) holding office as such immediately before the coming into force of the Constitution should continue to hold the office as if he had been appointed by its processes. The Chief Justice was a member and Head of the Superior Court of Judicature. He was a member of the class of persons or justices referred to in article 127(8). Accordingly the court would hold that upon the coming into force of the Constitution, the incumbent Chief Justice, by virtue of article 127(8) and (9) became the Chief Justice, and under article 114(1), the Head of the Judiciary – he became the Chief Justice by the due process of law holding the identical or equivalent office as he held before the Constitution came into force. That interpretation was in harmony with the use of the phrase 'shall be deemed' in other provisions of the Constitution and was in conformity with the rationale behind article 127 (8) and (9) as declared by paragraph 204 of the Proposals of the Constitutional Commission.

The significance of this case goes beyond the finding that Justice Apaloo was Chief Justice on the coming into force of the Constitution. This case is also of paramount importance in the legal and political history of Ghana in the sense that it also recognised the right of the people to bring actions in their own personal capacities in matters of public interest. The Court during this period seemed to be championing democratic ideals, including the rule of law and political accountability.

However, the case of *Kwakye v Attorney-General*⁴¹ soon reversed whatever progress had been made. The plaintiff, a former inspector-general of police, was purported to have been tried and convicted *in absentia* by an Armed Forces Revolutionary Council (AFRC) Special Court.⁴² He brought an action in the Supreme Court contending that he had never been convicted by any court of competent jurisdiction. The Supreme Court, in refusing to grant him the relief he sought, held that what took place was akin to a trial and that the transitional provisions of the 1979 Constitution forbade any court from questioning judicial actions taken or purported to have been taken by the AFRC. The Court held:⁴³

A judicial action taken within the true intendment of section 15(2) of the transitional provisions of the Constitution, 1979, meant a judicial action regularly and lawfully taken, ie a judicial action which satisfied the requirements of the law both substantive and procedural; while by a

41 [1981] GLR 944.

42 The AFRC was the military government that ushered in the Third Republican Constitution, headed by Flight-Lieutenant Jerry John Rawlings.

43 *Kwakye* (n 41 above).

'judicial action purported to have been taken' was meant an action which was not a judicial action properly so-called but which looked like, was intended to be, or which had the outward appearance of a judicial action. Precisely therefore, a purported judicial action was one whose claim to regularity, both procedurally and substantively, was inaccurate but whose intention to be a judicial action was clear. Consequently, on the facts of the instant case, although the evidence led by the defendant did not establish or prove any judicial action by the AFRC or by any person in the name of that Council, it sufficiently established a judicial action purported to have been taken by the special court, a body authorised by the AFRC, against the plaintiff. At least, it was evident that when the special court met, it intended to try the plaintiff under AFRCD 3 as amended by AFRCD 19, by relying on his file and to convict and sentence him if found guilty.

That notwithstanding, Taylor JSC was bold to call a spade a spade in his powerful dissenting opinion. He held as follows:⁴⁴

I must remark that the idea that any statutory institution, authority or tribunal of inferior jurisdiction, is outside the control of the judiciary, is surely incompatible with the essence and regime of democratic system; it undermines the rule of law; it is subversive of orderly government and is an erosion of the people's liberties ... [I]f the AFRC special court is uncontrollable, what was the need for the elaborate provisions setting it up? Who is to ensure that its statutory terms are complied with? ... A capricious or illegal action is not a judicial action and cannot have the appearance of a judicial action. Now, assembling unlawfully in secret, in a caucus or as a court and without hearing evidence as approved by law, to administer unlawful secret oaths and to sentence a person has no resemblance to judicial action or purported judicial action. It rather resembles a capricious act, or an illegal act.

As powerful as Taylor JSC's words were, this only represented the minority view on the Supreme Court since it had overwhelmingly rejected the plaintiff's claims. Thus, although in the *Tuffour* case the Court seemed to be willing to protect and safeguard the rule of law and consolidate democratic governance, this was in stark contrast to what it did in the *Kwakyé* case, which in our opinion set us back further and allowed and essentially fostered the longest period of military dictatorship in the country.⁴⁵

3 Rule of law and democratic governance in Ghana: 1993 to present

Before we delve into an analysis of some cases that epitomise the new era of democratic governance in Ghana, it is important to make some observations about the constitutional structure of the 1992 Constitution. This Constitution heralded a new era of democratic rule in Ghana, after the longest period of military rule in the country, which occurred under the PNDC from 31 December 1981 to

⁴⁴ As above.

⁴⁵ The Provisional National Defence Council (PNDC), also headed by Flight-Lieutenant Jerry John Rawlings, overthrew the government of Hilla Liman on 31 December 1981, and ruled Ghana from that time until 7 January 1993.

7 January 1993. However, the country had to endure another eight years of the PNDC in the form of the National Democratic Congress (NDC) political party that arose from the ashes of the PNDC and assumed the governance of the country following the November and December 1992 presidential and parliamentary elections in Ghana.

The Constitution of Ghana of 1992, which ushered in this new era of 'democratic' rule, however, was tainted from the outset. The controversial insertion of provisions related to indemnity for acts or omissions committed by PNDC officials, as well as officials of all the former military regimes, is a permanent blot on the conscience of the country.⁴⁶ The Constitution, therefore, is a contradictory document that seeks in one breath to stress the rule of law as a prerequisite for the sustenance of our democracy, yet in another purports to oust the jurisdiction of the courts in bringing past perpetrators' atrocities to book. However, as has been famously argued by Professor Kumado,⁴⁷ the indemnity provisions only represent a plea for mercy by the perpetrators of *coups d'état* and their cohorts and, as such, have no legal effect whatsoever. We are in full agreement. However, the unwillingness of the Supreme Court to deal with this issue concretely means that the indemnity provisions remain an affront to democratic governance, in general, and the rule of law, in particular, within the context of Ghana's constitutional structure.

It was for this reason that the National Reconciliation Commission (NRC) recommended in no uncertain terms that the indemnity provisions in the Transitional Provisions of the Constitution be resubmitted to a national referendum.⁴⁸ The Commission noted:⁴⁹

A stable constitutional order cannot be founded on injustice and impunity on the part of wrong-doers, matched by a deep sense of grievance by many citizens. The indemnity clauses must be subjected to a referendum once again, so that the democratic mechanisms might assist the nation to resolve this matter conclusively.

This still has not been done. Hence, for so long as we have a constitution grounded on impunity, the rule of law is inherently undermined. The Supreme Court's consistent failure to effectively address this issue when the opportunity presented itself in the *Kwakye* case and, to a lesser degree, in the 31 December case (briefly

46 The Constitution of the Republic of Ghana 1992 (sec 34 of the Transitional Provisions) provides for this sweeping indemnity. Furthermore, sec 37 of the same Transitional Provisions prohibits Parliament from amending sec 34. It has been suggested that the indemnity provisions contained in the draft Constitution that was presented to the people of Ghana during the 28 April 1992 referendum was inserted without debate and, as such, the choice available to the people was either approving the draft Constitution (thereby tacitly endorsing the indemnity) or rejecting the draft Constitution altogether, and continuing military rule.

47 CEK Kumado 'Forgive us our trespasses: An examination of the indemnity clause in the 1992 Constitution of Ghana' (1993) 19 *University of Ghana Law Journal* 83.

48 Report of the National Reconciliation Commission, 2004.

49 Centre for Democratic Development *Never again: Summary and synthesis of the National Reconciliation Commission's Final Report* (2014).

discussed below) signifies its weak resolve to concretely address the most important and controversial constitutional questions of our time, undermining the rule of law in the process.

In our view, several cases epitomise the progress that Ghanaian courts have made in terms of entrenching the rule of law during this period of sustained democratic and constitutional governance, some of which will be discussed below.⁵⁰ For the purposes of our analysis, we have divided the post-1993 era into three distinct periods, namely, (i) the period of judicial resurgence;⁵¹ (ii) the period of judicial entrenchment;⁵² and (iii) the period of judicial inconsistency.⁵³ The first case for consideration in the period of judicial resurgence is *New Patriotic Party v Inspector-General of Police*.⁵⁴ The Supreme Court in this case struck down provisions of the Public Order Decree (NRCD 68) that sought to put prior restraints on and limit the ability of persons to freely exercise their constitutional right to assembly, including the freedom to take part in processions and demonstrations, in contravention of article 21(1)(d) of the Constitution. The importance of this decision lies in the fact that the country was just returning to multiparty democracy after more than a decade of military and dictatorial rule by the PNDC; and the judiciary soon checked the dictatorial heritage of the new NDC government that was manifested in the fact that they had revoked a permit for peaceful demonstrations originally granted to the opposition NPP, which led to this case. That notwithstanding and true to form, the government quickly undermined the judiciary by reversing the human rights progress that had been made in this case through the enactment of the Public Order Act 491 of 1994. as Quashigah rightly notes.⁵⁵

50 It must be noted that, although the judiciary today arguably is the strongest it has been in Ghana's history and has made enormous progress in sustaining the rule of law, we are also of the considered view that the Supreme Court in particular has led the people down when it mattered the most in recent times, as will be explained below.

51 This era can be seen through the following cases: *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR 459; *New Patriotic Party v Attorney-General* [1993-94] 2 GLR 35; *New Patriotic Party v President Rawlings* [1993-94] 2 GLR 193; *New Patriotic Party v Ghana Broadcasting Corporation* [1993-94] GLR 354; *Ghana Bar Association v Attorney-General & Abban* [1995-96] GLR 598; *Ekwan v Pianim* (No 2) [1996-97] SCGLR 120; and *JH Mensah v Attorney-General* [1997-98] 1 GLR 227.

52 This era can be seen through the following cases: *Amidu v President Kufuor* [2001-2002] SCGLR 86; *Asare v Attorney-General* [2003-2004] SCGLR 823; *The Republic v Wereko-Brobby & Mpiani (Ghana @ 50 case)*, Case ACC 39/2010; and *Asare v Attorney-General* [2012] SCGLR 460.

53 This era can be seen mainly through the following cases: *In Re Presidential Election Petition* (No 4); *Akufo-Addo, Bawumia & Another v Mahama, Electoral Commission & Another* [2013] SCGLR (Special Edition) 73; and *Ghana Bar Association v Attorney-General* [2016] GHASC 43.

54 [1993-94] 2 GLR 459.

55 EK Quashigah 'The constitutional right to freedom of assembly and procession in Ghana in the light of the decision in the Public Order Case and the Public Order Act' (1996-1999) 20 *University of Ghana Law Journal* 1.

*New Patriotic Party v Attorney-General*⁵⁶ pertained to whether it was unconstitutional for the government to proclaim and celebrate 31 December each year as a national holiday with state resources. The Court held the celebrations as unconstitutional as this offended the spirit of the Constitution, because the celebrations signified the glorification of *coups d'état* in Ghana. Francois JSC held as follows:⁵⁷

For if the Constitution, 1992 frowns on violent overthrows of duly constituted governments, and rejects acts that put a premium on unconstitutionality to the extent of even proscribing the promotion of one party state, it is naivety of the highest order, to expect the Constitution, and in the same breath, to sing Hallelujah's in a paean of praise to unconstitutional deviations, past or present. If the past is being buried, the spirit of the Constitution, 1992 would frown on the resurrection of any of its limbs. That is the whole point of the cloak of indemnity conferred in section 34 of the transitional provisions of the Constitution, 1992 ... The admission that a violent overthrow of government occurred on 31 December, forecloses any sanctioning of public celebration in a constitutional era.

The Court once again stood firm and upheld the rule of law, thereby safeguarding our democratic governance system from the whims and caprices of an authoritarian regime masquerading as a democratic one.⁵⁸

In *New Patriotic Party v Ghana Broadcasting Corporation*,⁵⁹ the plaintiff brought an action against the state broadcaster, who had refused to allocate it equal airtime as the government, for the purpose of rebutting the budget statement of the government. The Court held that under article 163 of the Constitution, all state-owned media had to afford fair opportunities for the presentation of divergent viewpoints and, as a consequence, Ghana Broadcasting Corporation was under an obligation to provide equal opportunity to the opposition NPP to present its views on issues of national importance. In *Ekwam v Pianim (No 2)*,⁶⁰ however, the Supreme Court, in our opinion, erred when it held that the defendant was ineligible to participate in the 1996 presidential election because the PNDC Public Tribunal had convicted him during the 1980s for the offence of preparing to overthrow the PNDC government. Thus, by virtue of this, the Court held that Mr Kwame Pianim was ineligible to contest as presidential candidate for the New Patriotic Party under article 94(2)(c)(i) of the 1992 Constitution, which barred persons who had been convicted for offences involving the security of the state from contesting as President. We believe that the rule of law could have

56 [1993-94] 2 GLR 35.

57 *New Patriotic Party* (n 56 above).

58 The PNDC transformed itself into the National Democratic Congress (NDC) in time for the 1992 general elections, which returned Ghana to democratic rule. Allegations of widespread electoral malpractices on the part of the PNDC, which oversaw the elections, famously led to the opposition New Patriotic Party coming out with the 'Stolen Verdict' publication, and thus boycotting the scheduled parliamentary elections.

59 [1993-94] GLR 354.

60 [1996-97] SCGLR 120.

been further entrenched if the Court had dismissed the case against the defendant on the basis that the PNDC government was an unlawful government and that, as admonished by the previous 1979 Constitution, all citizens had a duty to take steps to return the previous constitutional regime.

Finally, in the case of *JH Mensah v Attorney-General*,⁶¹ the Court upheld the rule of law when it required all government ministers holding such offices before the 1996 elections to be submitted to parliamentary vetting in accordance with the Constitution. This was against the backdrop of the government purporting to allow such ministers to continue holding their positions after the 1996 general elections and the subsequent swearing in and start of the second term of office of President Rawlings. The Court, however, held that such appointees, regardless of the similar positions they held prior to the elections, ought to be vetted again by Parliament in accordance with the clear dictates of the 1992 Constitution of Ghana. Thus, political impunity in the form of an abject neglect of clear constitutional provisions was halted by the resurgent court that was somehow emboldened by the return of democracy and guided by the principle of limited government.

The period of judicial entrenchment, in our estimation, existed between the years 2000 and 2012. It starts with the case of *Amidu v President Kufuor*.⁶² In this case, the Supreme Court reiterated its position first advanced in the *NPP v Rawlings* case, namely, that an action can be brought against the President in the performance of his functions, in accordance with the dictates of the rule of law. However, such an action must be brought against the Attorney-General in accordance with article 88 of the Constitution as the nominal defendant. The period ends with the case of *Asare v Attorney-General*⁶³ (citizenship case), where the Court struck down provisions of the Citizenship Act 591 of 2000, which gave the Minister of the Interior the unfettered discretion to prescribe offices that dual citizens were not eligible to hold in Ghana, in addition to the offices that they were statutorily barred from holding.

Finally, the period of judicial inconsistency is the period from 2013 to date. Two cases are important here in terms of appreciating the Supreme Court's inconsistency in upholding the rule of law in recent times. The first case is that of *In re Presidential Election Petition (No 4); Akufo-Addo, Bawumia & Another v Mahama, Electoral Commission & Another*.⁶⁴ In this case, the candidate of the then opposition New Patriotic Party (NPP) during the 2012 presidential elections brought a petition to the Supreme Court challenging the validity of the election results and the declaration of John Mahama as the validly-elected

61 [1997-98] 1 GLR 227.

62 [2001-2002] SCGLR 86.

63 [2012] SCGLR 460.

64 [2013] SCGLR (Special Edition) 73.

President of Ghana by the Electoral Commissioner. The issues set out for trial were twofold: (i) whether there were malpractices, irregularities, and so forth, in the conduct of the election; and (ii) whether these malpractices and irregularities affected the outcome of the elections. In a strange turn of events, the Supreme Court, instead of answering these two questions, decided to rather proffer their opinion on the specific categories of alleged malpractices and irregularities, thereby, in our opinion, tainting the entire judgment. The petition was dismissed, and John Mahama was affirmed as being the validly-elected President.

The Court (the majority), in our view, in this case undermined our democratic credentials and the rule of law. It seems as though the majority of the Court were in a hurry to declare President Mahama as validly elected simply because it was the safest and easiest option to pursue.⁶⁵ This, we believe, fortified the general belief in Ghana that elections are won at the polling stations and not in the courtroom.⁶⁶ The dangers associated with this state of mind is all too obvious, as political party operatives will do all they can, legally and illegally, to win on election day. The Supreme Court, therefore, in our opinion, missed another great opportunity to further entrench and uphold the rule of law in Ghana.

Another case in this era that demonstrates the inconsistency on the part of the Supreme Court is that of *Ghana Bar Association v Attorney-General & Others*.⁶⁷ In this case, the Ghanaian Supreme Court essentially granted unfettered appointment powers to the President when it held that the provision in the Constitution requiring the President to act on the advice of the Judicial Council in the appointment of justices of the Supreme Court was not binding. Thus, even though the Constitution clearly requires the President to actually act on the advice of the Judicial Council for the purposes of such appointments, the Court was of the view that this provision was not binding on the President. The effect of this decision is that it renders nugatory all other provisions of the Constitution that require the President to act on the advice of another body in his appointment functions. This has serious implications for the rule of law because, if the President can act on his own accord in his appointment functions without acting pursuant to the advice of constitutional and other bodies, what was the purpose of the constitutional provisions

65 It should be noted that during this period there was much tension in Ghana, and the fear of many, including some members of the Supreme Court, in our view, was that there would be chaos in the country if the incumbent President John Mahama was declared as not having been validly elected. Thus, maintaining the *status quo* and, with it, the safety of the people, was the overriding public policy concern that must have weighed on the minds of a majority of the Supreme Court.

66 This belief has been further buttressed in Africa by recent events in Kenya where, even though the Supreme Court there nullified the 2017 presidential results for irregularities, eventually nothing really came out of it.

67 [2016] GHASC 43.

requiring him so to do? The blatant inconsistency of the judiciary in upholding the rule of law in this period can be ascertained when contrasted with the period of judicial resurgence, for example, where the courts were quick to check the powers of the executive.

4 Proposals for constitutional restructuring

Several measures must be undertaken in order to ensure that the democratic governance system in the country is not further undermined in future. In our opinion, three major changes to the constitutional structure are imperative in safeguarding and strengthening the rule of law in Ghana. In order of importance, these are (i) removing the indemnity clauses from the Constitution and/or drafting a new Constitution altogether; (ii) ensuring actual judicial independence and integrity; and (iii) curbing the unbridled power of the executive.

It has been about 17 years since the National Reconciliation Commission recommended the submission of the indemnity clauses to a referendum. Yet, nothing has been done in this regard. It also seems unlikely that it will be politically expedient to go ahead with such a radical recommendation. Therefore, we are of the opinion that Ghana needs a new Constitution altogether – one that is coherent and free from official endorsement of impunity. In terms of ensuring actual judicial independence and integrity, the proposed new Constitution should make provision for (i) putting a cap on the number of justices on the Supreme Court to nine; and (ii) providing life tenure for the nine justices. It is our belief that by reducing the number of Supreme Court justices, the dignity and efficiency of the judiciary will be safeguarded and guaranteed for generations to come. The situation where there is no cap on the maximum number of justices on the Court has the tendency of diluting the judicial philosophical approach of the Court in the most important cases of public concern. Nine, we believe, is a reasonable number that has worked in advanced jurisdictions such as the United States, and that can also work in Ghana.

The highest court of the land must also be one inspiring confidence, is stable, consistent and predictable in terms of its composition and membership. Thus, ensuring life tenure for judges similar to the position in the United States, to a large extent, will ensure judicial independence and integrity. By being insulated from political and other pressures, the judges can go about the business of administering justice in a fair and impartial manner, as it is supposed to be. The present mandatory retirement age of 70 years for Supreme Court judges is inimical to judicial progress and an affront to judicial independence and integrity, as the law becomes less predictable with a constant influx of new judges.

Finally, we believe that the wide-ranging powers of the executive must be effectively curbed and curtailed under the proposed new

Constitution. Even though Parliament is supposed to serve as a check on the powers of the executive, the practice under the 1992 Constitution has been to allow the executive to do virtually anything it wants. This is partly due to the hybrid system where the executive draws the majority of the cabinet from the legislature. Such a state of affairs does not augur well for the democracy of the country, in the sense that an over-concentration of power in the hands of an 'uncontrollable' executive may lead to a democratic dictatorship, which has the tendency of reversing the gains made in our democratic governance experiment. Thus, the proposed new Constitution may have to consider the elimination of the hybrid system and, as a by-product, may effectively curtail the power of the executive and ensure that it acts responsibly at all times, and is accountable to the people through their representatives in Parliament.

5 Conclusion

In conclusion, Ghana has had a chequered history in its quest for democratic governance and the rule of law. As has been demonstrated, the early days of independence showed how the judiciary failed to defend and protect the citizenry when the executive systematically detained and oppressed the population. However, the subsequent years witnessed a few cases where the courts stood up to executive and legislative overreach. Nevertheless, it has to be stressed that the abuses far outweighed the few cases of success and, therefore, much more still needs to be done to ensure that the gains in the area of democratic governance are safeguarded and consolidated. One major stumbling block involves the indemnity clauses in the 1992 Constitution, which legitimise abuses. These provisions must either be removed or, in the alternative, a new Constitution for Ghana needs to be adopted. There are some significant gains that can be derived from the adoption of a new Constitution. For instance, actual judicial independence and integrity can be attained through the provision in the proposed new Constitution for a cap on the number of justices of the Supreme Court and the guarantee of life tenure. Similarly, the powers of the executive can be effectively be curbed by the proposed new Constitution. Furthermore, the hybrid system where the legislature is virtually an appendage to the executive will be addressed. It is our belief that these and other measures will help safeguard and guarantee the success of a democratic governance system and the entrenchment of the rule of law in Ghana for generations to come.

Standing, access to justice and the rule of law in Zimbabwe

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Summary

This article argues that the liberalisation of locus standi, particularly the provisions of section 85(1) of the Zimbabwean Constitution, has magnified opportunities for access to justice and the rule of law in Zimbabwe. Liberalising standing allows a wide range of persons to approach the courts for personal relief or to vindicate the public interest. Furthermore, the Constitution also abolishes the 'dirty hands doctrine', a common law concept in terms of which a litigant lacks standing if he or she has not complied with the legislation the legality or constitutionality of which they are challenging. The new approach permits litigants to launch proceedings challenging the constitutionality of pieces of legislation that they allegedly have violated. More importantly, the provisions governing standing outline four principles with which court rules must comply. These principles are meant to ensure that the constitutional promises of access to justice and the rule of law are not thwarted by restrictive court rules at every level of the judicial system. In a way, the four principles allow courts to entertain as many cases as possible to ensure both that there is due respect for the rule of law and that the majority of litigants have access to both procedural and substantive justice. Finally, it is argued that the general ouster of the courts' jurisdiction in land-related legal claims undermines the concept of the rule of law and allows the state to violate property rights by grabbing land without either paying compensation or allowing the owners of such land to approach courts for redress.

Key words: standing; access to justice; rule of law; Zimbabwe

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1 Introduction

There has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Zimbabwean Constitution, towards the liberalisation of *locus standi* in Zimbabwe. Liberalising standing allows a wide range of persons who can demonstrate an infringement of their rights or those of others to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. To this end, the drafters of the Declaration of Rights acknowledged that restrictive standing provisions defeat the idea behind conferring entitlements upon the poor and marginalised. The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources and knowledge to take powerful states, transnational corporations or rich individuals to court in the event of a violation of their rights. To address this problem, section 85(1) of the Constitution allows not only persons acting in their own interests, but also any person acting on behalf of another person who cannot act for themselves, any person acting as a member, or in the interests of a group or class of persons, any person acting in the public interest and any association acting in the interests of its members, to launch court proceedings against alleged violators of the rights in the Declaration of Rights.

This article focuses on standing, access to justice and the rule of law in Zimbabwe and is composed of nine parts of which this introduction is the first. The second part of the article discusses, in some detail, the meaning of access to justice and delimits the reach of the research by confining the term to mean access to courts as the primary dispute resolution forum. The term 'court' is interpreted in its narrow sense to mean formal courts where provisions regulating standing have some relevance. In the third part, the article briefly explains the scope of the standing provisions of the Lancaster House Constitution (LHC) and the extent to which they limited access to justice and the rule of law. The fourth part critically analyses the scope of section 85 of the Constitution, its limitations, strengths and implications for access to justice and the rule of law. It is argued that the liberalisation of standing, particularly the constitutionalisation of public interest litigation, represents a major shift from restrictive standing rules and evidences an intention to widen the pool of citizens exercising the right of access to court in Zimbabwe.

The Zimbabwean Constitution abolishes the 'dirty hands doctrine', a concept in terms of which a litigant lacks standing if he or she has not complied with the legislation the legality or constitutionality of which they are challenging. The fifth part is devoted to a discussion of this doctrine and the positive changes brought about by the current Constitution. In the sixth part, the article describes the constitutional provisions regulating the formulation of rules of all domestic courts.

This part discusses the extent to which these principles promote access to justice and the rule of law in Zimbabwe.

Intersections and overlaps between standing, access to justice and the rule of law are explored in the seventh part of the article. It is argued that a liberal approach to standing requires courts to place substantial value on the merits of the claim, and underlines the centrality of the rule of law by ensuring that unlawful decisions are challenged by ordinary citizens and straightened by the courts. In the eighth part of the article, it is argued that the greatest threat to access to justice and the rule of law in Zimbabwe appears to have come from constitutional provisions that oust the jurisdiction of the courts, particularly in land-related claims. Ouster clauses have been part of Zimbabwean law since the insertion into the now repealed Constitution of an amendment, and the courts have been reluctant to declare these invalid, thereby undoing the promise of the liberalisation of *locus standi* and the rule of law in land-related cases. The final part of the article ends the discussion by making some remarks on the future of access to justice and the rule of law in Zimbabwe, especially in light of the provisions governing standing and other related matters.

2 Access to justice (fair hearing) as access to an impartial court

The notion of standing is based on the existence of a right, whether *prima facie* or certain. If a litigant wrongly appears before the courts and lacks a clear or sufficient interest in the matter, courts usually dismiss the matter and insist that the appropriate person should appear before them. The right of access to court is constitutionally protected as part of the broad right to a fair hearing. Sections 69(1) to (3) of the Constitution is framed in the following terms:

- (1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
- (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
- (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

The phrase 'right to a fair trial' consists of a number of component rights including, but not limited to, the right to a speedy hearing, legal representation, cross-examination, the presumption of

innocence and pre-trial disclosure.¹ It is obvious that the first two subsections outline the key components of the right of access to court, which is meant to give effect to the broad notion of access to justice. Section 69(1) of the Constitution captures the key components of the right to a fair hearing in criminal trials, and section 69(2) broadly describes the right to a fair hearing in civil proceedings. Notably, the component rights of a fair trial foster equality and enable litigants to present their side of the story in impartial courts or tribunals. The principle of equality becomes the core of the structure of fairness and lies at the heart of modern civil and criminal processes. The right to a fair hearing is as ancient as the trial process itself, stretching over centuries and underlining the need for justice for all and equality before the law. This right is aimed at promoting the administration of justice and securing the rule of law.²

The right to a 'fair trial' is treated as overlapping with the overarching right to a 'fair and public hearing by a competent, independent and impartial tribunal established by law'.³ The right implies that all persons should have inherent access to the courts and tribunals, including access to effective remedies and reparations. The fairness of the hearing goes beyond the requirement of independence and impartiality of the judges and entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever cause.⁴ The public character of hearings and of the pronouncement of judgments, therefore, is one of the core guarantees of the right to a fair trial and implies that court proceedings should be conducted orally and in a hearing to which the public has access.

The right to a fair hearing particularly implies that tribunals and other decision-making authorities must refrain from any act that could influence the outcome of the proceedings to the detriment of any of the parties to the court proceedings.⁵ In general, fair trial guarantees do not only concern the outcome of judicial proceedings, but rather the process by which the outcome is achieved.⁶ There are structural rules regarding the organisation of domestic court systems. Securing the right of access to court and to a fair hearing can require a high level of investment in the court system, and many states often fail to fulfil their obligations because of serious structural problems. It should be noted, however, that human rights law does not seek to impose a particular type of court system on states, but rather the

1 See R Clayton & H Tomlinson *Human rights law* (2000) 589-590; S Treehseil (ed) *Human rights in criminal proceedings* (2005) 85.

2 Human Rights Committee, Article 14 (Administration of justice) Equality before the courts and the right to a fair and public hearing by an independent court established by law' (1984) para 1.

3 See *Goktan v France* 33402/92.

4 W Kalin & J Kunzli *The law of international human rights protection* (2011) 453-454.

5 J Burchell *Principles of criminal law* (2005) 19.

6 S Shah *International human rights law* (2014) 270.

implementation of the principle that there should be a separation of powers between the executive, the legislature and the judiciary.⁷

Fairness, justice and the rule of law all have substantive and procedural dimensions. They suppose an inherent need to comply with the procedural and substantive requirements of the law in order to ensure that justice is delivered to individuals and communities.⁸ In general, it is an essential element of a fair trial that litigants be treated fairly and in accordance with lawful procedures, not only during the trial itself, but also from the moment they first come into contact with law enforcement agencies. If lawful procedures are violated at any stage during the process, not only does the adversely-affected litigant have a civil remedy against the responsible authorities, but the violation very often affects the validity of subsequent stages. This aspect of procedural justice is often referred to as procedural fairness and seeks to ensure that the state and the court comply with the procedural requirements of the rule of law. The procedural element of the rule of law requires state and non-state actors to function in a manner that is consistent with the applicable rules of procedure in any given case. Finally, the right to a fair hearing includes the right of equal access to courts and equality of arms before decision-making forums. These elements are in turn briefly considered.

2.1 Equal access to courts and equality of arms

The right of access to court is essential for constitutional democracy and the rule of law.⁹ Its significance lies in the fact that it outlaws past practices of ousting the court's jurisdiction to enquire into the legal validity of certain laws or conduct. A fundamental principle of the rule of law is that anyone may challenge the legality of any law or conduct.¹⁰ In order for this entitlement to be meaningful, alleged illegalities must be justiciable by an entity that is separate and independent from the alleged perpetrator of the illegality.¹¹ Access to court and the rule of law both seek to promote the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness resulting from people taking matters into their own hands.¹² Thus, not only is the right of access to court a bulwark against vigilantism, but also a rule against self-help and an axis upon which the rule of law turns. Unless there are good reasons (self-

7 As above.

8 See *S v Sonday & Another* 1995 (1) SA 497 (C) 507C and *Taylor v Minister of Education & Another* 1996 (2) ZLR 772.

9 *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) paras 1 & 64; *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) para 11; *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 105.

10 *De Lange v Smuts NO* 1998 (3) SA 785 (CC) paras 46-47.

11 *Mdeyide* (n 9 above) para 1.

12 In *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) paras 11-12, 18 & 22, the Court stressed the need for 'institutionalising the resolution of disputes, and preventing remedies being sought through self-help'.

defence or necessity, for instance), no one should be permitted to take the law into their own hands.¹³

The right to equality before the courts also includes the protection of equality of arms and treatment without discrimination. 'Equality of arms' means that all parties should be provided with the same procedural rights unless there is an objective and reasonable justification not to do so and there is no significant disadvantage to either party.¹⁴ The essence of the guarantee is that each side should be given the opportunity to challenge all the arguments put forward by the other side.¹⁵

2.2 An illimitable and non-derogable right at the domestic level

The Zimbabwean Constitution clearly stipulates in no uncertain terms that no law may limit the right of access to an impartial court and to a fair hearing.¹⁶ Such a provision is laudable, given that the aim of the right of access to court is to ensure the proper administration of justice and the rule of law. Therefore, in order for the state to commit itself to a society founded on the rule of law, there is a need to value and respect the aforementioned right to a fair trial.¹⁷ This should be demonstrated by the state in everything it does, including the way in which hearings are conducted.¹⁸ Given the importance of justice and fair treatment in the constitutional scheme, the gross unfairness as well as injustice which arises as a result of the absence of a fair hearing carries no less weight.¹⁹ The fair trial right may not be derogated from even during an emergency. The identification of this right as non-derogable implies that its suspension cannot directly assist in the usual objective of protecting the life of the nation, access to justice and the rule of law.²⁰

The Zimbabwean Constitution expressly stipulates that no law may limit the right to a fair trial and no person may violate this right.²¹ This right is also non-derogable in terms of section 87(4)(b) of the Constitution. In theory, the inclusion of the right to a fair trial under a list of illimitable and non-derogable rights entrenches the nation's commitment to due process rights, such as the presumption of innocence and the right to a public hearing which is not arbitrary. The

13 I Currie & J de Waal *The new constitutional and administrative law* (2001) 407.

14 Shah (n 6 above) 274.

15 General Comment 32, para 13.

16 Sec 86(3)(e) Constitution.

17 See *S v Sebejan & Others* 1997 (8) BCLR 1086 (W).

18 I Currie & J de Waal *The Bill of Rights handbook* (2013) 165.

19 This is in line with the principles of transparency, accountability and openness that inform our Constitution and its entrenchment of democracy and the rule of law.

20 Eg, there is no additional protection of the life of the nation to be gained from suspending the right to a fair trial. This is so particularly because derogating from this right only leads to arbitrariness and defeats the entire process of the proper administration of justice in a nation.

21 Sec 86(3)(e) Constitution.

Human Rights Committee has previously reiterated that 'deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times',²² thereby underlining the centrality of this right in modern democracies. More importantly, however, the fact that the right to a fair hearing is illimitable and non-derogable underlines the importance of the review powers of the court, the rule of law and the need to avoid ouster clauses at all costs.

3 Standing under the Lancaster House Constitution

According to the Lancaster House Constitution (LHC), only persons directly affected or about to be affected by infringements of rights were entitled to approach the courts for relief. The idea that 'any person acting in their own interests' is entitled to approach the local courts for relief was concretised by the provisions of the now defunct LHC. Section 24(1) of the LHC was designed to promote direct access to the then apex court (the Supreme Court) by any person who alleged that their personal rights had been infringed. Under the LHC, only persons negatively affected by the impugned conduct could institute court proceedings against alleged violators of human rights and the rule of law. Thus, a person could not have *locus standi* unless they were able to demonstrate that a provision of the Declaration of Rights had been contravened in respect of themselves.²³ When seeking direct access to the Constitutional Court, a litigant had to demonstrate that their right(s) had been violated by the impugned law or conduct.²⁴ It would not suffice that the interests of the person seeking direct access to the Supreme Court had been infringed.²⁵

The LHC codified a restrictive approach to standing and prevented civil society organisations, pressure groups and political parties from seeking justice on behalf of marginalised groups. In *United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others*,²⁶ the applicant, a political party, sought to challenge the constitutionality of certain provisions of the Electoral Act²⁷ on the basis that these provisions violated the right to freedom of expression as protected in section 20 of the LHC. The relevant provisions of the Act conferred on constituency registrars the right to object to the registration of voters and to refrain from taking any action relating to objections lodged by

22 Human Rights Committee General Comment 29 'Article 4: Derogations during a state of emergency' CCPR/C/21/Rev.1/Add.11 (2001) 234 para 11.

23 See *In Re Wood v Hansard* 1995 (2) SA 191 (ZS) 195 and *Chairman of the Public Service Commission & Others v Zimbabwe Teachers Association & Others* 1996 (9) BCLR 1189 (ZS) 1199.

24 G Linington 'Developing a new Bill of Rights for Zimbabwe: Some issues to consider' in N Kersting (ed) *Constitution in transition: Academic inputs for a new Constitution in Zimbabwe* (2009) 52.

25 See *Mhandirwe v Minister of State* 1986 (1) ZLR 1 (S).

26 1998 (2) BCLR 224 (ZS).

27 Electoral Act (Ch 2:01 of the Laws of Zimbabwe).

the electorate (within a period of 30 days before the polling date) concerning the retention of their names on the voters' roll. The Court held that the political party had no legal standing to challenge the provisions of the Electoral Act. Gubbay CJ (as he then was) held that section 24(1) of the LHC afforded the political party standing only in relation to itself and not on behalf of the general public or anyone else.²⁸

The Court observed that the provisions in question impacted on the rights and interests of 'voters', not the political party to which they belong, and denied the political party the standing 'to carry the torch for claimants and voters generally'.²⁹ This restrictive reading of the applicable provisions has been correctly criticised, with some scholars arguing that since 'the applicant alleged a contravention affecting the public (with him being a member thereof)', they were entitled 'to mount a constitutional challenge on the basis of his rights having been contravened. It is not self-evident that where a person is being affected as part of a ... group, he has not been affected personally.'³⁰ It would also appear that even if the Court was correct in refusing the applicant (a political party) standing, it should have seized the opportunity and clarified 'the important issue of "public interest" litigation then recognised in other jurisdictions'. In this case, the restrictive reading of provisions governing standing prevented the Court from deciding on the constitutionality of the impugned provisions and, therefore, limited the application of the substantive element of the rule of law.

Regardless of the restricted nature of standing provisions under the LHC, the Supreme Court later developed some flexibility in human rights litigation and expanded its capacity to hear cases that were brought before it in the public interest.³¹ In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others*,³² a human rights organisation brought an application to prevent the execution of certain prisoners on death row on the basis that the sentences had been rendered unconstitutional by virtue of the lengthy delay in carrying out the sentences. One of the questions to be determined by the Court was whether the organisation had *locus standi* to act on behalf of the prisoners. The Court observed that the organisation's 'avowed objects' were 'to uphold human rights, including ... the right to life', and that it was 'intimately concerned with the protection and preservation of the rights and freedoms granted to persons in

28 *United Parties v Minister of Justice* (n 26 above) 227.

29 *United Parties v Minister of Justice* 229.

30 L Madhuku 'Constitutional interpretation and the Supreme Court as a political actor: Some comments on *United Parties v Minister of Justice, Legal and Parliamentary Affairs*' (1998) 10 *Legal Forum* 48 52.

31 See *Zimbabwe Teachers Association & Others v Minister of Education* 1990 (2) ZLR 48 (HC) 52-53.

32 1993 (1) ZLR 242 (S).

Zimbabwe by the Constitution'.³³ Gubbay CJ, for the Court, held as follows:³⁴

It would be wrong ... for this Court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this Court.

Unfortunately, progressive court decisions constituted exceptions to the widespread denial of *locus standi* at the time they were decided. However, they laid the groundwork for access to court and justice by indigent individuals or groups without the legal knowledge and fiscal capacity to institute court proceedings.

However, later cases would restrict access to justice and the rule of law by preventing the leading opposition candidate from mounting constitutional challenges against laws governing presidential elections. In *Tsvangirai v Registrar-General of Elections*,³⁵ the applicant argued that the Electoral Act (Modification) Notice,³⁶ published three days before the 2002 presidential election by the President (the laws restricted postal voting to only members of the uniformed forces) violated his rights to protection of law and freedom of expression as envisaged by the LHC. In his dissent, Sandura JA took a different route and underscored the fact the he would have given the applicant standing in order to promote human rights, access to justice and the rule of law.³⁷ To this end, he made the following remarks:³⁸

Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Lancaster House Constitution, embraces the right to require the legislature ... to pass laws, which are consistent with the Constitution. If, therefore, the legislature passes a law, which is inconsistent with the Declaration of Rights, any person who is adversely affected by such a law has the *locus standi* to challenge the constitutionality of that law by bringing an application directly to this Court in terms of section 24(1) of the Constitution. Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by Parliament as required by section 28(4) of the Constitution. In the circumstances, he had the right to approach this Court directly in terms of section 24(1) of the Constitution and had the *locus standi* to file the application.

33 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 (4) SA 239 (ZS) 246H.

34 *Catholic Commission* (n 3 above) 246H-247A. See also G Feltoe 'The standing of human rights organisations and individuals to bring or be parties to legal cases involving issues of human rights' (1995) 7 *Legal Forum* 12.

35 [2002] ZWSC 20.

36 Statutory Instrument 41D of 2002.

37 For comparative academic scholarship, see GN Okeke 'Re-examining the role of *locus standi* in the Nigerian legal jurisprudence' (2013) 6 *Journal of Politics and Law* 209-210, where the author argues that provisions governing standing should not be used as an overly restrictive weapon for 'narrowing the road to litigation'.

38 *Tsvangirai* (n 35 above).

The majority's decision in this case has been largely criticised for both denying a candidate in the election the right to challenge laws which directly affected the manner in which the election had been conducted and fleshing out a very narrow approach to standing.³⁹ In the case of *Capitol Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe*,⁴⁰ the Court denied the applicant access to court on the ground that it was not licensed in terms of the relevant Act.⁴¹ The Court failed to protect the applicant's rights which were allegedly being violated by the Broadcasting Services Act. In the view of the Court, the applicant had to submit to the impugned legislation before challenging its unconstitutionality. This approach violated the rule of law and access to justice in that, if the legislation were to be found to be unconstitutional, the Court would have denied the litigant a remedy where, in fact, one existed. Chiduzo and Makiwane, after having conducted an extensive analysis of key cases that were decided before the adoption of the current Constitution, make the following findings:⁴²

The narrow interpretation of the rules of standing adopted by the judiciary became an impediment to human rights litigation in Zimbabwe. It limited litigants' right to access courts for the protection of their fundamental rights and freedoms. In an effort to improve human rights litigation and access to justice, the new constitutional dispensation in Zimbabwe, with great influence from the South African legal system, has adopted a more liberal approach to standing.

These remarks provide a useful background against which to analyse the various ways in which the new Constitution has enhanced access to court or justice, human rights and the rule of law in Zimbabwe.

4 Standing under the new Constitution

The current Constitution follows the South African model and broadens the number of persons who are entitled to bring rights or interests-based claims for determination by the local courts. As indicated earlier, these include any person acting in their own interests; any person acting on behalf of another person who cannot act for themselves; any person acting as a member or in the interests of a group or class of persons; any person acting in the public interest; and any association acting in the interests of its members. The stipulated categories of persons may approach a court alleging that a fundamental right or freedom protected in the Constitution has been, is being or is likely to be infringed by the impugned law or conduct.

39 A de Bourbon 'Human rights litigation in Zimbabwe: Past, present and the future' (2003) 3 *African Human Rights Law Journal* 195 201.

40 [2003] ZWSC 65.

41 Broadcasting Services Act (Ch 12:06 of the Laws of Zimbabwe).

42 L Chiduzo & P Makiwane 'Strengthening *locus standi* in human rights litigation in the new Zimbabwean Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 1 9.

This section discusses in detail the standing of each person; the circumstances under which each of these groups can vindicate human rights; and the extent to which the Constitution liberalises *locus standi* to enhance access to justice by marginalised groups.

4.1 Any person acting in their own interests

The idea that persons acting in their own interests are entitled to approach the courts for relief mirrors the common law principle that only persons who are directly affected by the matter to be considered by the court have a right to seek a remedy before it. However, it has been suggested that the term 'interest' is 'wide enough' and includes, for example, instances where a trustee seeks to maintain the value of a property.⁴³ An argument may be made that the term 'acting in their own interests' has a wider meaning under the Constitution than it had at common law. This view has support from the majority decision in *Ferreira v Levin NO & Others*,⁴⁴ where the majority of the Court denied Ackermann J's claim that the interest referred to must relate to the vindication of the constitutional rights of the applicant and no other person.⁴⁵ Chaskalson P, as he then was, emphasised that the Court would adopt a broader interpretation of the term 'sufficient interest', and indicated that the person bringing the claim should not necessarily be the person whose rights have been infringed.⁴⁶ He insisted that '[t]his would be consistent with the mandate given to [the] Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled'.⁴⁷ The application for relief need not relate to the constitutional rights of the plaintiff, but may relate to the constitutional rights or interests of other persons.⁴⁸

Section 85(1)(a) of the Constitution embodies the common law rule that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interests adversely affected by an infringement of a fundamental right or freedom.⁴⁹ The infringement must be in relation to the affected person as the victim, or there must be harm or injury to his or her own interests directly arising from the infringement of a fundamental right or freedom of another person. There must be a direct relationship between the person who alleges that a fundamental right

43 *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283.

44 1996 (1) SA 984 (CC).

45 For this narrow approach to standing, see *Ferreira v Levin* (n 44 above) para 38 and for a critique of this narrow approach, see O'Regan J's judgment in the same case, especially para 226.

46 *Ferreira v Levin* (n 44 above) paras 163-168.

47 *Ferreira v Levin* para 165.

48 See *Port Elizabeth Municipality v Prut NO & Another* 1996 (4) SA 318 (E) 324H-325J.

49 See *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/15 8-9.

has been infringed and the cause of action. The shortcomings of this rule prompted Chidyausiku CJ, in *Mawarire v Mugabe NO & Others*,⁵⁰ to make the following remarks:⁵¹

Certainly this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.

It appears as if Chidyausiku CJ was mainly concerned with the fact that the traditional approach to standing only served a litigant who had suffered an infringement of their rights or who had faced an imminent threat to their rights. This approach had to be broadened to include 'even those who calmly perceive a looming infringement' in order to fulfil the constitutional imperative that any person alleging that a right 'has been, is being or is likely to be infringed' is entitled to approach the courts for relief. Yet, the main threat to access to justice has been the fact that the categories of persons entitled to approach the courts for a remedy have been limited under the traditional rules governing standing.

4.2 Any person acting on behalf of another person who cannot act for themselves

The Constitution confers on 'any person' the authority to seek redress 'on behalf of another person who cannot act for themselves'. To claim relief based on this ground, the applicant usually should demonstrate why the person whose rights are adversely affected is not able to personally approach the court, and should also show that the person in question would have instituted proceedings if they were in a position to do so. Detained persons constitute one category of persons who are usually incapable of acting for themselves. Under section 24(1) of the LHC, any person could seek redress on behalf of detained persons. The same applies to the very young or mentally-challenged persons who lack the capacity to litigate before the courts. Given that it was widely accepted, even under the LHC, that another person could institute court proceedings on behalf of persons who could not do so on their own behalf, it is not necessary to discuss the relevant provisions in detail as the current Constitution essentially codifies what had already been common practice under the LHC.

50 CCZ 1/2013.

51 *Mawarire v Mugabe* (n 50 above) 8.

4.3 Any person acting as a member, or in the interests of, a group or class of persons

Members of groups or persons acting in the interests of a group have the legal competence to represent such groups in class actions. Section 85(1)(c) of the Constitution underlines the importance of class action and seeks to avoid the proliferation of separate court proceedings by litigants who are collectively affected by the conduct of a defendant. To constitute a class action, the defendants must have the same cause of action. Local courts have confirmed the importance of class actions and the role they play in enhancing access to court by people who are similarly negatively affected by the impugned law or conduct. In *Law Society & Others v Minister of Finance*,⁵² the Law Society sought to challenge the constitutionality of a withholding tax that would affect practising lawyers as a group. Counsel for the respondents objected, arguing that the Law Society did not have *locus standi*. McNally JA, in his usual clarity, remarked that the Supreme Court would take a broad view of *locus standi* generally, especially given that the Class Action Act was not yet in force, and that he was not under a legal obligation to make an order that would hinder the development of class actions.⁵³

The judge of appeal held that the applicant had standing, especially given that the applicant had statutory empowerment to involve itself in proceedings of this nature.⁵⁴ The judge partly relied on the provisions of the Legal Practitioners Act, (Chapter 27:07), particularly section 53, which provides that one of the objects of the Law Society is 'to employ the funds of the Society in obtaining or assisting any person to obtain a judicial order, ruling or judgment on a doubtful or disputed point of law where the Council of the [Law] Society deems it necessary or desirable in the interests of the public'.⁵⁵ As such, the Law Society had a real and substantial interest in the proceedings.

Matters relating to representative actions have also arisen in the context of labour-related disputes. In *Makarudze & Another v Bungu & Others*,⁵⁶ the Harare High Court had to determine whether other members of a trade union had *locus standi* to initiate proceedings for the removal of the president of the union on the basis that the president, having been dismissed by the employer, had legally ceased to be a member of the union. Mafusire J held that the 'court will be slow to deny *locus standi* to a litigant who seriously alleges that a state of affairs exists, within the court's area of jurisdiction, where someone in [a] position of authority, power or influence, abuses that position to

52 2000 (2) BCLR 226 (ZS).

53 *Law Society* (n 52 above) 243B-C. McNally JA indicated that he was following the Chief Justice's line of thought in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 9(1) ZLR 242 (S) 205A-E.

54 *Law Society* (n 52 above) 243B-C.

55 As above.

56 HH 08-15.

the detriment of members or followers'.⁵⁷ The Court held that it was beyond doubt that the applicants 'had a direct and substantial interest in the management of the affairs of the Union [and that] they [had] demonstrated a sufficient connection to the subject-matter of their complaint'.⁵⁸ In the words of the Court, '[i]f an alien, in the sense of someone having lost the capacity to remain a member of the union, let alone of Excom, continued to cling onto that position, then a member or members of the union, individually or collectively, would certainly have the right, power and authority to approach the courts for relief'.⁵⁹ On the whole, domestic courts have indicated that they are prepared to allow groups of persons similarly affected by the conduct or law complained of, to initiate court proceedings, individually or collectively, to advance the interests of the group.

4.4 Any person acting in the public interest

In public interest litigation, the central question is whether the challenged law or conduct has the effect of adversely impacting on the community or a segment thereof. It is not material that the impugned law or conduct affects the interests of a significant segment of society. Where, however, the fundamental rights and freedoms of any of the vulnerable or disadvantaged group are negatively affected by the challenged law, the courts will most likely ground standing in the public interest clause.⁶⁰ In *Ferreira v Levin*,⁶¹ the South African Constitutional Court set out the criteria for determining whether a matter is 'genuinely in the public interest'. O'Regan J held as follows:⁶²

Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.

These findings were reinforced in *Lawyers for Human Rights v Minister of Home Affairs*,⁶³ where the same Court added the degree of the vulnerability of the people affected; the nature of the right said to be infringed; and the consequences of the infringement of the right as crucial elements to be considered.⁶⁴ These criteria ensure that only cases that are genuinely intended to promote the public interest are

57 *Makarudze* (n 56 above) 7.

58 As above.

59 As above.

60 *Mudzuru* (n 49 above) 18.

61 *Ferreira v Levin* (n 44 above).

62 *Ferreira v Levin* para 234.

63 2004 (4) SA 125 (CC).

64 *Lawyers for Human Rights* (n 63 above) paras 16-18.

entertained by our courts and to distinguish such cases from those intended to advance private or political or publicity interests.⁶⁵ Public interest litigation does not only promote human rights, but also enhances the rule of law by ensuring that the majority of cases are decided based on the merits and not on mere technicalities or a failure to comply with procedural formalities. It requires courts to proceed to the substance of the application, to apply the relevant rules of law and to determine whether or not these rules have been violated by the impugned law or conduct.

Public interest litigation has a long history in Zimbabwe, and a number of pre- and post-independence judicial decisions have dealt with circumstances in which public and private bodies may institute proceedings in the public interest.⁶⁶ For them to justify their appearance before the court in the public interest, the petitioner has to demonstrate that the interest at stake involves a large number of victims so as to constitute the public interest. As Makarau J put it, '[t]he parties to the dispute and the nature of the dispute [must be] such as to place the litigation in the public domain'.⁶⁷ For instance, litigation to protect the environment may be pursued in the public interest. In *Deary NO v Acting President & Others*,⁶⁸ a public body that had brought an application on behalf of the citizens of the then Rhodesia against the colonial government alleged that it had standing based on the public interest. Although the applicant is cited as Deary, the application was brought by the Catholic Commission for Justice and Peace, a non-governmental organisation (NGO) seeking to protect the rights of the citizenry. The *locus standi* of the applicant was objected to, and it was initially contended that the application had been brought for purely political reasons and was vexatious. In holding that the applicant was properly before the court, Beck J made the following remarks:⁶⁹

It must be said from the outset that the Court will be slow indeed to deny *locus standi* to an applicant who seriously alleges that a state of affairs exists within the court's area of jurisdiction, whereunder people have been or about to be, and will continue to be unlawfully killed ... The non-frivolous allegation of a systematic disregard for so precious a right as the right to life is an allegation of an abuse so intolerable that the court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts.

65 See AK Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 407-414.

66 See generally *Law Society of Zimbabwe v Minister of Justice, Legal and Parliamentary Affairs & Another* 16/06; *Capital Radio (Private) Limited v Broadcasting Authority of Zimbabwe & Others* SC 128/02; *Law Society & Others v Minister of Finance* 1999 (2) ZLR 231 (S); *Ruwodo v Minister of Home Affairs & Others* 1995 (1) ZLR 227 (S); *In re Wood & Another* 1994 (2) ZLR 155 (S).

67 *The Zimbabwe Stock Exchange v The Zimbabwe Revenue Authority* HH 120-2006 6.

68 1979 ZLR 200 (S); see also *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 (1) ZLR 242 (S).

69 *Deary* (n 68 above) 203A-B.

The nature of the right plays an important role in determining the extent to which a court is prepared to entertain matters brought before it in the public interest. As the above remarks suggest, where the right allegedly infringed by the impugned conduct is 'so precious' and compelling that its violation would negatively impact on the enjoyment of other constitutional rights and freedoms, courts should not limit their powers to entertain cases simply because the plaintiff is not directly affected by the impugned conduct. In *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs & Others*,⁷⁰ two young girls who had left school after having fallen pregnant sought to challenge the constitutional validity of the statutory provisions allowing girls of a particular age to marry before attaining majority status. Counsel for the applicants conceded that the applicants were not victims of the alleged infringements of the fundamental rights of girl children involved in early marriages since they had attained the age of majority. The Constitutional Court dismissed as 'erroneous' the respondents' contention that the applicants lacked standing under section 85(1)(d) of the Constitution. The Court held:⁷¹

The argument that the applicants were not entitled to approach the court to vindicate the public interest in the well-being of children protected by the fundamental rights of the child enshrined in s 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose interests constitute a category of public interest.

Thus, public interest litigation becomes a mechanism designed to ensure that vulnerable groups in society are fully protected.

The bulk of human rights violations negatively affect not only individuals, but also families and communities. While it may, in some cases, be difficult to identify particular individuals affected by the infringement of rights, it is obvious in the majority of contested cases that the disputed legislation or conduct violates human rights and the rule of law. Public interest litigation enables lawyers and NGOs to expose and challenge human rights violations in instances where there is no identifiable person or determinate groups of persons directly negatively affected by the disputed legislation or conduct. This line of reasoning is applied in the *Mudzuru* case, where Malaba DCJ makes the following remarks:⁷²

Section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective

70 CCZ 12/15.

71 *Mudzuru* (n 49 above) 11-12.

72 *Mudzuru* 12. For comparative jurisprudence, see *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) ECW/CCJ/APP/0808*, 27 October 2009, para 34.

protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.

In countries where victims of human rights violations are often too poor to seek a remedy, the significance of civil society intervention and, therefore, the need to broaden standing rules cannot be underestimated.⁷³ Public interest litigation allows courts to entertain matters they would not entertain if they were to follow the technical rules and procedural formalities historically governing *locus standi*. According to Olowu, 'it is important for the effective protection of human rights ... to achieve liberal and wider access to court for social action and public interest litigation'.⁷⁴ Requiring the plaintiff to demonstrate a personal interest 'over and above' those of the general public unnecessarily limits the jurisdiction of domestic courts, the usefulness of public interest litigation and marginalised people's rights to the provision of goods and services. More importantly, public interest litigation enables courts to proceed to the merits of the parties' arguments instead of focusing on whether or not the plaintiff has suffered any injury from the impugned conduct. This allows courts to make determinations on the validity of legal rules and, in the process, promote the rule of law.

4.5 Any association acting in the interests of its members

Section 85(2)(e) of the Constitution confers on 'any association acting in the interests of its members' the capacity to seek relief on behalf of its members. There has been little development of the law governing the standing of associations in domestic courts. More importantly, however, the Constitution does not refer to 'incorporated associations', thereby leaving room for unincorporated associations to approach the courts for relief. This is important, specifically in Zimbabwe, where the rise of the informal sector (employing thousands of citizens) has witnessed the proliferation of unincorporated associations.

Although local courts have had limited experience with actions brought by associations, other jurisdictions have had occasion to deal with such matters.⁷⁵ At the domestic level, it remains to be seen whether the courts will follow the same line of reasoning adopted by foreign judges. Arguably, our courts should draw inspiration from the rulings of courts in foreign jurisdictions, especially in light of the fact that the Constitution confers on them the discretion to consider

73 ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Law Journal* 233 262.

74 D Olowu *An integrative rights-based approach to human development in Africa* (2009) 172.

75 See generally *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC); *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Authority & Others* 2002 (6) SA 66 (T) and *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others* (No 1) 2003 (5) SA (C) 518 556.

foreign law when interpreting provisions in the Declaration of Rights. Given that standing provisions are found in the Declaration of Rights and that the Zimbabwean Constitution was largely derived from the South African Constitution, the relevance of court judgments in that jurisdiction cannot be overemphasised.

5 Demise of the 'dirty hands' doctrine

The formulation of the 'dirty hands' doctrine is mirrored in the famous maxim of 'he who comes into equity must come with clean hands'. Despite its rootedness in 'natural law' principles and its moralistic tenor, the doctrine has been removed from the constitutional legislation of many countries. Section 85(2) of the Constitution provides that a person may not be debarred from approaching a court for relief simply because they have contravened 'a law'. This effectively means that a litigant can mount a claim challenging the constitutionality of a piece of legislation in terms of which they are being charged. The rationale behind this approach is simple: It would not make sense to require litigants to first comply with a piece of legislation which violates their rights for them to be given the right to challenge the constitutionality of that piece of legislation.

Unfortunately, domestic courts have a sad history of using this doctrine to deny litigants any audience before them. The *locus classicus* in this regard is the case of *Associated Newspapers of Zimbabwe (Pty) Ltd v Minister of State for Information and Publicity in the Office of the President*.⁷⁶ In this case, the Court refused to hear the applicant's claim as the applicant had not yet complied with the provisions of the piece of legislation it sought to challenge. Chidyausiku CJ observed as follows:⁷⁷

This is a court of law and as such cannot connive or condone the applicant's open defiance of the law. *Citizens are obliged to observe the law of the land and to argue afterwards*. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this Court with clean hands on the same papers.

The Court clearly misdirected itself in this respect. Requiring litigants to suffer prejudice and harm before they can be heard by the courts is not even remotely reconcilable with the notions of justice and fairness, even for the average legal systems. The Court's assertion appears to have proceeded from the erroneous premise that the state's laws are

⁷⁶ [2003] ZWSC.

⁷⁷ *Associated Newspapers* (n 76 above) 20.

perfect and that citizens' rights are not recognised as long as they have not yet complied with those laws. The Constitution now concretises the need to provide prompt redress to victims or potential victims of constitutional rights violations by scrapping the dirty hands doctrine which in effect, denied the general public access to justice and, in most instances, violated the rule of law.

6 Principles with which all court rules must comply

The constitutional provisions governing standing outline four principles with which all court rules must comply. These principles are meant to ensure that the promise of access to justice protected in section 85 of the Constitution is not thwarted by restrictive court rules at every level of the judicial system. They include the need to fully facilitate the right to approach the courts; the fact that formalities relating to court proceedings, including their commencement, should be kept to a minimum; the need to ensure that the courts are not unreasonably restricted by procedural technicalities; and the need to ensure that legal experts appear, with the leave of the court, as friends of the court.⁷⁸ In a way, these principles are meant to ensure that rules of court do not prevent courts from determining whether impugned laws or conduct are valid or constitutional. They allow courts to entertain as many cases as possible to ensure that there is due respect for the rule of law and that the majority of litigants have access to both procedural and substantive justice. This approach is reinforced by the constitutional injunction that the absence of court rules should not limit the rights to commence proceedings and to have one's case heard and determined by a court of law.⁷⁹ Below is an explanation of how each of the principles relating to court rules promotes human rights, access to justice and the rule of law.

6.1 Need to fully facilitate the right to approach the courts

Rules of court may not unnecessarily restrict access to court by individuals seeking relief for violations of fundamental rights and the rule of law. If they do so, such rules would be inconsistent with the letter and spirit of the new Constitution. The need to have rules of court which facilitate rather than restrict access to court must be interpreted in line with the purposes of two other provisions of the Constitution. The first is section 85(2) which, as has been demonstrated above, liberalises *locus standi* and permits a broad range of individuals to approach the courts for relief should their or other persons' human rights be violated. In the event that rules of court restrict access to court by victims of violations of rights, such rules have to be declared invalid to the extent of their inconsistency

⁷⁸ Secs 85(3)(a)-(d) Constitution.

⁷⁹ Sec 85(4) Constitution.

with the Constitution. This approach is in line with the rule, entrenched in section 2(1) of the Constitution, that the Constitution is the supreme law of the land and that any law or conduct inconsistent with it is invalid to the extent of the inconsistency.

In addition, the requirement that rules of court enhance rather than limit access to court is more directly related to the illimitable right to a fair hearing as protected in sections 69(1) to (4) of the Constitution. Section 69(3) of the Constitution provides that '[e]very person has the right of access to the courts or to some other tribunal or forum established by law for the resolution of any dispute'. The Constitution is based on the assumption that no one should be denied access to court for the resolution of their disputes, and recognises the need to have rules of court which make this objective possible. The principle of equality underlies the core of the structure of fair trial rights and lies at the heart of the modern legal system.

6.2 Need to keep to the minimum formalities relating to court proceedings

The failure to comply with requirements as to the completion of forms has been held to be a 'minor omission' that should not impede an applicant's right to have a matter determined by a court of law. In *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Others*,⁸⁰ the applicant contested the cancellation of its licence by the first respondent (POTRAZ), a regulatory body responsible for licensing in terms of the relevant statute. The first respondent had cancelled the licence on the grounds that the applicant had failed to comply with the requirement that it cede 11 per cent of its shares to locals in terms of the Indigenisation and Economic Empowerment Act.⁸¹ Counsel for the first respondent sought to contest the validity and urgency of the application, and argued that the application did not comply with Rule 241(1) of the High Court Rules, 1971 in that the purported Form 29B does not contain a summary of the grounds on which the application is brought. As such, the first respondent argued that there was no application at all before the court due to a lack of compliance with the relevant Rule. Counsel for the applicant conceded the omission of the grounds on which the application was made from the form, argued that the grounds were contained in the founding affidavit, and prayed the Court to condone what he thought was a 'minor omission'. Mathonsi J, for the Court, held as follows:⁸²

I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not [designed] to impede the attainment of justice. Where there has been substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should

80 HH-446-15.

81 Ch 14:33 of the Laws of Zimbabwe.

82 *Telecel* (n 80 above) 6.

condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by R 4C of the High Court Rules, I condone the omission.

Accordingly, a failure to conform to court rules or other formalities may be condoned to ensure that the applicant approaches a court of law for relief. The adoption of the Constitution created room for the local courts to place more emphasis on substance rather than form. Ultimately, the need to ensure that courts are not unreasonably restricted by procedural technicalities is intended to ensure that such technicalities do not frustrate the liberalisation of *locus standi*, access to justice by aggrieved persons and the rule of law.

6.3 Need to ensure that courts are not unreasonably restricted by procedural technicalities

Procedural technicalities may not be invoked in a manner that unreasonably restricts the courts' institutional competence to entertain cases brought before them. One of the procedural technicalities often relied upon by local lawyers to frustrate access to justice has been the argument that matters brought before the courts on an urgent basis are not at all urgent. When this happens, the court is required to rule on whether or not the matter is urgent before making a ruling on the merits of the case. Ultimately, this delays court proceedings and enables the other party to buy time on the basis of a mere procedural technicality. In *Telecel v POTRAZ & Others*, the respondent submitted that the applicant should not be entertained on an urgent basis as the matter simply was not urgent; in fact this was self-created urgency. The first respondent argued that, given that the applicant had been made aware on 5 March 2015, through a formal letter, that the first respondent intended to cancel its licence, it should have taken remedial action at that point instead of waiting until 30 April 2015 to file an application challenging the cancellation of the licence. The Court agreed with counsel for the applicant in the following terms:⁸³

[R]aising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute. Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in*

83 *Telecel 7*. See also *The National Prosecuting Authority v Busangabanye & Another* HH 427/15 3.

limine by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence vis-à-vis the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propriis*.

Just as the drafters of the Constitution, the Court in *Telecel Zimbabwe v POTRAZ* recognises a genuine concern that if undue emphasis is placed on technicalities, 'many litigants will suffer denial of access to justice [based on sheer technicalities] which leave their causes unresolved'. In *Zibani v Judicial Service Commission & Others*,⁸⁴ Hungwe J emphasised that 'courts should be slow, and indeed they are slow, in dismissing legitimate causes on the basis of technical deficiencies that may exist on the papers'.⁸⁵ Where the technical deficiency raised does not in any way resolve the issues placed before the Court by the applicant, it would be a travesty of justice for the Court to dispose of a matter based on such deficiency. Excessive reliance by litigants on deficiencies that do not dispose of the issues under consideration wastes the time of the court, delay the substance-related resolution of the dispute and violates the constitutional command that courts not be unreasonably restricted by procedural technicalities.

6.4 Need to ensure that any person with particular expertise appears as a friend of the court

Rules of court should also 'ensure that any person with particular expertise appears as a friend of the court'. Friends of the court, commonly known as *amici curiae*, play a pivotal role in assisting courts to reach informed judgments.⁸⁶ The idea that rules of court should ensure that any person with particular expertise should appear as a friend of the court is an important innovation by the drafters of the Constitution. This approach reinforces the idea of participatory democracy which lies at the heart of the new constitutional order. Moreover, concrete cases often raise far-reaching legal, economic and political questions that are often beyond the interests of the parties to the litigation. The fact that legal disputes may have consequences which affect the rights and interests of the parties not already before courts raises the need for specialist information and justifies the need

84 HH 797/16.

85 *Zibani* (n 84 above) 4.

86 For educative discussions on the *amicus*, see C Murray 'Litigating in the public interest: Intervention and the *amicus curiae*' (1994) 10 *South African Journal on Human Rights* 240; G Budlender 'Amicus curiae' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2014) 8-1; N Lieven & C Kilroy 'Access to the court under the Human Rights Act: Standing, third party intervenors and legal assistance' in J Jowell & J Cooper (eds) *Delivering human rights: How the Human Rights Act is working* (2003) 115.

for a more liberal approach to the admission of *amici curiae*. Thus, the Constitution underscores the need to evaluate the impact of litigation upon categories of persons not already before the courts and, in a way, challenges the notion that the resolution of legal disputes merely affect those parties to litigation. The involvement of friends of the court can play in assisting courts to make fair rulings and to promote the rule of law in concrete cases. This partly explains why section 85(3)(d) provides that the rules of every court should allow a person with particular expertise to appear as a friend of the court.

7 Liberalisation of *locus standi*, access to justice and the rule of law

The liberalisation of rules governing standing reflects a conceptualisation of the rule of law in terms of which the judiciary sits at the centre of decision-making processes and can be approached to determine any constitutional dispute and assess the validity of governmental action against the demands of the Constitution and the law.⁸⁷ Keyzer notes 'as a matter of constitutional law that people are entitled to know whether the laws that govern them are valid' and that, therefore, the general public must have standing to obtain a binding declaration about the state of the law.⁸⁸ A liberal approach to standing requires courts to place a substantial value on the merits of the claim and underlines the centrality of 'vindicating the rule of law and ensuring that unlawful decisions do not go uncorrected'.⁸⁹ In *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd*,⁹⁰ Lord Diplock made the following remarks:⁹¹

It would, in my view, be a grave *lacuna* in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

In one of its recent cases, *Mudzuru v Minister of Justice*, the Constitutional Court adopted a similar approach to standing and extended to everyone the right to institute proceedings even on occasions where they have an indirect interest in the outcome of the dispute. The Court held that while the applicants had failed to fulfil the requirements for standing under section 85(1)(a) of the Constitution – which permits persons to act in their own interest – they could still act in terms of section 85(1)(d) which allows public

87 S Evans & S Donaghue 'Standing to raise constitutional issues in Australia' in RS Kay (ed) *Standing to raise constitutional issues* (2005) 115 142.

88 P Keyzer *Open constitutional courts* (2010) 138.

89 A Street *Judicial review and the rule of law: Who is in control?* (2013) 24.

90 [1982] AC 617.

91 *Inland Revenue Commissioners* (n 90 above) 644E.

interest litigation. In its analysis on the relationship between broad standing rules and access to justice, the Court held that the Constitution guarantees

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.*⁹²

The constitutionalisation of public interest litigation and class actions represents a paradigm shift from the historical emphasis on the existence of a link between the challenger of a particular law and the challenged law. It underlines the importance of conferring on individuals, groups or civil society organisations the right to challenge the national laws in which they operate, even if there is no direct link between their own rights and the law they are challenging. This approach correctly locates the source of constitutional challenges and seeks to prevent the state from immunising unconstitutional legislation or decisions. It places the emphasis not on the question of whether the person bringing the claim is the appropriate person, but on whether the challenged law or conduct is valid or constitutional.

There are strong linkages between broad standing rules and access to constitutional justice. This is so because 'a more liberal standing regime ... makes it easier for individuals to raise constitutional issues as a means of vindicating constitutional entitlements'.⁹³ In the case of *De Beer No v North Central Local Council and South Central Local Council*,⁹⁴ the South African Constitutional Court linked the rights of access to court and a fair hearing to the rule of law in the following terms:⁹⁵

The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this.

92 *Mudzuru* (n 49 above) 14.

93 S Evans 'Standing to raise constitutional issues' (2010) 22 *Bond Law Review* 38 50.

94 2002 (1) SA 429 (CC).

95 *De Beer* (n 94 above) para 11.

With respect to founding values, which include the rule of law, it is important to realise that they perform an important interpretive function and broaden the meaning of substantive constitutional provisions entrenching fundamental rights and freedoms. Both the liberalisation of *locus standi* and the founding principle of the rule of law legitimise the instrumentalisation of the state in that they revolve around the idea that the central purposes of the law and the state are to serve the citizen and to protect human rights; to prevent the arbitrary and unlawful use of public power; to enable individuals to challenge public authorities that are thought to infringe upon the fundamental rights of the citizen; and to ensure that unjust laws are struck down by an independent judiciary.⁹⁶ To this end, the liberalisation of *locus standi* constitutes one of the means through which the twin ends – access to justice and the rule of law – can be achieved.

8 Ouster clauses and the rule of law

On a negative note, some constitutional provisions undermine the principle of the rule of law and the enjoyment of property rights. Section 72(3)(b) of the Constitution⁹⁷ provides that where agricultural land has been compulsorily acquired, no person may apply to the court for determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition. It further provides that such acquisition may not be challenged on the ground that it is discriminatory in contravention of the equality and non-discrimination clause.⁹⁸ This general ouster of the court's jurisdiction in land issues emasculates the concept of the rule of law and allows the state to violate property rights by grabbing land without either paying compensation or allowing the owners of such land to turn to courts for redress. This in no way reflects the principles of standing and the rule of law, which both imply that all citizens should have the right to approach courts to seek redress in the event of their rights having been infringed. Such provisions imply that the state power is not subject to the checks and balances that exist through the judiciary. Even in the event that the state uses its powers arbitrarily, the courts' hands are tied and the state would get away with such abuse of its citizens which the rule of law and all the concepts that fall under it seek to protect.

In a group of disputes related to the compulsory acquisition of land, the Supreme Court has previously emphasised that Parliament has the power to make or amend any law, including the Constitution.⁹⁹ As such, if Parliament amends the Constitution while

96 See generally L Pech 'The rule of law as a constitutional principle of the European Union' (2009) 04/09 Jean Monnet Working Paper 1 44.

97 See also sec 295(3) of the Constitution.

98 Secs 56(1)-(6) Constitution.

exercising its powers to amend any law, courts have no business to intervene in the matter even if the amendment ousts the jurisdiction of the courts.¹⁰⁰ In the process, the then apex court emphasised that the question of what protection an individual should be afforded under the Constitution in the use and enjoyment of private property is of a political and legislative character.¹⁰¹ This is not a judicial question. In *Mike Campbell (Pvt) Limited & Another v The Republic of Zimbabwe* (Merits),¹⁰² the SADC Tribunal correctly held that the ouster clause in the LHC denied applicants access to courts, unfairly deprived them of a fair hearing and violated the rule of law.¹⁰³ Section 72(3)(b) of the Constitution specifically provides that 'no person may apply to court for the determination of any question to compensation' for compulsorily acquired land, and that 'no court may entertain any such application'. This is inconsistent with the principle that every person has the right of access to court for purposes of having their matter determined by an impartial person, and violates not only the review powers of the court, but the principle of the rule of law.

9 Conclusion

This article has demonstrated that the prospects for access to justice and the rule of law have, at least in theory, been improved by the liberal approach to standing entrenched in the current Constitution. The constitutionalisation of public interest litigation has broadened the number of persons that may appear before the local courts to vindicate their or other people's rights. A liberal approach to standing enables citizens to ask the courts to determine wide-ranging constitutional disputes and to assess the validity of governmental action against the demands of the Constitution and the law. This requires courts to place a substantial value on the merits of the claim, vindicate the rule of law and ensure that unlawful decisions do not go uncorrected.

However, access to justice in the sense of access to court requires more than merely the implementation of constitutional provisions regulating standing and access to court. There are numerous possibilities for enhancing access to justice through other means than by insisting on strict adherence to duties imposed on the state by constitutional provisions. First, the promise of access to justice and the rule of law embodied in the provisions liberalising *locus standi* are

99 *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* [2008] ZWSC 1. See also *Manica Zimbabwe Ltd & Others v Minister of State for National Security Lands Land Reform and Resettlement in the President's Office & Another Case* (06/06); *Quinnell v Minister of Lands Agriculture and Rural Resettlement & Others* (13/04) [2004] ZWSC 47.

100 As above.

101 As above.

102 SADC (T) Case 02/2008, 28 November 2008.

103 *Campbell* (n 102 above) 26-27.

severely curtailed, even undone, in instances (such as in land-related claims) where the jurisdiction of the courts is expressly ousted. Courts are the guardians of the rule of law, and ouster clauses constitute the greatest threat to both the review powers of the courts and the rule of law. Second, the Constitution itself might be unknown to the ordinary citizens who are often the victims of gross violations of human rights. It could be that the country also needs to embark on grassroots-based legal literacy and educative programmes especially targeting remote rural communities where the majority of the people are uneducated and unaware of the applicable constitutional provisions. This could be done through initiatives involving Parliament, local law schools, civil society organisations, independent commissions and other relevant institutions involved in mobile legal aid clinic work educating communities about their constitutional rights and how to enforce these rights. Third, it could be that there is the need for a huge drive towards representation of litigants by public interest lawyers or trained paralegals. This highlights either the need for lawyers in private practice to, on their own volition or through some kind of regulatory provision, develop or broaden their *pro bono* services or for the government to expand the role and substantially increase the budget of the Legal Aid Directorate.

Fourth, the lack of access to the formal courts could be pointing to the fact that there is a serious need for individuals, society and the state to reconsider the value of both alternative dispute resolution mechanisms and the role of customary law courts in promoting access to justice in local communities. These dispute resolution mechanisms are affordable and the procedures followed are highly informal and flexible. As a result, much of what happens in these fora is understandable and the majority of the people can easily follow proceedings. Besides, there is an element of participatory democracy in these dispute resolution methods, and the participants are likely to feel that they own the process and outcome of the decision-making process. In the context of traditional dispute resolution methods and the goals of the dispute resolution process, the majority of citizens are likely to have a strong feeling that their cultural identity is mirrored in the decision-making process, and this encourages compliance with the decisions of traditional courts. Finally, the complexities associated with the formal justice system and the limited public knowledge of court proceedings might be a solid reason for increasing calls for the simplification of the relevant procedures to ensure that not only the average person understands what is involved, but also that the formal justice system is accessible to local communities. Only then can we have full access to justice and promote the rule of law in the formal courts.

Prosecuting international crimes in the Democratic Republic of the Congo: Using victim participation as a tool to enhance the rule of law and to tackle impunity

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Summary

In an effort to address the legacies of massive human rights abuses and to restore the harms that have been caused, access to justice in the Democratic Republic of the Congo should be seen within a broad context. Central to the fulfilment of such a broad understanding of access to justice is victim participation. The legal framework of the DRC permits a wide range of participatory rights for victims in criminal proceedings. However, until recently the authority to prosecute serious violations of international human rights law, namely, genocide, crimes against humanity and war crimes, were exclusively held by the DRC's military courts. With the adoption of legislation in 2016 amending the Congolese Criminal Code and the Code of Criminal Procedure, what remains unclear is how victim participation will be operationalised once domestic courts start prosecuting these international crimes. The purpose of this article is to respond to these concerns.

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1 Introduction

Since 1993, the Democratic Republic of the Congo (DRC) has been marked by numerous major political crises, wars and multiple ethnic and regional conflicts that brought about the deaths of millions of people from war-related causes, making the conflict the deadliest since World War II. Very few people living within the borders of the DRC managed to escape the violence and were the victims of grave international crimes, including mass murder, sexual and gender-based crimes, forced displacement and pillage. For years, victims have demanded accountability at the national and international levels.¹ Despite such widespread atrocities, only a small number of serious crimes committed in the DRC have been brought to court, with the proceedings mainly taking place in military courts, leading one to surmise that there has been an inability on the part of the DRC government to effectively lead the pursuit towards justice.² Whether it is the limited engagement of the authorities in strengthening the rule of law, the tolerance of interference by political and military authorities in judicial affairs, the poor judicial practice of military courts and tribunals over recent years, the result, in the eyes of many victims, is that the judicial system in the DRC has neither the capability nor the credibility required in order to step up efforts to fight against impunity for the many violations of fundamental rights committed against them in the past.³

While rebuilding trust in the judicial system to be used as a tool to tackle the climate of impunity will undoubtedly require time and effort, one of the most important avenues by which to do this will be by strengthening the rule of law. Critical to such an endeavour is ensuring access to justice for victims. In an attempt to redress the legacies of massive human rights abuses and to restore the harm that has been caused, access to justice for victims through prosecutions should be seen in a broad context, which includes access to a trial; access by those within the trial; and access to the community by the

1 At the international level, the DRC in April 2004 invited the office of the Prosecutor of the International Criminal Court to investigate alleged crimes in the context of an ongoing armed conflict in its territory. After a brief preliminary examination, the ICC opened its investigations in June 2004. See <https://www.icc-cpi.int/drc> (accessed 21 February 2018).

2 See United Nations Office of the High Commissioner for Human Rights Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003 (Mapping Report), August 2010, http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf (accessed 1 June 2016).

3 Mapping Report (n 2 above) para 979.

trial.⁴ Central to the fulfilment of such a broad understanding of access to justice is victim participation. As Hobbs explains: 'Victim participation has the potential to empower survivors and engender individual healing and social trust, promoting accountability and the rule of law in post-conflict transitioning societies.'⁵

As is the case in most countries that follow the civil law tradition, the legal framework of the DRC permits a wide range of participatory rights for victims in criminal proceedings. However, until recently the authority to prosecute serious violations of international human rights law, namely, genocide, crimes against humanity and war crimes, were exclusively reserved for the military courts in the DRC. With the adoption of legislation in 2016 amending the Congolese Criminal Code and the Code of Criminal Procedure, effectively transposing the Rome Statute⁶ into national law, what remains unclear is how victim participation will be operationalised once domestic courts start prosecuting these international crimes. The purpose of this article is to respond to these concerns and, in an effort to do this effectively, the article is divided into four parts: First, the article starts by highlighting the importance of victim participation as a post-conflict justice mechanism. Subsequently the article examines international and regional human rights decisions in relation to the rights of victims to participate in criminal proceedings for serious human rights violations. Third, the article analyses the domestic legal framework of the DRC and the recent jurisprudence arising from the military tribunals, highlighting the more restrained participatory rights available to victims within the military justice system. Finally, the article turns to the Extraordinary Chambers in the Courts of Cambodia (ECCC) in an effort to anticipate any possible shortcomings in the DRC domestic framework when trying to accommodate the rights of what could amount to numerous victims.

2 Development of victim participation as a post-conflict justice mechanism

Post-conflict justice mechanisms, such as criminal prosecutions, truth commissions and reparation programmes, are principally concerned with a societal response to collective violence motivated by the search for truth and justice.⁷ While there are no exhaustive definitions for the terms 'truth' and 'justice', in practice the best way forward in

4 R Henham 'Conceptualising access to justice and victims' rights in international sentencing' (2004) 13 *Social and Legal Studies* 48.

5 H Hobbs 'Victim participation in international criminal proceedings: Problems and potential solutions in implementing an effective and vital component of justice' (2014) 49 *Texas International Law Journal* 3.

6 Rome Statute of the International Criminal Court, 2187 *UNTS* 90, entered into force 1 July 2002.

7 M Minow *Between vengeance and forgiveness* (1998) 9.

achieving these appears to be implementing a set of judicial and non-judicial measures in order to redress the legacies of massive human rights abuses. Most importantly for the victims, prosecutions can operate as a form of release or have a cathartic effect, where injustices are dealt with and not left to fester to be the catalyst for continued violence.⁸ Moreover, a failure to prosecute may result in damaging the legitimacy of the new regime since lawlessness most likely was a characteristic of the repressive regime.⁹ Prosecutions can have the power to provide societies in the process of rebuilding a reaffirmation in the rule of law, which respects the dignity of all people.¹⁰ In addition, through stigmatisation, trials can internalise that certain behaviours are not acceptable.¹¹ In this way, during periods of transition law not only is informed by past injustices but is prospective, forward-looking, creating the boundaries of law in the 'new' community and helping to shape it.¹²

Although victims' rights and, in particular, the rights of victims to participate in criminal proceedings, has garnered much attention internationally, the principle that individuals who have suffered personal harm or material injury as a result of another's conduct should be permitted personal and direct redress had traditionally been at the heart of the social contract between the individual and the collective.¹³ Generally speaking, ancient customary laws were almost exclusively victim-centric, with disputes being addressed by the collective and providing not only for restorative damages, but also punitive ones.¹⁴ As Funk explains, 'making the victim whole was, indeed, ancient law's paramount purpose'.¹⁵

Eventually, however, the focus of Western customary law on the victim began to change: With the centralisation of authority, the state took on the responsibility of administering criminal justice as law breakers were viewed to have committed offences against the 'crown' or 'society' as opposed to an individual victim.¹⁶ Once the central figure (the victim) became relegated to a distinctly secondary role, this was little more than a source of evidence to be used against the accused and to secure the welfare of the community at large.¹⁷

8 NJ Kritz 'Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights' (1996) 59 *Law and Contemporary Problems* 128.

9 DF Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1990-1991) 100 *Yale Law Journal* 2542.

10 As above.

11 P Akhavan 'Justice in The Hague, peace in the former Yugoslavia? A commentary on the United Nations war crimes tribunal' (1998) 20 *Human Rights Quarterly* 749.

12 R Teitel 'Transitional jurisprudence' (1997) 106 *Yale Law Journal* 2077-2080.

13 MT Funk *Victims' rights: An advocacy at the International Criminal Court* (2010) 19-20.

14 Funk (n 13 above) 20.

15 Funk 24.

16 As above.

17 Funk (n 13 above) 25.

Underlying the above-mentioned conceptual shift in criminal law and criminal justice institutions was the development of criminal justice theories, which eventually transcended from its earlier, and more narrow, focus on punishment to a broader and more comprehensive appreciation of the nature of law, legal systems and legal institutions.¹⁸ The traditional criminal law theory of retributivism has been particularly influential in shaping criminal proceedings that seek to determine individual criminal responsibility for the commission of heinous acts.¹⁹ The retributive approach at the international level, which can be transposed to the domestic framework, posits that crimes such as genocide, crimes against humanity and war crimes are acts that shock the conscience of mankind, deserving of society's condemnation. The main role of courts, therefore, should be to publicly pronounce upon the moral wrongdoings of the accused.²⁰ The wrongfulness of the deed is dependent solely on the actions of the accused and their state of mind, the *actus reus* or *mens rea*.²¹ Under the retributive approach, the voice of the victim, and the harms they have suffered, are silenced in an effort to remain impartial, to respect the rights of the accused, and to keep the focus of criminal proceedings on the alleged wrong that has taken place.²² Although central to the norm violation, the retributive approach does not offer any procedural role for the victim in the criminal process, aside from providing information pertaining to the wrong committed.²³ After determining culpability, which effectively provides the justification for punishment of the perpetrator, the content of the punishment should be designed in a manner that is proportional to the crime committed.²⁴ As McGonigle summarises:²⁵

Retributive theories view punishment as a response to a wrong and not a response to the harm experienced by the victim. Rather than focusing on the subjective suffering of the victim, the punishment focuses on the objective element of the act itself so as to avoid disparate sentencing of similarly situated defendants ... the victim's suffering is difficult to measure and can be disproportionate to the crimes.

However, beginning in the 1960s, campaigners for victims' rights expounded the importance of giving victims a 'voice' in the criminal process, which would serve as a formal acknowledgment that victims of a crime have a stake in the criminal procedures, one that differs from that of the judicial authorities or the prosecutor.²⁶ Victims

18 BL McGonigle *Procedural justice? Victim participation in international criminal proceedings* (2011) 36.

19 BL McGonigle 'Victim-oriented measures at international criminal institutions: Participation and its pitfalls' (2012) 12 *International Criminal Law Review* 379.

20 As above.

21 McGonigle (n 18 above) 40.

22 McGonigle (n 18 above) 41.

23 McGonigle (n 18 above) 40-41.

24 McGonigle (n 19 above) 379.

25 McGonigle (n 18 above) 39.

26 McGonigle (n 18 above) 50.

wished their interests to be taken into account, and to do this they had to be given an opportunity to share their views and concerns. For victims, fairness, satisfaction and procedural justice could only be achieved in this manner.²⁷

Reflecting on these developments, scholars of transitional justice agree that allowing victims to participate in the criminal proceedings, in addition to promoting accountability and the rule of law in post-conflict transitioning countries, can also offer significant benefits.²⁸ First of all, providing a role for the victims within the criminal justice process can promote knowledge, awareness and understanding of the often opaque process involved in criminal proceedings in addition to the results obtained from criminal proceedings.²⁹ Second, victim participation can promote individual healing by providing the victims with a sense of agency, empowerment and closure, leading to higher levels of overall satisfaction with the criminal justice system.³⁰ In effect, if the victim is given the opportunity to take a leading role in obtaining redress, victim participation has the power to make abstract justice personal.³¹ Third, participation can contribute to reconciling a community by promoting truth finding in criminal proceedings.³² With any society or community seeking to understand and to come to terms with mass atrocities, there must be a platform provided to victims to relate their stories and to allow their suffering to be publicly acknowledged.³³ Allowing these truths to permeate the dialogue of the courts serves to inform the content of the historical record that trials can create, permitting the survivors to feel as though their experiences gave birth to the narratives that underpin the legal proceedings.³⁴ In this sense the power of the judiciary is immense as it can officially sanction expressions of pain, shine a light on truth, and document human rights violations for the historical record.³⁵

27 McGonigle (n 18 above) 47.

28 Hobbs (n 5 above) 9.

29 Hobbs 10.

30 As above. See also S SàCouto & K Cleary 'Victims' participation in the investigations of the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* (2008) 76-77; J Doak 'Victims' rights in criminal trials: Prospects for participation' (2005) 32 *Journal of Law and Society* 312.

31 Hobbs (n 5 above) 10.

32 Hobbs 10; Doak (n 30 above) 312.

33 H Bertelman 'International standards and national ownership? Judicial independence in hybrid courts: The Extraordinary Chambers in the Courts of Cambodia' (2010) 79 *Nordic Journal of International Law* 365.

34 J Mertus 'Only a war crimes tribunal: Triumph of the 'international community', pain of the survivors' in B Cooper (ed) *War crimes: The legacy of Nuremberg* (1999) 239-240.

35 Hobbs (n 5 above) 10.

3 Rule of law, the right to an effective remedy and victim participation

With victim participation being understood as a means of making criminal proceedings more meaningful to directly-victimised communities by fostering a sense of involvement and ownership, by allowing their suffering to be publicly acknowledged, and by promoting truth finding, it should be kept in mind that the civil law tradition of the DRC allows for a wide range of participatory rights to victims. While this will be explained in more detail below, it is important to note here that the participation of victims in criminal proceedings is firmly based on the widely-recognised rights to an effective remedy and the principle of the rule of law, which in this case refers to a state's obligation to prosecute serious human rights violations. In other words, victim participation is the logical extension to several closely-related matters, such as the obligation on states to investigate and prosecute human rights violations, to provide remedies in the event of any infringements, and to protect the rights of victims of such violations in criminal proceedings.³⁶ Moreover, by helping to ensure that gross human rights violations are investigated and prosecuted, victim participation contributes to countering the impunity usually surrounding these infringements and reaffirms the importance society attaches to the infringed rights and the authority of law.³⁷

Traditionally, claims of sovereignty espoused by states over the individual rights of citizens have impeded victims' justiciable rights to prosecution. However, since the revelation of the state-sponsored atrocities during World War II, the international human rights norm that states have a duty to prosecute certain grave crimes has progressively become settled, regardless of whether governments are in a period of transition from civil war or under an authoritarian regime.³⁸ Seeing prosecutions as a victim's right has emerged mainly from the interpretation by international and regional human rights bodies of norms in comprehensive human rights treaties that establish a right to an effective remedy, the right to access justice or the right to be heard.³⁹

The Human Rights Committee (HRC), the body of independent experts charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR)⁴⁰ and

36 JC Ochoa *The rights of victims in criminal proceedings for human rights violations* (2013) 265.

37 Ochoa (n 36 above) 266.

38 R Aldana-Pinell 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1402.

39 Aldana-Pinell (n 38 above) 1414.

40 International Covenant on Civil and Political Rights, 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976.

with providing authoritative interpretations of the norms contained in this instrument, has determined that article 2(3) of the ICCPR requires states to conduct an effective prosecution to remedy the harm caused to victims that have suffered violations of the right to life and personal integrity.⁴¹ For victims of various offences, such as arbitrary detention,⁴² torture,⁴³ forced disappearances⁴⁴ and extrajudicial executions,⁴⁵ the HRC has concluded that criminal investigations that bring to justice those most responsible will satisfy the victims' effective remedy noted in article 2(3).⁴⁶

The United Nations (UN) has also adopted several specialised human rights instruments containing the right to an effective remedy. For example, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)⁴⁷ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁴⁸ both are human rights conventions containing an 'unambiguous duty to prosecute'.⁴⁹ By signing and ratifying the Genocide Convention, states have confirmed that genocide is a crime under international law,⁵⁰ and that no one is immune from prosecution.⁵¹ Similarly, a state party to the CAT requires that torture be made criminal under national law⁵² and requires that a torturer be tried or extradited.⁵³

At the Inter-American level, the American Convention on Human Rights (American Convention)⁵⁴ provides for a right to a fair trial⁵⁵ and a right to judicial protection.⁵⁶ When read in conjunction with

41 Aldana-Pinell (n 38 above) 1416.

42 Communication 612/1995, *Vicente & Others v Colombia*, UNHR Committee (14 June 1994), UN Doc CCPR/C/60/D/612/1995 (1997) para 10; Communication 322/1988, *Rodriguez v Uruguay*, UNHR Committee (9 August 1994), UN Doc CCPR/C/51/D/322/1988 (1994) para 14; Communication 366/1989, *Tshiongo v Zaire*, UNHR Committee (8 November 1993), UN Doc CCPR/C/49/D/366/1989 (1993) para 7.

43 As above.

44 Communication 540/1993, *Atachachua v Peru*, UNHR Committee (1993), UN Doc CCPR/C/56/D/540/1993 (1996) para 10; Communication 563/1993, *Bautista v Colombia*, UNHR Committee (14 June 1993), UN Doc CCPR/C/55/D/563/1993 (1995) para 10.

45 Communication 821/1998, *Chonwe v Zambia*, UNHR Committee (7 November 1997), UN Doc CCPR/C/70/D/821/1998 (2000) para 7.

46 Aldana-Pinell (n 38 above) 1416.

47 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 227, adopted 9 December 1948, entered into force 12 January 1951.

48 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1465 UNTS 85, adopted 10 December 1984, entered into force 26 June 1987.

49 Orentlicher (n 9 above) 2537.

50 Genocide Convention (n 47 above) art 1.

51 Arts 3 & 4 Genocide Convention.

52 Art 4 CAT.

53 Art 7 CAT.

54 American Convention on Human Rights, 144 UNTS 123, 22 November 1969.

55 Art 8(1) American Convention.

56 Art 25(1) American Convention.

article 1(1), which imposes a general duty on state parties to ensure the fulfilment of the rights enumerated in the Convention, the above-mentioned articles require states to provide victims of human rights violations with an effective prosecution as a remedy for those violations.⁵⁷ More specifically, the Inter-American Court of Human Rights (Inter-American Court) has interpreted article 8 of the American Convention to mean that victims have the right to an investigation into violations and that those responsible must be prosecuted and punished, all of which must take place with the guarantee of due process, within a reasonable time, and by a competent, independent and impartial tribunal.⁵⁸ Similarly, the Inter-American Court has interpreted article 25 of the American Convention to hold that victims' access to criminal proceedings forms part of a victim's right to timely recourse before a competent tribunal for the protection of the right to life and against violations of personal integrity.⁵⁹ Moreover, prosecutions allow family members of the victim the possibility to obtain knowledge concerning the circumstances surrounding the violation, as well as the identification of those responsible, effectively satisfying the right to truth.⁶⁰ The above-mentioned developments at the Inter-American Court may be considered a monumental shift in that a state's duty to prosecute serious crimes no longer is merely a duty owed to the public. Instead, the Inter-American Court has leaned towards a more victim-oriented perspective, where prosecution transforms into a private right that can be enforced by individual victims.⁶¹ As the Court indicated in the ground-breaking case of *Velásquez-Rodríguez v Honduras*.⁶²

The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify

57 Aldana-Pinell (n 38 above) 1417.

58 See *Castillo Páez v Peru* IACtHR (1998) Case 43/Ser C para 106; *Paniagua Morales v Guatemala* IACtHR (1998) Case 37/Ser C paras 155-156; *Genie Lacayo v Nicaragua* IACtHR (1998) Case 30/Ser C para 76.

59 *Castillo Páez v Peru* (n 58 above) paras 105-107. See also Aldana-Pinell (n 38 above) 1418.

60 See *Bámaca Velásquez v Venezuela* IACtHR (2000) Case 70/Ser C para 201; see also *Castillo Páez v Peru* (n 59 above) para 85 and Aldana-Pinell (n 38 above) 1419.

61 CP Trumbull 'The victims of victim participation in international criminal proceedings' (2008) 29 *Michigan Journal of International Law* 785.

62 IACtHR (1988) Case 4/Ser C para 174. At the European level, the European Court of Human Rights has interpreted arts 2(1) and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 213 UNTS 221, 1995) as integral to demonstrating a victim's justiciable right to prosecute. The European Court has found violations of the right to an effective remedy when there was a failure to investigate and prosecute right to life violations. See *Kaya v Turkey* (1998) EHRR 1 paras 86 and 107; *Yasa v Turkey* (1998) 28 EHRR 408 paras 98 & 114; *Ergi v Turkey* (1998) 32 EHRR 18 para 98; *Tanrikulu v Turkey* (1999) 30 EHRR 950 para 117; *Cakici v Turkey* (1999) 31 EHRR 5 para 113; *Kili v Turkey* (2000) 33 EHRR 58 para 91; *Timurtas v Turkey* (2000) 33 EHRR 6 para 111; *Salman v Turkey* (2000) 34 EHRR 17 para 121; *Akkoc v Turkey* (2000) 34 EHRR 51 para 103; *Tas v Turkey* (2000) 33 EHRR 15 para 91.

those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

Demands for criminal justice reforms in the area of victim participation made by the surviving victims of human rights abuses at the domestic level transcended borders, creating an impetus for the establishment of international or regional norms for the rights of victims.⁶³ The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims' Declaration)⁶⁴ has been the most prominent document demonstrating the willingness of the international community to agree upon the extent of victims' rights in criminal proceedings.⁶⁵ Furthermore, the Victims' Declaration was the first UN instrument to encourage victim participation in domestic criminal proceedings, and was worded broadly enough to be applicable in a wide range of legal systems. Article 6(b) of the Victims' Declaration states:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

...

- (b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

Almost 20 years after the Victims' Declaration, the UN General Assembly adopted the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law (Basic Principles),⁶⁶ drafted from a victim-based perspective designed to provide mechanisms, procedures and methods for the implementation of existing legal obligations under international human rights and humanitarian law.⁶⁷ While not explicitly calling for victim participation, the Basic Principles implicitly support the notion of victims having some form of participatory rights in the criminal process by emphasising the following: equal and effective access to justice; access to relevant information concerning

63 R Pindell-Aldana 'An emerging universality of justiciable victims' rights in the criminal process to curtail impunity for state-sponsored crimes' (2004) 26 *Human Rights Quarterly* 610.

64 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/RES/40/34 (1985).

65 A-M de Brouwer & M Groenhuijsen 'The role of victims in international criminal proceedings' in G Sluiter & S Vasiliev (eds) *International criminal procedure: Toward a coherent body of law* (2009) 149-204.

66 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, UN Doc E/2005/23 (2005).

67 MC Bassiouni 'International recognition of victims' rights' (2006) 6 *Human Rights Law Review* 251.

violations and reparation mechanisms; adequate, effective and prompt reparation; and the right to truth.⁶⁸

At the regional level, the European and African human rights systems have drawn upon the above-mentioned UN documents by outlining the ways in which they support the idea of allowing victims the opportunity of sharing their views and expressing their concerns at appropriate stages.⁶⁹

4 Victim participation in the Democratic Republic of the Congo

Traditionally there has been a divide with respect to the role of victims in criminal procedures before domestic courts between those countries where the law is based on the civil law tradition, and those states where the law is based on the common law tradition.⁷⁰ In understanding the civil law tradition, special attention should be paid to the influence of French law where, most notably, Napoleon's Code of Criminal Procedure of 1808 conferred wide rights on crime victims in criminal proceedings once they had started.⁷¹ Subsequently, the role of the victim widened in criminal proceedings to include the right to initiate criminal proceedings; the right to participate during the trial and the appeal proceedings; the right to offer and examine evidence pertaining to the guilt or innocence of the accused; the right to put questions through the presiding judge to the defendant, the witnesses, and all persons who have been called to the proceedings; and the right to appeal against the orders and decisions made during the investigation and against the trial decision in relation to their civil claim.⁷²

68 McGonigle (n 18 above) 104. See also Basic Principles (n 71 above) arts 11-24.

69 McGonigle (n 19 above) 381-382. At the European level, see Council of Europe, Recommendation of the Committee of Ministers, On Participation of the Public in Crime Policy, Doc R (1983) 7, 1983; Council of Europe, Recommendation of the Committee of Ministers, On the Position of the Victim in the Framework of Criminal Law and Procedure, Doc R (1985) 11 1985; and Council of the European Union, Council Framework Decision, 2201/220JHA, 2001 OJ (L 82) 1-4, 2001. At the African level, see Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, AU Doc DOC/05XXX(247) 2001. In addition, the European Court has interpreted provisions in the European Convention as providing for procedural rights of victims in criminal proceedings. With regard to the right to participate, the European Court regards art 2 as not only imposing a duty on states to prosecute 'right to life' violations, but also requires sufficient public scrutiny of criminal investigations in order to ensure accountability in the process. See *Jordan v United Kingdom* ECtHR (2001) App 24746/94 paras 105-109; *McKerr v United Kingdom* (2002) 34 EHRR 20 2002 paras 111-115; *Kelly v United Kingdom* ECtHR (2001) App 30054/96; *Shanaghan v United Kingdom* ECtHR (2001) App 37715/97 paras 88-92. See also Aldana-Pinell (n 38 above) 1434.

70 Ochoa (n 36 above) 136.

71 As above.

72 Ochoa (n 36 above) 136-137.

Before civil tribunals in the DRC, the prosecutor is the main actor in criminal proceedings, meaning that they have the power to initiate judicial proceedings or to opt for alternatives, such as requesting the payment of a fine when prescribed by law, or even deciding that no further action is necessary. However, when the prosecutor is unwilling to initiate proceedings, the victim of a crime⁷³ has the right to address such inaction and to bring the matter directly to the competent authority by filing a complaint to the Court,⁷⁴ thereby constituting himself as a civil party. Criminal proceedings, therefore, can begin by a summons being given to the suspect at the request of the prosecutor or the victim himself.⁷⁵ As will be discussed in more detail below, the right of victims to initiate criminal proceedings applies only in cases brought before ordinary courts and tribunals. The military criminal justice system does not provide these same rights, with the result that victims before military tribunals can only participate in the proceedings after having been invited by the military prosecutor.⁷⁶

Besides initiating the criminal process, the victim can also become a party to the proceedings that have been initiated by the prosecutor. At any time during the criminal proceedings, before the closure of the debates, a victim can request to become a civil party by intervention. Constituting oneself as a civil party is not subject to specific formalities. This can be done in the form of a written statement, submitted by the victim or their lawyer, but can also be done orally by making a declaration in court.⁷⁷ Victims of crime, once formally recognised as a civil party, have numerous rights conferred upon them, including calling witnesses or experts to appear before the court and requesting the court to perform a variety of investigations. Moreover, civil parties have the right to oppose a judge, to appeal all decisions, and to invoke procedural and factual exceptions. At the end of the proceedings, the civil party can, in their closing statement, request the court to confirm the facts as proven, to confirm that a harm has been suffered, and to confirm that the causal link has been established.⁷⁸

73 Congolese law uses the terms *partie civile* (civil party) or *partie lésée* (injured party) to designate a victim.

74 Art 54(1) Code of Criminal Procedure.

75 Arts 54 & 56 Code of Criminal Procedure.

76 Official Journal of the DRC, art 77(1) of Law 23/2002 of 18 November 2002 concerning the Military Judicial Code, Special Issue of 20 March 2003.

77 Official Journal of the DRC, art 69 of the Ordinary Code of Criminal Procedure and arts 226(2)-(3) of Law 23/2002 of 18 November 2002 concerning the Military Judicial Code, Special Issue of 20 March 2003.

78 L Bambi Lessa & B Ba Meyu *Manuel de procédure pénale* (2011) 304.

5 Victims' rights and the military justice system in the Democratic Republic of the Congo

Considering the number of serious human rights violations that have been committed during the last decades, it is remarkable that only a handful of cases relating to these crimes have been brought before DRC military tribunals.⁷⁹ The level of impunity when it comes to the prosecution of international crimes remains extremely high. One of the explanations for this could be that, despite victims having a wide range of participatory rights, many legal and practical hurdles make it extremely difficult to fully exercise these rights.

Despite efforts to give civilian courts jurisdiction over international crimes, until recently the DRC's military courts have retained authority over the prosecution of international crimes. Genocide, war crimes and crimes against humanity were not criminalised by the regular criminal code, which is applicable to civilians, mainly because its provisions predate international crimes as a legal category.⁸⁰ The so-called Law Ordinance 72/060 of 25 September 1972 promulgating the Military Justice Code was the first instrument to transpose international crimes into the domestic legal order.⁸¹ Articles 501 to

79 Military Garrison Tribunal of Mbandaka, *Case of Mutineers of Mbandaka*, Military Garrison Tribunal of Mbandaka, RP 086/05, Judgment, 12 January 2006, and Military Court of Equateur, Appeal, RPA 615/2006, 15 June 2007; Military Court of Equateur, *Case of Songo Mboyo*, RP 084/2005, Judgment, 12 April 2006 and Military Court of Equateur, Appeal, RPA 014/2006, 7 June 2006; Military Garrison Tribunal of Mbandaka, *Case of Waka Lifumba*, RP 134/2007 / RMP 575, Judgment, 18 February 2007; Military Garrison Tribunal of Ituri, *Case of Kahwa*, RP 039/2006, Judgment, 2 August 2006; Military Garrison Tribunal of Uvira, *Case of Lemera*, RP 132/ RMP 0933/KMC/10, Judgment, 30 October 2010; Military Garrison Tribunal of Bukavu, *Case of Maniraguha Jean Bosco alias Kazungu et consorts*, RP 275/09 & 521/10/RMP 581/07 & 1573/KMC/10, Judgment, 16 August 2011; Military Garrison Tribunal of Bukavu, *Case of Pantovee*, RP 372, Judgment, 2 October 2011; Military Garrison Tribunal of Bunia, *Case of Kakado Barnaba*, RP 071/09, RP 009/010 & RP 074/010, Judgment, 9 July 2010; Military Garrison Tribunal of Ituri, *Case of Bongji*, RP 018/06, Judgment, 18 March 2006; Military Court of Katanga; *Case of Ankoro*, RP 01/2003&RP 02/2004, Judgment, 20 December 2004; Military Garrison Tribunal of Bukavu, *Case of Biyoyo*, RP 096/006 & RP 101/2006, Judgment, 07 March 2006; Military Garrison Tribunal of Ituri, *Case of Gety/Bavi*, RP 101/06, Judgment, 19 February 2007 and Military Court of the Oriental Province, Appeal, RPA 101/06, 28 July 2007; Military Garrison Tribunal of Kindu, *Case of Kalonga Katamasi*, RP 011/05, Judgment, 26 October 2005; Military Court of Katanga, *Case of Kilwa*, RP 010/2006, Judgment, 28 June 2007; Military Garrison Tribunal of Bunia, *Case of Milobs*, Judgment RP 103/2006, 9 February 2007; Military Court of Katanga, *Case of Mituaba*, RP 011/2006, 25 April 2006; Operational Military Court of North Kivu, *Case of Minova*, RP 003/2013 RMP 0372/BBM/01, 5 May 2014.

80 Despite crimes such as murder and rape being punishable by law in the DRC, they do not capture the universally abhorrent nature of the mass atrocities committed that affect the peace and security of humankind, that are contrary to fundamental humanitarian values, and that form part of an organisational policy to direct attacks against a certain group or population. See MC Bassiouni *Introduction to international criminal law* (2003) 118-133.

81 Official Journal of Zaïre, Ordinance-Law 72/060 of 25 September 1972 concerning the institution of a Code of Military Justice 6, 15 March 1973

505 of its Title IV provided for the prosecution of war crimes and crimes against humanity. Genocide, however, did not get the status of an autonomous crime as it was listed as a crime against humanity.⁸² Later, in the framework of the ratification of the Rome Statute, the Congolese legislature promulgated Law 24/2002 of 18 November 2002 listing under the same military justice system the adjudication of war crimes, genocide and crimes against humanity.⁸³ Until recently, this law, which effectively transposes the Rome Statute into the military justice system, has been applied by the military tribunals in their efforts to prosecute international crimes committed in the territory of the DRC.⁸⁴

The exclusive competence of military tribunals to prosecute genocide, crimes against humanity and war crimes has been criticised by many.⁸⁵ The critics point to the nature of military tribunals and to the fact that military justice often is linked more to the necessity to obey military discipline than to guarantee the rights of the parties involved. In an effort to respond to the critics, the Congolese legislature, with the promulgation of Law 13/011-B of 11 April 2013, decided to also grant the 12 provincial Courts of Appeals competence to hear cases concerning war crimes, crimes against humanity and genocide.⁸⁶ However, until recently⁸⁷ the legislature has neglected to adopt the necessary implementation legislation required to transpose elements of the Rome Statute and amend the DRC Criminal Code. As

82 Art 505 Official Journal of Zaïre (n 81 above).

83 Arts 131-175 of Law 24-2002 of 18 November 2002 concerning the Military Criminal Code.

84 Military Court of Equateur, *Case of Songo Mboyo*, RP 084/2005, Judgment of 12 April 2006 and the appeal before the Military Court of Equateur RPA 014/2006 of 7 June 2006.

85 MS Nyabirungu *Les crimes de guerre au regard du statut de la CPI et en Droit Congolais, projet de renforcement du système de justice militaire (Résolution 1888 du Conseil de Sécurité des Nations Unies)*, Goma, 21-29 May 2012 6; M Wetsh'Okonda Koso *La justice militaire et le respect des droits de l'homme, l'urgence du parachèvement de la réforme, République démocratique du Congo* (2009) 9 42; Avocats Sans Frontières *Etude de jurisprudence: L'application du Statut de Rome de la cour pénale internationale par les juridictions de la République démocratique du Congo* (2009) 8.

86 Art 91(1) of Law 13/011-B of 11 April 2013 concerning the Organisation, Functioning and Competences of the Jurisdictions of the Judicial Order.

87 Law 15/022 of 31 December 2015, which entered into force on 30 March 2016, incorporated war crimes, crimes against humanity and genocide into the Ordinary Criminal Code of the DRC. See Official Journal of the DRC, Law 15/022 of 31 December 2015 modifying and completing the Decree of 30 January 1940 on the Criminal Code 57, 20 February 2016. Moreover, military tribunals must also apply the Ordinary Criminal Code when prosecuting war crimes, crimes against humanity and genocide. See art 1(1) of Law 15/023 of 31 December 2015 modifying Law 24-2002 of 18 November 2002 on Military Criminal Code, in the Official Journal of the Democratic Republic of the Congo 57, 29 February 2016. The Appeals Court of Lubumbashi is the first ever ordinary court to prosecute an individual or individuals for crimes against humanity and genocide since the entry into force of the above-mentioned law. See *Attorney-General and Civil Parties v Mukalayi Wa Kumbao Adalbert, Banza Guylain, Mbuyu wa Mubole & Others* Court of Appeal (Lubumbashi), RP.116, 30 September 2016.

a result, with the lack of recognition of specific crimes under national law, the principle of legality prevented the Court of Appeals from judging these cases.

As explained above, there is no doubt that the DRC recognises extended rights for victim participation. The rights of victims to participate in criminal proceeding nevertheless are better protected before ordinary courts than before their military counterparts. Military tribunals are competent to hear cases relating to military offences and crimes in the territory of the DRC punishable under the Military Criminal Code (MCC). When the MCC defines and limits offences and crimes committed by persons outside the army, military tribunals solely remain competent to prosecute the author or accomplice except where the law provides differently.⁸⁸ The competence *ratione personae* is based on the quality and rank of the author of the crime at the moment of the commission of the act or, alternatively, at the moment of appearance before the judge.⁸⁹ The prerogatives of the military hierarchy require that the presiding judge in the military tribunal, and the magistrate who represents the office of the military prosecutor, must have a rank equal or superior to that of the suspect.

As such, only the High Military Court is competent to judge superior officers of the DRC armed forces and the DRC national police with the rank of general. The 12 military courts focus on other senior officers of the army and police, and the Military Garrison Tribunals are competent to judge all the lower-ranked personnel, from the rank of recruit to the rank of captain.⁹⁰ The principle of equivalence of rank is one of the reasons why military tribunals malfunction: Military magistrates generally are inferior in rank to the commanding officers in the military region or units of their jurisdiction, with the result that they are 'legally' prevented from seeking their prosecution. Therefore, higher-ranked officers often escape prosecution, while lower-ranked personnel of the armed forces, militias and (former) members of armed groups have been targeted.⁹¹ In the *Cebeya* case, where the civil parties had lodged a complaint against the Commissar General of the Police, General John Numbi Banza Ntambo, no judicial instructions followed even though the civil parties requested the nomination of military magistrates with the required rank so that he could be judged for his role in the murder of the human rights activist.⁹²

88 Arts 76(1)-(2) & 79 of Law 23/2002 of 18 November 2002 concerning the Military Judiciary Code.

89 Arts 104-105.

90 Arts 120-122.

91 Wetsh'Okonda Koso (n 85 above) 6.

92 See '*RDC: Les veuves Chebeya et Bazana demandent un commissionnement de magistrats militaires de haut rang pour juger le général Numbi*', Fédération Internationale des Droits de l'Homme, <https://www.fidh.org/La-Federation-internationale-des-ligues-des-droits-de-l-homme/afrique/republique-democratique-du-congo/14130-rdc-les-veuves-chebeya-et-bazana-demandent-un-commissionnement-de> (accessed 30 May 2017).

At the pre-trial stage, two criticisms emerge: First, despite there being a movement to protect victims during the criminal proceedings, as will be discussed below, at the pre-trial stage the military justice offers no such protection.⁹³ Second, the interests and views of the victims are not taken into consideration when the competent authorities are asked to determine whether the suspect should be released on bail.⁹⁴ Articles 209 and 211 of the Military Judicial Code gives authority on custody to one military prosecutor only, without taking into account the views of the victims.⁹⁵ During the trial stage, the Military Judicial Code is also ambiguous on the rights of victims to have access to court files, to present observations, and to question witnesses brought by the defence.⁹⁶ Articles 249 and 250 of the Military Judicial Code do not provide any clarity on these matters but, instead, seem to suggest that the president of the court hearing the case has the discretionary power in the discovery of the truth and in the conduct of the hearings, with the victims seemingly forgotten in the process.

Moreover, even where victims have declared themselves a civil party before an operational military court, they do not have a right to appeal the judgments of this court. Decisions of the operational military tribunals are not subject to appeal when initiated by a civil party.⁹⁷ It could be argued that this prevents victims and their families from exercising their right to an effective remedy as provided for in article 21 of the DRC Constitution. As discussed above, before ordinary courts victims are considered parties to the court proceedings, and nothing hinders them from exercising their right of appeal.

In addition, when the prosecutor elects not to pursue a prosecution, the Minister of Justice can use his injunction right and request the Attorney-General of the Court of Cassation, or its counterpart at the level of the Court of Appeal, to initiate or continue criminal investigations to replace or support public action before lower courts and tribunals.⁹⁸ The Minister of Justice does not have that injunction right *vis-à-vis* the military tribunals. It is the Minister of Defence who exercises that right under the military justice system as he can request the Auditor-General of the armed forces to act,⁹⁹ but only on the condition that military imperatives require this.

93 JB Mbokani *La jurisprudence congolaise en matière de crimes de droit international* (2016) 353.

94 Mbokani (n 93 above) 354.

95 As above.

96 Mbokani (n 93 above) 367.

97 Arts 87 & 279 of Law 23/2002 of 18 November 2002 concerning the Military Judiciary Code.

98 Arts 70 & 72 of Law 13/011-B of 11 April 2013 concerning the Organisation, Functioning and Competences of Jurisdictions of the Judicial Order.

99 Art 47(1) of Law 23/2002 of 18 November 2002 concerning the Military Judiciary Code.

If the limits of military justice constitute important legal hurdles for victims to exercise their rights, additional legal constraints restrict the effective exercise of their right to participate in the legal proceedings. National law provides that the parties in the proceedings must pay court costs. Courts will only accept a complaint or a request by a civil party if a sum defined by the registrar is consigned to the court. Moreover, judges may request additional payments throughout the proceedings. Article 128 of the Code of Criminal Procedure also provides for the fee to be doubled in an appeal.¹⁰⁰ A failure to pay the fees is considered a barrier to further action, in turn resulting in the judge setting aside the request for a civil party. With a significant part of the population living under the poverty threshold, it is easy to see that most victims cannot afford the luxury of a court case. In addition, in the event of a favourable judgment granting compensation for the harm caused, the victim must pay the state a sum proportional to the compensation granted prior to the execution of the judgment.¹⁰¹ A failure to pay these costs results in the judgment not being executed and the victim not being granted reparations.¹⁰²

In addition, victims often are in a vulnerable position, particularly in countries where a high degree of impunity reigns and where victims can be intimidated and confronted with reprisals. In the *Songo Mboyo* case, after having been prosecuted by the Military Court on 7 June 2006, all six convicts escaped military prison on the night of 21 October 2006 and never returned to prison, potentially posing a threat to the victims. Similarly, following the conviction of Gudgeon Kyungu Mutanga,¹⁰³ the convicted militia leader escaped from the Kasapa prison in Lubumbashi, returned to his militia and committed

100 See arts 122-135 of Ch VIII of the Code of Criminal Procedure.

101 Art 129 of the Code of Criminal Procedure.

102 In the *Songo Mboyo* case, the Military Garrison Tribunal of the City of Mbandaka convicted seven members of the Congolese armed forces on 12 April 2006 to life imprisonment on the basis of crimes against humanity. The tribunal recognised the action of 14 civil parties who alleged having been raped by the convicts and rejected the claims of 15 others, considering their allegations unfounded. Every victim of rape was granted US \$5 000 as compensation, and for the family of the victims who had not survived the brutal acts, US \$10 000 was provided. In an appeal judgment of 7 June 2006, the Military Court of the Equateur Province confirmed the condemnation of six of the earlier convicted soldiers and decided that all 29 civil parties be granted a sum equal to what was provided by the tribunal in *Mbandaka* as compensation. However, the cost of obtaining the execution of the judgment prevented the civil parties from receiving their damages. To receive the indemnities awarded by the Court, they had to pay a total sum of US \$28 000 as a proportional levy, augmented by US \$684 (justice charges) and US \$756 (judgment charges), a sum the civil parties found impossible to pay. See the statement of costs established by the Principal Registrar of the Military Court of the Equateur Province in the *Case of Songo Mboyo* RPA 014/2006, Judgment, 7 June 2006.

103 Military Garrison Tribunal of Haut-Katanga, *Case of Gédéon Kyungu Mutanga*, RP 0134/07, 5 March 2009; Military Court of Katanga, *Case of Gédéon Kyungu Mutanga*, RPA 025/09, 16 December 2010.

new atrocities.¹⁰⁴ Victims need to be protected but, contrary to what is provided for under by the Rome Statute,¹⁰⁵ the DRC does not have specific legislation or a national programme to protect victims and witnesses involved in criminal proceedings.¹⁰⁶ The unwillingness of the DRC government to provide adequate protection measures increases the reluctance of victims to participate in court cases. In cases of sexual violence, the legislation explicitly refers to the need to apply measures to protect victims, which can be done by holding the proceedings in closed sessions or keeping the names of victims confidential.¹⁰⁷ In the *Minova* case, the Operational Military Court of North Kivu noted that article 74*bis* of the Code of Criminal Procedure places an obligation on the judge to take the necessary measures to protect the security, the physical and psychological well-being, the dignity and the privacy of the victims of sexual violence. However, as the Code does not specify in detail what measures must be taken, the Court referred to article 68 of the Rome Statute and decided to allow the veiling of protected persons, addressing them through pseudonyms, allowing them to testify from behind a curtain, and having psychologists assist them. In an effort not to violate the rights of the accused, the defence lawyers were informed of the measures and they did not object to these.¹⁰⁸

Moreover, there is the question of an adequate system of legal representation. Most victims of international crimes who have participated in criminal proceedings are financially insecure, and some

104 See 'Mgr Fulgence Muteba demande l'arrestation immédiate de Gédéon Kyungu', Forum des AS, <http://forumdesas.org/spip.php?article1419> (accessed 1 May 2017); 'Katanga: Les combattants de Gédéon attaquent Kalenge', Le Potentiel http://www.lepotentielonline.com/index.php?option=com_content&view=article&id=9471:katanga-les-combattants-de-gedeon-attaquent-kalenge&catid (accessed 1 May 2017).

105 See art 68(1) Rome Statute (n 6 above); ICC Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000), Rules 17(2)(b), 87 & 88.

106 In an effort to address the lack of protective measures for victims and witnesses, authorities adopted Law 15/024 of 31 December 2015. This law contains general provisions on the protection of victims and witnesses and states that in the context of prosecuting war crimes, crimes against humanity and genocide, the competent court should take measures to protect the safety, the physical and psychological well-being, the dignity and the privacy of victims, witnesses and intermediaries. However, this provision is rather general and does not indicate the mechanisms of operationalisation. Therefore, it will be necessary for the Ministry of Justice, the Ministry of Internal Affairs and the Ministry of Defence to adopt regulations that would detail for judges and prosecutors the appropriate measures that need to be taken during investigations, prosecutions, and even after the pronouncement of judgments, that would ensure the protection of victims, witnesses and intermediaries, with the necessary flexibility to adapt these to possible particularities. See Official Journal of the Democratic Republic of the Congo, Law 15/024 of 31 December 2015 modifying and completing the Decree of 6 August 1959 relating to the Code of Criminal Procedure, 29 February 2016. See also art 26*ter* of the Code of Criminal Procedure.

107 Art 74*bis* Code of Criminal Procedure. See L Mutata Luaba *Droit pénal militaire congolais* (2012) 44-45.

108 Operational Military Court of North Kivu, *Case of Minova*, RP 003/2013 RMP 0372/BBM/01, 5 May 2014.

have been reliant upon *pro bono* lawyers or *défenseurs judiciaires*¹⁰⁹ assigned by the courts. Some of these legal professionals often are young and not sufficiently experienced to handle such complex cases. In addition to these legal professionals only having a basic legal education, the curriculum of DRC law faculties very rarely contain courses specifically addressing the international crimes of genocide, crimes against humanity and war crimes. The way in which crimes are defined and the criteria used for establishing individual criminal responsibility often require lawyers to present the case and its evidence in a complex and unfamiliar way.¹¹⁰ This undoubtedly has an impact on how international crimes are assessed and treated in the domestic courts.

With the lack of resources provided by the state in confronting the existing impunity, various non-governmental organisations (NGOs) (the American Bar Association, *Avocats sans Frontières*, the International Committee of the Red Cross), international organisations (the UN), and bilateral development co-operation projects (*Restauration de la Justice à l'Est du Congo* (REJUSCO), the *Programme d'Appui à la Restauration de la Justice à l'Est*) have been involved in ameliorating the military judicial system by building court houses, paying the fees of the lawyers of the victims, providing training to lawyers and judges,¹¹¹ and supporting the hearings of military tribunals outside the military headquarters.¹¹² The distance between the courts and tribunals from the place where the crimes were committed is often seen as a serious problem as the high cost of travelling inhibits the ability of the victims and their lawyers to participate in the proceedings if organised in the provincial capital or the military base.¹¹³ Holding court hearings in close proximity to their normal activities is essential as victims are reluctant to travel hundreds of kilometres to be present at the hearings.

109 The profession of *défenseur judiciaire* was created in 1979 as a provisional measure to address the lack of qualified lawyers. It requires the person to have a basic law degree of two years (*graduat*) and to take the oath before the Tribunal of High Instance. See Official Journal of Zaïre, Title II of Ordinance-Law 79-028 of 28 September 1979 concerning the Organisation of the Bar, the Profession of Judicial Defenders, and the Profession of State Attorneys, 19, 1 October 1979.

110 Fédération Internationale des Droits de l'Homme, *RDC: Les victimes de crimes sexuels obtiennent rarement justice et jamais réparation, Changer la donne pour combattre l'impunité* (2013) 53.

111 See AC Grayson 'Delivering justice for sexual violence in the DR Congo and beyond: Co-operation, education, and capacity-building through national and international courts' (2012) 2 *Journal of Global Citizenship and Equity Education* 136; T Khan & J Wormington 'Mobile courts in the DRC: Lessons from development for international criminal justice' (2012) *Oxford Transitional Justice Research Working Paper Series* 1-42.

112 One is referring to an *audience foraine* when the tribunal is holding its hearing outside the place where it normally has its seat, but within the area of geographic competence. See arts 45-47 of Law 13/011-B of 11 April 2013 concerning the Organisation, Functioning and Competences of the Jurisdictions of the Judicial Order.

113 Fédération Internationale des Droits de l'Homme (n 110 above) 52.

Even in a civil law country such as the Congo where traditionally victims have broad rights to participate in criminal proceedings as fully-fledged parties, there still are too many impediments for victims of international crimes, thus preventing them from effectively exercising their rights under international and national law. Yet, as the Secretary-General of the UN confirmed, it is essential that the interests of the victim be taken into account at both the international and national levels in the Congo.¹¹⁴

6 Victim participation at the Extraordinary Chambers in the Courts of Cambodia: Lessons to be learned?

Traditional civil party models undoubtedly were devised for less complex proceedings with fewer victims. In adapting to cases involving genocide, crimes against humanity and war crimes, the ECCC provides us with an example of how a state is attempting to bridge the gap between national and international law in attempting to deal with mass atrocities, while also balancing the rights of victims with the rights of the accused. In researching the fate of victim participation in the DRC for cases of genocide, crimes against humanity and war crimes where there could be mass victimisation, the ECCC could prove of utmost relevance and importance.

As early as 1998, the UN brought together a group of experts to assess the feasibility of bringing the Khmer Rouge leaders to justice proposing the creation of an *ad hoc* tribunal modelled almost entirely on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹¹⁵ The government of Cambodia promptly rejected this proposal, insisting that the future tribunal be based on Cambodian law, and allocated a large role for Cambodian nationals, most notably judges, lawyers and victims.¹¹⁶ The result was a hybrid tribunal, mixing international and domestic elements in its laws, structures and staff, designed to prosecute the top-ranking officials of the Khmer Rouge regime. An examination of the ECCC could prove fruitful for the purposes of this article, as it reflects the civil law tradition similar to that in the DRC and is currently tackling the dilemmas of trying to provide a meaningful role for victims considering the likelihood of numerous victims desiring to participate in criminal proceedings.

The ECCC presents an interesting alternative to the traditional mechanisms of criminal justice with the Cambodian Code of Criminal Procedure, a relic of Cambodia's colonial past following the French civil law tradition, heavily influencing the Internal Rules of the ECCC

114 Mapping Report (n 2 above) para 116.

115 JP Bair 'From the numbers who died to those who survived: Victim participation in the Extraordinary Chambers in the Courts of Cambodia' (2009) 31 *University of Hawai'i Law Review* 518.

116 As above.

(Internal Rules),¹¹⁷ which are the authoritative source of procedural law for the ECCC.¹¹⁸ The Cambodian legal structure includes extensive procedural rights for victims, with victim participation stemming mainly from the right of victims' ability to petition the courts to become a civil party, making them a party to the proceedings. This civil law tradition is reflected in Internal Rule 23, where victims of crimes within the jurisdiction of the ECCC are afforded the right of civil party petition in order to support the prosecution of those responsible, as long as the victim has proven their identity; shown the existence of a causal link between the charged crime and the physical, material or psychological injury; and demonstrated a certain level of proof.¹¹⁹ When participating as a civil party, the victim becomes a party to the criminal proceedings, by supporting the prosecution of those responsible, being afforded protection by the tribunal; being entitled to representation by a lawyer;¹²⁰ and being able to request that the co-investigating judge collect evidence on his or her behalf.¹²¹

The first case to be heard, that of *Co-Prosecutors v Kaing Guek Eav*,¹²² resulted in the ECCC's first verdict on 26 July 2010, finding the accused guilty of crimes against humanity and grave breaches of international humanitarian law in connection with his role as the commander of a detention and torture centre during the Khmer Rouge period. This case is notable for the simple reason that it was the first trial in international criminal law where victims were able to participate as civil parties, with the understanding that this implicitly created expectations of a more victim-centred approach with strong participatory rights.¹²³ A total of 90 victims applied, and were subsequently granted approval, to participate as civil parties, with some commentators noting that 'neither the defence nor the prosecution challenged victim participation rights ... proceed[ing] with little judicial intervention'.¹²⁴

The second case, originally a joint case against the four most senior living members of the Khmer Rouge regime, *Co-Prosecutors v Nuon*

117 Internal Rules of the ECCC, <http://www.eccc.gov.kh/en/document/legal/internal-rules> (accessed 21 February 2018).

118 BL McGonigle 'Strengthening the participation of the victims at the ECCC? A look at the revised legal framework for civil party participation' Oxford Transitional Justice Research Working Paper Series, http://www.cslls.ox.ac.uk/documents/McGonigle_TheLegalFrameworkofVPattheECCC.pdf (accessed 12 May 2017) 1.

119 Internal Rules (n 117 above) Internal Rule 23*bis* (1). However, earlier versions of Internal Rule 23 required victims only to have suffered harm from a crime under the jurisdiction of the ECCC.

120 Internal Rule 23(6)-(7).

121 Internal Rule 23(5).

122 Judgment Case 001, *KAING Guek Eav alias Duch* ECCC (2012) Trial Chamber.

123 I Stegmiller 'Legal developments in civil party participation at the Extraordinary Chambers in the Courts of Cambodia' (2014) 27 *Leiden Journal of International Law* 467.

124 C Ferstman 'International criminal law and victim' rights' in W Schabas & N Bernaz (eds) *Routledge handbook of international criminal law* (2011) 412.

Chea and Khieu Samphan,¹²⁵ was much larger in scope, with over 4 000 victims applying for civil party status of whom, in the end, 3 866 were successfully admitted.¹²⁶

In both cases, victims granted civil party status have exercised numerous participatory rights. However, as will be shown, after an early favourable decision, it has become apparent that the Pre-Trial Chamber has been reluctant to recognise civil parties as equal parties to the prosecution and defence, continuously curtailing civil participatory rights.¹²⁷

Once having gained civil party status, many important participatory rights are afforded to victims during the pre-trial stage. First, there is the right to consult and examine the case file, which has proceeded in Case 001 and Case 002 without much contest. Second, civil parties have the right to request the co-investigating judges to carry out specific investigations on their behalf.¹²⁸ While this is a powerful right, it is not without limits. Victims participating in the proceedings must do so by supporting the prosecution. Therefore, although civil parties may request specific investigations, these investigations must be made with the consent of co-prosecutors or in support of the prosecution's case.¹²⁹ In addition to accessing the case file and requesting investigations, civil parties may also participate in some, but not all, pre-trial proceedings through written and oral interventions.¹³⁰ For example, Internal Rule 63(1), dealing with provisional detention, makes it clear that co-investigating judges shall hear the co-prosecutors and lawyers representing the accused, but no mention is made of civil parties. At the hearing on the appeal by Nuon Chea against a provisional detention order, lawyers representing the accused asserted that civil party participation presupposed an interest in the outcome of the proceedings and that a restrictive approach should be adopted in order not to infringe upon the rights of the accused to a fair hearing.¹³¹ The co-prosecutors submitted that Internal Rule 23 did not limit the meaning of proceedings and that guidance could be taken from recent international criminal practice, which is favourable towards victim participation at the investigation stage of criminal proceedings.¹³² The civil parties themselves expressed their need to disclose the effects that releasing the accused could have on society.¹³³ The Pre-Trial Chamber agreed with the co-

125 Judgment Case 002/01, *NUON Chea and KHIEU Samphan* ECCC (2014) Trial Chamber.

126 Stegmiller (n 123 above) 467.

127 McGonigle (n 18 above) 185.

128 Internal Rules (n 117 above) Internal Rule 59(5).

129 Internal Rule 23(1)(b).

130 McGonigle (n 18 above) 188.

131 *Case 002: Decision on Civil Party Participation in Provision Detention Appeals* ECCC (20 March 2008).

132 *Decision on Civil Party Participation* (n 130 above) para 6.

133 *Decision on Civil Party Participation* para 7.

prosecutors and the civil parties, stating that 'civil parties have active rights to participate starting from the investigative stage of the procedure',¹³⁴ and that including civil parties 'is in recognition of the stated pursuit of national reconciliation'.¹³⁵

Despite this landmark decision, questions concerning the effectiveness and appropriateness of a liberal set of participatory rights, especially as far as adjudicating individual criminal responsibility for such grave crimes is concerned, began to be raised, particularly because of the sheer number of civil parties.¹³⁶ In response, judges, concerned with more expeditious trial proceedings, made modifications to the Internal Rules designed to meet the requirements of trials of mass crimes, the specific Cambodian context, and to respond more fully to the needs of victims.¹³⁷

One of the most significant amendments made to the Internal Rules requires that civil parties can only participate as a 'consolidated group' once the trial stage is reached, and that a Civil Party Lead Co-Lawyer (CP-LCL) will be tasked with representing the interests of the consolidated group in order to co-ordinate the overall advocacy, strategy and in-court presentations of all civil parties.¹³⁸ While grouping according to common interests and goals can prove to be a sound idea, there will inevitably be tensions between individual rights and group rights, most likely resulting in limiting the ability of victim participants to make their individual experiences heard.¹³⁹ In trials where mass human rights violations are involved, there will undoubtedly be numerous victims and, therefore, trial management needs to be taken into consideration. However, there should be room for divergent views among victims: Unification as one group and one voice derives from a narrow understanding of the role of victims in the courtroom, focused only on efficiency and expediency.¹⁴⁰

What followed the above-mentioned normative regulation is what can only be classified as evidence of judicial restraint and procedural limitations. In an effort to ensure expeditious proceedings, the Pre-Trial Chamber made it clear that the 'Internal Rules should ... be read to provide that civil parties who have elected to be represented by a lawyer shall make their brief observations related to the application or appeal through their lawyers'.¹⁴¹ Moreover, the Chamber made it clear that the prosecution, defence and civil parties had different

134 *Decision on Civil Party Participation* para 36.

135 *Decision on Civil Party Participation* para 38.

136 C Ryngaert 'The Cambodian Pre-Trial Chamber's decisions in the case against Nuon Chea on victims' participation and bias' *The Hague Justice Portal*, <http://www.haguejusticeportal.net/eCache/DEF/9/135.html> 3 (accessed 12 May 2017).

137 Stegmiller (n 123 above) 471.

138 Internal Rules (n 117 above) Internal Rule 12ter.

139 S SàCouto 'Victim participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A feminist project?' (2012) 18 *Michigan Journal of Gender and Law* 326; Internal Rules (n 117 above) Internal Rules 23ter and 23quater.

140 Stegmiller (n 123 above) 472.

positions in the criminal process and, accordingly, the modalities of participation for the victims need not to be the same as those exercised by the other parties.¹⁴²

The overall satisfaction of the victims with the hybrid tribunal is mixed.¹⁴³ However, importantly for the future of victim participation in the DRC, a number of lessons can be learned: First, numerous external factors can hamper the criminal procedures. The sheer scale of the atrocities makes it difficult to assign guilt to specific parties which, in turn, means that not every victim can be acknowledged, leading to the dilemma of determining which victims are included or excluded.¹⁴⁴ Moreover, the ECCC has continued to grapple with considerable legal and procedural obstacles relating to civil party participation, underlining the difficulty of determining the scope and purpose.¹⁴⁵ Another factor is the endemic corruption in Cambodia as well as the limited accountability of public officials.¹⁴⁶ In addition, many of the Cambodian judges, legal officers, members of the prosecution, the defence and civil party lawyers are not familiar with international law and the substantive procedural rules that govern the ECCC.¹⁴⁷ Finally, civil party participation is costly, in terms of direct expenditure and the additional time required for participation to function smoothly.¹⁴⁸

7 Conclusion

Finding ways of reconciling the interests of society, the accused and the victim has always been a difficult endeavour. Human rights law, for its part, has attempted to address this issue by emphasising that the adherence to the rule of law and the right to an effective remedy includes the rights of victims to participate in criminal proceedings, particularly when prosecuting gross human rights violations. The prosecution of international crimes, however, has seemingly not been a high priority for the DRC government. Impulsively responding to the unacceptable degrees of impunity, the DRC ratified the Rome Statute

141 *Case 002: Directions on Civil Party Oral Submissions During the Hearing of the Appeal Against Provisional Detention Order ECCC* (20 May 2008) paras 1 & 4-5

142 *Case 002: Decision on Preliminary Matters Raised by Lawyers for the Civil Parties in Ieng Sary's Appeal Against Provisional Detention Order ECCC* (1 July 2008) para 4.

143 See R Killean 'Procedural justice in international criminal courts: Assessing civil parties' perceptions of justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 *Criminal Law Review* 1-38. See also Impunity Watch *Victim participation and transitional justice in Cambodia: The case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)* [http://www.impunitywatch.org/docs/IW_Report_Victim_Participation_in_Cambodia_\(April_2016\).pdf](http://www.impunitywatch.org/docs/IW_Report_Victim_Participation_in_Cambodia_(April_2016).pdf) (accessed 2 April 2017).

144 Impunity Watch (n 142 above) 57.

145 As above.

146 Impunity Watch (n 142 above) 5.

147 Impunity Watch 57.

148 Impunity Watch 58.

but for numerous years stalled in adopting the necessary implementation legislation that would transpose the relevant international criminal law provisions into the DRC's domestic legal framework. Similarly, initiatives to create temporary specialised tribunals, modelled after the ECCC, failed to materialise without any government officials providing convincing arguments as to why this was the case. Unfortunately, if victims were privileged enough to access justice mechanisms, it could only be done through military tribunals, where the participatory rights of the victims were constrained when compared to ordinary criminal proceedings. With the recent adoption of legislation that amends the Congolese Criminal Code and the Code of Criminal Procedure, effectively transposing the Rome Statute into national law, now permitting victims to initiate proceedings themselves and permitting a right of appeal, it is hoped that the level of impunity will start to decrease.

Moving forward, it is important to keep in mind that *lacunae* exist in the criminal procedure of the DRC: First, despite there being a movement towards protecting victims of sexual violence during criminal proceedings, one wonders whether the DRC will offer protection equivalent to that offered by the Rome Statute.¹⁴⁹ Moreover, the criminal procedure seems to be silent on the issue of keeping victims informed of their rights and the progress of the investigations.¹⁵⁰ As discussed above, such information is clearly enumerated as a state obligation when prosecuting serious human rights violations and as the right to an effective remedy for the victim. Finally, at the moment there are many NGOs that are able to finance the legal representation of victims. However, when this is not available, what assurances are governmental authorities providing to ensure that the lawyers provided will be trained to be able to handle trials of this magnitude?¹⁵¹

Moreover, in looking towards understanding what problems one can anticipate with the prosecution of international crimes in a domestic setting that allows for a robust set of participatory rights for the victims, the ECCC offers at least one important contribution: common legal representation. The DRC legal framework does not adequately address this issue, as it does not recognise the collective participation of victims in criminal proceedings. However, it seems quite pertinent as the number of victims in cases involving serious human rights violations is typically large, which could have a negative effect on the efficiency of criminal proceedings as well as infringing on the rights of the accused.

At the International Criminal Court, for example, common legal representation has emerged as a compulsory path: As the number of victims involved increased, every single case involved collective

149 Mbokani (n 93 above) 353.

150 Mbokani 354.

151 Mbokani 365-366.

participation by victims. In the *Katanga* case,¹⁵² the judges decided that the victims would be split into two groups, and one legal representative would represent all participants except for the child soldiers. The grouping according to the harm suffered allowed the legal representatives to formulate more targeted questions.¹⁵³ In the *Bemba* case,¹⁵⁴ thousands of victims were to be represented by two legal representatives from the Central African Republic as the ICC had not been persuaded that additional representation was necessary. However, unlike *Katanga*, the Trial Chamber in *Bemba* opted not to group victims by the harm suffered but instead decided that victims would be grouped according to the geographical location of the crimes.¹⁵⁵

However, will the protection of the integrity of the trial come at the expense of victims' interests and rights? Will the agency of the victims be restrained if it is institutionally inconceivable to accommodate the participation of a large number of victims?

Only time will tell.

152 *The Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui* ICC (22 July 2009) ICC-01/04-01/07/-1328, Order on the Organisation of Common Legal Representation paras 9-13.

153 McGonigle (n 18 above) 328.

154 *The Prosecutor v Jean-Pierre Bemba* ICC (11 November 2010) ICC-01/05-01/08-1005, Decision on common legal representation of victims for the purpose of trial, para 18.

155 McGonigle (n 18 above) 328.

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Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol

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Summary

As stipulated by the CEDAW Committee, the right of access to justice for women is a fundamental element of the rule of law, which is essential to the realisation of women's human rights everywhere. As also pointed out by the CEDAW Committee, one important aspect of women's access to justice is the implementation of international instruments and decisions in international and regional justice systems related to women's rights. In line with this focus, the CEDAW Committee urges states to establish credible monitoring mechanisms for the implementation of international law. This article discusses one such mechanism or, rather, the absence of such a mechanism, namely, the lack of a specialised committee on the rights of women in Africa under the African Women's Protocol. The article provides an analysis of the effects of the absence of a committee on the rights of women in Africa on the monitoring and enforcement of women's rights relating to the border issue of access to justice. This analysis refers to three inter-linked lines of inquiry. The first is whether the structure and procedure established by the African Women's and African Court Protocols are obstructing women's human rights claims from reaching the Court. The second line of inquiry relates to whether the use of preconceived, mainstream mechanisms to monitor women's rights is conducive to promoting and protecting women's rights and, lastly, whether the limited

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jurisprudence on women's rights that have been produced by the African Commission supports or rejects the idea that the Commission is conscious of its women's rights mandate.

Key words: *African Women's Protocol; gender equality; rule of law; women's access to justice*

1 Introduction

The rule of law, as a primary principle underlying the African Union (AU), is set to guide all its functions and processes.¹ However, the rule of law, understood as the observance of good laws, containing within it the core values of human rights, is not a complete remedy for the compounded problems of the women of this continent. As highlighted by Mutua, '[g]ender remains among the thorniest challenges to the rule of law'.² In line with Mutua's argument, situating gender at the heart of the rule of law debate, this core concept needs to be informed and, arguably, transformed by feminist theories of subordination and intersectionality.³

The centrality of gender to the concept of the rule of law is recognised in the Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, which emphasises the 'importance of establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice'.⁴ When a gender analysis is applied, to unearth the multifaceted ways in which women experience discrimination, exclusion and domination, one may be able to establish the limitations contained in the rule of law continuum and, consequently, better safeguard the lives, dignity and security of African women.

As stipulated by the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), the right of access to justice for women is a fundamental element of the rule of law, and it is essential to the realisation of women's human rights everywhere.⁵ The right of access to justice is multidimensional. It encompasses 'justiciability, availability, accessibility, good quality and accountability of justice systems, and

1 Art 4(m) of the Constitutive Act of the African Union, adopted on 11 July 2000, entered into force 26 May 2001, OAU Doc CAB/LEG/23.15 (2001).

2 M Mutua 'Africa and the rule of law' (2016) 23 *SUR International Journal on Human Rights* 169.

3 As above.

4 UNGA 'Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels' 30 November 2012, UN Doc A/RES/67/1 para 16.

5 UN Committee for the Elimination of All Forms of Discrimination against Women 'General Recommendation 33 on women's access to justice' CEDAW/C/GC/33 3.

provision of remedies for victims'.⁶ As pointed out by the CEDAW Committee, one important aspect of women's access to justice is the implementation of international instruments and decisions in international and regional justice systems related to women's rights. In line with this focus, the CEDAW Committee urges states, individually or through international or regional co-operation, to establish credible monitoring mechanisms for the implementation of international law.⁷ This article discusses one such mechanism or, rather, the absence of such a mechanism, namely, the lack of a specialised committee on the rights of women in Africa under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The article departs from two main assumptions: first, that using the mainstream human rights institutions (and not a specialised committee on the rights of women in Africa) would present several challenges in the implementation of women's rights; second, that a specialised women's rights institution would serve two important purposes, namely, as a *receiver* of litigation and as a *driver* of implementation, with the potential of increasing women's access to justice and providing important insights into the African Women's Protocol.

The discussion in the article is mindful of the fact that access to regional and international human rights institutions usually is beyond the reach of millions of African women suffering from discrimination, violence and oppression. As international human rights litigation is built upon the principle of state sovereignty and, thus, around the principle of exhaustion of local remedies, limitations to access on the domestic level generally prevent access at the regional level. Access to resources, knowledge, legal aid and proficient legal representation are other major hurdles to women's access to justice domestically and regionally. However, the objective of the article is not to address these aspects of women's access to justice in the 55 states making up the AU. The aim rather is to emphasise how access to regional justice, through institutional structures, such as the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court), could be improved to support the domestic implementation and enforcement of the African Women's Protocol and, as such, the rule of law.

In the following sub-sections, the analysis of the lack of a committee on the rights of women in Africa under the African Women's Protocol and its effects on the monitoring and enforcement of women's rights refers to three inter-linked lines of inquiry. The first is whether the structure and procedure established by the African Women's and African Court Protocols are obstructing women's human rights claims from reaching the Court. The second line of inquiry is whether the use of preconceived, mainstream mechanisms

6 General Recommendation 33 (n 5 above) para 14.

7 General Recommendation 33 para 56.

to monitor women's rights is conducive to promoting and protecting women's rights; and, lastly, whether the limited jurisprudence on women's rights that have been produced by the African Commission supports or rejects the idea that the Commission is conscious of its women's rights mandate.

2 Absence of a women's rights committee under the African Women's Protocol

In January 2009, the AU Assembly of Heads of States declared 2010-2020 the African Women's Decade. Although it is evident that women's human rights feature prominently on the current AU agenda, specialised, operational women's rights institutions are incongruously missing from the regional institutional human rights framework. The African Women's Protocol was created to overcome a paradox, referred to by Viljoen as creating another legal instrument to overcome the deficiencies of the already-existing instrument, namely, the African Charter on Human and Peoples' Rights (African Charter) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁸ The problem, however, as referred to by Banda, is not the normative deficiency of international or regional human rights law dealing with women's human rights, but rather the lack of implementation of such rights.⁹ Implementation primarily should be driven by a willingness of state parties to make good on its ratifications, through domestication and access to remedies in cases of non-compliance. However, as argued in this article, a focal point, a specialised women's rights institution, arguably would go a long way towards promoting implementation through both a specialised promotional and protective mandate.

For progressive women's rights treaties to be meaningful, the institutions established to interpret and enforce these treaties must assist in transforming such law into action through specialised promotional and protectional mandates. An important mechanism through which international human rights law becomes operative and accessible is through the interpretation and application of the law by judicial and quasi-judicial bodies. Recent studies reveal that decisions by such institutions can usher in a significant, domestic, human rights policy change, consequently supporting the rule of law.¹⁰ A good example is the CEDAW Committee's salient interpretation of the non-discrimination clause in the CEDAW confirming, for example, that

8 F Viljoen *International human rights law in Africa* (2012) 251.

9 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 74.

10 C Hillebrecht 'The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change' (2014) 20 *European Journal of International Relations* 1117.

gender-based violence is a form of discrimination.¹¹ The CEDAW Committee, in cases such as *AT v Hungary*, later applied this interpretation.¹² This groundbreaking understanding of violence, as a form of discrimination, has reverberated in domestic jurisprudence across the globe, confirming the importance of the interpretation provided by this specialised women's human rights institution.

However, for treaty bodies to be able to interpret and apply women's human rights law, women must have reasonable access to these bodies. In contrast to the specific women's rights mandate of the CEDAW Committee or the child rights mandate of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), established under the African Charter on the Rights and Welfare of the Child (African Children's Charter), the African Women's Protocol contains no reference to a specialised monitoring body (referred to as a committee on the rights of women in Africa). Thus, no specialised women's rights institution exists on the African continent which is able to draw women's issues into what arguably is still a patriarchal system. Furthermore, there is no specialised institution to bring women's claims of human rights violations to the forefront.¹³ Instead, the African Women's Protocol relies on an existing, mainstream, human rights structure, created by the African Charter, namely, the African Commission and the African Court as founded by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of a Court on Human and Peoples' Rights (African Court Protocol). As suggested by Engle, human rights institutions entrusted with enforcing *all* human rights (such as the African Commission and African Court) must arrange or re-arrange its priorities in order to be able to protect specific women's rights.¹⁴ The question is whether such arrangements or re-arrangements have been made and, furthermore, whether access to justice is hindered by the attitude towards women's rights displayed by, for example, the African Commission, as is further discussed in part 3.2 below.

While the ratification of the African Women's Protocol has been relatively successful, the invisibility of women's rights in the decisions and judgments of the treaty bodies set up to protect women's rights on the African continent is glaring. The African Women's Protocol to

11 UN Committee for the Elimination of All Forms of Discrimination against Women 'General Recommendation 19' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' 29 July 1994, UN Doc HRI/GEN/1/Rev 1.

12 Communication 2/2003 UN Doc CEDAW/C/32/D/2/2003 (2005).

13 Viljoen (n 8 above) 249.

14 K Engle 'Female subjects of public international law: Human rights and the exotic other female' (1992) 26 *New England Law Review* 1516.

date has been ratified by 39 of the 55 AU member states.¹⁵ It has been in force for a period of ten years or longer in 24 of these states. However, as stated by Oré J, the current Judge-President of the African Court:¹⁶

[I]n spite of the massive ratification of the [African Women's Protocol] on the rights of women, expectations about the volume of litigation have been disappointing ... [t]his ... is disappointing in view of the serious violations experienced by African girls and women.

Oré J is pointing to an important issue. Almost 12 years after the African Women's Protocol came into force, there still has been no judgment by the African Court or decision by the African Commission specifically enforcing the rights set out in the African Women's Protocol. This is notwithstanding the fact that violations of women's human rights are rampant on the African continent. It is pertinent to ask why this is the case.

Currently there are less than a handful of cases pending before the African Court and African Commission with the potential of breaking this mould. For example, in June 2016, the Court received an application from Mariam Kouma directing a complaint to the African Court regarding violations of article 3(1) (dignity); article 3(4) (protection from violence); and article 8(a) (effective access to justice) of the African Women's Protocol.¹⁷ The Court heard this case on 16 May 2017. In September 2016, the Court furthermore received an application from the *Association pour le Progrès et la Défense des Droits des Femmes* and the Institute for Human Rights and Development in Africa against Mali, challenging the Malian Code of Persons providing for marriages to be concluded with persons under the age of 18.¹⁸ This case specifically refers to article 2(2) (the obligation to modify harmful social and cultural practices); article 6(a) (full consent in marriage); article 6(b) (minimum age of marriage); and article 21 (the

15 Following the adoption of the Solemn Declaration on Gender Equality in Africa in July 2004, all member states of the AU undertook to (i) sign and ratify the African Women's Protocol by the end of 2004; (ii) support the launching of the public campaign aimed at ensuring its entry into force by 2005; and (iii) usher in an era of domestication and implementation of the African Women's Protocol, as well as other national, regional and international instruments on gender equality. In the AU Gender Policy, launched in 2009, member states furthermore undertook to achieve full ratification and enforcement of the African Women's Protocol by 2015 and its domestication by 2020.

16 Final Communiqué of the 59th ordinary session of the African Commission on Human and Peoples' Rights, 21 October to 4 November 2016, Banjul, The Gambia, para 10.

17 Application 40/2016, *Mariam Kouma v Republic of Mali (Kouma)*, African Court on Human and Peoples' Rights.

18 Application 46/2016, *APDF and IHRDA v Republic of Mali (IHRDA)*, African Court on Human and Peoples' Rights.

right to inheritance) of the African Women's Protocol.¹⁹ These are encouraging developments. However, the position remains that very little reference has been made directly to the African Women's Protocol which targets to address the marginalisation of women in Africa and to strengthen the rule of law. If this is not appropriately addressed, women's rights litigation will continue trickling instead of streaming in the regional domain.

3 African Women's Protocol and its enforcement mechanisms

The AU Assembly adopted the African Women's Protocol on 11 July 2003, and it entered into force on 25 November 2005, after the fifteenth ratification required had been made. It was established under article 66 of the African Charter, as a special protocol to supplement the provisions of the Charter. The CEDAW has been ratified by all AU member states except the Sharawi Arab Democratic Republic (which is not a member of the United Nations (UN)), Somalia and Sudan. Accordingly, there is a complete overlap between the state parties to the African Women's Protocol and the CEDAW. Out of the 39 member states of the AU that have ratified the African Women's Protocol, 37 states have been bound to the CEDAW for 20 years or longer. The exceptions are Mauritania and Swaziland, which ratified the CEDAW in 2001 and 2004 respectively. Conclusively, out of the 39 member states of the AU that have ratified the African Women's Protocol, all these states have been bound by the CEDAW for a period extending over ten years.

The African Women's Protocol arguably is a comprehensive treaty, prohibiting all forms of discrimination, harmful cultural practices and domestic violence against women and girls. It prescribes rights to property and inheritance and contains civil and political as well as socio-economic rights. As far as the latter category is concerned, the African Women's Protocol protects the general health of women and their reproductive health, and prescribes certain rights for women subjected to or living with HIV/AIDS. According to article 2 of the Women's Protocol, state parties furthermore have a comprehensive obligation to protect women from discrimination by state and non-state actors.

19 In addition, there is an interesting case pending a decision of seizure by the African Commission concerning collective rape during military operations in the Democratic Republic of the Congo (DRC). Institute for Human Rights and Development in Africa (IHRDA) 'Case against the Democratic Republic of Congo before the African Commission, on collective rape during military operations' October 2016 <http://www.ihrda.org/2016/10/case-against-the-democratic-republic-of-congo-before-the-african-commission-on-collective-rape-during-military-operations/> (accessed 8 February 2018).

As alluded to above, unlike the African Children's Charter, the African Women's Protocol does not constitute a committee on the rights of women in Africa. Born out of the same Charter, the African Charter, and the idea that specific protection is required for certain vulnerable groups such as children, the African Children's Charter established the African Children's Committee in 1999. In comparison, the Children's Charter has been ratified by 48 states, and the African Children's Committee, which held its first meeting in 2002, is entrusted with the specific mandate to promote and protect the rights and welfare of the child.²⁰ It consists of 11 impartial members with a specific competency in matters of the rights and welfare of children.²¹ The Children's Committee can receive communications from any person, group, non-governmental organisation (NGO),²² state party, or the UN relating to any matter covered by the African Children's Charter.²³ It can furthermore investigate any matter falling within the ambit of the Children's Charter and receives periodic reports from member states. The African Children's Committee has thus far finalised four communications,²⁴ and three communications are currently pending before the Children's Committee.²⁵ It has issued 31 Concluding Observations based on reports submitted by state parties. Of the 48 member states to the African Children's Charter, 33 states have submitted their initial reports, and seven have submitted periodic reports. The Children's Committee moreover to date has issued two General Comments as well as a joint General Comment with the African Commission.²⁶

20 Arts 32 & 42 African Children's Charter.

21 Art 33 African Children's Charter.

22 Recognised by the OAU, read AU.

23 Art 44(1) African Children's Charter.

24 *Michelo Hansungule (on behalf of children in Northern Uganda) v The Government of Uganda* 001/Com/001/2005; *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* 002/Com/002/2009; *The Centre for Human Rights (University of Pretoria); La Rencontre Africaine pour la Defense Des Droits de l'Homme (Senegal) v The Government of Senegal* 003/Com/001/2012; and *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v The Republic of Mauritania* 007/Com/003/2015.

25 *Institute for Human Rights and Development in Africa v The Government of Malawi* 004/Com/001/2014; *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v the Government of Republic of Sudan* 005/Com/001/2015; and *The Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v The Government of Republic of Cameroon* 006/Com/002/2015.

26 African Committee of Experts on the Rights and Welfare of the Child General Comment 1 (Article 30 of the African Charter on the Rights and Welfare of The Child) on 'Children of Incarcerated and Imprisoned Parents and Primary Caregivers' 8 November 2013; African Committee of Experts on the Rights and Welfare of the Child, General Comment 2 on article 6 of the African Charter on the Rights and Welfare of the Child: 'Right to Birth Registration, Name and Nationality' 16 April 2014; and Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage 30 January 2018.

3.1 Role of the Court in enforcing women's rights

The African Women's Protocol relies on the existing human rights structure, as created by the African Charter and the African Court Protocol, to monitor the implementation of the rights set out therein. When the African Women's Protocol was negotiated, the Court Protocol had been conceived and adopted; however, the Court had not yet become operational. The African Women's Protocol prescribes that pending the establishment of the African Court, the African Commission has the responsibility to hear matters pertaining to the interpretation and application of the Women's Protocol. As will be further discussed below, the bulk of the protection mandate today still lies with the Commission, even though the African Court has been in operation since 2004.

The African Women's Protocol appoints the African Court as the primary institution that should be 'seized with matters of interpretation arising from the application or implementation of ... [the] Protocol'.²⁷ This implies that if the rights are not implemented or the application of the rights of member states are not done in accordance with the African Women's Protocol, the African Court may hear such claims. Therefore, the Court would have jurisdiction under article 3 of the African Court Protocol *vis-à-vis* states that have ratified the Court Protocol as well as the African Women's Protocol, and it would equally be able to apply the provisions of the African Women's Protocol under article 7 of the Court Protocol. Of the 30 states²⁸ that have ratified the African Court Protocol, 25²⁹ have also ratified the African Women's Protocol, substantiating the material jurisdiction of the Court. In this context, it is also important to note that the Court is able to hear women's rights cases based on articles 2, 3 and 18(3) of the African Charter, and the CEDAW where a state party has ratified the Court Protocol but not the African Women's Protocol. Of the five states³⁰ that have not ratified the African Women's Protocol, four³¹ have ratified the CEDAW. The African Court's material jurisdiction is determined by article 3 of the Court Protocol, as mentioned above, indicating that for the Court to have material jurisdiction over an international treaty it has to be relevant, of a human rights nature and ratified by the state in question.

27 Art 27 African Women's Protocol.

28 African Union Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1 April 2016 https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 12 February 2018).

29 As above.

30 Chad, Ethiopia, Niger, Sahrawi Arab Democratic Republic and Tunisia.

31 The Sahrawi Arab Democratic Republic that has not ratified the CEDAW.

Besides material jurisdiction, the African Court also has to assume personal jurisdiction to be able to hear a case.³² The Court Protocol stipulates that the African Commission; a state party that has lodged a complaint to the Commission; a state party against which the complaint has been lodged at the Commission; a state party of which the citizen is a victim of a human rights violation; and African intergovernmental organisations have *locus standi* before the African Court.³³ Only in cases where the state has made a declaration under article 34(6) of the Court Protocol (an optional jurisdiction declaration), accepting the jurisdiction of the Court to hear complaints by individuals and NGOs (with observer status), may the Court accept such complaints.³⁴ Currently seven states have made such declarations.³⁵ All seven states furthermore have ratified the African Women's Protocol.³⁶ Conclusively, only individual victims or NGOs (with observer status) in seven out of 55 African states can complain directly to the primary mechanisms stipulated in the African Women's Protocol, that is, the African Court, with regard to violations under the African Women's Protocol.

In the 22 states that have ratified both the African Court Protocol (without making an optional jurisdiction declaration) and the African Women's Protocol, a case concerning a violation of the African Women's Protocol can only reach the Court through (i) a referral by the African Commission;³⁷ (ii) as a complaint submitted by an African intergovernmental organisation;³⁸ (iii) as an inter-state complaint;³⁹ or (iv) as a referral by the state that has been accused of human rights violations before the African Commission.⁴⁰ Thus far, the Commission has referred three cases to the Court.⁴¹ Moreover, as the African Women's Protocol does not establish a committee on the rights of

32 See Application 004/2013 *Lohe Issa Konate v Burkina Faso*, African Court on Human and Peoples' Rights 5 December 2014 para 30. The Court has to establish four instances of jurisdiction, namely, *ratione personae*, *materiae*, *temporis* and *loci*.

33 Art 5 Court Protocol.

34 Arts 5(3) & 34(6). See also App 001/2008 *Michelot Yogogombaye v Republic of Senegal*, African Court on Human and Peoples' Rights 15 December 2009 para 37.

35 Burkina Faso, deposited 28 July 1998; Malawi, deposited 9 October 2008; Mali, deposited 19 February 2010; Tanzania, deposited 29 March 2010; Ghana, deposited 10 March 2011; Côte d'Ivoire, deposited 23 July 2013; and Benin, deposited 8 February 2016. Tunisia signed on 13 April 2017 but has not yet deposited its declaration. Rwanda deposited its declaration on 6 February 2013 and officially withdrew it on 24 February 2016.

36 See n 28 above.

37 Art 5(1)(a) African Court Protocol; Rule 118 Rules of Procedure of the African Commission on Human and Peoples' Rights.

38 Art 5(1)(e) African Court Protocol.

39 Arts 5(1)(b) & (d).

40 Art 5(1)(c).

41 App 002/2013, *The African Commission on Human and Peoples' Rights v Libya*, African Court on Human and Peoples' Rights 3 June 2016; App 004/2011 *The African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*, African Court on Human and Peoples' Rights (struck out) and App 006/2012, *The African Commission on Human and Peoples' Rights v Republic of Kenya*, African Court on Human and Peoples' Rights 26 May 2017.

women in Africa, and as the African Children's Committee does not constitute an African intergovernmental organisation according to the Court,⁴² it is not clear what other AU/African body would have an interest and equally possess *locus standi* to submit such a claim. Furthermore, inter-state complaints are very rare, and it is unlikely that such a claim would involve women's rights.⁴³ In the last scenario, where a state that has been cited as a respondent party before the African Commission, the complaint would voluntarily be subjected to the binding judgments of the African Court, and would in all likelihood involve the Court as an appeal body. Except for the Commission, as alluded to above, none of the other entities with *locus standi* before the Court has thus far lodged a complaint.

3.2 Role of the African Commission in enforcing women's rights

3.2.1 State reports

The African Commission has since 1987 been entrusted with monitoring state compliance with the African Charter. In addition, as discussed above, the Commission acts as a transitional monitoring body for the African Women's Protocol in relation to states that have ratified the Women's Protocol but that have not yet ratified the Court Protocol, and states that have ratified the African Women's Protocol and the Court Protocol but which have not yet made an optional jurisdiction declaration. Furthermore, article 60 of the African Charter stipulates that the African Commission 'shall draw inspiration' from human rights instruments adopted by the UN, as ratified by African states. The CEDAW falls under this category.

Under article 26 of the African Women's Protocol state parties undertake to submit periodic reports every two years, on the measures taken (both administrative and legislative) to implement their obligations, in accordance with article 62 of the African Charter and rule 73 of the Rules of Procedure of the African Commission.⁴⁴ In order to assist member states in fulfilling their reporting obligations, the Commission has adopted Guidelines for State Reporting under the

42 African Court on Human and Peoples' Rights, Request for Advisory Opinion 002/2013 – The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights (ACRWC advisory opinion) para 93.

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

44 As approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul, The Gambia, 12-26 May 2010.

African Women's Protocol (Guidelines).⁴⁵ These Guidelines stipulate:⁴⁶

A state party to the African Charter and the Protocol must submit its report in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol. A state's first report under Part B must, preferably, not exceed 50 pages and subsequent reports should not exceed 30 pages.

Therefore, there is no separate reporting procedure for the African Women's Protocol. Instead, the African Commission relies on state parties to submit joint reports on the African Charter and the Women's Protocol for consideration. This reporting process is problematic, as the two reports are easily conflated. As an example, reports on the African Charter and the Women's Protocol are not listed separately on the Commission's homepage. Thus, there is no clear indication as to how many or which states have reported under the African Women's Protocol. It is sometimes difficult to distinguish between the two different reports and to find separate and relevant information on the status of state reporting under the African Women's Protocol.

As indicated above, of the 48 member states to the African Children's Charter, 33 states have submitted their initial reports, and seven have subsequently submitted periodic reports. Even considering the fact that the Children's Charter has been in force five years longer than the African Women's Protocol, the progress of state reporting under the Women's Protocol is substantially slower than under the Children's Charter. Currently, only seven out of the 39 state parties have submitted an initial report under the African Women's Protocol.⁴⁷ Only Nigeria has repeatedly reported. As article 62 of the African Charter instructs states to report every two years, it is clear that the majority of state parties do not consider reporting under the African Women's Protocol a priority.

45 Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 46th ordinary session of the African Commission held from 11 to 25 November 2009 in Banjul, The Gambia. The 46th ordinary session was covered in the 27th Activity Report of The African Commission.

46 Guidelines (n 45 above) 1.

47 Mauritania's 10th, 11th, 12th, 13th and 14th Periodic Report 2006-2014 (not yet considered by the African Commission); Rwanda's 11th, 12th and 13th Periodic Report 2009-2016 (not yet considered by the African Commission); South Africa's 2nd Periodic Report 2003-2014, considered at the 58th ordinary session of the African Commission, 6-20 April 2016, Banjul, The Gambia; Namibia's 6th Periodic Report 2011-2014, considered at the 58th ordinary session of the African Commission, 6-20 April 2016, Banjul, The Gambia; Burkina Faso's 3rd and 4th Periodic Report 2011-2015, considered at the 57th ordinary session of the African Commission, 4-18 November 2015, Banjul, The Gambia; Malawi's Initial and Combined Reports, 1995-2013, considered at the 56th ordinary session of the African Commission, 21 April-7 May 2015, Banjul, The Gambia; Nigeria's 5th Periodic Report 2011-2014, considered at the 56th ordinary session of the African Commission, 21 April-7 May 2015, Banjul, The Gambia; and Nigeria's 6th Periodic Report 2015-2016 (not yet considered by the African Commission).

3.2.2 Individual complaints

As of November 2015, the African Commission had received 581 communications. Of these, 408 communications had been finalised and three⁴⁸ transferred to the African Court.⁴⁹ It is notable that out of more than 400 finalised communications, the Commission has engaged with women-specific issues in only ten communications dating back to 1996, as part of broader claims of human rights violations.

It is evident that the Commission cannot choose the cases it eventually considers. The individual complaints process as set out in the African Charter, mainly in articles 45, 55, 56 and 59, is initiated by the complainant. There are undoubtedly several external reasons why women's claims do not, in general, reach the Commission (and for that matter the Court), thus hampering women's access to justice. These include the slow implementation of certain provisions of the African Women's Protocol; the lack of state reporting under article 26 of the African Women's Protocol and the conflation of state reports (as discussed above under 3.2.1); the persistent challenges to the universality of women's human rights *vis-à-vis* moral or traditional African values and how these relate to the different roles of women; the use of religion and culture to defend harmful and violent practices; a lack of awareness of human rights instruments in general and, more specifically, the African Women's Protocol; and a lack of progress regarding women's rights due to state-specific conditions and events such as environmental challenges, conflicts and health epidemics.⁵⁰ However, a lack of engagement with women's issues at the African Commission cannot *only* be explained by these external factors. Currently there are 514 NGOs with observer status listed with the Commission.⁵¹ Of these, at least 50 NGOs specifically list women's rights as part of their mandate.⁵² In this regard, it is

48 See n 41 above.

49 Inter-Session Activity Report of the Working Group on Communications May 2015-October 2015), presented to the 57th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 4-18 November 2015 4 para 16.

50 African Union Special Rapporteur on the Rights of Women in Africa and UN Office of the High Commissioner for Human Rights 'Report on women rights in Africa' 52 http://reliefweb.int/sites/reliefweb.int/files/resources/WomensRightsinAfrica_singlepages.pdf (accessed 12 February 2018).

51 Resolution 33 on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples' Rights, 5 May 1999, adopted at the 25th ordinary session of the African Commission held in Bujumbura, Burundi, 26 April-5 May 1999. The 25th ordinary session is covered in the 12th Activity Report of the African Commission, Assembly of Heads of State and Government 35th ordinary session, 12-14 July 1999, Algiers, Algeria, AHG/215 (XXXV).

52 African Commission on Human and Peoples' Rights 'NGOs with observer status' 2018 <http://www.achpr.org/network/ngo/by-name/> (accessed 12 February 2018).

important to note that NGOs often 'contribute to the development of international law through litigation'.⁵³ However, judging from the existing jurisprudence, this is not the case with regard to women's rights. One of the main reasons, as is further argued below, is that the Commission has not contributed to a culture where women's claims are prioritised. By not engaging with, detailing and personifying women's human rights claims, the Commission has not appropriately acted on its mandate to protect *all* human rights. Thus, individuals and NGOs seemingly are not prone to approach the Commission on these issues. Thus far the Commission has not decided any communication based on the African Women's Protocol. In a few cases, as discussed below, the Commission furthermore has failed to apply the CEDAW where applicable. In six cases, the Commission has been confronted with violations of women's rights in terms of rape and sexual violence during conflict. In another three cases, women's rights have been considered in relation to human dignity (article 5 of the African Charter) during detention, in relation to corporal punishment and immigration policies.⁵⁴ Only one case before the Commission refers specifically to women's rights (gender-based violence and sexual violence) and discrimination against women under articles 2, 3 and 18(3) of the African Charter.⁵⁵ The following sub-sections detail how the Commission's priorities and perceptions of women's rights have been entrenched, but also developed, in its jurisprudence from 1996 to 2013.

African Commission's 'women as victims of rape' discourse

The rape of girls and women has featured, as a violation of human rights, before the African Commission in cases from 1999 to 2009, that is, over a period of 10 years.⁵⁶ These cases relate to situations of civil or border-crossing wars, either during hostilities or in the

53 R Murray *The African Commission on Human and People's Rights and international law* (2000) 95.

54 *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996): The African Commission found that the conditions of detention in which children, women and the aged were held violated their physical and psychological integrity and, therefore, constituted a violation of art 5; *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008): The African Commission found that the state had to ensure that its immigration policies, measures and legislation did not discriminate against persons on the basis of race, colour, descent, national, ethnic origin, or any other status, and particularly take into account the vulnerability of women, children and asylum seekers; *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) (*Doebbler*): I discuss this case under part 3.2.2.2 below.

55 Communication 323/2006 (2011) *Egyptian Initiative for Personal Rights (EIPR) and Interights v Egypt* (EIPR) (2006).

56 *Interights (on behalf of Pan-African Movement & Others) v Eritrea and Ethiopia* (2003) AHRLR 74 (ACHPR 2003); *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) (*Malawi African Association*); *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) (*DRC*); *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) (*African*

aftermath of hostilities between the belligerent parties. These cases are indicative of the non-engaging approach that the Commission generally has taken towards women's rights and, more specifically, towards rape and sexual violence. Five of these cases are analysed below.⁵⁷ It is possible to detect an overarching narrative, used by the Commission, to diminish the violations of women's rights. A common denominator in these cases is that there is no real attempt to detail, in any significant way, the specific abuses the women involved in these cases were subjected to, or other relevant and related issues. On the contrary, the violations are reductively interpreted, primarily with reference to 'just' rape, without any further contextualisation. In the process, the victims arguably are both disempowered and disenfranchised.

As a first example, in *Malawi African Association*⁵⁸ the Commission was presented with a claim from, amongst others, Amnesty International, referring to the violence that had occurred in Mauritania from 1986 to 1992, between the northern Mauritanian population and the southern, black, ethnic groups. The complaint concerned violations of the rights to life, dignity, security and fair trial.⁵⁹ The Northern Mauritanian population's military raided the south, detained hundreds of individuals, imposed curfews, and inflicted various forms of violence and intimidation.⁶⁰ State-sponsored violence also reached the villages in the south, where security forces occupied and confiscated land and livestock, forcing the villagers to flee to neighbouring Senegal. The complaint averred that men from the southern black ethnic groups had been subjected to different forms of torture and humiliation. It is in relation to the description of the acts of massive human rights abuse taking place, as one village after another was taken over, that women are for the first time presented as

Institute); *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) (*Zimbabwe Human Rights Forum*); *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur*). Furthermore, a case on collective rape during military operations against the Democratic Republic of the Congo has been filed before the African Commission. IHRDA filed the case on 4 October 2016. IHRDA is awaiting confirmation of receipt from the Commission after having filed the seizure letter, <http://www.ihrda.org/2016/10/case-against-the-democratic-republic-of-congo-before-the-african-commission-on-collective-rape-during-military-operations/> (accessed 28 September 2017).

57 The sixth case, *Interights (on behalf of Pan-African Movement) v Eritrea and Ethiopia* (2003) AHRLR 74 (ACHPR 2003) was not settled by the African Commission but by a Claims Commission set up under a Peace Agreement between the governments of Ethiopia and Eritrea, signed on 12 December 2000. The agreement included a mechanism for the consideration of claims by individuals in either state whose citizenship may be in dispute. The cases of rape are referred to in para 5 of the case, where it is simply stated that 'some Ethiopian women and young girls were tortured and raped in the affected areas by Eritrean soldiers'. I have excluded the case because to the fact that it was not settled by the African Commission.

58 *Malawi African Association* (n 56 above).

59 *Malawi African Association* para 58.

60 *Malawi African Association* paras 18-19.

victims of human rights violations. As described in the communication:⁶¹

Whenever the villagers protested, they were beaten and forced to flee to Senegal or simply killed. Many villagers were arrested and tortured. A common form of torture was known as the 'jaguar'. The victim's wrists are tied to his feet. He is then suspended from a bar and thus kept upside down, sometimes over a fire, and is beaten on the soles of his feet. Other methods of torture involved beating the victims, burning the victims with cigarette stubs or with a hot metal. *As for the women, they were simply raped.*

In this communication, the African Commission determined that the mass rape and other forms of violence violated the African Charter, in particular article 6. The Commission requested Mauritania to compensate the victims of the violations and to carry out an assessment of the 'deep-rooted causes' of the 'degrading practices'.⁶² However, the Commission did not specify whether it considered these practices to include rape. It is clear from the quote above, and the way the Commission approached the plight of the women in this communication, that to a large extent it aimed to portray a narrative of the victimisation of African women that has dominated and still dominates the domain of international criminal law. Women, as in this case, are depicted as faceless victims of a militarised African masculinity where rape is but one of the many serious outcomes – women are simply raped. There is no attempt by the Commission to detail, problematise or empower the victims to address the real root causes of the pattern of rape as presented in the case, namely, deeply-rooted misogyny.

Another comparable narrative is presented in the *DRC* case.⁶³ The allegations concerned 'grave and massive violations of human and people's rights' by rebels from the three accused states against civilians living in the Congolese provinces since August 1998.⁶⁴ As part of the violence, approximately 2 000 HIV positive Rwandan and Ugandan soldiers raped Congolese women and young girls in order to spread HIV to the Congolese population. The Democratic Republic of the Congo (DRC) brought the complaint asserting, among other things, that the mass rape and deliberate infection of women and girls with HIV constituted a violation of human rights under the African Charter. The respondents did not deny the occurrence of mass rape and infection, but responded that 'there is never group responsibility for violations' such as rape.⁶⁵ As in the case of *Malawi African Association*, the rape the women were subjected to was primarily used by the African Commission to demonstrate the seriousness of the human rights violations that had occurred, but which did not merit

61 *Malawi African Association* para 20 (my emphasis).

62 *Malawi African Association* Recommendation para 5.

63 *DRC* (n 56 above).

64 *DRC* para 2.

65 *DRC* para 30.

any further consideration. Thus, the grave violence suffered by the women subjected to the brutal rapes was diminished, as it became a simple periphrastic way of characterising the state of 'gross human rights violations' rather than to investigate the sufferings and violations of these women in more detail. Paragraph 5 of the *DRC* case is significant, and reads:⁶⁶

The Democratic Republic of Congo also claims that the forces of Rwanda and Uganda aimed at spreading sexually transmitted diseases and committing rape. To this end, about 2 000 AIDS suffering or HIV-positive Ugandan soldiers were sent to the front in the eastern province of Congo with the mission of raping girls and women so as to propagate an AIDS pandemic among the local population and, thereby, decimate it. The Democratic Republic of Congo notes that 75 per cent of the Ugandan army are suffering from AIDS. A white paper annexed to the communication enumerates many cases of rape of girls and women perpetrated by the forces of Rwanda and Uganda, particularly in South Kivu province. It further states that on Monday, 5 October 1998, in Lumunba quarter, Babozo division, Bagira commune, under the instructions of a young Rwandan officer nicknamed 'Terminator', who was then commanding the Bagira military camp, several young Congolese girls were raped by soldiers based at the said camp. Similar cases of rape have been reported from Mwenga, Walungu, Shabunda and Idjwi.

The complainants provided the white paper mentioned in the quote above to the African Commission. It details the many cases of rape of girls and women perpetrated by the armed forces of Rwanda and Uganda, particularly in the South Kivu province. In addition, Human Rights Watch (HRW) published a report on Sexual Violence Against Women and Girls in Eastern Congo in June 2002, a year before the Commission made its final decision on this communication.⁶⁷ The HRW report equally provides a detailed and well-documented account of the rapes and sexual violence that occurred during this conflict. Arguably, when faced with these atrocities, the Commission could have enquired into the subjects of these atrocities and allowed them to account their experiences. The Commission could also have taken note of the HRW report, as this NGO has had a long-standing relationship with the Commission.⁶⁸

None of the women's voices is brought forward in this case, again depicting rape as a pure side effect of armed conflict, as collateral damage. The obligations of state parties under, for example, the CEDAW, continue to apply during conflicts or states of emergency, without discrimination between citizens and non-citizens within their territory or effective control.⁶⁹ It is, therefore, striking that even

66 *DRC* para 5.

67 Human Rights Watch 'The war within the war: Sexual violence against women and girls in Eastern Congo' June 2002 <https://www.hrw.org/reports/2002/drc/Congo0602.pdf> (accessed 1 April 2017).

68 Human Rights Watch obtained observer status at the 6th ordinary session of the African Commission, 23 October-4 November 1989.

69 CEDAW General Recommendation 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/30 para 2.

though all three respondent states had ratified the CEDAW⁷⁰ at the time these atrocities were committed, the Commission made no attempt to use its mandate under article 60 to make reference to this treaty.

In a later case, *African Institute*,⁷¹ rape was discussed in a little more detail. In a radio broadcast in September 2000, the President of Guinea called on citizens and the armed forces of Guinea to engage in mass discrimination against Sierra Leonean refugees in Guinea. The speech motivated civilians to rise up against the refugees, resulting in what the African Commission refers to as 'rapes and shootings'.⁷² In paragraph 41 of the communication, the Commission details the applicable international and regional human rights law in accordance with article 60 of the African Charter. The Commission refers to the Charter; the OAU Convention on Specific Aspects of Refugee Problems in Africa; the International Convention on Civil and Political Rights (ICCPR); the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the 1951 UN Refugee Convention and its Protocol. Importantly, Guinea ratified the CEDAW in 1982, but again no attempt was made to apply this treaty to the violence experienced by women. According to the complaint, Sierra Leonean women were raped as a way to 'punish them for being so-called rebels'.⁷³ The soldiers and civilians used weapons to intimidate and threaten the women, and women of various ages were raped in their homes, in various prisons, and in refugee camps.⁷⁴

While the African Commission clearly had the opportunity and the legal instruments, such as the CEDAW, at its disposal to go beyond the purely reductive narrative in *DRC* and *African Institute*, it did not do so. Instead, it remained trapped in what can be referred to as its 'women as victims of rape' discourse. This discourse not only diminishes the transformative potential of human rights instruments such as the African Charter and the CEDAW, but also reproduces gender stereotypes present in colonial discourse. Women's sexual security, in these cases, seems to function only as a yardstick of civilisation, that is, that 'these individuals are not civilised and thus they will rape and be raped'. This narrative then is placed in a context where the African continent is reduced to a position of ongoing civil unrest and war.

In *Zimbabwe Human Rights Forum*⁷⁵ the African Commission was once again confronted with cases of sexual violence and rape. As violence erupted in Zimbabwe between the constitutional referendum of 2000 and the parliamentary elections later that year, supporters of

70 Rwanda in 1981; Uganda in 1985; and Burundi in 1992.

71 *African Institute* (n 56 above).

72 *African Institute* para 4.

73 *African Institute* para 58.

74 As above.

75 *Zimbabwe Human Rights Forum* (n 56 above).

ZANU (PF) engaged in various human rights violations. The outcome of this case has significance as the Commission determined that '[a] state can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights'.⁷⁶ However, the Commission once again permeated an undetailed and unengaged version of women's suffering by simply referring to the fact that 'women and children were tortured and there were *cases of rape*'.⁷⁷ Clearly this does not only silence the women involved but also curtails their agency as, for example, prominent political activists. Again, it is important to acknowledge that Zimbabwe had, already in 1991, ratified the CEDAW, yet the Commission made no attempt to discuss either the sexual violence or rape under this instrument. It should also be added that at the time the violations in the *DRC, African Institute and Zimbabwe Human Rights Forum* cases took place, the CEDAW Committee had presented General Recommendation 19 on violence against women, specifically defining gender-based violence as a form of discrimination.

To reverse the risks of presenting a single, undetailed tale of rape, as portrayed in the cases above, diverse contextualised accounts of rape and sexual violence should be included. Significantly, the women, as subjects of these experiences, should be offered the opportunity to relate their experiences.⁷⁸ It might not be possible to hear or gather evidence from all parties involved, but at least the African Commission, with its very relaxed attitude towards the victim requirement in article 56 of the African Charter, could solicit further evidence and invite other narratives to perform its mandate to promote, protect, respect and fulfil all human rights. Another case assessed by the Commission, that of *Darfur*,⁷⁹ demonstrates the importance of this point, illustrating how the inclusion of women's voices can disrupt the 'women as victims of rape' discourse.

In 2003, an armed group known as the Sudan Liberation Army issued a political declaration and later clashed with Sudanese armed forces. During the drawn-out conflict in the Darfur region, Sudan, the respondent state, engaged in a succession of human rights violations against suspected insurgents, including the rape of women and girls. The African Commission noted that 'cases of sexual and gender-based violence against women and girls in and outside IDP camps ha[d] been a common feature of the Darfur conflict'.⁸⁰ Considering the grave nature of the conflict, the Commission sent a Special Mission to

76 *Zimbabwe Human Rights Forum* para 160.

77 *Zimbabwe Human Rights Forum* para 4 (my emphasis).

78 Report of the African Commission's fact-finding mission to the Republic of Sudan in the Darfur region, 8-18 July 2004, EX.CL/364 (XI) Annex III paras 11 & 46-95.

79 *Darfur* (n 56 above).

80 *Darfur* para 178.

the Darfur region to report on the conflict.⁸¹ Whereas the African Commission's analysis of the case does not differ much from the cases discussed above, the personal experiences related by refugee women to the Commission clearly had a disruptive effect on the 'victim' narrative. It is important to acknowledge that information surrounding the cases of rape assists the critical interrogation of rape and further highlights the complexity of the victims' situation. The Commission's Special Mission involved interviewing some female internally-displaced persons (IDPs), who reported as follows:⁸²

[T]heir villages were attacked by government forces, supported by men riding horses and camels. The attacks resulted in several deaths and injury of people. Some of these women who sustained injuries, showed their wounds to the Commission. The women furthermore stated that during the attacks, a number of cases of rape were committed, some of the raped women became pregnant. Complaints were lodged at the police but were yet to be investigated. They declared that the attackers came back at night to intimidate the villagers who had not fled, accusing them of supporting the opposition. Everyone had to run away from the villages. The women indicated that they were traumatised by the violent nature of the attacks and said that they would not want to return to the villages as long as their security is not assured. They lamented lack of water and a school in the camp. The mission visited the police station to verify complaints and the level of progress made on the reported cases of rape and other offences, but the mission was unable to have access to the files as the officer in charge of the said cases was absent at the time. At one of its meetings in El Geneina, the mission was informed by the authorities of West Darfur State that even though cases of rapes [rape] were reported to the police, investigations could not be conducted because the victims could not identify their attackers. Therefore the files were closed for lack of identification of the perpetrators.

For these victims, the act of rape unquestionably was an important part of the violations they endured. However, as acknowledged in their statements, the surrounding circumstances, such as the inability to report their cases to the police, the resulting pregnancies, their inability to access water and the impossibility of sending their children to school, were also made visible in their personal accounts. Their enduring sense of insecurity was not only based on the threat of sexual violence, but also on other forms of intimidation, including the fear of being evicted from their homes. In fact, in the women's narratives there was a clear link between the evictions and rape. These narratives describe other, otherwise unknown, dimensions of the lives of these women; arguably, equally important but hidden in the 'women as victims of rape' discourse. The introduction of women's voices and perspectives stands in stark contrast to the female subject constructed by the African Commission in *DRC*, *African Institute* and *Zimbabwe Human Rights Forum*. In *Darfur*, for the first time in the

81 The African Commission conducted a fact-finding mission to the Darfur region of Sudan between 8 and 18 July 2004. The Commission adopted the report of the mission during the 3rd extraordinary session, held in Pretoria, South Africa, 8-19 September 2004.

82 *Darfur* (n 56 above) para 151.

jurisprudence of the Commission, one actually sees women thinking and speaking for themselves.

Women's rights under the human dignity clause in the African Charter

As mentioned above, three of the cases relating to women's rights are classified under the right to dignity clause in the African Charter. In *Doebbler*,⁸³ eight female students were arrested for allegedly having engaged in immoral activities that violated Sudan's Criminal Code which incorporates Shari'a law. The immoral activities the women were accused of committing consisted of 'girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys, and sitting and talking with boys'.⁸⁴ The women were punished with fines and between 25 and 40 lashes each.⁸⁵ The lashing took place in public, by use of a wire and plastic whip.⁸⁶ The women were bareback while they were being lashed.⁸⁷ The complaint asserted that the punishment violated article 5 of the African Charter, which guarantees the right of individuals to human dignity and prohibits cruel, inhuman or degrading punishment and treatment. The African Commission found that the lashing violated article 5 of the African Charter and requested Sudan to abolish the punishment of lashing and to compensate the women for their injuries.

The importance of this case does not hinge on the findings of the African Commission as such, but rather on the obvious issues that were not discussed, and the statements it made on Shari'a law. As Sudan has not ratified the CEDAW, the Commission had to rely squarely on the African Charter. Some reflections again placed the spotlight on the Commission's non-engagement with women's rights. First, it is questionable why the Commission did not treat this as a case of discrimination, as the boys involved were not arrested or punished. Second, the Commission accepted the fact that the crimes, as they were stipulated in the Sudanese Criminal Code, had been undisputed by the parties, yet the Commission did nothing to engage with or interrogate its discriminatory nature. Third, even though the complainants referred to the argument that, in accordance with Shari'a law, lashing may only be meted out in the case of serious crimes, not the type of acts committed by the girls, the Commission took the position that 'it was not invited to interpret Islamic Shari'a law as obtained in the Criminal Code of the respondent state'.⁸⁸ In an attempt to escape the 'relativism' debate, the Commission limited the inquiry to the application of the African Charter in the legal system of Sudan as a party to the Charter without reflecting on the influence of

83 *Doebbler* (n 54 above).

84 *Doebbler* para 3.

85 *Doebbler* para 30.

86 As above.

87 As above.

88 *Doebbler* para 41.

Shari'a law. By only engaging with the cruel and inhuman punishment aspect of this case under article 5, the Commission arguably lost an important opportunity to discuss the combined effect of articles 1, 2, 3 and 18(3) of the African Charter. Even without directly discussing Shari'a law, the Commission arguably could have brought forward important questions about the discriminatory nature of the crimes, the arrest and subsequent punishment as well as women's overall subjugated position in Sudanese society.

Obligation to protect women from sexual violence under article 18(3) of the African Charter

So far, the case of *Egyptian Initiative for Personal Rights (EIPR)*⁸⁹ represents the African Commission's only direct engagement with women's rights. The complaint was filed in 2006, but the decision was only finalised in December 2011. The Commission mentions the African Women's Protocol in this case, but as Egypt has not ratified the Protocol, it could not be directly applied.

The backdrop to *EIPR* is a demonstration organised by the Egyptian Movement for Change (*Kefaya*) in May 2005 in respect of the referendum aimed at amending the Egyptian Constitution. During these demonstrations, four female journalists were sexually assaulted, beaten and intimidated. The victims claimed that these violations occurred in the presence of high-ranking officers of the Egyptian Ministry of Interior and the riot police.⁹⁰

EIPR presented the African Commission with a critical opportunity to confirm, in line with the decisions of the CEDAW Committee, that violence against women can amount to discrimination under the African Charter, according to articles 1, 2 and 18(3). The applicants argued that the state has a positive obligation to prevent private individuals from harming the victims (due diligence) and to investigate whether such violations had taken place; that they were discriminated against under articles 2 and 3, with regard to their sex and political opinion; and that violence of this nature against women should be recognised as a violation of article 18(3).⁹¹ As far as the latter is concerned, the applicants averred that 'the sexual abuse endured by the [v]ictims [was] gender specific and amount[ed] to discrimination on the grounds of sex, which is a violation of [a]rticle 18(3) of the African Charter'.⁹² The applicants furthermore referred the Commission to article 1 of the African Women's Protocol, arguing that 'it strongly underscores violence against women, whether it is physical, sexual or psychological'.⁹³

89 *EIPR* (n 55 above).

90 *EIPR* para 3.

91 *EIPR* paras 69-74.

92 *EIPR* para 90.

93 *EIPR* para 87.

In its analysis, the African Commission explored the definition of discrimination and the relationship between discrimination and gender-based violence.⁹⁴ In this regard, it is important to note that Egypt had ratified the CEDAW in 1981, albeit with reservations,⁹⁵ but had not ratified the African Women's Protocol. However, the Commission nevertheless referred to article 1(f) of the African Women's Protocol in defining discrimination against women, further referring to article 1 of the CEDAW as well as General Recommendation 19 in establishing the correlation between discrimination against women and gender-based violence.⁹⁶ To establish the alleged violation of article 2, the Commission analysed the witness statements of the four victims. The respondent claimed that no discrimination had taken place, as the assaults had not been inflicted on the victims because of them being women. The state maintained that both men and women participated in the protest. The Commission drew the following important conclusions from the assaults as described in the affidavits of the four victims, namely, (i) that all victims were women; (ii) that they were not protected against the abuse by the perpetrators and other unidentified actors during the demonstration; and (iii) that the violations were perpetrated on these victims because of their gender.⁹⁷ Thus, men and women had not been treated similarly during the demonstration and, as such, the respondent had violated article 2 of the African Charter.

The second leg of the analysis, whether the assaults amounted to discrimination, took place under the ambit of article 18(3). The applicants submitted that the sexual abuse they had endured were 'gender-specific, amounting to discrimination on the grounds of sex'.⁹⁸ The applicants further averred that the respondent had failed to protect the victims from said discrimination by not taking any measures to comprehensively investigate, prosecute and punish the perpetrators. In this regard, the African Commission commented that 'the characteristics of violence commonly committed against women and men differ, and it is only by analysing the nature of the violence that the Commission can effectively draw its conclusions'.⁹⁹ The Commission highlighted three different aspects of the assaults. First, the verbal assaults, namely, using gender-specific language by calling the victims 'sluts' and 'whores', in the opinion of the Commission,

94 *EIPR* para 120.

95 General Reservation on art 2: 'The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic *Shari'a*; and specific reservations to arts 16 and 29. On 4 January 2008, the Egyptian government notified the Secretary-General that it had decided to withdraw the reservation to art 9(2) made upon ratification.

96 *EIPR* (n 55 above) para 120.

97 *EIPR* para 137.

98 *EIPR* para 140.

99 *EIPR* para 142.

were used to humiliate the women as punishment for refusing to abide by the traditional religious norms set by Egyptian society.¹⁰⁰ Second, the assaults as such were gender specific as they targeted the breasts and private parts of the victims. The victims' clothes were torn or removed in an attempt to humiliate them. Some of the victims furthermore were threatened with allegations of prostitution if they refused to withdraw their allegations.¹⁰¹

Not every differentiation will constitute discrimination.¹⁰² If the differentiation is deemed reasonable and objective with the aim of achieving a legitimate purpose under the applicable human rights instrument, it should not be deemed discriminatory. However, in this case the African Commission found that the violence was gender specific and, thus, discriminatory by extension and, as the respondent had neither protected the victims from the violations nor put forward any evidence to suggest that the differentiation was legitimate, it was deemed a violation of article 18(3).¹⁰³ The Commission furthermore concluded that state actors, as well as non-state actors under the control of state actors, had perpetrated the acts of gender-based violence, and that such acts went unpunished.¹⁰⁴ The acts were designed to silence them and to deter any further activism.¹⁰⁵

Furthermore, referring to *Zimbabwe Human Rights Forum*, the African Commission stipulated that equality before the law meant that 'existing laws must be applied in the same manner to those subject to them'.¹⁰⁶ The Commission asserted that equality before the law necessitated equality in the administration of justice. The Commission found that the respondent state had violated article 3 since freedom from discrimination was also an aspect of the principles of equality before the law and equal protection of the law, as both present a legal and material status of equality and non-discrimination.

4 Conclusion

Concerned with viewing the rule of law through a feminist lens, this article set out to explore the effects of the absence of a committee on the rights of women in Africa, on women's access to the regional justice system and the enforcement of the African Women's Protocol.

Aiming to analyse this issue from a structural perspective, on the level of the AU human rights framework, the article departed from two assumptions: first, that using the mainstream human rights institutions such as the African Commission and the African Court

100 *EIPR* para 143.

101 *EIPR* para 145.

102 *EIPR* para 146.

103 *EIPR* para 153.

104 *EIPR* para 166.

105 *EIPR* para 166.

106 *Zimbabwe Human Rights Forum* (n 56 above) para 96.

would present a number of challenges to the implementation of women's rights; and, second, that a specialised women's rights institution would serve two important purposes, namely, as a *receiver* of litigation and as a *driver* of implementation.

As is evident from the discussion in the article, the challenges of mandating the African Commission and Court with protecting and promoting women's rights without considering the existing structures, biases and priorities are real. These present (i) the structural hurdles built into the African Court Protocol preventing direct access for most individuals and NGOs, thereby making the African Commission the main body for handling women's claims; (ii) the conflation of the reporting mechanisms, subsequently limiting the reach and value of the reports; (iii) the 'simply raped' narrative, thereby producing a voiceless female subject who is acknowledged only by alluding to her sexuality and, thus, her vulnerability to rape; (iv) the lost opportunities to apply the CEDAW when possible, thwarting important arguments of non-discrimination; and (v) the non-engaged approach to women's rights evident in the jurisprudence of the African Commission, creating minimal incentives for women and NGOs to address their complaints to the Commission.

In terms of the effects of the optional jurisdiction declaration and the slow ratification of the African Court Protocol, it is clear that the original idea, albeit naive (considering the optional jurisdiction clause), of giving the African Court the main mandate to monitor the enforcement of the African Women's Protocol, has been severely hampered. In an ideal world, where state parties readily accept the jurisdiction of international bodies, such as the African Court, the African Women's Protocol arguably would prescribe a stronger monitoring mechanism than, for example, the African Children's Charter. As far as the latter is concerned, claims of violations can be presented to the African Children's Committee, which at present does not have *locus standi* before the African Court.¹⁰⁷ However, when the following facts and assumptions are considered together, it becomes clear that the current model has little to offer in terms of enforcing women's rights: (i) the fact that the African Commission does not have much jurisprudence in the way of women's rights to show for almost 12 years after the inception of the African Women's Protocol (except in the case of *EIPR*); (ii) the fact that the Commission has not shown much willingness to refer cases to the African Court (three to date); (iii) the assumption that other bodies (states and African intergovernmental organisations) that have access to the Court will not bring women's rights cases to the Court in any significant way as it is not in their interests (to date none has been received); and (iv) the very slow process of optional jurisdiction declarations (eight to date).

107 ACRWC advisory opinion (n 42 above).

Since litigation against the optional jurisdiction clause has proven fruitless to improve women's access,¹⁰⁸ the African Commission would have to either re-conceptualise its approach to women's rights along with its willingness to bring cases before the African Court, or the structure would have to be reconsidered altogether. In terms of the latter, provided the relevant funding is afforded, an appropriate model could be to use the same structure for the enforcement of the African Women's Protocol as is constructed in the African Children's Charter, that is, a specialised body serving as a first instance with the opportunity to refer cases to the Court.¹⁰⁹ As indicated above, the African Children's Committee currently does not have *locus standi* under the African Court Protocol. However, this has been rectified in the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol) presenting a two-tier, specialised mechanism based on complementarity.¹¹⁰ As addressed by the African Court in the *ACRWC Advisory Opinion*, the apparent anomaly, that the African Children's Committee was not given the same position as the African Commission, was later addressed in the Merger Protocol.¹¹¹ The omission of a committee on the rights of women in Africa, under the African Women's Protocol, could be rectified under the amendment clause in articles 30 of the Women's Protocol and, instead of this, article 35 of the Women's Protocol and articles 58 and 59 of the Merger Protocol could be used to create appropriate *locus standi* for such a committee. The fact that the African Women's Protocol is adjacent to the African Charter does not summarily prevent it from establishing a structure complementary to the African Commission, the African Children's Committee and the African Court, as article 66 of the African Charter merely stipulates that '[s]pecial protocols or agreements may, if necessary, supplement the provisions of the present Charter'. Establishing a committee on the rights of women in Africa arguably would supplement the rights in the African Charter, and would strengthen the protection of these rights as elaborated on in the African Women's Protocol. There are always issues in defining complementarity and avoiding an overlap in a complex structure such as this.¹¹² However, a specialised institution with equal powers, modelled on the CEDAW Committee, would honour women's rights

108 App 001/2011, *Femi Falana v African Union*, African Court on Human and Peoples' Rights and App 014/2011, *Atabong Denis Atemnkeng v African Union*, African Court on Human and Peoples' Rights.

109 It is prudent to note that the African Children's Committee does not contain a clause specifying where its funds should be sourced, equal to art 41 of the African Charter and art 32 of the Protocol clarifying that in terms of the Commission and the Court, this is the responsibility of the AU, that is, the Assembly of Heads of State and Government.

110 Art 30(c), providing the African Children's Committee *locus standi* before the African Court of Justice and Human Rights.

111 ACRWC advisory opinion (n 42 above) para 93.

112 See A Rudman 'The Commission as a party before the Court: Reflections on the complementarity arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 1-29.

to equality and non-discrimination in the same manner as the African Children's Committee honours the best interests of the child, arguably all important aspects of the rule of law. As the AU currently places much emphasis on women's rights, it would be prudent to not only continue to urge states to make good on the promises in the AU gender policy, to achieve full ratification and enforcement of the African Women's Protocol, but to also combine this with an effective enforcement structure ultimately strengthening the rule of law for all.

Large-scale agricultural land acquisitions and Ethiopia's ethnic minorities: A test for the rule of law

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Summary

The Ethiopian Constitution provides for the exercise of the right to self-determination of ethnic groups. This right entitles each group to be in control of its local affairs, through its own autonomous arrangements, particularly regarding matters of land administration and utilisation. The right to self-determination also allows ethnic communities the right to directly participate in decisions affecting the utilisation of land resources. However, the enforcement of the legal rhetoric of self-determination in the administration and utilisation of land has been weak. This article analyses the challenges facing the enforcement of constitutionally-enshrined rights of ethnic minorities to administer and exploit their own land resources, by taking as a case study the Ethiopian government's measures regarding large-scale land dispossessions of local communities in the Gambella and Benishangul-Gumuz regions. The article suggests that, given the challenges of seeking a remedy from domestic forums, remedies from regional institutions can partly be a way forward. It contends that rulings from regional bodies, including the African Commission, at least can serve as discursive tools through which the actions of government officials are challenged and delegitimised. This, in turn, will provide the affected communities with more tools in their struggle against land dispossession.

Key words: *Constitution; Ethiopia; land dispossession; minorities; rule of law; self-determination*

1 Introduction

According to the Constitution of the Federal Democratic Republic of Ethiopia (Ethiopian Constitution), sub-national groups, in general,

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and ethnic minorities, in particular, are granted several constitutional rights, including the right to self-determination, in relation to the administration and utilisation of land and other natural resources. However, the implementation of these constitutional rights has been dismal, particularly in the lowlands, places that host many ethnic minorities. This is largely due to the government's interest to transfer land into the hands of private and public actors with little or no compensation to and consultation with local communities. This interest often trumps the constitutional rights of the ethnic minorities to administer land and be consulted in development projects, thus posing serious challenges to the rule of law. By focusing on ethnic minorities in the lowlands of Ethiopia (particularly in the Gambella and Benisangul-Gumuz regions), the purpose of this article is to analyse the challenges facing the enforcement of constitutionally-enshrined rights of ethnic minorities.

The article is structured as follows: Section 2 briefly discusses the notion of the rule of law. Section 3 examines the constitutional rights of ethnic minorities to self-administer their land resources through their own autonomous regional states, and analyses how such constitutionally-entrenched rights have been neglected. This section also discusses another aspect of the right to self-determination, namely, the right of ethnic minorities to directly participate in decisions affecting the utilisation of their land resources, and analyses the challenges in ensuring their rights. The last section provides concluding remarks.

2 The notion of the rule of law

Etymologically, the term 'rule of law' is derived from the Latin phrase *imperium legum*, literally meaning 'the empire of laws and not of men'.¹ The phrase 'the empire of laws and not of men' refers to 'the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper purpose, which is the public good (*res publica*) of the community as a whole'.² This means that the rule of law requires that, in addition to acting based on prescribed law, the law should serve as a tool to advance the public good instead of being an instrument to justify the capricious acts of persons and institutions.

The rule of law should be distinguished from 'rule by law' or mere legalism – a tool which can be deployed to justify arbitrary actions of public officials.³ As Harman notes, 'the creation and enforcement of laws does not, of itself, constitute or enable a society to be governed

1 M Sellers 'What is the rule of law and why is it so important?' in J Silkenat et al (eds) *The legal doctrines of the rule of law and the legal state (Rechtsstaat)* (2014) 4.

2 As above.

3 As above.

by the rule of law'.⁴ Governance of society by laws 'without consideration and embrace of the rule of law as a guiding and underlying principle, has the potential to lead to a tyrannical or "police" state'.⁵ This is often the case in many authoritarian states that deploy laws as instruments of repression.⁶

There is no universally-accepted definition of the term 'rule of law'. As Fombad notes in the overview in this issue of the *African Human Rights Law Journal*, the term can refer to many concepts or principles.⁷ The analysis in the article focuses on a mix of largely the following principles of the rule of law: governance based on publicly-promulgated laws; the avoidance of arbitrariness; separation of powers; the adjudication of laws by independent institutions; access to enforce laws, and participation in decision making.

3 Constitutional rights of ethnic minorities to self-determination

The Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the party that has maintained state power in Ethiopia since 1991, introduced a new Constitution that in principle fundamentally altered the political and legal landscape of the country. With the adoption of the Ethiopian Constitution in 1994, a federation was formed.⁸ The federation is organised largely based on the ethnicity of different communities.⁹

The establishment of a federal system was designed to decentralise power and resources and resolve the age-old questions for greater inclusion of different communities in the economic and political affairs of state institutions in Ethiopia.¹⁰ This decentralisation of power, it was thought, would empower ethnic communities to freely determine their destiny through their right to self-determination. This appears to

4 J Harman 'The rule of law – Law as an instrument of justice and a tool of oppression' Paper presented at the Legal Studies Teachers Conference, 15 March 2014 <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2014/speech-harman-rule-of-law> (accessed 11 May 2017).

5 As above.

6 See, eg, A Allo & B Tesfaye 'Spectacles of illegality: Mapping Ethiopia's show trials' (2015) 13 *African Identities* 279; T Moustafa 'Law and courts in authoritarian regimes' (2014) 10 *The Annual Review of Law and Social Sciences* 281.

7 C Fombad 'An overview of the rule of law crisis in Africa' (2018) 18 *African Human Rights Law Journal* 213.

8 Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation 1/1995, *Federal Negarit Gazeta*, 1st Year No 1.

9 Ethiopia's population is highly diverse, consisting of over 70 ethnic communities. Only some of these communities are conferred an autonomous regional status. In some cases, particularly in the Southern Nations, Nationalities and Peoples (SNNP) regional state, only one region was formed while the number of these ethnic communities total more than 45.

10 A Fiseha 'Ethiopia's experiment in accommodating diversity: 20 years balance sheet' (2012) 22 *Regional and Federal Studies* 435 446.

be the reason why the right to self-determination, to borrow words from Dersso, 'is the super norm on the basis of which the new constitutional system ... is premised'.¹¹ The right of minorities to self-determination, particularly in the administration and utilisation of land resources, may find concrete expression through autonomous regional state arrangements and through direct participation by the ethnic communities.¹²

In exercising the right to self-determination, regional states were organised, supposedly representing and acting on behalf of different ethnic communities. The Ethiopian Constitution provides that the federal government may not interfere in the powers vested in the regional states, and *vice versa*.¹³ Regional states have the power to 'formulate and execute economic, social and development policies, strategies and plans of the state'.¹⁴ This implies that the federal government may not override the powers of the regional states in respect of matters of economic, social and development, which can be formulated and implemented at regional level. Regional states are constitutionally empowered to administer land and natural resources, albeit with the requirement that such administration should take place in conformity with federal laws.¹⁵ In general, as Fiseha observes, the regional states in Ethiopia enjoy wide constitutional power of self-rule on many issues, including the administration and utilisation of land and other natural resources.¹⁶

Furthermore, the constitutional right of the ethnic communities to be heard and to be consulted in projects affecting the utilisation of their land can also be seen as an integral part of the right of ethnic minorities to self-determination.¹⁷ The Ethiopian Constitution

11 S Dersso 'Institutional options of the right to self-determination as a human rights solution to problems of ethnic pluralism in Africa: The case of Ethiopia and South Africa' (2002) 8 *Human Rights in Development Online* 335-364.

12 Arts 8(1) & (3) Ethiopian Constitution. The Ethiopian Constitution uses the terms nations, nationalities and people to refer to the different ethnic groups in the country. A different definition for each term is not provided in the Constitution. Rather, it provides the same definition in art 39(5) of the Constitution which stipulates: 'Nation, nationality or people', for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable predominantly contiguous territory.'

13 Art 50(8) Ethiopian Constitution.

14 Art 52(2)(c) Ethiopian Constitution.

15 Art 52(2)(d) Ethiopian Constitution.

16 Fiseha (n 10 above) 446.

17 The right to self-determination, particularly in the context of indigenous communities, often entails the right to be consulted in decisions affecting the utilisation of land resources. As will be noted later, given that most of the local communities affected by land dispossessions in the regions under discussion are indigenous communities, their right to be consulted may be seen as an integral part of their right to self-determination. For further details on the link between the

provides that communities have the right to directly participate and be consulted in the implementation of projects affecting them.¹⁸

However, as will be discussed in the next section, the enforcement of the legal rhetoric of self-determination, particularly in the administration and utilisation of land resources, has been dismal.

3.1 Challenges to self-administration through own regional state

The global demand for farm land increased following the 2008 world food price crisis.¹⁹ With the rise of interest in farm land, the Ethiopian government was actively engaged in facilitating the transfer of huge tracts of land to investors, both domestic and foreign, with a view to attracting capital in large-scale commercial farming. As a result, huge tracts of land were transferred into the hands of investors, particularly in the Gambella and Benishangul-Gumuz regions. While there is no accurate data on the extent of land transferred, different sources estimate that between hundreds of thousands and millions of hectares of land were transferred to investors.²⁰

right to participation or consultation and self-determination, see Human Rights Committee (HRC) 'Concluding Observations: Mexico' UN Doc CCPR/C/MEX/CO/5 (2010) para 22; HRC 'Concluding Observations: Chile' UN Doc CCPR/C/CHL/CO/5 (May 2007) para 19; Committee on Economic Social and Cultural Rights (ESCR Committee) 'Concluding Observations: Colombia' UN Doc E/C.12/COL/CO/5, (2010) para 9; ESCR Committee 'Concluding Observations: Democratic Republic of Congo' UN Doc E/C.12/COD/CO/4 (2009) para 14.

18 Arts 43(2) & 92(3) Ethiopian Constitution.

19 From 2006 to 2008 food prices worldwide sky-rocketed, roughly doubling, to levels not seen in nearly three decades. In an attempt to partly stabilise domestic food markets, some food exporting countries banned the exportation of staple food, such as rice. This exacerbated the food price spikes. The dramatic food price spikes in this period came to be recognised as the world food price crisis. The factors that led to the sky-rocketing of food prices during this period are diverse and difficult to disaggregate as each impact on the other. Some of the factors include the less than expected production of food items in some areas due to weather-related events. Moreover, the high cost of energy for the production of food and freight prevented the ability of producers to respond to the demand. The increase in the prices of oil also affected the price of food items and production as energy and agricultural prices have become inextricably linked. The high oil prices led to a corresponding increase in the cost of production of food as the energy needs of fertilisers, transportation and packaging increased, thereby widening the gap between farm gate price and prices on the international market. In addition, the rising demand for biofuels increased the prices of biofuel crops such as maize. Restrictions on the exportation of some food crops, such as rice, also played a role in the price rise of food items. With such price rises, expectations of returns from agricultural investment increased, in turn contributing to a rise in the demand for farmland globally. See K Baltzer et al 'A note on the causes and consequences of the rapidly increasing international food prices' Institute of Food and Resource Economics, University of Copenhagen, May 2008 2-3; International Food Policy Research Institute 'High food prices: The what, who and how of proposed policy action' Policy Brief, May 2008 2-6.

20 There is no accurate figure on the amount of land transferred to investors. In 2014, the International Institute for Environment and Development (IIED) noted that 1 million hectares of land have been awarded to investors. Furthermore, Cotula et al note that more than 1 million hectares of land area have been leased.

Before 2009, the role of the federal government in agricultural investment was limited to issuing investment permits to foreign investors, while all other issues related to the allocation and administration of land were left in the hands of regional states.²¹ However, the role of the federal government in processes governing agricultural land acquisitions drastically changed after the global rise of interest in farm land in 2008. The federal government floated the idea of delegation to allow it to directly allocate and control land in regional states, taking away the power of regional states enshrined under the Ethiopian Constitution in the name of delegation. This delegation empowered the federal government to administer lands received from regional governments in a federal land bank, with regional states only having a supporting role.²²

In 2009 the federal government established a new agency, the Agricultural Investment Support Directorate (AISD), renamed the Agricultural Investment Land Administration Agency (AILAA) in 2013. This organ was responsible for overseeing the allocation of large-scale agricultural lands from the federal land bank.²³ Following this, millions of hectares of land located in the Gambella and Benishangul-Gumuz regions came under the direct control and administration of the federal government.²⁴ However, as noted earlier, the Ethiopian Constitution explicitly confers this power on regional states as opposed to the federal government. The question then arises as to whether a power granted to regional states under the Ethiopian Constitution can be taken away by the federal government in the name of delegation.

Some scholars have questioned the constitutionality of the delegation of land administration power from regional governments to the federal government. They argue that such upward delegation is unconstitutional as the Ethiopian Constitution does not explicitly

On the other hand, in 2015, the director of the Agricultural Investment Land Administration Agency (AILAA) noted that approximately 500 000 hectares of land had been transferred by the federal government alone. This suggests that obtaining accurate data on the extent of land transfer is difficult. However, all sources show that a significant measure of land was handed over to investors. J Keeley et al *Large-scale land deals in Ethiopia: Scales, features and outcomes to date* (2014) 23; L Cotula et al 'Testing claims about large land deals in Africa: Findings from a multi-country study' (2014) 50 *Journal of Development Studies* 903-907; interview with the director of the AILAA, Addis Ababa, Ethiopia, 16 November 2015; interview with a senior official at the AILAA, Addis Ababa, Ethiopia, 17 November 2015.

- 21 Ethiopia's Investment Commission, a federal institution, was responsible for issuing investment licences, including agricultural investment licences, to foreign investors before the establishment of the AILAA.
- 22 D Rahmato 'The perils of development from above: Land deals in Ethiopia' (2014) 12 *African Identities* 26-29.
- 23 Art 3 of the Council of Ministers Regulation to Establish the Ethiopian Agricultural Investment Land Administration Agency, Regulation 283/2013, *Federal Negarit Gazette*, 19th Year No 32 (2013).
- 24 Cotula et al (n 20 above); Keeley et al (n 20 above); interview with the director of the AILAA (Addis Ababa, 16 November 2015); interviews (n 20 above).

allow this type of delegation.²⁵ One of these scholars, Fiseha, further argues that the drafting history does not support the interpretation that upward delegation is allowed under the Ethiopian Constitution.²⁶

It may be argued that a mere upward delegation is not contrary to the Ethiopian Constitution. That said, to have any validity, any delegation of power needs to be made in accordance with a prescribed law, and the will and consent of the communities concerned, which can be expressed through direct or indirect participation.²⁷

Seen from this perspective, the delegation to the federal government was made neither in accordance with any promulgated law nor consistent with the letter and spirit of the Ethiopian Constitution. The people of the regions did not consent to the upward delegation, either through their direct participation or that of their elected representatives in Parliament. Instead, it was the executive organ of the regional states and, in the case of the Gambella region, only the president of the region (apparently without deliberations even with the regional cabinet), who delegated the power to the federal government.²⁸ There was no prescribed law on the basis of which the executive organs of the Gambella and Benishangul-Gumuz regions could have delegated such power. Furthermore, the parliament of each region, the highest authority in each region,²⁹ did not approve the delegation of power to the federal government.

In the absence of explicit power empowering the executive organ of each regional state to delegate power to the federal government, one would have expected that such delegation should be made, or at least be approved, by the highest organ in each region, namely,

25 Eg, Tamrat and Fiseha argue that the upward delegation stands on shaky constitutional ground as this type of delegation is not explicitly provided for in the Ethiopian Constitution. See, eg, I Tamrat 'Governance of large-scale agricultural land investments in Africa: The case of Ethiopia' Paper presented at the World Bank conference on land policy and administration, Washington DC, World Bank, 2010; Fiseha (n 10 above) 447. The views of Tamrat and Fiseha are contested by Stebek, who is of the view that federal government can allocate land for various purposes without even obtaining any delegation from the regions. See E Stebek 'Between "land grabs" and agricultural investment: Land rent contracts with foreign investors and Ethiopia's normative setting in focus' (2011) 5 *Mizan Law Review* 175 178.

26 Fiseha (n 10 above) 447.

27 Direct participation refers to the participation of the people themselves. Indirect participation refers to participation through their elected representatives.

28 Interview with a former advisor to the Office of the President of the Gambella's Regional State, Addis Ababa, Ethiopia, 27 January 2016; OM Ujulu 'Large-scale land acquisitions and minorities/indigenous peoples' rights under ethnic federalism in Ethiopia: A case study of Gambella Regional State' unpublished PhD thesis, University of Bradford, 2013 189.

29 In each region, Parliament is the highest authority. The executive organs of regional states are accountable to Parliament. See art 48(1) of the Gambella Regional State Constitution and art 46(1) of the Benishangul-Gumuz Regional State Constitution.

parliament. However, regional executive officials did not consult parliament, much less seek its approval. By so doing, the executive officials apparently exceeded their limits set under the regional state constitutions and the Ethiopian Constitution.

The apparent unconstitutional delegation seems to have been made against the backdrop of power that the federal government wields over regional states. The federal government in practice has an overriding power over regional governments.³⁰ As will be explained below, this is because of the the top-down approaches of the EPRDF in formulating and implementing matters of economic, social and other development, depriving regional states of their constitutionally-enshrined powers.

Clapham notes that the EPRDF's ethnic based federalism has provided less than it promised, and the contradictions between local autonomy and central power are usually settled in favour of the latter.³¹ There is a huge presence and influence of the federal government through the ruling party – the EPRDF – making it appear more as a unitary state than a federation, apparently against the spirit of the Constitution.³² The EPRDF continues to undermine and, at times, thwart the federal arrangement as it retains all real power at the centre, limiting local participation on numerous policies.³³

The EPRDF is a strongly-centralised dominant party that predetermines decisions from the centre to even the lowest administrative unit, the *kebele*, in Ethiopia.³⁴ This is based largely on the party's ideology of democratic centralism, where party officials at all levels are accountable to the level above.³⁵ This means that party officials at the regional level are accountable to party officials who lead the federal government at the centre. This promotes the formulation of top-down policies which are often implemented through a 'tendency of ruling by coercion and imposed solutions'.³⁶ The ramification of the party's structure, which overshadows federal and regional government institutions, is that regional states play a minor role in the design of policies as these are formulated at the centre with little or no involvement from below.³⁷

30 C Clapham 'Post-war Ethiopia: The trajectories of crisis' (2009) 36 *Review of African Political Economy* 181 187.

31 As above.

32 J Abbink 'Ethnic-based federalism and ethnicity in Ethiopia: Reassessing the experiment after twenty years' (2011) 5 *Journal of Eastern African Studies* 596 602.

33 Abbink (n 32 above) 604.

34 International Crisis Group 'Ethiopia: Ethnic federalism and its discontents' Africa Report No 153, 2009 15.

35 L Aalen 'Ethnic federalism and self-determination for nationalities in a semi-authoritarian state: The case of Ethiopia' (2006) 13 *International Journal on Minority and Group Rights* 243 250.

36 Abbink (n 32 above) 608.

37 Fiseha (n 10 above) 458.

Furthermore, there is a blurred border between state and the EPRDF, contributing to undermining the division of power.³⁸ As Markakis observes, the party-state merger gives the regime effective control to impose its policies throughout the country with little or no variation.³⁹ The overwhelming control of the EPRDF and its affiliate parties in both federal and regional states apparently contributes to the state-party merger. In 2015, the EPRDF and its affiliate parties controlled 100 per cent of the seats in the federal parliament.

The affiliate parties, which control some regions, including the Gambella and Benishangul-Gumuz regions, are also overshadowed by the EPRDF. Vaughan and Tronvoll note that the EPRDF influences the internal politics of regional states controlled by affiliate parties through different mechanisms, including removing members of the affiliate parties from their political positions.⁴⁰ The presidents of regional states, controlled by the affiliate parties, are tacitly hand-picked by the federal government.⁴¹ Thus, in practice, regional authorities derive their authority from the centre, and are only marginally accountable to the local population.⁴²

Against this background, the federal government apparently exerted pressure on regional states to transfer land to the federal land bank.⁴³ As Abbink remarks, '[t]he chief agents in the land leasing at present are not the governments of the, in name autonomous, regional states of Ethiopia, but the federal government'.⁴⁴ The top-down approach of the EPRDF has been actively pursued, particularly following the government's recent emphasis on 'development' in the 'sense of grand infrastructure investments and commercial agriculture ventures by investors being given large tracts of land'.⁴⁵

38 Aalen (n 35 above) 251.

39 J Markakis *Ethiopia: The last two frontiers* (2011) 246. Markakis states that it is no wonder Ethiopians see no difference between party and state as policy directives come from the centre to be discussed by party committees before being taken up by the elected bodies that endorse such policies virtually without opposition.

40 S Vaughan & K Tronvoll *The culture of power in contemporary Ethiopian political life* (2003) 134.

41 Eg, regional presidents of the Somali region in some cases have tacitly been picked or removed when this is deemed necessary by the federal government. Other heads of regional states were also selected by the federal government even though the regional parliament was responsible to do so. See A Ismail 'Ethiopian federalism: Autonomy versus control in the Somali region' (2004) 25 *Third World Quarterly* 1131 1142-1143.

42 Ismail (n 41 above) 1147.

43 Fiseha (n 10 above) 447.

44 J Abbink 'Land to the foreigners: Economic, legal, and socio-cultural aspects of new land acquisition schemes in Ethiopia' (2011) 29 *Journal of Contemporary African Studies* 515 517.

45 Abbink (n 32 above) 609.

At the end of 2016, the federal government relinquished its 'delegated power' of directly administering and allocating land.⁴⁶ This decision was made by the Prime Minister of Ethiopia following an investigation into large-scale commercial farming in the Gambella region, which reportedly found the overall performance of large-scale farming in the region very poor.⁴⁷ As the delegation was made without any legal procedures, so was the power to relinquish the delegated power.

In general, the transfer of power in the name of 'delegation of power', albeit without prescribed laws and procedures, can be seen as an instrument to camouflage the arbitrary ways in which the government officials acted. In other words, the 'delegation' was an instrument of legitimising the actions of government officials. Therefore, the process through which the delegation of power and the subsequent relinquishment was made illustrates how the executive government officials at both regional and federal government are more powerful than the law-making organs, on paper the highest authorities.

In principle, the actions of the regional state and federal officials could have been challenged before the House of the Federation, the organ responsible for settling constitutional disputes in Ethiopia.⁴⁸ However, there have been no reported complaints challenging the excessive powers of the executive officials before the House of the Federation.

Admittedly, as Haile points out, mechanisms to limit the power of government officials, be it in terms of the separation of powers or acting within the confines of the law, 'make sense only if there is an independent body to decide whether the government has exceeded the limits to its power set by the Constitution'.⁴⁹ The independence of the House of the Federation is questionable.⁵⁰ Seen in this light, the prospects of bringing a successful legal action contesting that the actions of executive officials exceeded the powers set by the Ethiopian Constitution would have been challenging.

46 'በችግር የተተባበሩ የጋምቤላ የውበርና ኢንቨስትመንት' ('Gambella's agricultural investment entangled with problems') *Reporter* 21 December 2016; T Hindeya 'An analysis of how large-scale agricultural land acquisitions in Ethiopia have been justified, implemented and opposed' (2018) 16 *African Identities* 18.

47 As above.

48 Art 83(1) Ethiopian Constitution.

49 M Haile 'The new Ethiopian Constitution: Its impact upon unity, human rights and development' (1996) 20 *Suffolk Transnational Law Review* 1 53.

50 A Kefale *Federalism and ethnic conflict in Ethiopia: A comparative regional study* (2013) 152.

3.2 Right of ethnic minorities to participate in decisions affecting the utilisation of their land resources as an integral part of their rights to self-determination

As noted earlier, the right of ethnic minorities to participate or be consulted in decisions affecting the utilisation of their land resources may be seen as an integral part of their right to self-determination.⁵¹ According to the Ethiopian Constitution, communities have the right to be consulted on the initiation and approval of projects affecting their physical, cultural and socio-economic livelihoods.⁵²

The environmental policy of Ethiopia also seeks to empower and ensure the participation of local communities at all levels in environment management activities.⁵³ It specifically provides that all phases of environmental and resource development management, 'from project conception to planning and implementation to monitoring and evaluation, are undertaken based on the decisions of the resource users'.⁵⁴ The policy even envisages granting power to communities to make decisions on matters affecting their livelihoods and the environment. It provides that this needs to be done as sustainable environmental and economic production systems are unthinkable in the absence of power to make decisions on matters impacting on one's livelihood.⁵⁵

3.2.1 Challenges in ensuring the participatory rights of ethnic minorities

The practice surrounding large-scale land acquisitions contrasts sharply with the rights of local communities to participate in decisions affecting the utilisation of their land resources. Communities in the Gambella and Benishangul-Gumuz regions have been marginalised in the process of large-scale land transfers. In some instances, 'investment lands' were identified based on the spatial analysis of satellite images and aerial photographs without verifying the data through community-level socio-economic field research.⁵⁶ Important aspects, such as local land use practices and patterns, were not taken into account in the land allocations, causing problems for the communities' livelihoods as well as the environment.⁵⁷ For example, the Gambella Investment Agency has helped investors to identify land that suited their interests without taking the conflicting land uses into

51 See n 17 above.

52 Art 43(2) Ethiopian Constitution.

53 Sec 2(2)(g) Environmental Policy of Ethiopia.

54 Sec 4(2)(a) Environmental Policy of Ethiopia.

55 Sec 2(3)(b) Environmental Policy of Ethiopia.

56 T Moreda 'Postponed local concerns? Implications of land acquisitions for indigenous local communities in Benishangul-Gumuz Regional State, Ethiopia' Land Deal Politics Initiative (LDPI) Working Paper, February 2013 20.

57 As above.

account,⁵⁸ mainly land used by pastoralists and shifting cultivators.

Furthermore, negotiations leading to the conclusion of land deals for the appropriation of land in Ethiopia occur behind closed doors. Land contracts are concluded by the government and investors without the knowledge of the local communities. For instance, many local communities in Gambella became aware of the transfer of their traditional land to investors only after investors started to clear the land for farm operations.⁵⁹

The effort to contact local communities is often made only after the land transfer has been made on paper. Even so, in many cases representatives of the local communities who were invited for consultation were hand-picked by local administrators instead of the local communities.⁶⁰ Often local officials were instructed to convince the local communities to accept the transfer of their traditional land to investors. Even when local communities resisted the transfer of their land to investors, the land appropriation in any event took place through assaults, threats and, in some cases, arrests.⁶¹

Little effort has been made to challenge the marginalisation of these communities in the utilisation of their land resources before domestic courts. Apparently this is due to the local communities' poor image of the judicial organs. The limited power that Ethiopia's land laws give to judicial organs to review the administrative decisions of government officials may also explain why there has been little or no recourse to domestic courts.⁶² Fiseha notes that the judiciary in Ethiopia has abandoned its main function of reviewing the acts and decisions of the executive branch of the government, paving the way for arbitrary and unchecked government.⁶³ Even though the judiciary is constitutionally independent of both the executive and Parliament, this autonomy has been constrained because of the considerable influence of the executive branch. According to the World Bank, 'a long history of centralised governmental authority and a judiciary

58 G Schoneveld 'The challenges of governing Africa's new agricultural investment landscapes: An analysis of policy arrangements and sustainability outcomes in Ethiopia and Nigeria' (2015) 6 *Forests* 88 102.

59 D Rahmato 'Land to investors: Large-scale land transfers in Ethiopia' *Forum for Social Studies* (2011) 21.

60 Interview with expert 1 at the AILAA, Addis Ababa, Ethiopia, 19 November 2015.

61 Human Rights Watch "'Waiting here for death": Forced displacement and "villagisation" in Ethiopia's Gambella region' Human Rights Watch (2012) 26.

62 See art 11(1) of the Proclamation to Provide for the Expropriation of Land Holdings for Public Purposes and Payment of Compensation, Proclamation 455/2005, *Federal Negarit Gazeta*, 11th Year No 43. This provision stipulates that the decision of the relevant body can be challenged in a court having jurisdiction when the dispute relates to the amount of compensation, suggesting that other government official decisions in relation to the transfer of land cannot be challenged in a court of law. See also MA Srur 'State policy and law in relation to land alienation in Ethiopia' unpublished PhD thesis, University of Warwick, 2014 161.

63 A Fiseha 'Separation of powers and its implications for the judiciary in Ethiopia' (2011) 5 *Journal of Eastern African Studies* 702.

subjugated to the executive branch has fostered a weak judicial branch with reduced capacity to exercise genuine independence'.⁶⁴ The judicial system has also been highly politicised with little regard to the rule of law.⁶⁵ Furthermore, the judicial system has a poor public image: Many people perceive it as serving the interests of the ruling party instead of the larger public.⁶⁶ Ironically, because of the public's perception of the judiciary as lacking independence and impartiality, many citizens are increasingly seeking justice from the executive branch as opposed to the courts by petitioning to higher government officials.⁶⁷

This also apparently occurred in the case of some local communities affected by large-scale land transfers in the Gambella region, who brought their complaints against land disposessions to government executive officials instead of the courts, albeit unsuccessfully.⁶⁸ While most of these complaints were made at the *woreda* (local administrative unit in Ethiopia) level, one of the complaints by local communities in the Majang zone proceeded to higher government levels (both regional and federal). The land lease was for the transfer of 3 012 hectares to an Indian company in the Majang zone of the Gambella region. The large-scale land transfer involved the allocation of land to the investor, where the transferred land consisted of natural forests that are vital for the local communities' livelihoods as well as places considered sacred by the local communities.⁶⁹

The complaint by the Majang zone local communities and the responses of different government officials at both federal and regional level are significant to the rule of law issues under discussion, and the case as researched by Ujulu is discussed below.⁷⁰ The contract for the transfer of the land in the Gambella region, Majang zone (more specifically in Gumare and Kabu villages) was concluded by the federal government and Verdanta Harvests Plc. When the local communities became aware of the transfer of the land, they approached the *woreda* and higher regional state officials to enquire about the deal. They were informed that the contract had been

64 The World Bank 'Ethiopia: Legal and judicial sector assessment' Washington DC, Legal Vice-Presidency, World Bank (2004) 18.

65 HG Gabisa 'Justice system reform programme in Ethiopia: Is rule of law lost in translation?' (2015) 23 *African Journal of International and Comparative Law* 291 312-313, Allo & Tesfaye (n 6 above).

66 For further details, see Fiseha (n 63 above) 709; M Rheault 'Few Ethiopians confident in their institutions' GALLUP, January 2008 <http://www.gallup.com/poll/104029/few-ethiopians-confident-their-institutions.aspx> (accessed 24 September 2015); Federal Democratic Republic of Ethiopia Ministry of Capacity Building *Comprehensive justice system reform programme: Baseline study report* (2005) 14.

67 K Micheal & T Melaku 'Petitioning the executive in Ethiopia: Trends, implications, and propriety of institutionalising petitioning' in P Toggia et al (eds) *Access to justice in Ethiopia: Towards inventory of issues* (2014) 87.

68 Ujulu (n 28 above) 5.

69 Stebek (n 25 above) 200.

70 Ujulu (n 28 above) 1-3.

signed, but that the regional state could do nothing about it as the federal government had concluded it. This prompted the local communities to send representatives to the federal government to discuss their concerns about the transfer of the land to Verdanta Harvests Plc. While the relevant ministries were not willing to discuss their concerns, the representatives finally managed to get access to Mr Girma Wolde-Giorgis, the then President of Ethiopia (whose position nonetheless is more that of a figurehead). The President subsequently wrote a letter to the Environmental Protection Authority (EPA), demanding that action be taken which addresses the concerns of the local communities. Following this, the EPA wrote a letter to the Ministry of Agriculture and Rural Development (MoARD) (copying it to the Gambella regional state council and the Godere *woreda* administration council) to reconsider its decision of transferring the particular land under discussion. Nonetheless, the request was not accepted. Instead, the governor of Gambella regional state wrote a letter to *woreda* officials instructing them to hand over the land to Verdanta Harvests Plc.⁷¹

As their complaints were not addressed by the regional state government and the MoARD (now the Ministry of Agriculture and Natural Resources), the representative of the villagers wrote another letter to the President, who then 'wrote a direct letter to the MOARD literally telling them to suspend the project on environmental grounds, echoing the previous letter written by the EPA'.⁷² However, the MoARD did not respond to the President's letter. Instead, the head of one of the village councils who spearheaded the resistance against the land dispossession was dismissed by the *woreda* administrator.

This case demonstrates that higher government executive officials at both regional and federal government – 'arbitrating' in their own case – decided against the complaints of the local communities. The interventions by the EPA and the President of Ethiopia (a figurehead of the state who has little power under the Ethiopian Constitution)⁷³ were not successful. This illustrates how the MoARD and higher Gambella regional state officials persisted in their actions despite being challenged on the consistency of their actions within the law. The MoARD's disregard of the request from the EPA, an organ responsible to monitor and regulate projects that could affect the environment, illustrates how an organ that is created to check the actions of government officials and institutions may not be able to

71 As above.

72 Ujulu (n 28 above) 4.

73 In Ethiopia, the Prime Minister is the commander-in-chief and leads the executive branch of the government. The President, on the other hand, has only ceremonial powers and functions according to art 71 of the Ethiopian Constitution. The MoARD, now the Ministry of Agriculture and Natural Resources, is directly responsible to the Prime Minister.

discharge its responsibility in the face of government officials whose powers in practice apparently are unchallengeable.

With the absence of an independent judicial organ or any other independent organ that checks the actions of the MoARD and Gambella regional authorities, the local communities affected by the allocation of their land to investors did not have appropriate domestic forums from which they could seek justice. Thus, they were denied both access to justice and the subsequent remedy they might have received.

3.2.2 Possibilities for addressing the challenges related to the participatory rights of ethnic minorities

Land dispossessions and the subsequent lack of access to justice are not problems occurring only in Ethiopia. Many ethnic minorities have been dispossessed of their land for both commercial and non-commercial purposes in many parts of the world, including in Africa. Some of these communities have not been successful in getting a remedy from domestic forums. However, some experiences show that they have successfully lodged their complaints to regional institutions. In the context of Africa, the complaints filed by the Endorois communities in Kenya⁷⁴ and the Ogoni people in Nigeria⁷⁵ before the African Commission on Human and Peoples' Rights (African Commission) and the subsequent decisions rendered can be cited as instances where regional institutions played an important role in terms of providing access to justice and remedies to communities that have not been able to obtain justice from domestic forums. Similarly, local communities in Ethiopia affected by the large-scale land acquisitions can resort to regional institutions, including the African Commission, to seek a remedy against their land dispossessions. As will be noted below, in addition to regional judicial institutions, individuals and civil society organisations can assist these communities in their pursuit of justice.

In the *Endorois* case, the complainants alleged that the government of Kenya forcefully had removed them from their ancestral land to make way for a game reserve 'without proper prior consultations, adequate and effective compensation'.⁷⁶ This eviction prevented them from accessing vital resources for their survival. The complainants alleged that the Kenyan government's measures violated the Kenyan Constitution, the African Charter on Human and Peoples' Rights (African Charter) and international law.⁷⁷ The complains were lodged by two advocacy organisations, namely, the

74 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

75 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case).

76 *Endorois* case (n 74 above) para 2.

77 As above.

Centre for Minority Rights Development (CMRD), an organisation based in Kenya, and the Minority Rights Group International (MRGI) on behalf of the Endorois community.

It is beyond the scope of this article to discuss the details of the case. However, briefly stated, on the facts of the case the African Commission found that the Endorois community had been arbitrarily dispossessed of their land. The Commission noted that no effective consultations had been undertaken.⁷⁸ It further noted that 'no collective land of equal value was ever accorded'.⁷⁹ The Endorois rather were 'relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the lake area's medicinal salt licks or traditional water sources'.⁸⁰ Finally, the African Commission ruled that the Kenyan state should implement the following relief, among others: to reconstitute the Endorois land; to pay adequate compensation to the community for the loss suffered; and to allow unrestricted access in the appropriated land for the community's cultural activities and for the grazing of their cattle.

In the *SERAC* case, the complainants alleged violations by the Nigerian government of the rights of the Ogoni people as a result of irresponsible oil development practices in their territories. One of the violations cited by the complainants was the right of the Ogoni people to freely dispose of their land resources under article 21 of the African Charter. On the facts, the African Commission ruled that 'contrary to its Charter obligations and despite such internationally established principles, the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis', and it found the government to be in violation of a number of rights, including article 21 of the African Charter.⁸¹ The legal recourse of the Ogoni people to the African Commission was assisted by two non-governmental organisations (NGOs). These were the Social and Economic Rights Action Centre (SERAC), based in Nigeria, and the Centre for Economic and Social Rights (CESR), based in New York, United States.

Important lessons may be drawn from these cases. The cases demonstrate the important role regional institutions, in this case the African Commission, can play in becoming a forum for communities to access justice, especially when efforts to seek a remedy at national level are unsuccessful. Local communities in the Gambella and Benishangul-Gumuz regions (affected by the large-scale land dispossessions discussed earlier) can lodge complaints before the African Commission to obtain a ruling in their favour. That said, domestic legal remedies, particularly from the House of the

78 *Endorois* case (n 74 above) paras 290 & 297.

79 *Endorois* case paras 286 & 268.

80 *Endorois* case para 286.

81 *SERAC* case (n 75 above) para 58.

Federation, should be sought before lodging complaints before the African Commission.

Furthermore, many communities in the Gambella and Benishangul-Gumuz regions qualify to be indigenous peoples.⁸² They can thus lodge their complaints as indigenous peoples, as the Endorois community did, to benefit from the rights of peoples enshrined under the African Charter. The legal concept of indigenous peoples can have some strategic use to draw attention to the necessity of maintaining access and ties to, and control over, their traditional land, thereby contributing towards a successful legal challenge against the dispossession of their land.⁸³

This is not to suggest that the African Commission can force the Ethiopian government to change its behaviour on how it acts in relation to the utilisation of ethnic minorities' land resources. Admittedly, the Commission's rulings may not be implemented by the government. However, rulings by regional institutions can have far-reaching implications in deterring the arbitrary actions of government officials in the future. Regional institutions, including the African Commission, in the context of ethnic minorities in Ethiopia, can be used as forums where communities can increase their visibility in their resistance against the violation of their rights. Such forums can also be used to produce, to borrow words from Allo, 'knowledge and counter-narrative for peoples who can use that narrative to challenge the government in terms of their engagement with various institutions'.⁸⁴ Thus, regional institutions, including the African Commission, can serve as institutions that produce discursive tools through which the actions of government officials are challenged and delegitimised. This is likely to contribute towards pressurising the government to change its behaviour, at least in the longer term.

Furthermore, these cases demonstrate that individuals and civil society organisations can play an important role in assisting communities in their effort to challenge land dispossession. Apparently it is difficult for communities in the lowlands of Ethiopia to have easy access to regional institutions, given their financial constraints and limited legal and technical expertise. In the *Endorois* and *SERAC* cases, such constraints apparently were overcome through the assistance of civil societies based at home and elsewhere.

Such experience can be particularly relevant to challenge land dispossessions of local communities in Ethiopia. The role of organisations in voicing the concerns of vulnerable groups in Ethiopia

82 See, eg, African Commission & IWGIA *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, adopted at the 34th session of the African Commission (2003) 18.

83 See, eg, F Viljoen *International human rights law in Africa* (2012) 233.

84 A Allo, London School of Economics Africa summit, 2017.

is limited.⁸⁵ This is particularly the case following the enactment of the Charities and Societies Proclamation,⁸⁶ which restricted the financial sources of civil society organisations engaged in advocacy and human rights issues.⁸⁷ With the limited capacity of domestic civil society organisations in Ethiopia, co-operation between individuals or civil society organisations based in Ethiopia and international organisations or individuals abroad may prove to be useful in assisting to bring a successful legal challenge before the African Commission.

This is not to suggest that regional institutions, including the African Commission, can be a panacea for all rule of law challenges ethnic minorities in the lowlands of Ethiopia face in controlling and exploiting their land resources. It is rather to suggest that this can partly contribute towards redressing the injustices related to large-scale land dispossession.

4 Conclusion

This article illustrates the challenges facing the rule of law with regard to the constitutional rights of Ethiopia's ethnic minorities, by taking as a case study the government's measures in large-scale agricultural land acquisitions in the Gambella and Benishangul-Gumuz regions. The Ethiopian Constitution confers extensive rights on ethnic communities, including the right of self-determination and the corollary right of participation in projects affecting the utilisation of land resources. However, the enforcement of the legal rhetoric of self-determination and participation of ethnic minorities in decisions affecting the utilisation of their land resources, especially in the Gambella and Benishangul-Gumuz regions, where most of the current large-scale land acquisitions have been taking place, has been dismal.

The article discussed some of the challenges to the rule of law in Ethiopia by focusing on the transfer of constitutionally-enshrined power from regional states to the federal government in the name of delegation and the challenges in the participation of ethnic minorities in decisions affecting the utilisation of their land resources. Government officials at both federal and regional levels transferred power from regional states to the federal government, apparently against the letter and the spirit of the Ethiopian Constitution. There was also no prescribed law on the basis of which such delegation

85 For further details see D Rahmato 'Civil society organisations in Ethiopia' in B Zewde & S Pausewang (eds) *Ethiopia: The challenge of democracy from below* (2002) 103-119; K Berhanu 'The role of NGOs in protecting democratic values: The Ethiopian experience' in Zewde & Pausewang (above) 120-129.

86 Proclamation to Provide for the Registration and Regulation of Charities and Societies, Proclamation 621/2009, *Federal Negarit Gazeta*, 15th Year No 25 (Charities and Societies Proclamation).

87 According to art 2(2) of the Charities and Societies Proclamation, a minimum of 90% of the income of any advocacy and human rights organisation in Ethiopia has to come from a domestic source.

could have been made. Furthermore, communities in the Gambella and Benishangl-Gumuz regions have been significantly marginalised from directly participating in decisions affecting the utilisation of their land resources. Efforts to seek justice from domestic institutions have been unsuccessful.

The article contends that, given the limited role that domestic forums in Ethiopia can play in addressing the challenges discussed in the article, resorting to sub-regional and regional institutions, including the African Commission, is important in the pursuit of justice against land dispossessions. For this to happen, the role of civil society, including the assistance of individuals and NGOs, to ethnic minorities' efforts to challenge arbitrary actions of the Ethiopian government is critical. This is not to suggest that the African Commission can force the Ethiopian government to change its behaviour. However, rulings by regional institutions can have far-reaching implications in deterring the arbitrary actions of government officials in the future. More importantly, such rulings serve as discursive tools for affected communities to challenge and delegitimise the arbitrary actions of government officials. This, in turn, will provide these communities with more tools in their struggle against land dispossession.

The challenges for the rule of law posed by the increasing use of electronic surveillance in sub-Saharan Africa

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Summary

This article analyses the tension between the rule of law and the increasing use of electronic surveillance in sub-Saharan Africa. Indeed, in the sub-Saharan region today, the rule of law is severely under threat. These threats include bad governance, corruption and a poor human rights track record. Respect for human rights particularly is one of the key indices of the presence of a strong rule of law. However, sub-Saharan African states seriously lag behind in this respect. While so much has been said of the violations of other human rights, not much is said of the right to privacy. Hence, the rule of law being a fundamental component of human rights, the right to privacy faces emerging threats from practices aided by the gradual advances in technology, such as electronic surveillance. Electronic surveillance, with its capacity to effortlessly undermine human rights, is now commonplace in countries in the sub-Saharan region. This becomes more complicated with the frequently-made claim that such surveillance is 'lawful' or 'reasonable' for law enforcement or national security. What amounts to 'lawful' or 'reasonable' intrusions are not only nebulous, but also largely unquestionable. Interestingly, this is not the only difficulty concerning the practice of electronic surveillance. There seems to be a general misconception that electronic surveillance only constitutes a challenge to the right to privacy

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when it actually affects some other important values. In view of this, the article examines the ways in which the increasing use of electronic surveillance undermines the rule of law in sub-Saharan Africa.

Key words: *rule of law; surveillance; electronic surveillance; privacy; data protection; sub-Saharan Africa*

1 Introduction

Edward Snowden's ground-breaking revelation on the extent of state governments' 'mass electronic surveillance' practices has opened a Pandora's box for the rule of law.¹ It has also exposed the extent to which security agencies use various technologies to monitor and intercept the private communication of people regardless of their being suspected of having committed any crime. With the recent threats to security in many countries, especially those relating to terrorism, state governments are rapidly expanding their surveillance programmes. Recently, countries in sub-Saharan Africa have been developing a tremendous interest in spying on their citizens, which is facilitated by their growing technological capabilities. While the act of surveillance in itself is very problematic, electronic surveillance is trickier because of its ubiquitous nature. The increasing use of electronic surveillance raises a number of interesting issues for the rule of law in sub-Saharan Africa. One such issue is the impact of the unregulated use of electronic surveillance on the rule of law in the region. This concern, which is at the heart of this article, is crucial for the democratic development of the region.

Indeed, the debate on electronic surveillance in Africa has not advanced as much as that in other regions. This is one reason why, to the best of our knowledge, there has as yet been no serious consideration of the challenges which electronic surveillance poses to the rule of law in the literature. This is unlike the case in regions such as Europe where electronic surveillance is seen as a major challenge to the rule of law.² Nevertheless, it is high time African states seriously

1 These revelations, in summary, was that the US, National Security Agency (NSA) and the UK Government Communications Headquarters (GCHQ) were secretly operating a mass surveillance programme which enabled them to access personal information online from the world's largest internet companies, such as Yahoo, Facebook, Google, Twitter, YouTube, Skype and Apple. See Media Policy Democratic Project *An analysis of the communications surveillance legislative framework in South Africa* 5 http://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/comms-surveillance-framework_mare2.pdf (accessed 1 October 2017). See also D Lyon 'Surveillance, Snowden, and Big Data: Capacities, consequences and critique' (2014) July-December *Big Data and Society* 1-13.

2 European Commission for Democracy through Law *Rule of law checklist* 5 29 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e) (accessed 1 October 2017). The document identified, among others, several contemporary challenges to the rule of law that include corruption and conflict of interest and collection of data and surveillance.

considered the impact of electronic surveillance on the rule of law, considering the significant efforts being made to improve their rule of law rating internationally. Issues such as mass surveillance that can affect this rating ought to be taken seriously.

In view of the foregoing, the article poses the following crucial question: How does the increasing use of electronic surveillance impact upon the rule of law in sub-Saharan Africa? In answering the question, the article is organised in six parts. After the introduction, part two discusses the law and practice of electronic surveillance in sub-Saharan Africa. Part three establishes the link between electronic surveillance and the rule of law, while part four analyses the specific challenges which the increasing use of electronic surveillance poses to the already fragile state of the rule of law in sub-Saharan Africa. The fifth part re-evaluates the measures to entrench the rule of law in the use of electronic surveillance, before concluding with some reflections on the future of the rule of law and electronic surveillance in sub-Saharan Africa.

For the purposes of the article, some caveats are in order. First, while the article focuses on sub-Saharan Africa,³ it does not claim to cover the entire region. The analysis focuses on particular countries that may effectively represent the region.⁴ Second, although electronic surveillance is usually carried out for different purposes and by different entities, the article focuses on (electronic) surveillance practices carried out for supposedly 'law enforcement' and 'national security' purposes.⁵ Third, although electronic surveillance could be either domestic or extraterritorial (foreign surveillance), the article focuses on the former category. The latter category raises broader issues of international law, which are largely beyond the scope of the present exercise.⁶

3 Sub-Saharan Africa comprises countries that are fully or partly located south of the Sahara. The sub-Saharan region comprises 46 African countries, excluding Algeria, Egypt, Libya, Morocco and Tunisia.

4 For this purpose, more reference will be made to Nigeria (representing Western Africa), South Africa (representing Southern Africa) and Uganda (representing Eastern Africa).

5 According to Brookes, electronic surveillance is generally used for security reasons, in pursuit of hobbies and for checking on spouse loyalty. See P Brookes *Electronic surveillance devices* (2001) 1. There are many other uses, such as for the purposes of monitoring employees in a work place, and so forth.

6 For more on this, see A Deeks 'An international legal framework for surveillance' (2015) 55 *Virginia Journal of International Law* 292. See also M Milanovic 'Human rights treaties and foreign surveillance: Privacy in the digital age' (2015) 56 *Harvard International Law Journal* 81.

2 Conceptualisation, practice and normative framework of electronic surveillance in sub-Saharan Africa

The normative framework on the application of electronic surveillance can be found in a number of legal instruments. However, none of these instruments defines surveillance. The question then is: What is electronic surveillance?

2.1 Conceptualising electronic surveillance

The term 'electronic surveillance', to the best of our knowledge, has not been defined in any law or policy regulating its practice in sub-Saharan Africa.⁷ In fact, these instruments rarely use the term 'surveillance'; rather they use associated terms such as 'interception', 'communications', 'monitoring' and other device-specific terms. This may be because of the inherent difficulty in conceptualising such a term. Surveillance usually is defined in relation to its nature (overt or covert) or on the basis of the level of contact with the target, whether remote or direct.⁸ Basically, surveillance means to monitor or closely observe.⁹ This basic definition is problematic in that it anticipates the monitoring of a specific person who, for example, may be suspected of committing a crime. However, as will be shown shortly, modern surveillance practices do not necessarily involve monitoring a specific or identified person or for any particular purpose. Similarly, discussing surveillance in the context of 'monitoring' or 'observing' takes away one critical feature of modern surveillance practices, namely, the gathering or collecting of information about people and not necessarily observing them in the technical sense of the term.

The term 'electronic surveillance' may even create more definitional difficulties. However, a simple definition is that of the United Nations (UN) Office on Drugs and Crime (UNODC) which is that 'surveillance is the collection or monitoring of information about a person or persons through the use of technology'.¹⁰ The definition, though imperfect, highlights two important points which is crucial for this article. First, it mentions that surveillance involves (personal information) gathering and, second, such gathering or collection occurs with the aid of technology. However, this definition also omits

7 See United Nations Office on Drugs and Crime (UNODC) *Current practices in electronic surveillance in the investigation of serious and organised crime* 1 https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf (accessed 1 October 2017). However, the US Foreign Intelligence Surveillance Act (FISA) 1978 specifically defines surveillance in sec 1801.

8 As above.

9 *Collins concise dictionary* (2001).

10 As above. See also a related definition in M Watney 'State-on-nationals. Electronic communication surveillance in South Africa: A murky legal landscape to navigate?' <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=7335047> (accessed 1 October 2017).

one important feature which is the fact that, in most circumstances, the collection of the information usually is without the consent of persons.¹¹ Consent is crucial as it usually is the thin line separating unlawful from lawful surveillance.

From the foregoing, electronic surveillance is the use of technology to gather information about an individual or individuals. These technologies could vary from the simple use of cameras to more intrusive means, such as the use of sophisticated software to process personal information about a person.¹² Another important point to note is that electronic surveillance is unique in that it differs from all other types of government intrusions. According to Cassie, in the case of electronic surveillance, 'there is no seizure of tangible property, no search of a defined structure or place, and if properly executed, no knowledge of the government's action by the target of the search'.¹³ It is submitted that modern electronic surveillance practices does not even involve identifying a specific target. Government surveillance programmes indiscriminately collect information for no specific purpose or reason.

2.2 Increased use of electronic surveillance in sub-Saharan Africa: The move toward sophisticated surveilling technologies

It is not an exaggeration to say that sub-Saharan Africa is gradually evolving into a 'surveillance society'.¹⁴ This is because of the extent and sophistication of the current surveillance practices in the region. According to a recent report, 'many African governments are outdoing themselves in acquiring state of the art software that will enable them to eavesdrop on their citizens'.¹⁵ Yet, most states keep their surveillance capabilities or spying programmes a closely-guarded secret, making it difficult to document the exact nature and extent of electronic surveillance in sub-Saharan Africa.¹⁶ Nevertheless, there is available evidence of some of these practices from a few sources.

Recently, advances in technology have seen states adopt more ubiquitous and modern methods of electronic surveillance, such as

11 Eg, the definition of electronic surveillance under the US FISA includes consent.

12 For an incisive analysis of recent surveillance technologies and the attitude of the courts, especially in the US, see T Casey 'Electronic surveillance and the right to be secure' (2008) 41 *University of California, Davis* 977.

13 Casey (n 12 above) 985.

14 According to Tzanou, there are three main features of a surveillance society: (1) the increased engagement in intelligence gathering and surveillance activities; (2) the use of new technologies and technological devices; and (3) the overall goal of enhancing security. M Tzanou 'The EU as an emerging "surveillance society": The function creep case study and challenges to privacy and data protection' (2010) 4 *Vienna Journal on International Constitutional Law* 407.

15 CIPESA *State of internet freedom in Africa 2016* (2016) 18 https://cipesa.org/?wpfb_dl=225 (accessed 1 October 2017).

16 Deeks contends that '[i]t is difficult to know precisely what types of surveillance each state is conducting, what technologies they are using, and what their targets are'; Deeks (n 6 above) 344.

the use of complex devices and software for the interception of phone conversations and activities, generally online. For example, in an exclusive report in 2013, *Premium Times*, a leading online news outfit, exposed the presence of a 'Big Brother' phenomenon in Africa.¹⁷ It was revealed that the President of Nigeria was secretly engaging an Israeli firm, Elbit Systems,¹⁸ 'to help it to spy on citizens' computers and internet communications under the guise of intelligence gathering and national security'.¹⁹ This affords the government easy access to all computers and the ability to read all e-mail correspondence of citizens. This agreement was worth over \$40 million and, according to *Premium Times*, the contract was 'one of the most far-reaching policies ever designed in Nigeria's history to invade the privacy of citizens'.²⁰ In a similar initiative, the 2013 budget of Nigeria, submitted to the National Assembly, also contained a proposal for the procurement of a Wise Intelligence Network Harvest Analyser System, an Open Source Internet Monitoring System and a Personal Internet Surveillance System.²¹ All these are hi-tech online surveillance programmes. One would be able to fully appreciate how far-reaching this contract and other similar initiatives could be when it is considered in light of the level of internet penetration in Nigeria. Today, Nigeria records more than a 50 per cent internet penetration rate as against the position years ago when internet penetration was less than 10 per cent.²² The same applies to many other sub-Saharan African countries, such as South Africa.²³

There is credible evidence that other countries in sub-Saharan Africa are also developing similar online surveillance programmes. For example, a recent research carried out at the Munk School for Global Affairs at the University of Toronto revealed that countries such as Kenya were acquiring extensive internet surveillance and censorship programmes developed by Blue Coat. Blue Coat is an American company specialising in cyber security. Similarly, BBC recently reported that the Ugandan government has recently acquired a state-of-the-art surveillance technology which can be used to crush and

17 O Emmanuel 'Exclusive: Jonathan awards \$40 million contract to Israeli company to monitor computer, internet communication by Nigerians' *Premium times* 25 April 2013 <https://www.premiumtimesng.com/news/131249-exclusive-jonathan-awards-40million-contract-to-israeli-company-to-monitor-computer-internet-communication-by-nigerians.html> (accessed 1 October 2017).

18 'Elbit Systems is a world leader in the fields of intelligence analysis and cyber defence, with proven solutions highly suitable for countries, armies and critical infrastructure sites.'

19 Emmanuel (n 17 above).

20 As above.

21 As above.

22 'Nigeria's internet users remain 90m in April – NCC' <https://dailynigerian.com/business/nigerias-internet-users-remain-90m-in-april-ncc/> (accessed 1 October 2017).

23 South Africa also has about 52% penetration. See generally 'Freedom on the net 2016: South Africa country profile' <https://freedomhouse.org/report/freedom-net/2016/south-africa> (accessed 1 October 2017).

blackmail opposition.²⁴ Codenamed *Fungua Macho*, the Ugandan government adamantly denies the existence of the programme. An investigation by Privacy International (PI) titled *Uganda's Grand Ambitions of Secret Surveillance* further confirms this surveillance practice.²⁵ The investigation discloses that the Ugandan military procured a malware – FinFisher – by Gamma International GmbH (Gamma).²⁶ This malware, according to PI, is capable of collecting, modifying and extracting data communicated and stored on a device – say a computer or phone – once installed.²⁷ Thus, once installed, FinFisher can remotely transmit information to the operator. This technology can also be deployed to buildings, vehicles, computers, mobile phones, and so forth. Even if a user's device is encrypted, it cannot deter the function of the malware.

South Africa is also not left out in the electronic surveillance game. A recent report disclosed that the 'unregulated' National Communication Centre (NCC) also recently purchased a license for the sophisticated FinFisher.²⁸

2.3 Rationale for increased electronic surveillance: National security as a mask

From the foregoing, two main rationales usually are put forth by governments to justify their increased surveillance activities. These are law enforcement and national security. With regard to law enforcement, the constitutions of most countries give the government and its security agencies wide law enforcement powers. National security reasons seem to be the most problematic. Commenting on the difficulties of national security justification, Navi Pillay, the former United Nations High Commissioner for Human Rights, observed:²⁹

How do we define the legitimate parameters for national security surveillance? Indeed, states may use targeted surveillance measures provided for example that such surveillance is case-specific, and on the basis of a warrant issued by a judge on showing of probable cause or

24 N Hopkins & J Morris 'UK firm's surveillance kit used to crush Uganda opposition' <http://www.bbc.com/news/uk-34529237> (accessed 1 October 2017).

25 Privacy International (PI) *Uganda's grand ambitions of secret surveillance* <https://privacyinternational.org/node/656> (accessed 1 October 2017).

26 PI *For God and my president: State surveillance in Uganda* https://privacyinternational.org/sites/default/files/Uganda_Report.pdf (accessed 1 October 2017).

27 As above.

28 H Swart *Communications surveillance by the South African intelligence services* February 2016 26 http://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/comms-surveillance-nia-swart_feb2016.pdf (accessed 1 October 2017). See also P de Wet 'Spy wars: South Africa is not innocent' <https://mg.co.za/article/2013-06-21-00-spy-wars-south-africa-is-not-innocent> (accessed 1 October 2017).

29 Opening remarks by Ms Navi Pillay, United Nations High Commissioner for Human Rights to the Expert Seminar: The right to privacy in the digital age, 24 February 2014, Palais des Nations, Geneva, Switzerland <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14276&LangID=E> (accessed 1 October 2017).

reasonable grounds. However, the scope of national security surveillance in many jurisdictions has expanded significantly in recent years.

2.4 Normative framework regulating electronic surveillance in sub-Saharan Africa

Since the rule of law concerns doing things according to laid-down laws and procedure, it is important to identify the law and policy on electronic surveillance. In sub-Saharan Africa, the law and policy on electronic surveillance may be said to be contained in a combination of legal instruments. First, electronic surveillance is regulated by the provisions on the right to privacy in the constitutions of the countries since, in many cases, it is an unwarranted interference with the privacy of a person. The constitutions of countries in the sub-Saharan region provide for respect for the right to privacy in their Bills of Rights.³⁰ In some of these countries, such as Nigeria³¹ and South Africa,³² there is also well-developed jurisprudence on the protection of privacy through private law. Second, the provisions of international human rights instruments on privacy also regulate electronic surveillance.³³ Surprisingly, the African Charter on Human and Peoples' Rights (African Charter) does not contain a right to privacy. However, the right to privacy is found in the African Charter on the Rights and Welfare of the Child (African Children's Charter).³⁴

A third category of legal instruments which has a direct bearing on electronic surveillance and which has been established specifically to regulate the gathering of personal information by electronic means, such as electronic surveillance, are data protection instruments. Since the ultimate goal of surveillance is to collect information which, in most cases, relate to or identifies an individual, these naturally will fall in the scope of data protection laws. In this respect, the sub-Saharan region has both international and domestic laws and policies. The African Union (AU) recently adopted the AU Data Protection Convention which specifically seeks to regulate some of the threats resulting from the advances in technology.³⁵ Other regional instruments on data protection have provisions affecting electronic surveillance, such as the Economic Community of West African States

30 Sec 37 Constitution of the Federal Republic of Nigeria, 1999; sec 14 South African Constitution, 1996; sec 27 Constitution of the Republic of Uganda, 1995.

31 See ES Nwauche 'The right to privacy in Nigeria' (2007) 1 *Review of Nigerian Law and Practice* 67.

32 See A Roos 'Data protection law in South Africa' in A Makulilo (ed) *African data privacy law* (2016) 196.

33 Art 12 Universal Declaration of Human Rights; art 17 the International Covenant on Civil and Political Rights (ICCPR).

34 See art 10 of the African Children's Charter <http://www.achpr.org/instruments/child/#a10> (accessed 1 October 2017).

35 African Union Convention on Cyber Security and Personal Data Protection https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf (accessed 1 October 2017).

(ECOWAS) Supplementary Act on Data Protection, the Southern African Development Community (SADC) Model Law, and so forth. Domestic data protection laws also regulate electronic surveillance in sub-Saharan Africa. Currently, only a few countries in the region have data protection instruments,³⁶ while a number of countries, such as Nigeria, still have data protection Bills before their legislative assemblies.

Electronic surveillance may also be regulated through the interception of communications legislation. Such legislation basically gives the government or security agencies powers to intercept individuals' communications under certain explicitly-stated circumstances, in most cases for the purposes of law enforcement. Examples are the South African Regulation of Interception of Communications and Provision of Communication-Related Information Act 2002³⁷ and the Regulation of Interception of Communications Act 2010 of Uganda.³⁸ Nigeria currently does not have legislation on the interception of communication. However, a draft regulation of the Nigerian Communications Commission has that effect.³⁹ These laws are useful in that they provide for the permissible limit of surveillance.

Interception of communication or surveillance policies are found in other laws, especially emergency laws or national security laws. This is the case with laws on terrorism. For example, the Nigerian Terrorism (Prevention) (Amendment) Act 2013 provides for specific cases where there may be monitoring of communications of 'suspected' persons through the instrumentalities of electronic surveillance.⁴⁰ Similarly, the Kenyan National Intelligence Service Act 2012⁴¹ gives security agencies the power to carry out surveillance under certain circumstances. The Ugandan Anti-Terrorism Act 2002 has a similar provision.⁴² The same principles are also found in cybercrime legislation.

With regard to electronic surveillance specifically, the courts have not made any significant impact. Perhaps this is because infractions have not been identified and brought before the courts.

36 See G Greenleaf 'Global tables of data privacy laws and bills' (2017) 145 *Privacy Laws and Business International Report* 14.

37 Act 70 of 2002.

38 Act 18 of 2010.

39 Lawful Interception of Communications Regulations, <http://www.ncc.gov.ng/documents/328-lawful-interception-of-communications-regulations/file> (accessed 1 October 2017).

40 Sec 29.

41 Sec 6(2)(c) National Intelligence Service Act 28 of 2012, <http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/N/National%20Intelligence%20Service%20Act%20No.%2028%20of%202012/docs/NationalIntelligenceServiceAct28of2012.pdf> (accessed 1 October 2017).

42 The whole of Part VII of the Act provides for 'interception of communications and surveillance'.

Ideally, we may proceed on the assumption that the principles of the rule of law with regard to electronic surveillance can be found in the above-mentioned instruments. Nevertheless, it remains crucial to specifically establish the nexus between the rule of law and electronic surveillance.

3 Establishing the link between electronic surveillance and the rule of law

There is some uncertainty about the relationship between electronic surveillance and the rule of law as this has not been the subject of much academic discussion. Yet, the European Commission for Democracy through Law, in developing a rule of law checklist, listed (electronic) surveillance as one example of contemporary challenges to the rule of law.⁴³ To clarify this uncertainty, electronic surveillance raises two broad issues when considered in the context of the rule of law. The first is human rights issues, generally; the second is rule of law issues. We will consider these two issues in turn.

3.1 Human rights dimension: The right to privacy in perspective

While it may be impossible to identify all the elements of the rule of law with certainty, certain components seem to be globally accepted as indicators of the presence of the rule of law. These indicators are constitutionalism; the notion that the constitution controls the actions of government; an independent judiciary; and the requirement that the law must be fairly and consistently applied.⁴⁴ Others are the notion of transparency and accessibility of law; the efficient and timely application of the law; and respect for all categories of human rights.⁴⁵ Among all these elements, respect for human rights seems to be receiving the most attention. Therefore, it is not surprising that the UN Secretary-General defines the rule of law as

a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.⁴⁶

From the above definition, it would seem that all other indicators must be subject to 'international human rights norms and standards'. This invariably means that respect for human rights is a *sine qua non* to the realisation of rule of law.

43 European Commission for Democracy through Law (n 2 above) 29.

44 See BM Hager *The rule of law: A lexicon for policy makers* (1999) 21-49.

45 As above.

46 United Nations Security Council (UNSC) Report of the Secretary-General *The rule of law and transitional justice in conflict and post-conflict societies* 4 http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616 (accessed 1 October 2017) (my emphasis).

Although it would appear that there is general consensus that the respect for human rights is a fundamental pillar of the rule of law, there are contrary views. A strong argument exists against the inclusion of respect for human rights among the benchmarks for the rule of law. Tamanaha, for example, contends that the 'definition of the rule of law focuses only on law – it does not include democracy and does not include human rights'.⁴⁷ The scholar gives three reasons for his view, based on an analysis of the definition of the UN Secretary-General above. First, 'rule of law', 'democracy' and 'human rights' are 'separate elements that focus on different aspects of a political-legal system, which can exist separately or in combination'.⁴⁸ Each must, therefore, be understood on its own terms. Second, the notion of human rights is not an aspect of the rule of law as contending otherwise implies defining the rule of law in terms of institutions that match those of liberal democracies. This, in turn, suggests that the rule of law is only present in liberal democracies. Third, he argues, human rights cannot be included in the definition of the rule of law as it is contrary to the tenet of liberalism.⁴⁹

Without a doubt, the argument of the scholar against the inclusion of human rights (and democracy) as a component of the rule of law seems convincing but, then, certain points must be appreciated. First, even in its initial conception by Dicey, human rights were envisioned as a core value of the rule of law.⁵⁰ Although there are modern applications of this concept, that does not mean one should totally derogate from its roots or the ideals in its conception. Secondly, it is difficult to argue for the presence of the rule of law in a state that does not respect human rights. Indeed, one of the aims of limiting power is to curtail arbitrariness which could lead to an abuse of human rights. In any case, there is a difference between the use of the term 'human rights' (which connotes the wide sense) and 'respect for human rights' (in the narrow sense). The concept of the rule of law actually anticipates the use of 'human rights' in the narrow sense. In this regard, Shivute notes:⁵¹

It could be said that, in that parochial sense, the concept of *the rule of law* in itself says nothing of the justness and fairness of the laws. The upshot is that, if that narrow view is taken of the rule of law, states which do not respect human rights can carry on business as usual without the observance of the rule of law. But it is non-controversial that the rule of law is considered a prerequisite for democracy and democratic practice. It cannot, therefore, be contradicted that the rule of law plays a crucial role in the protection and promotion of human rights, democracy and good governance.

47 BT Tamanaha 'The history and elements of the rule of law' (2012) *Singapore Journal of Legal Studies* 233.

48 As above.

49 Tamanaha (n 47 above) 234.

50 AV Dicey *Introduction to the study of the law of the Constitution* (1915).

51 P Shivute 'The rule of law in sub-Saharan Africa: An overview' in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2009) 214.

It is our view, therefore, that Tamanaha's contention is not in tandem with the ideals of the rule of law. In further support of this view, the Council of Europe (CoE), in developing benchmarks for the rule of law, rightly observed that the rule of law is linked not only to human rights but also to democracy.⁵²

Much academic ink has been spilled on the nature and extent to which the right to privacy today has been severely under threat.⁵³ This has more to do with recent advances in technology and the increasing deployment of very intrusive technologies – 'privacy destroying technologies' – by governments and private entities alike. In view of this fact, one may safely argue that electronic surveillance constitutes one of the greatest challenges to the right to privacy (and other fundamental rights), hence to the rule of law, not only in advanced countries but also in developing countries. However, while advanced nations have taken significant strides to put governments under check and demand quality protection due to the high level of awareness, developing African states have not done so.

3.2 Rule of law dimension: Curbing arbitrariness of the state

An analysis of how electronic surveillance impacts on the rule of law naturally raise issues of privacy. However, one may argue that increasing electronic surveillance actually trumps mere privacy/human rights interests. It affects something greater. Some argue that to insist otherwise is to limit the impact which electronic surveillance has on society. Austin, for example, contends that '[t]he [electronic] surveillance debate ... has to focus more on the deep reasons for this tension with the rule of law and less on the nature of the impact of such practices on individual privacy rights'.⁵⁴ Since the rule of law is all about curtailing the arbitrary use of power, perhaps one should consider electronic surveillance more in that light. Surveillance in itself has the capacity to bestow broad powers on governments, and, therefore, it should be considered in the context of the urgent need to curb the arbitrary powers of state authorities. From this perspective, electronic surveillance has much more to do with some other tenets of the rule of law, such as the principle of legality which anticipates that state actions are subjected to law. The next part will consider this broader impact of electronic surveillance in detail.

52 European Commission for Democracy through Law (n 2 above) 9.

53 See D Solove *The digital person* (2004). See also DJ Solove *Understanding privacy* (2008).

54 L Austin 'Surveillance and the rule of law' (2015) 13 *Surveillance and Society* 295.

4 Increasing use of electronic surveillance as a challenge to the rule of law in sub-Saharan Africa

The general attitude towards respect for the rule of law makes its realisation a mirage for countries in the sub-Saharan region. The newly-found penchant for electronic surveillance by state governments creates diverse challenges. However, how electronic surveillance becomes a challenge to the rule of law remains unclear. The fact that governments usually justify electronic surveillance with reference to law enforcement and national security further adds to these uncertainties. The next part analyses the specific challenges to the rule of law by electronic surveillance.

4.1 Impact on human rights and civil liberties

The human rights track record of most sub-Saharan African states is not a particularly bright one based on available reports. According to Freedom House, sub-Saharan Africa is home to most of the world's worst performing countries in terms of respect for human rights.⁵⁵ In the World Justice Project's rule of law index, most of the countries in the sub-Saharan region are the worst performers with regard to human rights.⁵⁶ The same scenario also emerges in the Amnesty International Report, where African states are said to have failed 'to convert rhetoric on human rights into action'.⁵⁷ Although these reports do not specifically consider surveillance *per se*, the fact remains that the state of human rights is poor, and increasing electronic surveillance will only worsen this.

Irrespective of the uncertainties, respect for human rights indeed is an essential component of the rule of law. Therefore, a threat to any human right certainly constitutes a challenge to the rule of law in the sub-Saharan region. Several human rights are threatened by electronic surveillance, although most commentators only consider the impact of surveillance on the right to privacy. The general argument with regard to electronic surveillance, especially 'covert' surveillance, is that it constitutes an unreasonable intrusion into individuals' private and family lives. This is particularly true for specific instances where the activities of individuals are monitored without any lawful justification

55 Freedom House *Sub-Saharan Africa* <https://freedomhouse.org/regions/sub-saharan-africa> (accessed 1 October 2017).

56 World Justice Project *Rule of law index* https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (accessed 1 October 2017). Eg, Ethiopia and Zimbabwe, respectively ranked 111 and 113 out of 113 countries, were subjected to the assessment.

57 See Amnesty International *Amnesty International Report 2016/17: The state of the world's human rights* (2017) 23 <https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF> (accessed 1 October 2017).

or authorisation by the courts. However, most of the laws that guarantee the right to privacy also make exceptions to this right.⁵⁸ This restricts the full realisation of the right.

The 'traditional' right to privacy arguably is affected more by the traditional form of surveillance, which includes the physical monitoring of a person. The modern form of surveillance, increasingly being used in the sub-Saharan region, impacts more on the aspect of privacy which has to do with personal information and falls within the scope of data protection law. Currently, however, there is a vibrant movement making the claim that data protection cannot be subsumed under the right to privacy.⁵⁹ The former is argued to be an independent *sui generis* right distinct from the latter. In fact, in many European countries and the European Union (EU), both rights are provided for separately. This article will not attempt to consider the merits of these arguments. What matters is that electronic surveillance which results in the collection, processing and use of personal information (that is, information which 'relates to' or 'identifies' a person) constitutes a greater challenge to human rights and thus a challenge to the rule of law. The 'processing' of personal information obtained from electronic surveillance carries specific risks.

Surveillance or dataveillance can have a 'chilling effect' on individuals, causing them to modify their behaviour. In this case, it is immaterial whether the person is actually being watched or not, provided there is the feeling that such a person could be watched. As aptly put by Lynskey, 'whether or not an individual is actually being monitored is not decisive in these circumstances: The mere perception of surveillance may be sufficient to inhibit individual behaviour.'⁶⁰ Specifically, such surveillance can hinder an individual's self-development because of the unconscious urge to conform to certain invisible codes or rules. As Richards puts it, surveillance threatens a value called 'intellectual privacy' which is a theory that suggests that new ideas are most likely developed away from intense public scrutiny.⁶¹ It is here that Jeremy Bentham's famous Panopticon finds relevance.⁶² Even if one is actually not being watched, that unconscious feeling that there is a possibility of being monitored has a

58 Eg, sec 37 of the Constitution of the Federal Republic of Nigeria 1999 guarantees the right to privacy, and this right is limited by the effects of sec 45.

59 See eg M Tzanou 'Data protection as a fundamental right next to privacy? Reconstructing a not so new right' (2013) 3 *International Data Privacy Law* 99; J Kokott & C Sobotta 'The distinction between privacy and data privacy in the jurisprudence of the CJEU and ECtHR' (2013) 3 *International Data Privacy Law* 222; LA Bygrave 'The place of privacy in data protection law' (2001) 24 *UNSW Law Journal* 277.

60 O Lynskey 'Deconstructing data protection: The "added-value" of a right to data protection in the EU legal order' (2014) 63 *International and Comparative Law Quarterly* 589.

61 NM Richards 'The dangers of surveillance' (2013) 126 *Harvard Law Review* 1946.

62 See JH Reiman 'Driving to the Panopticon: A philosophical exploration of the risks to privacy posed by the highway technology of the future' (1995) 11 *Santa Clara Computer and High Technology Law Journal* 27 35.

significant impact on an individual's way of life. This definitely has an impact on the exercise of other rights guaranteed in a democratic society, such as freedom of liberty, association and assembly.

The UN recently acknowledged the potential impact of states' massive surveillance capabilities and its privacy implications in a General Assembly Resolution. Adopted in December 2013, the Resolution called on states 'to respect and protect the right to privacy', especially in the context of electronic surveillance and digital communications.⁶³ In a way, the Resolution effectively alerts states to take heed of their obligations to respect the rule of law, especially in their electronic surveillance practices.

Privacy, as stated earlier, is not the only right affected by the increasing use of electronic surveillance in sub-Saharan Africa. Other human rights are also under threat, either independent of privacy or because privacy is a gateway to the realisation of these rights.⁶⁴ In particular, electronic surveillance affects the right to freedom of association and assembly, freedom of thought, conscience and religion and freedom of expression.⁶⁵ For example, a report has shown that the Ugandan government under President Museveni's direction dismantled the post-election protest movement using surveillance spyware.⁶⁶ This same spyware was also used to suppress free speech and legitimate freedom of expression.⁶⁷

In recognition of the nexus between privacy and other human rights, the UN General Assembly, in a recent resolution on the promotion, protection and enjoyment of human rights on the internet, noted that 'privacy online is important for the realisation of the right to freedom of expression and to hold opinions without interference, and the right to freedom of peaceful assembly and association'.⁶⁸

Increased mass surveillance could lead to discrimination, thereby affecting the right against discrimination, which is equally guaranteed by the constitutions of countries in the sub-Saharan region.⁶⁹ The right against discrimination seems to be one of the most threatened human rights resulting from dataveillance. According to Roos, the information gathered may be incomplete, inadequate, accessed without authorisation or even destroyed.⁷⁰ Making a decision or

63 UNGA Resolution 68/167 The right to privacy in the digital age <https://ccdcoe.org/sites/default/files/documents/UN-131218-RightToPrivacy.pdf> (accessed 1 October 2017).

64 P Bernal 'Data gathering, surveillance and human rights: Recasting the debate' (2016) 1 *Journal of Cyber Policy* 245.

65 For more on this, see generally Bernal (n 64 above).

66 PI (n 26 above).

67 As above.

68 UNGA (n 63 above).

69 See sec 42 of the Nigerian Constitution; sec 4 of the South African Constitution.

70 A Roos 'The law of data (privacy) protection: A comparative and theoretical study' unpublished LLD thesis, University of South Africa 2003 6.

forming an opinion based on such erroneous details may lead to discrimination against an individual. Similarly, electronic surveillance facilitates profiling (like terrorism profiling) and dealing with an individual based on such a profile, with the high possibility of errors.

4.2 Lack of transparency

Because of national security and law enforcement justifications, electronic surveillance programmes usually are shrouded in mystery. This is why it is very difficult to document its practices. For example, it took a meticulous and bold media network to reveal the manner in which the former Nigerian President authorised the electronic surveillance of Nigerians' activities online. But for such a revelation, one would find it difficult to believe that this actually exists. Commenting on the problem of lack of transparency with regard to surveillance programmes, the former UN High Commissioner for Human Rights, Ms Navi Pillay, observed:⁷¹

[T]he secretive nature of security surveillance in many places inhibits the ability of legislatures, judicial bodies and the public to scrutinise state powers. This lack of transparency, together with a lack of clear and appropriate limitations to surveillance policies and practices, creates serious obstacles to ensuring that these powers are not used in an arbitrary or indiscriminate manner.

No doubt, one of the essential principles of the rule of law is transparency in not only law and policy making, but also activities of the government. Indeed, the UN, in its definition of the rule of law, includes 'legal and procedural transparency'.⁷² This also serves to further curtail the powers of potential autocrats. Transparency in government activities is a necessity in a democratic society. It also brings about accountability. Electronic surveillance naturally leads to abuse when one cannot even be aware of its existence, let alone question its rationale or the justification.

Transparency is one of the key principles of data protection law being a part of the fair information principles (FIPs). It is for this reason that some argue that the FIPs in data protection laws are not mere procedural requirements but aspects of the rule of law. Austin contends that the FIPs 'which underpin our data protection statutes, are better understood in rule of law terms than in terms of privacy'.⁷³

71 See Ms Navi Pillay Opening remarks (n 29 above).

72 United Nations Security Council (UNSC) Report of the Secretary-General *The rule of law and transitional justice in conflict and post-conflict societies* 4 http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616 (accessed 1 October 2017).

73 LM Austin 'Enough about me: Why privacy is about power, not consent (or harm)' in A Sarat (ed) *World without privacy?: What can/should law do* (2014) 131.

4.3 Restriction of judicial intervention and access to justice/lack of judicial oversight

Although it is difficult to find cases on electronic surveillance that have come before the courts in the sub-Saharan region, some inferences may be made from other jurisdictions since the approaches toward national security issues are basically the same. When it comes to anything that concerns national security, courts most likely will dismiss challenges to such programmes for lack of standing on the basis that mere surveillance creates no harm *per se*.⁷⁴ In any case, surveillance practices can only be challenged if they are known.⁷⁵ Similarly, in considering measures to curb criminal activities such as terrorism, members of the judiciary usually are sworn partners of the executive and would not want to be seen as an obstacle to the realisation of national security. This definitely amounts to a restriction on access to justice, which is one of the cardinal requirements of the rule of law. In this way, electronic surveillance, especially those justified for national security purposes, impinges on the rule of law in sub-Saharan Africa.

4.4 Prevalence of statutory exemptions and its impact on the rule of law

Even in enacting laws that have to do with upholding the rule of law in electronic surveillance practices, legislatures are quick to insert broad exceptions, sometimes for the flimsiest of reasons. This is not only true for provisions on fundamental human rights in the bill of rights, but also for other laws and policies on electronic surveillance. For example, after providing very extensive and robust principles on protection of personal information, the South African Protection of Personal Information Act (POPIA) provides that the processing of personal information (say by means of electronic surveillance) will not be considered in breach of the conditions stated if the Regulator⁷⁶ is 'satisfied' that 'the public interest in the processing outweighs, to a substantial degree, any interference to privacy of the data subject that could result from such processing'.⁷⁷

Obviously frustrated by the ease in which the rule of law may be suspended in legislation, Sellers notes:⁷⁸

Scholars may sometimes advocate partial departures from the rule of law, or its incomplete realisation, or its differing application in different societies, because of transient or unfortunate circumstances, but no one can deny that every departure from the rule of law is a denial of justice.

74 See the US case of *Clapper v Amnesty International* 568 US 398 (2013).

75 Richards (n 61 above) 1934.

76 This is the public agency in charge of administering the South African data protection law.

77 Sec 37 Protection of Personal Information Act of South Africa 4 of 2013.

78 M Sellers 'An introduction to the rule of law in comparative perspective' in M Sellers & T Tomaszewski (eds) *The rule of law in comparative perspective* (2010) 9.

The ultimate goal of every society and every legal system should be equal and impartial justice for all. *Imperia legume potentiora quam hominumesto.*

4.5 Electronic surveillance, the rule of law and independence of the judiciary

Recently in Nigeria, the rule of law was put to the test in relation to the requirement of independence of the judiciary or non-interference with the judiciary. There was a crackdown on 'corrupt' judges by security agencies. Part of the strategies adopted by the security agencies was the monitoring of their 'expensive' and 'luxurious' lifestyles, including the monitoring of their bank accounts and call logs. Their houses were raided at very odd hours. The Nigerian Judicial Council (NJC), the judicial regulator in the country, described the raids as 'the height of impunity' and an 'attempt to intimidate the judiciary'.⁷⁹ The NJC also seriously berated those acts and unequivocally stated that 'it will not allow the independence of the judiciary, or its impartiality to be mocked by the SSS [State Security Service] or any arm of government'.⁸⁰ In a sharp turnaround of events, one of the judges who was on the watch list was discharged and acquitted along with two other accused persons. In his ruling, the trial judge held that 'the prosecution has failed to establish any *prima facie* case against the defendants'.⁸¹ The use of surveillance in this particular context raises a number of issues with respect to the rule of law in Nigeria. First, security agencies are willing to act on evidence emanating from surveillance with any serious investigation. Second, and more disturbing, is the fact that even the mere allegation of corruption which is not substantiated by credible evidence can be used as a basis for interference with judicial independence. Indeed, based on the evidence gathered from various sources, including electronic surveillance, these judges were suspended from office for quite some time.

The above should not be taken as being in support of corruption in the judiciary. The argument here is that placing heavy reliance on the evidence from electronic surveillance by security agencies could be a challenge to the rule of law, as is demonstrated by the discharge and acquittal of the judge mentioned above. In the case of clear unequivocal evidence, nobody will argue against the actions of security agencies or the government. For example, a situation similar to the Nigerian case also occurred in Ghana where an investigative journalist, Anas Aremeyaw Anas, used electronic surveillance material

79 E Okakwu 'NJC formally replies SSS, says arrest of judges "denigration of judiciary"' <http://www.premiumtimesng.com/news/headlines/212733-njc-formally-replies-sss-says-arrest-judges-denigration-judiciary.html> (accessed 1 October 2017).

80 As above.

81 CA Oloyede 'BREAKING: Justice Ademola, wife, SAN discharged, acquitted' *Daily Trust* 5 April 2017 <https://www.dailytrust.com.ng/news/law/breaking-justice-ademola-wife-san-discharged-acquitted/192239.html> (accessed 1 October 2017).

to implicate some senior judges in bribery scandals. Anas said that 'he ha[d] nearly 500 hours of video evidence on tape, showing judges allegedly asking for bribes and demanding sex'.⁸² It was on the basis of this documentary evidence that 22 judges were suspended. In this case, there was no reason to question the use of electronic surveillance since the evidence was stated to be 'very clear' and 'incontrovertible'.

Overall, the state must be very careful in relying on evidence obtained from electronic surveillance when dealing with judges. Judges have a higher duty to the state and, as such, their independence must be jealously guarded. Besides, accusing judges of corruption based on unsubstantiated evidence obtained from electronic surveillance can lead to a loss of confidence by the public in the judiciary. In many cases, these judges are subjected to large-scale media trials. All these have a multi-dimensional impact on the rule of law in the country.

4.6 Propensity for massive abuse of power by government

One of the greatest dangers which electronic surveillance poses to the rule of law is the propensity for massive abuse of power by state authorities. This is all the more disturbing considering that most governments in the sub-Saharan region are working hard towards the harmonisation of the databases of the key public agencies. These databases of course will be easily accessible by a mere click, using unique identifiers on the internet. For example, the Nigerian President recently directed all agencies involved in the processing of biometric information to harmonise their databases.⁸³ This means that the government will effectively have almost every kind of information on its citizens which is hosted on clouds on the internet. This situation naturally gives the government untold powers over its citizens with a high probability of abuse. Indeed, it has been rightly noted that 'government surveillance of the internet is a power with the potential for massive abuse. Like its precursor of telephone wiretapping, it must be subjected to meaningful judicial process before it is authorised'.⁸⁴

The threat which these harmonised databases pose, coupled with the possibility of monitoring, is one dimension to this challenge. It must also be considered that such electronic databases can also be a source of danger to individuals, especially if they are accessed by

82 'Ghana suspends High Court judges after Anas Aremeyaw Anas' film' <http://www.bbc.com/news/world-africa-34452768> (accessed 1 October 2017).

83 These agencies include NIMC, FRSC, NCC and INEC. See N Ibeh 'FRSC, NIMC to harmonise biometric data' <https://www.premiumtimesng.com/news/more-news/189110-frsc-nimc-to-harmonize-biometric-data.html> (accessed 1 October 2017). Some agencies have already complied; see NIMC 'NIMC and INEC comply with presidential directive on harmonisation of biometric data: Set up joint technical committee' <https://www.nimc.gov.ng/nimc-and-inec-comply-with-presidential-directive-on-harmonisation-of-biometric-data-set-up-jointtechnical-committee/> (accessed 1 October 2017).

84 Richards (n 61 above) 1961.

unscrupulous persons or foreign governments. Such 'big data' facilitates 'mass surveillance' and exposes individuals to other unanticipated risks. It is probably the realisation of the potential dangers of these databases that data protection instruments hold data controllers (in this case, the government) to task when it comes to the standard of security safeguard of electronic databases. For example, the South African POPIA requires strict protection of the information in the hands of the government based on sections 19 to 22.⁸⁵ Regionally, the AU Data Protection Convention also requires in article 21 that state governments 'must take all appropriate precautions, according to the nature of the data, and in particular, to prevent such data from being altered or destroyed, or accessed by unauthorised third parties'.

4.7 Increase in asymmetric relationship between the people and the government

For the rule of law to prevail in a society, there has to be some form of evenness between the government and the governed. The authority the state wields over the people itself is enough to always tilt power in its favour. The rule of law, therefore, seeks to ensure that this critical balance is maintained irrespective of the inherent powers of the state. When a government has substantial information about its people and is willing to gather more, this will definitely tilt power in favour of the government. As it is often said, 'information is power and more information is more power'. Electronic surveillance has the intrinsic capability of generating so much information for the government in this era of 'big data'. This is more disturbing in view of the significant efforts made by state governments to harmonise their databases. In this regard Richards observes:⁸⁶

A second special harm that surveillance poses is its effect on the power dynamic between the watcher and the watched. This disparity creates the risk of a variety of harms, such as discrimination, coercion, and the threat of selective enforcement, where critics of the government can be prosecuted or blackmailed for wrongdoing unrelated to the purpose of the surveillance.

The foregoing has shown how electronic surveillance impacts on the rule of law in sub-Saharan Africa. The next part considers how to entrench the rule of law in the practice of electronic surveillance.

85 Protection of Personal Information Act 4 2013.

86 Richards (n 61 above) 1935.

5 Measures to entrench the rule of law in electronic surveillance and the challenges for sub-Saharan African states

While admitting that electronic surveillance is sometimes necessary for national security, its overwhelming challenges to the rule of law cannot be casually dismissed. Therefore, the question is how the principles of the rule of law can be infused into current practices to ensure that 'it does not provide the state an unlimited power to control the life of individuals'.⁸⁷ Various mechanisms are available to curtail the powers of governments in surveillance practices.

First, there is the need for countries in sub-Saharan Africa to reconsider and take seriously their international obligations. Scholars have re-emphasised the significance of international and regional frameworks in entrenching the culture of the rule of law in a country. As mentioned earlier, there is no internationally-binding treaty on electronic surveillance. However, scholars are increasingly calling for one as electronic surveillance doubtlessly is one issue which requires a concerted action at a multilateral level, especially because of its foreign dimension. Deeks, for example, using the international relations theory, argues that

[s]tates turn to international law to achieve different goals, including overcoming collective action problems, co-ordinating on issues that inherently require a multilateral approach, and signaling [sic] normative commitments. Whether one looks at the problem from a realist, institutionalist, liberalist, or constructivist perspective, there is reason to think as a positive matter that current conditions are ripe for states to employ international law to regulate foreign surveillance.⁸⁸

Quite convincing arguments were put forth by the above scholar for such an international legal framework. The justifications include the ability of states to collectively set the agenda, lessen the pressures on human rights fora and signal an underlying commitment to accountable government.⁸⁹ Nevertheless, one has strong reasons for being sceptical about the possible emergence of an international legal framework on surveillance. Electronic surveillance issues have to do with the right to privacy, and regulating privacy has over the years been a source of serious controversy. It goes without saying that when it comes to surveillance, the power brokers in the world are far from agreeing on what privacy means and how it should be protected. In this regard, for example, we find that the approach of the United States and the EU are poles apart.⁹⁰ Considering the influence of both

87 European Commission for Democracy through Law (n 2 above).

88 Deeks (n 6 above)

89 As above.

90 For more on these, or differences even among Western states, see JQ Whitman 'The two Western cultures of privacy: Dignity versus liberty' (2004) 113 *Yale Law Journal* 1151.

jurisdictions in international politics, it is unlikely that countries in sub-Saharan Africa can campaign for the adoption of an international instrument of electronic surveillance.

While we await such an internationally-binding treaty, it must be stated that there are several international instruments that create binding obligations on sub-Saharan African states in relation to electronic surveillance.⁹¹ The critical challenge for the rule of law, however, is the sub-Saharan states' unreceptive attitude towards international obligations. First, the ratification of the necessary international and regional treaties is a major problem. For example, since the adoption of the AU Data Protection Convention in 2014, only seven sub-Saharan countries have signed this Convention⁹² and one has ratified it.⁹³ Another example of this unreceptive attitude towards international obligations, and which borders directly on online surveillance, is South Africa's action in voting against the recent UN Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet in July 2016.⁹⁴ The efforts by some sub-Saharan African states to ratify the CoE's Data Protection Convention, which is the only international binding instrument of data protection, however, is noteworthy and commendable.⁹⁵ Second, states rarely comply with the obligations created by such instruments even when they eventually ratify them. In fact, compliance with international instruments is an obvious challenge to most African states. In this regard, Viljoen notes that 'the greatest challenge [in Africa] is to bring about compliance with the treaty provisions by government officials and nationals alike'.⁹⁶ The dualist approach to international agreements in most sub-Saharan African states further compounds this problem.⁹⁷ For an international treaty to be binding and enforceable in a state, it must not only be ratified but must be domesticated.⁹⁸

91 As discussed in part 2.4 above.

92 See https://www.au.int/web/sites/default/files/treaties/29560-sl-african_union_convention_on_cyber_security_and_personal_data_protection_.pdf (accessed 30 September 2017).

93 Only Senegal, based on records made available by the AU. This is another clear example of the unreceptive attitude toward privacy.

94 'Freedom on the net 2016' (n 23 above).

95 Sub-Saharan states such as Mauritius, Senegal, Burkina Faso and Cape Verde. See generally AB Makulilo 'African accession to Council of Europe Privacy Convention 108' (2017) 41 *Datenschutz und Datensicherheit – DuD* 364-367.

96 F Viljoen *International human rights in Africa* (2012) 25.

97 For more on the problems of attitude towards African states to international legal obligations, especially in relation to data protection, see LA Abdulrauf & CM Fombad 'The African Union Data Protection Convention: A possible cause for celebration of human rights in Africa' (2016) 8 *Journal of Media Law* 67.

98 See eg sec 12 of the Nigerian Constitution.

In all, it must be re-emphasised that while the right to privacy under international human rights law is not absolute, any instance of interference must be subject to a careful and critical assessment of its necessity, legitimacy and proportionality.⁹⁹ This justifies the need for independent oversight and enforcement institutions and a strong judiciary.

Besides international instruments as a means of curbing the excesses of arbitrary states in electronic surveillance practices, other measures are available. Constitutions also have a key role to play. Indeed, the constitution is probably the strongest instrument to foster the rule of law. This fact is further confirmed by constitutions like that of South Africa where it provides, in section 1(c), that South Africa is founded on the supremacy of the Constitution and the rule of law. Constitutions, in their guarantee of the right to privacy, also constitute one of the measures for the regulation of electronic surveillance. Therefore, electronic surveillance must not only be carried out with respect for the rule of law, but also for the right to privacy contained in the constitution. However, there are two main challenges in this respect: The first is the national security justification. Most constitutions, although guaranteeing the right to privacy, provide derogations, which are usually unreasonably relied upon by the government and its security agencies. However, it has been stated that 'it is not acceptable to use national security concerns as a blanket justification to excuse unwarranted privacy breaches'.¹⁰⁰ A second challenge with constitutions as a means of fostering the rule of law in electronic surveillance practices in sub-Saharan African is well captured by a commentator in the following terms:¹⁰¹

Although many African countries have excellent constitutions providing for the protection of fundamental rights and freedoms, it is disheartening to note that these rights are in some instances not respected in reality. Wanton disregard of the rights of the citizenry, principally by the executive, is a phenomenon which can be noted amongst some African states. This situation ultimately stems from skewed implementation of the separation of powers doctrine, characterised by timid judiciaries and legislatures run by the executive.

Yet another measure to infuse the rule of law principle in electronic surveillance in sub-Saharan Africa is a clearly-drafted surveillance law (or provisions). According to Dicey, one of the foundations of the rule of law is that states must consider making laws which sincerely show a willingness to limit the discretion of public officials.¹⁰² These rules must also be made as clear and as transparent as possible. It goes without saying that incorporating the rule of law in surveillance

99 Ms Navi Pillay 'Opening remarks' (n 29 above).

100 A Gwagwa & A Wilton 'Protecting the right to privacy in Africa in the digital age' <http://www.hrforumzim.org/wp-content/uploads/2014/06/Protecting-the-right-to-privacy-in-Africa-in-the-digital-age.pdf> (accessed 1 October 2017).

101 Shivute (n 51 above) 218.

102 Dicey (n 50 above).

practices requires that the laws and policies are clear as legal certainty itself is one of the benchmarks for the rule of law.¹⁰³ A major problem with respect to laws and policies on surveillance, according to the UN Special Rapporteur, is that they are obsolete and hardly ever clear.¹⁰⁴ For example, as noted above, none of the normative framework defines 'electronic surveillance' in spite of its wide usage.

One more point to note with regard to the law regulating surveillance is the significance of data protection instruments. It is apposite to state that data protection instruments are more properly placed to ensure that surveillance is carried out in accordance with the rule of law. Indeed, most of the discourses on surveillance and the law are carried out within the context of privacy and data protection.¹⁰⁵ This is not surprising, considering that in most cases surveillance involves the accumulation of personal information which falls within the scope of data protection law. Furthermore, data protection instruments contain principles such as legality and proportionality which are ordinarily meant to foster the rule of law. What this implies is that all African states must attempt to put in place data protection instruments based on their obligations under the AU Convention on data protection and other regional treaties.

Third, independent data protection authorities/agencies (DPAs) are indispensable in fostering the rule of law regarding electronic surveillance in Africa. This point is justified by the fact that authors are increasingly identifying independent enforcement institutions as paramount for democracy and constitutionalism in Africa.¹⁰⁶ Regarding electronic surveillance, no institution is better placed to curb the excesses of state governments than truly independent DPAs. This is so for two reasons: First, DPAs, by their architecture, are supposed to be composed of specialists in identifying when an information processing programme is *ultra vires*. Second, they are

103 European Commission for Democracy Through Law (n 2 above).

104 'Legal standards are either non-existent or inadequate to deal with the modern communications surveillance environment. As a result, states are increasingly seeking to justify the use of new technologies within the ambits of old legal frameworks, without recognising that the expanded capabilities they now possess go far beyond what such frameworks envisaged. In many countries, this means that vague and broadly conceived legal provisions are being invoked to legitimise and sanction the use of seriously intrusive techniques' UNGA Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue para 50 13 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf (accessed 1 October 2017) 50-51.

105 See Solove (n 53 above); Bernal (n 64 above); Tzanou (n 14 above).

106 See eg CM Fombad 'The role of emerging hybrid institutions of accountability in the separation of powers scheme in Africa' in CM Fombad (ed) *Separation of powers in African constitutionalism* (2016) 325.

independent of government to ensure objectivity in their actions.¹⁰⁷ Even the UN General Assembly in a resolution called on states

[t]o establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for state surveillance of communications, their interception and the collection of personal data.¹⁰⁸

Similarly, Navi Pillay drew attention to the challenge of infusing the rule of law principles in electronic surveillance without an effective enforcement mechanism.¹⁰⁹ She contended that 'a lack of effective oversight and review to monitor compliance and enforcement contributes to a lack of accountability for arbitrary or unlawful intrusions on the right to privacy'.¹¹⁰ She further expressed the view that 'internal safeguards without independent, external monitoring are ineffective against the abuse of surveillance methods'.¹¹¹ With regard to external monitoring specifically, the AU has been criticised for adopting a data protection treaty without specific provisions for a region-wide monitoring institution.¹¹²

A fourth measure is the need for a strong judiciary. Indeed, while there are no settled approaches in realising the rule of law, the role of a strong judiciary is incontrovertible.¹¹³ Therefore, judges and courts must recognise their crucial role as agents in promoting the rule of law. They should also be protectors of rights and liberties while upholding the law. This may be somewhat problematic for the rule of law, as observed by Graver, as 'sometimes these two expectations are in conflict'.¹¹⁴ What should a judge do when faced with an electronic surveillance regulation (for national security purposes) which affects human rights and civil liberties? Should they uphold the law or let human rights prevail? According to Graver, 'the judge has to choose whether to side with the legislator or to side with the ideals of the rule of law'.¹¹⁵ This means that the court must act according to three principles which are essential to a judiciary committed to the rule of

107 See G Greenleaf 'Independence of data privacy authorities: International standards' (2012) 28 *Computer Law and Security Review* 3; G Greenleaf 'Independence of data privacy authorities: International standards and Asia-Pacific experience' (2012) 28 *Computer Law and Security Review* 3.

108 UNGA (n 63 above).

109 Ms Navi Pillay 'Opening remarks' (n 29 above). See art 10 <http://www.achpr.org/instruments/child/#a10> (accessed 1 October 2017).

110 As above.

111 As above.

112 See Abdulrauf & Fombad (n 97 above) 91.

113 HP Graver *Judges against justice: On judges when the rule of law is under attack* (2015) 1, where Graver elaborately considered the role of the judge when confronted with autocratic or oppressive rules. See also SD O'Connor 'Vindicating the rule of law: The role of the judiciary' (2003) 2 *Chinese Journal of International Law* 1.

114 As above.

115 As above.

law: independence, integrity and competence.¹¹⁶ It is also submitted that this kind of situation calls for judges to be meticulous and proactive.

Fifth is the role of civil society organisations (CSOs), non-governmental organisations (NGOs) and the media. In the words of Shivute:¹¹⁷

These organisations play a crucial role as they take on the responsibility of being watchdogs, tasked with ensuring that governments live up to their obligations. It goes without saying that critical voices are a necessary component to any democratic state.

There are several CSOs and NGOs that play the critical role of infusing the rule of law in surveillance practices of the government. The role of the media also cannot be overemphasised. Together, all these institutions have helped to expose the surveillance programmes of governments in the sub-Saharan region which, as observed earlier, are covert in nature. In particular, the role of CSOs such as the Electronic Frontier Foundation (EFF);¹¹⁸ the Electronic Privacy Information Centre (EPIC);¹¹⁹ Privacy International (PI);¹²⁰ and Global Internet Liberty Campaign (GILC),¹²¹ is noteworthy.

In concluding this section, it is important to make two points. First, the tension between surveillance and the rule of law can be significantly reduced if it is not used as an instrument of first resort. Thus, electronic surveillance as an investigative tool in the context of law enforcement should only be used when other 'less intrusive means have proven ineffective or when there is no reasonable alternative to obtain crucial information or evidence'.¹²² Second, surveillance practices must comply with the principles of necessity and proportionality. In this regard, the International Principles on the Application of Human Rights to Communications Surveillance is noteworthy.¹²³ This is a set of principles resulting from a global consultation with civil society groups, industry and international experts in communications surveillance law, policy and technology. The principles are legality; legitimate aim; necessity; adequacy; proportionality; competent judicial authority; due process; user notification; transparency; public oversight; integrity of

116 O'Connor (n 113 above) 1. According to O'Connor, '[d]espite the important differences among nations, and legal systems, these bedrock principles have proven themselves indispensable in upholding the rule of law'.

117 Shivute (n 51 above) 218.

118 <https://www.eff.org/> (accessed 1 October 2017).

119 <https://epic.org/#> (accessed 1 October 2017).

120 <https://www.privacyinternational.org/> (accessed 1 October 2017).

121 See <http://gilc.org/> (accessed 1 October 2017).

122 UNODC (n 7 above).

123 Otherwise called the 'Necessary and Proportionate Principles' or '13 Principles'. This is a set of 13 principles which came out from a global consultation with civil society groups, industry and international experts in communications surveillance law, policy and technology.

communication and systems; safeguards for international co-operation; and safeguards against illegitimate access.¹²⁴ In a nutshell, it is submitted that these principles appropriately embody the idea of the rule of law in respect of electronic surveillance.

6 Conclusion: The future of electronic surveillance and the rule of law in sub-Saharan Africa

The above has made one point clear, namely, that the increasing use of electronic surveillance significantly undermines the rule of law in sub-Saharan Africa and this seems to be taken for granted by both the people and the governments. It has been argued that the debates with regard to the link between electronic surveillance and the rule of law far transcend privacy intrusions. The rule of law itself is an independent democratic ethos which is also significantly affected in that surveillance gives states (or individual surveilling) untold powers which is susceptible to abuse. This is true especially when presented with a national security justification. As most reports show, the rule of law has not fared well in sub-Saharan Africa, although no serious consideration has been given to the kind of threats electronic surveillance poses to rule of law. Yet, it is obvious that any further analysis of the rule of law in sub-Saharan Africa must pay specific attention to the impact of increasing electronic surveillance. There is no better time for that to be done in the region than now.

124 International Principles on the Application of Human Rights to Communications Surveillance <https://www.eff.org/files/necessaryandproportionatefinal.pdf> (accessed 1 October 2017). For more on the principles, see EFF *Necessary and proportionate: International principles on the application of human rights law to communications surveillance* <http://www.ohchr.org/Documents/Issues/Privacy/ElectronicFrontierFoundation.pdf> (accessed 1 October 2017).

The right to privacy in the age of surveillance to counter terrorism in Ethiopia

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Summary

Despite being a useful tool to prevent and prosecute terrorism, surveillance is increasingly being utilised as an excuse for infringements on privacy in several jurisdictions. Laws governing counter-terrorism surveillance either are not in compliance with human rights standards governing privacy or inappropriately implemented. Research on the relevant law and practice in Ethiopia is limited. This article identifies legal and practical problems causing violations of the right to privacy while countering terrorism in Ethiopia. In doing so, it evaluates the human rights compatibility of the relevant law and practice mainly based on article 17 of the ICCPR. The analysis is substantiated by an empirical study involving key informant interviews and case file reviews from Ethiopian courts. Legitimate counter-terrorism surveillance should respect the right to privacy. A state may implement counter-terrorism surveillance only when it is properly defined by law and reasonably applied. Prior judicial authorisation of covert interceptions is usually regarded as a safeguard to prevent the misuse of counter-terrorism surveillance. Ethiopia does not have a law regulating mass surveillance in the absence of a specific terrorism threat. However, reports suggest that the Ethiopian government has unrestricted access to private communications since it monopolises telecommunications and postal services. Counter-terrorism related surveillance, however, is legally regulated in Ethiopia. Ethiopian law requires that law enforcement agencies may conduct the interception of communications on terrorist suspects upon getting a court warrant. Nonetheless, evidence suggests that, in practice, there is widespread use of warrantless interceptions

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which are used as prosecution evidence in defiance of the law. This article may serve to assess and improve counter-terrorism surveillance in Ethiopia so that the law and its implementation reflect the values of a democratic society based on the rule of law and respect for the right to privacy.

Key words: *Ethiopia; Anti-Terrorism Proclamation; counter-terrorism surveillance; mass surveillance; targeted surveillance*

1 Introduction

Counter-terrorism-related surveillance is one of the prominent contemporary challenges in the exercise of the right to privacy. This article examines state surveillance in Ethiopia and assesses its compatibility with the right to privacy. The use (abuse) of surveillance and intercepted communications in terrorism-related criminal proceedings will particularly be analysed based on relevant Ethiopian laws and international human rights instruments ratified by Ethiopia. Ethiopia is a party to the International Covenant on Civil and Political Rights (ICCPR)¹ and the African Charter on Human and Peoples' Rights (African Charter).² International human rights instruments ratified by Ethiopia form part of the law of the land.³ Indeed, the Federal Democratic Republic of Ethiopia Constitution (Ethiopian Constitution)⁴ provides that its human rights provisions should be interpreted in conformity with international human rights covenants adopted by Ethiopia.⁵ The human rights compatibility assessment in the article, therefore, will be done by analysing the relevant provisions of the ICCPR and associated jurisprudence. The African Charter does not specifically recognise the right to privacy. Although the Ethiopian Constitution recognises the right to privacy, there are no relevant cases and jurisprudence.⁶ Therefore, due to the depth of the jurisprudence under the ICCPR, most of the analysis in the article draws from the ICCPR. Reference to the African Charter and the Ethiopian Constitution will be made whenever necessary.

In addition to the doctrinal analysis of the relevant Ethiopian laws and international human rights covenants, the analysis in the article will be substantiated by empirical data collected in Ethiopia between

1 International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A of 16 December 1966 (ICCPR).

2 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 June 1981.

3 Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995, Federal Negarit Gazeta, 1st Year No 1 (Ethiopian Constitution).

4 Art 9(4) Ethiopian Constitution.

5 Art 13(2) Ethiopian Constitution.

6 G Timothewos 'Freedom of expression in Ethiopia: The jurisprudential dearth' (2010) 4 *Mizan Law Review* 201 231. Timothewos explains that there is a serious lack of cases and jurisprudence explaining the freedom of expression provision of the Ethiopian Constitution. Therefore, the dearth of cases and jurisprudence based on the provision regarding the right to privacy in the Constitution is not unique.

February and May 2016. The empirical data includes interviews with judges, prosecutors, defence lawyers and police officers who have first-hand terrorism-related experience, as well as relevant case file reviews at Ethiopian federal and regional courts. The data collection was made pursuant to a human ethics approval to ensure research integrity and participants' safety.⁷ The interviews accordingly are anonymised to prevent interviewees from being identified.

The article begins with a brief overview of terrorism threats in Ethiopia and the Anti-Terrorism Proclamation, which regulates criminal justice responses to counter-terrorism in Ethiopia. It then explains the necessity of adherence to the rule of law as an important feature of an effective counter-terrorism strategy. Adherence to the rule of law requires that counter-terrorism laws and their implementation should not set aside relevant international human rights standards. Hence, the next section of the article evaluates the human rights compatibility of Ethiopia's laws regulating surveillance and interception of communications and the consequent practices. Lastly, the article finalises its arguments with concluding remarks and recommendations.

2 Brief overview of Ethiopia's terrorism threats and the Anti-Terrorism Proclamation

Terrorism is a contested subject. Attempts to adopt a universal definition of terrorism are generally unsuccessful.⁸ The political risk of taking positions on the various elements of a definition of terrorism is one of the most significant factors inhibiting agreement on a universal definition of terrorism.⁹ One of these divisive issues is whether terrorism should be defined in a manner that includes both state and non-state terrorism. Some scholars argue that terrorism should be defined in an actor-neutral approach, including state terrorism.¹⁰ Others argue against the inclusion of state terrorism, alleging that it will only complicate efforts in defining terrorism. It has also been argued that state terrorism should be excluded since it is already regulated by rules of international humanitarian law in the context of

7 Monash University Human Research Ethics Committee approved the project for data collection in a project with reference number CF15/2367-2015000953.

8 See B Saul 'Attempts to define "terrorism" in international law' (2005) 52 *Netherlands International Law Review* 57 57-83; see also E Herschinger 'A battlefield of meanings: The struggle for identity in the UN debates on a definition of international terrorism' (2013) 25 *Terrorism and Political Violence* 183.

9 S Zeidan 'Desperately seeking definition: The international community's quest for identifying the specter of terrorism' (2004) 36 *Cornell International Law Journal* 491.

10 See, eg, M Stohl 'Yes: State terror: The theoretical and practical utilities and implications of a contested concept' in R Jackson & SJ Sinclair (eds) *Contemporary debates on terrorism* (2012) 43 44.

an armed conflict.¹¹ For any violence perpetrated by the state outside of the context of an armed conflict, the concepts of 'human rights abuses'¹² and 'crimes against humanity'¹³ regulate state actions. The term 'terrorism' is used in this article without reference to arguments pertaining to state terrorism.

The Eastern African region, where Ethiopia is located, is considered one of the major sources of global terrorism, particularly after the 1990s.¹⁴ The existence of several social and political problems creates a comfortable breeding ground for terrorism in the Eastern African region.¹⁵ In light of the complicated social, economic and political problems in the region, some have even doubted if parts of Africa, including the Eastern African region, have any hope of overcoming terrorism at all.¹⁶

The sources of the terrorism threat in Ethiopia may be summarised in three categories. These are the proliferation of insurgent groups and other political groups aiming at unconstitutional change; Somalia-based radicalised Islamic groups such as Al-Shabaab; and the threatening inter-ethnic conflicts.¹⁷ The most common source of the terrorism threat in Ethiopia is that of rebel political groups that use 'all possible means' to topple the Ethiopian government.¹⁸ The use of violence to settle political differences is not uncommon in Ethiopia.¹⁹ The relations between the government and the political opposition is

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- 11 M Williamson *Terrorism, war and international law: The legality of the use of force against Afghanistan in 2001* (2009) 67.
 - 12 See United Nations Office of the High Commissioner for Human Rights *Training manual on human rights monitoring* (2001) 10.
 - 13 See G Werle & B Burghardt 'Do crimes against humanity require the participation of a state or a 'state-like' organisation?' (2012) 10 *Journal of International Criminal Justice* 1151.
 - 14 RI Rotberg (ed) *Battling terrorism in the Horn of Africa* (2005) 94; United States Institute of Peace workshop, Special Report: Terrorism in the Horn of Africa, Washington DC January 2004 2.
 - 15 PN Lyman & JS Morrison 'The terrorist threat in Africa' (2014) 83 *Foreign Affairs* 75 76.
 - 16 See, generally, RL Feldman 'The root causes of terrorism: Why parts of Africa might never be at peace' (2009) 25 *Defence and Security Analysis* 355.
 - 17 Rotberg (n 15 above) 99. See also D Feyissa 'The experience of Gambella regional state' in D Turton (ed) *Ethnic federalism: The Ethiopian experience in comparative perspective* (2006) 208.
 - 18 See, eg, a leading opposition group in exile named Ginbot 7, which is proscribed as a terrorist organisation, which officially proclaimed the following in its political strategy: 'Owing to the peculiar situation in Ethiopia, it will be using *all possible means* as its political strategy without being constrained by the threatening measures based on "law" and other ways by the authoritarian leaders and their constituency.' Ginbot 7 official website, <http://www.ginbot7.org/> (accessed 21 October 2014). There are also a number of ethnically-organised large and small insurgent groups, all aiming at overthrowing the government with armed struggle demands ranging from secession to claims of democratic inclusion.
 - 19 See, eg, P Toggia 'The revolutionary endgame of political power: The genealogy of "red terror" in Ethiopia' (2012) 10 *African Identities* 265.

usually depicted as a mutually-destructive culture of political violence.²⁰

Terrorism-related court cases in Ethiopia to date under the Anti-Terrorism Proclamation indicate that the most common type of terrorism-related cases that reach courts is membership or participation in the activities of proscribed rebel political groups.²¹ The rebel political groups use various strategies to destabilise the Ethiopian government, including armed resistance, violent public protests and sporadic bombings. In interviews, a senior police officer at the Ethiopian Federal Police Commission stated that terrorism threats related to these groups were the most complicated and controversial type of terrorism in Ethiopia.²²

With a declared objective to prevent and prosecute acts of terrorism, the Ethiopian Parliament adopted the Anti-Terrorism Proclamation in August 2009.²³ The Proclamation is the primary legal instrument adopted to regulate terrorism-related criminal justice matters in Ethiopia. The provisions of the Ethiopian Criminal Code and Criminal Procedure Code may be applied in terrorism-related cases only when they are not inconsistent with the Proclamation.²⁴ The Proclamation defines terrorist acts and prescribes severe penalties, including capital punishment.²⁵ It criminalises the planning, preparation, conspiracy and attempt of terrorist acts, which are punishable in the same way as the actual commission of the crime.²⁶ The Proclamation also provides for other lists of criminalised activities in the context of countering terrorism in Ethiopia.²⁷

20 See, generally, N Ayele 'Legitimacy, culture of political violence and violence of culture in Ethiopia' in JE Rosenfeld (ed) *Terrorism, identity and legitimacy: The four waves theory and political violence* (2011) 212-231.

21 See, eg, *The Federal Public Prosecutor v Abebe Kassie Belay & Others* Ethiopian Federal High Court, Criminal file 149911; *The Amhara Region Public Prosecutor v Awoke Lakew Dasew & Others* Amhara Regional State Supreme Court, Criminal file 12526; *The Amhara Region Public Prosecutor v Belachew Awoke Mengist & Ashenafi Shewarke Tessema* Amhara Regional State Supreme Court, Criminal file 13952; *The Amhara Region Public Prosecutor v Taye Derbe Temeslew & Tariku Yalew Ali* Amhara Regional State Supreme Court, Criminal file 13164; *The Amhara Region Public Prosecutor v Tilahun Abebe & Others* Amhara Regional State Supreme Court, Criminal file 12527; *The Federal Public Prosecutor v Afendi Farah Mohammed Isa & Others* Ethiopian Federal High Court, Criminal file 97453; *The Federal Public Prosecutor v Abdi Mohammed Adem & Adem Ibro Mohammed* Ethiopian Federal High Court, Criminal file 124505.

22 Interview with police officer 2, Investigation of International Crimes division, Ethiopian Federal Police Commission, 24 March 2016.

23 Anti-Terrorism Proclamation 652/2009, Federal Negarit Gazeta 15th Year, No 57 (Anti-Terrorism Proclamation) Preamble.

24 Art 36 Anti-Terrorism Proclamation (n 23 above).

25 Art 3 Anti-Terrorism Proclamation.

26 Art 4 Anti-Terrorism Proclamation.

27 These offences include rendering support to terrorism; encouragement of terrorism; participation in a terrorist organisation; possessing or using property for terrorist acts; possessing and dealing with proceeds of terrorist acts; the false threat of terrorist acts; and a failure to disclose terrorist acts.

The Proclamation authorises the Ethiopian Federal Parliament with a power to proscribe and de-proscribe terrorist organisations.²⁸ Accordingly, Parliament to date has proscribed five domestic and international groups in 2011 as terrorist organisations. The proscribed groups are Ogaden National Liberation Front (ONLF); Oromo Liberation Front (OLF) and Ginbot 7 Movement for Justice, Freedom and Democracy (Ginbot 7); Al-Qaeda; and Al-Shabaab.²⁹ Although they pose security threats to Ethiopia, Al-Qaeda and Al-Shabaab are not local groups. ONLF, OLF and Ginbot 7 are domestic political groups whose leaders are in exile. These groups have committed sporadic bombings in public places, assassinated civilian government agents and attempted to destroy state-owned infrastructure.³⁰

The decision to proscribe these rebel groups is often a subject of controversy. By the time the Ethiopian Federal Parliament made the decision about proscription, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) – the leading political party in Ethiopia since 1991 – and its affiliates controlled all but two seats in Parliament. An independent member and a member of the opposition coalition, the Ethiopian Federal Democratic Unity Forum (MEDREK), were the only non-EPRDF-affiliated members of Parliament. All the EPRDF members of the House of Peoples' Representatives (HPR) and the independent candidate voted for the resolution, contending that the proscription would help in combating terrorism by the proscribed groups, which they referred to as 'anti-peace' and 'anti-development' elements.³¹ The only opposition political party member of the HPR voted against the resolution, arguing that proscription should look beyond specific actions of the nominated groups and consider the overall features of Ethiopian politics. He further noted that the proscription would be a negative step against his political party's vision to create tolerance and national consensus between political groups in Ethiopia.³² The proscription of terrorist organisations and the consequent targeted surveillance of terrorist suspects as per the Proclamation, therefore, are a subject of political controversy.

28 Art 25 Anti-Terrorism Proclamation.

29 See A media (Diretube) video report of the proscription process, http://www.diretube.com/ethiopian-news-ethiopian-parliament-named-five-groups-as-terrorist-video_6e6bc3d3c.html (accessed 9 November 2016).

30 See, eg, *The Guardian* news article, <https://www.theguardian.com/world/2007/apr/25/ethiopia> (accessed 22 October 2016), where it is stated that the ONLF attack at a Chinese-run mining site in Ethiopia killed 74 Ethiopians and foreigners working on site; *The Federal Public Prosecutor v Fekede Abdisa Gusu & Others* Ethiopian Federal High Court, Criminal file 104548 (an OLF attempt to bomb public places was foiled by the police); Patriotic Ginbot 7 official website, <http://www.patriotg7.org/?p=1101> (accessed 9 November 2016) (Ginbot 7 leader Birhanu Nega mentioned in a video message, later transcribed by his organisation's website, that roads and other infrastructure are facilitating government repression and they will be targets for destruction); Patriotic Ginbot 7 official website, <http://www.patriotg7.org/?p=1285> (accessed 16 January 2017) (Ginbot 7 takes responsibility for assassinating civilian government agents).

31 A media (Diretube) video report of the proscription process (n 30 above).

32 As above.

The Proclamation incorporates provisions aimed at facilitating state efforts to prevent, control and foil terrorism. The incorporation of such provisions is one of the justifications for the adoption of the Proclamation as a separate criminal legislation which differs from the ordinary Criminal Code, which was adopted in 2004.³³ The provisions in the Proclamation relating to surveillance and interception of communications of terrorist suspects, therefore, are considered 'new legal mechanisms' to enhance terrorism-related investigation and prosecution.³⁴

3 Adherence to the rule of law while countering terrorism

Counter-terrorism refers to the overall process to prevent terrorism, including the criminal justice and the 'war-on-terror' approaches. Former United Nations (UN) Secretary-General, Kofi Annan, identified five strategies for an effective counter-terrorism strategy. These are dissuading people from resorting to terrorism or supporting it; denying terrorists the means to carry out an attack; deterring states from supporting terrorism; developing state capacity to defeat terrorism; and defending human rights.³⁵ Mindful of the fact that many states may lack the requisite capacity and commitment, Kofi Annan identified promoting the rule of law and respect for human rights as one of the priority areas where state capacity to defeat terrorism has to be strengthened.³⁶

Terrorism is a term which is 'emotionally charged, morally laden and politically contentious'.³⁷ Efforts to counter terrorism, therefore, are most likely to be reflections of the political controversy characterising the overall terrorism and counter-terrorism narrative.³⁸ In this context, adherence to the rule of law may serve as a safeguard to prevent counter-terrorism measures from being arbitrary and unpredictable. Sellers explains how adherence to the rule of law may minimise arbitrary and unpredictable actions as follows:³⁹

The rule of law signifies 'the empire of laws and not of men': the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper

33 Preamble, para 4 Anti-Terrorism Proclamation (n 23 above).

34 As above.

35 United Nations General Assembly, Report of the Secretary-General, Uniting against terrorism: Recommendations for a global counter-terrorism strategy, A/60/825, 2006.

36 UNGA Report (n 35 above) 15.

37 VJ Ramraj et al 'Introduction' in VJ Ramraj et al (eds) *Global anti-terrorism law and policy* (2005) 2.

38 Compare B Saul *Defining terrorism in international law* (2006) 1.

39 MNS Sellers 'What is the rule of law and why is it so important?' in JR Silkenat et al (eds) *The legal doctrines of the rule of law and the legal state (Rechtsstaat)* (2014) 4.

purpose, which is the public good (*res publica*) of the community as a whole.

In a similar vein, renowned scholars in counter-terrorism and human rights studies consider respect for the rule of law as one of the most important pillars of effective counter-terrorism interventions. For example, Schmid contended that 'when rulers stand above the law and use the law as a political instrument against their opponents, the law loses its credibility'.⁴⁰ Counter-terrorism law and practice generally has been regarded as an area where governments are tempted to trespass legal limits protecting human rights in the name of countering terrorism.⁴¹ This is particularly true in the context of the right to privacy, where increasing counter-terrorism surveillance may result in unlawful and arbitrary interferences in private communications.⁴²

The concept of the rule of law is helpful to protect individuals from unconstrained governmental power.⁴³ Respect for and the protection of human rights are prominent means of ensuring restraint on governmental power and protecting individuals from abuse of power by the government.⁴⁴ States that ratify international human rights covenants have a legal duty to ensure that their counter-terrorism legislation is human rights-compliant. The practical implementation of counter-terrorism legislation, furthermore, should be in accordance with the law. While explaining the various moral traits that characterise the internal morality of the law, Fuller identified 'congruence between official action and declared rule' as the most complex of all.⁴⁵ An assessment of congruence between counter-terrorism laws and the consequent practice requires a meticulous approach. In the following sections, the law and the practice of surveillance and interception of communications to counter terrorism in Ethiopia will be assessed for compatibility with the right to privacy, as recognised in the ICCPR and the Ethiopian Constitution.

40 See, eg, AP Schmid 'United Nations measures against terrorism and the work of the terrorism branch: The rule of law, human rights and terrorism' in W Benedek & A Yotopolous-Marangopoulos (eds) *Anti-terrorist measures and human rights* (2004) 53 60.

41 See, eg, N Hicks 'The impact of counter terror on the promotion and protection of human rights: A global perspective' in RA Wilson (ed) *Human rights in the "war on terror"* (2005) 209 212.

42 See, eg, S Sottiaux *Terrorism and the limitation of rights: The ECHR and the US Constitution* (2008) 308.

43 G Lautenbach *The concept of the rule of law and the European Court of Human Rights* (2013) 23.

44 As above.

45 LL Fuller *The morality of law* (1969) 81.

4 Surveillance to counter terrorism in Ethiopia: A challenge to the right to privacy?

4.1 Right to privacy

The notion of privacy may be defined differently based on one's interpretation of what amounts to an 'individual's sphere of autonomy'.⁴⁶ It refers to an individual's 'desire for independence of personal activity, a form of autonomy'.⁴⁷ Cannataci, the UN Special Rapporteur on the Right to Privacy, noted that despite the absence of a universally-agreed definition, the concept of privacy is related to individual autonomy and self-determination.⁴⁸ He recommends that our conceptualisation of privacy be 'framed in the context of a discussion of the protection and promotion of the fundamental right to dignity and the free, unhindered development of one's personality'.⁴⁹ Privacy mainly involves what should be left only to the individual concerned. However, the conceptual understanding of the right to privacy is further obscured in this era of digital communications where the right to privacy can only protect anonymity instead of not being observed at all.⁵⁰

The African Charter does not explicitly recognise the right to privacy. However, the African Commission on Human and Peoples' Rights (African Commission) notes in a guideline⁵¹ that components of the right to privacy may be inferred from other provisions of the African Charter, which emphasise state non-interference on individual matters.⁵²

Article 26 of the Ethiopian Constitution on the right to privacy reads as follows:

- (1) Everyone has the right to privacy. This right shall include the right not to be subjected to searches of his home, person or property, or the seizure of any property under his personal possession.

46 See S Joseph & M Castan *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2013) 533-534.

47 P Rosenzweig 'Privacy and counter-terrorism: The pervasiveness of data' (2010) 42 *Case Western Reserve Journal of International Law* 625 641.

48 Joseph A Cannataci, United Nations Special Rapporteur, 'Report of the Special Rapporteur on the Right to Privacy', UN Doc A/HRC/31/64 (2016) 10.

49 As above.

50 Rosenzweig (n 47 above) 646.

51 Art 45(1)(b) of the African Charter mandates the African Commission to formulate rules, principles and standards relating to human and peoples' rights upon which African governments may base their legislation. Such guidelines are designed in accordance with the Commission's case law and resolutions as well as international human rights treaty law.

52 African Commission on Human and Peoples' Rights Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, adopted in Banjul, The Gambia, 56th ordinary session, May 2015, part 11(A).

- (2) Everyone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices.
- (3) Public officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.

Given the limited jurisprudence on the subject of the African Commission and the Ethiopian Constitution, the following commentary therefore will concentrate on the ICCPR.

Article 17 of the ICCPR provides as follows:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

In its General Comment on the right to privacy,⁵³ the Human Rights Committee (HRC) stated that the ICCPR protects individuals from unlawful and arbitrary interferences with their privacy interests from state authorities or other persons.⁵⁴ The right to privacy, thus, is not absolute and is subject to the concept that any interference must not be 'unlawful' or 'arbitrary'.

Interference in private communications is considered 'unlawful' when it is not authorised by law.⁵⁵ Any interference in private communications which is not authorised by law is a breach of the right to privacy. The mere existence of a law authorising interference in private communications, however, is not enough to comply with the ICCPR's requirement of legality. The HRC requires that a law authorising an interception in private be 'precise and circumscribed'.⁵⁶

In the case of *Pinkney v Canada*,⁵⁷ the applicant, a detainee at a regional correction centre, claimed that his correspondence had been subjected to arbitrary and unlawful interference by state authorities. The then relevant legislation provided that 'every letter to or from a prisoner shall ... be read by the warden or by a responsible officer

53 General Comments contain the Human Rights Committee's interpretations and commentaries on the various provisions of the ICCPR that address matters relevant to all state parties. General Comments are based on art 40(4) of the ICCPR and they make a significant contribution to interpreting the rights recognised in the ICCPR.

54 Human Rights Committee General Comment 16 art 17 (The right to respect of privacy, family and correspondence, and protection of honour and reputation) 1988 para 1.

55 General Comment 16 (n 54 above) para 3.

56 Joseph & Castan (n 46 above) 536; see also (1995) UN Doc CCPR/C/79/Add.54 para 19.

deputed by him for the purpose'.⁵⁸ The HRC stated that this provision failed to provide satisfactory legal safeguards against arbitrary application of the warden's power to censor mail. The HRC noted that subsequent legislation, which contained specific provisions regulating censorship of prisoners' communications, was compatible with article 17 of the ICCPR.⁵⁹ Therefore, domestic legislation authorising interception in private communications should have specific provisions to prevent an uncircumscribed application.

In addition to being lawful, an interference with private communications must not be 'arbitrary'. A lawful interference may potentially enable a 'highly oppressive invasion' of the right to privacy.⁶⁰ The HRC commented that an interference with private communications may be regarded as arbitrary even when it is envisaged by law. The requirement of non-arbitrariness means that an interference with privacy, even when authorised by law, must always be applied in a way that is reasonable in the particular circumstances of a given case.⁶¹ For instance, in *Toonen v Australia*,⁶² the HRC stated that any interference with privacy 'must be proportional to the end sought and be necessary in the circumstances of any given case'. Therefore, an interference with privacy may be considered arbitrary if those empowered to authorise the interference do not apply it with restraint. The prohibition on arbitrariness is meant to ensure reasonable applications of interferences with private communications.⁶³

The reasonableness of particular interferences with the right to privacy is determined on a case-by-case basis. The ICCPR does not list the permissible grounds that validate restrictions on the right to privacy. The HRC stated that an interference with privacy interests may be allowed only if it 'is essential in the interests of society as understood under the Covenant'.⁶⁴ Joseph and Castan argue that permissible grounds for restriction under article 17 should probably be 'proportionate measures designed to achieve a valid end'.⁶⁵ In

57 Communication 27/1978, *Larry James Pinkney v Canada*, UNHR Committee 29 October 1981 UN Doc CCPR/C/OP/1 95 (1985). The first Optional Protocol to the ICCPR gives the HRC a mandate to receive and consider communications from individuals who make complaints against a state party to the ICCPR which should also be a party to the first Optional Protocol, and recognises the HRC's mandate to entertain individual communications. When such complaints are submitted, the HRC will decide on the matter after reviewing the arguments from the author and the state party. These decisions may serve as guides to interpret the relevant provision of the ICCPR in a similar setting.

58 As above.

59 As above.

60 Joseph & Castan (n 46 above) 537.

61 General Comment 16 (n 54 above) para 4.

62 Communication 488/1992, *Nicholas Toonen v Australia*, UNHR Committee 25 December 1991 UN Doc CCPR/C/50/D/488/1992 (1994).

63 Joseph & Castan (n 46 above) 537.

64 General Comment 16 (n 54 above) para 7.

65 Joseph & Castan (n 46 above) 538.

contrast, article 26 of the Ethiopian Constitution enumerated a list of compelling circumstances which may be regarded as permissible grounds to restrict the exercise of the right to privacy. These grounds are safeguarding national security or public peace; the prevention of crimes or the protection of health; public morality; and the rights and freedoms of others.

In addition to refraining from unlawful and arbitrary interferences in privacy, state parties to the ICCPR have a positive obligation to take measures to protect privacy. Article 17(2) of the ICCPR requires that there should be a legal framework which prohibits unlawful and arbitrary interferences in privacy by third parties.⁶⁶

4.2 Mass surveillance as a challenge to privacy

Globally, counter-terrorism initiatives have complicated the relations between citizens and governments in the context of respect for and protection of the right to privacy.⁶⁷ This is due to the increasingly-expansive surveillance powers that states use with a declared objective of countering terrorism.⁶⁸ Increased surveillance powers are often justified to prevent the commission of acts of terrorism by taking proactive measures based on surveillance data.⁶⁹ Surveillance is also helpful to gather evidence which may be used to prosecute perpetrators of terrorist acts. Counter-terrorism is a legitimate objective which may be used to restrict the exercise of the right to privacy. Nevertheless, counter-terrorism surveillance must be regulated by law and applied with proportionate restraint.

Although human rights instruments require that interferences with privacy be legal and reasonable, the practice in different jurisdictions indicates that governments on many occasions employ unnecessarily invasive measures against the right to privacy in the name of countering terrorism.⁷⁰ In Africa, one specific criticism against states has been the use of counter-terrorism to prioritise regime survival over human security.⁷¹

Surveillance may take two forms in the context of counter-terrorism, namely, mass surveillance or targeted surveillance. Mass surveillance refers to 'the general practice of seeking bulk access to digital communications'.⁷² Mass surveillance is applied irrespective of

66 General Comment 16 (n 54 above) para 9.

67 F Davis et al 'Mapping the terrain' in F Davis et al (eds) *Surveillance, counter-terrorism and comparative constitutionalism* (2014) 3 4.

68 As above.

69 S Sottiaux *Terrorism and the limitation of rights: The ECHR and the US Constitution* (2008) 265.

70 Sottiaux (n 69 above) 294 308.

71 P Kagwanja 'Counter-terrorism in the Horn of Africa: New security frontiers, old strategies' (2006) 15 *African Security Review* 72 84.

72 Ben Emmerson, United Nations' Special Rapporteur, 'Report of the Special Reporter on the Promotion and Protection of Human Rights while Countering-Terrorism' UN Doc A/69/397 (2014) 5.

whether the subjects of surveillance are suspected of any involvement in terrorism. Some states utilise mass surveillance as a counter-terrorism measure to trace potential threats of terrorism. However, there are arguments that mass surveillance is not particularly helpful in preventing terrorism.⁷³ If mass surveillance does not have particular benefits in preventing terrorism, it is difficult to imagine justifications to uphold the consequent interference with the right to privacy.

The UN Special Rapporteur on Human Rights and Counter-Terrorism has noted that only a few states have adopted explicit legislation governing mass surveillance.⁷⁴ Others rely on older laws which are unable to regulate contemporary surveillance capacities.⁷⁵ In the absence of a relevant regulatory regime, mass surveillance programmes are likely to lead to breaches of the right to privacy. The Special Rapporteur on Human Rights and Counter-Terrorism has stated:⁷⁶

The absence of clear and up-to-date legislation creates an environment in which arbitrary interferences with the right to privacy can occur without commensurate safeguards. Explicit and detailed laws are essential for ensuring legality and proportionality in this context. They are also an indispensable means of enabling individuals to foresee whether and in what circumstances their communications may be a subject of surveillance.

The Special Rapporteur has furthermore indicated that mass surveillance is likely to breach the right to privacy unless a state party can substantively justify the legality, necessity and proportionality of the adoption of such a measure.⁷⁷ Since mass surveillance sometimes is utilised against the general public, without necessarily requiring the presence of imminent security threats, mass surveillance is highly problematic with regard to the right to privacy. This is because justifications for the necessity and proportionality of such measures are less likely to be demonstrated in the absence of a specific terrorism threat.

In Ethiopia, a state-owned corporation enjoys a monopoly over all telecommunications services.⁷⁸ A state-owned provider also predominantly controls postal services.⁷⁹ Ethiopia does not have specific legislation regulating the government's access to private communications through these mediums. Ethiopia has no laws specifically regulating the use of mass surveillance. In practice, the Ethiopian government has unrestricted access to all telephone call recordings and metadata, in defiance of the right to privacy.⁸⁰ It is

73 Cannataci (n 48 above) 6.

74 Emmerson (n 72 above) 14.

75 As above.

76 Emmerson (n 72 above) 14-15.

77 As above.

78 Ethio-Telecom Establishment Council of Ministers Regulation 197/2010, Federal Negarit Gazeta, 17th Year, No 11.

79 Ethiopian Postal Service Enterprise Establishment Council of Ministers Regulation 165/2009, Federal Negarit Gazeta, 15th Year, No 29.

alleged that the government abuses this access as a partisan instrument against political dissidents.⁸¹ In some cases, the political dissidents allegedly affected by intrusive surveillance are individuals who have alleged contacts with proscribed terrorist groups based in the diaspora. Some of them are leaders of registered opposition political parties with alleged links to the proscribed organisations.⁸² The level of governmental control in telecommunications is so enormous that it has created a public perception that the government monitors everyone's movements.⁸³

Mass surveillance may be an acceptable means of anticipating future security risks in some circumstances, provided that the Ethiopian government offers a particular justification. In such a case, there should be a legislative framework to regulate its application and provide a chance for an open evaluation of the system from a human rights perspective.⁸⁴ The practice of mass surveillance without a legal basis circumscribing its application does not comply with requirements regarding lawfulness in article 17(1) of the ICCPR. Furthermore, the absence of a legislative framework to regulate mass surveillance by the government and other persons is a breach of article 17(2) of the ICCPR and article 26 of the Ethiopian Constitution.

4.3 Targeted surveillance as a challenge to privacy

Targeted surveillance refers to the process whereby law enforcement agencies survey an individual or a group with a view to monitoring and documenting their activities.⁸⁵ Such surveillance generally is regarded as legitimate as long as a person is reasonably suspected of involvement in terrorism.⁸⁶ However, targeted surveillance should be implemented with restraint and be applied only when necessary.

As opposed to cases of mass surveillance, which are not addressed in the Ethiopian Anti-Terrorism Proclamation or elsewhere in Ethiopian law, the Proclamation places limits upon the exercise of targeted surveillance against terrorist suspects in Ethiopia. Specifically, the Proclamation empowers the police and the National Intelligence and Security Services (NISS) to intercept the communications of, or conduct surveillance on, anyone suspected of terrorism.⁸⁷ The police and NISS may enter into any premises in secret or install or remove instruments to enforce or enable the interception.⁸⁸ The Proclamation

80 Human Rights Watch Report *They know everything we do: Telecom and internet surveillance in Ethiopia* (2014) 36.

81 HRW Report (n 80 above) 14-19.

82 As above.

83 As above.

84 See Ben Emmerson, United Nations Special Rapporteur, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' UN Doc A/HRC/34/61 (2017) 12.

85 Emmerson (n 72 above) 3.

86 Emmerson 12.

87 Art 14(1) Anti-Terrorism Proclamation (n 23 above).

obliges all communication service providers to co-operate with the NISS to conduct interceptions.⁸⁹ It provides that the purpose of the interception or surveillance should be the prevention or control of acts of terrorism.⁹⁰ To prevent misuse of surveillance data, the Proclamation requires that 'information obtained through interception shall be kept in secret'.⁹¹ It should be noted that the requirement of secrecy will not be relevant if evidence based on interception is later made part of prosecution evidence in a terrorism-related trial. In all other cases, the police and NISS should prevent intercepted data from being made publicly available.

One of the procedural safeguards established by the Proclamation to ensure the legality and reasonableness of an interference with privacy in the context of counter-terrorism is the requirement of independent prior authorisation of the interference.⁹² In Ethiopia, a court warrant is required for the police or the NISS to conduct interception and surveillance against a terrorist suspect.⁹³ The Proclamation requires that the court consider two factors before issuing a warrant for a covert search and seizure. The first is the gravity of the suspected or committed terrorist act; second, the court will consider the contribution of the warrant to the prevention of an act of terrorism or in order to apprehend a terrorist suspect.⁹⁴

The UN Special Rapporteur on Privacy indicates that a reasonable suspicion of involvement in terrorism and prior judicial authorisation may constitute a valid reason to interfere in privacy.⁹⁵ However, the Proclamation fails to specify the standard of suspicion in this regard. It is thus not clear whether courts should consider a reasonable standard of suspicion as the acceptable ground to seek a warrant for covert interception of communications, or whether something short of this would suffice. In the absence of express language regarding the standard of suspicion required, unsubstantiated or unreasonable suspicions arguably could be used as justifications to interfere in privacy under Ethiopian law.

The Proclamation states that evidence gathered through interception or surveillance is admissible in terrorism-related criminal proceedings.⁹⁶ Indeed, intercepted communications form part of the evidence in many terrorism-related cases.⁹⁷ However, it appears that

88 As above.

89 Art 14(3) Anti-Terrorism Proclamation.

90 Art 14(4) Anti-Terrorism Proclamation.

91 Art 14(2) Anti-Terrorism Proclamation.

92 Compare Emmerson (n 77 above) 3.

93 Art 14 Anti-Terrorism Proclamation.

94 Art 18(1) Anti-Terrorism Proclamation.

95 Cannataci (n 48 above) 13.

96 Art 23(3) Anti-Terrorism Proclamation.

97 Interview with Judge 2, Ethiopian Federal High Court judge, Lideta sub-city, Addis Ababa, Ethiopia 9 March 2016. See also the following cases: *The Federal Public Prosecutor v Elias Kifle & Others* The Ethiopian Federal High Court, Criminal file

there are times when the police and the NISS do not conduct the relevant interceptions based on a court warrant as required by the Proclamation. From the more than 30 terrorism-related court cases reviewed for this research, in only one case did the prosecution include a court warrant for the interception in the list of evidence presented to the trial court.⁹⁸ In the rest of the cases, the prosecutors did not provide evidence of a court warrant to perform the interception. This is so, despite a police officer asserting in interviews that police only ever intercept communications after obtaining a court warrant.⁹⁹

Moreover, it is not clear which court has jurisdiction to entertain court warrant requests for interception and surveillance. In the absence of a specific provision in this regard, it appears that the Proclamation envisages that such requests should be presented to courts hearing terrorism-related trials: the Federal High Court or the Federal Supreme Court. The Vice-President of the Ethiopian Federal High Court stated in an interview that the police or the NISS could request the warrant either from the terrorism bench or the president or vice-presidents of the Federal High and Supreme Courts.¹⁰⁰ He further explained that if the alleged offence is punishable with less than 15 years' imprisonment, the application for an interception warrant may be decided by one judge. In all other cases, three judges have to sign the warrant.¹⁰¹ Nevertheless, all but one of the five judges interviewed for this research stated that they did not remember any request for interception either from the police or the NISS.¹⁰² The fact that judges presiding on the terrorism bench of the Federal High Court, with long years of experience, did not encounter any request for interception may further indicate that the police or the NISS have implemented warrantless interceptions.

One of the most common types of evidence produced by prosecutors in terrorism-related trials in Ethiopia is a copy of

124062 (*Elias Kifle & Others case*); *The Federal Public Prosecutor v Andualem Arage Wale & Others* The Ethiopian Federal High Court, Criminal file 112546 (*Andualem Arage & Others case*); *The Federal Public Prosecutor v Zelalem Wokagegnehu & Others* The Ethiopian Federal High Court, Criminal file 158194.

98 *Elias Kifle & Others case* (n 97 above).

99 Interview with police officer 1, Investigation of Terrorism-Related Crimes division, Ethiopian Federal Police Commission 22 March 2016.

100 Interview with Judge 5, judge and Vice-President of the Federal High Court of Ethiopia, Lideta sub-city, Addis Ababa, Ethiopia 12 May 2016. However, see interview with Judge 1, Ethiopian Federal High Court judge, Lideta sub-city, Addis Ababa, Ethiopia 2 March 2016. While attempting to justify why interception warrants are not presented to the terrorism bench of the Federal High Court, the judge stated that '[s]ince such kind of interception occurs before the filing of a criminal charge, the police and the NISS may be requesting such warrants from Federal First Instance courts which entertain pre-trial issues including remand'.

101 Interview with Judge 5 (n 100 above).

102 Interview with Judge 1 (n 100 above); interview with Judge 2 (n 98 above); interview with Judge 3, Oromia Regional Supreme Court Judge, Arada sub-city, Addis Ababa, Ethiopia 12 May 2016; interview with Judge 4, Amhara Regional Supreme Court judge, Bahirdar, Ethiopia 5 April 2016.

intercepted communications by terrorist suspects or their associates. In addition to intercepted telephone communications, the police and prosecutors often rely on electronic media accounts of terrorism suspects as evidence in trials. It is particularly common for transcripts from e-mail and private Facebook messages with members of banned political groups in the diaspora to form part of the evidence in terrorism trials.¹⁰³ In most of these cases, the prosecution did not provide evidence of the proper authorisation for the interception of communications. The absence of evidence to prove the judicial authorisation of intercepted communications, which are later used as part of the prosecution evidence, is a strong indicator that the police sometimes implement warrantless interceptions in private communications.

In practice, intercepted communications are procured in two ways. First, public prosecutors use intercepted audio records of suspected terrorists allegedly recorded as part of the criminal investigation process. Second, while investigating a terrorism-related crime, the police routinely check e-mail and private messages within social media accounts belonging to the suspect with a view to finding something that may be used as evidence. In interviews, a lawyer explained how the police organise transcripts of electronic communications for terrorism-related investigations pending a criminal trial as follows:¹⁰⁴

If terrorism suspects have e-mail or Facebook accounts, the police will mostly require them to give their passwords and look into the files for anything which may be used as evidence. The police will first look at the accounts. If they find something that they may use as evidence, they will invite witnesses and research the accounts to have a witness observe that a given document is printed from a suspect's account.

Defence lawyers usually challenge the admissibility of intercepted evidence when there is no proof of a court warrant to undertake the interception.¹⁰⁵ When confronted with such objections, prosecutors present findings of such an interception as part of intelligence reports.¹⁰⁶ The Proclamation exempts intelligence reports prepared in relation to terrorism from disclosing the source or the method of its gathering.¹⁰⁷ The practice of evading the requirement of a warrant for interception, or at least the requirement of proof of a warrant, is an inappropriate deviation from the Proclamation and seems to amount to an unlawful interference in the privacy interests of the

103 See, eg, the *Andualem Arage & Others* case (n 97 above); *The Federal Public Prosecutor v Zemene Kassie Bewke & Others* The Ethiopian Federal High Court, Criminal file 141253 (*Zemene Kassie Bewke & Others* case); *The Federal Public Prosecutor v Hassen Jarso Setolu & Others* The Ethiopian Federal High Court, Criminal file 119650; *The Federal Public Prosecutor v Desalegn Embiale Kebede & Others* The Ethiopian Federal High Court, Criminal file 124062.

104 Interview with lawyer 1, defence lawyer of terrorist suspects, Addis Ketema sub-city, Addis Ababa, Ethiopia 19 March 2016.

105 Interview with Judge 1 (n 100 above).

106 As above; interview with Judge 2 (n 100 above).

107 Art 23(1) Anti-Terrorism Proclamation.

suspects implicated in the particular case. If so, such instances are breaches of the right to privacy.

As noted above and confirmed in interviews, police officers require suspects to provide their e-mail and Facebook passwords during investigation. Responding to critics alleging that the police use force to obtain passwords from suspects, a police officer stated that 'when we have enough information regarding terror-related electronic communications, we do interrogate suspects to voluntarily give their e-mail and Facebook passwords as a gesture of co-operation'.¹⁰⁸ If suspects decline to give their passwords, the police 'use their own ways to access the electronic communications'.¹⁰⁹ This expression may suggest that the police practically implement unauthorised interceptions of communications. It appears that the police do not generally request court warrants to examine electronic communications, which instead is regarded as a routine part of investigations during the pre-trial stage of criminal proceedings against terrorist suspects. The UN Special Rapporteur on Privacy identified practices of warrantless interceptions as violations of the right to privacy.¹¹⁰

However, there are a number of cases where evidence based on intercepted communications of terrorist suspects is admitted by trial courts without proof that the interception took place based on prior judicial authorisation.¹¹¹ Trial courts have a duty to ensure the protection of terrorist suspects' right to privacy.¹¹² The prevalent use of illegally-obtained intercepted communications of terrorist suspects at trial courts, without confirmation of its having been obtained legally, is likely to be a breach of the state's duty to protect the right to privacy which is recognised in article 17(2) of the ICCPR.

It was commented above that the failure of the Proclamation to specify the standard of suspicion makes it susceptible to abuse by the police. Judicial practice remains unclear in this regard. Targeted surveillance apparently is implemented without a court warrant. There is no adequate data to determine whether courts authorise requests for interception based on a reasonable suspicion that the subject of the interception is involved in terrorism.

Given the fact that targeted surveillance is usually implemented without a court warrant, it is not clear whether courts authorise requests for interception based on reasonable suspicion that the subject of the interception is involved in terrorism. The failure by the Proclamation to outline the standard of suspicion required in such circumstances might lead to potentially-unsubstantiated suspicions by

108 Interview with police officer 2, Investigation of International Crimes division, Ethiopian Federal Police Commission 24 March 2016.

109 Interview with police officer 1 (n 99 above).

110 Cannataci (n 48 above) 20.

111 See, eg, *Zemene Kassie Bewke & Others* case (n 103 above).

112 Art 13(1) Ethiopian Constitution.

the police to be used as excuses to interfere in privacy. The Ethiopian Parliament should consider revising the Proclamation so that only reasonable suspicions by the police may be used as legitimate grounds to seek judicial authorisation of targeted interference in privacy interests of terrorist suspects. In the absence of such a circumscribed provision, the purpose of prior judicial authorisation – to evaluate requests of interference in privacy on a case-by-case basis – cannot be achieved.

In addition to electronic surveillance, the Proclamation provides a legal basis for sudden and covert searches of persons and premises with a view to prevent acts of terrorism:¹¹³

Where a police officer has a reasonable suspicion that a terrorist act may be committed and deems it necessary to make a sudden search in order to prevent the act, with the permission of the Director-General of the Federal Police or a person delegated by him, may stop a vehicle and pedestrian in an area and conduct sudden search at any time, and seize relevant evidences.

The sudden search provided for above does not require a court warrant. However, the requirement of permission from the Director-General of the Federal Police or a delegate limits potential misuse of this power by ordinary police officers. Given the fact that imminent threats of a terrorist attack may have irreversible consequences, it seems that the Proclamation's endorsement of a sudden search without a court warrant is a reasonable interference in privacy through sudden open searches. By contrast, a police officer is required to obtain a court warrant in order to undertake a covert search into any premise to prevent or take action against a terrorist act or a terrorist activity.¹¹⁴ The police should have reasonable grounds to believe that a resident or possessor of the premise to be searched is related to an act of terrorism that has been or is likely to be committed.¹¹⁵ Whereas a court warrant for covert physical searches has the requirement of reasonable suspicion of involvement in terrorism, the same standard is absent in the case of a court warrant for electronic surveillance.

5 Conclusion and recommendations

Surveillance and interception of communications are one method of counter-terrorism which is often employed as a means to anticipate, prevent and investigate acts of terrorism. Targeted surveillance against terrorist suspects is particularly identified as an effective intelligence and law enforcement tactic while countering terrorism. Many countries have broadened their surveillance and interception outreach

113 Art 16 Anti-Terrorism Proclamation.

114 Arts 17 & 18 Anti-Terrorism Proclamation.

115 Art 17 Anti-Terrorism Proclamation.

accordingly. While counter-terrorism is an undoubtedly justified objective to authorise legitimate restrictions to privacy, counter-terrorism surveillance should be applied within the limits set by relevant international, regional and national human rights standards. Research suggests that the increasingly-expansive counter-terrorism surveillance, which continues to define counter-terrorism in various jurisdictions, is sometimes applied in ways that negate the essence of the right to privacy.

As a country located in the troubled East African region, where violence is used as a means of settling political differences, Ethiopia faces considerable terrorism threats requiring an effective counter-terrorism strategy. Ethiopia adopted a separate Anti-Terrorism Proclamation in 2009. Accordingly, the Ethiopian government controversially proscribed three violent rebel political groups as terrorist organisations. Individuals who are suspected of terrorism charges, including participation and membership of one of the proscribed groups, face terrorism trials in the country. Surveillance and interception of communications is utilised in the process. This article assessed the human rights compatibility of the counter-terrorism surveillance law and its implementation in Ethiopia from the perspective of the right to privacy as recognised in the ICCPR and the Ethiopian Constitution.

Article 17 of the ICCPR requires that interference in privacy may be justified only when it is applied with restraint, in accordance with law. Ethiopia does not have a law regulating mass surveillance where a specific terrorist suspect is not in sight. Nonetheless, reports suggest that the Ethiopian government has unrestricted access to private communications. If mass surveillance is believed to be an effective means of anticipating future security risks, the Ethiopian government may introduce enabling legislation. In the absence of such legislation, legally-unregulated government access to private communications is a violation of the right to privacy.

Unlike mass surveillance, which is legally unregulated in Ethiopia, the Anti-Terrorism Proclamation regulates the use of counter-terrorism surveillance and interception of communications. While the Proclamation requires prior judicial authorisation of counter-terrorism surveillance and interception against terrorist suspects, it fails to specify the standard of suspicion that must be applied. The failure to specify the 'reasonable suspicion' standard, which is widely recognised, may potentially result in the abuse of counter-terrorism surveillance in cases of unsubstantiated suspicions. The Ethiopian Parliament should consider revising the Proclamation so that it is expressly stated that only reasonable suspicions will be sufficient for the judicial authorisation of targeted interference in the privacy of terrorist suspects.

Ethiopian law requires that covert counter-terrorism surveillance and interception of communications by the police and intelligence officers require a court warrant. However, evidence suggests that

warrantless interceptions are in practice often implemented. Most of the terrorism-related case file reviews undertaken for this research suggest that intercepted communications of terrorist suspects are admitted in trial courts without a corresponding court warrant for the interception. It appears that this practice is not adequately challenged. In a case where defence lawyers of terrorist suspects request evidence containing warrantless interceptions to be inadmissible, public prosecutors present the interceptions as intelligence reports. Intelligence reports are legally exempt from disclosing the source or method of collection. The widespread use of warrantless interceptions and their subsequent admission in terrorism trials are a violation of the right to privacy. It is recommended that police, intelligence officers and public prosecutors should conduct terrorism-related investigations within the bounds of the law. Judges should also defend the right to privacy by rejecting evidence from warrantless interceptions.

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The Nairobi Principles on Accountability as a means of monitoring and enforcing the rule of law and accountability for international crimes in Africa

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Summary

This article examines the Nairobi Principles on Accountability, a set of principles developed by civil society actors and academics to create standards for accountability processes relating to international crimes. The article describes key aspects of the Nairobi Principles of Accountability as well as their ramifications from a rule of law perspective. By creating standards and guidance relevant to academics, policy makers and practitioners working on justice processes for international crimes, the Principles intends to create a platform for policy and legal change with significant potential to advance the rule of law. This includes informing policy and decision makers at various levels – including the international,

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regional and national – on how to address the challenges faced by the contemporary system of justice for international crimes and, consequently, to develop a more efficient and legitimate system of international justice. Having described the justifications, methodology and scope of the Nairobi Principles on Accountability, the article elaborates on the main themes addressed by the Principles, namely, (i) state co-operation in international criminal justice; (ii) immunity of state officials; (iii) complementarity; and (iv) victim and witness issues. Whereas all of these topics are examined with the starting point in the challenges experienced in the Kenyan situation, the article comments on the broader ramifications from a rule of law perspective, including the lessons to be learned from the Kenyan experiences with regard to justice for international crimes, in order to advance accountability norms and, hence, the rule of law, in Africa.

Key words: *international criminal justice; rule of law; state co-operation; immunity of state officials; complementarity; victims and witnesses*

1 Introduction

This article uses Kenya as a case study to discuss rule of law issues in Africa. Specifically, the article comments and elaborates on the Nairobi Principles on Accountability. The development of these Principles is based on a research project undertaken by the authors in collaboration with other academics and civil society activists based in Kenya. The primary aim of the Principles is to develop standards for accountability processes for international crimes on the basis of Kenya's experiences with such justice processes. The article describes the work undertaken to date on the Nairobi Principles of Accountability as well as the broader ramifications of the Principles from a rule of law perspective. Accordingly, the article seeks to explain an ongoing research project which has important implications for the rule of law in Africa and elsewhere.

As such, by creating standards and guidance relevant to academics, policy makers and practitioners working on justice processes for international crimes, the Principles create a platform for policy and legal change in areas of the rule of law. It does so primarily by informing policy and decision makers at various levels – including the international, regional and national – on how to address the challenges faced by the contemporary system of justice for international crimes and, consequently, to develop a more efficient and legitimate system of international justice. This is significant from a rule of law perspective as institutions of international justice – and those supporting them – need to learn from the unique challenges they have faced in the past. It is also important to note that the Principles are based on collaboration between academics and civil society activists. This offers a unique basis for achieving such change, including by informing the strategies used by civil society groups to promote accountability norms. At the broadest level, it is widely

recognised that accountability norms, if effectively implemented, should be a key component of the rule of law. In contrast, impunity presents the anti-thesis to the rule of law.¹

Having described the justifications, methodology and scope of the Nairobi Principles on Accountability, the article elaborates on the main themes addressed by the Principles, namely, (i) state co-operation in international criminal justice; (ii) immunity of state officials; (iii) complementarity; and (iv) victim and witness issues. While all these topics are examined with the starting point in the challenges experienced in the Kenyan situation, the article comments on the broader ramifications from a rule of law perspective, including the lessons to be learned from the Kenyan experiences with regard to justice for international crimes in order to advance accountability norms and, hence, the rule of law, in Africa.

2 Goals, justifications and methodology of the Nairobi Principles on Accountability

2.1 Overview of the themes addressed by the Nairobi Principles on Accountability

Kenya, as well as several other countries in the region, faces significant challenges with regard to impunity for large-scale human rights violations, including international crimes.² As discussed below in the article, in Kenya specifically, neither the involvement of the International Criminal Court (ICC) nor domestic avenues for accountability were successful in achieving accountability for the post-election violence. Whereas there are multiple, partly overlapping reasons for this, some of the most obvious challenges are briefly outlined here, and then discussed in more detail below in the article.

First, notwithstanding states' obligations under the Rome Statute of the International Criminal Court (Rome Statute), the Kenyan case highlights that co-operation with the ICC should not be taken for granted. Further, the Kenyan case illustrates that co-operation may entail more than formal compliance with statutory obligations. Importantly, the Kenyan case exemplifies that the current system of enforcement may be inadequate to promote full co-operation. The Nairobi Principles on Accountability will help provide clarification concerning what can be done in future cases to advance co-operation with international justice mechanisms.

Second – but related to the above – the Kenyan case demonstrates that there are significant challenges related to prosecuting heads of

1 See generally JA McAdams (ed) *Transitional justice and the rule of law in new democracies* (1997).

2 See eg TO Hansen 'Political violence in Kenya: A study of causes, responses, and a framework for discussing preventive action' ISS Paper 205 (November 2009).

state and senior government officials while they hold office. Regardless of the principle of irrelevance of official capacity set out in the Rome Statute, the Kenyan case exemplifies that governments are unlikely to provide the ICC with information which may incriminate state officials. The ICC's treatment of suspects who are state officials may differ significantly from its treatment of other types of suspects. Partly as a consequence of developments in Kenyan ICC cases, new legal regimes, specifically in the context of the African Union (AU), are being developed that do not permit the prosecution of senior incumbent state officials. It is on this basis that the Nairobi Principles on Accountability will help clarify the norms and practices relating to immunity for state officials in international criminal law.

Third, the Kenyan case points to interactions between international and national justice processes that are more complex than typically recognised in the scholarship on complementarity. This includes the possibility that domestic processes may be formally initiated, but without necessarily complying with the principles and values underpinning the ICC's complementarity regime, perhaps even with the aim of undermining accountability at the international level. This raises a range of questions addressed by the Nairobi Principles, including how other stakeholders should approach such domestic processes and, more broadly, about the value for complementarity of the current regime.

Finally, the Kenyan case raises important questions concerning the challenges of the current regimes for witness protection, participation and reparation. For example, is it justifiable that participation and reparation depend on the scope and outcome of criminal cases? The Kenyan case further suggests that the ICC faces significant challenges in providing adequate witness protection, especially when the information held by the witnesses could incriminate state officials. The Nairobi Principles address these and related questions.

Understanding the themes mentioned above, it is important to keep in mind that Kenya and other African countries have voiced concern about the system of justice for international crimes as it currently exists. This is evidenced not only by continuous criticism of the ICC's operations within existing structures, such as the Assembly of States Parties (ASP), but also by threats of withdrawing from the Rome Statute (which have in one instance been followed by actual withdrawal) as well as the AU's adoption of a strategy for collective withdrawal.³ The Kenyan ICC cases demonstrate that it may be difficult to balance the concerns expressed by Kenya and other African

3 Burundi, South Africa and The Gambia all sent instruments of withdrawal from the Rome Statute to the UN Secretary-General, but South Africa and The Gambia have since rescinded their withdrawals. See further PI Labuda 'The African Union's collective withdrawal from the ICC: Does bad law make for good politics?' *EJIL Talk* 15 February 2017, <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/> (accessed 26 February 2018).

states with the need to achieve accountability and promote the rights and needs of victims. The Nairobi Principles will attempt to achieve such a balance.

2.2 Goals and justifications of the Nairobi Principles on Accountability

Drawing on Kenya's experiences with justice processes relating to the post-election violence, the primary goal of the Nairobi Principles is to set standards and create guidance for future justice processes relating to international crimes elsewhere, in that way offering an important tool for advancing the rule of law in African countries and elsewhere.

Evidence suggests that national authorities often are reluctant to endorse accountability norms, in particular to the extent that accountability processes put state officials under scrutiny. More guidance is needed concerning how to create more positive synergies, which would ultimately benefit goals of conflict prevention and the rule of law in these countries. In simpler terms, justice mechanisms addressing international crimes offer promises for advancing accountability norms, but the experiences from Kenya point to significant challenges in giving effect to these norms in practice when those in power are subject to investigation.

Accordingly, by creating guidance relevant to both academics and practitioners on the issues mentioned above, the Nairobi Principles offer a unique platform to advance the rule of law. In particular, the Principles create a platform for policy and legal change by way of informing policy and decision-makers at various levels on how to address the challenges faced by the contemporary system of justice for international crimes and to develop a more efficient and legitimate system.

The rationale is that important lessons may be learned from the challenges faced by the ICC in the Kenyan situation, which will benefit the ICC itself, regional actors such as the AU, states, and civil society groups working to promote accountability. Accordingly, the Nairobi Principles aim to promote the rule of law in Africa and elsewhere by encouraging states, international and regional actors and others to learn from Kenya's experiences with international justice, rather than repeating the mistakes that ultimately led to the collapse of the accountability processes in this case.

2.3 Methodology and scope of the Nairobi Principles on Accountability

The Nairobi Principles are based on close collaboration between academics and civil society activists. The Principles are drafted by a 'core group of experts', involving 15 academics and civil society activists with significant research or practical experience on the processes of seeking accountability for international crimes in Kenya. The first meeting of the core group of experts was held in Naivasha,

Kenya, from 6 to 7 April 2017 to create the foundation for the development of the Nairobi Principles on Accountability, including framing the key issues to be addressed by the project, identifying the type of stakeholders to be consulted and discussing means of achieving policy impact.

As a draft version of the Principles is being developed, the core group of experts seeks feedback and input from the government of Kenya, the AU, ICC officials and others. Moreover, relevant resources are being collected to develop a broader resource centre involving a database with background material relevant to the Principles, including academic publications, non-governmental organisation (NGO) reports, government statements and other types of publications relating to the process of seeking accountability for post-election violence crimes in Kenya. This will lead to the launch of a dedicated website entailing both the Principles and the resource centre. It is envisaged that these outcomes will be used for training purposes and as an advocacy tool for engagement with the ICC, states and civil society actors, in this way offering a platform for advancing the rule of law.

Some important issues relating to the scope of the Nairobi Principles deserve a brief mention here. First, whereas the Principles take their starting point in the ICC process relating to post-election violence crimes in Kenya specifically, they also address other mechanisms of 'transitional justice' in Kenya where relevant, including attempts at establishing a domestic criminal justice process, the Truth, Justice and Reconciliation Commission (TJRC) as well as the various efforts to remedy victims. Second, whereas the Principles focus primarily on the ICC, they also address other forms of accountability processes and developments in international criminal law more generally. Third, even if the ICC's intervention in Kenya acts as the reference point for the Principles, where relevant the Principles draw on lessons from other ICC situations. Fourth, rather than only examining the period after which the ICC opened a formal investigation into the Kenyan situation, the Principles take a holistic approach to the accountability process, relying on an assessment of relevant developments both before the ICC intervened and after the cases were terminated.

In the following sections, the article turns to an analysis of the main themes addressed by the Nairobi Principles, including state co-operation with the ICC (section 3); immunity of state officials (section 4); complementarity (section 5); and issues relating to victims and witnesses (section 6), and debates why these are issues are important from a rule of law perspective. Section 7 briefly outlines a range of other themes addressed by the Principles.

3 State co-operation with the International Criminal Court

3.1 Adjudication by the International Criminal Court of co-operation issues in Kenyan cases

Whereas compliance with international law in general has attracted significant attention in legal scholarship, only limited attention has been paid to how the ICC's co-operation regime works and the implications thereof.⁴ The Kenyan case demonstrates some important challenges that the system may face in practice.

The post-election violence-related ICC cases – and, in particular, the *Kenyatta* case – collapsed largely due to a lack of co-operation by the Kenyan government. The ICC Prosecutor has consistently emphasised that a lack of co-operation was a key cause of the cases collapsing,⁵ and – as detailed below – Chambers of the Court ultimately reached the conclusion that Kenya's co-operation with the Court fell short of the statutory obligations and, on that basis, referred Kenya to the ASP. However, this decision followed lengthy legal proceedings, which rendered the impact of the decision largely symbolic as the case against Kenya had already been withdrawn. The ASP is yet to take any action against Kenya, and it is doubtful if it will ever do so in any meaningful way.

Specifically, despite finding that Kenya had not fully complied with its obligations under Part 9 of the Rome Statute by failing to provide the material requested, in a decision of December 2014 the Trial Chamber in *Kenyatta* initially decided not to refer Kenya to the ASP. In part, the Chamber justified this decision by pointing to the Prosecutor's own problematic conduct.⁶ However, based on the Prosecutor's appeal of that decision, the Appeals Chamber in August 2015 held that the Trial Chamber had erred in its discretion and referred the matter back to the Trial Chamber. It took the Trial Chamber more than a year to reach a new decision, which is problematic from a rule of law perspective. However, in its decision of

4 A notable exception to this involves the recently-published edited volume O Bekou & JB Daley (eds) *Co-operation and the International Criminal Court: Perspectives from theory and practice* (2016).

5 See eg F Bensouda 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta', <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2> (accessed 26 February 2018). For civil society statements, see eg Kenyans for Peace with Truth and Justice (KPTJ) *All bark no bite? State co-operation and the International Criminal Court* (2014).

6 *Prosecutor v Kenyatta* 'Decision on prosecution's application for a finding of non-compliance under article 87(7) of the Statute' ICC-01/09-02/11-982, 3 December 2014, https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF (accessed 26 February 2018).

19 September 2016, the Trial Chamber opted to refer Kenya to the ASP for non-co-operation.⁷ Kenya's lack of co-operation was not discussed during the November 2016 ASP, and it is unclear whether and, if so how, the Assembly will seize on the matter at the next ASP in November 2017. So far, not a single state party has indicated that they will push strongly for action being taken against Kenya within the framework of the ASP.⁸

Given the delays in reaching a decision on whether to refer Kenya to the ASP, some speculate that the ICC Chambers may have attempted to time their decisions in ways to limit controversy with state parties, even if this is to the detriment of the ICC's co-operation regime and, hence, the rule of law. Indeed, the decision by the Trial Chamber to refer Kenya to the ASP was rendered almost three years after the Prosecutor had filed the first petition, for the Chamber to make a finding of non-compliance under article 87(7) of the Rome Statute against Kenya on the grounds that the Kenyan government did not comply with the Prosecutor's April 2012 request concerning the provision of evidence.⁹

3.2 Effectiveness of the International Criminal Court's co-operation and enforcement regime in the Kenyan situation

The above raises broader questions concerning the effectiveness of an enforcement system that is largely based on (potential) action by a political body, namely, the ASP. Importantly, the Trial Chamber's decision to refer Kenya to the ASP presents the only enforcement measure available to a Chamber that finds a state party to be in breach of its co-operation obligations under article 87(7) of the Rome Statute in situations that had not been referred to the Court by the United Nations (UN) Security Council. Whereas a Chamber's finding of non-co-operation in theory is strictly judicial, the actual

7 *Prosecutor v Kenyatta* 'Second decision' https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF (accessed 26 February 2018); Prosecution's application for a finding of non-compliance under art 87(7) of the Statute', ICC-01/09-02/11-1037, 19 September 2016, available at https://www.icc-cpi.int/CourtRecords/CR2016_06654.PDF accessed 26 February 2018).

8 See further TO Hansen 'Referring Kenya to the ICC Assembly of States Parties, Part 1: A battle for the narrative' *Justice in Conflict* 3 October 2017, <https://justiceinconflict.org/2016/10/03/referring-kenya-to-the-icc-assembly-of-states-parties-part-1-a-battle-for-the-narrative/> (accessed 26 February 2018).

9 The last submissions by the parties on the issue were filed in October 2015, and there were no significant legal or factual issues to resolve (tellingly, the Trial Chamber's 19 September 2016 decision comprises only 18 pages, at least half of which are devoted to a summary of the proceedings and the parties' submissions). The most obvious conclusion, therefore, is that the Trial Chamber was seeking to limit the controversy which an ASP referral of Kenya would create by delivering its decision at a point where there was less attention on the Kenyan ICC cases (and the conduct of the parties). See further TO Hansen 'Referring Kenya to the ICC Assembly of States Parties, Part 2: Implications for co-operation and enforcement' *Justice in Conflict*, 4 October 2016, <https://justiceinconflict.org/2016/10/04/referring-kenya-to-the-icc-assembly-of-states-parties-part-2-implications-for-co-operation-and-enforcement/> (accessed 26 February 2018).

enforcement of such a finding is essentially political as it belongs to a body comprised of state representatives, namely, the ASP. The Statute does not offer any guidance concerning the type of action the ASP can take, although the ASP itself has created a 'formal response procedure', but this procedure is primarily aimed at promoting co-operation in ongoing cases.¹⁰

Accordingly, the ICC's co-operation regime can be said to be essentially based on a 'managerial model' of compliance.¹¹ Whereas such a model may be useful in certain contexts, it is less likely to promote compliance when the relevant state has a limited motive for co-operating with respect to the actual case that triggered the co-operation proceedings. It raises particular problems when the case that led to a non-co-operation finding has already been terminated, as happened in the *Kenyatta* case. In the absence of goodwill by the state subject to co-operation proceedings, the efficiency of the ICC's co-operation regime, therefore, largely depends on the potential action taken by external actors.¹² However, such unified action has frequently been absent. Since international partners have seemingly come to view the ICC as an obstacle to having 'normal relations' with Kenya after *Kenyatta* became President, there are no good reasons to believe that there will be any unified push in or outside the ASP for sanctioning Kenya.¹³

The above raises questions about whether there are other ways of promoting co-operation and, thereby, the rule of law, for example by elevating the reputational costs of non-co-operation or creating more space for states that in principle may be interested in advancing co-operation to utilise tools such as aid restrictions and travel bans for the accused person and his or her family which may have a more direct impact on the affected state's will to co-operate.

The Nairobi Principles on Accountability address a range of additional challenges and lessons learned from the Kenyan case

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- 10 In addition to relying on the informal work of the ASP president, the ASP's own guidelines create a 'formal response procedure' when a decision by the Chambers regarding non-co-operation has been referred to the ASP. The procedure seems to be primarily aimed at promoting co-operation with respect to *ongoing* cases. The procedure provides, *inter alia*, that the president may write an 'open letter' to the state concerned reminding it of the obligation to co-operate; the holding of 'public meetings'; discussions in plenary; and the appointment of 'a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter'. Importantly, the procedure does not lay down a framework for actually sanctioning a state party that refuses to co-operate.
 - 11 On the managerial model, see further A Chayes & A Chayes *The new sovereignty: Compliance with international regulatory agreements* (1998).
 - 12 As Rastan argues, '[i]f the non-compliance procedure is genuinely to influence state behaviour, the support for justice must be matched by concerted and unified action by the international community under a notional responsibility to enforce'. See R Rastan 'Testing co-operation: The International Criminal Court and national authorities' (2008) 21 *Leiden Journal of International Law* 431.
 - 13 See further S Brown & R Raddatz 'Dire consequences or empty threats? Western pressure for peace, justice and democracy in Kenya' (2014) 8 *Journal of Eastern African Studies* 43.

relating to state co-operation. For example, the co-operation requests made by the ICC Prosecutor may not have been sufficiently specific, and there are broader questions about how to make such requests more 'compliant'. Furthermore, the extent to which it is possible for the ICC Prosecutor to obtain evidence and information from sources other than the state in the face of a state's non-co-operation deserves more attention. At the same time, it is clear that basic state co-operation is needed to allow ICC investigators in the country and to conduct other operations, for example relating to victim participation and outreach activities. One important question in this regard concerns the expectations of the ICC Prosecutor in relation to state co-operation. In some cases, the Prosecutor would likely benefit from commencing investigations with no expectations of good faith co-operation by the affected state. Weak separation between the office held by accused persons and the personal interests of the persons holding the office can present significant challenges for promoting co-operation. The Kenyan situation further illustrates that it is important not to view state co-operation in static terms. Since the level of co-operation may over time change significantly, the ICC Prosecutor, civil society and other actors may be able to take advantage of situations where there is temporarily a favourable environment to push for state co-operation. The Kenyan case, moreover, points to significant obstacles, genuinely bringing into play domestic proceedings with a view to securing needed co-operation and, thus, a significant challenge to the rule of law. For example, in the early phases of the ICC investigation, the ICC Prosecutor sought to interview senior Kenyan police officers, but domestic judicial processes were used to block access to these officers. Domestic proceedings in Kenya have also been used to shield three Kenyans indicted for article 70 offences relating to the obstruction of justice from transfer to the ICC for prosecution.

4 Immunity of state officials

4.1 Rome Statute

The irrelevance of official capacity with respect to the prosecution of international crimes, specifically genocide, crimes against humanity and war crimes, appears to have now been settled in international law. Article 27 of the Rome Statute concerning 'irrelevance of official capacity' states as follows:

- 1 This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
- 2 Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international

law, shall not bar the Court from exercising its jurisdiction over such a person.

While these provisions make it clear that in principle no one is immune from prosecution before the ICC, the question of how – or even whether – to give effect to these norms concerning accountability for state officials is subject to increased controversy in scholarly debates.¹⁴ One particularly contested issue that has been highlighted following the refusal by several African countries to arrest Sudan's President Omar al-Bashir (and the AU's support for such inaction) concerns the scope of states' obligations to arrest and transfer to the Court persons subject to an arrest warrant where that person holds state office and is protected by the general rules on immunity in international law.¹⁵

4.2 Dilemmas in the Kenyan ICC cases

The Kenyan ICC cases demonstrate that notwithstanding the irrelevance of official capacity under the Rome Statute system, prosecuting state officials – in particular a sitting head of state – faces immeasurable obstacles. In the context of running for office, the accused persons stated that it was possible to make a distinction between their personal and official capacity. In reality, however, this distinction was easily blurred as Kenyatta had been elected President and Ruto Deputy-President in 2013. The Kenyan government, as an entity, was responsible for complying with requests for co-operation from the ICC, but that entity was led by Kenyatta himself as President, raising a clear conflict of interest. Notably, Kenyatta was also the Chairperson of the National Security Council and, thus, had control over the bodies tasked with enforcing the ICC's co-operation requests. The accused persons consistently used the state apparatus to challenge and undermine the accountability process. Kenyan leaders also used the threat of withdrawing from the Rome Statute to create leverage with respect to contested issues of the accountability process,

14 See eg D Akande & S Shah 'Immunities of state officials, international crimes, and foreign domestic courts' (2010) 21 *European Journal of International Law* 815.

15 See eg J Iverson 'Head of state Immunity is not the same as state immunity: A response to the African Union's position on article 98 of the ICC Statute' *EJIL Talk* 13 February 2012, <https://www.ejiltalk.org/head-of-state-immunity-is-not-the-same-as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/> (accessed 26 February 2018). In this regard, it is important to take note of art 98 of the Statute, which provides as follows: '(1) 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 the 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. (2) The Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, unless the Court can first obtain the co-operation of the sending state for the giving of consent for the surrender.'

including attempting to influence the outcome of specific proceedings before the Chambers.¹⁶

The Kenyan leaders further used the threat of non-co-operation as a means of achieving particular procedural outcomes. For example, Kenyatta made it clear that he would only continue to co-operate with the Court if it treated positively his request to have his and Ruto's trials run on alternating days.¹⁷ Having initially rejected such a request, the Chamber ultimately granted the suspects' request after this statement had been made.¹⁸ More generally, at times it appeared that the Court was willing to stretch the Statute to its limits to accommodate the concerns of Kenyatta and Ruto. In one notable decision, the Trial Chamber granted Ruto's request to be generally absent from his trial, notwithstanding the fact that article 63(1) of the Statute clearly states that the 'accused shall be present during the trial'. The Chamber explicitly cited Ruto's official status as a reason to provide him with this preferential treatment, raising questions about the application of article 27 mentioned above concerning the irrelevance of official capacity and the obligation to treat all persons equally under the law.¹⁹ This preferential treatment was further consolidated within the framework of the ASP, where Kenya, with the assistance of other African states, successfully lobbied for the adoption of new Rules 134*bis*, 134*ter* and 134*quater* of the Rules of Procedure and Evidence, whereby the accused persons would be allowed to be absent from trial hearings.²⁰

The developments discussed above must be viewed in light of the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).²¹ Although not yet in force, the Protocol creates a framework for prosecuting international crimes whereby senior state officials are exempted from prosecution while still in office. Article 46*Abis* provides:

16 See further TO Hansen 'The price of deference: Is the ICC bowing to pressure in the Kenya cases?' *Justice in Conflict* September 2013, <http://justiceinconflict.org/2013/09/16/the-price-of-deference-is-the-icc-bowing-to-pressure-in-the-kenya-cases/> (accessed 26 February 2018).

17 See *Standard Newspaper* 'President Uhuru Kenyatta rejects parallel Hague trial with William Ruto' 9 September 2013, https://www.standardmedia.co.ke/?articleID=2000093115&story_title=uhuru-rejects-parallel-hague-trial-with-ruto (accessed 26 February 2018).

18 See further Hansen (n 16 above).

19 For a further discussion of this decision, see TO Hansen 'Caressing the big fish? A critique of ICC Trial Chamber V(A)'s Decision to grant Ruto's request for excusal from continuous presence at trial' (2013) 22 *Cardozo Journal of International and Comparative Law* 101.

20 See further Coalition for the International Criminal Court 'Report on the 12th session of the ASP, 20-28 November 2013', http://www.iccnw.org/documents/asp12_report.pdf (accessed 26 February 2018).

21 Malabo Protocol, adopted 27 June 2014, <https://www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (accessed 26 February 2018).

No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

While organisations such as Amnesty International argue that this aspect of the Protocol undermines accountability norms and the rule of law,²² the Kenyan ICC cases demonstrate that the *practical* difference between the Rome Statute and African Court system may be less significant than what first meets the eye.

Further, the fact that Kenyatta and Ruto were elected President and Deputy-President respectively only after ICC charges had been brought raises broader questions concerning how to ensure a swifter determination of ICC cases, rather than creating a situation where ICC cases can be instrumentalised politically by accused persons. An argument may be made that, although the Prosecutor sought and the Chamber issued summonses to appear, requests for warrants of arrest could have been made in the early days as the accused persons did not consistently abide by the terms of the summonses. On the other hand, had warrants of arrest been issued, this may have resulted in a deadlock between the Kenyan government and the ICC earlier on.

Taken together, the above raises questions as to whether the prosecution of a sitting head of state and other senior government officials is feasible in the current system of international justice and, hence, as to the ability of this system to support a crucial aspect of the rule of law, namely, equality before the law.

5 Complementarity

5.1 Concepts of complementarity and positive complementarity

The principle of complementarity, whereby national courts are given priority in the prosecution of international crimes, has often been pointed to as the cornerstone of the Rome Statute.²³ Article 17(1)(a) of the Rome Statute provides:

The Court shall determine that a case is inadmissible, where: The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.

22 See Amnesty International Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, 22 January 2016, <https://www.amnesty.org/en/documents/afr01/3063/2016/en/> (accessed 26 February 2018).

23 See eg M Benzing 'The complementarity regime of the International Criminal Court: International criminal justice between state sovereignty and the fight against impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591; JI Charney 'International criminal law and the role of domestic courts' (2001) 95 *American Journal of International Law* 120; M Bergsmo 'Occasional remarks on certain state concerns about the jurisdictional reach of the International Criminal Court, and their possible implications for the relationship between the Court and the Security Council' (2000) 69 *Nordic Journal of International Law* 87.

Besides complementarity as a legal threshold for admissibility, the ICC Prosecutor endorses 'positive complementarity', seen to require national judicial authorities and the ICC to 'function together'.²⁴ The Prosecutor has explained that 'positive complementarity' implies 'a proactive policy of co-operation and consultation, aimed at promoting national proceedings and at positioning itself as a sword of Damocles, ready to intervene in the event of unwillingness or inability by national authorities'.²⁵ However, the extent to which positive complementarity works in practice remains disputed.

5.2 Lessons from Kenya

The concepts of complementarity and positive complementarity proved important to the Kenyan situation. Notably, prior to the ICC's official opening of an investigation, sustained debate took place in Kenya as to whether a local mechanism for prosecuting post-election violence crimes should be established. This was partly due to the dynamics surrounding the work of the Commission of Inquiry on Post-Election Violence (popularly known as the Waki Commission) set up after the post-election violence crisis to make recommendations for accountability and reform. The Commission made it clear that in the event that the Kenyan government did not create a credible accountability process domestically, it would hand over a list of key suspects to the ICC prosecutor.²⁶ As several attempts to set up a special tribunal in Kenya to prosecute the perpetrators of the 2007-2008 post-election violence crimes had failed, the list of suspects eventually was forwarded to the ICC Prosecutor.²⁷ Referring to Kenya's failure to create a domestic accountability mechanism that could address post-election violence crimes, in March 2010 the ICC

24 Office of the Prosecutor Policy Paper on Preliminary Examinations November 2013 para 100.

25 F Bensouda 'Reflections from the International Criminal Court Prosecutor' (2012) 45 *Case Western Reserve Journal of International Law* 505.

26 See further C Sriram & S Brown 'Kenya in the shadow of the ICC: Complementarity, gravity and impact' (2012) 12 *International Criminal Law Review* 219.

27 In December 2008, then President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement stipulating that a cabinet committee would draft a Bill on the Special Tribunal. In February 2009, the Constitution of Kenya Amendment Bill 2009, drafted by then Justice Minister Martha Karua, proposed to create a Special Tribunal, but was voted down in Parliament, with many parliamentarians arguing that accountability for the PEV instead should be pursued by the ICC. In July 2009, the Cabinet, citing its decision to establish a Truth, Justice and Reconciliation Commission (TJRC) to 'deal with PEV perpetrators', refused to table in Parliament a second Bill on a Special Tribunal, drafted by then Justice Minister Mutula Kilonzo with input from civil society. In November 2009, in another attempt to enact the Special Tribunal, a revised Constitutional Amendment Bill was tabled but not passed as quorum had not been met in Parliament (only 18 out of 222 parliamentarians were present). See further TO Hansen 'Complementarity in Kenya? An analysis of the domestic framework for international crimes prosecution' in R Slye (ed) *The Nuremberg Principles in non-Western societies: A reflection on their universality, legitimacy and application* (2016) 143.

Prosecutor decided to use the *proprio motu* powers under the Rome Statute to open an investigation into Kenya.²⁸

The Kenyan leadership soon took up a hostile attitude towards the ICC, as it became clear that among the so-called 'Ocampo Six' were government officials and prominent politicians. On the basis of ostensible domestic efforts to investigate post-election violence crimes, the Kenyan government filed an admissibility challenge with the Court. However, the admissibility challenge was rejected first by the Pre-Trial and later by the Appeals Chamber, which held that there was a situation of 'inactivity' in Kenya since the government had not provided information pointing to the existence of genuine proceedings relating to the same suspects and incidents subject to ICC investigation.²⁹ The Chamber emphasised that the Kenyan government had contradicted itself by arguing that the ongoing investigations would later extend to the highest level of the hierarchy, while at same time stating that there were actually on-going investigations in relation to the six suspects involved in the cases under the Chamber's consideration.³⁰ Accordingly, the judges made it clear that for an admissibility challenge to succeed, investigations at the national level concerning the persons subject to ICC investigations must be *ongoing*, as opposed to some future investigations, and, further, that it is insufficient for a state with jurisdiction over the crimes to merely claim that there is an ongoing investigation; there must also be 'concrete evidence of such steps' with regard to the specific suspects investigated by the Court.³¹

It has been suggested that, rather than promoting accountability norms, the real aim of Kenya's admissibility challenge was to construct another obstacle to the criminal prosecution of those responsible for planning and organising the post-election violence. Kenyan human rights activist George Kegoro at the time argued:³²

The government has the right to challenge admissibility, but if wise counsel prevailed, they would spend that time doing something else. If government was saying it has got something of its own that it's falling back on, then you would sympathise with the government. But they are saying let's not have ICC and instead let's have nothing. They are saying – leave us alone.

28 On these developments, see further TO Hansen 'Transitional justice in Kenya? An assessment of the accountability process in light of domestic politics and security concerns' (2011) 42 *California Western International Law Journal* 1.

29 See further TO Hansen 'A critical review of the ICC's recent practice concerning admissibility challenges and complementarity' (2012) 13 *Melbourne Journal of International Law* 217.

30 *Prosecutor v Muthaura & Others* Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute, ICC-01/09-02/11-96, 30 May 2011.

31 *Muthaura* (n 30 above) para 60.

32 George Kegoro as quoted in *Daily Nation* 'State enlists Queen's Counsel in Hague cases' 12 March 2011, <http://www.nation.co.ke/News/politics/State+enlists+Queens+Counsel+in+Hague+cases+/-/1064/1123962/-/6qr9cm/-/index.html> (accessed 26 February 2018).

The continued reference to 'bringing the ICC cases home', coupled with the absence of concrete action at the domestic level, thus gives weight to Mueller's conclusion that the overall goal of Kenyan decisions makers has been to 'use as many delaying tactics as possible to ensure that no one would ever be held accountable for the post-election violence', and that the government attempted to use the ICC's complementarity regime as one such tactic.³³ Although the government's admissibility challenge failed, this raises broader questions about how to ensure that the Rome Statute's complementarity regime actively promotes the rule of law domestically, including in situations where states are hostile to ICC intervention.

The debates about a domestic framework for accountability in Kenya continued both while the ICC cases were ongoing and thereafter. Kenya domesticated the Rome Statute by adopting the International Crimes Act (ICA), which came into force on 1 January 2009.³⁴ The ICA provides the foundation for giving effect to the Rome Statute within Kenyan law, including the principle of complementarity. The Act gives Kenyan courts jurisdiction to prosecute Rome Statute crimes; creates the foundation for Kenyan authorities to provide the ICC with requested information; gives the right to transfer to the Court persons against whom the ICC has issued arrest warrants and otherwise to co-operate with the ICC; and lays down provisions permitting the ICC to operate in the country. In 2015 the Kenyan judiciary confirmed that it would establish a so-called International and Organised Crimes Division (IOCD) within the High Court, which is intended to have jurisdiction over international crimes as defined by the Rome Statute, as well as transnational crimes such as organised crime; piracy; terrorism; wildlife crimes; cybercrime; human trafficking; money-laundering; and counterfeiting.³⁵ However, at the time of writing, the IOCD is not yet operational, and Kenyan authorities have continuously stated that the post-election violence crimes will not be prosecuted by the IOCD.³⁶ President Kenyatta has affirmed this approach, stating that no further efforts would be made

33 S Mueller 'Kenya and the International Criminal Court (ICC): Politics, the election and the law' (2014) 8 *Journal of Eastern African Studies* 25.

34 International Crimes Act 2008 (Kenya), ISN KEN-2008- L-82568, http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf (accessed 26 February 2018).

35 Wayamo Foundation 'International and Organised Crimes Division (ICD) of the Kenyan High Court', 19 June 2014, <http://www.wayamo.com/archives/international-and-organised-crimes-division-icd-of-the-kenyan-high-court/> (accessed 26 February 2018).

36 Following a series of statements that the PEV cases would prove difficult to prosecute due to a lack of evidence, in February 2014 the Director of Public Prosecutions in Kenya made it clear that no further PEV cases would be prosecuted before Kenyan courts. See B Koech 'Fresh doubt about mandate of Kenya's Special Court' *Institute for War and Peace Reporting* 21 February 2014, <https://iwpr.net/global-voices/fresh-doubts-about-mandate-kenyas-special-court> (accessed 26 February 2018).

to pursue accountability for post-election violence crimes, but that a fund would instead be established to assist victims of the violence.³⁷

Accordingly, it seems clear that the main challenge to giving effect to the principle of complementarity in Kenya has not been a lack of capacity, but a lack of political will.

6 Victim and witness issues

6.1 Rome Statute provisions and Chambers' decisions on victim participation

According to article 68(3) of the Rome Statute, victims are permitted to participate in ICC proceedings when it is not prejudicial to the rights of the defence and a fair and impartial trial.³⁸ Rule 85 of the RPE defines a victim as a natural person who has suffered harm as a result of the commission of any crime in the jurisdiction of the Court. These provisions leave a lot to Chambers' interpretation.

On 3 October 2012, Trial Chamber V issued its decisions on victim participation and representation for the trial in the two Kenyan cases.³⁹ Emphasising that participation must be 'meaningful' and not 'purely symbolic',⁴⁰ the Trial Chamber stated that an individual, organisation or institution must 'have suffered harm as a result of an incident falling within the scope of the confirmed charges' to qualify as a victim under Rule 85 of the RPE.⁴¹ Compared to earlier decisions on victim participation, the decisions in the Kenyan cases set themselves apart in a number of important ways. Notably, victims who do not wish to appear in court in person need not submit a detailed application as otherwise required under Rule 89 of the RPE, in this way distinguishing between 'direct individual participation' and 'indirect participation through a common legal representative'.⁴² Further, the Legal Representatives for Victims (LRVs) are tasked with representing the views and concerns of *all* individuals qualifying as victims in the cases, including those who chose not to register or were unable to do so, but whom the LRVs have reason to believe qualify as

37 *Daily Nation* 'PEV victims get Sh10bn fund' 26 March 2016, <http://www.nation.co.ke/news/PEV-victims-get-Sh10bn-fund/-/1056/2667062/-/114lb3g/-/index.html> (accessed 26 February 2018).

38 Art 68(3) of the Rome Statute provides that '[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused'.

39 *Prosecutor v Ruto & Sang* Decision on victims' representation and participation ICC-01/09-01/11-460, 9 October 2012; *Prosecutor v Muthaura and Kenyatta* Decision on victims' representation and participation ICC-01/09-01/11-498, 6 October 2012.

40 *Ruto & Sang* (n 39 above) paras 10 & 9, respectively.

41 *Ruto & Sang* paras 46-47; 45-46, respectively.

42 *Ruto & Sang* paras 24, 29, 23, 28, respectively.

victims in the cases.⁴³ The decision is also noteworthy in that it requires the LRVs to be based in Kenya and only be present in the courtroom during important moments of the proceedings. In all other instances, the Office of the Public Counsel for Victims (OPCV) is in charge of handling the legal proceedings in the courtroom, based on the LRV's instructions.⁴⁴

6.2 Challenges for meaningful victim participation in Kenya

Although presenting some important progress compared to previous models, the ICC's regime for victim participation faced significant challenges in the Kenyan case, from which important lessons can be learned for future cases.

Whereas Rule 86 of the RPE requires the Chambers to take into account the needs of all victims and witnesses in making any direction or order, it has been argued that the Trial Chamber had failed to sufficiently consult victims before making the above-mentioned decision.⁴⁵ To advance more meaningful participation, it is also important that the basic needs of victims are first met and that they are compensated before (or while) engaging in a lengthy legal process.⁴⁶ While obtaining clear and consistent information about the ICC is vital for advancing meaningful participation, victims' knowledge of the ICC and the framework for participation has generally been poor in Kenya (although participating victims had a better knowledge compared to victims not participating in ICC cases, and some improvements have over time taken place). This raises serious questions concerning the scope and quality of ICC outreach activities.⁴⁷ The registration process also faced significant challenges in Kenya, particularly in the early phases of the process where victims lacked information and often were confused about how to register and the purpose thereof. A key challenge in this regard concerns a lack of consistency in the registration process, including the Court's continued alteration of the forms used for registration.⁴⁸ Moreover, whereas it may be necessary to uphold the Court's distinction between case and situation victims, this can be problematic from the point of view of victims who often view the distinction as arbitrary. In some situations, the distinction may have created tensions between different groups of victims.⁴⁹ Whereas the Chamber's requirement that the LRVs be based in Kenya was beneficial to victims as it

43 *Ruto & Sang* paras 53, 52, respectively.

44 *Ruto & Sang* paras 60, 59, respectively. See further Impunity Watch 'In the shadow of politics: Victim participation in the Kenyan ICC cases' June 2016.

45 Impunity Watch (n 44 above) 22-23. See also M Pena & G Carayon 'Is the ICC making the most of victim participation?' (2013) 7 *International Journal of Transitional Justice* 518.

46 Impunity Watch (n 44 above) 57.

47 As above.

48 As above.

49 Impunity Watch (n 44 above) 57-58.

facilitated more regular consultation, this also resulted in the LRVs being less frequently present in the courtroom. This is seen as problematic by some as the OPCV may be less familiar with the preferences of victims in specific cases.⁵⁰ In the view of the Nairobi Principles on Accountability, victim participation in Kenya often left the impression that court officials viewed victim participation merely as an 'add on' with little thought of how to best promote meaningful participation. As the post-election violence-related cases collapsed, so did victims' opportunities to participate in the proceedings and obtain reparations from the Court.

Apart from the above, the Nairobi Principles on Accountability observes that the two LRVs at the trial stage viewed their roles differently. The Principles also observe that the Trust Fund for Victims (TFV) has not met the expectations of victims. To date, the TFV has continued to raise expectations without offering any assistance. One concrete suggestion is that the assistance of the TFV ought to be mandatory in all situation countries, at least in the form of smaller projects which could potentially attract other donors or promote the government itself to offer assistance. In Kenya, challenges relating to promoting victims' interests and rights were further intensified as the Kenyan government itself took a narrow view of reparations. The government simply offered victims – sometimes allegedly on a discriminatory basis – a small sum of money, without adequately addressing questions of medical assistance, psycho-social support and livelihoods.

6.3 Challenges to the protection of witnesses

The Kenyan ICC cases have been marred by witness interference, and witnesses have often been subject to harassment or worse. As Judges Fremr and Eboe-Osuji noted in the *Ruto and Sang* case, there has been 'a disturbing level of interference with witnesses' which, together with other factors, has had a negative effect on the proceedings and 'appear to have influenced the prosecution's ability to produce more (credible) testimonies'.⁵¹

50 Impunity Watch 58. On the challenges facing victim participation in Kenya and elsewhere, see further Amnesty International and Redress 'Independent Panel of Experts report on victim participation at the International Criminal Court' July 2013, <http://www.amnesty.org/fr/library/info/IOR53/001/2013/en> (accessed 26 February 2018); E Haslam & R Edmunds 'Common legal representation at the International Criminal Court: More symbolic than real?' 12 *International Criminal Law Review* 871; UC Berkeley School of Law, Human Rights Center, 'The victims' court? A study of 622 victim participants at the International Criminal Court' 2015, https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf (accessed 26 February 2018); L Moffett 'Meaningful and effective? Considering victims' interests through participation at the International Criminal Court' (2015) 26 *Criminal Law Forum* 255.

51 *Prosecutor v Ruto and Sang* 'Public redacted version of decision on defence applications for judgments of acquittal' 5 April 2016, ICC-01/09-01/11-2027-Red (reasons of Judge Fremr) para 147.

In this light, the Nairobi Principles on Accountability emphasise that there is a need to secure and evacuate witnesses well in advance, especially in cases where government opposition to the ICC's intervention can be expected. The Principles also address the role of civil society in advancing witnesses protection. However, one challenge in Kenya is that civil society groups often were similarly subject to intimidation and may lack the necessary resources and facilities to promote the security of witnesses.⁵² At the same time, the Kenyan cases illustrate that in some cases there is a need to avoid over-reliance on live witnesses who may be threatened, bribed, intimidated or killed and, where possible, to rely more on documentary and forensic evidence.

7 Other topics addressed by the Nairobi Principles on Accountability

Besides the four main themes discussed above, the Nairobi Principles on Accountability address a range of other topics that, for reasons of space, are not elaborated on in detail in this article, but will be briefly described here.

One such theme addressed by the Principles involves outreach. The Kenyan ICC cases demonstrate the importance of providing affected communities with sufficient information about the ICC. Yet, in the Kenyan situation, only one ICC staff member specifically worked on outreach, despite the significant challenges in the country. Partly due to limited ICC outreach, Kenyan civil society organisations were heavily involved in outreach activities, including disseminating key messages regarding the operation of the ICC and crucial moments in the proceedings. Consequently, the Nairobi Principles on Accountability emphasise that outreach must be re-conceptualised as a core part of the Court's operations, and form part of the core budget of the ICC.⁵³

Another, but related, theme, addressed by the Nairobi Principles on Accountability concerns civil society strategies in promoting accountability. The experiences of Kenyan civil society will prove useful for civil society groups elsewhere. It is generally acknowledged that civil society groups in Kenya played a vital role on the international stage promoting justice for the post-election violence, for example by attending ASP sessions and offering alternative versions to the narrative presented by the Kenyan government.⁵⁴

52 On the intimidation of civil society, see further TO Hansen & C Sriram 'Fighting for justice (and survival): Kenyan civil society accountability strategies and their enemies' (2015) 9 *International Journal of Transitional Justice* 407.

53 As above.

54 As above.

Finally, the Nairobi Principles on Accountability address the politics of accountability. This must be viewed in light of the failure of both the ICC and Kenyan civil society to insulate the ICC trials from political interference. Although the notion that criminal trials devoid of any political interference or considerations can be conducted when state officials are the target may be unrealistic, both the Court and other actors have important lessons to learn about how to promote the rule of law in the face of political manipulation.

8 Conclusion

This article has presented an overview of the Nairobi Principles on Accountability, including an analysis of four main themes addressed by the Principles, namely, state co-operation; the immunity of state officials; complementarity; and issues relating to victims and witnesses. In so doing, the article has explained the particular challenges experienced in the Kenyan ICC cases, while at the same time pointing to the broader ramifications of these from a rule of law perspective.

Although some of the challenges for giving effect to accountability norms experienced in Kenya are unique, the lessons learned from this case will be valuable for understanding how justice processes relating to international crimes can be improved. For example, elite manipulation of justice processes is not unique to Kenya, and civil society groups across the African region and elsewhere frequently struggle to identify and operationalise strategies that can effectively counter the narratives presented by ruling elites. Moreover, challenges relating to state co-operation and giving effect to the rules governing immunity of state officials are facing other ICC situations, as evidenced by the failure of African states and others to arrest Sudan's President Omar al-Bashir while present in their territories. Notwithstanding its claimed benefits, complementarity faces challenges across the African region and elsewhere. Despite claims that the ICC is a court for victims, it is also clear that the challenges described in this article relating to meaningful victim participation and effective reparations are far from unique to the Kenyan situation.

The Nairobi Principles on Accountability will provide a platform for advancing the rule of law in Africa and elsewhere by informing actors – ranging from the ICC itself to the AU, state parties and civil society – on how to improve the system of justice for international crimes.

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CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2017

Compiled by: I de Meyer

Source: <http://www.au.int> (accessed 1 June 2018)

	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	20/11/16	10/01/17
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	30/11/16
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	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			23/02/17
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	16/06/17	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	24/04/18
Namibia	30/07/92		23/07/04		11/08/04	23/08/16
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	48	30	39	31

* Additional declaration under article 34(6)

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