

# AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 19 No 1 2019

Pretoria University Law Press  
PULP

2019

## ***African Human Rights Law Journal Volume 19 No 1 2019***

### **Published by:**

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher, based in Africa, launched and managed by the Centre for Human Rights and the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa that have been peer-reviewed. PULP also publishes a number of journals, series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa.

For more information on PULP, see: [www.pulp.up.ac.za](http://www.pulp.up.ac.za)

### **To order, contact:**

Centre for Human Rights  
Faculty of Law  
University of Pretoria  
South Africa  
0002  
Tel: +27 12 420 4948  
Fax: +27 86 610 6668  
[pulp@up.ac.za](mailto:pulp@up.ac.za)  
[www.pulp.up.ac.za](http://www.pulp.up.ac.za)

### **Printed and bound by:**

Minit Print, Hatfield, Pretoria

### **Cover design:**

Lizette Hermann, Centre for Human Rights, University of Pretoria

**ISSN: 1609-073X**

**EISSN: 1996-2096**



The financial assistance of the European Union is gratefully acknowledged.

# CONTENTS

Editorial.....	vii
Confidentiality and the implementation of the decisions of the African Commission on Human and Peoples' Rights <i>by Rachel Murray</i> .....	1
Private prosecution as a local remedy before the African Commission on Human and Peoples' Rights <i>by Jamil D Mujuzi</i> .....	26
Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and Peoples' Rights <i>by Ronald Naluwairo</i> .....	43
No second chance for first impressions: The first amicable settlement under the African Children's Charter <i>by Benyam D Mezmur</i> .....	62
The International Criminal Court and Africa: A fractious relationship assessed <i>by Archangel Byaruhanga Rukooko and Jon Silverman</i> .....	85
Twelve years of judicial cooperation between the Democratic Republic of the Congo and the International Criminal Court: Have expectations been met? <i>by Shirambere Philippe Tunamsifu</i> .....	105
The effectiveness of market-based initiatives for regulating development projects by multinational corporations in Africa with regard to human rights and environmental abuses <i>by Yolandi Meyer</i> .....	126
Students' academic freedom in African universities and democratic enhancement <i>by Kwadwo Appiagyeyi-Atua</i> .....	151
Digital activism and free expression in Uganda <i>by Ronald Kakungulu-Mayambala and Solomon Rukundo</i> . ..	167
Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy <i>by Itumeleng Shale</i> .....	193

Land-grabbing and the right to adequate food in Ethiopia <i>by Samrawit Getaneh Damtew</i> .....	219
Human rights violations of persons with albinism in Tanzania: The case of children in temporary holding shelters <i>by Ines Kajiru and John C Mubangizi</i> .....	246
Greasing the wheels of legal aid in criminal proceedings in Ghana: An evaluation of the legal and regulatory framework <i>by Isidore Kwadwo Tufuor</i> .....	267
A capabilities approach to remedies for systemic resource- related socio-economic rights violations in South Africa <i>by Shanelle van der Berg</i> .....	290
An empirical study of the early cases in the pilot equality courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 <i>by Louis Botha and Anton Kok</i> .....	317
The right to equality and access to courts for government employees in South Africa: Time to amend the Government Employees Pension Law <i>by Mtendeweka Mhango</i> .....	337
<b>Special focus: The right to development</b>	
Editorial .....	361
Systems problem and a pragmatic insight into the right to development governance for Africa <i>by Carol C Ngang</i> .....	365
Finding value for the right to development in international law <i>by Simeon A Igbiniedion</i> .....	395
A call for a 'right to development'-informed pan- Africanism in the twenty-first century <i>by Serges Djoyou Kanga</i> .....	418
The Sustainable Development Goals and the rights-based approach to development: Compatible or missing the point? <i>by Annelie de Man</i> .....	445

Reviving the right to development within the multilateral trade framework affecting (African) countries to actualise Agenda 2063 by <i>Clydenia Stevens</i> .....	470
--	-----

The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections by <i>Isaac Shai</i> .....	494
--	-----

## **Recent developments**

Reconceptualising the first African Women's Protocol case to work for <i>all</i> women by <i>Ciara O'Connell</i> .....	510
---	-----

The constitutionality of the Fee Exemption Regulations in South African schools: A critical analysis of <i>Michelle Saffer v Head of Department, Western Cape Education Department</i> by <i>Jesse Prinsloo</i> .....	534
--	-----

Please note that the editors will only consider submissions that clearly indicate that the submission has not already been submitted for publication or published elsewhere. Submissions should be no longer than 10 000 words (footnotes included). For further information, see 'Guidelines for Contributors' after the last contribution in this *Journal*. Also see <http://www1.chr.up.ac.za/index.php/ahrlj-contributors-guide.html> for detailed style guidelines.



## Editorial

This issue of the *African Human Rights Law Journal* appears as the independence of the African Commission on Human and Peoples' Rights (African Commission) remains under threat. This follows a decision of the African Union's Executive Council Decision in 2015 in which it not only gave an ultimatum to the Commission to withdraw the observer status granted to the Coalition of African Lesbians, but also demanded a revision of the Commission's guidelines on granting observer status to non-governmental organisations (NGOs). This development signals a concerted attempt to erode human rights at both the regional and national levels in Africa. Against this background scholarly reflection on aspects of human rights – as contained in this issue of the *Journal* – is all the more important.

The first four articles focus on the African Union's two quasi-judicial human rights bodies. In the first three, aspects of the mandate, jurisprudence and operations of the African Commission are considered. All three contributions explore the relationship between the regional and the national. Murray contributes to the burgeoning scholarship on the implementation of international human rights law by highlighting the relationship between confidentiality in the exercise of the Commission's protective mandate and the implementation of its findings. Mujuzi provides some guidance on instituting private prosecutions as a requirement for the exhaustion of domestic remedies. Naluwairo investigates the influence of the Commission's jurisprudence on the existence and functioning of military courts within national legal systems. In the fourth article – which relates to the African Children's Committee – Mezmur draws our attention to insights from the first amicable settlement overseen by that Committee.

The next two articles of this edition of the *Journal* are devoted to the International Criminal Court (ICC) and its relationship with Africa. Although much has been written on this, these contributions add to the growing scholarship that exists on the issue. Rukooko and Silverman discuss empirical data, collected through interviews with civil society actors in two countries – Kenya and Uganda – at the epicentre of on-going debates on the role of the ICC in Africa. By interrogating the cooperation between the ICC and the Democratic

Republic of Congo (DRC), Tunamsifu solidly grounds his discussion at the domestic level.

Meyer and Appiagyei-Atua frame their contributions from a broader African perspective. Both authors engage with themes of contemporary concern across the continent: the negative effects of multinational companies on the environment, and the inclusion of students in debates about academic freedom at universities.

The remaining eight articles explore aspects of human rights at the domestic level. Kakungulu-Mayambala and Rukundo write about digital activism in Uganda. Shale advances an argument for a more effective reliance on international human rights treaties in Lesotho. With reference to a report by the African Children's Committee, Kajiru and Mubangizi critically discuss the placement of children with albinism in temporary holding shelters in Tanzania. The right to legal aid for accused persons in Ghana is the issue that concerns Tufuor. The final three articles deal with diverse aspects related to human rights in South Africa. Van der Berg proposes a new way of looking at remedies that have resource implications in socio-economic rights cases. Botha and Kok consider the right to equality and, specifically, the South African equality courts, against the background of empirical data on the early practice of these courts. Another aspect of equality, namely, the right of government employees to access courts, is explored in Mhango's contribution.

In the section in which recent developments are reviewed, O'Connell provides a critical assessment of the decision of the Court of Justice of the Economic Community of West African States, which made the first judicial finding of violations of the Protocol to the African Charter on the Rights of Women in Africa. Prinsloo discusses a South African domestic court decision related to the rights of children to education in the context of the divorce of their parents.

From time to time a section of the *African Human Rights Law Journal* is devoted to a special thematic focus. In this issue it is the right to development that is under the spotlight. Although the right to development has received relatively scant attention in the scholarly literature on human rights in the past, the *Journal* has attracted contributions and published articles on this topic. See, for example, RF Oppong 'Trade and human rights: A perspective for agents of trade policy using a rights-based approach to development' (2006) 6 *African Human Rights Law Journal* 123; MA Tadeq 'Reflections on the right to development: Challenges and prospects' (2010) 10 *African Human Rights Law Journal* 325; and O Nnamuchi and S Ortuanya 'The human right to health in Africa and its challenges: A critical analysis of Millennium Development Goal 8' (2012) 12 *African Human Rights Law Journal* 178. This special focus, therefore, builds on these antecedents. A number of the articles in the special focus are based on papers presented at the second International Conference on the Right to Development, held from 15 to 17 August 2018 at the University of Pretoria, South Africa. The editors of the *Journal* thank the editor and



contributors to the special focus for the seamless collaboration on this timely special focus section.

Our sincere appreciation go out to all who have been involved in making the *AHRL* 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 so generously gave of their time, expertise and insights: Omogboyega Abe; Adem Abebe; Jegede Ademola; Dennis Armah; Gina Bekker; Lilian Chenwi; Rebecca Cook; Anthony Diala; Ebenezer Durojaye; Lovell Fernandez; Eugene Fidell; Ama Hammond; Christof Heyns; Tomiwa Ilori; Obonye Jonas; Kristi Kenyon; Anton Kok; Rosaan Kruger; Josua Loots; Kitty Malherbe; Stuart Maslen; Izak Minnaar; Freddy Mnyongani; Trésor Makunya; Godfrey Musila; Sylvie Namwase; Carol Ngang; Michael Nyarko; Geoffrey Ogwaro; Chairman Okoloise; Dejo Olowu; Nicholas Orago; Chris Maina Peter; and Aifheli Tshivhase.



## Confidentiality and the implementation of the decisions of the African Commission on Human and Peoples' Rights

*Rachel Murray\**

Professor of International Human Rights Law; Director of the Human Rights Implementation Centre, University of Bristol Law School, United Kingdom  
<https://orcid.org/0000-0003-4077-9381>

### Summary

*The African Commission on Human and Peoples' Rights has been criticised for its restrictive application of article 59 of the African Charter on Human and Peoples' Rights resulting, it is argued, in a shroud of secrecy around the protective elements of its work. This article explores the application of the principles and presumptions in article 59 and the confidentiality covering the communication procedure of the African Commission after the adoption of the decision. Research reveals that there may be a greater likelihood of implementation of the recommendations in the decision if it is visible and a variety of actors are made aware of its existence and these measures that the state then takes, or fails to take. Drawing upon an Economic and Social Research Council-funded project, the article argues that article 59 in practice has so far been applied without a great deal of thought, to procedures post-decision that monitor the implementation of the recommendations. Thus, at present the African Commission has slipped into presuming that measures taken by the state to implement recommendations, evidence presented by the complainants (or indeed other actors) on the extent to which it has done so, and the Commission's own assessment, fall within the communication procedure and, therefore, by default are confidential. Yet, article 59 does not require this, neither do the Rules of Procedure, and a blanket approach to confidentiality post-decision is not appropriate. The article recommends that the African Commission can improve publication and visibility of the decision itself;*

---

\* LLB (Leicester) LLM (Bristol) PhD (W England); [Rachel.Murray@bristol.ac.uk](mailto:Rachel.Murray@bristol.ac.uk). I would like to thank Frans Viljoen, Debra Long and Clara Sandoval-Villalba for their helpful and insightful comments on earlier drafts of this article.

*and should be making available on its website and in documentation information on what measures the state has taken to implement the decision.*

**Key words:** *Africa; human rights; confidentiality; implementation; article 59*

## 1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) has been criticised for its restrictive application of article 59 of the African Charter on Human and Peoples' Rights (African Charter) resulting, it is argued, in a shroud of secrecy around the protective elements of its work.<sup>1</sup> This article explores the application of the principles and presumptions in article 59 and the confidentiality covering the communication procedure of the African Commission after the adoption of the decision. Research reveals that there may be a greater likelihood of implementation of the recommendations in the decision if it is visible and a variety of actors are made aware of its existence and the measures to implement it that the state then takes or fails to take.<sup>2</sup> Drawing upon an Economic and Social Research Council (ESRC)-funded project,<sup>3</sup> I argue that article 59 in practice has so far been applied, without a great deal of thought to procedures post-decision that monitor the implementation of the recommendations.

Since its establishment in 1987 the African Commission has received more than 500 communications under article 55 of the African Charter whereby individuals, civil society organisations (CSOs) and others have submitted cases that allege violations of the rights in the Charter. If admissible, the African Commission then will proceed to look at the merits and, if violations are found, will make 'recommendations' to the state on what action it should take to

---

1 See eg M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 574-575.

2 See eg Open Society Justice Initiative *From rights to remedies: Structures and strategies for implementing international human rights decisions* (2013).

3 See Human Rights Implementation Project (Project), <http://www.bristol.ac.uk/law/hrlip/> (accessed 1 April 2019). This project tracked the implementation of decisions from nine states: three in Africa (Burkina Faso, Cameroon and Zambia); three in Europe (Belgium, the Czech Republic and Georgia) and three in the Americas (Canada, Colombia and Guatemala), adopted by UN treaty bodies and the regional human rights commissions and courts. It consisted of documentary analyses, in-country workshops, and over 200 interviews with members and representatives of these supranational bodies, and within the nine states, the government representatives, victims, parliamentarians, the judiciary, civil society organisations and academics. Interviews are anonymous. However, where appropriate, information is given on the profile or location of the interviewee. For further information on our methodology, see *Journal of Human Rights Practice*, Special Issue, 2019, forthcoming.

remedy those violations. This latter section is found at the end of the decision. These recommendations have varied in number, breadth, detail and sophistication, from a bland 'take measures to comply with its international obligations', to lists of tasks that the state should carry out, such as establishing commissions of inquiry, releasing the individuals, paying compensation and amending legislation.<sup>4</sup> While the content may still be criticised for their ambiguity, the trend is to become increasingly detailed and focused in setting out what the state should do once violations have been found. Normally the state will be given 180 days to respond to the Commission on the measures it has taken to implement the recommendations.<sup>5</sup> However, often little is known about whether states in fact implement these recommendations. Systematic follow-up by the African Commission has not yet occurred although *ad hoc* information is available.<sup>6</sup> Some of this information is public (for example in its annual reports, or through statements by CSOs), some of it is private, but there does not appear to be a consistent approach or policy on which aspects, if any, should be confidential.

The decision on the communication, including the recommendations that the state should take to address the violations, used to be published in the Commission's Activity Report, but since the African Union (AU) organs restricted the number of pages in 2011,<sup>7</sup> the text of the communication now appears under the relevant page on the website.

Article 59 of the African Charter provides:

- 1 All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.
- 2 However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
- 3 The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Thus, prior to this approval by the Assembly the decision remains confidential. While the focus of discussion around article 59 principally has been on when decisions and information on them should be

---

4 See eg G Bekker 'The African Commission on Human and Peoples' Rights and remedies for human rights violations' (2013) 13 *Human Rights Law Review* 499; R Murray *The African Charter on Human and Peoples' Rights. A commentary* (2019) ch 2.

5 Rule 112(2), Rules of Procedure of the African Commission on Human and Peoples' Rights, 2010.

6 Eg in its annual reports and in an oral report by the Chairperson of the Working Group on Communications to each ordinary session of the African Commission; see further below.

7 30th Activity Report of the African Commission on Human and Peoples' Rights, 2011.

published, no debate has taken place on what happens post-adoption of the decision by the African Commission and the AU. One might consider this lack to be irrelevant: Article 59 applies only to the decision pre-authorisation by the AU organs. However, the policy of confidentiality applicable to its communication procedure risks being applied, by default, to the processes that occur post-decision. Leaving aside cogent criticisms directed at the manner in which article 59 has been employed by the African Commission pre-decision (particularly given interference by the AU political organs in the content of the Commission's findings),<sup>8</sup> this restrictive approach does not need to and, indeed, should not automatically apply to any process post-adoption of the decision.

There are various points post-decision to which confidentiality may apply, as will be seen below, including information provided by the state on the measures it has taken to implement the decision or judgment; information provided by other actors, including the victims or complainants, on what the state has done, if anything; and the assessment the African Commission may make as to whether those measures are sufficient. These points will be examined in turn.

The African Court on Human and Peoples' Rights (African Court) does not operate under the constraints of article 59. However, given the nascent processes and the potential fluidity of any monitoring mechanism by the African Commission as well as the relationship of both organs with the AU political bodies, this article will draw as well upon the approach of the African Court.

## 2 Confidential from whom

The *Oxford English dictionary* defines 'confidential' as 'intended to be kept secret', but neither article 59 nor the Rules of Procedure of the African Commission assist in clarifying confidential in relation to whom. Whilst submissions and pleadings during the consideration of a communication are shared by the Commission with the parties to the case, the actual decision on the merits is only provided to the parties after it has been approved by the Assembly of the AU. Thus, 'confidential' in the context of article 59 means different things at different stages of the process: While the case is pending, documents should not be disseminated beyond the parties and Commission, but once the decision has been adopted by the Commission it is not disclosed even to the parties until it has been approved by the Assembly.

The focus of the article is about what happens subsequently, whether the measures taken by the state to implement the decision or judgment are then made public, that is, visible to the parties to the

---

8 Eg Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec.49(III); Killander (n 1) 574-575.

case and the African Commission and beyond, to other stakeholders and the public. At the very least, one would expect the victims to know what action the state has taken in response to the decision, particularly individual measures. The victims themselves have a right to know what the state is doing to redress the violations that occurred. One could argue that this has already been achieved if the state has reported its activities to the victims directly or to them through the treaty or monitoring body. Yet, while the state authorities may engage the victim with respect to any individual measures (such as payment of compensation), the project also obtained evidence in at least one case, that the victim did not know whether other reparations such as guarantees of non-repetition had been implemented.<sup>9</sup>

Consequently, throughout the article I talk of confidentiality in terms of information being made public, beyond the parties to the communication and the treaty body itself.

### 3 Other regional systems and the United Nations

Comparisons with other regional systems reveal a mixed picture.

Under the Council of Europe, as noted below, discussions on what measures the state will take to implement the judgment of the European Court of Human Rights take place in private and without the victim's presence. However, these measures, including their action plans, subsequently are published by the Committee of Ministers, along with submissions from the parties as well as non-governmental organisations (NGOs) and national human rights institutions.<sup>10</sup> When the Committee decides no longer to supervise implementation it will adopt a resolution. All of these documents are available on-line.<sup>11</sup> The Parliamentary Assembly's Committee on Legal Affairs and Human Rights also adopts reports on the implementation of judgments.<sup>12</sup>

---

<sup>9</sup> Interview A.7, December 2017.

<sup>10</sup> Rules of the Committee of Ministers for the supervision of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at its 964th session), Appendix 4, item 4.4, Doc CMRules (2006) App 4, Rules 8.2-8.5.

<sup>11</sup> See [https://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp](https://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp); <http://www.coe.int/en/web/execution/submissions>; <http://www.coe.int/en/web/execution/closed-cases> (accessed 1 April 2019); also through HUDOC.

<sup>12</sup> See eg Committee on Legal Affairs and Human Rights, Implementation of Judgments of the European Court of Human Rights, Report (Rapporteur: Mr Klaas de Vries, The Netherlands, Socialist Group), Doc 13864, 9 September 2015, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=22005&lang=EN> (accessed 1 April 2019). The report forms the basis on which the Parliamentary Assembly adopted Resolution 2075 (2015), <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=22197&lang=EN> and Recommendation 2079 (2015), <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=22198&lang=EN> (accessed 1 April 2019).

With respect to cases before the Inter-American Commission for those states that have not accepted the Inter-American Court's jurisdiction the process is confidential. The Commission will consider whether the state has taken adequate measures to comply with its recommendations and, if it has failed to do so, after a vote of an absolute majority of the Commission's members the report on the merits will become public, although in practice all the specific documents submitted by the parties will not.<sup>13</sup> Where the state has accepted the Court's jurisdiction, if the Commission considers that the state has complied with its recommendations, it can choose whether to publish the report on the merits.<sup>14</sup> The Inter-American Commission on Human Rights includes sections in its annual reports that set out the action that states have taken and the current state of implementation, separating out friendly settlements from recommendations.<sup>15</sup> The Commission also could host private working meetings on compliance or thematic hearings (that are not based on a single case) to look at compliance issues.

After the Inter-American Court on Human Rights has issued a judgment it establishes modalities of compliance to be followed by the state that include, for example, when to report to the Court. When the Court receives the state's report it is shared with the legal representatives of the victims for their comments. The report is then sent to the Commission for it also to comment. This entire process is confidential. The Court also can hold private or public hearings to learn more about compliance, but the greatest majority of hearings have been of a private nature.

All the UN treaty bodies consider communications in closed sessions so that the oral deliberations and summary records remain confidential.<sup>16</sup> Once views on the communication have been formulated it is standard practice for these to be sent to the individual and the state party concerned.<sup>17</sup> The text of any final decision on the merits of the case or of a decision of inadmissibility is posted on the website of the Office of the High Commissioner for Human Rights (OHCHR) as part of the treaty bodies' jurisprudence. The UN treaty bodies also include information on follow-up in their annual reports to

---

13 Art 51(3).

14 IACHR *Impact of the Friendly Settlement Procedure* Doc OEA/Ser.L/V/II.Doc. 45/13, 18 December 2013 para 62, [http://www.oas.org/en/iachr/friendly\\_settlements/docs/ReportFriendlySettlement.pdf](http://www.oas.org/en/iachr/friendly_settlements/docs/ReportFriendlySettlement.pdf) (accessed 1 April 2019).

15 See IACHR, Annual Report 2015, ch II.D, Status of compliance with the recommendations of the IACHR.

16 Eg Human Rights Committee: see art 5(3) of the Optional Protocol to ICCPR and Rule 102(1) of the Rules of Procedure. See also Guidelines on Making Oral Comments Concerning Communications, CCPR/C/159, 21 December 2017 para 3(e).

17 See art 5 of the Optional Protocol to ICCPR, and Rule 101 of the Rules of Procedure of the HRC; Rule 107 of the Rules of Procedure for the CAT; Rule 76 for the Rules of Procedure for CRPD; Rule 29 for the Rules of Procedure for CRC; Rule 74 of the Rules of Procedure for CEDAW; Rule 80 for the Rules of Procedure of CED; and Rule 25 of the Rules of Procedure of ICESCR.



the General Assembly<sup>18</sup> or, in the case of the Human Rights Committee (HRC), under the International Covenant on Civil and Political Rights (ICCPR) in the follow-up reports. However, it can be difficult to find specific information on the activities of the Special Rapporteurs on follow-up, whose reports to the respective Committees are noted in the annual report but not necessarily annexed, presumably due to restrictions imposed on the length of the treaty bodies' reports. Furthermore, although the HRC, for example, categorises the response of the state with respect to the implementation of specific recommendations it is not always apparent on which basis this 'grade' is made.

## 4 Publicity and implementation

Why should the measures taken by states to implement these decisions and judgments be made public? First, this requirement is part of the right to truth, not only for the victims in the case but also for the wider public.<sup>19</sup>

In addition, research around why and how states implement decisions and judgments from human rights treaty bodies and indeed international legal courts and tribunals identifies a range of factors with different theories attempting to explain the rationale behind states' responses.<sup>20</sup> Some argue that if one can 'generate publicity about compliance patterns [one can] ... raise awareness among

18 See HRC General Comment 33 para17.

19 UN Human Rights Council, Right to Truth, A/HRC/RES/9/11; UN Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, A/HRC/16/48. See eg *Dino Noca v Democratic Republic of the Congo* Communication 286 2004, para 158; Bekker (n 4) 499. See also before the European Court, *El-Masri v Former Yugoslav Republic of Macedonia* App 39630/09 para 191; UN Human Rights Council, Right to Truth, A/HRC/RES/9/11. The Aire Centre, Amnesty International, ICJ, OMCT, Redress, Joint NGO Response to the Standing Committee on the Rules of Court's Report on the Treatment of Classified Documents, AI Index: IOR 60/8245/2018, 5 April 2018.

20 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; F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 44 *Journal of African Law* 1; Open Society Justice Initiative (n 2); Open Society Justice Initiative *From judgment to justice. Implementing international and regional human rights decisions* (2010); R Murray & D Long *Implementation of the findings of the African Commission on Human and Peoples' Rights* (2015); B Çalı & A Wyss 'Why do democracies comply with human rights judgments? A comparative analysis of the UK, Ireland and Germany, 26 August 2009; D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and International Relations* 35 40; C Hillebrecht 'Rethinking compliance: The challenges and prospects of measuring compliance with international human rights tribunals' (2009) 1 *Journal of Human Rights Practice* 368; C Hillebrecht *Domestic politics and international human rights tribunals: The problem of compliance* (2014); F Viljoen 'Exploring the theory and practice of the relationship between international human rights law and domestic actors' (2009) 22 *Leiden Journal of International Law* 177.

agencies and ... make it easier for the media to follow up on problem areas'.<sup>21</sup> As the Open Society Justice Initiative (OSJI) report made clear: 'Improving the visibility, accessibility, and accuracy of information pertinent to implementation is also essential.'<sup>22</sup>

The project found that there is a distinction but inter-relationship here with the awareness of the treaty body issuing the decision, awareness of the decision itself and the visibility of the measures taken by the state to implement any of the reparations contained therein. Thus, there was some evidence from the cases that were examined that, tied up with the implementation is a lack of awareness of the treaty bodies: 'Most government officials don't know there is an African Commission on Human and Peoples' Rights. Very, very few people. Even lawyers don't know there is an African Commission.'<sup>23</sup> Consequently, there may be little knowledge among citizens and lawyers about the existence of these communication procedures and how they operate,<sup>24</sup> and government officials may not have regular engagement with the African Commission through, for instance, attendance at its sessions.<sup>25</sup> This lack of knowledge may be related to, or explained by, the level of awareness of human rights generally within the state:<sup>26</sup>

The problem of implementation of decisions of international bodies ... is really a symptom of a root cause ... the human rights culture in the country, but also the level of awareness among the citizens, but, possibly very importantly among the officials.

With respect to the decision itself the project heard in some of the cases that the amount of publicity determined whether the state reacted and how quickly, as it could prompt key domestic actors to ask questions of the executive.<sup>27</sup> Conversely, where the decision is not known this 'reduces the possibility of intense pressure from citizens. Popular pressure is missing ... I see lack of ownership of these

21 V Gauri, J Staton & JV Cullell 'A monitoring mechanism for constitutional decisions on the Costa Rican Supreme Court' 2012 International Congress of the Latin American Studies Association (21 May 2012) 5, cited in Open Society Justice Initiative (n 20) 100. Report of the Human Rights Committee, UN Doc A/51/40 paras 435-438; then in Rules of Procedure 2012, Rule 103.

22 Open Society Justice Initiative (n 20) 29.

23 Interview with civil society representative, Cameroon, March 2017. Round Table on Factors Influencing the Implementation of Decisions of Human Rights Bodies, Yaoundé, Cameroon, 5 July 2017 (on file with author).

24 Eg HRLIP Evaluation by Burkina Faso of their implementation of decisions made by international human rights bodies, Ouagadougou, 27-28 November 2017, Workshop Report; Interview with government official, 20 March 2018.

25 General Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights, 12-15 August 2017, Dakar, Senegal. F Viljoen & C Odinkalu *The prohibition of torture and ill-treatment in the African human rights system: A handbook for victims and their advocates* OMCT Handbook Series Vol 3, OMCT, Geneva, Switzerland, 2014.

26 Interview with civil society representative, Zambia, March 2017. See also General Report (n 25); Interview A3, December 2017.

27 Eg interview with parliamentarian, Zambia, August 2017.

decisions ... The problem is not because people are not willing but that they are unaware.<sup>28</sup>

States may be more likely to respond if the decision is more visible and may take a pragmatic approach accordingly. As one government official acknowledged in the project: 'It's about which one gets more publicity, and so then that determines also how much attention is given to it ... sometimes the speed at which a matter moves is very dependent on what attention is gotten.'<sup>29</sup>

Here visibility is relevant not just at the national level but also regionally and internationally: 'A country agrees to implement ... international decisions depending on how it sees or views the human rights at the global level ... [the country] must make progress at continental and global levels in terms of human rights.'<sup>30</sup>

Furthermore, the legitimacy of the treaty body itself, according to some, may also be at stake. One rationale for a body such as the African Commission to publish information on the measures taken by the state to implement the decision is that it shows that it is doing something to monitor the situation and, as one litigant said, 'that someone is keeping track'.<sup>31</sup> Consequently, without such transparency there is a risk that any decisions that are taken may be tainted by political interference.<sup>32</sup>

Without a systematic recording of the measures taken by states to implement the recommendations of the African Commission one has a skewed picture of the extent of implementation. As two interviewees told us: 'We tend to only hear about cases where the complainant has not received any compensation',<sup>33</sup> and that 'states sometimes do good things but not able to tell us'.<sup>34</sup> Furthermore, this situation can result in 'rumours' around what did or did not happen in response to the decision and lack of concrete evidence.<sup>35</sup>

While there are strong arguments for information post-decision to be public a blanket approach may not always be wise. There may be cogent reasons why some issues should be kept confidential. First, it may be necessary to protect individuals and their identities, particularly if the victim has been the subject of criminal proceedings at the national level. Second, and this argument relates to the fact that there can be limited knowledge at the national level of the work of the treaty body, the project heard concerns from one state that if

---

28 Interview with government official, Burkina Faso, December 2017.

29 Interview Zambia, March 2018. Interview with civil society organisation, Zambia, March 2017.

30 Interview with civil society organisation, Burkina Faso, December 2017.

31 Interview D11, May 2017.

32 CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359 fn 49.

33 Interview with civil society representative, Burkina Faso, July 2017.

34 Interview B2, July 2017.

35 Interview with civil society representative, Burkina Faso, July 2017.

the public knew, for example, that compensation had been paid to particular individuals, this would open a 'Pandora's box' for others to claim, and that some discussions are best dealt with through a 'process of quiet negotiation'.<sup>36</sup>

Third, in some circumstances it may engender trust between the African Commission and the state if it is able to report difficulties to it in confidence, views echoed by a litigant, as well as a member of the Commission.<sup>37</sup>

You want the parties to report to you the challenges they are facing without feeling like they are exposed to the public. We need the state to be able to come to you openly and have that protection there. If you get the feeling that this will be out there and exposed ... it is similar to the amicable settlement procedure.

States also may be reluctant to make the actual decisions public when compared anecdotally with the recommendations in the Universal Periodic Review (UPR). As one state representative told us, in part because of the language involved, the audience to whom it is directed, and the apparent discretion the state has in terms of how it addresses the recommendation.<sup>38</sup>

The state decides whether to accept recommendations and so tries to inform the entire international community on the decision. Individual communications always have words condemning states. The UPR procedure is much more diplomatic and encouraging and facilitating, as compared with individual communications. So it incentivises the state and raises awareness of other people in informing them what is being done.

In conclusion, this finding does not lead us to suggest that confidentiality should apply to all such instances, but what it does point to is a need for greater clarity on when and what should be made public.

## 5 Relevant elements of the process

There are a number of different elements of the communication procedure post-decision that need to be considered.

### 5.1 Provisional measures

The African Commission can issue provisional measures according to Rule 98 of its 2010 Rules of Procedure (and former Rule 111 of its 1995 Rules) and has done so in a number of cases.<sup>39</sup> A

36 Interview C1, March 2017.

37 Interview D8, May 2017; interview D2, April 2017.

38 Interview, February 2018. See also Round Table on Factors Influencing the Implementation of Decisions of Human Rights Bodies, Yaoundé, Cameroon, 5 July 2017 (on file with author).

39 For a discussion, see CB Herrera & F Viljoen 'Danger and fear in prison. Protecting the most vulnerable persons in Africa and the Americas by regional human rights

communication must be pending before the Commission before it will consider provisional measures.<sup>40</sup> The challenge arises in that if the communication is pending, any issue relating to it, including provisional measures, then, according to the African Commission, will be considered confidential. In fact, on no occasion have provisional measures adopted by the Commission been made public. All that is available is a brief mention in the activity report of the Commission citing the name of the case<sup>41</sup> and, again usually in passing, reference in the decision on the communication that provisional measures were requested and accepted or rejected by the African Commission.<sup>42</sup> There is no separate 'decision', and it is not clear if the Commission's conclusions on granting provisional measures are a separate 'order' (as it has referred to it in some communications)<sup>43</sup> or merely a procedural element of the communication mechanisms in the same way as, say, seizure.

Rule 98 refers to the provisional measures being a 'request' taken by the African Commission (or the Chairperson or Vice-Chairperson if the Commission is not in session).<sup>44</sup> This request is sent to the state party and then only is it forwarded to the victim, the Assembly, Peace and Security Council (PSC) and the AU Commission.<sup>45</sup> In this regard, therefore, it does not appear to warrant authorisation by the Assembly, in contrast to a final decision on the merits under article 55 of the African Charter. Yet, this possibility could contradict article 59(1) which provides that '[a]ll measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide', the Chapter being articles 46-59, but not article 45. The reference to 'all measures' seems unequivocal. Yet, while the African Commission has called on parties not to disseminate information, in practice it is not clear how consistently it has done so and there is evidence that this request has been disregarded.<sup>46</sup> The result of this confused state of affairs, as Herrera and Viljoen note, is that '[i]t is virtually impossible to establish exactly how many [provisional measures] have been adopted by the ACHPR and whether the state concerned complied with the request'.<sup>47</sup> Under its Rule 118(2), the African Commission can refer to

---

bodies through interim measures' (2015) 33 *Netherlands Quarterly of Human Rights* 163.

40 'At any time after the receipt of a Communication and before a determination on the merits', Rule 98(1), Rules of Procedure of the African Commission, 2010.

41 Eg, 44th Activity Report of the African Commission on Human and Peoples' Rights para 21.

42 Herrera & Viljoen (n 39) 170-171.

43 Eg, *Ahmed Ismael & 528 Others v the Arab Republic of Egypt* Communication 467/14, 27 May 2016; *The Indigenous Peoples of the Lower Omo (represented by Survival International Charitable Trust) v Ethiopia* Communication 419/12, 35th Activity Report of the African Commission on Human and Peoples' Rights para 27.

44 Rule 98(2), Rules of Procedure of the African Commission, 2010.

45 Rule 98(3), Rules of Procedure of the African Commission, 2010.

46 Information on file with author.

47 Herrera & Viljoen (n 39) 191.

the African Court any communication where a request for provisional measures has not been complied with.

Before the African Court the order on provisional measures is made public.<sup>48</sup>

## 5.2 Proceedings to determine reparations and the reasoning in the decision

Before the African Commission there is no separate procedure, written or oral, to determine the recommendations or reparations that the Commission makes in the finding of a violation. Instead, these issues are dealt with as part of the written submissions in the communication and in any hearings, both of which are governed by article 59 and, therefore, confidential.<sup>49</sup> Before the African Court, while the pleadings when the case is pending before the Court are confidential,<sup>50</sup> the Court's Rules enable additional submissions on reparations, post-judgment, and the issuing of a separate ruling on reparations.<sup>51</sup> While the pleadings in this second process, on the reparations, also are private, the ruling itself will be public.

Furthermore, in part because before the African Commission reparations are dealt with in the merits, the reasoning provided in the decision on how the Commission reached its recommendations often is limited if not absent. This practice is not without consequence because, as the project found for one state, it can impact on the legitimacy of the Commission and how it is perceived.<sup>52</sup>

## 5.3 Publication and visibility of the actual decision

The decision on the communication, which includes recommendations that the state has to implement to remedy the violations, is adopted by the African Commission at one of its sessions. It is then submitted to the AU organs in accordance with article 59 and, usually, approved.<sup>53</sup> It is only after its publication has been authorised by the AU Assembly at its Summit that the decision on the communication becomes public.<sup>54</sup>

48 Eg App 016/2017, *Dexter Eddie Johnson v Republic of Ghana*, Order for Provisional Measures, 28 September 2017.

49 Rule 110(2), (3) and (4) (decision on the merits): 'The Commission shall deliberate on Communications in private, and all aspects of the discussions shall be confidential.'

50 Interview D5, May 2017.

51 Eg App 004/2013, *Lohe Issa Konaté v Burkina Faso*, Judgment on the merits, 5 December 2014; Ruling on Reparations, 3 June 2016.

52 Eg Interview B7, 28 February 2018.

53 However, see for instances where this has not occurred, Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR), EX CL/Dec310 (IX); F Viljoen *International human rights law in Africa* (2007) 199; R Murray *Commentary on the African Charter on Human and Peoples' Rights* (2019) ch 36.

54 See eg Decision on the 44th Activity Report of the African Commission on Human and Peoples' Rights, EX CL/Dec 1014 (XXXIII) para 1.

The broad applicability of article 59 to the whole communication procedure has been critiqued.<sup>55</sup> This situation is not helped by the fact that the some versions of the African Charter, including the version for some time published on the website of the African Commission itself, stated under article 59 that '[a]ll measures taken within the provisions of the present *Charter* shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide', with 'Charter' being inserted instead of 'Chapter'. This confusion may explain, in part, the very limiting interpretation of the scope of article 59 by the African Commission.

Prior to the adoption of the decision, the applicability of article 59 is strict. This ruling is buttressed by the Rules of Procedure of the African Commission. Rule 18(d) requires that its Secretary will 'ensure confidentiality of the Commission's records where appropriate', and the staff similarly have obligations to 'observe the principle of confidentiality in all matters that the Commission considers confidential as stipulated under the Charter and these Rules'.<sup>56</sup> Communications are discussed in private sessions and Rule 31 notes that 'deliberations shall remain confidential', with the Commission ensuring the 'confidentiality of all case files, including pleadings'.<sup>57</sup> Although the Chairperson of the Commission 'may communicate to the public general information on deliberations in private sessions', this possibility is 'subject to the exigencies of article 59 of the Charter and any special directions by the Commission'. In practice it has meant that the only information revealed while a communication is pending in the Commission's activity report is the name and number of the communication and at what stage it is at in the Commission's deliberations.<sup>58</sup> Consequently, pleadings and submissions by the parties on pending communications are considered confidential, and the African Commission has called on parties not to publish their submissions on their websites.<sup>59</sup>

Rules 110(2), (3) and (4) of the 2010 Rules of Procedure provide that the decision will remain confidential even after having been signed by the Chairperson and Secretary of the African Commission and will be transmitted to the parties only once the Assembly has authorised its publication. The Rules also require the African Commission to then post the decision on its website.<sup>60</sup>

---

55 Eg Killander (n 1) 572.

56 Rule 22 African Commission Rules of Procedure.

57 Rules 31(1) and (3) respectively, Rules of Procedure of the African Commission 2010.

58 Eg 44th Activity Report of the African Commission on Human and Peoples' Rights Submitted in Accordance with Article 54 of the African Charter on Human and Peoples' Rights, November 2017-May 2018 para 21.

59 Information on file with author.

60 See also Rule 18(i) (functions of the secretary): 'Make available to the general public documents which are not confidential, including states reports, by ensuring that they are posted on the website of the Commission.'

The first matter relevant to the implementation of the decision is the extent to which the decision itself is visible and publicised. Once the decision is made public, it may not be visible and may reach few people beyond the actual parties to the communication, a situation acknowledged by the African Commission itself.<sup>61</sup> While the African Court specifically has required the state to place a summary of the judgment in its official Gazette, a 'widely-read' national daily newspaper and on the official website for one year,<sup>62</sup> the African Commission has not adopted a similar approach. Consequently, and in light of the lack of awareness of the work of the Commission generally at the national level, in the states involved in the project certainly, the decision easily can disappear from sight.

The requirement that it is only the parties with whom the African Commission will communicate while the matter is pending before it spills out beyond the decision itself. While the Commission places the decision on its website, the presumption appears to be that those wishing for more information, such as national human rights institutions or civil society organisations in the state, are encouraged to approach the Commission, rather than the Commission having an obligation to disseminate the decision itself. As noted in the report of the Working Group on Communications, '[o]nce the Activity Report of the Commission has been authorised for publication by the AU policy organs, the general public can have access to the text of the decisions referenced in that report'.<sup>63</sup>

The practical difficulty is how the 'general public' can get access to such texts or even are aware of their existence. This is exacerbated by the fact that the website of the African Commission is not always updated, links are broken, and decisions, even after their adoption, can disappear from the site if they were ever put there in the first place.

Consequently, even though there is no question over the extent to which the decision itself should be published, in reality publication does not equate with visibility.

While national stakeholders, including parliament, may be waiting for the state authorities to share information with them, the project was also informed that the executive may not see it as within its role to do so, nor did they see the need to inform others outside of government. As one ministry official from Cameroon told us, 'it is not our authority to inform the public ... [we] inform the people with the ... objective to implement the decision. It is not for us to inform

---

61 See General Report (n 25) para 23.

62 See eg *Lohe Issa Konaté v Burkina Faso* App 004/2013, Judgment on Reparations, 3 June 2016 para 60(viii).

63 Report of the Chairperson of the Working Group on Communications, by Commissioner Lucy Asuagbor, presented during the 56th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 April-7 May 2015 para 15.



people or parliament.<sup>64</sup> Consequently, perhaps the communication is seen simply to ‘focus on people involved in order to resolve the problem’ rather than seeing it as information for others, ‘the communication is not talking to the entire population but to the people concerned’.<sup>65</sup>

#### **5.4 Process within the state determining how the recommendations are to be implemented**

The implementation of decisions will require a range of different procedures and processes to be initiated, through executive departments, the courts or parliament. Whether the state has appointed a particular ministry or department to coordinate the implementation varies from state to state and from decision to decision. In the three countries in Africa involved in the project, for instance, one had an inter-ministerial committee to coordinate the government response (Cameroon), the others had *ad hoc* mechanisms (Burkina Faso and Zambia) and all three countries required additional procedures to be followed to ensure the implementation of specific aspects of the recommendations. The state may also need to discuss the technicalities of implementation with the African Commission itself, although in the cases the project examined this possibility does not appear to have been utilised.

There will inevitably be a need for the government to discuss internally how it will coordinate and manage this process of implementation. Depending on where this takes place, the extent to which these discussions are, and should be, transparent is important to consider. In Cameroon, discussions on implementation take place in the Inter-Ministerial Committee for Monitoring the Implementation of Recommendations and/or Decisions Arising from International and Regional Mechanisms for the Promotion and Protection of Human Rights and, while the Committee has a broad composition, it meets erratically and its findings are not made public.<sup>66</sup>

#### **5.5 Assessment by the African Commission of the measures taken by the state**

Rule 112 provides for the procedure on ‘follow-up on the recommendations of the Commission’ and reads:

- (1) After the consideration of the Commission’s Activity Report by the Assembly, the Secretary shall notify the parties within thirty (30) days that they may disseminate the decision.

---

64 Round Table on Factors Influencing the Implementation of Decisions of Human Rights Bodies, Yaoundé, Cameroon, 5 July 2017 (on file with author).

65 As above.

66 As above. See also interview B5, 26 February 2018; interview B8, 28 February 2018.

- (2) In the event of a decision against a state party, the parties shall inform the Commission in writing, within one hundred and eighty (180) days of being informed of the decision in accordance with paragraph one, of all measures, if any, taken or being taken by the state party to implement the decision of the Commission.
- (3) Within ninety (90) days of receipt of the state's written response, the Commission may invite the state concerned to submit further information on the measures it has taken in response to its decision.
- (4) If no response is received from the state, the Commission may send a reminder to the state party concerned to submit its information within ninety (90) days from the date of the reminder.
- (5) The Rapporteur for the communication, or any other member of the Commission designated for this purpose, shall monitor the measures taken by the state party to give effect to the Commission's recommendations on each communication.
- (6) The Rapporteur may make such contacts and take such action as may be appropriate to fulfil his/her assignment including recommendations for further action by the Commission as may be necessary.
- (7) At each ordinary session, the Rapporteur shall present the report during the public session on the implementation of the Commission's recommendations.
- (8) The Commission shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to any situations of non-compliance with the Commission's decisions.
- (9) The Commission shall include information on any follow-up activities in its Activity Report.

There are various tools that the African Commission has used to collate information on the measures taken by the state to implement its decisions. One needs to consider what aspects of this procedure should be and, indeed, currently are public.

#### ***5.5.1 Information provided by the parties and others on the measures taken by the state to implement the decision***

The project attempted to find what measures the states had taken to implement the decisions. There were challenges in doing so as, in the three African states there is no one place where this information is provided at the national level, nor does the African Commission show this information in an easily-accessible location. Rather, one has to look across statements made by the state representatives at the Commission sessions and reference to these cases and measures in documents adopted by the Commission, including its Concluding Observations or any resolutions it adopted.

The project found that there are a number of reasons why there is a need for the information on the measures taken to implement the decision to be made public. First, this may be one way or indeed the

only way in which the litigants learn what the state has done.<sup>67</sup> Additionally, in the interests of justice one would presume that the victims themselves, at the very least, should know what action the state has taken to address their violations. Without a clear policy on what is confidential and what is not, the project found that sometimes even the victims and complainants themselves were not aware of the information that the state had shared with the treaty body, for instance: 'We usually would get copies of any correspondence that was sent, but we have never received anything from the state that said "Listen, here we are. Here's the new law – look, it's fine" or anything of the sort.'<sup>68</sup>

Making public the measures (or lack of measures) taken by states to implement decisions and judgments can mean that examples of good as well as bad practices among states can be identified, and credit can be given to states that have implemented reparations. Moreover, more visibility can enable the accuracy of any information submitted to the supervisory bodies on the measures taken by the state to be verified. If the supervisory body has only one source of information, whether that be from the state itself or from the complainant, it may not be in a position to determine whether that information indeed is reliable. Making those claims public could enable others to come forward with further evidence.

Thus, visibility is another tool to facilitate state accountability, particularly if the information emanating from any national mechanism is not available. As one civil society representative told us in relation to Cameroon, 'the follow up mechanism is the inter-ministerial committee but it is difficult to track, it sits within the PM office and made of many ministries'.<sup>69</sup>

Visibility then enhances the capacity of the complainant to bring further awareness to the level of implementation: 'The complainant plays a very big role in making the noise about their issue, and then a bit of attention is given to it.'<sup>70</sup>

Hence, if one accepts that there should be visibility of the action taken by the state to implement the decision, then it becomes important to determine how the African Commission makes such information public. At the moment its approach is *ad hoc*, making incidental references in resolutions, the state reporting procedure and in its activity reports.<sup>71</sup> There is a strong argument for the African Commission to maintain a database on its website that will display the

---

67 Eg interview D11, May 2017.

68 As above.

69 Round Table on Factors Influencing the Implementation of Decisions of Human Rights Bodies, Yaoundé, Cameroon, 5 July 2017 (on file with author).

70 Interview with government official, March 2018.

71 See below.

actions taken by the state as against each of the recommendations in the communication.<sup>72</sup> However, this demand will require that it has a process and system by which it is able to seek information from various sources beyond the parties to the case, to test its accuracy and to cross-check it against other sources, before making this available on any public-facing database.

Indeed, the project has evidence that the African Commission holds considerably more information on the measures taken by the state to implement the decision, but this has not been made available as a matter of course to those outside the Commission.<sup>73</sup>

### 5.5.2 *African Commission's monitoring process*

The African Commission does not have a process, as such, to monitor the implementation of its decisions. Rather, beyond sending letters to the parties asking for information on any measures taken it utilises its other procedures to seek information.

The African Commission sometimes asks questions of the state during the article 62 state-reporting process on the measures taken to implement decisions. These questions may be posed in public during that part of the session of the Commission and the state may or may not respond to them at the time, with the manner in which the oral examination takes place enabling them to evade answering certain questions. Consistency and regular contact between the African Commission Rapporteur for the state report and domestic civil society organisations and the national human rights institution could facilitate the asking of more pointed questions during the oral examination. Written responses from the state almost never are made public and while the Concluding Observations adopted by the African Commission are public and increasingly detailed, including some examples where the implementation of decisions have been raised, they are not consistently available on the Commission's website. The few examples of references to implementation of decisions are *ad hoc* and brief. A low-resource approach that would maximise the potential for the state-reporting process to assist here is to require that Concluding Observations have a standard paragraph that requires the state to report back on the implementation of decisions.

In addition to state reporting, a handful of resolutions adopted by the African Commission in relation to particular states have identified the measures taken or failed to have been taken by the authorities in implementing a decision. There are only a small number of instances where resolutions refer to the implementation of decisions, for example, in relation to *Gunme & Others v Cameroon*,<sup>74</sup> where its

---

72 This was also a recommendation in Dakar: General Report (n 25): 'Develop a database with periodic updates on the status of implementation of decisions by states.'

73 Interview D1, 20 April 2017.

74 AHRLR 9 (ACHPR 2009).

resolution in 2018 noted ongoing concerns with the situation in the country.<sup>75</sup> Thus, it is not clear on what basis the Commission will adopt a resolution urging the implementation of a case and why it has done so for these and not for others.

Depending on the timing, the African Commission and its special mechanisms have highlighted specific decisions during their missions to states and referred to evidence obtained in relation to their implementation in subsequent reports.<sup>76</sup> These reports are not always provided on the Commission's website although it is not clear if this is because they are intended to be confidential or because of a lack of resources at the Secretariat to ensure an up-to-date and comprehensive website.

The African Commission has held hearings on communications, but on two occasions only has it held hearings to examine implementation, one in relation to the *Endorois* case against Kenya<sup>77</sup> and one for communications against Mauritania.<sup>78</sup> They clearly are the exception rather than the rule. Rule 25(2) of the Commission's Rules of Procedure provides that '[s]essions of the Commission shall be held in public unless the Commission decides otherwise or if it appears from the relevant provisions of the Charter that the meeting shall be held in private'.

One may argue that hearings on implementation no longer fall under article 59 as the decision has been authorised by the Assembly and made public. Yet, in practical terms, those who are likely to be aware that the hearing will take place principally are the parties. Communications are slated to be discussed during the private sessions, and one would presume that any hearings on implementation by default would happen then as well.

In addition, there is no clear policy on how the hearings should be run. As one person involved in one of the two hearings that had been held told us, 'the hearings ... are sort of well, appear to be confidential, don't they? Although that's not I guess, clear, 'cause

---

75 Resolution on the Human Rights Situation in the Republic of Cameroon, ACHPR/Res 395 (LXII), 9 May 2018. See also, in general, press release on the human rights situation in Cameroon, 29 January 2018, although this does not explicitly reference the decision. See also Resolution Calling on the Republic of Kenya to Implement the *Endorois* Decision, ACHPR/Res.257, 5 November 2013; see also Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site, ACHPR/Res 197, 5 November 2011.

76 Eg listed among the 'positive developments' was Cameroon's implementation of *Association of Victims of Post Electoral Violence & Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009) by payment of compensation.

77 See R Martin "'The *Endorois* decision" – Four years on, the *Endorois* still await action by the government of Kenya', <https://minorityrights.org/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/> (accessed 23 September 2014).

78 See LM Bingham & J Harrington 'Never-ending story: The African Commission evolving through practice in *Malawi Africa Association et al v Mauritania*' (2013) 1 *Human Rights and International Legal Discourse* 7.

there's no rules, procedure that cover it.'<sup>79</sup> Consequently, the approach was described to us as 'chaotic'.<sup>80</sup> The decision to hold them in private appears to be by default rather than design.

If the hearings are to be public, the question then arises of when they would be held. The discussion of communications takes place in the private sessions of the African Commission, in the second half of the session and, consequently, when many other state delegates, national human rights institutions and civil society organisations have left.<sup>81</sup> Although in theory there is no reason why the African Commission could not hold such hearings in public and during its sessions, this will require a change from the normal practice. Holding the hearings during extraordinary sessions that have so far taken a more *ad hoc* approach to when matters will be public or private may also be a possibility, as may having them separate to the session (or even in the state to which they relate), although to do this inevitably would require additional resources.<sup>82</sup> Lessons could be learnt from the practice of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).<sup>83</sup>

Hence, consideration needs to be given to the role of the hearing and whether it also is an attempt to come to a settlement ('Let them meet face to face publicly. Try to at least discussion in the open outstanding issues that really have not been settled'),<sup>84</sup> to assist in the clarification of what steps the state should take to implement the decision; and/or to obtain information from the parties on what measures have been taken. A decision impacts on who should attend, how it should be organised and where. If, for instance, it is to promote the decision, then holding any hearing in private will not facilitate the involvement of national stakeholders. The experiences of the Inter-American Commission on Human Rights, which can hold working groups in private, hearings in public, and thematic hearings dealing with implementation, could provide a useful model on which the African Commission could draw.<sup>85</sup>

### 5.5.3 *Criteria to measure implementation*

The African Commission, one presumes in line with its requirement to report on such to the Commission's session and to the AU's Permanent Representatives Committee and Executive Council in Rules 112(7) and (8), will need to make some assessment also whether the

79 Interview D1, April 2017.

80 As above.

81 Eg interview D2, April 2017.

82 As above.

83 See eg <https://www.chr.up.ac.za/news-archive/505-centre-for-human-rights-takes-part-in-african-children-s-rights-committee-hearing-on-implementation> (accessed 1 April 2019).

84 Interview D1, April 2017.

85 V Kristicevic 'A strategy for improving the level of implementation of judgments in the Inter-American system' (2010) 16 *Interights Bulletin* 92-93.

state has satisfactorily implemented the recommendations in the decision. In order to do so, it must first obtain the information on what the state has actually done. It then must determine the criteria for how it measures implementation<sup>86</sup> which is not a straightforward process.<sup>87</sup> On the one hand, determining if an individual has been released from custody, for instance, could appear to be easily fulfilled. However, on the other, if no time frame is given in the decision as to when the individual should be released and the state authorities take time to do so, when will the African Commission consider that it has or has not been satisfactorily implemented? If the recommendations are vague ('comply with its international obligations'), the assessment, in itself, may require the clarification of certain benchmarks. Complex political situations and guarantees of non-repetition raise different challenges. For instance, how precisely does the African Commission evaluate when the Cameroonian government has 'stop[ped] the transfer of accused persons from the Anglophone provinces for trial in the Francophone provinces'?<sup>88</sup>

The process and criteria, if it has any, by which the African Commission determines state implementation is not yet apparent. At present there is evidence from the project that even if the state has submitted information it is not clear what the Commission thinks about this. As one litigant told us: 'We submitted a dossier of one thousand pages. Interestingly enough that particular file was lost ... we try our best to make all that information available ... you don't get any feedback ... Nothing.'<sup>89</sup>

Without an indication from the Commission that it has taken these submissions into account in some way there is a risk that further information will not be sent by the parties. As litigants informed us: 'We keep reminding the state, reminding the Commission, but we are leaning to think, of course, that it is a waste of time.' As a result it is reported: 'I don't see them doing a lot, to be honest, on implementation', and 'It never really [followed up on deadlines] and then it never really follows up properly.'

#### **5.5.4 Working Group on Communications' report on implementation and the African Commission's activity report**

The Working Group on Communications having been given the mandate to monitor the implementation of decisions,<sup>90</sup> now issues a

---

86 D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American Courts for Human Rights' (2010) 6 *Journal of International Law and International Relations* 35.

87 D Long & A-K Speck 'Measuring implementation' (2019) *Journal of Human Rights Practice* Special Issue (forthcoming).

88 *Gunme* (n 74) para 215(2).

89 Interview April 2017.

90 Resolution on the Mandate of the Working Group on Communications of the African Commission on Human and Peoples' Rights, ACHPR/Res 212, 1 March 2012.

report at every session that can provide a list of cases and provides some brief detail on the status of implementation. For instance, while the report to the 60th session of the African Commission noted some 'constructive dialogue' between the parties and the Commission around the implementation of Communication 318/06 and that there had 'not been a debut of implementation' with respect to four cases, this was all that was provided.<sup>91</sup> In addition, the African Commission's activity report now includes the odd sentence or two on actions regarding some communications and provisional measures.<sup>92</sup>

This practice is not comparable to the detail provided by the Inter-American system nor, albeit to a lesser extent, by the African Court. It is not at all clear whether the AU, when the African Commission reports to it, receives any more information than that which is provided at the sessions.

## 5.6 Referral to the African Court

Rule 118(1) of the African Commission's Rules of Procedure enables the Commission if it 'considers that the state has not complied or is unwilling to comply with its recommendations' to submit the communication to the African Court. If the African Commission is to do so, it will have had to gather information on the measures to implement taken by the state. Litigants have been making requests for such referrals. The African Commission, unlike the Inter-American Commission,<sup>93</sup> has not made public any detailed criteria it applies when determining which cases to refer to the Court. So far it has referred only three cases, and none of them on the basis of article 118(1). Conversely, because the process for decision on referral is an internal matter of the African Commission, no detail can be gleaned from the African Court's subsequent judgment as to why the case was referred.<sup>94</sup>

91 Inter-Session Activity Report (November 2016-May 2017) of Hon Commissioner Lucy Asuagbor, Chairperson of the Working Group on Communications, presented at the 60th ordinary session of the African Commission on Human and Peoples' Rights, Niamey, Niger, 8-22 May 2017 paras 29-30.

92 Eg 35th Activity Report of the African Commission, reference to *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2011) AHRLR 90 (ACHPR 2011), to 'follow-up on implementation', 27; see also para 27: 'With regards to 419/12, *The Indigenous Peoples of the Lower Omo (Represented by Survival International Charitable Trust) v Ethiopia*, the Commission issued an order against the state, requesting the latter to adopt provisional measures to prevent irreparable harm being caused to the victim of alleged human rights violations; the state has not respected that order.'

93 See Rules of Procedure of the Inter-American Commission on Human Rights Approved by the Commission at its 137th regular period of sessions, held from 28 October to 13 November 2009, and modified on 2 September 2011 and during the 147th Regular Period of Sessions, held from 8-22 March 2013, for entry into force on 1 August 2013, art 45.

94 See *African Commission on Human and Peoples' Rights v Republic of Kenya*, App 6/2012, Judgment of 27 May 2017 para 53 and paras 58-61.



Furthermore, the pleadings and submissions to the African Court (although not the hearings) are covered by principles of confidentiality<sup>95</sup> and, therefore, despite it being the culmination of a decision by the African Commission, the case then enters into a further closed procedure whereby information on any measures taken by the state is hidden from public view until any hearing and subsequent judgment by the Court.

### **5.7 Requests by the state for technical assistance on how to interpret the judgment or decision**

There is some merit in the argument by some states that they were not clear on what precisely they were meant to do to implement the decision. For example, a generic ‘take the necessary measures to bring in line with the African Charter and international human rights law’ arguably is more nebulous than, say, the more specific recommendation that an individual victim is paid a certain amount of compensation. Leaving aside valid comments that a state with the necessary good-will certainly may find the appropriate manner in which to respond to the vaguest of recommendations, the question arises as to whether any requests from the state to the treaty body for further clarity and assistance in interpreting the decision themselves should be made public. The African Commission has not published any policy on what its response would be to such requests but the project found that there was a willingness, in some instances but not necessarily all, to engage with states post-decision to assist them in clarifying what action they should take to implement the decision.<sup>96</sup>

However, the extent to which states have made such requests to the African Commission is not evident. The project noted, through additional judgments of the African Court, that states have asked this judicial body for clarification on how to implement its judgments and reparations.<sup>97</sup> While the trend is towards greater specificity in the recommendations and, therefore, the need may become less, the project found that states often say they want to be able to maintain a relationship with the African Commission to enable them to discuss what action they need to adopt to implement the decision.

Again, there may be cogent reasons why the discussion around the measures to be taken by the state should remain confidential. For example, the issue may be one of particular political sensitivity and it may enable a more open discussion if this is done out of the glare of the media. For instance, the Department of Execution of the Committee of Ministers in the Council of Europe’s discussions with the

95 Rules of Court, Rules 60(1) and 61(1). Re hearings, see Rule 43; art 10 of the Protocol.

96 Eg interview D13, 23 November 2017; interview D4, 27 June 2017. Rule 111 of the African Commission’s 2010 Rules of Procedure deals with reviews of decisions on the merits.

97 See eg App 1/2017 – Interpretation of Judgment of 20 November 2015 – *Alex Thomas v United Republic of Tanzania*, Judgment, 28 September 2017.

state are not public. Although a state's action plan is published, the meetings with the state exclude civil society organisations as well as the applicants.

## 6 Conclusion and recommendations

At present the African Commission has slipped into presuming that measures taken by the state to implement recommendations, the evidence presented by the complainants (or indeed other actors) on the extent to which it has done so and the Commission's own assessment fall within the communication procedure and, therefore, by default are confidential. Yet, article 59 neither requires this nor do the Rules of Procedure, and a blanket approach to confidentiality post-decision is not appropriate.

The publication and dissemination of the decision itself over which there can be no doubt, as the 2017 Dakar Seminar of the African Commission reiterated,<sup>98</sup> can be assisted with a few, low or no-cost, tactics. The Commission's website should be kept up to date and the Commission could draw on the African Court's approach, namely, to include as a standard paragraph in each of its decisions the requirements that the state publish the decision in a national paper, on social media and maintain it there for a particular period of time and publish, certainly at the national level, the procedures and those responsible for implementing the decision, and the measures it has taken to implement the decision and to share these specifically with the victims.

There may be some merit in discussions on technical assistance, however these are achieved, being kept confidential, but the outcomes (as with action plans adopted by states in respect of implementation of European Court of Human Rights judgments) should be made public. Regardless of the approach taken it is crucial that the African Commission set out criteria on when it will hold hearings, adopt resolutions or refer the matter to the African Court. These criteria also should be made public if the Commission is to avoid the criticism of being perceived as doing nothing or taking an inconsistent or potentially biased approach.

The African Commission, unless it is not in the interests of the victim to do so, should make public any information it receives from the state as to the measures taken to implement the reparations. The Commission does not appear to have any clear benchmarks that assess whether implementation is satisfactory or not, made more challenging by the ambiguity of some of its recommendations. Hence, making any appraisal of the state's actions is complicated. Yet, what the Commission can do is simply publish the information it has received from the parties without making any assessment as to

---

98 General Report (n 25), recommendations to the African Commission.

whether state measures are satisfactory or not. This information could be provided on its website under the activities of the Working Group on Communications and in its activity reports, in practice akin to the approach of the African Court.

The recommendations in this article are not to imply that any action taken by the African Commission will be sufficient to ensure the visibility of its decisions and the measures taken to implement them, neither should they detract from the principal responsibility of the state authorities to make the decisions available at the national level and ultimately implement the reparations contained therein. However, at the very least these actions by the African Commission could heighten awareness of its decisions, indicate that the Commission has not lost interest in what states are doing in response to them, thereby ultimately increasing the likelihood that victims will receive justice.

## Private prosecution as a local remedy before the African Commission on Human and Peoples' Rights

Jamil D Mujuzi\*

Professor of Law, Faculty of Law, University of the Western Cape, South Africa  
<https://orcid.org/0000-0003-1370-6718>

### Summary

*Article 56(5) of the African Charter on Human and Peoples' Rights provides that the African Commission on Human and Peoples' Rights will admit individual communications only if, inter alia, they '[a]re sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. The African Commission has developed rich jurisprudence around article 56(5). One of the issues that has started to emerge before the African Commission is whether or not a private prosecution is a domestic remedy that has to be exhausted before a person may file a communication before the Commission. Relying on the jurisprudence of the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of All Forms of Racial Discrimination, the Inter-American Court of Human Rights and the European Court of Human Rights, the author suggests some of the ways in which the African Commission could deal with the issue of private prosecution as a domestic remedy. Specifically, the author argues that in order to determine whether or not a private prosecution is an effective remedy the African Commission may have to consider factors such as the person with locus standi to institute a private prosecution; funding to conduct a private prosecution; and how the public prosecutor has exercised or is likely to exercise the power to intervene in private prosecutions.*

**Key words:** *private prosecution; domestic/local remedy; African Commission; exhaustion; victim participation*

---

\* LLB (Makerere) LLM (Pretoria) LLM (Free State) LLD (Western Cape);  
[djmujuzi@gmail.com](mailto:djmujuzi@gmail.com)

# 1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) has the mandate to deal with inter-state<sup>1</sup> and individual communications.<sup>2</sup> Since its establishment it has dealt with hundreds of individual communications and a few inter-state communications.<sup>3</sup> Before the African Commission declares an individual communication admissible the complainant, among other admissibility requirements, has to exhaust local or domestic remedies. Thus, article 56(5) of the African Charter on Human and Peoples' Rights (African Charter) provides that the African Commission will admit individual communications only if they '[a]re sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. The African Commission has developed a rich jurisprudence around article 56(5)<sup>4</sup> and it is beyond the scope of this article to discuss that jurisprudence in detail. One of the issues that appears to be emerging from the jurisprudence of the African Commission is that of the private prosecution as a local remedy. Private prosecutions are provided for in many African countries and submissions have been made before the African Commission on whether or not the complainant should have instituted a private prosecution as a local remedy before approaching the African Commission. It is not far-fetched to argue that sooner or later the African Commission increasingly will have to deal directly with the issue of whether a private prosecution is an effective remedy that has to be exhausted before a person may file a communication before the Commission. In this article the author suggests ways in which the African Commission may establish whether or not a private prosecution was an effective remedy before declaring the communication admissible or inadmissible. The Commission's decisions have to be based on factors such as the law governing private prosecutions in a given country and the manner in which it is being implemented. In order to support the recommendations made in the article, the author demonstrates how other international and regional human rights bodies have dealt with private prosecution as a domestic remedy. The author first highlights the jurisprudence of the African Commission in which the issue of private prosecutions as a local remedy has been dealt with.

---

1 Arts 47-54 of the African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

2 Arts 55-59 African Charter.

3 See generally M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012); F Viljoen *International human rights law in Africa* (2012) 213-390.

4 Viljoen (n 3) 213-390.

## 2 Jurisprudence of the African Commission on private prosecutions

The first communication in which the African Commission dealt with the issue of private prosecution as a local remedy, and also the only communication in which it has so far dealt with the issue of private prosecutions comprehensively, is *Zimbabwe Human Rights NGO Forum v Zimbabwe*.<sup>5</sup> In this communication the complainants argued that government agents had violated several human rights in the African Charter and committed criminal acts leading to the death of more than 80 people in the aftermath of the February 2000 constitutional referendum.<sup>6</sup> In objecting to the admissibility of the communication, the Zimbabwean government argued that the complainants should have approached the Attorney-General to prosecute the suspects<sup>7</sup> and that 'the complainant could have instituted private prosecutions against those persons alleged to have committed crimes and had not been prosecuted by the state'.<sup>8</sup> The complainants argued that they could not have instituted criminal proceedings against those alleged to have perpetrated the violations as the President had granted them immunity from prosecution through a clemency order.<sup>9</sup> In dismissing the state's objection, the African Commission held that the state, through the police force, had the responsibility to maintain law and order, to investigate alleged criminal activity and to arrest those suspected of committing offences and hand them over to the relevant authorities for prosecution.<sup>10</sup> The African Commission added:<sup>11</sup>

To expect victims of violations to undertake private prosecutions where the state has not instituted criminal action against perpetrators of crimes or even follow up with the Attorney-General what course of action has been taken by the state as the respondent state seems to suggest in this matter would be tantamount to the state relinquishing its duty to the very citizens it is supposed to protect. Thus, even if the victims of the criminal acts did not institute any domestic judicial action, as the guardians of law and order and protectors of human rights in the country, the respondent state is presumed to be sufficiently aware of the situation prevailing in its own territory and therefore holds the ultimate responsibility of harnessing the situation and correcting the wrongs complained of.

The African Commission added that the respondent state's concession that its criminal justice system did not have the capacity to investigate and prosecute all allegations of crime was an indication that 'domestic remedies may have been available in theory but as a matter of

---

5 (2006) AHRLR 128 (ACHPR 2006).

6 *Zimbabwe Human Rights NGO Forum* (n 5) paras 1-13.

7 *Zimbabwe Human Rights NGO Forum* paras 61 & 68.

8 *Zimbabwe Human Rights NGO Forum* para 62.

9 *Zimbabwe Human Rights NGO Forum* para 64.

10 *Zimbabwe Human Rights NGO Forum* para 70.

11 As above.

practicality were not capable of yielding any prospect of success to the victims of the criminal assaults'.<sup>12</sup>

The above decision should be understood in light of the fact that there had been a breakdown of the rule of law in Zimbabwe and that the government had decided not to prosecute those alleged to have violated human rights and committed criminal acts. This decision was made because those acts had been committed by government officials or militias associated with the ruling party with the explicit or implied approval of senior public servants. In light of the fact that under Zimbabwean law a private prosecution cannot be instituted without a certificate from the Prosecutor-General (previously the Attorney-General) to the effect that he had declined to prosecute the alleged offenders,<sup>13</sup> it would have been unrealistic to expect the Attorney-General to issue such certificate for private prosecutions to be instituted against government officials or militias who had committed such acts to achieve or further government objectives. It should also be noted that in Zimbabwean law a public prosecutor is empowered to take over a private prosecution and either continue

---

12 *Zimbabwe Human Rights NGO Forum* para 71.

13 At the time when the communication was filed before the African Commission and when the African Commission handed down its decision, sec 16 of the Criminal Procedure and Evidence Act 2 of 2016 provided: '(1) Except as is provided by subsection (2), it shall not be competent for any private party to obtain the process of any court for summoning any party to answer any charge, unless such private party produces to the officer authorised by law to issue such process a certificate signed by the Attorney-General that he has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance, and in every case in which the Attorney-General declines to prosecute he shall, at the request of the party intending to prosecute, grant the certificate required.' However, in 2016 sec 16 was amended to give the Prosecutor-General more control over the process of instituting private prosecutions. The amended section provides: '(1) Except as is provided by subsection(4), it shall not be competent for any private party to obtain the process of any court for summoning any party to answer any charge, unless such private party produces to the officer authorised by law to issue such process a certificate signed by the Prosecutor-General that he or she has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance, and, subject to the conditions set forth in subsections (2) and (3), in every case in which the Prosecutor-General declines to prosecute he or she shall, at the request of the party intending to prosecute, grant the certificate required. (2) The Prosecutor-General shall grant the certificate referred to in subsection (1) if (a) there is produced to him or her by the private party a written request in the form of a sworn statement from which it appears to the Prosecutor-General that the private party (i) is the victim of the alleged offence, or is otherwise an interested person by virtue of having personally suffered, as a direct consequence of the alleged offence, an invasion of a legal right beyond that suffered by the public generally; and (ii) has the means to conduct the private prosecution promptly and timeously; and (iii) will conduct the private prosecution as an individual (whether personally or through his or her legal practitioner), or as the representative of a class of individuals recognised as a class for the purposes of the Class Actions Act ... and (b) no grounds exist in terms of subsection (3) for withholding the certificate. (3) The Prosecutor-General may refuse to grant the certificate referred to in subsection (1) upon any one or more of the following grounds, namely (a) that the conduct complained of by the private party does not disclose a criminal offence; or (b) that on the evidence available, there is no

with it or discontinue it.<sup>14</sup> Had the complainants been permitted to institute private prosecutions, one cannot rule out the possibility that public prosecutors would have taken over and discontinued them. Therefore, a private prosecution as a local remedy was not likely to be effective. However, the challenge is that the African Commission does not deal with Zimbabwean law on private prosecutions in reaching its conclusion whether or not it would have been an effective local remedy. One of the observations to be made about the above holding of the African Commission is the fact that in cases of massive or widespread human rights violations it is for the state to ensure that the violations are investigated and the perpetrators prosecuted. In other words, private prosecution is not an effective remedy in cases where state officials have been implicated in massive or widespread human rights violations.

The second communication in which the African Commission dealt with the issue of private prosecutions was *Hadi v Sudan*.<sup>15</sup> The respondent's police officers allegedly violated several African Charter rights, committed various criminal acts, and enjoyed immunity from prosecution. In its submissions the state argued that the complainant had not exhausted local remedies, for example, by failing to approach public prosecutors to prosecute the alleged perpetrators.<sup>16</sup> The state also added that the Constitution guaranteed the complainant the right to litigation and that they should have invoked that right.<sup>17</sup> The state did not expressly submit that victims had a right to institute a private prosecution. In response, the complainants submitted that

[t]he Criminal Procedure Code provides for the right to bring a private prosecution. However, such prosecution can only proceed with the approval of the head of the police forces who will need to lift the immunity of the individual officer(s) concerned. It is also subject to the approval of the Attorney-General ... [T]here is no prospect of any immunity being lifted where the police have not even commenced the initial investigation as in the present case.<sup>18</sup>

---

possibility (or only a remote possibility) of proving the charge against the accused beyond a reasonable doubt; or (c) whether the person to be prosecuted has adequate means to conduct a defence to the charge (in the case of any person who but for the fact that the Prosecutor-General has declined to prosecute him or her, would have qualified for legal assistance at the expense of the state); or (d) that it is not in the interests of national security or the public interest generally to grant the certificate to the private party. (4) When the right of prosecution referred to in this Part is possessed under any statute by any public body or person in respect of particular offences, subsections (1), (2) and (3) shall not apply.'

14 Sec 20 of the Criminal Procedure and Evidence Act provides that '[i]n the case of a prosecution at the instance of a private party, the Attorney-General or the local public prosecutor may apply by motion to any court before which the prosecution is pending to stop all further proceedings in the case, in order that prosecution for the offence may be instituted or continued at the public instance and such court shall, in every such case, make an order in terms of the motion'.

15 *Abdel Hadi, Ali Radi & Others v Republic of Sudan* Communication 368/09 (African Commission, 4 June 2014).

16 *Hadi* (n 15) paras 33-37.

17 *Hadi* para 38.

18 *Hadi* para 27. See also *Hadi* para 42.



### The African Commission held:<sup>19</sup>

The respondent state also admits that police officers in Sudan generally enjoy immunity which can only be lifted after a preliminary investigation. It does not also dispute the fact that there is no established procedure or right to compel the prosecution attorney to commence an investigation where there is an allegation of wrongdoing by the police, nor that as established above; an attempt at investigating the allegations was made. The Commission considers the granting of such blanket immunities to police officers as an impediment to the exhaustion of local remedies since it is not disputed that there is no legal obligation on the part of the police hierarchy to lift the immunities of these officers on demand. Because of the immunity granted to police officers, neither a private prosecution nor a civil suit could be brought against them unless such immunities were lifted, which immunities could only be lifted after a preliminary investigation.

Against that background the African Commission held that 'by failing to initiate an investigation into the complaints, the respondent state thereby made any local remedies that theoretically existed, ineffective'.<sup>20</sup> In *Al-Asad v Djibouti*<sup>21</sup> the state argued that the communication was inadmissible because the complainant had not exhausted local remedies,<sup>22</sup> including 'criminal local remedies'.<sup>23</sup> The complainant argued that 'the respondent state having failed to institute an effective investigation, even upon notice [of the violations] ... to the respondent state's Chief Prosecutor, he was and is under no obligation to bring private prosecution as a domestic remedy'.<sup>24</sup> Although the African Commission declared the communication inadmissible, it did not address the issue of private prosecution.

The above jurisprudence shows that the issue of private prosecutions as a local remedy has started to be raised at the African Commission level.<sup>25</sup> In its General Comment on article 5 of the African Charter,<sup>26</sup> the African Commission called upon African countries to ensure that victims of torture are empowered to institute

19 *Hadi* para 47.

20 *Hadi* para 48.

21 *Mohammed Abdullah Saleh Al-Asad v the Republic of Djibouti* Communication 383/10 (African Commission, 14 October 2014).

22 *Al-Asad* paras 83-88.

23 *Al-Asad* para 85.

24 *Al-Asad* para 71.

25 In their periodic reports some African countries have reported on cases in which private prosecutions have been instituted in cases such as forced marriage, sexual violence against minors, and gender-based violence (assault and battery perpetrated against women). See eg Initial Periodic Report of the Republic of Côte d'Ivoire (2012-2015) (2016) 14, [http://www.achpr.org/files/sessions/59th/state-reports/2nd-2012-2015/cote\\_divoire\\_periodic\\_report\\_2012\\_2015\\_eng.pdf](http://www.achpr.org/files/sessions/59th/state-reports/2nd-2012-2015/cote_divoire_periodic_report_2012_2015_eng.pdf) (accessed 24 April 2019).

26 Art 5 of the African Charter provides that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

private prosecutions.<sup>27</sup> The Commission is yet to find that a private prosecution is an effective local remedy that should have been exhausted by the applicant before he or she submitted a communication to the Commission. In order to rule that a private prosecution is an effective and available remedy the African Commission would have to analyse the legislation on private prosecutions in different African countries and the extent to which such legislation is implemented in practice. In light of the fact that different African countries have adopted different approaches to the issue of private prosecutions, each communication would have to be determined on the basis of the law and practice in a given country. It should be recalled that African countries have taken three broad approaches to the issue of private prosecutions. First, in some countries such as Kenya<sup>28</sup> and The Gambia,<sup>29</sup> private prosecutions are provided for in the Constitution. Second, in many countries, such as South Africa, Zimbabwe, Namibia, Rwanda and Uganda, private prosecutions are provided for in pieces of legislation.<sup>30</sup> Finally, in some countries, such as Ghana, the law prohibits private prosecutions.<sup>31</sup> There is still room for the African Commission to develop its jurisprudence on private prosecution as an effective local remedy especially in cases that do not involve massive human rights violations. In order to enrich its jurisprudence on private prosecutions the African Commission may also draw on the practice of international human rights bodies by invoking article 60 of the African Charter. This jurisprudence is discussed below.

---

27 General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted at the 21st extraordinary session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia, para 75 provides that '[i]n line with state parties' obligations under article 7 of the African Charter, the option of private prosecution for acts of torture and other ill-treatment by non-state actors should be availed and sufficiently facilitated by the state when utilised by a victim, including by addressing practical challenges to private prosecution such as prohibitive costs or the impossibility in practice to access all relevant evidence', [http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr\\_general\\_comment\\_no.\\_4\\_english.pdf](http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no._4_english.pdf) (accessed 24 April 2019).

28 Art 157(6)(b) Constitution of Kenya. For a detailed discussion of the right to institute a private prosecution in Kenya, see JD Mujuzi 'Private prosecutions in Kenya' (2018) 11 *African Journal of Legal Studies* 33-70.

29 Arts 85(1)(c)(i) & (ii) Constitution of The Gambia.

30 See generally JD Mujuzi 'The right to institute a private prosecution: A comparative analysis' (2015) 4 *International Human Rights Law Review* 222.

31 See secs 4 and 9 of the Criminal Procedure Code (Amendment) Act 633 of 2002 repealing secs 57 and 139 of the Criminal Procedure Code Act 30 of 1960.

### 3 International human rights bodies and private prosecution as a domestic remedy

Some international human rights bodies have a mandate to receive individual communications alleging the violations of the rights provided for in the relevant treaties. One of the requirements that has to be met before such communications can be admissible is that the author or the complainant must first exhaust local remedies. Jurisprudence from some of these human rights bodies shows that private prosecution, where necessary, is one local or domestic remedy that has to be exhausted for a communication to be admissible. In this part of the article the author highlights the jurisprudence from the following human rights bodies relevant to the issue of private prosecutions as a domestic or local remedy: the Human Rights Committee; the Committee against Torture; the Committee on the Elimination of All Forms of Racial Discrimination; the Inter-American Court of Human Rights; the Inter-American Commission of Human Rights; and the European Court of Human Rights.

Article 60 of the African Charter requires the African Commission when interpreting the African Charter to 'draw inspiration from international law on human and peoples' rights' in particular those adopted by the African Union (AU), the United Nations (UN) and by African countries. The African Commission may invoke and has invoked article 60 of the African Charter to refer to jurisprudence from international human rights bodies.<sup>32</sup> As mentioned above, before international human rights bodies such as the Human Rights Committee,<sup>33</sup> the Committee against Torture<sup>34</sup> and the Committee against All Forms of Racial Discrimination<sup>35</sup> may admit a communication, the petitioner has to exhaust domestic remedies unless such remedies are ineffective or unavailable. The issue of private prosecutions as a domestic remedy has been dealt with by some of these treaty bodies. In *Dimitrijevic v Serbia and Montenegro*<sup>36</sup> the complainant approached the Committee against Torture because he had been ill-treated and tortured by the respondent's security agents. He submitted that he had reported the case to the public

32 See eg *Law Offices of Ghazi Suleiman v Sudan (II)* (2003) AHRLR 144 (ACHPR 2003); *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000); *Darfur Relief and Documentation Centre v Sudan* (2009) AHRLR 193 (ACHPR 2009); *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, Communication 295/04; *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); and *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

33 Art 2 Optional Protocol to ICCPR.

34 Art 22(5)(b) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

35 Art 14(2) International Convention on the Elimination of All Forms of Racial Discrimination.

36 *Dimitrijevic v Serbia and Montenegro*, Communication 207/2002, UN Doc A/60/44 142 (CAT 2004).

prosecutor who did not get back to him to inform him whether or not the allegations had been investigated.<sup>37</sup> He submitted that in terms of the Criminal Procedure Code, if the public prosecutor comes to the conclusion that he will not investigate the alleged commission of an offence (request for a formal judicial investigation), he has to inform the victim in order for him to decide whether or not to institute a private prosecution.<sup>38</sup> He added that the Criminal Procedure Code does not stipulate the time within which the public prosecutor must decide whether or not he will 'request a formal judicial investigation' and in the absence of such a decision the victim cannot institute a private prosecution.<sup>39</sup> He further argued that '[p]rosecutorial inaction following a complaint filed by the victim therefore amounts to an insurmountable impediment in the exercise' of his rights to institute a private prosecution and to access a court to have his case heard.<sup>40</sup> He added that the failure by the police and the public prosecutor to identify the alleged perpetrators meant that it was impossible for him to 'file for a formal judicial investigation'.<sup>41</sup> This is because the relevant provision of the Criminal Procedure Code (article 158(3)) provides that 'the person against whom a formal judicial investigation is requested must be identified by name, address and other relevant personal data' which details the applicant did not have.<sup>42</sup> Against that background the Committee against Torture held:<sup>43</sup>

Concerning the alleged violation of articles 12 and 13 of the Convention, the Committee notes that the public prosecutor never informed the complainant about whether an investigation was being or had been conducted after the criminal complaint was filed on 31 January 2000. It also notes that the failure to inform the complainant of the results of such investigation, if any, effectively prevented him from pursuing 'private prosecution' of his case before a judge. In these circumstances the Committee considers that the state party has failed to comply with its obligation, under article 12 of the Convention, to carry out a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed. The state party also failed to comply with its obligation, under article 13, to ensure the complainant's right to complain and to have his case promptly and impartially examined by the competent authorities.

The Committee against Torture came to a similar conclusion in other communications.<sup>44</sup> The jurisprudence from the Committee against

37 *Dimitrijevic* (n 36) paras 2.2-2.4.

38 *Dimitrijevic* para 2.5.

39 As above.

40 As above.

41 As above.

42 As above.

43 *Dimitrijevic* (n 36) para 5.4.

44 *Besim Osmani v Serbia*, Communication 261/2005, UN Doc A/64/44 289 (CAT 2009) para 5.7. See also the earlier decision of *Dzemajl v Serbia and Montenegro*, Communication 161/2000, UN Doc A/58/44 78 (CAT 2002) para 9.5; *Dimitrijevic v Serbia and Montenegro*, Communication 172/2000, UN Doc A/61/44 144 (CAT 2005) para 7.3; *Dimitrov v Serbia and Montenegro*, Communication 171/2000, UN Doc A/60/44 112 (CAT 2005) para 7.2.

Torture shows that a state party has to investigate allegations of torture or ill-treatment and that if it is unwilling to prosecute the perpetrators it should make the findings of the investigation available to the victim so as to enable him or her to institute a private prosecution against the alleged perpetrators. The Human Rights Committee has also dealt with the issue of private prosecutions as a local remedy. In *Andersen v Denmark*<sup>45</sup> the complainant, a Muslim woman, alleged that some Danish politicians had made discriminatory and insulting comments about Muslim women contrary to Danish law.<sup>46</sup> These politicians were not prosecuted by Danish authorities. Denmark argued that the petitioner should have instituted a private prosecution against the politicians and that 'choosing not to do so, she has failed to exhaust all available domestic remedies'.<sup>47</sup> The author argued that 'private litigation is ... not by definition a remedy to secure the implementation by the state party of its international obligations'.<sup>48</sup> The Committee 'took note of the author's argument that private litigation is not by definition a remedy to secure the implementation by the state party of its international obligations'.<sup>49</sup> The Committee held that in the circumstances and according to Danish legislation, 'it would be unreasonable to expect the author to initiate' a private prosecution against the politicians.<sup>50</sup> The Human Rights Committee came to a similar conclusion in a subsequent communication against Denmark. Similarly, in cases where discriminatory statements were publicly made by a politician and the public prosecutor declined to prosecute the politician in question the Committee on the Elimination of All Forms of Racial Discrimination held that it would have been unreasonable to expect the complainants to institute private prosecutions for the offences that had been committed in public and which, according to Danish law, should have been prosecuted by the public prosecutor.<sup>51</sup>

The Human Rights Committee will declare a communication inadmissible if the complainant has not exhausted local remedies, including instituting a private prosecution if such a remedy is effective. In *Hickey v Australia*<sup>52</sup> the author's son died of injuries he sustained after falling off his bicycle when a police car was driving behind

---

45 *Andersen v Denmark*, Communication 1868/2009, UN Doc CCPR/C/99/D/1868/2009, A/65/40, Vol II (2010), Annex VI 508 (HRC, 26 July 2010).

46 *Andersen* (n 45) para 2.1.

47 *Andersen* para 4.4.

48 *Andersen* para 5.6.

49 *Andersen* para 6.3.

50 As above.

51 *Mohamad Adan v Denmark*, Communication 43/2008, UN Doc CERD/C/77/D/43/2008, A/65/18(2010) Annex III 142 (CERD, 13 August 2010) para 6.3; *Quereshi v Denmark*, Communication 33/2003, UN Doc A/60/18 142 (2005) para 6.3; *Gelle v Denmark*, Communication 34/2004, UN Doc A/61/18 124 (2006) para 6.5; *Jama v Denmark*, Communication 41/2008, UN Doc A/64/18 123 (2009) para 6.5.

52 *Hickey v Australia*, Decision, Communication 1995/2010, UN Doc CCPR/C/111/D/1995/2010 (HRC, 21 July 2014).

him.<sup>53</sup> The police investigated the death and concluded that it had been an accident and that no police officer would be prosecuted. The coroner also concluded that there was no evidence to conclude that the action of the police contributed to the deceased's death.<sup>54</sup> As a result no police officer was prosecuted for the alleged offence. In the complaint to the Human Rights Committee the author argued that the state had violated the son's right to life (under article 6 of ICCPR) and articles 2 and 26 because it had failed independently to investigate the circumstances leading to his death. The state argued that before approaching the Human Rights Committee the author should have instituted a private prosecution against those who had allegedly caused her son's death.<sup>55</sup> In response to the state's submission on private prosecutions, the author argued that '[a] private prosecution in the circumstances of the present case would be very likely to be taken over or discontinued by the Director of Public Prosecutions and be dependent on the initial investigation'.<sup>56</sup> The state argued that the author's 'comments on the possibility of a private prosecution action are only speculative and mere doubts about the action that can be taken by the Director of Public Prosecutions'.<sup>57</sup> However, in this communication the Committee declared the communication inadmissible on the ground that the author should have challenged the coroner's findings locally before approaching the Human Rights Committee.<sup>58</sup> The Committee did not deal directly with the question of whether the author should have instituted a private prosecution. If a complainant institutes a private prosecution, he has to wait for the outcome of that prosecution before he approaches the Human Rights Committee otherwise the communication will be declared inadmissible.<sup>59</sup>

The above jurisprudence from the international human rights bodies shows that a private prosecution is a domestic remedy only when it is effective and available. In determining whether or not it is effective and available, the relevant committee will examine the legislation governing private prosecutions in a given country. This is an approach that the African Commission may have to adopt when confronted with communications alleging that private prosecutions should have been instituted before the complainants approached the African Commission. It should be emphasised that treaties impose obligations on state parties and not on individuals. Therefore, a state party has a duty to ensure that human rights are protected, promoted and fulfilled. This duty should not be relegated to human rights

---

53 *Hickey* (n 52) paras 2.1-2.2.

54 *Hickey* para 2.5.

55 *Hickey* para 4.10.

56 *Hickey* para 5.4.

57 *Hickey* para 6.3.

58 *Hickey* para 8.4.

59 *Jama v Denmark*, Communication 41/2008, UN Doc A/64/18 123 (2009) para 4.6.

victims by expecting them to institute private prosecutions in cases where human rights violations also amount to criminal acts in domestic legislation.

Apart from the UN human rights bodies, some regional human rights bodies have also dealt with the issue of private prosecutions as a domestic remedy. Article 46(1)(a) of the American Convention on Human Rights<sup>60</sup> provides that before the Inter-American Commission of Human Rights or the Inter-American Court of Human Rights admits a communication the petitioner has to ensure 'that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law'. The Inter-American Court of Human Rights and the Inter-American Commission of Human Rights have developed rich jurisprudence on article 46(1)(a),<sup>61</sup> but a discussion of this jurisprudence falls outside the scope of this article. The article will deal with those communications in which private prosecutions have been dealt with as a domestic remedy.

In *Luisiana Rios Paiva v Venezuela*<sup>62</sup> the complainants alleged that they had been subjected 'to several threats, acts of harassment, and verbal and physical abuse, including injuries caused by gunshots' by state officials.<sup>63</sup> In objecting to the admissibility of the communication, the respondent state argued that

in the cases of alleged verbal attacks (threats, libel and slander) and damages to the property, given that these are crimes of a private prosecution the alleged victims should have turned directly to the trial court and legally filed a private accusation, since the Public Prosecutors' Office is prevented from investigating these crimes *ex officio*.<sup>64</sup>

Without directly addressing the issue of private prosecutions the Court found that Venezuela had violated several provisions of the Convention.<sup>65</sup> The Inter-American Court and the Inter-American Commission have held that a complainant should not be expected to institute a private prosecution if the alleged offence could be prosecuted only by a public prosecutor.<sup>66</sup> In *Gayle v Jamaica*<sup>67</sup> the petitioners argued that the state had violated the deceased's right to life because he had died as a result of injuries inflicted on him by the

60 Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

61 JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2012) 92-98.

62 *Luisiana Rios Paiva v Venezuela*, Judgment (IACtHR, 28 January 2009).

63 *Luisiana Rios Paiva* (n 62) para 2.

64 *Luisiana Rios Paiva* para 34.

65 *Luisiana Rios Paiva* para 416.

66 *Laura Susana Alban-Cornejo v Ecuador*, Judgment (IACtHR, 22 November 2007) para 92; *Vera-Vera & Others v Ecuador*, Judgment, Series C 226 (IACtHR, 19 May 2011) 94; *Parada Cea v El Salvador*, Case 10.480, Inter-Am CHR, Report 1/99, OEA/Ser.L/V/II.106, doc 6 rev (1999) para 119.

67 *Gayle v Jamaica*, Petition 191/2002, Inter-Am CHR, Report 8/03, OEA/Ser.L/V/II.118, doc 5 rev 2 (2003).

respondent's security forces.<sup>68</sup> The state argued that the petition was inadmissible for failure to exhaust domestic remedies, including the institution of a private prosecution against the perpetrators.<sup>69</sup> In response the petitioner acknowledged that although Jamaican law provided for circumstances in which a person may institute a private prosecution, the following were some of the challenges the author would have faced had he decided to institute a private prosecution: the Constitution empowers the Director of Public Prosecutions to take over and either continue or discontinue such a prosecution; a private prosecution cannot be instituted without the consent or authorisation of the Director of Public Prosecutions; and the Director of Public Prosecutions was unlikely to allow the applicant to institute a private prosecution as he had already expressed the view that there was insufficient evidence to secure a conviction.<sup>70</sup>

The state in response argued that the law provided for the remedy of private prosecution and that the petitioner had failed to adduce evidence to prove that had he instituted a private prosecution the Director of Public Prosecutions would have taken it over in order to prevent him from continuing with it.<sup>71</sup> Against that background the state argued that the petitioner had not exhausted domestic remedies and that, therefore, the Commission should declare the petition inadmissible.<sup>72</sup>

In rejecting the state's submission, the Commission referred to the Jamaican Constitution and held that in Jamaica the Director of Public Prosecutions 'has exclusive authority' for 'making all decisions concerning criminal prosecutions arising in Jamaica'. This authority meant that he could take over a private prosecution and either continue with it or discontinue it.<sup>73</sup> According to the Commission this provision meant that the 'state retains exclusive authority for pursuing criminal proceedings in respect of the circumstances relating to [the deceased]'.<sup>74</sup> Against that background, the Commission held:<sup>75</sup>

While the record indicates that there is provision under Jamaican law for 'private prosecutions', the Commission considers that proceedings of this nature do not constitute remedies that the petitioners are required to exhaust. It is clear from the instruments and decisions of the Inter-American system ... that the obligation to investigate, prosecute and punish serious violations of human rights rests with member states, as the entities with the international legal commitment and resources to carry out these functions. To expect the petitioners to assume these responsibilities would not only be inconsistent with the system's jurisprudence, it would

---

68 *Gayle* (n 67) para 2.

69 *As above*.

70 *Gayle* (n 67) para 13.

71 *Gayle* para 26.

72 *As above*.

73 *Gayle* (n 67) para 43.

74 *As above*.

75 *As above*.



also place an inequitable burden on those who generally lack the means and expertise to fulfil these responsibilities.

On the issue of judicial review, the Commission held:<sup>76</sup>

The Commission similarly considers that an application for judicial review in respect of the DPP's decision not to prosecute criminal charges in relation to [deceased's] death does not constitute an effective remedy that the petitioners should be required to pursue for the purposes of the exhaustion of domestic remedies requirement. It reaches this conclusion in light of the fact that the ability of an individual to pursue application for judicial review requires the granting of leave by the Jamaican Supreme Court which, according to the information available, is a discretion that is exercised by the Court infrequently, as well as the fact that, even where successful, the relief available appears to be limited to an order requesting the DPP to reconsider his or her decision not to prosecute.

In *García García v Ecuador*<sup>77</sup> the Inter-American Commission on Human Rights held that private prosecution as a domestic remedy is not available if the law does not provide for circumstances in which the petitioner could institute such a prosecution. The petitioner's application to be a private prosecutor in a military court had been dismissed by the Military Court of Justice as 'the Military Code of Criminal Procedure does not provide for private prosecution'.<sup>78</sup> The state's argument that the decision of the Military Court of Justice could be reversed on appeal was rejected by the Commission because 'during the criminal proceedings in the military courts, the alleged victim's family was unable to be a prosecuting party thereto. As a result, they were unable to raise the respective claims before the authorities hearing the case.'<sup>79</sup> The Commission reiterated its position that 'special courts, such as those of the military or police, are not an appropriate forum and thus are not the appropriate remedy to investigate, try and punish potential violations of the human rights enshrined in the American Convention'.<sup>80</sup>

Article 35(1) of the European Convention of Human Rights provides that '[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law'.<sup>81</sup> The European Court of Human Rights in several decisions has held that a private prosecution will be a domestic

76 *Gayle* (n 67) para 44.

77 *García García v Ecuador*, Report 84/12, Petition 677-04 (IACmHR, 8 November 2012).

78 *García* (n 77) para 12.

79 *García* para 41.

80 *García* para 37.

81 For a discussion of the relevant case law on art 35(1), see European Court of Human Rights *Practical guide on admissibility criteria* (2018) 21-28, [https://www.echr.coe.int/documents/admissibility\\_guide\\_eng.pdf](https://www.echr.coe.int/documents/admissibility_guide_eng.pdf) (accessed 25 April 2019).

remedy if it is effective.<sup>82</sup> For example, the Court held that where the government failed to intervene to prevent and stop the applicant's neighbours from violating her rights under article 3 of the European Convention on Human Rights the government had failed to show that the applicant's institution of a private prosecution against her neighbours 'could lead to such an intervention [by the government] and effective resolution of the underlying systemic problem'.<sup>83</sup> The Court held that depending on the facts of the case it is dealing with, 'where the domestic law provided for public criminal prosecution, it is not for the Court to speculate on whether the applicant's criminal complaint should have been pursued by way of private prosecution'.<sup>84</sup> The legal framework that provides for public prosecutions and also for the possibility of a victim of human rights violations instituting a private prosecution should the public prosecutor decline to prosecute provides for 'sufficient protection'.<sup>85</sup> The Court held that for a private prosecution to be an effective and adequate domestic remedy, the state has to prove that 'it was capable of providing any redress to the applicant in relation to the complaint' in question.<sup>86</sup> Also, a private prosecution will be an effective remedy if there is evidence of previous successful private prosecutions.<sup>87</sup> The mere fact that the accused was acquitted in a private prosecution does not mean that the private prosecution was not an effective domestic remedy. The European Court of Human Rights held that '[t]he mere fact that the outcome of those [private] criminal proceedings was not in the applicant's favour, does not render them ineffective'.<sup>88</sup> The applicant is not required to appeal against an unfavourable judgment in a private prosecution matter before approaching the European Court of Human Rights.<sup>89</sup> Where there are other ways in which the applicant could bring the 'substance of his complaint to the notice of the national authorities' and unsuccessfully followed those ways, he or she is not expected to institute a private prosecution if it 'would have had the same objective as' the first remedy he sought.<sup>90</sup> In cases of human rights violations by

---

82 *Abdu v Bulgaria* (Application 26827/08) 11 March 2014 para 36; *Bazjaks v Latvia* (Application 71572/01) 19 October 2010 para 125; *Borbála Kiss v Hungary* (Application 59214/11) 26 June 2012 para 26; and *Denizci & Others v Cyprus* (Applications 25316-25321/94 and 27207/95) 23 May 2001 paras 355-357; *Irina Smirnova v Ukraine* (Application 1870/05) 13 October 2016 para 77; *MF v Hungary* (Application 45855/12) (31 October 2017) para 35; *Tarjáni v Hungary* (Application 29609/16) (10 October 2017) paras 30-31.

83 *Irina Smirnova v Ukraine* (Application 1870/05) 13 October 2016 para 77.

84 *ŽB v Croatia* (Application 47666/13) (11 July 2017) para 60.

85 *Alković v Montenegro* (Application 66895/10) (5 December 2017) para 68.

86 *Bazjaks v Latvia* (Application 71572/01) 19 October 2010 para 91.

87 *Egmez v Cyprus* (Application 30873/96) 21 December 2000 para 99; *Haász and Szabó v Hungary* (Applications 11327/14 and 11613/14) 13 October 2015 para 28; *Heino v Finland* (Application 56720/09) 15 February 2011 para 53.

88 *Borisov v Lithuania* (Application 9958/04) 14 June 2011 para 125.

89 *MF v Hungary* (n 82) paras 32-37.

90 *Tarjáni v Hungary* (n 82) para 30. See also *Škorjanec v Croatia* (Application 25536/14) (28 March 2017) para 46.

government officials, the Court held that 'victims are not required to pursue the prosecution of officers accused of ill-treatment on their own, this being a duty of the public prosecutor who is certainly better, if not exclusively, equipped in that respect'.<sup>91</sup>

The above jurisprudence shows the circumstances in which a private prosecution may or may not be an effective domestic remedy. As in the case of the other human rights bodies discussed above, the European Court of Human Rights will also examine the law and practice of the state party to determine whether or not the private prosecution was an effective remedy. The African Commission may find some of the jurisprudence of the European Court above relevant should it be confronted with communications dealing with private prosecutions as a domestic remedy.

## 4 Conclusion

This article has dealt with the issue of private prosecution as a domestic remedy before the African Commission and other international and regional human rights bodies. It has been illustrated that the African Commission so far specifically has dealt with the issue of private prosecution in a single communication. However, there have been other communications in which authors have submitted that private prosecution was not an effective local remedy that should have been exhausted before a communication was filed with the African Commission. In these communications the African Commission has not dealt directly with the issue of private prosecution. In light of the fact that African countries have adopted different approaches to the issue of private prosecutions the African Commission would have to analyse the law and practice in a given country to decide whether or not a private prosecution was an effective domestic remedy in need of exhaustion before a complainant can approach the Commission. Sometimes the mere fact that there is a possibility to institute a private prosecution does not mean that it is an effective remedy. For example, some victims of human rights violations may be bribed to withdraw a private prosecution. In one communication before the Human Rights Committee, for example, there were allegations that the parents of a child who had been sexually assaulted were bribed to withdraw a private prosecution against the perpetrator.<sup>92</sup> It is recommended that in assessing whether or not a private prosecution is an effective remedy the African Commission may consider the following factors (the list is not exhaustive). First is the issue of a person with *locus standi* to institute a

91 *Haász and Szabó v Hungary* (Applications 11327/14 and 11613/14) 13 October 2015 para 30. See also *Jasiński v Poland* (Application 72976/01) 6 December 2007 para 28.

92 *HLC v Serbia*, Communication 1355/2005, UN Doc A/62/40, Vol II 525 (HRC 2007) para 2.8.

private prosecution. One of the questions to be asked in this regard is whether another person, including a juristic person, may institute a private prosecution on behalf of the victim of crime. Private prosecutions may be costly and some victims of crime may not be willing or be able (financially or otherwise) to institute private prosecutions.<sup>93</sup> It is important that the right to institute private prosecutions is extended to natural and juristic persons, even if they are not individually affected by the offence in question, who may be willing and able to prosecute the alleged offenders. This extension will enable non-governmental organisations (NGOs), for example, to fundraise and institute private prosecutions on behalf of some victims. Second, and related to the first issue, is the issue of funding to conduct a private prosecution. As mentioned above, private prosecutions are expensive and many victims of crime may not have the necessary resources to finance such prosecutions. If there is no legal aid for such victims or if they are unable to raise funds from other sources, a private prosecution is out of their reach and, therefore, unavailable as a remedy. The third factor is how the public prosecutor has exercised or is likely to exercise the power to intervene in private prosecutions. If there is evidence to show that the private prosecutor is likely to take over and discontinue the private prosecution without any convincing reason or that in the past he or she has taken over private prosecutions and discontinued them or merely did not continue without a convincing reason, then a private prosecution is not an effective remedy.<sup>94</sup> However, a public prosecutor could take over and discontinue a private prosecution in order to prevent the private prosecutor from using such a prosecution to abuse the court process.

---

93 In *Ndlovu v S* 2017 10 BCLR 1286 (CC); 2017 (2) SACR 305 (CC) para 58 (fn 39) the South African Constitutional Court held that '[i]n the event that the Director of Public Prosecutions declines to prosecute an alleged offence, a private person with a substantial and peculiar interest in a matter may apply to the NPA [National Prosecuting Authority] for a certificate *nolle prosequi* (refusal to prosecute) in terms of section 7(1)(a) of the Criminal Procedure Act. This certificate is required for a private person to institute a private prosecution, however instituting a private prosecution is prohibitively expensive.'

94 This has been the case, eg, in Uganda where the Director of Public Prosecutions took over private prosecutions and merely did not continue with them. See, generally, JD Mujuzi 'Strengthening the right to institute a private prosecution in Uganda by amending article 120(3) of the Constitution: A comment on *Uganda v Inspector-General of Police, General Kale Kayihura & 7 Others* (17 August 2016)' (2017) 25 *African Journal of International and Comparative Law* 589.

## Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and Peoples' Rights

Ronald Naluwairo\*

Senior Lecturer, School of Law, Makerere University, Kampala, Uganda; Senior Research Fellow, Advocates Coalition for Development and Environment (ACODE)

<https://orcid.org/0000-0002-8627-2597>

### Summary

*The African Commission on Human and Peoples' Rights was established to protect and promote human and peoples' rights on the African continent. This mandate extends to protecting and promoting human rights in the administration of justice by all organs that exercise judicial power, including military courts. In the execution of its mandate the African Commission has developed important jurisprudence on different aspects concerning the administration of justice by military courts. In this jurisprudence, the African Commission has expounded on what constitutes a violation of the African Charter on Human and Peoples' Rights and how military courts should administer justice in a manner that conforms to internationally-agreed standards, especially those relating to the right to a fair trial. Through desk review, the contribution appraises this jurisprudence. In analysing this jurisprudence, the article tries to draw a comparison, especially with the jurisprudence of the Human Rights Committee and other UN-established initiatives. It is argued that although the African Commission has done fairly well in interpreting the relevant provisions of the African Charter and in laying down principles and rules that should be followed by military courts in administering justice, there is still much the Commission can do to improve the administration of justice through military courts in Africa.*

**Key words:** Africa; justice; right to a fair trial; military courts

\* LLB (Hons) (Makerere) LLM (Cambridge) PhD (London); [rnaluwairo@law.mak.ac.ug](mailto:rnaluwairo@law.mak.ac.ug)

# 1 Introduction

Almost all African countries have military courts alongside civilian or ordinary courts. The main function of military courts is to administer justice with respect to military personnel and other persons subject to military law. This arrangement mainly is for purposes of the maintenance of military discipline which is considered critical for military efficiency.<sup>1</sup> As some of the cases analysed in the article will show, it is also the case that some national governments establish special tribunals akin to military courts during war and civil disturbances to address justice needs arising in these situations.<sup>2</sup> The administration of justice by military courts (hereafter used to include special courts) in Africa raises many concerns that can lead an informed and objective person to conclude that what many of these courts actually do is to dispense 'injustice' rather than 'justice', as the case should be. This situation mainly is because many military courts in African countries do not adhere to the internationally-accepted principles for the administration of justice, which makes it easy for these principles to be abused by the executive. For the most part, the internationally-accepted principles for the administration of justice are what is comprised in the right to a fair trial. The right to a fair trial is provided for in article 7 of the African Charter on Human and Peoples' Rights (African Charter)<sup>3</sup> and article 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup> Suffice to note that 53 of the 54 countries in Africa are party to the African Charter. The majority of African countries are also party to ICCPR.

This article examines the contribution of the African Commission on Human and Peoples' Rights (African Commission) in improving the administration of justice by military courts in Africa. This examination is done mainly through an analysis of the Commission's jurisprudence enunciated in its decisions on individual and interstate communications; its Concluding Observations and recommendations

- 
- 1 See M Gibson 'International human rights law and the administration of justice through military tribunals: Preserving utility while precluding impunity' (2008) 4 *Journal of International and Relations Law* 10. For an analysis of the validity of the existence of military justice as a separate system of justice in Uganda's context, see R Naluwairo 'A reassessment of military justice as a separate system in the administration of justice: The case of Uganda' (2012) 18 *East African Journal of Peace and Human Rights* 136.
  - 2 These tribunals are akin to military courts in a sense that they are often staffed and presided over by military personnel.
  - 3 The African Charter on Human and Peoples' Rights was adopted on 27 June 1981 and entered into force on 21 October 1986. All countries in Africa are party to the Charter. The African Charter is Africa's major treaty for the protection and promotion of human and peoples' rights and fundamental freedoms on the African continent.
  - 4 The International Covenant on Civil and Political Rights was adopted on 16 December 1966 and entered into force on 23 March 1976. It is the major international agreement for the protection and promotion of civil and political rights. All African states are party to ICCPR.

on periodic reports of states; and principles, guidelines and resolutions. The most relevant principles, guidelines and resolutions considered in the article are the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa;<sup>5</sup> the Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa;<sup>6</sup> the Resolution on the Right to Fair Trial and Legal Assistance in Africa;<sup>7</sup> the Resolution on the Right to Recourse and Fair Trial;<sup>8</sup> and the Resolution on the Respect and the Strengthening of the Independence of the Judiciary.<sup>9</sup> Although examining the impact of the African Commission's jurisprudence on African countries' national military court systems and practice is important to fully appreciate the role of the Commission in improving the administration of justice by military courts, it is outside the scope of the article given the word limit and other limitations.

The article examines and summarises the African Commission's jurisprudence based on thematic issues. The article is divided into four parts. Before appraising the Commission's jurisprudence, it is important briefly to explore its establishment and functions. This is the main subject addressed in the next part.

## 2 About the African Commission on Human and Peoples' Rights

The African Commission is the major organ of the African Union (AU) charged with the responsibility of protecting and promoting human and peoples' rights on the African continent. It is established under article 30 of the African Charter. According to this provision, the Commission was established with the overall objective 'to promote human and peoples' rights and ensure their protection in Africa'. The African Commission is comprised of 11 members who, although

---

5 Adopted in 2003, <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/> (accessed 30 May 2018).

6 Adopted by the African Commission during its 56th ordinary session in Banjul, The Gambia, 21 April-7 May 2015, [http://www.achpr.org/files/instruments/principles-guidelines-countering-terrorism/principles\\_and\\_guidelines\\_on\\_human\\_and\\_peoples\\_rights\\_while\\_countering\\_terrorism\\_in\\_africa.pdf](http://www.achpr.org/files/instruments/principles-guidelines-countering-terrorism/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf) (accessed 3 June 2018).

7 Adopted by the African Commission at its 26th ordinary session held in November 1999 in Kigali, Rwanda, <http://www.achpr.org/sessions/26th/resolutions/41/> (accessed 30 May 2018).

8 Adopted by the African Commission at its 11th ordinary session, in Tunis, Tunisia, 2-9 March 1992, <http://www.achpr.org/sessions/11th/resolutions/4/> (accessed 3 June 2018).

9 Adopted by the African Commission at its 19th ordinary session, Ouagadougou, Burkina Faso, 26 March-4 April 1996, <http://www.achpr.org/sessions/19th/resolutions/21/> (accessed 3 June 2018).

elected by the Assembly of Heads of State and Government, serve in their personal capacity.<sup>10</sup>

The African Commission has four specific mandates. According to article 45 of the African Charter, the Commission is mandated:

- (1) to promote human and peoples' rights and in particular:
  - (a) 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;
  - (b) 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; and
  - (c) to cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights;
- (2) to ensure the protection of human and peoples' rights under conditions laid down by the present Charter;
- (3) to interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African organisation recognised by the OAU; and
- (4) to perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

To effectively carry out its functions the African Commission was given several powers. These include the power to receive and consider interstate communications alleging violations of the rights and freedoms provided for in the African Charter;<sup>11</sup> to receive and consider individual communications alleging violations of the rights and freedoms provided for in the African Charter;<sup>12</sup> and to receive and examine reports by state parties to the African Charter on the legislative and other measures taken in giving effect to the rights and freedoms provided for in the African Charter.<sup>13</sup>

In considering inter-state and individual communications, in examining the periodic state reports, and in its Principles, Guidelines and Resolutions, the African Commission has developed a body of jurisprudence on different aspects concerning the administration of justice by military courts. The next part appraises this jurisprudence and the contribution of the African Commission in improving the administration of justice by military courts in Africa.

---

<sup>10</sup> See arts 31 & 33 of the African Charter.

<sup>11</sup> Arts 47 & 53 African Charter.

<sup>12</sup> Arts 55-58 African Charter.

<sup>13</sup> Art 62 African Charter.



### 3 Jurisprudence of the African Commission regarding the administration of justice by military courts

Without a doubt the major contribution by the African Commission in improving the administration of justice by military courts in Africa has been in the area of ensuring that they conform to and uphold the guarantees for the right to a fair trial as provided for in the African Charter and other international human rights instruments. In the African Charter, the guarantees of the right to a fair trial are provided for in articles 7 and 26. Article 7 provides:

- (1) Every individual shall have the right to have his cause heard. This comprises:
  - (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
  - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
  - (c) the right to defence, including the right to be defended by counsel of his choice; and
  - (d) the right to be tried within a reasonable time by an impartial court or tribunal.
- (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 26 of the African Charter enjoins state parties to the African Charter to ensure that their courts are independent. It provides that 'states parties to the present Charter shall have the duty to guarantee the independence of the courts'. In its Resolution on the Right to Fair Trial and Legal Assistance in Africa,<sup>14</sup> the African Commission adopted the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa. In this Declaration the Commission emphasised that while exercising their functions military courts should respect fair trial standards. In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,<sup>15</sup> the African Commission restated this position. In section L(b) of these Principles and Guidelines the Commission emphasises that 'military courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines'. In the Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa the Commission reiterated this position.<sup>16</sup>

14 Resolution (n 7).

15 Principles and Guidelines (n 5).

16 Principles and Guidelines (n 6) Part IV (B).

In a number of decisions on individual communications the African Commission has emphasised the fact that military courts should respect the guarantees of the right to a fair trial. Perhaps the most important case on this issue is *Civil Liberties Organisation & Others v Nigeria*.<sup>17</sup> In this case the African Commission stressed that 'military tribunals must be subject to the same requirements of fairness, openness, justice, independence and due process as any other process'. The Commission's position that military and special courts should respect fair trial standards provided for in the African Charter is consistent with the jurisprudence of the Human Rights Committee.<sup>18</sup> In its General Comment on the Right to a Fair Trial, the Human Rights Committee points out that the guarantees of the right to a fair trial provided for in article 14 of ICCPR apply 'to all courts and tribunals including military and other specialised courts'.<sup>19</sup> In its jurisprudence the African Commission has attempted to expound on what amounts to the violation of fair trial rights in the context of the administration of justice by military courts and what needs to be done to ensure that military courts adhere to and respect the right to a fair trial. The following subsections summarise and appraise this jurisprudence. This is done based on thematic issues.

### 3.1 Independence, competence and impartiality of military courts

Although the African Charter explicitly provides for the right to a competent tribunal and the right to an impartial tribunal,<sup>20</sup> it does not explicitly provide for the right to an independent tribunal. Nonetheless, article 26 of the African Charter obligates state parties to ensure that their courts and tribunals are independent. According to section A(1) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>21</sup> it is provided, among others, that in determining any criminal charge against a person or in determining a person's rights and obligations, 'everyone shall be entitled to a fair and public hearing by a legally constituted competent, *independent* and impartial judicial body'.<sup>22</sup> In section A(4) of these Principles and Guidelines the African Commission expounded on the essential requirements and other considerations for ensuring judicial independence.

---

17 (2001) AHRLR 75 (ACHPR 2001).

18 Just as the African Commission is charged with the responsibility of interpreting and monitoring the implementation of the African Charter, the Human Rights Committee is mandated to interpret and monitor the implementation of ICCPR.

19 See para 22 Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial, adopted during the 19th session of the Human Rights Committee, 9-27 July 2007, Geneva, Switzerland.

20 See arts 7(1)(b) and (d) of the African Charter.

21 Principles and Guidelines (n 5).

22 My emphasis.

There are a number of cases involving military courts where the African Commission has addressed the question of what it takes for military courts to be independent, competent and impartial. In *Marcel Wetsh'okonda Koso & Others v Democratic Republic of the Congo (Koso case)*,<sup>23</sup> the military court in issue was comprised of five members, among whom only one was a trained jurist. The complainants requested the African Commission to declare, among others, that the mere fact of submitting their case to a court, the majority of whose members had no legal qualification whatsoever, constituted a blatant violation of article 26 of the African Charter. While observing that the 'independence of a court refers to the independence of the court *vis-à-vis* the executive', the Commission observed that as is the case with civil courts, in determining the independence of a military court, consideration should be given to 'the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence'.<sup>24</sup> This test for determining the independence of military courts is generally consistent with the international standards as expounded by the Human Rights Committee in General Comment 32 of 2007 and in the United Nations (UN) Basic Principles on the Independence of the Judiciary. According to the Human Rights Committee, the independence of courts refers

to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure ... the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.<sup>25</sup>

In the *Koso* case the African Commission further stressed the fact that the ability of a court to offer justice depends on the competence and quality of its members.<sup>26</sup> Citing its earlier decision in the case of *Amnesty International & Others v Sudan*,<sup>27</sup> the Commission held that depriving courts of qualified staff to guarantee their impartiality constitutes a violation of article 26 of the African Charter which requires state parties to the Charter to guarantee the independence of courts.<sup>28</sup> Accordingly, it asked the government of the Democratic Republic of the Congo (DRC) to introduce measures to guarantee the independence of tribunals.<sup>29</sup> It is arguable that legally-qualified members of military courts are less likely to be influenced by external factors. They are more likely to adjudicate cases based on the law and facts, unlike members who are ignorant of the law.

---

23 (2008) AHRLR 93 (ACHPR 2008).

24 *Koso* (n 23) para 79.

25 General Comment 32 (n 19) para 19.

26 *Koso* (n 23) para 82.

27 (2000) AHRLR 297 (ACHPR 1999).

28 *Koso* (n 23) paras 82 & 94.

29 *Koso* para 96.

In *Law Office of Ghazi Suleiman v Sudan* (Law Office case)<sup>30</sup> a number of civilians were tried by a military court established by presidential decree. This court was comprised of four members, three of whom were active military personnel. It was alleged, among others, that the military court was neither independent nor impartial as its members had been carefully chosen by the President. The African Commission observed that the composition of the military court alone was evidence of impartiality.<sup>31</sup> It held that trying civilians in military courts presided over by active servicemen still under military regulations violated the right to a fair trial. This was largely because the military court was dominated by servicemen who were part and parcel of the executive. In this case, the African Commission also held that 'depriving the court of qualified staff to ensure its impartiality is detrimental to the right to have one's cause heard by competent organs'.<sup>32</sup>

In *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (Lekwot case)<sup>33</sup> the Civil Disturbance (Special Tribunal) Act provided that the Special Tribunal in issue would consist of one judge and four members of the armed forces. The African Commission correctly found this composition to be in violation of the right to an impartial tribunal guaranteed in article 7(1)(d) of the African Charter.<sup>34</sup> It was observed that the composition of the tribunal alone created 'the appearance, if not actual lack, of impartiality'.<sup>35</sup> Why did the African Commission so rule? This was largely because the tribunal did not appear to be impartial, as it was 'composed of persons belonging to the executive branch of government, the same branch that passed the Civil Disturbance Act'.<sup>36</sup> Moreover, as active service men the three members remained subject to the military chain of command. As Tshivhase correctly points out, the right to an impartial tribunal requires the absence of bias, actual or perceived.<sup>37</sup> In this connection, the Human Rights Committee has stated:<sup>38</sup>

The requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.

---

30 (2003) AHRLR 134 (ACHPR 2003).

31 *Law Office* (n 30) para 64.

32 As above.

33 (2000) AHRLR 183 (ACHPR 1995).

34 *Lekwot* (n 33) para 14.

35 *Lekwot* para 14.

36 *Lekwot* para 13.

37 A Tshivhase 'Military courts in a democratic South Africa: An assessment of their independence' (2006) 6 *New Zealand Armed Forces Law Review* 121.

38 General Comment 32 (n 19) para 21. In *Findlay v The United Kingdom* (1997) ECHR 8, the European Court of Human Rights expounded a similar test.

Arguably, in the *Lekwot* case a reasonable and objective person could easily apprehend bias. The African Commission, therefore, was correct in holding the opinion it did.

From the jurisprudence summarised above four key factors emerge as critical to ensure that military courts are competent, independent and impartial. First, to achieve the independence of military courts it is critical to ensure that they are truly independent of the executive branch of government. This requirement is in line with the doctrine of separation of powers, which in this context demands a separation of judicial from executive functions and powers in order to have a proper system of checks and balances. Second, the critical aspects to consider in determining whether military courts are truly independent from the executive are the method of appointment/designation of their members; the length of their tenure; the existence of protection against external pressures; and the issue of real or perceived independence. Third, having legally-qualified persons as members of military courts is an important measure not only in guaranteeing the independence of military courts, but also their competence and impartiality. Fourth, in the particular context of trials of civilians in military courts staffed with and presided over by active servicemen, military courts cannot be considered impartial. This is essentially because active servicemen are part and parcel of the executive, and under their military codes they are obligated to respect the military chain of command. Where these military personnel are adequately insulated from obeying orders and the command influence when performing their judicial functions the threat of not being impartial can largely be reduced.

### **3.2 Trials before military courts must be conducted in a manner that upholds the right to a presumption of innocence and should be public**

The right to presumption of innocence is provided for in article 7(1)(b) of the African Charter. This article provides that '[e]very individual shall have ... the right to be presumed innocent until proven guilty by a competent court or tribunal'. In the *Media Rights Agenda v Nigeria* case<sup>39</sup> the African Commission held that the actions in issue were a violation of this provision, because prior to the setting up of the military tribunal there were intense pre-trial publicity events organised to make the general public believe that the arrested people had contrived a *coup* plot and, therefore, were guilty of treason.<sup>40</sup> Similarly, in the *Law Office* case there was wide publicity concerning the suspects by state officials before and during the trial. This publicity was aimed at declaring the suspects guilty of the offences they were being tried for in the military court. The suspects were accused of a number of offences, including destabilising the constitutional system;

39 (2000) AHRLR 262 (ACHPR 2000).

40 *Media Rights Agenda* (n 39) paras 47 & 48.

inciting people to war; engaging in the war against the state; inciting opposition against the government; and abetting terrorism. The African Commission condemned the negative publicity before finding the suspects guilty by a competent court.<sup>41</sup> It correctly held that such publicity violated the right to be presumed innocent as guaranteed in article 7(1)(b) of the African Charter.<sup>42</sup>

With respect to the right to a public hearing, this is not explicitly provided for in the African Charter. Nevertheless, invoking articles 60 and 61 of the African Charter<sup>43</sup> the African Commission in a number of cases has held the right to a public hearing to be part and parcel of the right to a fair trial provided for in article 7. In the *Media Rights Agenda* case the military tribunal in issue excluded members of the public and the press from the trial. The complainant contended that this was a violation of the internationally-guaranteed right to a fair trial, in particular the right to a public hearing. Invoking articles 60 and 61 of the African Charter and article 14 of ICCPR, the Commission held that the exclusion of members of the public and the press from the trial amounted to a violation of the right to a public hearing. It observed that although the right to a public hearing was subject to exceptions, such as that a court or tribunal can exclude from the proceedings persons other than the parties thereto in the interests of defence, public safety and public order, it was not sufficient for Nigeria to present an omnibus statement in its defence to the effect that the right to a public hearing was subject to exceptions. Nigeria had to indicate specifically which of the permitted exceptions prompted it to exclude the public from the trial.<sup>44</sup> Similarly, in the *Civil Liberties* case, where the communication alleged that except for the opening and closing ceremonies, the trial before the military court was conducted *in camera*, the African Commission found this to be a violation of the right to a public hearing, especially because Nigeria 'did not show that the holding of the proceedings in secret was within the exceptional circumstances contemplated under the African Charter'.<sup>45</sup>

In sum, from its jurisprudence highlighted above the African Commission points to the need for trials before military courts to be public, and in the case of exclusion of the public, for the military courts to give specific justifications within the permitted exceptions to the right to a public hearing. From the cases mentioned above, the African Commission also highlighted the great need for military and

---

41 *Law Office* (n 30) para 56.

42 As above.

43 In interpreting the provisions of the African Charter, arts 60 and 61 empower the African Commission to draw inspiration from international law and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

44 *Media Rights Agenda* (n 39) paras 52-54.

45 *Civil Liberties* (n 17) para 39.

other authorities to desist from prejudging cases before military courts and persuading members of the public to believe in the guilt of the accused before competent courts adjudge them so. All these factors are important in the quest to improve the administration of military justice by military courts in Africa.

### 3.3 Military justice systems and military courts must guarantee and respect the right to defence

The right to defence is provided for in article 7(1)(c) of the African Charter. This article provides that '[e]very individual shall have ... the right to defence, including the right to be defended by counsel of his choice'. The *Constitutional Rights* case involved a special tribunal composed of one judge and four members of the armed forces. It was alleged that during the trial counsel for the complainants were harassed and intimidated to the extent of being forced to withdraw from the proceedings. This situation notwithstanding, the tribunal continued with the hearing, found the accused guilty and sentenced them to death. This behaviour was held to be a violation of the defendants' right to defence as guaranteed in article 7(1)(c) of the African Charter. In the *Civil Liberties* case the African Commission held that the assignment of military counsel to the accused persons, despite their objections, and especially in criminal proceedings that carry the death sentence, was a breach of article 7(1)(c) of the African Charter.<sup>46</sup> The Commission observed that the purpose of guaranteeing the accused's right to counsel of their own choice was to ensure that the accused has confidence in his defence counsel.<sup>47</sup> It rightly argued that even in cases where the accused is unable to afford legal counsel and is to be represented by counsel provided at the expense of the state, he or she should be able to choose from a list of his or her preferred independent counsel answerable only to him or her.<sup>48</sup>

In the *Law Office* case a military court delivered a judgment of which the purpose was to prevent the lawyers chosen by the accused from appearing in the military court. Citing its earlier decision in *Amnesty International & Others v Sudan*<sup>49</sup> (where the African Commission stressed the fact that to recognise that a court has the right to veto the accused's choice of counsel amounts to an unacceptable violation of the right to defence),<sup>50</sup> the Commission held that refusing the victims the right to be represented by a lawyer of their choice (Ghazi Suleiman) amounted to a violation of article 7(1)(c) of the African Charter. In *Malawi African Association & Others v*

46 *Civil Liberties* para 31.

47 *Civil Liberties* para 28.

48 *Civil Liberties* para 29.

49 (2000) AHRLR 297 (ACHPR 1999).

50 *Amnesty International* (n 49) para 59.

*Mauritania*<sup>51</sup> the African Commission argued that the right to defence included the right to understand the charges being brought against one. In one of the trials under issue, only three out of the 21 accused persons were fluent in the Arabic language. Arabic was the language used during the trial. It found Mauritania to be in breach of article 7(1)(c) of the African Charter as 18 of the accused 'did not have the right to defend themselves'.

From the African Commission's jurisprudence above the following points are important to improve the administration of justice by military courts from the perspective of the right to defence. First, military courts must respect accused persons' choice of counsel. Conversely, military courts and military authorities should never impose counsel on accused persons. Even when the state is meeting the expenses of defense counsel, persons appearing before military courts should be allowed to choose from a list of defense counsel. Third, members of the military courts must act with respect towards defense counsel. They should not engage in acts aimed at intimidating or harassing defence counsel. Fourth, military courts must ensure that accused persons appearing before them understand the charges against them.

### **3.4 Military laws and other legislations should never foreclose the right of appeal from decisions of military courts**

Article 7(1)(a) of the African Charter provides for the right of appeal. This article provides that '[e]very individual shall have ... the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force'. There are numerous decisions where the African Commission has consistently held that foreclosing appeals from decisions of military and special courts is a violation of the right to appeal as guaranteed in the African Charter. In the *Media Rights Agenda* case<sup>52</sup> Nigeria was held to be in violation of the right of appeal because by law, decisions of the special military tribunal that tried and convicted Malaolu were not subject to appeal. According to the Treason and Other Offences (Special Military Tribunal) Decree 1 of 1986, decisions of the Special Military Tribunal were subject only to confirmation by the Provisional Ruling Council.

In the *Civil Liberties* case, the African Commission held that the foreclosure of any avenue of appeal to competent national organs in a criminal case involving the death penalty was a clear violation of article 7(1)(a) of the African Charter.<sup>53</sup> In this case, as was the situation in *Media Rights Agenda*, the decision of the tribunal was not subject to appeal, but to confirmation by the Provisional Ruling Council, the members of which were exclusively members of the

51 (2000) AHRLR 149 (ACHPR 2000).

52 *Media Rights Agenda* (n 39).

53 *Civil Liberties* (n 17) para 33.



armed forces. Similarly, in the *Law Office* case the African Commission found Sudan to be in violation of article 7(1)(a) of the African Charter on the basis that the decisions of the military court in issue were not subject to appeal.<sup>54</sup> The Commission rightly emphasised the fact that preventing the submission of an appeal to competent national courts increased the risk of not remedying the procedural defects that could have occurred during the hearing.<sup>55</sup>

### 3.5 The jurisdiction of military courts should be confined to trials of military personnel accused of committing military offences

An awkward question that the African Commission has addressed concerning the administration of justice by military courts is the issue of jurisdiction. In terms of jurisdiction over subject matter, the Commission's position is that military courts should have jurisdiction over only military and not over civil offences. With respect to jurisdiction over persons its position is that military courts should have jurisdiction over only military personnel and not over civilians. In its Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa, the Commission stated that '[t]he purpose of military courts is to determine offences of a pure[ly] military nature committed by military personnel ... they should not in any circumstances whatsoever have jurisdiction over civilians'.<sup>56</sup>

In similar terms, in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,<sup>57</sup> the African Commission reiterated that '[t]he only purpose of military courts shall be to determine offences of a purely military nature committed by military personnel'.<sup>58</sup> To this effect the Commission stressed that '[m]ilitary courts should not in any circumstances whatsoever have jurisdiction over civilians'.<sup>59</sup> This position has been upheld also in a number of the Commission's decisions on individual communications and in some Concluding Observations and Recommendations on periodic state reports. In the *Media Rights* case, for instance, the African Commission held that the arraignment, trial and conviction of Malalou – a civilian – by a special military tribunal, presided over by a serving military officer, was a violation of the principles of the right to a fair trial guaranteed by article 7 of the African Charter.<sup>60</sup> The Commission also found the trial to be in contravention of Principle 5 of the UN Basic Principles on the Independence of the Judiciary.<sup>61</sup> Similarly, in the

54 *Law Office* (n 30) para 53.

55 As above.

56 Resolution (n 7).

57 Principles and Guidelines (n 5).

58 See sec L(a).

59 As above.

60 *Media Rights Agenda* (n 39) para 61.

61 *Media Rights Agenda* para 64. Principle 5 of the UN Basic Principles on the Independence of the Judiciary provides, *inter alia*, that '[e]veryone shall have a right to be tried by ordinary courts'.

Koso case the African Commission found that the establishment of the military court in question, of which the jurisdiction extended to hearing civil acts perpetrated by civilians, was a blatant violation of article 7 of the African Charter.<sup>62</sup> In this case, civilians and soldiers accused of the theft of drums of fuel were tried together in a military court.

In its Concluding Observations and Recommendations on Uganda's third periodic report the African Commission expressed concern that the state had not introduced measures to 'comply with article 7 of the African Charter and, in particular, the 2001 Principles and Guidelines on Fair Trial and Legal Assistance in Africa, as they relate to the prohibition of trials of civilians by military tribunals' as it had earlier recommended in the Concluding Observations and Recommendations on the country's second periodic report.<sup>63</sup> It once again urged Uganda to introduce legal measures to prohibit the trial of civilians by military courts.<sup>64</sup>

With particular reference to special tribunals the African Commission has been emphatic that their jurisdiction should not include trying offences over which ordinary courts have jurisdiction.<sup>65</sup> In the *Media Rights* case the Commission held that the setting up of the special military tribunal and clothing it with jurisdiction to try treason and other related offences (which offences were recognised by Nigerian law as falling within the jurisdiction of the regular courts) was unacceptable as it infringed on the independence of the judiciary.<sup>66</sup>

Besides infringing on the independence of the judiciary the practice of giving special tribunals and military courts the jurisdiction that belongs to ordinary courts undermines the authority of ordinary courts which they should enjoy in any country that cherishes democracy and the rule of law. In *Civil Liberties Organisation v Nigeria*<sup>67</sup> the Treason and Other Offences (Special Military Tribunal) Act contained ouster clauses that removed the jurisdiction of civil courts to try persons accused of treason-related offences. The special military tribunal in issue was established under this Act. It was composed of five serving military personnel. Thirteen civilians were tried by this tribunal, which found them guilty of being accessories to

---

62 See *Koso* (n 23) para 95.

63 Concluding Observations of the African Commission on the 3rd periodic report of the Republic of Uganda, adopted during the 45th ordinary session of the African Commission, Banjul, The Gambia, 13-27 May 2009. The Commission's Concluding Observations and Recommendations on Uganda's 2nd periodic report were adopted at the Commission's 40th ordinary session, 15-29 November 2006.

64 For an analysis of the reasons and constitutionality of the trial of civilians in military courts in Uganda, see R Naluwaio 'The trial of civilians in Uganda's military courts: Interrogating the reasons and constitutionality' (2013) 19 *East African Journal of Peace and Human Rights* 383.

65 See sec L(b) of the Principles and Guidelines on the Right to a Fair Trial (n 4).

66 *Media Rights Agenda* (n 39) para 63.

67 (2000) AHRLR 243 (ACHPR 1999).

treason. They were sentenced to life imprisonment. While holding that ouster clauses were a violation of article 7 of the African Charter, the African Commission urged Nigeria to 'end the practice of removing entire areas of law from the jurisdiction of the ordinary courts'.<sup>68</sup> It correctly argued that the practice of setting up a parallel system of justice administration was not acceptable as it undermined the civil court system.<sup>69</sup> The African Commission correctly argued that such a practice also created the possibility of an unequal application of the law.<sup>70</sup> The Commission observed that if the ordinary courts were overburdened by numerous cases as a result of the breakdown of law and order, it was better for the Nigerian government to allocate more resources than to create a parallel court system.<sup>71</sup> In the *Law Office* case the Commission reiterated its position that military courts should not deal with offences that are under the purview of ordinary courts.<sup>72</sup>

The African Commission's position that military courts should not have jurisdiction over civilians and offences that fall within the jurisdiction of ordinary courts is partly consistent with the UN Basic Principles on the Independence of the Judiciary. According to these principles, '[e]veryone has the right to be tried by ordinary courts or tribunals using established legal procedures'.<sup>73</sup> The Principles emphasise that courts that do not use the duly-established procedures of the legal process should not be created to displace the jurisdiction belonging to civil courts.<sup>74</sup>

The African Commission's position that military courts should not have jurisdiction over civilians is consistent with the Draft Basic Principles Governing the Administration of Justice through Military Tribunals (commonly referred to as the Decaux Principles).<sup>75</sup> These Principles provide that '[m]ilitary courts should, in principle, have no jurisdiction to try civilians'.<sup>76</sup> It is stressed that '[i]n all circumstances, the state shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts'.<sup>77</sup> This position is also in line with some expert groups' opinions.<sup>78</sup> However, it is worth noting that the

---

68 *Civil Liberties* (n 67) para 17.

69 *Civil Liberties* para 23.

70 As above.

71 *Civil Liberties* paras 18 & 23.

72 *Law Office* (n 30) para 65.

73 *Law Office* para.5

74 As above.

75 Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc E/CN.4/2006/58 4 (2006), Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, <http://hrlibrary.umn.edu/instate/DecauxPrinciples.html> (accessed 12 June 2018). For a critique of the Decaux Principles, see Gibson (n 1).

76 See Principle 5.

77 As above.

78 See, eg, UN Human Rights Council Report of the Working Group on Arbitrary Detention, 30 June 2014, A/HRC/27/48 para 69(a), <http://www.refworld.org/docid/53eb29a04.html> (accessed 12 June 2018).

African Commission's position on the issue of military courts and civilians is inconsistent with its earlier decision. In the *Civil Liberties* case, one civilian and five soldiers were arraigned, tried, convicted and sentenced to death by a military court in Nigeria. The African Commission refused to hold the Nigerian state to be in breach of article 7(1)(d) of the African Charter based on the mere fact that a civilian had been tried by a military court chaired by a military *persona*.<sup>79</sup> It argued that the accused civilian was part of a common conspiracy and that it was reasonable to charge him with his military co-accused in the same military court.<sup>80</sup> In other words, the Commission found no issue with a civilian being tried in a military court. In this case the Commission observed that military tribunals were not negated by the mere fact of being presided over by military officers.<sup>81</sup> It emphasised that what is critical is whether the military tribunal processes are fair, just and impartial.<sup>82</sup>

A question may be posed at this point: Why did the African Commission depart from its decision in the *Civil Liberties* case now rigidly to insist that military courts should not have jurisdiction over civilians? First, since the existence of military courts in many countries is largely justified by the need to maintain military discipline, it makes sense to restrict their jurisdiction to only acts and omissions and only committed by those individuals whose acts and omissions can negatively impact military discipline. For the most part these acts and omissions are military offences and the individuals whose acts and omissions mainly impact on military discipline are serving military personnel. Second, it is arguable that the other reason why the African Commission does not accept the trial of civilians by military courts is because of their bad track record as far as respecting the right to a fair trial and other human rights is concerned. As some of the cases analysed in the article have demonstrated, incidents of violations of fair trial rights by military courts in African countries are numerous. These range from staffing military courts with legally-incompetent serving military personnel; holding trials *in camera*; adjudging accused persons guilty until proven otherwise; denying accused persons their right to counsel of their choice; and foreclosing possibilities of appeal from their decisions. In many cases the military courts also employ arbitrary procedures. In some countries, such as Uganda, for instance during Amin's regime, military courts could even conduct trials in the absence of accused persons, who would simply be informed of the court's decision and sentence.<sup>83</sup>

79 Art 7(1)(d) of the African Charter provides that '[e]very individual shall have the right to have his cause heard. This comprises ... (d) the right to be tried within a reasonable time by an impartial court or tribunal.'

80 *Civil Liberties* (n 67) para 25.

81 *Civil Liberties* para 27.

82 As above.

83 Amnesty International *Human Rights in Uganda Report* (1978) 4.

However, the view of the African Commission that military courts should not have jurisdiction over civilians in whatever circumstances is problematic with respect to some international human rights treaties; in particular ICCPR and the Geneva Conventions. With respect to ICCPR, the Human Rights Committee has stated that the treaty does not prohibit the trial of civilians in military courts.<sup>84</sup> However, it has emphasised that the trials of civilians in military courts should be exceptions. According to the Committee the trial of civilians in military courts should be limited to cases where such trials are 'necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials'.<sup>85</sup> This majority view of the Human Rights Committee that ICCPR does not prohibit trials of civilians in military courts, however, is contested by some members of the Committee. In *Akwanga v Cameroon*<sup>86</sup> Mr Fabian Omar Salvioli disagreed with the Committee's position. In his view, if it was the intention of the drafters of ICCPR to allow the trial of civilians by military courts in certain circumstances, they would have explicitly stated so.<sup>87</sup> In *Musaev v Uzbekistan*<sup>88</sup> two members of the Human Rights Committee (Mr Fabián Omar Salvioli and Mr Rafael Rivas Posada) partially dissented with the Committee's position. They argued that while it is true that ICCPR does not prohibit the trial of civilians in military courts, there also is nothing to suggest that military justice can be applied to civilian jurisdiction. They called for a review of the Committee's position which considers the trial of civilians in military courts to be compatible with ICCPR.

With respect to the Geneva Conventions, Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949 allows for trials of prisoners by military courts. Under article 84, it is provided that prisoners of war are to be tried only by military courts, unless the laws of the detaining power expressly permit civil courts to try a member of the armed forces of the detaining power in respect of the particular offence alleged to have been committed by the prisoner of war. According to this provision civilians may be accorded the status of prisoners of war under article 4 of Geneva Convention III if they are (a) accompanying the armed forces of a belligerent; (b) crew members of merchant ships or civil aircraft flagged or registered to a belligerent; (c) parties to a *levée en masse*; or (d) former members of the armed forces who have been interned by the opposing belligerents for security reasons.

Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 also allows for the trial of civilians

84 General Comment 32 (n 19) para 22.

85 As above. See also *Madani v Algeria* CCPR/C/89/D/1172/2003 (2007).

86 *Akwanga v Cameroon* CCPR/C/101/D/1813/2008 (2011).

87 *Akwanga* (n 86) para 4.

88 *Musaev v Uzbekistan* CCPR/C/104/D/1914, 1915 & 1916/2009.

by military courts. Under articles 64 and 66 of this Convention, during occupation it is allowed for the occupying power to subject the civilian population of the occupied territory to its 'properly constituted, non-political military courts'. However, this is only acceptable when the military courts are based in the occupied country.

In sum, considering that international humanitarian law explicitly allows for the trial of civilians by military courts in certain circumstances and given the need to ensure accountability by retired military personnel for crimes committed while still serving, the better view is that expressed in the Decaux Principles: the Yale Draft Principles for Governing Administration of Justice through Military Tribunals.<sup>89</sup> The Yale Draft provides:

Military courts have no jurisdiction to try civilians except where there are very exceptional circumstances and compelling reasons based on a clear and foreseeable legal basis, made as a matter of record, justifying such a military trial. Those circumstances only exist, where

- (a) such a trial is explicitly permitted or required by international humanitarian law;
- (b) the civilian is serving with or accompanying a force deployed outside the territory of the sending state and there is no appropriate civilian court available; or
- (c) the civilian who is no longer subject to military law is to be tried in respect of an offence allegedly committed while he or she was serving as a uniformed member of the armed forces or he or she was a civilian subject to military law under paragraph (b).

## 4 Conclusion

This article has summarised and appraised the jurisprudence of the African Commission concerning the administration of justice through military courts. Most of the Commission's jurisprudence in this area is concentrated on the jurisdiction of military courts, acts and omissions of military courts that amount to violations of the African Charter, and what can be done to ensure that the administration of justice through military courts complies with international standards of administration of justice. From the above analysis it is fair to conclude that the African Commission has done relatively well, especially with respect to articulating principles, rules and making recommendations aimed at improving the administration of justice by military courts in Africa.

What is contestable is whether these principles, rules and recommendations have translated into actual legal, policy and practice reforms in the way in which military courts in the different

---

<sup>89</sup> The Yale Draft is an outcome of the workshop of experts on military law held at Yale Law School, Yale University, New Haven, USA, 23-24 March 2018. The author of this article was among the experts that participated in this workshop.

African countries administer justice. For instance, as highlighted earlier, in its 2009 Concluding Observations and Recommendations on Uganda's third periodic report the African Commission expressed concern that the government had not introduced measures to prohibit the trial of civilians in military courts as it had recommended in 2006. To date (13 years since the African Commission first made this recommendation) Uganda's military courts retain jurisdiction over many categories of civilians beyond what is acceptable in international human rights law. Consequently, in order to fully appreciate the contribution by the African Commission in improving the administration of justice by military courts in Africa, the impact of its jurisprudence on national military court systems and practices needs to be studied in detail.

Also, given its mandate with respect to the promotion and protection of human rights on the African continent several things remain that the African Commission can do to improve the way in which military courts administer justice in the different African countries. First, there is a need for the Commission to undertake or commission studies on different thematic issues concerning military courts and the administration of justice. Second, the Commission should consider organising a high-level multi-stakeholder symposium or conference on the issue of administration of justice through military courts in Africa. Third, although it is appreciated that decisions of the African Commission are not binding, it should at least inquire into and attempt to find out from the respective states why its decisions and recommendations aimed at improving the administration of military justice by military tribunals are not enforced or implemented.

## No second chance for first impressions: The first amicable settlement under the African Children's Charter

*Benyam Dawit Mezmur\**

Associate Professor of Law; Coordinator of the Children's Rights Project, Dullah Omar Institute, Faculty of Law, University of the Western Cape, South Africa  
<https://orcid.org/0000-0002-0439-8082>

### Summary

*In 2016 the African Children's Committee dealt with its first amicable settlement under the African Children's Charter. The article discusses amicable settlements within the African human rights system, and analyses Government of Malawi v Institute for Human Rights and Development in Africa – the first amicable settlement dealt by the African Children's Committee. Some thematic reflections are proffered relating to the definition of a child, child marriage, the notion of 'serious and massive violations' of children's rights, reparations, the mandate to initiate an amicable settlement, and the follow-up to the amicable settlement reached.*

**Key words:** *Africa; human rights; confidentiality; implementation; article 59*

### 1 Introduction

During the drafting of the United Nations (UN) Convention on the Rights of the Child (CRC), the possibility of providing children with an opportunity to seek an international remedy through a complaints

---

\* LLB (Addis Ababa) LLM (Pretoria) LLD (Western Cape); [benyam.mezmur@gmail.com](mailto:benyam.mezmur@gmail.com)



mechanism was broached.<sup>1</sup> The inclusion of socio-economic rights in CRC, which at the time many considered to be non-justiciable, reportedly was mentioned as one reason why a communications procedure to CRC would not be acceptable.<sup>2</sup> Moreover, the possibility to explore such a complaints mechanism was 'deferred' with a view to promoting a spirit of non-contested implementation of CRC.

The same reasoning did not seem to occupy the minds of the drafters of the African Charter on the Rights and Welfare of the Child (African Children's Charter). The African Children's Charter contains a specific provision on individual communications.<sup>3</sup> The monitoring body of the Charter, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has adopted Guidelines for the Consideration of Communications,<sup>4</sup> which cover amicable settlements (also known as 'friendly settlements'). Amicable settlements are intended to facilitate the non-contentious resolution of individual cases.<sup>5</sup> In many cases where an amicable settlement has been used, it has presented an important avenue of resolution to both parties. One could even argue that it bodes well for the notion of settling disputes in Africa through negotiations.

Article 46 of the African Children's Charter is critical to a discussion on amicable settlements. A similar provision in the African Charter on Human and Peoples' Rights (African Charter) – article 52 – has been used by the African Commission to deal with amicable settlements.<sup>6</sup> Article 46 of the African Children's Charter provides:

The Committee shall draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

---

1 During the negotiations of the CRC, the NGO *Ad Hoc* Group reportedly insisted on the importance of a positive atmosphere for the implementation of the CRC that could be undermined if a complaints procedure was to be established.

2 S Pinheiro 'Reasons and timing to elaborate a communications procedure under the Convention on the Rights of the Child' 10 December 2009 A/HRC/WG.7/1/CRP.4 2.

3 The relevant provision, art 44(1), provides that '[t]he Committee may receive communications from any person, group or non-governmental organisation recognised by the Organisation of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter'.

4 African Committee of Experts on the Rights and Welfare of the Child Guidelines for the Consideration of Communications.

5 An amicable settlement also has similar characteristics that are at the core of the state party reporting process. Central to the state party reporting is constructive dialogue, which often is characterised by engaging with a state in a non-judgmental and diplomatic manner with a view to assisting the state to benefit from recommendations to address the gaps that might exist in law, policy and practice.

6 Art 52 African Charter.

As a result this article draws insights from the African Charter, but also to a limited extent on the UN human rights system, especially the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC).<sup>7</sup> In fact, within the UN treaty body system, it is only the Optional Protocol to the Covenant on Economic, Social and Cultural Rights on a Communications Procedure (OP-CESCR)<sup>8</sup> and OPIC that have provisions explicitly allowing for the possibility of a friendly settlement.<sup>9</sup>

Moreover, the regional human rights systems in Europe and the Americas have a more nuanced and lengthy experience in dealing with amicable settlements. The Inter-American Commission on Human Rights (Inter-American Commission) reported that as at July 2015, approximately 121 friendly settlements had been approved in reports it issued.<sup>10</sup> In further recognition of the role of friendly settlements the re-organisation of its Executive Secretariat has included a new Section of Friendly Settlements and Follow-Up.<sup>11</sup> In 2009 the European Court of Human Rights (European Court) was reported to have had concluded friendly settlements or 'unilateral withdrawals of petitions'.<sup>12</sup> Albeit limited, the experiences of the two regional human rights systems serve as an inspiration for the African Children's Committee.

This article, which is not a comprehensive assessment of the strengths and weaknesses of the amicable settlement procedure, proceeds in five steps. Following the introduction a discussion unfolds on amicable settlements in the African human rights system, with a focus on the African Commission. This is followed by a discussion of the African Children's Charter, the African Children's Committee, and its Guidelines on the communications procedure with a focus on the sections on amicable settlements.<sup>13</sup> Part 4, which is the core of the article, analyses the first amicable settlement dealt with by the

---

7 The Optional Protocol entered into force on 14 April 2014. After two sessions of the Open-Ended Working Group, in 2009 and 2011, the Human Rights Council, followed by the General Assembly, adopted the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) on 19 December 2011, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/10/PDF/N1146710.pdf?OpenElement> (accessed 8 May 2019).

8 Optional Protocol to ICESCR (UN Doc A/Res/63/117).

9 However, the practice is that in instances where parties reach an agreement, the treaty bodies may suspend the consideration of the individual communication.

10 OAS 'Inter-American Commission on Human Rights Friendly Settlements', [http://www.oas.org/en/iachr/friendly\\_settlements/default.asp](http://www.oas.org/en/iachr/friendly_settlements/default.asp) (accessed 8 May 2019).

11 As above.

12 International Federation for Human Rights 'Practical Guide: The African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights' (2010) 29, [https://www.fidh.org/IMG/pdf/african\\_court\\_guide.pdf](https://www.fidh.org/IMG/pdf/african_court_guide.pdf) (accessed 8 May 2019).

13 This piece is not a comprehensive diagnostic assessment of the strengths and weaknesses of the amicable settlement procedure.

Committee, namely, *Institute for Human Rights and Development in Africa v The Government of Malawi*.<sup>14</sup> The analysis covers the complaint, the amicable settlement reached, and some thematic reflections on the definition of a child, child marriage, the notion of 'serious and massive violations' of children's rights, reparations, the mandate to initiate an amicable settlement, and follow-up to the amicable settlement reached. A conclusion sums up the article.

## 2 Amicable settlements in the African human rights system

At the core of the African human rights system<sup>15</sup> is the African Charter, supplemented by the African Women's Protocol,<sup>16</sup> the African Court Protocol and the African Children's Charter. Unlike the Inter-American human rights system, where only the Inter-American Commission is involved in promoting friendly settlements,<sup>17</sup> in the African human rights system all three bodies – the African Commission, the African Court on Human and Peoples' Rights (African Court)<sup>18</sup> and the African Children's Committee – fulfil this role.

The African Charter and the Rules of Procedure do not give the African Commission an explicit mandate to play a role in friendly settlements. In fact, a close reading (some would argue and say a 'strict reading') of the relevant provisions of both the African Charter (articles 47 and 48) and its Rules of Procedure (Rule 98) suggests that there is no doubt that the amicable settlement procedure is provided for only in respect of interstate communications. One may question whether the African Commission has the requisite expertise to deal with amicable settlements.<sup>19</sup> Nonetheless, while its provisions are silent on amicable settlements, the Commission has recommended that governments resolve cases amicably, including with individuals, as opposed to the Commission resolving them in a recommendation.<sup>20</sup>

14 Communication 4/Com/001/2014 African Committee of Experts on the Rights and Welfare of the Child (2014), <https://www.ihrda.org/2015/12/ihrda-on-behalf-of-malawian-children-v-the-republic-of-malawi/> (accessed 1 June 2019).

15 On the African human rights system in general, see F Viljoen *International human rights law in Africa* (2012).

16 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

17 D Padilla 'An African human rights court: Reflections from the perspective of the Inter-American system' (2002) 2 *African Human Rights Law Journal* 189.

18 Art 9 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).

19 From this it could follow that an amicable settlement should not be viewed as one of the core activities of the African Commission.

20 See eg the case of *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

One of the criticisms levelled against the African Commission is its initial overemphasis on the attainment of amicable resolutions.<sup>21</sup> The Commission's description of its primary purpose with regard to individual communications, which is to 'initiate a positive dialogue, resulting in an amicable resolution',<sup>22</sup> has led some to arrive at the conclusion that such an approach is an obstacle to the provision of a remedy to victims.<sup>23</sup> It also suffices to note that the deference to the state at times portrayed amicable settlements in a negative light from the viewpoint of the victims.<sup>24</sup>

It may also be contended that in some instances, because of the inequality of the parties, a victim might be 'forced' to accept a less than adequate remedy. For instance, in *Open Society Justice Initiative (on behalf of Njawe Noumeni) v Cameroon*<sup>25</sup> the complainant agreed to discontinue a communication in return for temporary permission to broadcast, as well as the release, by the state, of radio equipment it had confiscated.<sup>26</sup> By contrast, in the case of the Inter-American Commission such a 'remedy' would not have been allowed as one of the Commission's duties in terms of friendly settlements is to terminate the procedure if it appears that the outcome will be unfair to the victim.<sup>27</sup>

Here, the early years' practice of the Commission can be differentiated from that of the European Court. The European Court approves an amicable settlement and transfers the case to the Committee of Ministers whose duty it is to supervise friendly settlements, thus ensuring that the victim is not unfairly disadvantaged.<sup>28</sup> Furthermore, with regard to obtaining the views of the complainant, the Inter-American Commission and the European Court take seriously the clear consent of the applicant with regard to the terms of the settlement agreement. Where a party withdraws consent, the Inter-American Commission terminates the procedure,<sup>29</sup> and where the European Court feels that the applicant has not clearly

21 G Bekker 'The African Commission on Human and Peoples' Rights and remedies for human rights violations' (2013) 13 *Human Rights Law Review* 499.

22 *Free Legal Assistance Group* (n 20) para 39.

23 Bekker (n 21) 501. Eg, in *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1997) para 42, despite the complainant's dissatisfaction with the state's remedies, leading to the reopening of the case, the African Commission had earlier attempted to prevail on the government to resolve the situation amicably. A similar position was evident in *Recontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) with regard to attempts to amicably settle an issue on administrative detention.

24 In *Kalenga v Zambia* (2000) AHRLR 321 (ACHPR 1994), while the state wrote a letter to the African Commission confirming the resolution of the case, the Commission accepted this position without verification with the complainant. (2006) AHRLR 75 (ACHPR 2006).

26 *Free Legal Assistance Group* (n 20) para 4.

27 [https://www.oas.org/en/iachr/friendly\\_settlements/about-friendly-settlements.asp](https://www.oas.org/en/iachr/friendly_settlements/about-friendly-settlements.asp) (accessed 8 May 2019).

28 Art 29(4) European Convention on Human Rights.

29 Inter-American Commission (n 27).

consented to the terms of the settlement agreement, it may not permit the amicable settlement to proceed.<sup>30</sup>

Concern has also been raised that amicable settlements might not take into account the broader human rights interests of society.<sup>31</sup> This is because it is a process that is not open to outside role players, and that it excludes the possibility of third party intervention in the form of an *amicus curiae*.<sup>32</sup> It may also be argued that an amicable settlement implies that violations have not occurred.<sup>33</sup> Some of these criticisms appear to be based on the early experience of the Commission that seemed to undermine the added value of amicable settlements.

However, the arguments that underscore the potential shortcomings of amicable settlements should be assessed. First, amicable settlements could, and often do, contain remedies that could satisfy the needs and rights of the complainant.<sup>34</sup>

Second, the deference the Commission has displayed towards states in being overly ready to recognise the presence of an amicable settlement should not be seen as a limitation of amicable settlements in general. Rather, it should serve as a ground to develop guidelines to clarify the existence of, as well as compliance with, the terms of an amicable settlement.<sup>35</sup> The Inter-American Commission had a similar approach whereby it created the 'Friendly Settlement Group' which was tasked with analysing and improving the friendly settlement procedure.<sup>36</sup> The Commission has similarly also drafted an impact report to offer further clarification on friendly settlements.<sup>37</sup>

Third, in instances where massive and grave violations have been committed, and the broader interests of society appear to be involved, the Commission should not approve amicable settlements. Notably, the Rules of Procedure of the Inter-American Commission mandate it to make a decision regarding friendly settlements always 'on the basis of respect for the human rights recognised in the American Convention on Human Rights, the American Declaration and other applicable instruments'.<sup>38</sup> In the *Velásquez Rodríguez* case the Inter-American Commission contended that a friendly settlement could not have been promoted, because the violations of rights were

30 *Paladi v Moldova* ECHR (10 July 2007) App 39806/059 paras 51-53.

31 *Bekker* (n 21) 504.

32 As above.

33 R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 176.

34 Inter-American Commission on Human Rights 'Impact of the friendly settlement procedure' OEA/Ser L/V/II Doc 45/13 (18 December 2013) para 5.

35 The Inter-American Commission has over three decades of experience in which the improvement in its handling of friendly settlements is evident; Inter-American Commission (n 34) para 7.

36 [https://www.oas.org/en/iachr/friendly\\_settlements/default.asp](https://www.oas.org/en/iachr/friendly_settlements/default.asp) (accessed 22 March 2019).

37 *Free Legal Assistance Group* (n 20) para 14.

38 Art 41(1) Inter-American Commission on Human Rights Rules of Procedure.

such that they could not be remedied through conciliation.<sup>39</sup> The Inter-American Court correctly held that a friendly settlement should only be attempted in a situation where the circumstances of that case render it 'necessary and suitable'.<sup>40</sup>

Finally, as mentioned above, in the African human rights system the notion of amicable settlement is not the preserve of the African Commission. The African Court Protocol provides that 'the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter'.<sup>41</sup> The relevant provisions of the Charter once again appear to be articles 47 and 48, which limit amicable settlements in respect of interstate communications. Since the African Court has not yet engaged with amicable settlements, it remains premature to suggest the manner in which its approach to the issue will develop. This article now turns to amicable settlements under the African Children's Charter.

### 3 Amicable settlements and the African Children's Charter

The African Children's Charter explicitly provides for the submission and consideration of individual communications. Accordingly, '[t]he Committee may receive a communication, from any person, group or non-governmental organisation recognised by the Organisation of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter'.<sup>42</sup> This explicit reference stands in stark contrast to the African Charter which only offers rules that must be complied with when bringing a communication to the African Commission, but does not state who may bring a communication.<sup>43</sup>

In 2014 the African Children's Committee developed and adopted the Revised Guidelines for the Consideration of Communications provided for in article 44 of the African Charter on the Rights and Welfare of the Child (Revised Guidelines).<sup>44</sup> The previous Guidelines for the Consideration of Communications provided for in article 44 of the African Children's Charter contained no elements on amicable

---

39 *Velásquez Rodríguez v Honduras (Preliminary Objections)* IACHR (26 June 1989) (Ser C) No 1 (1994) para 14. In the *Nicaraguan Population of Miskito Origin* case the state requested that a body such as the Commission supervise a friendly settlement over a matter including a gross violation of human rights, since it is the Commission and not the respondent state that recommends what measures should be put in place. See Inter-American Commission on Human Rights *Report on the Situation of a Sector of the Nicaraguan Population of Miskito Origin* OEA/Ser L/V/II.62 Doc10 Rev 3, 29 November 1983.

40 *Free Legal Assistance Group* (n 20) para 44.

41 Art 9 African Court Protocol.

42 Art 44(1) African Children's Charter.

43 Art 56 African Charter.

44 African Committee of Experts on the Rights and Welfare of the Child 'Guidelines for the Consideration of Communications'.

settlements.<sup>45</sup> However, the Revised Guidelines have a dedicated section entitled 'Amicable settlement'.<sup>46</sup>

This section of the Revised Guidelines starts off with 'General Principles'. The Revised Guidelines state that '[p]arties to a communication may settle their dispute amicably any time before the Committee decides on the merits of the communication'.<sup>47</sup> Two important observations are crucial here. First, the procedure is optional. Second, one could question whether an amicable settlement can be initiated after a case has been registered, but even before a decision on admissibility is made. The reference to 'any time before the Committee decides on the merits' seems to suggest this possibility.

It is also indicated in the Revised Guidelines that 'the terms of settlement reached must be based on respect for the rights and welfare of the child recognised by the African Children's Charter'.<sup>48</sup> It is not a clear-cut process to determine what would constitute a settlement term that is considered to respect the rights recognised in the Charter. The Rules of Procedure under the OPIC contain a similar paragraph.<sup>49</sup> Furthermore, the European Convention and Inter-American Commission's Rules of Procedure contain a similar sentence, stating that the friendly settlement procedure should proceed 'on the basis of respect for human rights'.<sup>50</sup> As an example, the Inter-American Court has held that in cases involving forced disappearances and where the state denies such acts, 'it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment and to personal liberty'.<sup>51</sup>

The Revised Guidelines envisage two types of amicable settlements – one under, and another outside, the auspices of the African Children's Committee.<sup>52</sup> In the context of the former, the Committee facilitates, leads and offers its good offices for the negotiation.<sup>53</sup> It may also appoint one or more members of the Committee to facilitate the negotiations towards an amicable settlement.<sup>54</sup> In the case of the latter, the Committee plays a secondary role where the agreement is reached and subsequently reported to the Committee.<sup>55</sup> In both

45 Available at <https://ihrda.uwazi.io/en/document/7ywjn5ennrb?page=1> (accessed 24 June 2019).

46 Sec XIII African Children's Committee 'Revised Guidelines for the Consideration of Communications' (Revised Guidelines).

47 Sec XIII (1)(i) Revised Guidelines.

48 Sec XIII(1)(ii) Revised Guidelines.

49 Rule 25(6) Optional Protocol on a Communications Procedure (OPIC) (n 7) Rules of Procedure.

50 Art 39(1) European Convention; art 41(1) Inter-American Commission Rules of Procedure.

51 *Velásquez Rodríguez* (n 39) para 46.

52 Secs XIII(1)(i) & (iii) Revised Guidelines.

53 Sec XIII(1)(i) Revised Guidelines.

54 Sec XII(2)(iii) Revised Guidelines.

55 Sec XIII(1)(iii) Revised Guidelines.

instances, however, the approval of the amicable settlement by the Committee is a requirement, in the absence of which it may continue with the consideration of the communication.<sup>56</sup>

The Revised Guidelines answer in the affirmative the question of whether the Committee may initiate an amicable settlement of its own volition.<sup>57</sup> Instruments that govern friendly settlements in the European Court and Inter-American Commission allow these bodies to initiate such a procedure at any point of the proceedings.<sup>58</sup> The Revised Guidelines also provide a number of grounds upon which the Committee 'may terminate its facilitation of an amicable settlement'. One such ground is '[i]f the subject matter of the communication involves serious and massive violations of children's rights'. What would constitute 'serious and massive' violations is open to interpretation.

Time is a critical element in determining the presence or otherwise of an alleged violation pertaining to children's rights.<sup>59</sup> The negotiations for an amicable settlement cannot be allowed to continue without reasonable time limits. Consequently, the Guidelines indicate that '[t]he Committee may, prior to consideration of the merits of a communication, set a time period for the parties to express their interest in reaching an amicable settlement'.<sup>60</sup> Moreover, a report on amicable settlement transmitted to the parties has to be returned to the Secretariat of the Committee with signatures within 14 days of receipt.<sup>61</sup>

## **4 *Institute for Human Rights and Development in Africa v The Government of Malawi***

### **4.1 The complaint**

Malawi ratified the African Children's Charter in 1999. In October 2014 the Committee received a communication, *Institute for Human Rights and Development in Africa v The Government of Malawi*.<sup>62</sup> The Institute for Human Rights and Development in Africa (IHRDA) alleged a number of violations of the provisions of the African Children's Charter by the government of Malawi. IHRDA contended that the impugned provisions were article 1 (on the nature of state parties'

---

56 Secs XIII(1)(vi) & XIII(2)(viii) Revised Guidelines.

57 Sec XIII(2)(i) Revised Guidelines.

58 Art 39(1) European Convention; art 41(1) Rules of Procedure of the Inter-American Commission on Human Rights.

59 G Lansdown (Save the Children) 'Every child's right to be heard: A resource guide on the UN Committee on the Rights of the Child General Comment No 12' (2011) 72.

60 Sec X(2) Revised Guidelines.

61 Sec XIII(2)(vi) Revised Guidelines.

62 IHRDA (n 14).



obligations), article 2 (on the definition of a child) and article 3 (on the prohibition of discrimination).

The crux of the complaint was that the Constitution of Malawi, which provides in section 23(5) that '[f]or the purposes of this section, children shall be persons under sixteen years of age', constituted a violation of article 2 of the African Children's Charter. Article 2 of the Children's Charter provides that 'a child means every human being below the age of 18 years'. The communication further contended that since the ratification of the Children's Charter by Malawi in 1999, the state party had not undertaken any legislative measures to address this shortcoming. This, it was argued, violated the relevant part of article 1 of the Charter, which provides as follows:

Member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

The communication also alleged that the distinction made in the Constitution between children below 16 years of age and those between 16 and 18 years violated the prohibition of non-discrimination in article 3 of the African Children's Charter, and is not justified. Article 3, on non-discrimination, provides that

[e]very child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 3 of the African Children's Charter does not explicitly mention discrimination on the basis of 'age' as an explicit ground on which discrimination is prohibited. However, 'age' could easily be read in within 'other status' as it is comparable to the other grounds explicitly mentioned in article 3 of the Charter. Section 20 of the Malawian Constitution contains most of the explicit grounds on which discrimination is prohibited under the Charter.<sup>63</sup>

According to the complainants, the impact of section 23(5) was that a number of children within the jurisdiction of the state party had been left without the protection that they should have under child rights law. Furthermore, linked to this central element of the complaint was the contention that the constitutional provision also was not aligned with other subsidiary legislation, such as the Marriage, Divorce and Family Relations Law, which increased the minimum age of marriage from 15 to 18 years. As a result of the

<sup>63</sup> The grounds mentioned in sec 20 include 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition'.

overarching constitutional definition of a child, the complainants argued that children above 16 but below 18 benefit from the protection to which they were entitled as a result of Malawi's international human rights law obligation, in particular, the African Children's Charter.

The African Children's Committee in 2015 declared the communication admissible. However, before proceeding on the merits the Committee was approached by the two parties indicating that they would like to resort to an amicable settlement. The Revised Guidelines allow such a process if the request is made before the Committee makes a decision on the merits of a communication.<sup>64</sup> Therefore, during its 28th ordinary session in October 2016 the Committee offered its good offices to facilitate a discussion between the two parties on the terms for an amicable settlement. The amicable settlement was reached under the auspices of the African Children's Committee, as provided for in section XIII(2) of the Revised Communication Guidelines

Noting that this was the first amicable settlement brought before the Children's Committee, it has been argued that its initiation prevented the Committee from producing an 'authoritative analysis and novel jurisprudence', in the form of a decision, which could have made other state parties such as Malawi initiate similar changes, was a weakness of the mechanism.<sup>65</sup> However, it has also been argued that this procedure may help to 'reduce potential tensions that may arise during contentious proceedings' and that it also allows for 'more room for constructive dialogue between the parties'.<sup>66</sup>

## 4.2 The amicable settlement reached

As part of the amicable settlement the government of Malawi agreed to undertake efforts to amend its constitutional provision with a view to complying with article 2 of the African Children's Charter by 31 December 2018.<sup>67</sup> In the interim, and while the amendment of the constitutional provision was underway, the government also agreed to undertake all possible administrative measures to ensure that all persons in the state party below the age of 18 enjoy the rights in the Charter.<sup>68</sup> With a view to ensuring follow-up, it was also agreed that the government would submit periodic reports on the developments related to the implementation of the agreement. Based on publicly-available information, the Malawian Government

64 Sec XIII Revised Guidelines.

65 MG Nyarko & AO Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 311.

66 BD Mezmur & MU Kahbila 'Follow-up as a "choice-less choice": Towards improving the implementation of decisions on communications of the African Children's Committee' (2018) 2 *African Human Rights Yearbook* 211.

67 M Yadessa 'Malawi amends its Constitution to comply with article 2 of the Charter' (2017) 1 *ACERWC Tribune* 11.

68 As above.

submitted to the Committee four progress reports, the last of which reportedly was on 7 February 2018, updating it on the progress the government had made.<sup>69</sup> The submission of periodic reports assists the Committee to carry out its duty of following up and supervising the implementation of the terms of amicable settlements.<sup>70</sup>

### 4.3 Some reflections on the amicable settlement

#### 4.3.1 *Definition of a child*

The definition of a child is very central to the children's rights discourse.<sup>71</sup> It determines the scope of application of a law both at the international and domestic levels and differentiates the kind of special promotion and protection rights to which children are entitled as compared to adults.<sup>72</sup>

The government of Malawi in its report to the CRC Committee in 2015 indicated that 'there is no broad definition of a child' as the definition contained in section 23(5) of the Constitution is 'only for purposes of that section'.<sup>73</sup> However, since the Constitution is the supreme law of the land,<sup>74</sup> it is only reasonable to consider section 23(5) as offering an overarching or broad definition of a child that has implications beyond the specific provision.

The government's report in terms of CRC still conceded that this variance between the Convention and the definition of a child in the Constitution 'may only be addressed through a referendum'.<sup>75</sup> Section 23 of the Constitution requires a higher level of voting threshold and process for its amendment.<sup>76</sup>

Reference to subsidiary legislation can substantiate the argument that the Constitution has had a significant influence in defining a child. The Child Care Protection and Justice Act,<sup>77</sup> which is 'the most comprehensive piece of legislation for children in Malawi',<sup>78</sup> in section 2 provides a definition of the child as contained in section 23(5) of the Constitution.<sup>79</sup> It provides that 'child' means a person below the age

69 n 45.

70 Mezmur & Kahbila (n 66) 218.

71 Nyarko & Jegede (n 65) 310.

72 <https://ijrcenter.org/thematic-research-guides/childrens-rights/> (accessed 25 March 2019).

73 State Party Report, 3rd to 5th periodic reports of Malawi (CRC/C/MWI/3-5) (7 January 2015) para 2.

74 Sec 199 Constitution of the Republic of Malawi (1994).

75 State Party Report (n 73) para 3.

76 The wording proposing a more rigorous process of amendment emanated from a proposal by the Malawi Law Commission and adopted in 2010.

77 Act 22 of 2010.

78 Human Rights Council, Malawi National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (A/HRC/WG.6/22/MWI/1) (4 February 2015) para 26.

79 This is despite the fact that the report of the Malawi Law Commission proposed a definition of a child in line with the CRC.

of 16 years.<sup>80</sup> Section 160(A) of the Penal Code (Amendment) Act 1 of 2011 adopts the same definition. This would have serious consequences with respect to the kind of protection from which children in conflict with the law and who are between the ages of 16 and 18 would benefit. Child victims and witnesses in this age group face similar limitations.

This limitation affects Malawian and non-citizen children, including those that may find themselves in a vulnerable situation. For example, in 2015 there were a number of instances where unaccompanied migrant Ethiopian children, victims of trafficking, were detained in prison in Malawi for long periods under 'dire' conditions together with adults and common criminals.<sup>81</sup> In November 2015 it was reported that 387 migrants, of whom one in six was an unaccompanied minor, were held in five prisons across the country, and 'were charged with illegal entry, fined USD 35 and imprisoned from two to nine months'.<sup>82</sup> There is no evidence that the child migrants, especially those between the ages of 16 and 18, have benefited from a child-friendly justice system – partly as a direct result of the definition of a child contained in the Constitution. In fact, the CRC Committee had specifically asked the government to 'provide information about the 43 unaccompanied Ethiopian migrant children detained at Kachere Juvenile Prison'.<sup>83</sup> In this respect, it would not be surprising if the 'juvenile prison' housed only those below 16 years of age.

Therefore, apart from amending the constitutional provision, the government had promised the further harmonisation of subsidiary laws to comply with its obligations under international law<sup>84</sup> as one of the elements of the amicable settlement.<sup>85</sup> IHRDA indicated that the state has agreed 'to amend ... all other relevant laws to be in compliance with article 2 of the African Charter on the Rights and Welfare of the Child by 31 December 2018'.<sup>86</sup> However, there is no evidence that other subsidiary laws had been harmonised by the set deadline.

---

80 Sec 2 Child Care Protection and Justice Act 22 of 2010.

81 IOM 'Stranded Ethiopian child migrants return home from Malawi' 6 November 2015, <https://www.iom.int/news/stranded-ethiopian-child-migrants-return-home-malawi> (accessed 10 May 2019).

82 IOM 'Stranded Ethiopian child migrants return home from Malawi' 27 November 2015, <https://www.iom.int/news/stranded-ethiopian-child-migrants-return-home-malawi> (accessed 10 May 2019).

83 CRC Committee, List of Issues: Malawi (July 2016) (CRC/C/MWI/Q/3-5) para 13.

84 CRC Committee, Concluding Observations: Malawi (CRC/C/MWI/CO/3-5) (March 2017) para 13.

85 IHRDA 'Public Statement of IHRDA during the April 2018 Session of the ACERWC' (April 2018).

86 As above.

On the other hand, there are a number of domestic laws that define a child as a person below the age of 18, such as the Prevention of Domestic Violence Act. Under section 7 of the Liquor Act<sup>87</sup> it is an offence to supply liquor to any person under the age of 18 years.<sup>88</sup> In addition, the Employment Act<sup>89</sup> contains provisions that appear to define a child as a person below the age of 18. According to the Act a person below the age of 18 years is prohibited from undertaking hazardous work.

#### 4.3.2 *Child marriage*

Malawi has a high prevalence of child marriage. As of 2017, 42 per cent of girls were married by the time they reached 18 years of age.<sup>90</sup> The approach adopted by the Constitution in relation to child marriages to a certain extent appears to echo the definition of a child contained in section 23(5). Section 22(6) of the Constitution states that '[n]o person over the age of eighteen years shall be prevented from entering into marriage'. Of course, this provision does not violate the relevant provisions of the African Children's Charter, namely, article 21(2), which provides that '[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory'.<sup>91</sup>

Closely linked to this is article 1(3) of the African Children's Charter, captioned '[o]bligation of state parties', which sets the initial manner in which state parties should address harmful practices. The article reads that '[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall, to the extent of such inconsistency, be discouraged'.

However, the exception entrenched in the Constitution in section 22(7) states that '[f]or persons between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians'. This exception not only violates the provisions of the Charter but is also at variance with the Marriage, Divorce and Family Relations Act, which provides that the minimum age of marriage is 18 years.<sup>92</sup> The same can be said of section 22(8),

---

87 Cap 50:07 Laws of Malawi.

88 For the purpose of this section it is irrelevant whether the liquor is intended for the child or for the use of some other person, including an adult.

89 Cap 55:02 Laws of Malawi.

90 Girls Not Brides 'Malawi', <https://www.girlsnotbrides.org/child-marriage/malawi/> (accessed 28 March 2019).

91 A point worth emphasising is the confusing and sometimes conflicting guidance from international human rights law and the interpretation in respect of the minimum age for marriage and, if any, the extent to which exceptions to the age of 18 should be allowed.

92 Art 18 Act 5 of 2015.

which provides that the 'state shall actually discourage marriage between persons where either of them is under the age of fifteen years'. While there is in article 1(3) a general obligation to discourage harmful practices, in respect of child marriage the obligation of states particularly is to 'prohibit' and take 'effective action, including legislation' against the practice.<sup>93</sup>

Unfortunately, despite their direct relevance to the definition of a child, there is no evidence that sections 22(7) and 22(8) of the Constitution were made a subject of the complaint brought by IHRDA. As a result it was not made part of the amicable settlement reached.

However, this begs the question of whether the African Children's Committee would have acted *ultra vires* if it had raised these two sub-sections on its own initiative and made them part of the final amicable settlement. There is nothing in the Revised Guidelines that seems to bar the Committee from taking the initiative to raise matters directly related to a communication before it, and being made a subject of an amicable settlement. Further, in any case, if this issue was raised by the Committee, it would not have been the first time that the attention of the government had been drawn to it.<sup>94</sup> For instance, in 2015, in its report to the Human Rights Council in the context of the Universal Periodic Review and child marriage, Malawi stated that its efforts to address child marriage in the state 'will be followed by the amendments of the Constitution'.<sup>95</sup> Thus, the non-inclusion of the need to also amend section 22(7) of the Constitution arguably is one of the shortcomings of the amicable settlement.<sup>96</sup> On a positive note, when the government of Malawi passed the amendment to the Constitution, sections 22(7) and (8) had been deleted.<sup>97</sup>

#### 4.3.3 Reparations

In individual communications, upon finding a violation, human rights treaty bodies can recommend various types of reparations. These

93 Art 21(2) African Children's Charter.

94 See similar concerns expressed by Human Rights Watch 'Good news for child protection in Malawi: Decision to redefine childhood should help deter child marriage Agnes Odhiambo' 3 November 2016, <https://www.hrw.org/news/2016/11/03/good-news-child-protection-malawi> (accessed 7 June 2019).

95 Human Rights Council, Malawi, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (A/HRC/WG.6/22/MWI/1) (4 February 2015) para 28; also a Special Law Commission on the Technical Review of the Constitution had already emphasised the need to amend sec 22.

96 This is arguable, in part because sec XIII(1)(iii) underscores that '[i]n all cases of an amicable settlement, the terms of settlement reached must be based on respect for the rights and welfare of the child recognised by the African Children's Charter and other applicable instruments'. This section does not require the amicable settlement to be comprehensive.

97 Constitutional Amendment Act 36 of 2017.

include restitution, rehabilitation, compensation, measures of satisfaction, and guarantees of non-repetition.<sup>98</sup>

The question of reparations for child victims, especially those victims of child marriage, is a complex one. The complexity in large part arises from the various rights violations implicated as a result of child marriage, as well as the long-lasting, sometimes life-long effect it could possibly have on victims.<sup>99</sup> For instance, where dowries and bride prices are involved in the child marriage, the case among a number of practising communities,<sup>100</sup> their role in reparations, including on compensations, add their own complexity.

In the 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, the obligation of states 'to provide adequate, effective and comprehensive reparation'<sup>101</sup> to child victims of child marriage is outlined. While almost the whole gamut of reparations, including compensation, is highlighted as a possibility, states as a minimum are 'obliged to provide all victims of child marriage reparation in at least the forms of restitution and rehabilitation'.<sup>102</sup> With respect to restitution, pregnant girls or those who have children can be assisted to 'have an opportunity to continue their education on the basis of their individual ability'.<sup>103</sup> In respect of rehabilitation, services such as legal aid, access to healthcare and medical services, and alternative vocational training, should be provided to restore, as far as possible, the victim's physical, mental, social and full inclusion in society.<sup>104</sup>

The amicable settlement does not appear to have considered most of these reparation options. In fact, the agreement reached appears to be more forward-looking and emphasises prevention, rather than redressing the violations that have occurred as a result of the constitutional provisions that go against the Charter. Insofar as

---

98 Guidelines on Measures of Reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the Committee at its 118th session (17 October-4 November 2016) following the Committee's discussion on the report submitted by committee member Fabián Omar Salvioli on the specification of measures of redress within the scope of individual communications considered by the Committee (30 November 2016) (CCPR/C/158).

99 Eg, early pregnancy, maternal morbidity and mortality, school drop-outs and forced exclusion from school often accompany child marriages.

100 Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage (2017) para 24.

101 Joint General Comment (n 100) para 59.

102 As above.

103 Art 11(6) African Children's Charter; Joint General Comment (n 100).

104 Joint General Comment (n 100).

monetary compensation is concerned, there is a recognition that it 'may not be feasible in areas of high prevalence',<sup>105</sup> such as in Malawi. However, since the provision of access to legal remedies for violations as well as the need to provide or facilitate access to rehabilitation services have been identified as obligations under international human rights law,<sup>106</sup> the amicable settlement could have considered this.

Such an omission could be because of a number of factors, including, in partial defence of the Committee, the fact that the Joint General Comment with the African Commission was only adopted in 2017 after the amicable settlement had been reached. Commendably, too, the obligation entered into under the amicable agreement by the state to undertake interim administrative measures to ensure that all persons in the state party below the age of 18 enjoy the rights in the Charter,<sup>107</sup> could be interpreted to include the possibility of reparations. Here, a leaf could be taken from the European system where there are still some obligations to which a state may be bound even after reaching an amicable settlement, including the possibility of an expression of regret for the actions that had led to the complaint.<sup>108</sup>

The experience of the Human Rights Committee (HRC) underscores that guarantees of non-repetition are general in scope. The HRC sheds light on some examples of guarantees of non-repetition, such as the request to repeal or amend laws to bring them in accordance with human rights obligations; the improvement of conditions in places of detention; changes in procedure that may have been found to constitute a violation; as well as measures for training and awareness raising.<sup>109</sup> As to the latter, for example, it would have been interesting if the amicable settlement had included an obligation on the part of the state to raise awareness of the amendment of the Constitution, and any other subsidiary legislation. It is important to recall that Human Rights Watch has reported that most of those who work with and for children, especially magistrates, police officers and child protection workers, did not recognise 15 to 17 year-olds as children because of the constitutional provision.<sup>110</sup> In fact, the CRC Committee had also

---

105 Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee in the Rights of the Child on Harmful Practices para 51.

106 As above.

107 African Children's Committee Draft Report: 28th session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 21 October-1 November 2016, Banjul, The Gambia (ACERWC/RPT (XXVIII)), <https://www.acerwc.africa/wp-content/uploads/2018/07/28th-ACERWC-Report-English.pdf> (accessed 7 June 2019).

108 KO Kufuor *The African human rights system: Origin and evolution* (2010) 136.

109 Guidelines (n 98) paras 13(a)-(d).

110 Human Rights Watch 'Submission to the Committee on the Rights of the Child' 21 November 2016, [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MWI/INT\\_CRC\\_NGO\\_MWI\\_25922\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MWI/INT_CRC_NGO_MWI_25922_E.pdf) (accessed 8 May 2019).



recommended to the state that, apart from amending its laws expeditiously, it should 'ensure wide public awareness of such legislative changes'.<sup>111</sup>

#### 4.3.4 *Serious and massive violations of children's rights*

As mentioned above,<sup>112</sup> the Revised Guidelines provide a number of grounds upon which the Committee 'may terminate its facilitation of an amicable settlement'. One such ground is '[i]f the subject matter of the communication involves serious and massive violations of children's rights'. What would constitute 'serious and massive' violations is open to interpretation.

It has been argued that in order to determine whether a violation was serious or massive two elements should be considered: purpose or planning and quantity.<sup>113</sup> With respect to the element of purpose or planning, the human rights violations should have been committed as a means to an end, to achieve a goal in response to certain behaviour.<sup>114</sup> Furthermore, the inclusion of the word 'series' in article 58(1) of the African Charter suggests that there should be the establishment of a 'pattern of abuse' systemically instituted by authorities.<sup>115</sup> With regard to the element of quantity, this speaks to the number of violations committed and the number of victims against whom the violations were committed.<sup>116</sup> In terms of the number of victims, it appears that the African Commission has always referred to serious or massive violations in cases where there has been more than one victim.<sup>117</sup> In terms of the number of violations, it has been noted that, despite the exact wording of article 58(1) of the African Charter, the Commission has referred to serious or massive violations not only in cases where more than one communication was brought, but also in cases where one communication included violations in respect of more than one article of the Charter.<sup>118</sup>

At the outset it should be mentioned that the use of the conjunction 'and' in 'serious and massive' in the Revised Guidelines is not common. In international human rights law the literature usually refers to 'serious or grave',<sup>119</sup> 'systemic or massive', and by using the disjunctive 'or'. For example, the African Charter refers to 'serious or

111 CRC Committee Concluding Observations: Malawi (CRC/C/MWI/CO/3-5) (March 2017) para 13.

112 See part 3 above.

113 Murray (n 33) 111-113.

114 Murray 111.

115 Murray 112.

116 Murray 113.

117 As above.

118 As above.

119 For more details on the concept of a serious violation of human rights law, see Geneva Academy of International Humanitarian Law and Human Rights 'What amounts to "a serious violation of international human rights law"? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty'

massive violations'.<sup>120</sup> However, Murray notes that the Commission has itself referred to 'serious *and* massive', 'gross', 'grave', 'serious' and 'massive' violations,<sup>121</sup> which is proof of inconsistency in wording, as opposed to a deliberate attempt to differentiate cases.<sup>122</sup> Heyns and Killander are of the opinion that the Commission should interpret the African Charter in a way that affords a high protection of the rights contained therein that may appear from a literal reading of the text.<sup>123</sup> Thus, it could be argued that the African Commission's practice of using different terms when referring to article 58(1) violations should not be seen in a bad light; instead, the flexibility should be welcomed, and perhaps be emulated by the Children's Committee.

In the amicable settlement reached there is no indication whether consideration was given to assessing whether the alleged violation would constitute 'serious and massive' violations. Indeed, the impact of the definition of a child that excludes those that are 16 and 17 years old from protection, as discussed above,<sup>124</sup> has wide-ranging and very serious implications.

In moving forward, there are additional lines of inquiry that the African Children's Committee will need to pose, in particular, whether there are some nuances that need to be taken into account in dealing with 'massive and serious violations' in the context of the rights of the child. For example, it should be considered whether there are rights that are so fundamental to the realisation of the rights of the child that a violation thereof should qualify as constituting a 'massive and serious violation'; also, whether a single violation can constitute 'serious and massive' in the context of the rights of the child. What about violations of children's socio-economic rights? It would also be difficult to answer a question whether a violation is 'serious and massive' without having regard to context. As a result, as to the

---

Academy Briefing 6 August 2014, [https://www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law\\_Academy%20Briefing%20No%206.pdf](https://www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf) (accessed 7 June 2019 ). Within the UN treaty body system, the Committee against Torture (Convention Against Torture art 20); the Committee on the Elimination of Discrimination against Women (Optional Protocol to the Convention on the Elimination of All Forms of Discrimination art 8); the Committee on the Rights of Persons with Disabilities (Optional Protocol to the Convention on the Rights of Persons with Disabilities art 6); the Committee on Enforced Disappearances (International Convention for the Protection of All Persons from Enforced Disappearance art 33); the Committee on Economic, Social and Cultural Rights (Optional Protocol to the International Covenant on Economic, Social and Cultural rights art 11); and the Committee on the Rights of the Child (OPIC art 13) have the mandate to initiate inquiries if they receive reliable information on serious, grave or systemic violations by a state party.

120 Art 58(1) African Charter.

121 Murray (n 33) 110-111.

122 Murray 110.

123 C Heyns & M Killander 'Africa in international human rights textbooks' (2007) 15 *African Journal for International and Comparative Law* 135.

124 See discussions in parts 4.3.1 and 4.3.2 above.

approach of the Committee, it may be possible to juxtapose Odinkalu's observation made in the context of the Commission that 'the expression "serious or massive violations" ... is merely a framework whose details may be worked out by experience'.<sup>125</sup>

The Revised Guidelines provide a number of grounds upon which the Committee 'may terminate its facilitation of an amicable settlement' but do not provide grounds upon which it does not even start the facilitation of an amicable settlement in the first place. In this respect, the question arises as to whether some articles in the Charter should be considered off-limits for amicable settlements. Arguably, some provisions of the Charter that could be explored for this purpose include the definition of a child; the right to life (the application of the death penalty to persons who committed the crime while below the age of 18);<sup>126</sup> and the absolute prohibition of torture.<sup>127</sup> The prohibition of torture and the application of the death penalty for offences committed by persons while below the age of 18 are absolute, and even constitute customary international law.<sup>128</sup> The latter, for example, has been declared to be a peremptory norm, meaning that it is binding on all states whether or not they are parties to international treaties.<sup>129</sup>

However, the experience of the European Court suggests otherwise, meaning that the identification of specific articles as being beyond the amicable settlement process perhaps is neither necessary nor possible. According to Webber, the record of friendly settlements thus far reached through the European Court covers all 13 guaranteed freedoms under the European Convention on Human Rights.<sup>130</sup>

#### 4.3.5 *Mandate to initiate amicable settlement*

The relatively broad mandate of the African Children's Committee involves initiating and dealing with amicable settlements. This can, for

---

125 CA Odinkalu & R Mdoe *Article 58 of the African Charter on Human and Peoples' Rights. A legal analysis and proposals for implementation* (1996) 5.

126 Art 5 African Children's Charter.

127 If state parties enter reservations to any of these provisions, it is highly likely that the African Children's Committee will find such reservations to be against the object and purpose of the instrument.

128 WA Schabas 'International law and abolition of the death penalty' (1998) 55 *Washington and Lee Law Review* 813.

129 Amnesty International 'The exclusion of child offenders from the death penalty under general international law' (2003), <https://www.amnesty.org/download/Documents/100000/act500042003en.pdf> (accessed 7 June 2019); *Michael Domingues v United States*, Inter-American Commission of Human Rights, IAm Comm of HR (22 October 2002), Case 12.285, Merits, Report 62/02 paras 84-85. Also see CA Bradley 'The juvenile death penalty and international law' (2002) 52 *Duke Law Journal* 485.

130 GS Weber 'Who killed the friendly settlement? The decline of negotiated resolutions at the European Court of Human Rights' (2007) 7 *Pepperdine Dispute Resolution Law Journal*, as cited in VO Ayeni & TO Ibraheem 'Amicable settlement of disputes and proactive remediation of violations under the African human rights system' (2019) 10 *Beijing Law Review* 407.

instance, be differentiated from the OPIC<sup>131</sup> which has provisions governing 'friendly settlements',<sup>132</sup> a term used interchangeably with 'amicable settlements', where the question of who can initiate a friendly settlement is less clear. Unlike the mandate of the Children's Committee which can take the initiative to start an amicable settlement, the wording in the OPIC appears restricted to making 'available its good offices', including in the context of inter-state communications.<sup>133</sup> This restrictive approach to initiating amicable settlements is further reinforced by the Rules of Procedure for the OPIC. For example, Rule 25(1) of OPIC indicates that it is '[a]t the request of any of the parties pursuant to article 9 of the Protocol' that 'the Committee shall make available its good offices to the parties with a view to reaching a friendly settlement'.

This restriction is not without practical limitations. For instance, there currently are approximately 87 cases pending before the CRC Committee,<sup>134</sup> the great majority of which are against Spain alleging 'subjecting [an] unaccompanied child to medical test to determine ... age'.<sup>135</sup> As a result, it may be argued that a friendly settlement with the government of Spain with a view to addressing some of the potential shortcomings in age determination processes could serve the best interests of the child. However, the proposal to initiate a process for such a friendly settlement appears to be beyond the mandate of the CRC Committee.

For the Committee, the mandate to initiate amicable settlements could also mean resolving cases involving serious violations or urgent matters as swiftly as possible. For example, in cases involving a child who is complaining about the denial of free and compulsory primary education, children rendered stateless because of discrimination, and asylum-seeking children who are deprived of their liberty, the children could all suffer significant physical, mental and developmental damage as a result of the non-disposal of their cases within a short period of time. In fact, some children might even become adults while their communications are being processed, meaning that immediate and important decisions in favour of their rights would be undermined because of the lapse of a significant period of time. As a result, there could be additional compelling arguments why bodies dealing with communications involving children, as compared to those dealing with adults, should be more motivated to resolve

131 OPIC entered into force in 2014. It has currently been ratified by 44 states including two African states, namely, Gabon and Tunisia. See [https://www.ohchr.org/Documents/HRBodies/CRC/OHCHR\\_Map\\_CRC-OP-IC.pdf](https://www.ohchr.org/Documents/HRBodies/CRC/OHCHR_Map_CRC-OP-IC.pdf) (accessed 7 June 2019).

132 Art 9 OPIC.

133 Art 12(3) OPIC.

134 <https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf> (accessed 7 June 2019).

135 As above.

communications amicably, sometimes at the initiative of the Children's Committee itself.

#### 4.3.6 Follow-up

The Revised Communication Guidelines mandate the parties to an amicable settlement to report to the Committee.<sup>136</sup> It is indicated that one of the elements of the amicable settlement reached was that the government had to periodically report its progress to the Committee,<sup>137</sup> and by the end of 2018 the government had provided five periodic progress reports,<sup>138</sup> which is commendable. Notably, since the adoption of the amicable settlement, Malawi has amended its Constitution.<sup>139</sup> Thus, the Constitution defines a child as a person under the age of 18,<sup>140</sup> and the exceptions for those under 18 to marry are abolished in the Constitution.<sup>141</sup>

At the presentation of its first state party report to the Committee, the Minister of Justice and Constitutional Affairs headed the Malawian government delegation.<sup>142</sup> During the public hearing the state drew the attention of the Committee to the measures undertaken, as contained in periodic reports submitted. These measures include the establishment of a task force on the amendment; a national stakeholders' conference held on 16 December 2016; the Constitutional Amendment Act (15 of 2017) that was gazetted on 7 April 2017; and an initial audit on all laws on the definition of the child that has been completed by the Malawi Law Commission with the government identifying 27 laws that needed amendment.<sup>143</sup> The government of Malawi requested an extension of the date by which the government would be able to finalise the harmonisation of all laws from December 2018 to June 2019.<sup>144</sup>

It should be noted that the full details of how the Committee carries out follow-up activities in relation to amicable settlements are

---

136 Sec XIII(1)(iii) Revised Communications Guidelines.

137 Draft Report (n 107).

138 IHRDA (n 85).

139 Mezmur & Kahbila (n 66) 211.

140 O Khamula 'Malawi Parliament raise child age definition from 14 to 18: Illegal to marry a girl before 18' *Nyasa Times* 15 February 2017, <https://www.nyasatimes.com/malawi-parliament-raise-child-age-definition-14-18-years-illegal-marry-girl-18/> (accessed 17 April 2019). As the change of the age of majority was an amendment of a section of the Constitution, the proposed change required a two-thirds majority (sec 197 of the Constitution of the Republic of Malawi) from the 193-member House..

141 Similar hearings on the implementation of decisions on communications on amicable settlements included an engagement with the delegation of the government of Kenya in the context of the *Children of Nubian descent*, as well as a delegation of the government of Senegal in relation to the *Talibé* decisions.

142 African Committee of Experts on the Rights and Welfare of the Child 31st ordinary session report para 9.

143 IHRDA (n 85).

144 African Committee of Experts on the Rights and Welfare of the Child 32nd ordinary session report para 84.

yet to be seen in terms of the creation of good practice. The manner in which follow-up to an amicable settlement is undertaken should also take into account the difference between individual measures and general recommendations. To avoid duplication, the latter can continue to benefit from follow-up during the periodic state party reporting process. However, there also is no indication in the Revised Guidelines that the follow-up procedure is carried out on a confidential basis. In the interests of transparency and to increase the visibility of the important role of the communications procedure, including amicable settlements, follow-up procedures to amicable settlements could be made public, as long as complainants agree and the process does not compromise children's best interests.<sup>145</sup>

## 5 Concluding remarks

The amicable settlement agreed upon within the framework of the African Children's Charter has added significant positive pressure and urgency to convince parliamentarians and to complete the amendment process within a reasonable period of time. The lessons to be learnt from Malawi in respect of the definition of a child are relevant for a few African countries, such as Botswana, which has entered a reservation to the definition of a child under article 2 of the Charter.

This first amicable settlement sets a positive precedent in that parties to a communication make use of the offices of the African Children's Committee, and implement agreed-upon settlements in good faith. Understandably, the settlement reached is the first experience of the Committee, and not the final word on the issue. The Committee will need to reflect further, and draw from the experiences of other bodies, with a view to refining its working methods and exploring the possibility of amicably settling disputes as one of its core functions.

---

145 ESCR Committee 'Working methods concerning the Committee's follow-up to views under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' adopted at its 61st session 29 May-23 June 2017.

## The International Criminal Court and Africa: A fractious relationship assessed

*Archangel Byaruhanga Rukooko\**

Associate Professor of Philosophy and Human Rights, Makerere University, Kampala, Uganda

<https://orcid.org/0000-0002-4675-7522>

*Jon Silverman\*\**

Professor of Media and Criminal Justice, University of Bedfordshire, United Kingdom

<https://orcid.org/0000-0002-1496-9344>

### Summary

*For many African states, the latest iteration of Western colonialism is the International Criminal Court. All the Court's prosecutions have involved African conflicts, and the continent's initially strong support for its creation has in recent years notably weakened. Leaders from Museveni to Kenyatta and Zuma to Bashir have excoriated the Court for its partiality, and only a change of government in The Gambia reversed a serious threat to quit its jurisdiction. Under pressure from Burundi and South Africa, the African Union has made increasingly militant noises about a mass withdrawal of member states. How should blame be apportioned for the turbulence of this relationship between the Court and the current generation of African leaders? Where does it leave a continent blighted by conflict, egregious human rights abuses and perceptions of the impunity of the 'big man' at the top? A research project, funded by the British Academy, has examined attitudes in civil society in Uganda and Kenya towards the ICC and asked whether human rights abuses could be effectively addressed by any other means. Researchers from three universities in Kenya, Uganda and the UK have interviewed judges, lawyers, NGOs, journalists and others about the ICC, domestic or regional forms of 'justice' (such as the putative African*

---

\* BA (Hons) (Makerere) MA (Nairobi) PhD (Makerere); [rukookobe@gmail.com](mailto:rukookobe@gmail.com). This work was supported by the British Academy under International Partnership Award PM150031.

\*\* BA (Hons) (Cambridge); [Jon.Silverman@beds.ac.uk](mailto:Jon.Silverman@beds.ac.uk)

*Court of Justice and Human Rights) and other transitional post-conflict mechanisms. The findings suggest that there is a high level of frustration with the performance of the ICC and, specifically, the Office of the Prosecutor. The article argues that although there is no one common denominator in the failed prosecutions, the ICC's strategy has too often yielded the initiative to long-serving leaders adept at retaining power and that, while state parties see little hope of reforming the ICC and favour an 'Africanist solution to African problems', there is little agreement on what form that should take.*

**Key words:** *International Criminal Court; justice; post-conflict; rights; colonialism; impunity*

## 1 Introduction

Gathering in a plush Nairobi hotel, a group of African journalists and other civil society representatives held a one-day discussion about the International Criminal Court (ICC) and its relationship with Africa. The failed ICC prosecution of the Kenyan President, Uhuru Kenyatta, and his deputy, William Ruto, was much debated with little surprise expressed that the case had been brought to a premature close, with the Office of the Prosecutor offering no further evidence. After all, in an African setting allegations of witness intimidation shoring up presidential impunity are not exactly news.

The meeting considered the stance of the African Union (AU) which, although not a signatory to the Rome Statute, nor having a legal or institutional relationship with the ICC, has been obliged by disaffected member states to review its relationship with the Court at several summits. Three months after the Nairobi colloquium, the AU approved a non-binding resolution calling for a mass withdrawal from the ICC.<sup>1</sup> With Kenyatta retaining power in 2017 after a violently-disputed election; the quashing of Jean-Pierre Bemba's conviction in 2018; and the ruling in early 2019 that the former Ivory Coast President, Laurent Gbagbo, had no case to answer, the foothold of the ICC in Africa has been weakened further. This, then, is an ideal vantage point from which to shine a reflective light on the conception and application of international criminal justice, as viewed from a continent which has been the subject of every prosecution so far initiated by the Court.

While several non-governmental organisations (NGOs), academics and think-tanks have explored the pursuit of legal accountability for crimes against humanity committed in Africa, and indeed the ICC itself has not lacked self-examination on the issue, the view from

---

1 Reported by *Reuters Africa*, 1 February 2017.



'ground level' has received less attention.<sup>2</sup> As the Kenyan Section of the International Commission of Jurists stated, '[t]o date, there has been inadequate space for reflection by local voices on the implications of international justice in Africa and on the ICC's interventions specifically'.<sup>3</sup>

This article distils the findings of a British Academy-funded collaborative research project by the Universities of Bedfordshire (United Kingdom), Makerere in Uganda, and Nairobi, in which 30 semi-structured interviews were conducted with civil society representatives, including judges and advocates, about the ICC and other means of addressing the 'impunity gap' in Africa.<sup>4</sup> This ethnography was supplemented by an analysis of secondary material around the themes of post-conflict justice and reconciliation on the continent. On the basis of the findings, we argue that nearly two decades of ICC intervention in Africa have failed to convince civil society that a legal remedy for crimes against humanity lies in The Hague. Notwithstanding this, in both Uganda and Kenya, the inviolability of 'big man' impunity is increasingly being challenged.

## 2 Context

At the heart of this article is the pursuit of 'justice' which, as a concept, deserves further interrogation. The roots of the term can be traced back through Latin to Greek, while both the Old and New Testaments of the Bible provide layers of interpretation.<sup>5</sup> In the context in which we write, there are many responses to the deliberate infliction of violence. To put it somewhat mechanistically, at one end of the spectrum there is 'reciprocal mimetic violence in which perpetrators are made to suffer, even in ways similar to what they caused their victims to suffer'.<sup>6</sup> At the other, there are restorative responses which form part of a wider reconciliatory process.

The foundation on which modern (that is, post-1945) international courts have been based is the Nuremberg tribunals which addressed Nazi atrocities, and we have taken that form of retributive, juridical

---

2 For examples, see, among others, 'Just justice? Civil society, international justice and the search for accountability in Africa' (2011) *International Refugee Rights Initiative* and 'The ICC intervention in Kenya' Chatham House, AFP/ILP 2013/01.

3 3rd Roundtable 'Strengthening the African human rights protection mechanisms' Mombasa, Kenya, October 2011.

4 The project has been the subject of two seminars led by the authors, in Nairobi, Kenya, October 2016 and Kampala, Uganda, January 2017. The interviews in Uganda for this study were conducted by Professor Archangel Rukooko of Makerere University. In Kenya, the interviews were carried out by Joseph Kobuthi of the University of Nairobi.

5 CF Kolbert *The legal background in Justinian: The digest of Roman law – Theft, rapine, damage and insult* (1979).

6 VN Redekop 'A post-genocidal justice of blessing as an alternative to a justice of violence: The case of Rwanda' in B Hart (ed) *Peacebuilding in traumatised societies* (2008) 206.

response as our starting point. Nevertheless, since we are addressing African conflicts, we have not sought to ignore the importance of customary interventions claimed to be more 'culturally appropriate' in an African context, such as *mato oput* or *Gacaca*, particularly because some of the interviewees have raised objections to the ICC, precisely on the grounds that it fails to understand the African psyche, what Lajul calls 'the African social philosophy'.<sup>7</sup> Issues of cultural difference have a special relevance to the case of Northern Uganda.<sup>8</sup>

In social science research, qualitative interviewing raises issues of epistemology. For example, what can interviewees tell us and what do they not reveal, or actively conceal? How do we analyse and assess the interview data? They also confront the questioner with the difficult question of reflexivity; in this case, a recognition that adopting a position of detached neutrality is not appropriate in the face of egregious human rights abuses. However, this does not imply a stance either of support for or opposition to the ICC, nor of any predetermined approval for arguments that 'the law should not be an instrument of cultural imperialism'.<sup>9</sup> While noting the frequency of 'discursive repertoires'<sup>10</sup> such as 'neo-colonial justice', 'Western double standards' and 'race-hunting' in some of the responses and secondary sources, our inclination is to treat them as binary simplicities that are as likely to hinder inquiry as to help it.

The study has not sought to achieve an exact mathematical balance in the opinions expressed by the interviewees, nor to disqualify anyone because of their affiliation. The primary aim was to sample as wide a spread of civil society views or interpretations as possible within the time-limited scope of a modestly-funded research project. As a disclaimer, we point out that the voices of direct victims of atrocities are absent from this inquiry and certainly deserve to be heard. In addition to the people interviewed in Uganda and Kenya, two lawyers closely involved with the Kenyatta/Ruto matter were questioned.<sup>11</sup>

---

7 W Lajul 'Justice and post-LRA war in Northern Uganda: ICC versus Acholi traditional justice system' Paper delivered at the European Conference on Ethics, Religion and Philosophy (2016) 3.

8 See T Allen *Trial justice: The International Criminal Court and the Lord's Resistance Army* (2006); EK Baines 'The haunting of Alice: Local approaches to justice and reconciliation in Northern Uganda' (2007) 1 *International Journal of Transitional Justice* 91; A Branch 'International justice, local injustice' (2004) 51 *Dissent* 22.

9 T Kelsall *Culture under cross-examination: International justice and the Special Court for Sierra Leone* (2009) 258.

10 B Byrne 'Qualitative interviewing' in C Seale (ed) *Researching society and culture* (2012) 211.

11 A full list of interviewees can be found at the end of the article.

### 3 Sparring with the International Criminal Court

A plethora of explanations have been offered for Africa's growing disaffection with the ICC. Murithi argues that African states believe that the ICC has singled out their continent because it dare not risk alienating its largest financial supporters in the global community.<sup>12</sup> Mueller suggests that initial support for the Court was strong as long as its investigations centred on non-state actors (such as the Lord's Resistance Army (LRA)), but when the focus shifted towards former heads of state and even serving presidents, self-preservation became the dominant response.<sup>13</sup>

For Asaala, primary responsibility lies with the United Nations (UN) Security Council for being 'selective in the recognition and waiver of immunities for international crimes in favour of the interests of its permanent members'.<sup>14</sup> On the other hand, Nel and Sibiya point out that the ICC has opened preliminary investigations in Iraq, Colombia, Afghanistan and Georgia, 'thereby dispelling the myth that the ICC only focuses on situations in Africa'.<sup>15</sup>

These assessments all have merit but it is undeniable that the issuing of an ICC warrant for the arrest of Sudanese President, Omar al-Bashir in March 2009 began the process of framing the Court as an instrument of Western colonialism, a viewpoint summed up by The Gambia's then Information Minister, Sheriff Baba Bojang, who was reported as calling the ICC 'the international Caucasian court for the persecution and humiliation of people of colour, especially Africans'.<sup>16</sup>

The indictment did not deter Bashir from successfully testing the concept of immunity by visiting Nigeria for an African Union (AU) summit in 2013 and South Africa in 2015, where the ANC-led government countermanded a court order for his arrest. The visit which provided the impetus for this research study was one to Uganda in 2016, where he attended the re-inauguration of President Museveni. At the ceremony, the Ugandan leader's attack on the ICC as 'a bunch of useless people' provoked a walkout by the ambassadors of the United States of America and Canada.<sup>17</sup> Like South Africa, Uganda had once been a proponent of the ICC and, indeed, was the first country to refer a case (that of the Lord's Resistance Army leader, Joseph Kony) to the Court, after it came into being in 2002. However,

12 T Murithi 'Africa's relations with the ICC: A need for reorientation?' in HB Stiftung *A fractious relationship: Africa and the International Criminal Court* (2012) 5.

13 SD Mueller 'Kenya and the International Criminal Court: Politics, the election and the law' (2014) 8 *Journal of Eastern African Studies* 25.

14 EO Osaala 'Rule of law or *realpolitik*? The role of the United Nations Security Council in the International Criminal Court processes in Africa' (2017) 17 *African Human Rights Law Journal* 266.

15 M Nel & VE Sibiya 'Withdrawal from the International Criminal Court: Does Africa have an alternative?' (2017) 17 *African Journal on Conflict Resolution* 79.

16 *The Guardian* 27 October 2016.

17 Various reported in *Al Jazeera*, *allAfrica.com* 13 May 2016.

for those prepared to look, the signs were already there that leaders such as Museveni saw the Court as a means to address their own political problems rather than as a conduit to justice. Joseph Kobuthi, a member of the civil society umbrella group, Kenyans for Peace with Truth and Justice, goes right back to 1998 in his assessment:<sup>18</sup>

The decision to sign up to the Treaty of Rome by African heads of state who came to power in *coups* in the 1980s and 1990s was quite cynical. They saw the ICC as somewhere they could place their enemies and political opponents.

However, Museveni has seemingly inverted that proposition. Speaking at the first inauguration of Uhuru Kenyatta as Kenya's President, he congratulated Kenya's voters for rejecting 'the blackmail of the ICC' which the West used 'to install leaders of their choice in Africa and eliminate the ones they don't like'.<sup>19</sup>

From 2003, when Museveni referred the crimes of the Lord's Resistance Army in Northern Uganda to the ICC, his relationship with the Office of the Prosecutor – then occupied by the Argentinian, Luis Moreno Ocampo – reflects the old maxim: 'Keep your friends close and your enemies closer.' Indeed, the proximity was highlighted by the pair appearing at a joint press conference in London to announce the referral. The Prosecutor went on to Kampala, declaring that he would 'interpret the referral as concerning all crimes under the Rome Statute committed in Northern Uganda, leaving open the possibility of investigating alleged atrocities by government forces'.<sup>20</sup>

However, despite well-documented crimes committed by the Ugandan army, the Uganda Peoples' Defence Force (UPDF), no soldier was indicted by the ICC, leading to criticism that the Prosecutor had overplayed his hand with his earlier pledge, and claims by some in the opposition that 'the ICC has become Museveni's political tool'.<sup>21</sup>

The Court of Appeal judge, Mr Justice Remmy Kasule JA, agrees that the ICC Prosecutor made a serious misjudgment in appearing alongside Museveni at the London press conference:<sup>22</sup>

By issuing the warrants of arrest [for Joseph Kony and other LRA leaders] in the company of Museveni, Ocampo gave the impression that the ICC was doing the bidding of the political leader of a country where the conflict began. This is a picture which should not have been created. Indeed, the situation became even more confusing later when the President stated publicly that he was opposed to the existence of the ICC.

18 Personal interview with researchers, October 2016.

19 Quoted by James Verini in *New York Times* 22 June 2016, [www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html](http://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html) (accessed 20 March 2019).

20 P Clark 'Law, politics and pragmatism' in N Waddell & P Clark (eds) *Courting conflict? Justice, peace and the ICC in Africa* (2008) 42.

21 As above.

22 Personal interview with researchers, October 2016.

This somewhat instrumentalist conclusion illuminates one facet of a complicated picture. There is also the principle of complementarity, a founding tenet of the ICC, to consider. This means that if a member state is willing and capable of carrying out prosecutions itself, the ICC will not take precedence. A fellow Court of Appeal judge, Mr Justice Richard Buteera JA, argues that, albeit in a limited way, this is exactly what happened in Uganda:<sup>23</sup>

When I was Director of Public Prosecutions, some UPDF soldiers were put on trial. In fact, on one occasion, the High Court moved the proceedings to Kitgum [in Northern Uganda] to hear cases. Some soldiers were convicted of murder, rape, robbery and defilement and fired from the army. The High Court, the Uganda police and my own DPP's office made sure that sentences were served. So, yes, the ICC did not prosecute UPDF perpetrators but other institutions did.

Odong Stephen, Programme Manager for Human Rights Network Uganda (Hurinet-U), adds:<sup>24</sup>

Suppose the ICC had carried out investigations into the UPDF, would the state have co-operated? Wouldn't it have made evidence hard to find? After all, look at Kenya, where evidence and witnesses gradually disappeared until proceedings against President Kenyatta had to be stayed.

Whatever view is taken of the arrangement which underpinned the LRA indictments, there is little doubt that President Museveni showed a great deal of political finesse in his early dealings with the ICC. Perhaps encouraged by his example, fellow East African President, Uhuru Kenyatta, also demonstrated nimble footwork in forging an alliance with his erstwhile opponent, William Ruto, to fight the 2013 elections while under indictment from the ICC. This manoeuvre was not only well judged to discomfort the Office of the Prosecutor, but also to subvert the notion of 'victim-centred justice', so central to the ICC's mandate. A report by the civil society alliance, Kenyans for Peace with Truth and Justice, expressed it as follows:<sup>25</sup>

In a strange ironical reversal, Mr Kenyatta and Mr Ruto now presented themselves as victims, the hapless targets of an imperialistic plot against Africans. A plot, moreover, that would ultimately undermine democracy in Africa by blocking reconciliation efforts, such as those that the political alliance headed by Uhuru, representing the Kikuyus, and Ruto, representing the Kalenjins was purportedly trying to achieve. In turn, the ICC was cast as the pliant tool of a Western conspiracy against Kenya's sovereignty.

---

23 As above.

24 As above.

25 Kenyans for Peace with Truth and Justice 'Impunity restored? Lessons learned from the failure of the Kenyan cases at the International Criminal Court' 24 November 2016 5, <http://kptj.africog.org/impunity-restored-lessons-learned-from-the-failure-of-the-kenyan-cases-at-the-international-criminal-court/> (accessed 20 March 2019).

## 4 Harnessing the media

In this context, becoming the first sitting head of state to stand in the dock in The Hague was not so much a high stakes gamble as an opportunity to shape the narrative which would play most effectively with a domestic audience. Harnessing the power of Kenya's highly mediated environment was central to a 'Mugabe-ist strategy of demonising critical civil society and media voices as neo-colonial "sell-outs" and "traitors"'.<sup>26</sup> Kwamchetsi Makokha writes a column for the *Sunday Nation*.<sup>27</sup>

The approach by the Kenyatta government was to hold the trial anywhere but in the courtroom. In other words, to make it a trial of public opinion and, in particular, to fight the charges in our growing social media space. We've got over 30 million users of mobile phones, many of them smart phones, and it's a space which is poorly regulated and ideally suited to carrying snappy, emotive messages. No long boring articles in the newspapers but a focused social media assault. Yes, there were some newspapers and broadcast media which took the side of the ICC but the qualitative impact of the anti-coverage was far more effective.

Despite 'counter-currents in which a new Nairobi based "twitterati" utilised social media to criticise Kenyatta and Ruto and defend their prosecution',<sup>28</sup> the government's social media campaign was effective in discrediting civil society groups, according to Edigah Kavulavu, legal officer for the International Commission of Jurists, Kenya Section.<sup>29</sup>

These groups were seen as being in cahoots with the ICC by providing evidence for the prosecutions and there was a very effective use of Facebook and What's App to undermine their credibility. What's App is a very good tool for spreading false rumours, for example, that some of the witnesses were 'fake', in that they had been coached by Ocampo.

Thus, prefiguring the irruption of 'fake' news and 'post-truth' politics into the lexicon of the Western democracies, Kenya's media space also played host to 'pseudo' blogs and paid-for propaganda supporting the Kenyatta/Ruto camp and attacking the ICC, designed, according to Kwamchetsi Makokha,

to give the impression that they had a greater level of backing than they did. A relatively small number of people were able to make a lot of noise. Some journalists were paid to go to The Hague to cover the trials and you wonder where the resources came from, given that the media here is badly cash-strapped.<sup>30</sup>

26 K Voltmer & H Kraetzschmar 'Investigating the media and democratization conflicts' 2015 <http://www.mecodem.eu/publications/working-papers> (accessed 22 June 2017).

27 Personal interview with researchers, October 2016.

28 Voltmer & Kraetzschmar (n 26).

29 Personal interview with researchers, October 2016.

30 As above.

In the interests of balance, it should be noted that this co-opting of journalists was not exclusive to the Kenyatta/Ruto side. A Kenyan journalist, who wishes to remain anonymous, told the Nairobi colloquium:

The ICC- sponsored training of journalists in Kenya, ahead of the trials, was not just teaching us about how the court operates. It was basically a form of advocacy journalism. It implied that any journalist who saw flaws in the ICC prosecution was pro-impunity. I blame the prosecutor, Ocampo, for raising expectations unreasonably.

## 5 Witnesses at risk

It will come as little surprise to anyone who has studied Kenya's media to learn that journalists are willing to accept cash for writing in support of one political interest or another. However, it is also alleged – although difficult to substantiate – that some parts of the media were used by the Kenyatta/Ruto camp to reveal the names of protected witnesses, putting their lives at risk. Ultimately, it was the unwillingness of many witnesses to repeat in oral evidence what they had previously told investigators in interviews which fatally undermined the prosecution. Irene Mutile, communications officer of the NGO Maskani Ya Taifa, says this took civil society by surprise:<sup>31</sup>

Kenyans did not expect the case to collapse due to witnesses and evidence disappearing. They thought maybe it would collapse for other reasons but not witnesses disappearing.

The ICC Prosecutor, Fatou Bensouda, complained that over half the witnesses in the case against William Ruto withdrew or retracted their initial testimony and others were killed or bribed in the Kenyatta case:<sup>32</sup>

The level of interference with those witnesses was a huge problem for the OTP. Some had members of their family threatened. We were having to protect witnesses even against their own communities and that presented a huge challenge.

However, the Kenyan advocate, Peter Kiriba, believes that the OTP could have done more to anticipate this problem:<sup>33</sup>

This is a loophole that the prosecution ought to have foreseen and sealed prior to the presentation of its case. The nature of the accused persons' [Kenyatta and Ruto] status, capability and influence should have alerted the OTP to a potential crisis and not have been left to chance.

The Irish barrister, Fergal Gaynor, represented victims of the 2007 post-election violence in the Kenyatta trial and in 2013 and 2014

31 Personal interview with researchers, September 2016.

32 Interview with 'Journalists for Justice' 21 July 2016, <http://www.jfjustice.net/en/icc-cases/icc-chief-prosecutor-shares-thoughts-on-kenyan-cases> (accessed 23 February 2017).

33 Personal interview with researchers, October 2016.

spent 49 days interviewing 839 of these victims. He believes that an imaginative use of technology could have helped circumvent the problem of witness intimidation:<sup>34</sup>

There should be less dependence by the OTP on the oral evidence of witnesses. Where possible, investigations and prosecutions should focus on cell phone and cell site data, including SMS messages, emails and messages sent via What's App, Viber and so on between those carrying out atrocities. There's no reasonable doubt that much of this data is already being collected (if not analysed) by Western and other intelligence agencies. The difficulty is to get it to the ICC. The Special Tribunal for Lebanon has shown how billions of pieces of cell phone/cell site data can give a precise picture of what happened during the critical hours leading up to and including a major crime.

## 6 Office of the Prosecutor

Much of the criticism which followed the collapse of the Kenyatta and Ruto cases has been directed at the Office of the Prosecutor. However, it should be pointed out that, faced with an unwillingness to co-operate by a state, the ICC, which has none of the resources available to a domestic prosecutor, such as subpoenas, surveillance and policing, is at a severe disadvantage. In the Kenyatta case, requests for information from the Kenyan authorities went unanswered and the Attorney-General refused to hand over telephone, land and asset records.

However, lawyer Gary Summers, who was part of the Kenyatta defence team from August 2011 onwards, believes the Office of the Prosecutor cannot escape blame for the failure of the prosecution:<sup>35</sup>

It was amateurish. You can't just rely on human rights NGOs to find witnesses and interview them. You needed trained investigators on the ground in Kenya to check the sources of some of the allegations. The OTP relied far too heavily on the report of the Waki Commission to find witnesses. Indeed, the case against Kenyatta started with a single informant, witness no 4. The ICC needs a prosecutor who is ruthlessly focused on the target. This wasn't the case with Ocampo and frankly, Fatou Bensouda has become almost invisible.

There has been considerable criticism of Ocampo's approach.<sup>36</sup> Edigah Kavulavu of the ICJ, Kenya Section, supported the prosecutions but remains disappointed by the way they turned out:<sup>37</sup>

The general mood here was that we would get justice through the ICC. And that the Kenyan case would be an example to the rest of the world. But attitudes began to change when the indictments did not include Odinga and Kabaki, because their part in the PEV was well-known. The

<sup>34</sup> E-mail from Fergal Gaynor, 12 October 2016.

<sup>35</sup> Personal interview with researchers, October 2016. The Waki Commission was set up by the Kenyan government in 2008 to investigate the post-election violence of the previous year.

<sup>36</sup> Verini (n 19).

<sup>37</sup> Personal interview with researchers, October 2016.



OTP only had a small outreach office in Nairobi, from where witnesses were interviewed. And there was no proper profiling of victims. The OTP based its judgments about witnesses/victims almost entirely on information from civil society NGOs. And, when the case finally opened in court, it was obvious that Ocampo was not trial-ready.

The ICC would argue in its defence that it achieved a historic first in getting a sitting President (Kenyatta) into court and at least dislodged a brick in the seemingly impregnable wall of impunity which has shielded African leaders from legal accountability. Bemih Kanyonge is a lawyer working for the advocacy NGO Kituo Cha Sheria (We Care for Justice):<sup>38</sup>

Politicians in Kenya are small gods. Impunity is their *modus operandi*. Seeing leading political figures, including the son of Kenya's founding father, in the dock at an international court humanised the political class, it made them less invincible as they had for a long time made us believe. Here was a super confident prosecutor insisting, day-in-day-out, that he had enough evidence and had made adequate preparations to effectively prosecute and provide answers for victims. At this point, impunity was certainly on a back foot.

It should be acknowledged that, although the prosecution collapsed, it was the catalyst for discussions leading to the setting up of an International Crimes Division in Kenya's High Court to make good on the promise of complementarity. However, the insistence of the prosecutor, Fatou Bensouda, that the key factor was the retraction of testimony by witnesses betrays a lack of robust strategic thinking by the ICC, which may continue to put it at a severe disadvantage when confronted by a determined state party.<sup>39</sup>

Edigah Kavulavu points out:<sup>40</sup>

The Kenyatta/Ruto government had a well thought-out strategy: to fight the prosecution on three levels. First, to win the domestic battle of public opinion. Then, at a regional level, to gain the support of the African Union. And third, to lobby the UN Security Council that Kenyatta and Ruto were democratically elected by Kenyans and that the trial would destabilise a sensitive region of the world. Thus, by the time the prosecution collapsed, most Kenyans were relieved because they feared serious violence if Kenyatta and Ruto were convicted.

This strength of calculated resistance from a state party under indictment, where 'the government is the criminal',<sup>41</sup> means that the prospects of a successful prosecution are vanishingly small. As Kenyans for Peace with Truth and Justice point out:<sup>42</sup>

38 As above.

39 Fatou Bensouda interview, <http://www.ifjustice.net/en/icc-cases/icc-chief-prosecutor-shares-thoughts-on-kenyan-cases> (accessed 4 March 2017).

40 Personal interview with researchers, October 2016 (Kavulavu) (n 38).

41 Verini (n 19).

42 Kenyans for Peace with Truth and Justice 'All bark no bite? State co-operation and the International Criminal Court' (2014) 24, <http://kptj.africog.org/all-bark-no-bite-state-cooperation-and-the-international-criminal-court/> (accessed 20 March 2019).

The decisions, orders and requests of the Court can only be enforced by national authorities. With no enforcement agency at its disposal, the ICC cannot execute arrest warrants, compel witnesses to give testimony, collect evidence or visit the scenes where the crimes were perpetrated, without the acquiescence of national state authorities.

This, of course, is where the experience of the ICC differs from that of its *ad hoc* predecessors, the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY), mandated by the UN Security Council under chapter VII of the Charter. Both these tribunals have been regarded as 'successful' in the sense that the overwhelming majority of those indicted have been tried and convicted. However, they were dealing with conflicts that were over and peace processes signed by the time prosecutions took place. By contrast, the ICC is grappling with the ongoing geo-political turbulence of internecine and inter-state rivalries.

In Kenya's case, the prosecutor Ocampo sought to persuade the then President, Moi Kabaki and Prime Minister, Raila Odinga, to voluntarily refer the post-election violence of 2007 to the ICC. He failed and, thus, for the first time in the ICC's history, had to use his *proprio motu* powers to initiate an investigation. Was this a wise move? Majani Tyson, a youth, governance and human rights practitioner in Nairobi, strongly believes that it was:<sup>43</sup>

For the last few decades and even currently, massive atrocities happen without anyone being brought to book. And if one is brought to book, it is after massive damage that could have been avoided. Remember the Rwandan genocide, the Darfur conflict, the Wagalla massacre [of ethnic Somalis by Kenyan security forces in 1984] etc. All these happened due to the decision of the international community to be bureaucratic, to sit on the fence and wait for referral by state parties before intervening. To me, the decision by the ICC Prosecutor to intervene in the Kenya case was a move to encourage the international community to show a commitment to global peace and justice.

Computer engineer Samuel K argues that

[w]hether he [the Prosecutor] used his own powers without a state referral is not the issue. The issue is that our local politicians made the people believe that an external court was segregating and discriminating against them based on their ethnic affiliations. The politicians rallied behind their ethnicity and convinced people that it was the community that was being prosecuted and not the individual.<sup>44</sup>

## 7 The individual or the community?

This last insight provides a pathway to understanding one of the most significant fault lines in the fractious relationship between the ICC and Africa. Like the two *ad hoc* tribunals discussed earlier, the ICC was established to try crimes committed by individuals rather than states,

43 Personal interview with researchers, September 2016.

44 As above.

notwithstanding those individuals' role in a government or a government-sanctioned agency (the International Court of Justice exists to mediate disputes between state parties).

This gave expression to the principle established at the Nuremberg tribunals that 'state agents who authorised torture or genocide against their own populations were criminally responsible in international law, and might be punished by any court capable of catching them'.<sup>45</sup>

Thus, in prosecuting Uhuru Kenyatta, the ICC was addressing his individual criminal liability for crimes committed during the 2007 post-election violence, not putting the state of Kenya on trial. However, within Kenyan society Kenyatta's individuality is intimately bound up with a heritage of Kikuyu patrimonial obligations. Historically, in this patron-client arrangement

there is a shared understanding of the appropriate relationship between leaders and their communities that gave rise to complex moral economies in which rulers were expected to provide for their followers in return for their support.<sup>46</sup>

In other words, in Kenya a criminal prosecution of the patron can be presented as an attack on the clan, raising the possibility of all those dependent on the patron being deprived of material benefits and political influence if he is brought down. In these circumstances, it was all too easy for the embattled Kenyatta to make a case that, as the representative of the largest ethnic group in the country, he embodied the nation, standing resolute against an alien, Western-backed institution, the ICC. At the (off the record) Nairobi colloquium cited earlier, two eminent civil society representatives made the same point, namely, that the Kenyatta case at the ICC was the first in which the state itself was, in effect, in the dock, and that, in these circumstances, it would mobilise every means at its disposal to thwart the prosecution. Neither speaker believed that the Office of the Prosecutor fully grasped how significant this would be.

Yet, this was not a novel challenge for an international tribunal. In the 1990s Serb politicians and military leaders, aided by a compliant domestic media, were able to present their prosecutions at the ICTY as attacks on Serbia itself. Katarina Ristić calls this perception a 'hero-defendant frame', in which the accused is represented as 'sacrificing at the ICTY for the nation. Nationalist discourse transforms individual criminal charges into collective guilt accusations, in order to reject them as ungrounded'.<sup>47</sup>

This is what also happened in Kenya.

45 G Robertson *Crimes against humanity: The struggle for global justice* (1999) xiv.

46 N Cheeseman *Democracy in Africa: Successes, failures and the struggle for political reform* (2015) 3.

47 'Media discourses on war crimes trials in Serbia' Centre for South-East European Studies Working Paper 2012 4 6.

## 8 African solutions to an African problem?

In 2016 the trial opened in The Hague of the former LRA commander, Dominic Ongwen, charged by the ICC with crimes against humanity. Earlier, the possibility had been mooted by both prosecution and defence, and counsel for the victims, of holding the first hearing in Gulu, Northern Uganda, where the alleged crimes had taken place. However, the judges ruled this out, citing both security and logistical concerns.

Notwithstanding the fact that some of those interviewed for this study express few qualms about justice for Africa being delivered at a distance in The Hague, there is little doubt that geographical remoteness has given impetus to criticism of the ICC by African leaders. The fact that the Court sits in the heart of Europe has also reinforced the message that prosecutions of Africans are the latest iteration of colonialism – ‘new wine in old bottles’, as it were. Hence, it is understandable that the AU has been searching for an ‘Africanist’ solution to the challenge of human rights abuses on the continent.

In 2010 the AU Commission began a process of amending the Constitutive Act of the African Court of Human and Peoples’ Rights as follows:<sup>48</sup>

[T]o expand the Court’s jurisdiction to include international and transnational crimes. The resultant draft protocol adds criminal jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes, such as terrorism, piracy and corruption.

It is beyond the scope of this study to dissect the tortuous debates at AU summits and other plenary sessions about operationalising the putative AU Court of Justice and Human Rights. However, the key point of principled difference between the remit of this Court and the ICC is the issue of immunity from prosecution for a serving leader. By trying Uhuru Kenyatta and Laurent Gbagbo and indicting Bashir of Sudan, the ICC has demonstrated that, in international law, presidential impunity is dead. By contrast, the AU, meeting in Malabo, Equatorial Guinea, in 2014, declared in a protocol that as far it was concerned, immunity for a sitting president was very much alive.

As a consequence, few of the interviewees see an African court with criminal powers as an adequate answer to Africa’s justice and impunity gap. Bwana Mdogo works for the Kenyan NGO Maskani Ya Taifa:<sup>49</sup>

Given the stance of the AU in supporting African heads of state (and their assistants) plus its resistance and continuous threats to withdraw from the ICC ... I highly doubt the African Court would have any teeth. And who

48 M du Plessis, T Maluwa & A O’Reilly *Africa and the International Criminal Court* (2013) 8.

49 Personal interview with researchers, September 2016.

knows, given the African 'big-man' culture, my fears are that it could be used to prosecute and intimidate the 'big-man's' opponents. Didn't Yoweri Museveni call upon the ICC to help him address the Joseph Kony menace in Uganda? Not to say that Kony should not be indicted of crimes against humanity, but looking at African 'big-men', which of them shouldn't be?

The budget of the proposed African Court of Justice and Human Rights, once it is operational, would undoubtedly be considerably smaller than that of the ICC, and Bemih Kanyange of Kituo Cha Sheria believes its functional capacity would be a substantial handicap.<sup>50</sup>

Yes, the court is an option, if only it had the capacity and there was political will to operationalise its increased jurisdiction. If that court was to work properly, it would be the answer to the 'African solutions to African problems' debate. However, as we know, that court is currently almost entirely funded by international development partners, capable of wielding the same influence the ICC is accused of.

Of course, this raises a number of ontological questions about what constitutes an 'Africanist solution'. Is it a question of geography – where the court sits? Or, who provides the finance? After all, the largely 'successful' Special Court for Sierra Leone held the Charles Taylor trial in The Hague, with funding from only one major African donor state, Nigeria. Yet, it was not widely decried as an 'international' tribunal. In the opinion of the authors, the key issue is whether it is acknowledged in the state or region where the crimes have been committed that a measure of accountability (sufficient or not) has been achieved.

In May 2016 another way forward for trying egregious crimes in Africa came to fruition in a court in Senegal. The Extraordinary African Chambers (EAC) convicted the former President of Chad, Hissène Habré, of crimes against humanity, torture and rape. The international media (at least, those organs which take an interest in matters of justice) was euphoric.

In an editorial, the *Guardian* newspaper wrote that '[t]he trial of Habré has been an event without precedent. Its outcome is a watershed for human rights in Africa and beyond'.<sup>51</sup>

This unprecedented use of the principle of universal jurisdiction to prosecute and convict the leader of one state in the courts of another was a development which many Africans thought they would never see. The financial contribution of the government of Chad towards the holding of the trial, plus its cooperation with the investigating judges during their four missions to Chad in 2013 and 2014, should not be underestimated. It is true that it took a court order from the UN to unblock the impasse which had mired the mooted prosecution in procedural difficulties for the best part of a decade, and the majority of the funding for the court process came from European

50 Personal interview with researchers, October 2016.

51 'The *Guardian* view on the conviction of Hissène Habré: Africa points the way' 1 June 2016 28.

states. However, by the authors' own accountability standard, it must be counted as a successful African solution, not least because it was the remarkable persistence of victims' groups over two decades which made the trial a reality. Their 'reward' was the agreement by the AU to set up a trust fund for victims.

However, the implications of the Habré prosecution are clearly a threat to those AU leaders who fear an indictment once they leave power. Thus, it remains to be seen whether the EAC is a *sui generis* response to the challenge of impunity rather than a viable African alternative to the permanent blueprint offered by the ICC.

What of the much-vaunted principle of complementarity, referred to above, and the notion of the ICC as a court of last resort? When Moreno Ocampo first visited Uganda after the ICC came into force in 2002, he is said to have used the rather picaresque metaphor of the new court as an aeroplane flying over the continent of Africa, only landing if a state showed itself either incapable of or unwilling to carry out its own prosecutions. In 2008, following the Juba Peace Agreement between the Ugandan government and the Lord's Resistance Army, a war crimes division was established in the High Court (later rebranded, when Uganda adopted the International Criminal Court Act, as the International Crimes Division) which, in theory, should be capable of holding trials to an acceptable international standard. Nathan Twinomugisha was a member of Uganda's Amnesty Commission:<sup>52</sup>

The higher courts in Uganda, like the ICD, have a lot of credibility and I do believe that these courts would ably handle these cases if the international community have an interest and if they would support the ICD financially, enabling it to offer reparations. Moreover, I don't think there would be pressure from the executive, as statistics show that the government loses a higher percentage of court cases in Uganda than it wins.

A judge sitting in the International Crimes Division, Lady Justice Elizabeth Ibanda Nahamya, agrees with that assessment, but offers a caveat:<sup>53</sup>

If Joseph Kony was arrested in Uganda, there is no reason why he shouldn't be tried here, although his atrocities are more international than merely domestic, since they spread in South Sudan and Central African Republic as well. The problem is that we do not have sufficient resources to take off. Besides, we are still grappling with just one case.

The one case she refers to is that of a former LRA commander, Thomas Kwoyelo, the first trial at the International Crimes Division, which some observers regard as a landmark test for the principle of complementarity in Africa.<sup>54</sup> Although Kwoyelo successfully invoked

52 Personal interview with researchers, February 2017.

53 Personal interview with researchers, October 2016.

54 *International Justice Monitor* 13 March 2017, [www.ijmonitor.org/2017/03/the-thomas-kwoyelo-case-at-the-icd-issues-of-victim-participation/](http://www.ijmonitor.org/2017/03/the-thomas-kwoyelo-case-at-the-icd-issues-of-victim-participation/) (accessed 20 March 2019).

Uganda's amnesty law to stop the prosecution in the lower court, the decision was overturned by the Supreme Court and the trial has resumed. However, it must be said that, among those interviewed for this study – admittedly, neither a large nor necessarily representative sample – there was no abundance of confidence that domestic justice for war crimes and crimes against humanity would equate to fair and impartial justice. In 2010 a group of experts wrote to the UN Secretary-General criticising the proposition that Kenya could handle a trial of the magnitude of Kenyatta's. Dr Wandia Njoya is a lecturer at Daystar University.<sup>55</sup>

Our problem isn't a legal capacity one: It's a political one. The politicians have a noose around the judiciary's neck. They're willing to kill and impoverish judges if they need to, and they won't be investigated because the police lack capacity and the politicians will rally support from their ethnic groups.

## 9 Customs versus courts

Those who criticise the ICC as a neo-colonial construct imposing its will on Africa, invariably make the case that for many cultures on the continent a retributive version of justice is less familiar than a reconciliatory one and, therefore, that dealing with the aftermath of conflict requires a more mixed and nuanced approach than the thud of a judicial gavel. The model often referred to is that of Rwanda, which turned to the grassroots system of justice known as *Gacaca*, alongside an international tribunal, to address the enormity of the 1994 genocide.

However, it sometimes is overlooked that *Gacaca* was an instrumental solution to a practical problem, namely, that an antiquated prison system was incapable of accommodating even a fraction of the tens of thousands of perpetrators. In Northern Uganda another customary practice, *mato oput*, has been championed as a more culturally acceptable alternative to the ICC. The ritual involves the sharing of a bitter liquid (*oput*) and a slaughtered animal, usually a sheep, by two sides in conflict, to seal reconciliation, although not necessarily forgiveness. It has been practised sporadically in the Acholi tribal territories for many generations, although opinions differ as to how widely used it is today and for what kinds of disputes.

However, there are important differences between Rwanda and Uganda. The latter is both far less centralised and far more ethnically diverse, and, whereas the genocide was confined to Rwanda itself, the Lord's Resistance Army has at various times left its imprint in South Sudan and the Central African Republic, as well as in Northern Uganda. Thus, Tim Allen of the London School of Economics, who has lived in Northern Uganda for several periods, argues that an Acholi-

---

55 Personal interview with researchers, October 2016.

inspired practice would not be suitable for addressing the transnational crimes committed by the LRA.<sup>56</sup>

The Ugandan judge, Lady Justice Elizabeth Ibanda Nahamya, is not so dismissive of *mato oput*.<sup>57</sup>

It is not quite true that *mato oput* is specific to one region. It is also used in West Nile and Soroti, alongside other traditional justice methods to deal with all kinds of crime. But these methods cannot be equated with the ICC. Our problem in Uganda is that we have not wholly embraced informal justice. If we were to integrate it into our justice system, I believe it would be as effective because all these methods are meant to act as social controls.

Her judicial colleague, Mr Justice Remmy Kasule, argues that the retributive basis of an ICC prosecution is no different from that practised by Uganda's criminal justice system and, therefore, is widely understood, if not embraced. However, he reinforces the conceptual point made earlier that the mechanism of international criminal justice is at odds with the customary process.<sup>58</sup>

*Mato oput* as a trial system is more intended to establish collective guilt [of a community or clan] rather than individual guilt, unlike the ICC, where the charges and trials are of specific individuals. Traditionally, in *mato oput* it is the community that says 'we have done wrong' and every member, both individually and collectively, shares that wrong. However, where *mato oput* can be of value is after trial and sentencing, when the convicted person can be called on to show amends to the community.

The LRA delegation at the peace talks in Juba in 2007 favoured the incorporation of traditional justice methods into the formal Ugandan judicial system and for the government to challenge the jurisdiction of the ICC.<sup>59</sup> It would require deeper inquiry to establish whether the championing of *mato oput* has broader support, but recognising that opinion is sharply divided about the respective merits and applicability of modern criminal justice mechanisms and traditional justice in Northern Uganda, Lajul, who has Acholi heritage, argues for a melding of the two approaches, and proposes

a type of justice that harmonises other than polarising the communities that have suffered for more than two decades. This theory is centred and guided by the view that crime that breeds injustice is more than a personal affair, it is as well a *social* affair.<sup>60</sup>

However, this middle way would require a paradigm shift in jurisprudential thinking at the ICC, and there is no sign that this is about to happen.

56 T Allen 'Ritual ab(use)? Problems with traditional justice in Northern Uganda' in N Waddell & P Clark (eds) *Courting conflict? Justice, peace and the ICC in Africa* (2008) 47.

57 Personal interview with researchers, October 2016.

58 As above.

59 Allen (n 57) 51.

60 Lajul (n 7) 2 (our emphasis).



## 10 Conclusion

In the true spirit of objective ethnography, this inquiry has eschewed *a priori* assumptions in favour of empirical observation. The conclusions to be drawn from the interviews are several and do not necessarily form a consistent pattern. Most of those representing what can loosely be described as human rights NGOs have argued that, for the health of society a measure of juridical accountability is necessary in order to challenge the perceived impunity of leaders and, moreover, that victims of post-conflict violence have been left on the margins of any debate about the ICC and Africa. Most believe that in theory the international criminal approach is better placed to deliver justice than domestic mechanisms because courts in Uganda and Kenya are less likely to demonstrate a robust independence from the executive. There is a similar scepticism about the potential effectiveness of a regional African Court of Justice and Human Rights. Perhaps understandably, the judges interviewed have more faith in the courtroom than do other sectors of civil society.

Scepticism turns to cynicism when questions are asked about the dealings of leaders, such as Museveni and Kenyatta, with the ICC. The consensus is that domestic political advantage is the priority for governing parties rather than a genuine commitment to addressing the results of conflict and human rights abuses. There is widespread dismay at the strategy and assumptions of the ICC, particularly of the first Prosecutor, Moreno Ocampo, in allowing foreseeable obstructions, such as witness intimidation, to undermine prosecutions. The failure of the Court to do more to acknowledge perceptions of remoteness and neo-colonialism is also keenly felt on the continent.

The final thought concerns the case for African 'exceptionalism'. The haemorrhaging of support for the ICC may eventually lead to an AU-mandated court assuming responsibility for prosecuting human rights abuses. This would be a blow to the global remit of the ICC, especially if the principle of presidential immunity is maintained. However, it should never be forgotten that the ICC is a court of last resort and, in the spirit of complementarity, any means of redress for those who suffer egregious violence and abuse is surely better than none. Many of those interviewed for this study can be described as civil society gatekeepers, articulate and generally well-informed about the issues under scrutiny. What is perhaps even more urgent is to drill down further and speak to those whose lives have been irreparably scarred by man's inhumanity to man.

### List of interviewees

#### Uganda

- Mr Justice Richard Buteera JA, Court of Appeal judge
- Simon Kaheru, lead media analyst and director, Uganda Broadcasting Corporation

- Mr Justice Remmy Kasule JA, Court of Appeal judge
- Kasande Sarah Kihika, Uganda Programme Associate, International Centre for Transitional Justice
- Christopher Mbazira, Associate Professor, School of Law, Makerere University
- Peter Magala, Programme Manager for civil liberties NGO Chapter Four
- Lady Justice Elizabeth Ibanda Nahamya, judge, International Crimes Division
- Twinomugisha Nathan, Principal Legal Officer, Uganda Amnesty Commission
- Odong Stephen, Programme Manager, Human Rights Network Uganda (Hurinet-U)
- Anthony Wesak, chief court reporter, Monitor Publications

## Kenya

- Jared Aol, Policy Analyst, NGO Bunge La Mwananchi
- Sharon Eshushi, Programme Manager, Sauti Yetu Debates
- Nahila Galole, NGO Inuka Kenya
- Chris Gitari, Executive Director, International Commission of Jurists, Kenya Section
- Peter Irungu, Programme Director, Inuka Kenya Trust
- K Samuel, computer engineer
- Bemih Kanyonge, Advocate, Kituo Cha Sheria
- Edigah Kavulavu, International Commission of Jurists, Kenya Section
- Vincent Kimosop, former Chairperson, Unclaimed Financial Assets
- Peter Kiriba, lawyer, Kiriba & Co
- Kwamchetsi Makokha, columnist, *Sunday National*
- Bwana Mdogo, Maskani Ya Taifa
- Elvis Mogeni, NGO Maskani Ya Taifa
- Dismas Mokua, political analyst
- Irene Mutile, NGO Maskani Ya Taifa
- Wandia Njoya, lecturer, Daystar University
- Kasyoka Salim, Programme Officer, Local Development Research Institute
- Majani Tyson, Youth, Governance and Human Rights practitioner

## London

- Fergal Gaynor, lawyer representing victims in Kenyatta case
- Gary Summers, lawyer, Kenyatta defence team

To cite: SP Tunamsifu 'Twelve years of judicial cooperation between the Democratic Republic of the Congo and the International Criminal Court: Have expectations been met?' (2019) 19 *African Human Rights Law Journal* 105-125  
<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a6>

## Twelve years of judicial cooperation between the Democratic Republic of the Congo and the International Criminal Court: Have expectations been met?

*Shirambere Philippe Tunamsifu\**

Senior Lecturer, Université Libre des Pays des Grands Lacs; Senior Researcher, Centre Africain de Recherche et d'Éducation à la Paix et à la Démocratie (CAREPD), Democratic Republic of the Congo; Research Fellow, Institute for Dispute Resolution in Africa, University of South Africa  
<https://orcid.org/0000-0001-5381-7944>

### Summary

*The Democratic Republic of the Congo is a party to the Rome Statute. Unable to deal with past serious violations of human rights the country decided formally to refer the situation to the International Criminal Court. Based on article 54(3)(c) of the Rome Statute a judicial cooperation agreement was signed between the DRC and the ICC in 2004. As a result six cases have been prosecuted. The research relied on legislation, literature and empirical fieldwork as its sources of information. To collect data, 29 key informants were interviewed and three focus group discussions were held. After a data analysis the following results were found. Thirteen key informants and participants in the focus group appreciated the ICC's jurisdiction over international crimes and its complementarity to the Congolese judicial system as it brought some relief in the fight against impunity considering the lack of political will on the part of the government to prosecute alleged perpetrators. Eleven key informants and participants in the focus group revealed that the ICC was*

---

\* LLB (Licence) (Université Libre des Pays des Grands Lacs) MA (University for Peace) LLD/PhD (South Africa); [tusphil@yahoo.fr](mailto:tusphil@yahoo.fr). The article is essentially based on the author's doctoral thesis titled 'A comparative study of transitional justice in the Republic of South Africa and the Democratic Republic of the Congo'. The author's doctoral study received a grant from ULPGL-Goma and the token for thesis writing granted by the Council for the Development of Social Science Research in Africa (CODESRIA) is also acknowledged.

*selective as it prosecuted some perpetrators and freed others (mostly the leaders). Six key informants and participants in the focus group noted that the achievements of the ICC were below the expectations of the population due to the prolonged nature of the proceedings. Six key informants regretted the fact that the ICC does not have retroactive jurisdiction for crimes committed in the DRC before the entry into force of the Rome Statute. Therefore, the study recommends that the ICC should avoid selective justice in prosecuting persons bearing the greatest responsibility. The ICC must also make an effort to prevent further delays in proceedings and avoid long trials in order to meet Congolese expectations and, therefore, restore its credibility and avoid frustration on the part of victims.*

**Key words:** complementarity; crimes; DRC; fight against impunity; International Criminal Court; judicial cooperation; Rome Statute; selective justice; slow proceedings

## 1 Introduction

The Rome Statute establishing the International Criminal Court (ICC) was adopted on 17 July 1998 and entered into force on 1 July 2002 with the determination to put an end to impunity. The ICC is the first permanent and independent criminal court that has the jurisdiction to hold accountable individuals who bear the greatest responsibility for serious international crimes. When states are unwilling or unable to conduct investigations and prosecutions against alleged perpetrators, the ICC appears to be the panacea to fight serious international crimes. The exercise of such jurisdiction, however, is subject to the principle of complementarity<sup>1</sup> which entails that 'national courts have priority to exercise jurisdiction over the crimes prohibited in the Statute' and, consequently, 'the ICC cannot exercise its jurisdiction over the crimes unless the state concerned is unable or unwilling to investigate or prosecute the crimes'.<sup>2</sup> As observed by Yang, and rightly so, the principle of complementarity remains one of the remarkable distinguishing features of the ICC in relation to two previous *ad hoc* international criminal tribunals, as the statutes of the latter clearly accorded them the 'primacy over national courts',<sup>3</sup> which is not the position in the case of the ICC. There are two explanations as to why the principle of complementarity is important. First, the ICC may exercise jurisdiction only where national legal systems fail to do so, including in instances where states purport to

---

1 Preamble and art 1 Rome Statute of the International Criminal Court.

2 L. Yang 'On the principle of complementarity in the Rome Statute of the International Criminal Court' (2005) 4 *Chinese Journal of International Law* 122.

3 See art 9(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia and art 8 of the Statute of the International Criminal Tribunal for Rwanda.

act but in reality are unwilling or unable genuinely to carry out investigations or prosecutions.<sup>4</sup> Heller argues to that effect that 'article 17 permits the Court to find a state "unwilling or unable" only if its legal proceedings are designed to make a defendant *more difficult* to convict'.<sup>5</sup> Second, the principle of complementarity is based both on respect for the primary jurisdiction of states and on considerations of efficiency and effectiveness, since states generally have the best access to evidence and witnesses and the resources to carry out proceedings.<sup>6</sup> Such benefits certainly may have prompted states, including the Democratic Republic of the Congo (DRC),<sup>7</sup> to ratify the Rome Statute and avail themselves of the opportunity to cooperate with the Court.

In the aftermath of various armed conflicts<sup>8</sup> in which numerous serious crimes were committed, the judiciary in the DRC was unable to deal with the past.<sup>9</sup> Some of the reasons pertain to the fact that 'the different armed conflicts had severely affected the Congolese courts and tribunals, some of which were destroyed, and at that time judges were appointed through irregular processes and based on political considerations'.<sup>10</sup> There subsequently was a 'total abdication by the state of its own responsibilities'.<sup>11</sup> It consequently was not surprising that pursuant to article 13(a) of the Rome Statute, the DRC government on 19 April 2004 decided formally to refer the situation to the ICC for prosecution and to determine whether one or more persons should be charged with crimes under the Court's jurisdiction.<sup>12</sup>

This article aims to examine the extent to which the ICC has met the expectations of victims and survivors of international crimes in the

---

4 ICC-OTP 'Informal expert paper: The principle of complementarity in practice' (2003) [https://www.icc-cpi.int/CR2009\\_02250.pdf](https://www.icc-cpi.int/CR2009_02250.pdf) (accessed 22 October 2018).

5 KJ Heller 'The shadow side of complementarity: The effect of article 17 of the Rome Statute on national due process' (2006) 17 *Criminal Law Forum* 257. See also MS Ellis 'The International Criminal Court and its implication for domestic law and national capacity building' (2002) 15 *Florida Journal of International Law* 238.

6 ICC-OTP (n 4).

7 The DRC signed the Rome Statute on 8 September 2000 and deposited its instrument of ratification on 11 April 2002.

8 For a detailed account on armed conflicts in the DRC, see 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 (August 2010) [https://www.ohchr.org/Documents/Countries/CD/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](https://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf) (accessed 17 October 2018).

9 Report of the Mapping Exercise (n 8) paras 895-897.

10 SP Tunamsifu 'A comparative study of transitional justice in the Republic of South Africa and the Democratic Republic of the Congo' unpublished LLD thesis, University of South Africa, 2016 151.

11 Report of the Mapping Exercise (n 8) para 896.

12 See ICC-OTP 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' ICC-OTP-20040419-50, Press Release, 19 April 2004, [http://www.iccpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx](http://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx) (accessed 12 July 2014).

DRC, 12 years after it had signed a memorandum of understanding (MoU) to cooperate with the country. Since the signing of the judicial cooperation MoU on 6 October 2004 the ICC has prosecuted four Congolese perpetrators in Ituri and two Rwandan militias in Kivu provinces. This study covers the period between October 2004 and December 2016. It is based on a literature study, legal analysis and empirical field work in areas affected by armed conflict. The study analyses cases prosecuted by the ICC in the situation of the DRC and assesses the expectations of Congolese victims and survivors' 12 years after the signing of the judicial cooperation agreement (2004-2016). The reasons for conducting such a study are two-fold. Because DRC is the first country where the ICC started its investigations, it is relevant to assess the extent to which the Court has met the expectations of victims and survivors. The study also contributes to the existing literature on the ICC by raising the voices of victims and survivors regarding their expectations of the ICC's actions after the crimes committed in the territory of the DRC had been referred to the ICC.

Some data analysed in this study was collected mainly through interviews. In this regard semi-structured and open-ended questionnaires were used in order to obtain key informants' opinions on the ICC's jurisdiction over international crimes, cooperation and its complementarity to national criminal jurisdiction. A purposive sampling strategy was used to elicit information from key informants. Four basic criteria were used to select respondents. The first criterion was based on the participant's role as a representative of the Military High Court (*Haute Cour Militaire*), while the second was based on the participant's role as representative of the Prosecutor-General of the Republic (*Procureur Général de la République*).<sup>13</sup> The third criterion was based on a participant's role as representative of the coordination of civil society organisations in areas affected by armed conflict. The last requirement was that the participant should be a representative of an association of victims of armed conflict or of an association taking care of victims or advocating victims' cases in the courts of law in the DRC. In addition, three focus groups were assembled consisting of survivors' groups and representatives of associations that took care of survivors or advocated victims' cases in courts of law. Twenty-nine in-depth interviews were conducted with key informants.

The article is structured in five sections. It begins with an introductory section to the research, followed by an analysis of the legal framework of the judicial cooperation. It then examines the ICC's jurisdiction complementing the Congolese judicial system. Next, perceptions of the Congolese population of the ICC's jurisdiction

---

13 Art 149(1) of the 2006 Constitution as amended in 2011 provides that '[t]he judicial power is devolved to the courts and tribunals which are the Constitutional Court, the Court of Cassation, the Council of State, the High Military Court, as well as the civil and military courts and tribunals'. The public prosecutor's office falls within their jurisdictions.

complementing the Congolese judicial system are presented. Lastly, a conclusion and recommendations are presented.

## 2 Legal framework of judicial cooperation

This section discusses the main legal instruments that constitute the basis for judicial cooperation between the DRC and the ICC: first, the Rome Statute establishing the ICC; second, the Judicial Cooperation Agreement between the DRC and the Office of the Prosecutor of the ICC and, lastly, the memorandum of understanding between the United Nations (UN) and the ICC concerning cooperation between the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC)<sup>14</sup> and the ICC.

### 2.1 Rome Statute establishing the ICC

In the Preamble to the Rome Statute the parties affirm that measures at the national level should be taken to enhance international cooperation in order for the most serious crimes under the ICC's jurisdiction to be prosecuted and punished.<sup>15</sup> To achieve the commitment of state parties the Prosecutor in accordance with articles 54(3)(c) and (d) must seek the cooperation of any state and conclude arrangements that may facilitate such cooperation. Article 86 stipulates that state parties have the obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction, and article 89(1) provides that alleged perpetrators should be arrested and surrendered to the Court.

### 2.2 Judicial cooperation agreement between the DRC and the ICC

With regard to article 54(3)(c) of the Rome Statute the Minister of Justice and the Deputy Prosecutor, on behalf of the DRC and of the ICC, signed the judicial cooperation agreement on 6 October 2004. The purpose of the agreement is to facilitate cooperation and necessary assistance to the ICC's prosecution while conducting investigations and prosecutions within the territory of the DRC (article 1). In this regard the office of the President of the DRC instructed the Auditor-General of the armed forces to cooperate fully with the ICC's investigators in accordance with this agreement.<sup>16</sup> With respect to the business of the Court, the Court or the team conducting field

14 The United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC), currently the United Nations Organisation Stabilisation Mission in the DRC (MONUSCO).

15 Preamble to the Rome Statute of 17 July 1998, entered in force 1 July 2002, as amended in 2010.

16 Letter from the Office of the President CAB/PR/DC/0699/mac/2005 of 18 June 2005. See M Kabunda 'La coopération entre la CPI et la RDC: A l'épreuve de la pratique' in *Avocats Sans Frontières (ASF) Les 10 ans de la Cour Pénale Internationale: Bilan et Perspectives* (2012) 74.

investigations in the DRC must enjoy privileges and immunities necessary to fulfil their purpose (article 48).

### **2.3 Memorandum of understanding between the UN and the ICC concerning cooperation between MONUC and the ICC (Relationship Agreement)**

After signature of the peace agreement known as the Global and Inclusive Agreement by governmental officials, representatives of armed militia involved in armed conflicts in the DRC and representatives of civil society organisations in Pretoria, South Africa, on 17 December 2002, the United Nations Security Council (UNSC) through Resolution 1565 committed itself to assist the government of the DRC in the promotion and protection of human rights.<sup>17</sup> In this Resolution, particular emphasis was placed on support in the investigation of human rights violations in order to bring an end to impunity, and to cooperate with efforts to ensure that perpetrators of serious crimes are brought to justice.<sup>18</sup> In this regard, the assistance and support provided by paragraphs 1 and 4 to 5 of article 8 of the Relationship Agreement consist of providing aircraft passenger services or transportation in motor vehicles to staff and officials of the Court and to witnesses that are voluntarily cooperating with the Court. Moreover, article 9 provides that the UN Mission may provide military support to the ICC team conducting field investigations where military units are already deployed, and following a request by the ICC Prosecutor, article 10 provides that the team may have access to documents and information held by the UN Mission. According to article 11, the team conducting field investigations may also interview members of the UN Mission where there is good reason to believe that they may have information that cannot be obtained by other means, and may receive testimony by members of the UN Mission as provided for in article 12. In addition, with the written consent of the government of the DRC, article 13 stipulates that the UN Mission may assist the ICC Prosecutor to identify, trace and locate witnesses or victims other than its staff, as well as assist in the preservation of physical evidence for a limited period of time in secure rooms as provided for in article 15. However, according to article 20 it is the responsibility of the Court or the Prosecutor to obtain the prior written consent of the government of the DRC.

---

17 UNSC Resolution 1565 (2004), para 6(g) <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7DDRC%20SRES1565.pdf> (accessed 28 September 2015).

18 UNSC Resolution 1565 (n 17).



### 3 ICC's jurisdiction complementing the Congolese judicial system

In the aftermath of several internationalised armed conflicts, the judiciary of the DRC was unable (and still is)<sup>19</sup> to investigate and prosecute widespread gross violations of human rights and serious violations of international humanitarian law committed in the territory of the DRC. Mindful of this state of affairs,<sup>20</sup> in December 2002 delegates to the Inter-Congolese Dialogue<sup>21</sup> recommended that crimes committed in the DRC since independence (30 June 1960) during different armed conflicts be prosecuted by an *ad hoc* tribunal that should be created by the UNSC.<sup>22</sup> The request for the establishment of such a tribunal made by President Joseph Kabila of the DRC before the UN General Assembly in 2003 was not approved due to the high costs involved in both previous *ad hoc* tribunals of the former Yugoslavia and Rwanda.<sup>23</sup> As the UN was unwilling to establish the *ad hoc* tribunal, according to article 13(a) of the Rome

19 In dealing with widespread gross violations of human rights, no state would have adequate resources to deal with the prosecution of hundreds of thousands who have committed widespread crimes during a period of conflict as prosecutions often are expensive, time-consuming and divisive. Tunamsifu (n 10) 1.

20 The different armed conflicts had severely affected the Congolese courts and tribunals, some of which had been destroyed, and at that time judges were appointed through irregular processes and based on political considerations. See Tunamsifu (n 10) 151. Furthermore, 'the number of judges was far below the level needed to handle all the cases that could be referred to the courts'. See UN Doc A/HRC/8/4/Add.2.

21 Following art III19 of the agreement on cease-fire in the DRC signed in Lusaka in July 1999 (Lusaka Agreement), the Inter-Congolese Dialogue – political negotiations on the peace process and on transition – was convened on 25 February 2002 at Sun City, South Africa, after years of internationalised armed conflicts in which foreign armies were involved. Its purpose was to put an end to the conflicts, revive and consolidate a democratisation process and agree on a national reconciliation programme in the DRC. Various elements and entities were involved, such as the government of the DRC; the Congolese Rally for Democracy (RCD); the Movement for the Liberation of the Congo (MLC); the political opposition; civil society; the Congolese Rally for Democracy/Liberation Movement (RDC/ML); the Congolese Rally for Democracy/National (RCD/N); and the Mai-Mai. After 52 days at Sun City, delegates reached agreement on a cessation of hostilities; the integration of the opposing armed forces; reunification and reconstruction of the country; all-inclusive transitional government in a power-sharing, national reconciliation; and so forth. For details, see the Global and Inclusive Agreement on Transition in the DRC: Inter-Congolese Dialogue – Political negotiations on the peace process and on transition in the DRC.

22 See Resolution ICD/CPR/05 relating to the establishment of an International Criminal Court of the Global and Inclusive Agreement on Transition in the DRC.

23 The ICTY and the ICTR have played a crucial role in fighting impunity and have made an important contribution to the development of a rich jurisprudence. However, their annual budgets were rather high given the low number of cases processed. Therefore, the UNSG suggested that 'high priority should be given to consideration of the need to provide for an effective system for delivery of justice'. See Tunamsifu (n 10) 153; UNSC Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616).

Statute the DRC decided formally to refer the situation to the ICC on 19 April 2004.<sup>24</sup>

As stated in the Preamble and article 1 of the Rome Statute, the relationship between the ICC and national criminal jurisdictions is based on the principle of complementarity. However, as provided in article 17, the Court must determine the admissibility of the case if the state which has jurisdiction over it is unwilling or unable to prosecute the person concerned, unless the person has been tried for the conduct in another court where proceedings were conducted independently or impartially. Under the principle of complementarity, Sang-Hyun argues, 'the national judiciary of each state retains the right, and the primary duty, to investigate and prosecute grave violations of international humanitarian law'.<sup>25</sup> Thus, the ICC does not replace national jurisdictions, but enables them to prosecute cases in order to ensure sovereignty and takes advantage of the benefits of decentralised prosecution by states closest to the alleged crime and most directly affected by it.<sup>26</sup> In addition, Fisher argues that '[t]his arrangement aims to ensure that the international authority does not supersede the role of national authorities in the administration of criminal justice'.<sup>27</sup> Where national jurisdictions properly can investigate and prosecute offenders, the ICC Prosecutor had assessed that they are normally the most effective and efficient means of bringing offenders to justice since they normally have the best access to evidence and witnesses.<sup>28</sup>

In the case of the DRC the ICC complementing the Congolese judicial system remains fundamental because, at the domestic level, national criminal jurisdictions often are unable to adjudicate widespread international crimes due to the lack of means; the highly political and judicial influence that some alleged perpetrators bearing the greatest responsibility might have; the non-progressive reform of the justice sector; insufficient resources; the fragile peace situation; and so forth. In order to avoid the culture of impunity and to fight it in accordance with articles 12(2)(a) and (b), the ICC exercises its jurisdiction over the territorial principle or territorial jurisdiction (*ratione loci*) and the nationality principle or personal jurisdiction (*ratione personae*) for war crimes, crimes against humanity, genocide and crimes of aggression, as provided for in article 5.

24 SP Tunamsifu 'Transitional justice and peacebuilding in the Democratic Republic of the Congo' (2015) 65 *African Journal on Conflict Resolution* 15.1.

25 S Sang-Hyun 'Preventive potential of the International Criminal Court' (2013) 210 *Asian Journal of International Law* 3.

26 G Werle *Principles of international criminal law* (2009) 84.

27 KJ Fisher *Moral accountability and international criminal law: Holding agents of atrocity accountable to the world* (2012) 105.

28 ICC-OTP 'Paper on some policy issues before the Office of the Prosecutor' (2003) [http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf) (accessed 11 July 2014); L Raub 'Positioning hybrid tribunals in international criminal justice' (2009) 1090 *International Law Politics* 41/1013.

Twelve years after signature of the judicial cooperation agreement with the DRC under the principle of complementarity the ICC has focused its investigations in the district of Ituri and in both provinces of North and South Kivu where crimes listed in the Rome Statute were perpetrated by Congolese and foreign nationals who were members of armed groups or forces. Two accused were sentenced (Thomas Lubanga and Germain Katanga), while two others were acquitted (Mathieu Ngudjolo and Callixte Mbarushimana).<sup>29</sup> The trial of one of the accused, Bosco Ntaganda, which commenced in September 2015, closed in August 2018 and the accused is awaiting sentence.<sup>30</sup> At present one accused, Sylvestre Mudacumura, remains at large.<sup>31</sup> The cases of Ntaganda and Mudacumura will not be analysed since they have yet to be decided. The study focuses on the cases of Lubanga, Katanga, Ngudjolo and Ntaganda. The analysis consists of presenting both rebel leaders, their armed wings, crimes perpetrated under their leadership and their conviction by the Court.

### 3.1 Two cases sentenced: *Lubanga* and *Katanga*

Mr Thomas Lubanga was both the President of a rebel movement named *Union des Patriotes Congolais* or the Union of Congolese Patriots (UPC) and the commander-in-chief of the armed wing of the ethnic-based UPC called *Forces Patriotiques pour la Libération du Congo* or Patriotic Forces for the Liberation of Congo (FPLC). Although Lubanga and Katanga were operating in the same areas, the two belonged to different armed groups. Germain Katanga was the former leader of the *Front des Nationalistes et Intégrationnistes* (FNI) or National Integrationist Front and the commander-in-chief of the *Force de Résistance Patriotique en Ituri* (FRPI) or Patriotic Resistance Force in Ituri. Crimes they had committed in these areas and the fact that victims were almost the same united the fate of the two former militia men.

The FPLC was allegedly involved in the conscription of children under 15 years of age in order actively to participate in the conflicts and to serve as Lubanga's bodyguards and as ranked military leaders.

29 *The Prosecutor v Callixte Mbarushimana* [2011] ICC-01/04-01/10-465-Red paras 14-16 & 134.

30 'Ntaganda case: *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06' 2018 <https://www.icc-cpi.int/drc/ntaganda> (accessed 20 October 2018).

31 It is important to note that both Mr Callixte Mbarushimana and Mr Sylvestre Mudacumura are Rwandan nationals alleged to have committed crimes listed in the Rome Statute on the territory of the DRC. Mr Callixte was the Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda* or Democratic Forces for the Liberation of Rwanda (FDLR). The FDLR is a Hutu armed group which over time consisted of Rwandan refugees in the DRC, especially some members of the former *Forces Armées Rwandaises* or Armed Forces of Rwanda (ex-FAR) and militias (*Interahamwe*), implicated in the genocide of 1994 in Rwanda as well as exiled Rwandans seeking political change in Rwanda. Mr Sylvestre was the Supreme Commander of the armed wing of the FDLR during the relevant period. For more, see *The Prosecutor v Callixte Mbarushimana* (n 29) para 3 and *The Prosecutor v Sylvestre Mudacumura* [2012] ICC-01/04-01/12-1-Red para 29.

In addition to this, other crimes such as murder, rape, torture, looting and destruction of property were committed under his leadership.<sup>32</sup> Such a range of international crimes, although similar as regards victims and effects, differed slightly from those allegedly committed by the FRPI. The FRPI was alleged to have indiscriminately attacked the village of Bogoro and to have conscripted children under the age of 15 years to fight in the conflict.<sup>33</sup>

Lubanga and Katanga were both found guilty by the Court, although on different counts and committed during different periods. On 14 March 2012, pursuant to article 74(2) of the Statute, Lubanga was found guilty as co-perpetrator of the crimes of conscripting and enlisting children under the age of 15 years into the UPC/FPLC and using them to participate actively in conflicts in Ituri.<sup>34</sup> Katanga was convicted on 7 March 2014 of being an accessory to four counts of war crimes (murder; attacking the civilian population that did not participate in the hostilities; the destruction of enemy property; and pillaging) and one crime against humanity, that of murder, but was not found guilty of the other crimes.<sup>35</sup> As far as sentence is concerned, on 10 July 2012 Lubanga was sentenced to a total of 14 years' imprisonment<sup>36</sup> and on 23 May 2014 Katanga was sentenced to a total of 12 years' imprisonment.<sup>37</sup> On 19 December 2015, in accordance with article 103 of the Rome Statute, Lubanga and Katanga were transferred to Kinshasa to serve the rest of their sentences of imprisonment in Makala Central Prison,<sup>38</sup> but the time spent in detention at the ICC was deducted from their sentences.

These two cases are worthy of analysis as part of this study for three main reasons. First, they demonstrate a willingness to put an end to impunity instead of leaving crimes committed unpunished. Second, the conviction of perpetrators contributes to the deterrence aimed at preventing international crimes. Third, as a state party the DRC government was the first to refer the situation of crimes committed in its territory to the ICC since 1 July 2002. Under the judicial cooperation agreement Lubanga and Katanga were the first and second rebel leaders brought before the Court for various crimes committed in the armed conflict under their leadership. However, it is unfortunate that the Court did not focus on the ethnic aspect of

32 *The Prosecutor v Thomas Lubanga Dyilo* [2012] ICC-01/04-01/06-2842 paras 29, 54, 65 & 56.

33 *The Prosecutor v Germain Katanga* [2007] ICC-01/04-01/07-1-US-tENG para 5; *The Prosecutor v Mathieu Ngudjolo Chui* [2007] ICC-01/04-02/07-1-tENG SL PT para 5.

34 *The Prosecutor v Thomas Lubanga Dyilo* (n 32) paras 1588 & 1358.

35 *The Prosecutor v Germain Katanga* [2014] ICC-01/04-01/07-3436 Summary of Trial Chamber II's judgment of 7 March 2014 pursuant to art 74 of the Statute, paras 29-30.

36 *The Prosecutor v Thomas Lubanga Dyilo* [2012] ICC-01/04-01/06-2901 para 107.

37 *The Prosecutor v Germain Katanga* [2014] ICC-01/04-01/07-3484 para 170.

38 AFP, [https://www.lexpress.fr/actualites/1/monde/cpi-lubanga-et-katanga-transfere-en-rdcongo-pour-purger-leurs-peines\\_1747427.html](https://www.lexpress.fr/actualites/1/monde/cpi-lubanga-et-katanga-transfere-en-rdcongo-pour-purger-leurs-peines_1747427.html) (accessed 11 October 2016).

conflict but also on the criminal responsibility of foreign military commanders from Rwandan and Ugandan armies involved in the armed conflict. In the *Lubanga* case it was imperative that the accused be held accountable for other crimes such as murder, rape, torture, looting and destruction of property which were committed under his leadership in the attacks carried out by UPC/FPLC against the Lendu.<sup>39</sup> In the *Katanga* case it is unfortunate that the Court acquitted the accused on three counts of war crimes (rape and sexual slavery, and using children under the age of 15 years actively to participate in hostilities) and two crimes against humanity, namely, those of rape and sexual slavery.<sup>40</sup>

### 3.2 Two cases acquitted: *Ngudjolo* and *Mbarushimana*

Unlike the previous cases where the two accused were Congolese nationals and crimes were committed in the same area (Ituri), the *Ngudjolo* and *Mbarushimana* cases present differences. First, *Ngudjolo* is a Congolese former rebel leader of the *Front des Nationalistes et Intégrationnistes* (FNI) or National Integrationist Front commanding the *Force de Résistance Patriotique en Ituri* (FRPI) or Patriotic Resistance Force in Ituri while *Mbarushimana* is a Rwandan national and Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda* or Democratic Forces for the Liberation of Rwanda (FDLR), a Rwandan armed group operating in the DRC. Second, *Ngudjolo* was prosecuted for crimes against humanity and war crimes during the attack on Bogoro on 24 February 2003 while *Mbarushimana* allegedly committed war crimes and crimes against humanity in the Kivu Provinces in the DRC.<sup>41</sup> Third, the FNI and FRPI are armed groups consisting of Congolese nationals and led by *Ngudjolo*, while the FDLR is made up of former members of the Rwandan Armed Forces (ex-FAR) and militias (*Interahamwe*) who are notoriously known for having committed the 1994 Rwandan genocide.<sup>42</sup> Lastly, the area of operation also differed since the FNI and FRPI were located in Ituri and FDLR is active in Kivu.

In both cases the prosecution had not proven beyond reasonable doubt that both accused committed the alleged crimes or contributed to those crimes. Therefore, on 17 December 2011 the Court declined by majority to confirm the charges against *Mbarushimana*,<sup>43</sup> and on 23 December 2011 he was released from the ICC's custody.<sup>44</sup>

39 *The Prosecutor v Thomas Lubanga Dyilo* [2012] ICC-01/04-01/06-2879 para 23.

40 *Katanga* Summary of Trial Chamber II's judgment (n 35) paras 29-30.

41 *The Prosecutor v Callixte Mbarushimana* (n 29) paras 6 & 13.

42 *The Prosecutor v Callixte Mbarushimana* para 3.

43 *The Prosecutor v Callixte Mbarushimana* paras 14-16 & 134.

44 As above.

Ngudjolo was also found not guilty by the Court and was acquitted of all charges against him on 18 December 2012.<sup>45</sup> On 20 December the office of the Prosecutor appealed the verdict of the Chamber, but the following day he was released from custody.<sup>46</sup> On 27 February 2015 the Appeals Chamber confirmed the acquittal of Ngudjolo.<sup>47</sup>

Both cases are important for three reasons: First, they reveal much criticism of the method used by the office of the Prosecutor to conduct its field investigations. Second, the *Mbarushimana* case demonstrates that crimes listed in the Rome Statute perpetrated on the territory of the DRC by nationals of a non-state party will not go unpunished. Third, the silence of the Prosecutor regarding several international crimes committed by Congolese rebel leaders in both North and South Kivu provinces is unfortunate.

In the *Ngudjolo* case the team of the Prosecutor conducting field investigations failed to prove the charges against him due to security problems as militias were still active in the region. As Bogoro remained unsecured, the Prosecutor could have postponed the trial awaiting the stabilisation of areas where crimes were committed in order to investigate and obtain evidence of those crimes.

The case of *Mbarushimana* is interesting as the accused is a citizen of Rwanda which is not a state party to the Rome Statute. Thus, the ICC exercised jurisdiction based on articles 12(2)(a) and (b) of the Statute. In this case, crimes were committed against Congolese civilians in the DRC and the accused was arrested in France (both the DRC and France are state parties). Therefore, regardless of their nationality, the Prosecutor has the duty to prosecute foreigners who bear the greatest responsibility for the crimes committed in the eastern part of the DRC based on the territorial principle. Thus, in order for the office of the Prosecutor to have a good understanding of crimes committed in the Kivu Provinces and elsewhere, this article

---

45 *The Prosecutor v Mathieu Ngudjolo Chui* [2012] ICC-01/04-02/12-3-tENG 197. Seven counts of war crimes were brought against Ngudjolo, namely, using children under the age of 15 to take active part in the hostilities; directing an attack against a civilian population as such or against individual civilians not taking part in hostilities; wilful killing; destruction of property; pillaging; sexual slavery; and rape. The three counts of crimes against humanity included murder, rape and sexual slavery. These charges were first confirmed by Pre-Trial Chamber I on 30 September 2008. *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* [2008] ICC-01/04-01/07 210-212.

46 From the ICC press release it can be read that '[j]udges found that the prosecution had not proved beyond reasonable doubt that Mathieu Ngudjolo Chui was responsible for the crimes committed during the attack. The Office of the Prosecutor has appealed the verdict. The Chamber also ordered the immediate release of Mathieu Ngudjolo Chui following his acquittal. On 20 December 2012, the Appeals Chamber rejected the Office of the Prosecutor's request to keep Mathieu Ngudjolo Chui in custody until the Chamber decides on its appeal of the immediate release decision.' ICC-CPI-20121221-PR868 <https://www.icc-cpi.int/Pages/item.aspx?name=pr868> (accessed 28 May 2018).

47 ICC-CPI-20150227-PR1089 [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1089.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1089.aspx) (accessed 25 March 2015).

strongly encourages its officials to travel to the DRC for field investigations.

## 4 Perceptions of the Congolese population regarding the ICC's jurisdiction complementing the Congolese judicial system

With the help of the interview guide, key informants were asked to reflect on what they thought about the ICC's jurisdiction over international crimes committed in the DRC, the collaboration and complementarity between the ICC and the national system. Responses from participants reveal four major trends: first, that there is complementarity between the ICC and the Congolese judicial system; second, that the ICC undertakes selective prosecutions; third, that the ICC's proceedings are too slow; and, lastly, that there is no retroactivity for crimes committed before the entry into force of the Rome Statute.

### 4.1 Complementarity

Thirteen key informants<sup>48</sup> and participants in focus group #1FG<sup>49</sup> said that the ICC's jurisdiction over international crimes and its complementarity to the Congolese judicial system was well appreciated as it brought some relief in the fight against impunity considering the lack of political will on the part of the DRC government to prosecute alleged perpetrators. For example, key informant #29 remarked that

the complementarity of the ICC to the Congolese judicial system is significant because it alleviates the immunities and privileges of alleged perpetrators who were promoted in public institutions. Thus, the ICC has annihilated the political weight that can be carried internally.

Key informant #14 also noted that the intervention of the ICC in the DRC was normal as the DRC is a member state to the Rome Statute. Unfortunately, the DRC government failed to arrest and transfer General Bosco Ntaganda following the fourth ICC arrest warrant against him, arguing that to arrest him would jeopardise peace efforts in the Kivu region. That is why President Kabila invoked the reason of

---

48 Key informant #03 interviewed in Bukavu on 20 December 2013; #06 interviewed in Uvira on 22 December 2013; #08 interviewed in Kaniola on 23 December 2013; #10 interviewed in Uvira on 3 January 2014; #11 interviewed in Bunia on 20 January 2014; #14 interviewed in Bunia on 21 January 2014; #16 interviewed in Bunia on 22 January 2014; #17 interviewed in Bunia on 22 January 2014; #19 interviewed in Bunia on 24 January 2014; #20 interviewed in Kisangani on 29 January 2014; #24 interviewed in Kisangani on 1 February 2014; #29 interviewed in Kinshasa on 28 March 2014.

49 Focus Group discussion #1FG held in Bunia on 20 January 2014.

there being a difficult choice between justice and peace, stability and security in Eastern Congo, his choice was to prioritise peace.<sup>50</sup>

However, the population is concerned about the techniques employed by the ICC to conduct field investigations that result in a lack of evidence against alleged perpetrators and, therefore, unconfirmed charges. In order to obtain sufficient evidence, the team of the Prosecutor should ensure that field investigations are conducted where crimes are alleged to have been committed.

Furthermore, key informant #25 argued that

with only one Prosecutor for all the countries, the ICC will not be able to prosecute all individuals bearing the greatest responsibility in the DRC. Thus, under the principle of complementarity, it is appropriate for Congolese courts that have the first responsibility to commit themselves and prosecute other alleged criminals.<sup>51</sup>

Elements of such a statement were outlined in the letter the ICC Prosecutor sent to President Joseph Kabila on 25 September 2003.<sup>52</sup>

Since the International Criminal Court will not be in a position to try all the individuals who may have committed crimes under its jurisdiction in Ituri, a consensual division of labour could be an effective approach. We could prosecute some of those individuals who bear the greatest responsibility for the crimes committed, while national authorities, with the assistance of the international community, implement appropriate mechanisms to deal with others. This would send a strong sign of the commitment of the Democratic Republic of the Congo to bring to justice those responsible for these crimes. In return, the international community may take a more resolved stance in the reconstruction of the national judicial and in the re-establishment of the rule of law in the Democratic Republic of the Congo.

Indeed, as stated in the Preamble and article 1 of the Rome Statute, the relationship between the ICC and national criminal jurisdictions is based on the principle of complementarity. Nevertheless, many critics faulted the method used by the office of the Prosecutor to conduct its field investigations. The team conducting the field investigation in Eastern DRC failed due primarily to security problems as militias were still active in the region, gunshots could constantly be heard, and the team could not conduct any investigation outside the city of Bunia which was under the protection of the UN Mission.<sup>53</sup> Even after Bunia became stable, further field investigations were not conducted.

Findings from the field work further reveal that the ICC's jurisdiction over international crimes and its complementarity to the

50 SP Tunamsifu 'The challenges of the obligation to co-operate between the ICC and the DR Congo: The case of the fourth arrest warrant against General Bosco Ntaganda' (2012) 1 *The A38 Journal of International Law*.

51 Key informant #25 interviewed in Kinshasa on 18 February 2014.

52 P Kalume Kambale 'A story of missed opportunities: the role of the International Criminal Court in the Democratic Republic of Congo' in C de Vos, S Kendall & C Stahn (eds) *Contested justice: The politics and practice of International Criminal Court interventions* (2015) 177.

53 See C Buisman 'Delegating investigations: Lessons to be learned from the *Lubanga* judgment' (2013) 34 *Northwestern Journal of International Human Rights* 11.



Congolese judicial system reinforce the immunities and privileges enjoyed by alleged perpetrators that had been appointed to public institutions. The findings also corroborate article 1 of the Rome Statute and the views of Song Sang-Hyun that applying the principle of complementarity to the national criminal jurisdictions is fundamental, but does not replace national jurisdictions. Regarding the conduct of the ICC during field investigations, Buisman argues that concern about security in the affected areas was the principal reason for outsourcing the investigation.<sup>54</sup>

Thus, the researcher is of the opinion that the ICC's jurisdiction over the cases due to unwillingness to prosecute on the local level is an alternative mechanism in the fight against impunity. However, the investigative failures on the part of the team of the office of the Prosecutor deprive the Court of sufficient evidence, causing victims that expected the alleged perpetrators to be convicted to appear defeated.

## 4.2 Selective prosecution

According to 11 key informants<sup>55</sup> and participants in focus group #2FG<sup>56</sup> the ICC is selective because it prosecuted some perpetrators and freed others (mostly the leaders), and limited its action to crimes committed in Ituri and ignored those committed by domestic armed groups in the Kivu provinces. For example, participants in focus group #2FG said:

The ICC is selective because it has not prosecuted alleged criminals bearing greatest responsibility who were promoted in the public institutions including former Vice President Azarias Ruberwa, and Rwandan and Ugandan militaries including their respective generals Kabarebe and Kazini.

Similarly, participants in focus group #3FG believed that '[t]he ICC is selective and it has prosecuted on ethnic basis in Ituri, but in Kivu provinces prosecutions are directed against Rwandan rebels while Congolese rebels have not yet been prosecuted as is the case of

54 Buisman (n 53) 33 70.

55 Key informant #03 interviewed in Bukavu on 20 December 2013; #05 interviewed in Uvira on 21 December 2013; #06 interviewed in Uvira on 22 December 2013; #12 interviewed in Bunia on 21 January 2014; #15 interviewed in Bunia on 22 January 2014; #18 interviewed in Bunia on 23 January 2014; #19 interviewed in Bunia on 24 January 2014; #21 interviewed in Kisangani on 30 January 2014; #22 interviewed in Kisangani on 31 January 2014; #27 interviewed in Kinshasa on 6 March 2014; Focus group #3FG held in Kinshasa on 6 March 2014

56 Focus Group discussion #2FG held in Kisangani on 30 January 2014.

Laurent Nkunda<sup>57</sup> and Azarias Ruberwa,<sup>58</sup> etc'. Key informant #25 explained:

The ICC's Prosecutor decided to begin investigations in Ituri due to the gravity of the crimes committed there. However, the Congolese courts must be encouraged to prosecute alleged perpetrators because the ICC's Prosecutor will not be able to prosecute all individuals bearing the greatest responsibility of crimes committed in the DRC.

Almost all armed conflicts started in the provinces of North and South Kivu where hundreds of local and foreign armed groups operate (and some still do) that have experienced the most serious crimes of concern to all human kind. Peace agreements signed between warring parties allowed former rebel leaders to be promoted and granted important positions in the government as well as in the army and police forces. As no prosecution has as yet been undertaken against any former rebel leader the armed wing of which is alleged to have perpetrated serious human rights violations as well as gross violations of international humanitarian law, neglecting or delaying prosecution in both Kivu provinces is regarded as selective, on the one hand, and as impunity, on the other. Thus, peace agreements signed to end armed conflicts allowing the integration and promotion of former rebel leaders into public institutions are seen as an umbrella against prosecution at domestic and international levels.

The analysis of the field work reveals that the ICC is selective in its handling of cases because in the DRC it prosecuted some perpetrators and left others (presumably the leaders) untouched and limited its operations to crimes committed in Ituri and not those committed by Congolese warlords in the Kivu provinces.

On that basis, the researcher is of the opinion that findings from the fieldwork in the DRC demonstrate that prosecutions are selective because the ICC focused mainly on Ituri and has not yet carried out serious prosecutions of former Congolese warlords or officials who are now integrated into and promoted within public institutions and are

---

57 Under Nkundun military leadership, the armed wing of the CNDP is alleged to have committed various crimes in South and North Kivu provinces. In South Kivu these include pillage; the rape of women; mass killings; the destruction of economic infrastructures; and the burning of the Kadutu market in Bukavu. In North Kivu the crimes include an attack on Mugunga internally-displaced persons and mass killings in Kiwanja. See SP Tunamsifu 'International humanitarian law violations in the armed conflict in eastern part of DR Congo: The case of the National Congress for the Defence of People' (2013) 1 *The A38 Journal of International Law* 247-250.

58 Mr Azarias Ruberwa is an alleged rebel leader of the former Congolese Rally for Democracy Goma faction (RCD) created on 2 August 1998 backed by Rwanda. Among the crimes listed in the Rome Statute, it is alleged that from mid-July 2002 to the installation of a transitional government in June 2003, various crimes were committed by the former combatants of the RCD-Goma. These include widespread acts of sexual violence for long periods; extra-judicial killings; and widespread looting in Kisangani and in North and South Kivu provinces. See Human Rights Watch 'Seeking justice: The prosecution of sexual violence in the Congo' Vol 17, No 1(A) and Human Rights Watch 'War crimes in Kisangani: The responses of Rwandan-backed rebels to the May 2002 mutiny' Vol 14, No 6 2002.

alleged to be perpetrators of crimes committed in the Kivu provinces. However, even in the Ituri district no arrest warrant has been issued for Ugandan and Rwandan soldiers who are alleged to have committed crimes during the internationalised armed conflicts in Ituri. No effort has yet been made at the local level, but the principle of complementarity would work better if the prosecution targeted perpetrators from all sides of the conflicts in provinces affected by conflict.

### 4.3 Delay in proceedings

Six key informants<sup>59</sup> and participants in focus group #1FG noted that the achievement of the ICC was below the expectations of the population due to the prolonged nature of the proceedings. For example, participants in focus group #1FG remarked that '[t]he jurisdiction of the ICC is in order because the DRC is a state party to the Rome Statute, but the population is concerned about the slowness of proceedings and the longer trials'. Key informant #05 also noted that '[t]he ICC is too slow and this slowness worries victims because since 2002 it has prosecuted very few perpetrators only one of which was convicted; Mr Thomas Lubanga'.

Several authors have criticised the slow pace of ICC proceedings as well as the delay of the Appeals Chamber in issuing judgments. The fact that proceedings often are too slow and the trials prolonged have disappointed victims awaiting the conviction of their persecutors and for reparations. Thus, the ICC must make an effort to prevent further delays in proceedings and avoid long trials in order to restore the credibility of the Court and to avoid frustration on the part of victims.<sup>60</sup>

Findings from the fieldwork also reveal that the Congolese population is concerned about the slow pace of proceedings and the prolonged trials. This finding corroborates the observation of a

59 Key informant #05 interviewed in Uvira on 21 December 2013; #11 interviewed in Bunia on 20 January 2014; #12 interviewed in Bunia on 21 January 2014; #13 interviewed in Bunia on 21 January 2014; #16 interviewed in Bunia on 22 January 2014; #26 interviewed in Kinshasa on 21 February 2014.

60 BLE Luzolo & MNA Bayona *Manuel de Procédure Pénale* (2011) 759; BM Rowe & V Steger 'The International Criminal Court: A case for conservatives' (2014) 8 [http://www.amicc.org/docs/A\\_Case\\_for\\_Conservatives\\_\(July\\_2014\).pdf](http://www.amicc.org/docs/A_Case_for_Conservatives_(July_2014).pdf) (accessed 20 August 2015); D Mihajlov 'Dr Alina Ioana Szabó (née Apreotesei): The International Criminal Court: Starting with Africa' (2011) 8 *Miskolc Journal of International Law* 33; International Bar Association *Enhancing efficiency and effectiveness of ICC proceedings: A work in progress* (2011) 19; M Laborde-Barbanègre & R Cassehari 'Reflections on ICC jurisprudence regarding the Democratic Republic of the Congo: Drawing lessons from the Court's first cases' 1 <https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-ICCReflections-2014.pdf> (accessed 15 August 2015); War Crimes Research Office (WCRO) 'Expediting proceedings at the International Criminal Court' 48 50-51 <https://www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf> (accessed 15 August 2015); Avocats sans Frontières 'Modes of participation and legal representation' 14 [http://www.asf.be/wp-content/uploads/2013/11/ASF\\_IJ\\_Modes-of-participation-and-legal-representation.pdf](http://www.asf.be/wp-content/uploads/2013/11/ASF_IJ_Modes-of-participation-and-legal-representation.pdf) (accessed 15 August 2015).

number of authors such as Rowe and Steger, Mihajlov, Laborde-Barbanègre and Cassehgari, and of the War Crimes Research Office, confirming the issue of the slow pace of proceedings of the ICC as well as of the Appeals Chamber to issue its judgments.

The researcher is of the opinion that the frustration of the millions of victims (compared to the hundreds of thousands of perpetrators) with the delay in proceedings and trials is understandable. If the ICC does not expedite its proceedings and trials, many victims are likely to have died before a final verdict is reached in their case.

#### 4.4 Non-retroactivity

According to six key informants,<sup>61</sup> the ICC does not have retroactive jurisdiction for crimes committed in the DRC before the entry into force of the Rome Statute. For example, key informant #19 confirmed that '[t]he Congolese population welcomed the investigation of the ICC, however the population deplores the fact that it will not have retroactive jurisdiction for crimes that were committed before its entry into force in the DRC'.

Article 24 of the Rome Statute provides:

- (1) No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
- (2) In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

The analysis of the fieldwork shows that the population deplores the fact the ICC does not have retroactive jurisdiction for crimes committed in the DRC before the entry into force of its Statute. This finding corresponds with article 24 of the Rome Statute which guarantees the principle of non-retroactivity *ratione personae*. The principle implies that the ICC has jurisdiction only over crimes committed after the entry into force of the Rome Statute on 1 July 2002.

This research notes that respondents are aware that according to article 24 of the Rome Statute the Court cannot exercise jurisdiction over any crime committed before 1 July 2002. It is suggested that a hybrid tribunal be established that would have jurisdiction over crimes committed before July 2002 in the DRC in which Congolese and non-state actors from neighbouring countries have been involved.

---

61 Key informant #19 interviewed in Bunia on 24 January 2014; #21 interviewed in Kisangani on 30 January 2014; #23 interviewed in Kisangani on 30 January 2014; #24 interviewed in Kisangani on 1 February 2014; #26 interviewed in Kinshasa on 21 February 2014; #27 interviewed in Kinshasa on 6 March 2014.

## 5 Conclusion and recommendations

Serious violations of human rights and of international humanitarian law were committed in the DRC during different phases of internationalised armed conflicts involving state and non-state actors (Congolese and foreign). Affected by the long regime of dictatorship and the various armed conflicts, the judiciary was unable to deal with the large number of perpetrators of crimes related to different armed conflicts.

It is the primary responsibility of the state to investigate and prosecute crimes. However, as the judiciary was already ailing in the aftermath of the various internationalised armed conflicts in which widespread crimes were committed, the situation of crimes committed in the territory of the DRC was referred to the ICC. Under the principle of complementarity the ICC prosecuted a few cases which represented an important breakthrough in the fight against impunity, but it was unable to prosecute the numerous perpetrators that bear the greatest responsibility for the crimes relating to the different armed conflicts. Thus, 12 years since the judicial cooperation agreement was reached the ICC's jurisdiction over international crimes and its complementarity to the Congolese judicial system is appreciated by the population considering the lack of political will on the part of the government to prosecute alleged perpetrators, mainly the former several high-ranking rebel leaders who were integrated into and promoted in public institutions.

However, the ICC has been criticised for prosecuting some perpetrators and freeing others (mostly the leaders), and for the fact that no action has been taken against Ugandan and Rwandan soldiers who allegedly committed serious crimes during the different internationalised armed conflicts. This practice was regarded as selective justice. The ICC's proceedings are believed to be of a prolonged nature with the result that the achievements of the ICC are below the expectations of the population.

The study, therefore, recommends that the ICC should avoid selective justice in prosecuting people bearing the greatest responsibility. The fact that proceedings often are too slow and the trials prolonged have disappointed victims awaiting the conviction of their persecutors and for reparations. Thus, the ICC must make an effort to prevent further delays in proceedings and avoid long trials in order to meet Congolese expectations, restore its credibility, and avoid frustration on the part of victims.

### List of participants (key informants and focus groups)

- Participants in the focus group #1FG held in Bunia on 20 January 2014. Staff of at Réseau Haki na Amani in Bunia. Gender: F: 3, M: 2
- Participants in the focus group #2FG held in Kisangani on 30 January 2014. Focus group with the Comité du fond de solidarité des victimes de guerre de six jours à Kisangani. Gender: F: 2, M: 10

- Participants in the focus Group discussion #3FG held in Kinshasa on 6 March 2014. Staff of the International Center for the Transitional Justice in Kinshasa. Gender: F: 1, M: 2
- Key informant #01 interviewed in Goma on 17 December 2013. Staff of Association du Barreau Américain à Goma. Gender: M: 2
- Key informant #02 interviewed in Goma on 18 December 2013. Member of the Coordination Provinciale de la société civile du Nord Kivu à Goma. Gender: M: 1
- Key informant #03 interviewed in Bukavu on 20 December 2013. Person at Hôpital Général de Panzi à Bukavu. Gender: M: 1
- Key informant #04 interviewed in Bukavu on 20 December 2013. Member of the Coordination Provinciale de la société civile du Sud-Kivu. Gender: M: 1
- Key informant #05 interviewed in Uvira on 21 December 2013. Staff of Genre actif pour un devenir meilleur de la femme (GAD) in Uvira. Gender: F: 1
- Key informant #06 interviewed in Uvira on 22 December 2013. Staff of the entity Village de Makobola in Uvira. Gender: M: 1
- Key informant #07 interviewed in Kaniola on 23 December 2013. Staff of the Paroisse Reine de tous les Saints de Kaniola à Bukavu. Gender: M: 1
- Key informant #08 interviewed in Kaniola on 23 December 2013. Staff of the Bureau d'écoute Justice et Paix at the Paroisse Reine de tous les Saints de Kaniola in Bukavu. Gender: F: 1
- Key informant #09 interviewed in Burhale on 23 December 2013. Staff of the Paroisse Saint Jean Apôtre de Burhale à Bukavu. Gender: M: 1
- Key informant #10 interviewed in Uvira on 3 January 2014. Staff of the Cadre de Concertation inter-ethnique de Uvira. Gender: M: 1
- Key informant #11 interviewed in Bunia on 20 January 2014. Staff of Caritas Bunia. Gender: M: 1
- Key informant #12 interviewed in Bunia on 21 January 2014. Staff of Association des Mamans Anti Bwaki de Bunia and former Commissioner of the Commission Vérité et Réconciliation in the DRC. Gender: F: 1
- Key informant #13 interviewed in Bunia on 21 January 2014. Staff of Ecole de la Paix des Missionnaires d'Afrique in Bunia. Gender: M: 1
- Key informant #14 interviewed in Bunia on 21 January 2014. Staff of Coopération Internationale in Bunia. Gender: M: 1
- Key informant #15 interviewed in Bunia on 22 January 2014. Staff of the Centre de recherche de l'Institut Supérieur Pédagogique de Bunia. Gender: M: 1
- Key informant #16 interviewed in Bunia on 22 January 2014. Staff of Justice Plus in Bunia. Gender: M: 1
- Key informant #17 interviewed in Bunia on 22 January 2014. Representative of the Hima community of Bunia. Gender: M: 1
- Key informant #18 interviewed in Bunia on 23 January 2014. Member of the Coordination de la Société civile de Bunia. Gender: M: 1
- Key informant #19 interviewed in Bunia on 24 January 2014. Person representing Lendu community of Bunia. Gender: M: 1
- Key informant #20 interviewed in Kisangani on 29 January 2014. Staff of Congo en Images in Kisangani. Gender: M: 1
- Key informant #21 interviewed in Kisangani on 30 January 2014. Staff of Actions et Réalisations pour le Développement de Kisangani. Gender: M: 1
- Key informant #22 interviewed in Kisangani on 31 January 2014. Member of the Coordination Provinciale de la société civile de Kisangani. Gender: M: 1

- Key informant #23 interviewed in Kisangani on 30 January 2014. Staff of the Commission Justice et Paix de la Province Orientale. Gender: M: 1
- Key informant #24 interviewed in Kisangani on 1 February 2014. Staff of Union pour le développement de la Province Orientale. Gender: M: 1
- Key informant #25 interviewed in Kinshasa on 18 February 2014. Staff of the Bureau de la représentation de la CPI à Kinshasa. Gender: M: 1
- Key informant #26 interviewed in Kinshasa on 21 February 2014. Staff of Coalition pour la CPI à Kinshasa. Gender: M: 1
- Key informant #27 interviewed in Kinshasa on 6 March 2014. Member of la Nouvelle Société civile Congolaise à Kinshasa. Gender: M: 1
- Key informants #28 interviewed in Kinshasa on 25 March 2014. Staff of the Parquet Général de la République in Kinshasa. Gender: M: 1
- Key informants #29 interviewed in Kinshasa on 28 March 2014. Staff of Haute Cour Militaire à Kinshasa. Gender: M: 1

To cite: Y Meyer 'The effectiveness of market-based initiatives for regulating development projects by multinational corporations in Africa with regard to human rights and environmental abuses' (2019) 19 *African Human Rights Law Journal* 126-150  
<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a7>

## The effectiveness of market-based initiatives for regulating development projects by multinational corporations in Africa with regard to human rights and environmental abuses

Yolandi Meyer\*

Post-Doctoral Research Fellow, South African Research Chair in International Law, University of Johannesburg, South Africa  
<https://orcid.org/0000-0003-2367-6516>

### Summary

*This article analyses market-based initiatives for ensuring compliance by multinationals in Africa with specific standards, such as standards established by international financial institutions such as the International Finance Corporation, the World Bank as well as the Equator Principles and self-regulatory standards incorporated by multinationals into their operations. These initiatives are described as market-related initiatives because non-compliance could have a direct effect on a corporation's social licence to operate or its economic position in the international market. In other words, in general these initiatives involve measures that are voluntary and, strictly speaking, are not legally required, but which are complied with by corporations because of possible negative consequences associated with non-compliance. The initiatives discussed in this article include voluntary corporate social responsibility standards. The article further demonstrates how these initiatives possibly could be more effective in regulating multinational corporate activities on the continent as corporations generally seem more willing to comply with standards where non-compliance has a negative impact on the corporation's social and economic position.*

---

\* LLB LLM LLD (Pretoria); [ymeyer8@gmail.com](mailto:ymeyer8@gmail.com). The work is based on research supported by the National Research Foundation of South Africa (Grant No 85104).



**Key words:** *market-based initiatives; International Finance Corporation; World Bank; Africa; development*

## 1 Introduction

Under the initiatives by international financial institutions the article focuses on standards set by the World Bank, specifically the private sector-funding arm of the World Bank, the International Finance Corporation (IFC). International financial institutions, such as the IFC, aim to promote economic and social development in developing countries by funding private sector projects.<sup>1</sup> The presence and involvement of these institutions in developing countries can add legitimacy to projects and encourage additional private investment in various business ventures.<sup>2</sup> Investors generally believe that, if an entity such as the World Bank is involved in a project, certain minimum human rights standards apply and the risk of political and financial instability is significantly reduced.<sup>3</sup> The involvement of the World Bank can even be a precondition for the approval of a project by the major stakeholders, as was the case in the Chad-Cameroon Pipeline Project.<sup>4</sup> This Project is a good example of the complex relationship between the desire to foster successful and economically viable projects in Africa and the pressure from civil society and other groups that these projects abide by certain minimum standards. The Project involved the construction of a 1 070-kilometer pipeline, transporting crude oil from three different Chadian oil fields to an offshore floating facility, 11 kilometres off the coast of Cameroon.<sup>5</sup> In this case, external pressure forced investors such as the World Bank and the IFC to consider human rights implications, where previously they had refused to do so because of a conviction that such consideration would interfere in the political affairs of the host state and violate the Articles of Agreement which prohibit the consideration of factors of a political nature in the granting of a loan.<sup>6</sup> It is because of this external pressure that the private investors agreed to abide by certain minimum human rights standards.<sup>7</sup>

1 See International Finance Corporation *Our governance* [http://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/about+ifc\\_new/ifc+governance/ourgovernance](http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/ifc+governance/ourgovernance) (accessed 14 September 2017).

2 Catholic Relief Services *Bottom of the barrel: Africa's oil boom and the poor* (2003) 15.

3 As above; see also GH Uriz 'To lend or not to lend: Oil, human rights, and the World Bank's internal contradictions' (2001) 14 *Harvard Human Rights Journal* 198 where, in the context of the Chad-Cameroon Pipeline Project, the author describes the Bank as 'a lender and moral guarantor'.

4 Catholic Relief Services (n 2) 15.

5 Chad-Cameroon Pipeline Project Overview 1, <http://www.ifc.org/wps/wcm/connect/6f271e00487e8e09844ced51e3a7223f/ChadCamProjectOverview.pdf?MOD=AJPERES> (accessed 20 November 2016).

6 Uriz (n 3) 200; see also secs 5 and 10 of the IBRD Articles of Agreement.

7 Uriz (n 3) 198.

However, in September 2008 the World Bank released a statement whereby it effectively ended its involvement in the Project. The Bank stated that during the course of the Project, the government of Chad had failed to comply with specific requirements in the loan agreement by not allocating funds to critical sectors as required by the agreement, such as education, infrastructure, health and rural development and governance. The Bank warned the government that its actions, or rather omissions, in this regard and its non-compliance with the loan agreement 'undermines the basis for the World Bank's involvement in the project'.<sup>8</sup> In 2008 the Chadian government repaid the *International Bank for Reconstruction and Development* (IBRD) and *International Development Association* (IDA) loans and officially ended the Bank's involvement in the Project.<sup>9</sup>

Notwithstanding the abundance of natural resources in some developing states, these states are severely dependant on foreign investment to fund resource extraction projects. Furthermore, multinationals and international financial institutions are vital to the process of establishing resource extraction operations and maintaining these projects to ensure the existence of a profitable venture that not only benefit the investors, but also contribute to economic and social development in the host country. However, multinationals and international financial institutions (IFIs) have a duty to ensure that their operations are in compliance with necessary human rights standards and ultimately contribute to a sustainable model of development. Standards established by IFIs and applicable to operations of multinationals in Africa could more effectively regulate corporate behaviour because of the fact that non-compliance will have severe consequences such as rescinding funding allocated for a project. Related to the activities of IFIs, the article also considers the Equator Principles as a possible regulatory hurdle with regard to the financing of projects. The article further considers self-regulatory measures such as incorporating corporate governance standards into a corporation's operations, and in this regard the article includes an assessment of the King IV principles and the UN Guiding Principles, which are widely incorporated by corporations on a domestic and global scale.

## 2 International Finance Corporation

The IFC is a member organisation of the World Bank. The World Bank is an intergovernmental organisation and a specialised agency of the United Nations (UN). It was established in 1944 as the International

---

8 World Bank 'World Bank statement on Chad-Cameroon Pipeline' Press release 2009/073/AFR 9 September 2008, [http://www.geosint.com/images/stories/geointelligence/study/exxon\\_project/WorldBank\\_Statement\\_Chad.pdf](http://www.geosint.com/images/stories/geointelligence/study/exxon_project/WorldBank_Statement_Chad.pdf) (accessed 22 November 2016).

9 As above.

Bank for Reconstruction and Development (IBRD) and it aimed to facilitate the reconstruction and development of post-war Europe.<sup>10</sup> Today the World Bank consists of the IBRD and the International Development Association (IDA), as well as other member organisations, including the IFC, the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). The Bank's mandate has evolved from focusing on reconstruction to improving economic and social development in developing countries, and also to alleviate poverty in these areas through development projects funded by the World Bank.<sup>11</sup> In this article mostly IFC standards are discussed, although many IFC standards are based on or draw inspiration from World Bank provisions regarding human rights and environmental protection.

With the emergence of the human rights discourse in the twentieth century it has become virtually impossible to avoid issues of human rights and environmental protection when discussing economic development. The human rights agenda has infiltrated almost every area of international law and, therefore, an effort will have to be made by international organisations to incorporate these considerations into their decision-making processes in a manner that remains consistent with the object and purpose of the organisation's existence. This necessity is true not only for international organisations such as the World Bank and the IFC, but also for economic entities such as multinationals. Market-based initiatives could be useful tools in ensuring that the activities of multinationals are kept to a certain standard.

In this regard a corporation's financial situation could be affected by not implementing these standards. This consequence could be an especially useful regulatory tool in the case of multinationals operating in Africa as regulating multinational corporate activity on the continent faces significant challenges. It especially can be difficult for African states to regulate corporate behaviour as these countries lack the institutional capacity or the political will to regulate multinational activities in their territory. This lack of will to regulate also could be due to a dependence on foreign investment. Therefore, it is imperative that host states as well as multinationals adhere to standards set by IFI's to ensure that certain regulations are adhered to in the host state which can be a more effective regulatory tool.

---

10 History of the World Bank, <http://www.worldbank.org/en/about/history> (accessed 17 October 2016); see also International Bank for Reconstruction and Development/World Bank *Development and human rights: The role of the World Bank* (1998) 3, <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/08DHR.pdf> (accessed 16 October 2016).

11 As above.

## 2.1 The International Finance Corporation and standards relating to the activities of multinational corporations

The IFC can be described as the private lending arm of the World Bank. Also, it is the 'largest global development institution focused exclusively on the private sector in developing countries'.<sup>12</sup> The IFC often finances large projects in the extractive industries sector in Africa. For example, in the last few fiscal years the IFC has funded a \$50 million oil exploration project in Kenya, a \$60 million gas exploration project in Tanzania and a \$2,83 million iron exploration project in Mozambique, to name a few.<sup>13</sup>

According to its Articles of Agreement, the purpose of the IFC is 'to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of the International Bank for Reconstruction and Development'.<sup>14</sup>

According to article 3, section 9 of the Articles of Agreement:<sup>15</sup>

The Corporation and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.

- 12 See 'About the IFC', [http://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/about+ifc\\_new](http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new) (accessed 17 October 2016); see also TE Lawson-Remer 'A role for the IFC in integrating environmental and human rights standards into core project covenants: Case study of the Baku-Tbilisi-Ceyhan Oil Pipeline Project' in O de Schutter (ed) *Transnational corporations and human rights* (2006) 393 401. See also E Morgera *Corporate accountability in international environmental law* (2009) 146 who described the IFC as a 'public sector institution committed to working with the private sector'.
- 13 See World Bank Group in Extractive Industries: 2016 Annual Review 29, <http://www.ifc.org/wps/wcm/connect/9703eec3-927a-49b6-ba33-9d8f4fd2ac63/WBG-in-Extractive-Industries-2016-Annual-Review.pdf?MOD=AJPERES> (accessed 10 January 2018); see also World Bank Group in Extractive Industries: 2014 Annual Review 25, <http://www.ifc.org/wps/wcm/connect/4a71b8004707be599bf1ff57143498e5/WBG+Extractive+Industries+Annual+Report+2014+FINAL.pdf?MOD=AJPERES> (accessed 12 January 2018).
- 14 Art 1 of the International Finance Corporation Articles of Agreement (2012). The IFC has also stated: 'Central to the IFC's development mission are its efforts to carry out investment and advisory activities with the intent to 'do no harm' to people and the environment, to enhance the sustainability of private sector operations and the markets they work in, and to achieve positive development outcomes. IFC is committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process, and that renewable natural resources are managed sustainably.' See International Finance Corporation's Policy on Environmental and Social Sustainability (2012) 2 [http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES) (accessed 12 November 2016). See also International Finance Corporation's Policy on Environmental and Social Sustainability (2006) para 8, <http://www.ifc.org/wps/wcm/connect/608f3a804942f69aaa86fe4f5d4ddda76e/SustainabilityPolicy.pdf?MOD=AJPERES> (accessed 14 November 2016).
- 15 Art 3, sec 9 of the International Finance Corporation Articles of Agreement (2012).

Environmental and social concerns, therefore, are not of primary importance to the IFC in deciding whether or not to approve a specific project for financing. The main consideration for project approval remains financial viability. If undue environmental or social harm would ensue, however, and such harm is prohibited in terms of the agreement, the project funding could be cancelled owing to non-compliance with procedures and standards as discussed below.<sup>16</sup>

Although the IFC was established in the 1950s it started considering the environmental impact of its financing operations only in the 1990s.<sup>17</sup> In 1989 the IFC established its first formal procedure to review the environmental impact of projects.<sup>18</sup> From 1990 onwards the IFC applied the 1988 World Bank Guidelines for evaluating projects.<sup>19</sup> Because World Bank guidelines were drafted mainly for governments, however, it became necessary to draft a new set of standards which would be tailored to private financing activities.<sup>20</sup>

This need for a new set of standards became especially evident in 1992 when the IFC approved finance for a project in Chile which involved the construction of a series of dams as part of a hydroelectric project which would be constructed by Endesa, a privatised electric company in Chile. At that time there were no environmental regulations in Chile and, therefore, the IFC standards were of great importance in ensuring compliance with environmental standards and to prevent human rights abuses.<sup>21</sup> For purposes of financing the project, the IFC utilised relevant World Bank directives as well as its own environmental review process. In 1995 various non-governmental organisations (NGOs) filed a request for inspection with the World Bank Inspection Panel, which oversees accountability of World Bank operations, claiming that the IFC had not complied with the relevant World Bank directives with regard to the Chilean project.<sup>22</sup> Although the request was declared inadmissible as the

---

16 Lawson-Remer (n 12) 407.

17 See Morgera (n 12) 148. According to Morgera, during the 1990s certain IFC projects garnered negative publicity owing to its impact on local communities, and consequently the IFC decided to incorporate environmental requirements in its contracts with clients.

18 See IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Report on the First Three Years of Application 1, [http://www.ifc.org/wps/wcm/connect/90f2d88046b63bdaa9f7abb254bf7d4/IFC\\_Third\\_Year\\_Report\\_PS\\_DP\\_.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/90f2d88046b63bdaa9f7abb254bf7d4/IFC_Third_Year_Report_PS_DP_.pdf?MOD=AJPERES) (accessed 19 September 2017).

19 As above; see also Morgera (n 12) 148.

20 Morgera (n 12) 147.

21 MA Orellana 'Indigenous peoples, energy, and environmental justice: The Pangué/Ralco Hydroelectric Project in Chile's Alto BioBio' (2004) 3 *Centre for International Environmental Law* [http://www.ciel.org/Publications/Ralco\\_Brief\\_22Jul04.pdf](http://www.ciel.org/Publications/Ralco_Brief_22Jul04.pdf) (accessed 31 October 2016).

22 As above; see also JD Hair *Pangué Hydroelectric Project (Chile): An independent review of the International Finance Corporation's compliance with applicable World Bank Group environmental and social requirements* (April 1997), <http://www.sdsg.org/wp-content/uploads/2010/02/Pangué-hydroelectric-project.pdf> (accessed 31 October 2016).

Inspection Panel does not have a mandate over IFC-funded projects,<sup>23</sup> the president of the World Bank at the time, James Wolfensohn, requested an independent review of the project by Jay Hair, the then president of the International Union for the Conservation of Nature (IUCN).<sup>24</sup> The Report provided:<sup>25</sup>

From an environmental and social perspective the IFC added little, if any, value to the Pangué Project. Its failure to adequately supervise this project – from beginning to end – significantly increased the business risks and diminished the public credibility for both the World Bank Group (particularly IFC) and its private sector partner. There is no indication at this time (April 1997) that IFC has in place the necessary institutional operating systems, or clarity in its policy and procedural mandate, to manage complicated projects such as Pangué in a manner that complies consistently with World Bank Group environmental and social requirements and recognised best practices.

The Report recommended that the IFC adopt clear standards to apply to its operations, whether they were the World Bank standards or standards specifically tailored to IFC operations.<sup>26</sup> The Report further stated that '[t]he IFC should develop and implement a comprehensive system of operational accountability and the institutional capacity to systematically assess, process, and effectively manage ... all IFC projects for environmental and social compliance'.<sup>27</sup> It stressed the importance not only of incorporating environmental and social commitments into investment agreements but also of ensuring that these standards were implemented, and that progress would be monitored with sufficient systems in place to analyse compliance.<sup>28</sup>

In this regard the Report stated:<sup>29</sup>

---

23 The Inspection Panel has a mandate over projects funded by the IBRD and IDA. Complaints about projects funded by the IFC and MIGA are referred to the Office of the Compliance Advisor Ombudsman (CAO). See The World Bank Inspection Panel <http://ewebapps.worldbank.org/apps/ip/PanellnBrief/English.pdf> (accessed 15 September 2017).

24 Orellana (n 21) 4.

25 Hair (n 22) 4.

26 The Report recommended that the 'IFC needs standards by which its performance can be measured. The World Bank Group's top management team must make a decision as to whether the World Bank Group's policies and directives for managing the environmental and social impacts of projects apply to the operation of the IFC. Assuming they do apply, that fact must be communicated clearly to the IFC staff so appropriate management systems and performance standards can be established, implemented and monitored. If some changes or adjustments in these policies are needed to make them fit IFC's mission, they should be made.' See Hair (n 22) 6.

27 Hair (n 22) 7.

28 As above.

29 Hair (n 22) 148. The report further stated: 'No aspect of our review of the Pangué Project was more troubling than the inability of IFC staff to articulate clearly what procedures it was to follow, whether the World Bank Group requirements were or were not guidelines applicable to IFC, what standards are used to ensure these requirements are met, or on what basis the current rather *ad hoc* approach

[The] IFC's failure to (a) provide explicit environmental and social guidance for meeting World Bank Group standards, (b) provide specific criteria on which Pangue SA's performance would be evaluated, was (and continues to be) a very serious shortcoming of [the] IFC's overall supervision of the Pangue Project.

### 2.1.1 *Pre-2006 environmental and social standards*

The pre-2006 Environmental and Social Safeguards apply only to investments made before 30 April 2006.<sup>30</sup> The pre-2006 Safeguards consist of the Disclosure Policy (1998),<sup>31</sup> which relates to disclosure of information; the Environmental and Social Review Procedure (1998);<sup>32</sup> Guidance Notes (1998),<sup>33</sup> which provide additional information regarding the Environmental and Social Review Procedure; and Safeguard Policies (1998),<sup>34</sup> which provide information and guidance to the IFC and its clients<sup>35</sup> on how to

- 
- 29 provided a mechanism for holding IFC staff accountable for its actions and results.' The Report further recommended that there 'must be independent oversight of environmental and social aspects of IFC's projects' once proper guidelines have been established, as well as a 'comprehensive system of operational accountability and the institutional capacity to systematically assess, process, and effectively manage ... all IFC projects for environmental and social compliance.' See 155-157 of the Report.
  - 30 See Former Environmental and Social Safeguards and Supporting Materials [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/safeguards+-+pre2006#disclosure](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/safeguards+-+pre2006#disclosure) (accessed 24 October 2016). As an example of a pre-2006 standards project, see eg the Ghanaian Australian Goldfields Ltd Project 7261 (1996) which was a category B project due to the limited number of possible environmental impacts. Some of the main issues that were addressed as part of the environmental review included waste disposal; socio-economic impacts; rehabilitation; worker safety/cyanide handling; land use; and cultural impacts and emissions. See Environmental and Social Review Summary for the projects, <https://disclosures.ifc.org/#/projectDetail/ESRS/7261> (accessed 16 April 2019).
  - 31 The Disclosure Policy was replaced by the new IFC Disclosure Policy in 2006 and the IFC Access to Information Policy in 2012, [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_site/Sustainability+and+Disclosure/Disclosure+Portal](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_site/Sustainability+and+Disclosure/Disclosure+Portal) (accessed 24 October 2016).
  - 32 The 1998 version was replaced by the revised versions of the Procedure in 2006, 2007, and 2009 and 2013. For the latest version, see [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/environmental+and+social+review+procedure+manual](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/environmental+and+social+review+procedure+manual) (accessed 24 October 2016).
  - 33 The 1998 Guidance Notes were replaced by the 2006 and 2012 Guidance Notes; see [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes) (accessed 24 October 2016).
  - 34 The Safeguard Policies were replaced by the Performance Standards and the Policy on Social and Environmental Sustainability in 2006 and 2012. For the Sustainability Policy, [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/environmental+and+social+sustainability+policy](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/environmental+and+social+sustainability+policy) (accessed 24 October 2016). For the Performance Standards, see [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes) (accessed 24 October 2016).
  - 35 In this article the term 'client' includes multinational corporations.

prevent and mitigate environmental and social harm in the planning and execution of their projects.<sup>36</sup>

The 1998 Procedure for Environmental and Social Review of Projects states, with regard to IFC projects, that 'all its operations are carried out in an environmentally and socially responsible manner', and that all IFC projects must comply with certain 'IFC environmental, social and disclosure policies'.<sup>37</sup> Additionally, the IFC applies World Bank environmental guidelines and, where no relevant guidelines exist, it applies internationally-prescribed standards. It also is obliged to abide by the host country's domestic laws and regulations.<sup>38</sup>

The IFC Procedure for Environmental and Social Review of Projects states that the IFC 'reviews prospective projects for soundness before it invests, focusing on economic, financial, technical, legal, environmental and social issues during the project appraisal process'.<sup>39</sup> The IFC established an Environment Division which was part of the Technical and Environment Department and responsible for reviewing, approving and supervising projects in accordance with the review procedure requirements.<sup>40</sup>

The pre-2006 framework includes several safeguard policies relevant to environmental and human rights protection.<sup>41</sup> The pre-2006 framework provides Guidance Notes that elaborate on how certain provisions should be interpreted and implemented.<sup>42</sup>

The World Bank's *Pollution prevention and abatement handbook* further applies to IFC-financed projects, and sets out acceptable levels of emissions and prevention and abatement measures.<sup>43</sup> Furthermore,

---

36 See Former Environmental and Social Safeguards and Supporting Materials (n 30).

37 See IFC Procedure for Environmental and Social Review of Projects (1998) 1 <http://www.ifc.org/wps/wcm/connect/8b64370048855267ab74fb6a6515bb18/ESRP.pdf?MOD=AJPERES> (accessed 17 October 2016).

38 As above.

39 As above.

40 As above.

41 These include OP 4.01 Environmental Assessment (1998); OP 4.09 Pest Management (1998); OP 4.04 Natural Habitats (1998); OD 4.20 Indigenous Peoples (1991); OPN 11.03 Safeguarding Cultural Property (1986); OD 4.30 Involuntary Resettlement (1990); OP 4.36 Forestry (1998); OP 4.37 Safety of Dams (1996); OP 7.50 Projects on International Waterways (1998); and Child and Forced Labour Policy Statement (1998); see IFC Environmental and Social Performance Standards and Guidance Notes [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes#pre2006](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes#pre2006) (accessed 17 October 2016).

42 The pre-2006 Guidance Notes include Guidance Note A – Checklist of potential issues for an environmental assessment; Guidance Note B – Content of an environmental impact assessment report; Guidance Note C – Outline of an environmental action plan; Guidance Note D – Outline of a project specific environmental audit; Guidance Note E – Outline of a project specific major hazard assessment; Guidance Note F – Guidance for preparation of a public consultation and disclosure plan. See IFC Environmental and Social Performance Standards and Guidance Notes (n 41).

43 See IFC Procedure (n 37) 1.



the IFC is not authorised to finance projects that contravene host state obligations in terms of international environmental treaties.<sup>44</sup> In this way multinationals can be held accountable for violations of primary rules of international law applicable to the host state because funding will not be provided for their operations should they contravene these international law provisions.

According to the 1998 IFC Procedure for Environmental and Social Review of Projects, projects are categorised by the Environment Division and, according to OP 4.01 (Environmental Assessment), as Category A, B, C or FI projects. The 'type, location, sensitivity, and scale of the project, as well as the nature and magnitude of its potential impact' determine the category of a project.<sup>45</sup> Projects are classified as Category A if they are 'likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented'.<sup>46</sup> Category A projects could have an effect on an area broader than simply that of the operation site, and they require an Environmental Impact Assessment (EIA) and an Environmental Action Plan (EAP).<sup>47</sup> A project is classified as Category B if its 'potential[ly] adverse environmental impact on human population or environmentally important areas – including wetlands, forests, grasslands, and other natural habitats – are less adverse than those of Category A projects'.<sup>48</sup> The impacts of Category B projects tend to be site-specific, and the scope of a Category B environmental assessment is narrower than that of a Category A environmental assessment.<sup>49</sup> Category C projects are described as being 'likely to have minimal or no adverse environmental impacts' and do not require environmental impact assessments.<sup>50</sup> Category FI projects 'involve [the] investment of IFC funds through a financial intermediary in subprojects that may result in adverse environmental impacts'.<sup>51</sup>

Multinationals that are funded by the IFC are further regulated by the investment agreement between the IFC and the multinational. This requirement can be an invaluable tool to ensure compliance with

---

44 IFC Procedure 2.

45 IFC Procedure 9.

46 IFC Procedure 1. Examples of Category A projects include projects affecting indigenous populations; major oil and gas developments; major industrial plants; large reservoirs and dams; projects that pose significant socio-economic risks; hazardous waste disposal operations; and transfer, manufacture and use of hazardous materials. For a complete list, see IFC Procedure (n 37) 20.

47 See IFC Procedure (n 37) 9.

48 See IFC Procedure 10. Examples of Category B projects include tourism projects; small-scale agro-industries; rural water supply and sanitation; general manufacturing; textile plants; and telecommunications. For a complete list, see IFC Procedure (n 37) 20.

49 See IFC Procedure (n 37) 10.

50 As above. Examples of Category C projects include factoring companies; technical assistance; life insurance companies; and mortgage securitisation. For a complete list, see IFC Procedure (n 37) 21.

51 See IFC Procedure (n 37) 10 21. Examples of Category FI projects are corporate loans to banks; private equity funds; and credit lines.

relevant standards, as either party to the contract can terminate the agreement in case of non-compliance. The IFC investment agreement stipulates that the corporation has to comply with host country regulations as well as IFC standards. The agreement requires corporations also to submit annual environmental performance and monitoring reports.<sup>52</sup> In addition, the IFC independently monitors social and environmental impacts of projects.<sup>53</sup>

### **2.1.2 IFC Sustainability Framework 2006**

The 2006 Sustainability Framework consists of the Policy on Social and Environmental Sustainability, the Performance Standards and the Policy on Disclosure of Information.<sup>54</sup> The Sustainability Framework [articulates the]

IFC's strategic commitment to sustainable development and is an integral part of its approach to risk management. It provides guidance on how to identify risks and deal with them, and is designed to help clients avoid and mitigate adverse impacts and manage risk as a way of doing business in a sustainable way.<sup>55</sup>

The 2006 Performance Standards consist of eight standards relating to the issues of social and environmental assessment and management systems; labour and working conditions; pollution prevention and abatement; community health, safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable natural resource management; indigenous peoples; and cultural heritage.<sup>56</sup>

The approach that the 2006 Performance Standards utilises is one of negative obligations on the part of the IFC's clients. The Standards require clients to 'avoid adverse impacts on workers, communities, and the environment, or, if avoidance is not possible, to reduce, mitigate, or compensate for the impacts, as appropriate'.<sup>57</sup> This also is the general approach that the IFC adopts with regard to its financing activities. It aims to carry out its investment activities in a 'do no harm' manner, which seeks to avoid causing damage to local communities

---

52 See IFC Procedure (n 37) 15.

53 IFC Procedure 16.

54 See IFC Sustainability Framework 2006 Edition [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/ifcsustainabilityframework\\_2006](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/ifcsustainabilityframework_2006) (accessed 12 November 2016). See also Morgera (n 12) 148 who states that the 2006 IFC Performance Standards can be 'considered to embody the IFC's standards for corporate environmental accountability'.

55 IFC Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy (April 2011) iii, [http://www.ifc.org/wps/wcm/connect/fca42a0049800aaaaba2fb336b93d75f/Board-Paper-IFC\\_SustainabilityFramework-2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/fca42a0049800aaaaba2fb336b93d75f/Board-Paper-IFC_SustainabilityFramework-2012.pdf?MOD=AJPERES) (accessed 24 October 2016).

56 See 2006 Performance Standards [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/performance-standards](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/performance-standards) (accessed 19 September 2017).

57 IFC Policy (n 14) para 4.

and the natural environment.<sup>58</sup> The IFC has a due diligence obligation to ensure that the possible negative impacts of a project do not outweigh its potential benefits, and that the conduct of its client will meet the requirements as set out in the Performance Standards.<sup>59</sup>

The client primarily is responsible for ensuring that its operations are conducted in a manner that is consistent with the 2006 Performance Standards and for managing the environmental and social risks of its projects.<sup>60</sup> The IFC plays a complementary role in this regard in that it is responsible for monitoring the project to ensure that it complies with the relevant standards set by the IFC Policy.<sup>61</sup> The IFC, therefore, reviews the project in order to establish whether it complies with relevant standards and, if not, the IFC aims to assist the client where possible to bring its conduct into compliance with the Standards.<sup>62</sup> The Standards further recognise and support the responsibility of its clients and the private sector in general to respect human rights and to act in a socially-responsible manner when conducting its operations.<sup>63</sup>

The 2006 Policy on Environmental and Social Sustainability sets out the categorisation of projects according to their potential environmental and social impact. Similar to the programme of the pre-2006 framework, projects are categorised as Category A, B, C or FI.<sup>64</sup> Specific standards apply to extractive industry projects, which include oil, gas and mining projects, as they carry inherently distinctive risks. With regard to these projects, the IFC specifically considers the risks regarding governance versus the benefit of the potential project. Should the risks outweigh the benefits the IFC will not support the project. The IFC further requires that revenue payments, which are made from these projects to the host government, be disclosed publicly in order to ensure transparency.<sup>65</sup>

The Performance Standards prescribe the use of environmental impact assessments and environmental management systems, which can be an effective way of ensuring compliance with relevant environmental standards as they set out a very detailed procedure that needs to be followed by a multinational to prevent any negative impact on the local environment.

In terms of the 2006 Policy on Environmental and Social Sustainability the IFC requires that its clients should have grievance mechanisms in place in order to address any concerns of the local

---

58 IFC Policy para 8.

59 IFC Policy paras 13-17.

60 IFC Policy para 5.

61 As above.

62 IFC Policy para 11.

63 IFC Policy para 8.

64 The 2012 Policy on Environmental and Social Sustainability also utilises the environmental and social categorisation of a project according to the risks it poses, namely, an A, B, C and FI categorisation. See IFC Policy (n 14) 8.

65 IFC Policy para 22.

community or anyone affected by the project.<sup>66</sup> However, should this not occur or should it not be possible for an aggrieved party to achieve recourse in this manner, the IFC provides for a Compliance Advisor/Ombudsman (CAO), an independent body tasked with managing such complaints.<sup>67</sup> The CAO reports to the president of the World Bank, and is independent of the IFC management. The CAO aims to resolve complaints and disputes regarding IFC-funded projects through a 'flexible problem-solving approach, and to enhance the social and environmental outcomes of projects'.<sup>68</sup>

The important role of the CAO's involvement in the oversight of IFC projects can be seen in various case studies in Africa over the last few decades. In 2004 a complaint was brought to the CAO by the First Peoples of the Kalahari against Kalahari Diamonds Ltd (KDL) operating as Sekaka Diamonds in Botswana.<sup>69</sup> The company had received a licence to prospect in Botswana, including in the Central Kalahari Game Reserve. The complainants alleged that the project interfered with the rights of the San Bushmen to live in the reserve which is their ancestral homeland.<sup>70</sup> In its 2005 Assessment Report the CAO found that the San people had been displaced by a policy of the government of Botswana and that the mining operations themselves had not interfered with their way of life.<sup>71</sup> However, it also ordered that KDL continue to engage with the communities on these issues to ensure that their rights are respected.<sup>72</sup>

In another CAO case in Ghana the Vice-President of the CAO requested an investigation into IFC standards and procedures with regard to investment in deep water offshore oil and gas exploration activities.<sup>73</sup> This investigation largely was as a result of the 2010 Gulf of Mexico oil spill in order to ensure that the IFC standards were adequate to avoid such disasters relating to deep-water exploration in future.<sup>74</sup> From December 2010 onwards the IFC was involved in deep-water offshore oil and gas development of the Jubilee Field 63 kilometres off the coast of Ghana. The investigation constituted a preliminary investigation and is not a full-scale CAO audit.<sup>75</sup> The companies involved in this venture included Tullow Oil plc, Kosmos

---

66 IFC Policy para 31.

67 IFC Policy paras 31-34.

68 IFC Policy para 33.

69 See Compliance Advisor Ombudsman 'Botswana/Kalahari Diamond-01/Kalahari (2004) [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=90](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=90) (accessed 15 April 2019).

70 As above.

71 As above.

72 As above.

73 See Compliance Advisor Ombudsman 'Ghana/Tullow Oil, Kosmos Energy & Jubilee FPSO-01/CAO Vice President Request' (2010) [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=166](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=166) (accessed 15 April 2019).

74 As above.

75 As above.

Energy and other partners.<sup>76</sup> The CAO found that the IFC adequately had assessed issues relating to a potential well blow-out and the possible consequence of such an event in accordance with relevant standards at the time.<sup>77</sup> However, it also found that there was a 'need for the IFC to assess the relevance and applicability of the current standards and Environmental, Health, and Safety (EHS) Guidelines when the client is involved in deep water offshore oil and gas exploration, and to update such standards and guidelines to reflect new developments in good international business practices'.<sup>78</sup>

In South Africa the director of the Cradle of Life Initiative filed a complaint with the CAO regarding possible mining operations in the Badplaas area.<sup>79</sup> The purpose of the Initiative is to 'conserve the Badplaas protected area and pursue sustainable eco-tourism initiatives'.<sup>80</sup> The company that was planning to launch operations in this area was Tsodilo, an exploration company that wanted to establish mining operations adjacent to or possibly overlapping the Badplaas area.<sup>81</sup> The IFC had an equity share in Tsodilo and the complainant raised concerns regarding the possible effects of mining operations on the protected area and its environment, cultural heritage and biodiversity.<sup>82</sup> Having considered all the relevant information, the CAO found that no further investigation was necessary, but it reserved the right to reassess the situation in future when the operations were at a more advanced stage.<sup>83</sup>

These examples are but a few of the cases considered by the CAO with regard to African projects. However, it is encouraging to note that the World Bank has an established oversight mechanism in place with regard to its funded projects to ensure that clients as well as the IFC itself comply with relevant due diligence standards relating to human rights and the environment. Such oversight is necessary in order to ensure that the standards prescribed by the IFC or World Bank are not merely considered as a tick-box exercise but are incorporated substantially into a corporation's daily operations.

### **2.1.3 IFC Sustainability Framework 2012**

The 2012 IFC Sustainability Framework consists of the Policy on Environmental and Social Sustainability, which sets out the IFC's role and commitments in achieving environmental and social sustainability; the Performance Standards, which set out the client's

---

76 As above.

77 As above.

78 As above.

79 See Compliance Advisor Ombudsman 'South Africa/Tsodilo-01/Badplaas (2013) [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=203](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=203) (accessed 16 April 2019).

80 As above.

81 As above.

82 As above.

83 As above.

responsibility with regard to environmental and social risks and how to identify, avoid and mitigate risks; and the Access to Information Policy, which defines the IFC's commitment to transparency.<sup>84</sup> For purposes of this section, I consider only the Policy on Environmental and Social Sustainability and the Performance Standards.

As the name indicates, the 2012 Policy on Environmental and Social Sustainability aims to achieve environmental and social sustainability.<sup>85</sup> The Policy also stresses that the IFC has a social and environmental due diligence obligation in terms of its proposed activities.<sup>86</sup> According to the Policy:<sup>87</sup>

Proposed investments that are determined to have moderate to high levels of environmental and/or social risk or the potential for adverse environmental and/or social impacts will be carried out in accordance with the requirements of the Performance Standards.

Managing the social and environmental risks of a project primarily is the responsibility of the client. The IFC, however, has a due diligence obligation with regard to projects, which includes the responsibility of monitoring and supervising the activities of clients to ensure that they comply with the relevant Performance Standards that are applicable to those activities.<sup>88</sup> In cases where the standards of the host country the IFC and the World Bank differ, the most stringent standard should be applied.<sup>89</sup>

The 2012 Performance Standards support the responsibility of business to respect human rights.<sup>90</sup> If a client does not comply with the environmental and social standards prescribed by the IFC in the legal agreements between the parties, the IFC attempts to assist the client to comply with the relevant standards. If compliance remains lacking, the IFC considers recourse and remedies.<sup>91</sup>

As far as extractive industry sector projects are concerned, for example, the IFC assesses governance risks versus the potential benefits of a project.<sup>92</sup> Should the risks outweigh the benefits, funding cannot be granted for a project. Extractive industry projects have to be monitored more closely as a result of weak host state

84 See IFC Access to Information Policy <http://www.ifc.org/wps/wcm/connect/98d8ae004997936f9b7bffb2b4b33c15/IFCPolicyDisclosureInformation.pdf?MOD=AJPERES> (accessed 18 January 2018). On the link between access to information and environmental protection, see D Tladi & L Ferris 'Environmental rights' in C Heyns & D Brand (eds) *Socio-economic rights in South Africa* (2005) 249.

85 The Policy states that 'an important component of achieving positive development outcomes is the environmental and social sustainability' of IFC activities, which it tries to achieve through the implementation of the policy. See IFC Policy (n 14) 1.

86 See IFC Policy 1.

87 As above.

88 See IFC Policy (n 14) 2.

89 As above.

90 IFC Policy 3.

91 IFC Policy 5.

92 IFC Policy para 49.

governance structures and a lack of transparency in revenue payments by the local government.<sup>93</sup> The IFC requires public disclosure of royalty payments to the host government.<sup>94</sup>

The 2012 Performance Standards contain eight standards: assessment and management of environmental and social risks and impacts; labour and working conditions; resource efficiency and pollution prevention; community health, safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable management of living natural resources; indigenous peoples; and cultural heritage.

Performance Standard 1, namely, the assessment and management of environmental and social risks and impacts, requires clients to 'respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to'.<sup>95</sup> This requirement implies a negative duty on the part of the client, which also requires the client to exercise a certain level of due diligence when conducting its operations. This standard mainly requires that the client evaluate environmental and social risks, mitigate risks and impacts if avoidance is not possible, and provide for grievance mechanisms should negative impacts occur.<sup>96</sup>

Performance Standard 3, which addresses resource efficiency and pollution prevention, aims to promote the sustainable use of natural resources and to avoid or mitigate environmental harm.<sup>97</sup> Performance Standard 4, community health, safety and security, 'recognises that project activities, equipment, and infrastructure can increase community exposure to risks and impacts'. This standard relates to the impact that environmental degradation can have on human safety and security, which aptly demonstrates the important interplay between the issue of human rights and the environment. The client, therefore, is required to avoid or where it is not possible to avoid, to mitigate these risks and impacts.<sup>98</sup>

Performance Standard 6, biodiversity conservation and sustainable management of living natural resources, stresses the importance of managing and conserving natural resources and biodiversity in order to achieve sustainable development. The standard is influenced by the

---

93 As above.

94 IFC Policy 11.

95 See Performance Standard 1 of IFC Performance Standards on Environmental and Social Sustainability (2012), [http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES) (accessed 12 November 2016).

96 As above. It is interesting to note that Performance Standard 1 applies to social and environmental impacts of projects only within their 'area of influence' which is described as the 'area likely to be affected by the project'. This provision is very similar to that of the Global Compact provision, which provides for a 'sphere of influence' concept.

97 See Performance Standard 3 (n 95).

98 See Performance Standard 4 (n 95).

Convention on Biological Diversity<sup>99</sup> and, unlike some of the other standards, contains more direct obligations on clients. This standard requires clients to 'protect and conserve biodiversity' and to 'promote the sustainable management of living natural resources'. These duties imply a positive duty on the part of the client. The standard, however, contains also a negative duty inasmuch as it requires clients to avoid negative impacts on biodiversity and ecosystems and, if avoidance is not possible, to mitigate the effects.<sup>100</sup>

### 3 Equator Principles

The Equator Principles are a voluntary<sup>101</sup> set of principles developed by private sector banks, and are based on the IFC Performance Standards on Social and Environmental Sustainability and the World Bank Environmental, Health and Safety Standards.<sup>102</sup> The Equator Principles are defined as 'a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making'.<sup>103</sup>

Financial institutions that sign up to the Equator Principles commit themselves to refrain from providing loans to clients that do not comply with the relevant social and environmental standards prescribed by the Principles.<sup>104</sup> The Equator Principles apply to all industry sectors and state that the projects that they finance should aim to avoid negative environmental impacts or, where these are unavoidable, to minimise or mitigate negative impacts.<sup>105</sup> Equator Principles Financial Institutions (EPFIs) consider themselves as having a duty to respect human rights and to exercise a certain level of due diligence in their investment activities in accordance with the Principles. In this respect the Principles also reference the Guiding Principles on Business and Human Rights and the Protect, Respect, Remedy Framework as the origins of this duty.<sup>106</sup>

99 See Convention on Biological Diversity 1992.

100 See Performance Standard 6 (n 95).

101 The Principles state: 'Financial institutions adopt and implement the Equator Principles voluntarily and independently, without reliance on or recourse to the IFC, the World Bank Group, the Equator Principles Association, or other EPFIs.' See The Equator Principles (June 2013) 11, <http://www.equator-principles.com/index.php/ep3/ep3> (accessed 28 November 2016).

102 The Equator Principles: Frequently asked questions, <http://equator-principles.com/resources/Frequently%20Asked%20Questions.pdf> (accessed 28 November 2016); see also Morgera (n 12) 169.

103 See 'About the Equator Principles' <http://www.equator-principles.com/index.php/about-ep/about-ep> (accessed 14 November 2016).

104 The Equator Principles: Frequently asked questions (n 102).

105 The Equator Principles 2 & 3.

106 As above.



A project has to comply with the requirements of all ten Principles in order to qualify for funding. Projects are reviewed and categorised according to risk into Category A, B and C, similar to the World Bank categorisation system. The Principles require a client to undertake an environmental and social assessment for Category A and B projects in order to establish the risks and possible impacts of the project.<sup>107</sup> The Principles further require that the project should comply with relevant host state laws and standards related to environmental and social issues. In some cases the project should also comply with IFC Performance Standards and World Bank Group Environmental, Health and Safety Guidelines (EHS Guidelines).<sup>108</sup>

With regard to Category A and B projects clients are required to provide and maintain an Environmental and Social Management System (ESMS) as well as an Environmental and Social Management Plan (ESMP).<sup>109</sup> The Principles also require an independent environmental and social consultant to review documentation such as the ESMS and the ESMP.<sup>110</sup>

In order to manage compliance the Equator Principles provide for covenants. They state in Principle 8 that '[f]or all projects, the client will covenant in the financing documentation to comply with all relevant host country environmental and social laws, regulations and permits in all material respects'. Should the client not comply with the relevant environmental and social covenants, the EPFI works with the client in order to remedy the situation and bring the client back into compliance with these standards.<sup>111</sup>

Although the Equator Principles are voluntary and do not provide for any substantial enforcement mechanism, it is encouraging to see that the Principles are based on IFC and World Bank provisions and that, in that way, they ensure the continuity and consistency of standards relating to international financial activity. The Equator Principles, similar to the IFC or World Bank Standards, find their strength in the fact that EPFIs can withhold financing in case of non-compliance, thereby effectively rendering them binding for all practical purposes on any potential investment operations by multinationals.

---

107 Principle 2 of The Equator Principles (n 102).

108 Principle 3 of The Equator Principles.

109 Principle 4 of The Equator Principles. As part of the ESMS, clients are required to provide for a grievance mechanism; this is according to Principle 6 of the Equator Principles.

110 This only applies to Category A projects and certain Category B projects. See Principle 7 of The Equator Principles.

111 Principle 8 of The Equator Principles.

## 4 Self-regulation and corporate social responsibility

Self-regulation is discussed to illustrate how multinationals can utilise self-regulatory initiatives in order to make international norms directly applicable to their operations. Corporations have made environmental protection a priority because of consumer concerns regarding transparency and corporate responsibility.<sup>112</sup> The issue of self-regulation has become a popular topic, especially when considering new and innovative ways of regulating multinational activity. Self-regulation initiatives can take many forms including, but not limited to, codes of conduct, disclosure and transparency agreements and social labels.<sup>113</sup> According to Utting and Clapp, corporate social responsibility (CSR) refers to 'a range of initiatives adopted by companies, business associations and so-called multi stakeholder entities that aim to promote ethical corporate behaviour and minimize the negative impact of business activity on society and the environment'.<sup>114</sup>

CSR exists mainly as a result of the commitments made by business entities at the Rio Conference where various entities agreed voluntarily to alter the way they operate in order to ensure that a more sustainable model of business is followed in the future. This initiative was supported by various international NGOs.<sup>115</sup> CSR initiatives, such as codes of conduct, are a popular type of self-regulatory tool, which has been utilised by multinationals, especially in the last few decades.<sup>116</sup> These codes prescribe certain minimum standards for the manner in which multinationals conduct their operations. The codes also can specify in which types of countries the multinational should invest, in order to prevent the multinational operating in a country vulnerable to human rights abuses and to set out standards for business partners and subsidiaries of the multinational operating abroad.<sup>117</sup>

One obvious major shortcoming of corporate codes of conduct is that they apply only to those multinationals that decide to adopt them. Codes of conduct require independent monitoring and enforcement mechanisms by objective third parties to be truly effective, which normally is not the case.<sup>118</sup> Moreover, these codes of

---

112 D Shelton & A Kiss *Guide to international environmental law* (2007) 67.

113 A Gatto *Multinational enterprises and human rights obligations under EU law and international law* (2011) 18-19, citing CSR Europe and Ashridge Centre for Business and Society *Exploring business dynamics. Mainstreaming corporate social responsibility in a company's strategy, management and systems* (2002) 9.

114 J Clapp & P Utting 'Corporate responsibility, accountability, and law: An introduction' in P Utting & J Clapp (eds) *Corporate accountability and sustainable development* (2008) 1.

115 Clapp & Utting (n 114) 2.

116 Clapp & Utting 1.

117 S Joseph *Corporations and transnational human rights litigation* (2004) 7.

118 Joseph (n 117) 8.

conduct generally are not legally binding. They, however, could be binding on a multinational in the sense that the corporation incorporates these regulatory standards into its operations and effectively binds itself to these standards through incorporation and internalisation. Some of these codes of conduct could be made applicable to a multinational's subsidiaries or subcontractors operating abroad.<sup>119</sup>

An important method to ensure compliance in cases of self-regulatory initiatives being utilised is to require companies to report on their progress with regard to the incorporation of corporate social standards. In order to comply with corporate social responsibility requirements companies generally have to draft reports on the impact their operations have on the environment and the local communities. Companies usually make these reports available on their websites. However, there also are organisations, such as the Global Reporting Initiative (GRI), that set specific requirements for company reporting. The organisation then places these reports on its website and this practice adds some transparency to the process of submitting a company report. The GRI primarily considers issues of environmental and sustainable development and, therefore, the focus of the reports is on these issues.<sup>120</sup>

CSR initiatives have proved to be successful in some instances, especially as multinationals consider self-regulation not to be an invasive and formal method of regulation. Multinationals, therefore, have more control to decide how and when regulations are to be applied and, by giving them a sense of control over the process, they tend to be more willing to comply with set standards. Therefore, it is not difficult to envision that the system could be flawed precisely because of the level of control that multinationals have over the process of regulation. Factors, such as a lack of transparency, a lack of independent monitoring and voluntary commitments drafted too vaguely, contribute to self-regulation being considered an ineffective regulatory method.<sup>121</sup>

It is very rare that self-regulation initiatives are applied objectively and effectively. Most multinationals simply cannot regulate their own activities without some degree of bias or subjectivity. Consumers, therefore, often view self-regulation efforts as a mere tool used to foster public relations and improve a multinational's image among its consumers or clients without it having the necessary positive impact

---

119 Gatto (n 113) 18-20.

120 Gatto (n 113) 22; Global Reporting Initiative, <https://www.globalreporting.org/information/about-gri/Pages/default.aspx> (accessed 17 March 2015). Also see A de Jonge *Transnational corporations and international law: Accountability in the global business environment* (2011) 28; Joseph (n 117) 7.

121 Gatto (n 113) 22.

on the local environment in host states.<sup>122</sup> For example, Royal Dutch Shell adopted one of the most extensive codes of conduct in the 1990s after the negative environmental and social impact of its operations in Nigeria had come to light. After its adoption the code seemed to have little impact on the welfare of local communities. In fact, in some communities the situation surrounding environmental degradation and human rights abuses worsened.<sup>123</sup>

For these reasons many scholars do not favour this system of regulation. For example, Duruigbo argues that insufficient international standards and weak domestic regulatory frameworks have led to many multinationals embracing the concept of self-regulation.<sup>124</sup> These initiatives, however, have proven to be ineffective in most cases as a result of factors such as the voluntariness of the initiatives, the lack of transparency, vagueness of regularity provisions and a lack of remedies available to injured parties.<sup>125</sup> Duruigbo advocates obligatory initiatives to regulate corporate activities as voluntary codes have thus far proved to be mostly ineffective.<sup>126</sup> In a sense the voluntary initiatives discussed in this article fall somewhere between an obligatory initiative and a voluntary initiative because of the fact that there are more concrete consequences in cases of non-compliance with the initiatives discussed in the article, such as a loss of social standing or loss of profit, even if it may be marginal in some cases.

Market-related methods of regulation can be useful in the right circumstances where compliance is monitored effectively and without bias. Self-regulation remains an important tool in prompting multinationals to do business in a more sustainable way. It is necessary, however, that the process of self-regulation becomes more transparent and that sufficient monitoring takes place to ensure that corporations are held accountable for non-compliance or, alternatively, that sufficient repercussions for non-compliance exist even if only in the form of an effect on the company's licence to operate.

Examples of two initiatives that have proven to be quite effective at ensuring the internalisation of corporate governance standards by companies are the South African King IV Principles on the domestic level, and the UN Guiding Principles on the global level. Although these principles are not legally binding, they have become so widely accepted by the business community as constituting good corporate

---

122 As above; S Joseph 'An overview of the human rights accountability of multinational enterprises' in MT Kamminga & S Zia-Zarifi (eds) *Liability of multinational corporations under international law* (2000) 83.

123 Kamminga & Zia-Zarifi (n 127) 9; see n 12 above.

124 EA Duruigbo *Multinational corporations and international law: Accountability and compliance issues in the petroleum industry* (2003) xxi.

125 As above.

126 Duruigbo (n 129) 128-129.

governance that numerous companies have incorporated these principles into their corporate governance structures.

The King IV Principles build on the King III Principles and have been revised to include the most up-to-date international corporate governance codes and practices. King IV was published in 2016 and is applicable to financial years starting from 1 April 2017.<sup>127</sup> King IV is a set of voluntary principles and practices. Some principles of corporate governance have been incorporated into legislation in South Africa, and should there be a conflict between the law and the King IV Principles the domestic law will prevail.<sup>128</sup> Should the King IV Principles be more prescriptive, then the higher standard of care should be followed.<sup>129</sup> Voluntary principles, such as the King IV Principles, could evolve into binding rules and can inform national legislative decision making. Furthermore, should a voluntary principle be widely practised to a sufficient extent, it could evolve into a standard of care which is recognised by the courts.<sup>130</sup> According to the KPMG King IV Summary Guide:<sup>131</sup>

Whilst King IV™ is not law, the governance outcomes achieved and the practices adopted and implemented will likely become the criteria by which the required standard of care and appropriate standards of conduct of the governing body and its members are measured.

Moreover, for a company to be registered on the Johannesburg Stock Exchange (JSE) it has to comply with certain aspects of the King IV Principles as a listing requirement and non-compliance with corporate governance practice, which includes the King IV Principles, could also lead to board liability in some circumstances.<sup>132</sup> The King IV Principles are drafted to apply to all sectors irrespective of form. However, the principles should be tailored to specific organisations' needs as a one-size-fits-all approach rarely is effective and could become nothing more than a tick-box exercise.<sup>133</sup>

The United Nations Guiding Principles on Business and Human Rights<sup>134</sup> are based on three core principles, namely, the state obligation to respect, protect, and fulfil human rights. Business enterprises have specific functions and are required to respect human

127 KPMG *King IV summary guide* (2016) 2 <https://assets.kpmg.com/content/dam/kpmg/za/pdf/2016/11/King-IV-Summary-Guide.pdf> (accessed 4 July 2018).

128 Institute of Directors Southern Africa *King IV Report on corporate governance for South Africa* (2016) 35.

129 Institute of Directors (n 133) 76.

130 Institute of Directors 35.

131 KPMG (n 132) 3.

132 Werksmans Attorneys 'A Review of the King IV Report on Corporate Governance' (2016) 25 <https://www.werksmans.com/wp-content/uploads/2013/05/061741-WERKSMAANS-king-iv-booklet.pdf> (accessed 15 April 2019).

133 Institute of Directors (n 133) 35.

134 Report of the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Ruggie (Guiding Principles). See also the report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean,

rights, which necessarily includes the duty to respect the environment as these rights are 'inherently interdependent'. Furthermore, effective remedies are required when rights and obligations are breached.<sup>135</sup> The duty to respect is considered to be a 'global standard of expected conduct' regardless of where a corporation operates, and it is independent also of a state's duty to protect.<sup>136</sup> The duty to respect primarily involves acting with due diligence.<sup>137</sup> The due diligence obligation is not an unusual or novel legal construct as most companies already have existing due diligence structures as part of larger risk management systems.<sup>138</sup> The reasons for the incorporation of due diligence measures generally are economically or strategically driven.<sup>139</sup> Companies incorporate due diligence measures in order to comply with statutory and common law requirements of due diligence and further to protect themselves from civil and criminal liability in the case of alleged human rights violations.<sup>140</sup>

The Guiding Principles provide a sound and legally authoritative framework, which is accompanied by an implementation plan that is structured in such a manner that all relevant parties know what their responsibilities are regarding the business and human rights agenda. The normative contribution of the Guiding Principles lies not in the creation of new international law obligations but rather in elaborating the implications of existing standards and practices for states and businesses, integrating them within a single, logically coherent and comprehensive template and identifying where the current regime

---

Healthy and Sustainable Environment, JH Knox A/HRC/22/43 (24 December 2012) para 10. See further the report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment para 2 which states: 'A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of a vast range of human rights, including the rights to life, health, food, water and development.'

135 Guiding Principles (n 139) 1.

136 Guiding Principles 13.

137 The Guiding Principles define due diligence in this context as 'a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks'. See also the Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and human rights: Towards operationalising the 'protect, respect and remedy' framework para 71.

138 See Global Risk Affairs: Human Rights Due Diligence (I): Corporate Social Responsibility meets Compliance (3 May 2013) <http://www.globalriskaffairs.com/2013/05/human-rights-due-diligence-i-corporate-social-responsibility-meets-compliance/> (accessed 24 April 2017). See also MB Taylor, L Zandvliet & M Forouhar 'Due diligence for human rights: A risk-based approach' Corporate Social Responsibility Initiative Working Paper 53 (2009) [https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_53\\_taylor\\_etal.pdf](https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf) (accessed 21 April 2017).

139 Taylor, Zandvliet & Forouhar (n 143) 6.

140 Taylor, Zandvliet & Forouhar 5.

falls short and how it should be improved.<sup>141</sup> Several companies have demonstrated their support for the Guiding Principles and are involved in a process of reporting their progress with regard to the implementation of the Guidelines, including companies such as BHP Billiton, BP, Microsoft, Nestlé, Unilever, Shell and Total, to name a few.<sup>142</sup>

## 5 Conclusion

Morgera states that the IFC Performance Standards 'reinforce the growing expectation in the international community that private companies should contribute to biodiversity conservation and sustainable development, and behave in a preventative and participatory manner with regard to their use of natural resources'.<sup>143</sup>

The fact that environmental conditions can be included in financing agreements between IFIs and clients (such as multinational corporations) means that private financing could be an effective method of regulating the activities of multinationals. These conditions become contractually binding and, consequently, if the company does not comply with the provisions, the contract could be cancelled and financing withdrawn.<sup>144</sup> Therefore, it may be considered a very effective market-related mechanism which, if not complied with, can have serious financial consequences for a corporation including losing funding for a particular project owing to non-compliance with certain standards. The IFC is bound also by international environmental law as a result of its degree of international legal personality and, therefore, it is not authorised to finance activities that are in contravention of its duties in terms of international law.<sup>145</sup>

The IFC believes that environmentally and socially sustainable business practices could increase the profitability of investments and also ensure a competitive advantage for its clients. These practices also improve the reputation of the IFC and ensure that it can continue to promote its development agenda effectively in countries where it is most needed.<sup>146</sup>

One could argue that an IFI can be held legally responsible for lending to a client who engages in activities that violate human rights and environmental standards. An IFI has a due diligence duty to

141 J Ruggie *Guiding principles on business and human rights: Implementing the United Nations 'protect, respect and remedy' framework* A/HRC/17/31 (21 March 2011) 6; Guiding Principles on Business and Human Rights 5 [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed 19 April 2017).

142 UN Guiding Principles Reporting Framework <https://www.ungpreporting.org/database-analysis/explore-disclosures/> (accessed 28 August 2018).

143 Morgera (n 12) 171.

144 Morgera 144.

145 P Sands *Principles of international environmental law* (2012) 1025.

146 IFC Policy (n 14) para 7.

ensure that a project complies with international as well as host country standards before investing in the project. In this regard Brodnig states that '[w]hile states remain the major duty-holders in implementing the right to development, international organisations have important complementary responsibilities in fostering international cooperation'.<sup>147</sup>

Self-regulatory initiatives, on the other hand, can persuade multinationals to adopt rules applicable to their operations in order to improve their overall social image and commit themselves to a higher standard of doing business as it makes good business sense to do so. This commitment occurs through the process of self-regulation, where corporations implement initiatives such as corporate codes of conduct or other self-regulatory initiatives in order to make international rules applicable to their operations. These codes are directly legally binding in that a corporation internalises the provisions, thereby agreeing to be bound. Examples of such internalisation include companies adopting the King IV Principles or the Guiding Principles, as previously discussed. The process of self-regulation requires objective oversight and monitoring to be truly effective, elements which are often lacking with regard to self-regulatory efforts by multinationals. However, it is encouraging to see that corporations in fact are willing to incorporate restrictive rules in order to be bound by principles of environmental and human rights whether for the sake of the well-being of people and the environment or for window dressing. In the end, the result is the same.

What this article aims to illustrate is that market-based initiatives, such as funding requirements by IFIs or the implementation of self-regulatory measures and social considerations into the corporate governance structures of businesses, can be effective in ensuring that corporations are held to a certain standard of conduct. In some ways this practice can be more effective than other international regulatory initiatives because the result of non-compliance is experienced directly by corporations through, for example, an effect on a corporation's licence to operate or a loss of profits owing to non-compliance with standards set by IFIs.

---

147 See G Brodnig 'The World Bank and human rights: Mission impossible?' (2002) 17 *The Fletcher Journal of Development Studies* 7.



## Students' academic freedom in African universities and democratic enhancement

*Kwadwo Appiagyei-Atua\**

Associate Professor of Law, University of Ghana, Legon, Accra, Ghana  
<https://orcid.org/0000-0002-3118-2383>

### Summary

*This article makes a case for the need to recognise students' right to academic freedom as a necessary and vital component in the academic freedom matrix in addition to that of the university and academics. It seeks to affirm this position by exposing the various categories of rights that students are entitled to enjoy on and off campus. The conclusion reached is that the academic freedom of the three actors (university, academics, students) are indivisible, interdependent and interconnected; and that the suppression of students' right to academic freedom has the consequence of denying them the right to engage democratically on the university campus which could spill over into their involvement in realpolitik in the real world.*

**Key words:** *academic freedom; students' rights; Kampala Declaration; University of Ghana*

### 1 Introduction

Students' right to academic freedom in Africa has been given little attention in the literature and in regional instruments such as the 1990 Kampala Declaration on Intellectual Freedom and Social Responsibility (Kampala Declaration). Where it is addressed, it is done only tangentially, that is, when it coincides with the interests of the university or academics. Subsequently, academic freedom for students on the continent continues to suffer abuse and neglect,

---

\* LLB (Hons) (Ghana) BL (Ghana School of Law) LLM (Dalhousie, Canada) DCL (McGill, Canada); [kappiagyeiatua@ug.edu.gh](mailto:kappiagyeiatua@ug.edu.gh). The author is grateful to the European Union for granting the Marie Curie Fellowship which enabled research to be conducted at the University of Lincoln, United Kingdom.

especially as African universities increasingly submit to pressures to corporatise the university, and where the principal violations no longer are directly by the state but by the university management (against academics and students) and academics (against students).

The analysis is applied to the case of the University of Ghana and the conclusion reached is that this development denies students the right and opportunity to engage democratically and to be involved in university affairs and in the way in which knowledge is produced and shared. When these democratic rights are violated in this way, students graduate from the university with a compromised understanding of democracy and human rights. This compromised understanding subsequently informs their behaviour in their communities, workplaces as well as in politics. In the end, the denial of students' academic freedom is likely to have a negative impact on democratisation in Africa.

The article begins by asking who the recipients of the right to academic freedom are, and discusses why students are sidelined in the process. A matrix is posited that identifies this relationship. A brief historical survey is undertaken to establish the context in which students came to acquire the right to enjoy academic freedom in pre-colonial Africa, Europe and the United States of America. The discussion then proceeds to an examination of two Africa-made documents on academic freedom, namely, the Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics (Dar es Salaam Declaration) and the Kampala Declaration. The 1966 ILO/UNESCO Recommendation Concerning the Status of Teachers (ILO/UNESCO Recommendation) and the 1997 UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel (1997 UNESCO Recommendation) are further used to determine the extent to which students' right to academic freedom is recognised. This analysis is placed in the context of the relationship between academic freedom and the right to education and the way in which this relationship creates space for democratic enhancement, not only on the campus but in society. In this context, the work analyses how the denial of students' academic freedom affects the development of a democratic culture in society.

The final part of the article involves a practical application of the rights and freedoms enshrined in the documents and the extent to which the law is able to enhance the enjoyment and exercise of these rights and freedoms.

## **2 Students in the academic freedom matrix**

Academic freedom has often been defined with the focus and attention on the academic. Thus, for example, according to Sir Edward Boyle,

[a]cademic freedom means the absence of discriminatory treatment on grounds of race, sex, religion or politics, and the right to teach according to his own conception of fact and truth rather than according to any predetermined orthodoxy. It involves freedom to publish and subject to the proper performance of allotted duties, freedom to pursue whatever personal studies are congenial.<sup>1</sup>

Alongside the academic is the university, as reflected, for example, in Dr TB Davie's classical definition of academic freedom as involving 'four essential freedoms ... [for the university] to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study'.<sup>2</sup>

The marginal treatment given to the presence or relevance of students' academic freedom suffers an even greater setback where some scholars go to the extent of refusing any form of recognition to it. Byrne, for example, contends that '[t]he term "academic freedom" should be reserved for those rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching ...'.<sup>3</sup>

In reaction to the lopsided approach in identifying the actors in the academic freedom equation, Metzger argues as follows:<sup>4</sup>

Undoubtedly, students fit less snugly than teachers into the constitutional history of academic freedom. The question is: do they fit so poorly that they ought to be ignored? In the end, it seems best to conclude that, in the academic freedom club, students qualify as special members ... because to keep them out would be anomalous and impoverishing.

Fuchs adds that '[s]tudent freedom is a traditional accompaniment to faculty freedom as an element of academic freedom in the larger sense'.<sup>5</sup> McFarlane's comment in support is that sometimes students' academic freedom is treated as merely 'the by-product of the protection of the freedom of academics'.<sup>6</sup>

1 Quoted in GR Bozzoli *Academic freedom in South Africa: The open universities in South Africa and academic freedom 1957–1974* (1974).

2 A van de Sandt Centlivres et al (Editorial Committee) (1957) 'The Open Universities in South Africa: A statement of a conference of senior scholars from the Universities of the Witwatersrand and Cape Town. Compare R Krüger 'The genesis and scope of academic freedom in the South African Constitution' (2013) 8 *Kagisano* 5. However, in most cases academic freedom for the university is couched as 'institutional autonomy'.

3 JP Byrne 'A special concern of the First Amendment' (1989) 99 *The Yale Law Journal* 251 at 262.

4 WP Metzger 'Profession and constitution: Two definitions of academic freedom' (1988) 66 *Texas Law Review* 1265.

5 RF Fuchs 'Academic Freedom: Its basic philosophy, function and history' in L Joughin (ed) *Academic freedom and tenure: A handbook of the American Association of University Professors* (1969) 243–44 (Appendix E).

6 B Macfarlane 'Re-framing student academic freedom: A capability perspective' (2012) 63 *Higher Education* 720.

The above analysis, which amounts to denying academic freedom to students, is attributed to a narrow understanding of who the rights holders in the academic freedom equation are.<sup>7</sup> The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (Lima Declaration)<sup>8</sup> fairly grants students pride of place in its definition of academic freedom by using 'academic community' to 'cover all those persons teaching, studying, researching and working at an institution of higher education'.<sup>9</sup> In essence, academic freedom for the university, academics and students is indivisible, interdependent and interconnected.

As discussed elsewhere, the state is the principal duty bearer in the academic freedom matrix.<sup>10</sup> It owes duties to three entities: the university, academics and students – in that order. Therefore, as against the state, the rights holders are the academic community. However, in the academic freedom matrix, rights holders are also duty bearers in their relations with the other entities in the matrix. Thus, the university is a duty bearer in its relationship to academics and students who serve as rights holders. Similarly, academics owe duties to students. Therefore, in a cascading fashion, the state owes the greatest proportion of the duties while students enjoy most rights in their relationship with the other entities, including the state.

In light of the above, the article adopts a definition of academic freedom as a freedom carved out for academics, higher education institutions and students to enable access and opportunity to conduct scientific inquiry and disseminate the findings thereof – through teaching, publication and the application of the findings to promote human welfare – within the limits of public order, professional ethics and social responsibility and without restraint or the threat of sanctions by government and other power brokers.<sup>11</sup>

### 3 Historical context of academic freedom

#### 3.1 Pre-colonial Africa

Ancient Egypt is considered the cradle of higher education, having

---

7 G Robinson & J Moulton 'Academic freedom' in LC Becker & CB Becker (eds) *Encyclopaedia of ethics* (2001) 1.

8 Adopted at the 68th General Assembly of World University Service, meeting in Lima, Peru, 6-10 September 1988, the year of the 40th anniversary of the Universal Declaration of Human Rights.

9 Sec 1(b) Lima Declaration (n 8).

10 K Appiagyei-Atua et al 'The capture of institutional autonomy by the political elite and its impact on academic freedom in African universities' (2015) 47 *Higher Education Review* 48.

11 K Appiagyei-Atua, K Bieter & T Karran 'The composite theory: An African contribution to the academic freedom discourse' (2015) 31 *South African Journal on Human Rights* 315.

established universities in the *Per-ankh* (House of Light) around 2000 BCE<sup>12</sup> and the *Biblioteca Alexandrina* which attracted international scholars, including those who were recognised as 'scholars in residence' at the libraries which served as important seats of learning. One may further mention Islamic universities which evolved later on in Egypt, such as the Al Azhar which remains in existence today,<sup>13</sup> and Al Qarawwyin in Morocco.<sup>14</sup>

The existence of academic freedom in these institutions cannot be denied due to its inextricable link to the university.<sup>15</sup> As noted by Karran, 'the principle of academic freedom [is] an essential pre-requisite for such an institution'.<sup>16</sup> Therefore, as long as the university has existed, so has academic freedom.<sup>17</sup> In principle, the evolution of academic freedom in Africa did not occur without recognition of students as also possessing some form of academic freedom, such as the freedom to write their own manuscripts and freedom of movement which enabled them to travel to study at these centres of learning or universities.<sup>18</sup>

### 3.2 Europe

In the European context, two types of universities emerged, namely, the *universitas scholarium* (community of scholars (or students) in Bologna and *universitas magistrorum et scholarium* (community of teachers and scholars) in Paris. Both were formed under the sponsorship of the medieval church and under its authority, with faculties composed mainly of clerics.<sup>19</sup>

According to Neave, two basic types of academic freedom emerged in Bologna and Paris. In Bologna autonomy vested in students who

12 Y G-M Lulat *A history of African higher education from antiquity to the present* (2005). The *per-ankh* was an institution devoted to the teaching of both theoretical and practical arts, such as sculpture and other crafts. Lulat also writes that it is thought that some of the Pharaohs studied there, singling out Ramses IV, 'a literary person of considerable knowledge'.

13 Founded in 970 or 972 by the Fatimids as a centre of Islamic learning, its students studied the Qur'an and Islamic law in detail, along with logic, grammar, rhetoric, and how to calculate the lunar phases of the moon. It was one of the first universities in the world and the only one to survive as a modern university to include secular subjects in the curriculum.

14 S Hamdun & N King (eds) *Ibn battuta in black Africa* (1975) 52-53.

15 For a discussion on the theoretical origins of the concept, see KD Beiter 'The doctrinal place of the right to academic freedom under the UN Covenants on Human Rights' in (2011) *University Values* 5-7; A de Baets 'The doctrinal place of the right to academic freedom under the UN Covenants on human rights: A rejoinder' (2012) *University Values* 2-3; K Appiagyei-Atua 'The theoretical origins of academic freedom' (2014) *University Values* 5-7.

16 T Karran 'Academic freedom in Europe: Reviewing UNESCO's recommendation' (2009) 57 *British Journal of Educational Studies* 3.

17 R Quinn 'Defending "dangerous" minds' (2004) 5 *Items and Issues* 1.

18 Lulat (n 19).

19 W Rüegg 'The university as a European institution' in H de Ridder-Symoens *A history of the university in Europe Volume 1 Universities in the Middle Ages* Part of *A history of the university in Europe* (2003) xix.

hired the professors and also elected the rector. Karran notes that in the examination of candidates for degrees, the authority of the masters was paramount, but in all other matters the students reigned supreme.<sup>20</sup> Also, in Bologna, Emperor Frederick I Barbarossa issued the *Authentica Habita* or *Privilegium Scholasticum* in 1155<sup>21</sup> to protect, among others, the right of foreign scholars to freedom of movement, security and their property.

Furthermore, in Germany (then Prussia), Alexander von Humboldt postulated the concepts of *lernfreiheit* (freedom to learn) and *lehrfreiheit* (freedom to teach) out of which evolved the special theory on academic freedom.<sup>22</sup> *Lernfreiheit* gave students the freedom to choose the courses they want to follow and the university at which they want to study, thereby engaging in the cultivation of the self, a principle embodied in the notion of *bildung* (self-cultivation).<sup>23</sup>

### 3.3 United States of America

In the USA, influenced by the German experience,<sup>24</sup> academic freedom found expression in the 1915 Declaration of the American Association of University Professors (AAUP) which, while it recognised the *lehrfreiheit* and *lernfreiheit* principles,<sup>25</sup> did not elaborate on or directly recognise the rights of students.

The AAUP finally addressed this gap by drafting and adopting the 1967 Joint Statement on Rights and Freedoms of Students. The Preamble to the 1967 document recognises the inter-related and indivisible nature of academic freedom for academics and students thus, that 'the freedom to teach and the freedom to learn are inseparable facets of academic freedom'.<sup>26</sup>

Additionally, the courts have affirmed and recognised some kind of First Amendment right of academic freedom for students. In *Sweezy v New Hampshire*,<sup>27</sup> for instance, it was held that '[t]eachers and students must always remain free to inquire, to study and to evaluate, and to gain maturity and understanding; otherwise our civilization will stagnate and die'. Also, in *Healy v James*<sup>28</sup> the court concluded that

20 T Karran 'Academic freedom: In justification of a universal ideal' (2009) 34 *Studies in Higher Education* 263.

21 De Ridder-Symoens (n 19).

22 JR Searle 'Two concepts of academic freedom' in EL Pincoffs (ed) *The concept of academic freedom* (1972) 86.

23 Metzger (n 4) 1304-1305.

24 H Röhrs *The classical German concept of the university and its influence on higher education in the United States* (1995).

25 Appendix I 1915 Declaration of Principles Academic Freedom and Academic Tenure at 292, <http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> (accessed 7 January 2018).

26 Para 2 of the Preamble to Appendix C Joint Statement on Rights and Freedoms of Students (1967) reprinted with permission of the American Association of University Professors, from Policy Documents and Reports 141 (AAUP 1984).

27 354 US 234, 250 (1957).

28 408 US 169, 181-82 (1972).

respect for students' right to freedom of association was a reaffirmation of academic freedom.

#### 4 Dar es Salaam Declaration versus Kampala Declaration: What space for students?

The first attempt by African scholars to develop a policy document to promote and protect academic freedom came in April 1990 when delegates from six academic staff associations of Tanzanian universities met in Dar es Salaam to proclaim the Dar es Salaam Declaration, 1990.

The Dar es Salaam Declaration contains some progressive provisions not only on academic freedom for universities and academics but also for students. It does so, among others, by adopting the term 'academic community' as used in the Lima Declaration to cover all three stakeholders in the academic freedom equation.<sup>29</sup> Thus, there are numerous instances where, in respect of students and their rights to academic freedom, the document refers to the rights of all members of society to the academic community without hindrance;<sup>30</sup> freedom of study;<sup>31</sup> the right of participation in institutional governance;<sup>32</sup> freedom of expression over national and international issues, individually and collectively;<sup>33</sup> and the right to initiate, participate in and determine academic programmes of their institutions in accordance with the highest standards of education and the Basic Principles.<sup>34</sup>

Academics from the continent as a whole later met in Kampala, Uganda, in November 1990, to adopt the Kampala Declaration. However, unlike the Dar es Salaam Declaration, the Kampala Declaration does not seem to recognise students as forming part of the academic freedom matrix. Article 1 provides that '[e]very person has the right to education and participation in intellectual activity'. Since the right to education mainly covers students, one may argue that the numerous references to 'intellectuals' or the 'intellectual community' in the Kampala Declaration extend to students. However, academics are also entitled to enjoy or exercise the right to education, by reference to article 13(2)(e) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>35</sup>

29 Para 53 of the Declaration which provides: 'In this Declaration, unless the context otherwise requires, "academic community" covers all those persons teaching, studying, researching or otherwise working at an institution of higher education.' The Declaration was made at the 68th General Assembly of World University Service, meeting in Lima, Peru, 6-10 September 1988.

30 Para 17 of the Declaration.

31 Para 23.

32 Paras 24 & 39.

33 Para 24.

34 Para 18. See also paras 14, 25 & 35.

35 My emphasis.

The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right ... (e) the development of a system of schools *at all levels* shall be actively pursued ... *and the material conditions of teaching staff shall be continuously improved.*

Thus, the Kampala Declaration uses 'African intellectuals' in a way that largely severs students from the academic freedom matrix. Where 'community' is used, the reference is not to 'academic community' but to 'intellectual community', such as in article 9 thereof, which does not extend in its meaning to cover students. Therefore, in terms of adopting an expansive approach to determine who the rights holders of the academic freedom matrix are, the Kampala Declaration is not a progressive document. Indeed, this Declaration gives direct recognition of students' rights to academic freedom in a single article, namely, article 7, which provides as follows:

Teaching and researching members of staff and students of institutions of education have the right, directly and through their elected representatives, to initiate, participate in and determine academic programmes of their institutions in accordance with the highest standards of education.

The only other direct mention of students in the Kampala Declaration is indicated with reference to the symposium the organisation of which culminated in the Kampala Declaration, which 'called for the transformation of administrative structures, procedures and practices in academic institutions to make these more representative of and accountable to teachers, researchers, students and others working within them'.<sup>36</sup>

## 5 Inferring rights and freedoms for students from duties imposed on other duty bearers

Apart from direct means of identifying rights and freedoms in the aforementioned documents, there are other indirect ways of doing the same; that is, by inferring these rights and freedoms from the duties imposed on the university and academics for the sake of their students. This approach is justified by the Hohfeldian principle that states that rights both confer a legal advantage (as 'claim rights') and impose correlative duties on any other person apart from the rights holder. In strict legal terms, correlativity such as this between a claim and a corresponding duty is the test of whether a legal stipulation is a 'right in the strict sense'.<sup>37</sup>

36 Under 'The intelligentsia and intellectual freedom' section of the Kampala Declaration.

37 W Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 16, reprinted in W Hohfeld *Some fundamental legal conceptions as applied in judicial reasoning and other legal essays* (1923) 23 at 63-64.



The relationship between rights and duties is acknowledged by the major international human rights instruments. For example, article 29 of the Universal Declaration of Human Rights (Universal Declaration) contains a general statement of principle regarding individual duties in international human rights law. Also, the Preambles to both the International Covenant on Civil and Political Rights (ICCPR) and ICESCR stipulate that 'the individual, hav[e] duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of ... rights'.

However, a careful examination of the Kampala Declaration reveals that under the 'Responsibilities' section, none of the responsibilities spelt out which can be converted into a right directly address students based on the above formula. The only exception is article 19, which provides that '[m]embers of the intellectual community are obliged to discharge their roles and functions with competence, integrity and to the best of their abilities. They should perform their duties in accordance with ethical and highest scientific standards.'

The sidelining of students in the Kampala Declaration is unfortunate, considering the fact that one of the motives for the adoption of the Kampala Declaration was to counter the excesses of the International Monetary Fund and the World Bank's structural adjustment policies which severely affected respect for the academic freedom of not only academics but also universities and students in Africa.<sup>38</sup> Thus, a Human Rights Watch report on academic freedom in Africa in the 1980s noted violations of human rights on African campuses which affected students directly and indirectly:<sup>39</sup>

[S]ummary executions of students; torture; arbitrary arrest and prolonged detention without charge or trial; imprisonment under conditions that are cruel and degrading; restrictions on freedom of expression, assembly, association and movement; dismissal of faculty staff; expulsion of students; university closures; banning of student organizations and staff unions; the prohibition of 'political activity' on campus; discrimination against students on the basis of race, ethnic or regional origin; censorship of teaching and reading materials and manipulation of curricula; refusal to grant scholarships to politically active students; and the requirement that students who have been implicated in political disturbances sign pledges of 'good behaviour' in order to resume their studies ... Students and academics were paid to inform on each other.

---

38 See, eg, para 1 of the Preamble to the Kampala Declaration: 'Intellectual freedom in Africa is currently threatened to an unprecedented degree. The historically produced and persistent economic, political and social crisis of our continent continues to undermine development in all spheres. The imposition of unpopular structural adjustment programmes has been accompanied by increased political repression, widespread poverty and intense human suffering.'

39 Human Rights Watch *Academic freedom and human rights abuses in Africa* (Africa Watch Report, March 1991).

Applying the same formula of deriving rights from duties to the 1966 ILO/UNESCO Recommendation and the 1997 UNESCO Recommendation,<sup>40</sup> however, one is able to identify several rights and freedoms indirectly carved out for students based on the duties the UNESCO Recommendation imposes on the state, the university and academics. Students' academic freedom *vis-à-vis* the state includes the protection of their right to education; the right to demand respect for institutional autonomy for the university; as well as respect for institutional self-governance, tenure and academic freedom for academics.<sup>41</sup>

With respect to students' academic freedom *vis-à-vis* the university, the following are discernible: the right of access to library facilities and modern teaching, research and information resources;<sup>42</sup> the right to quality and excellence in the teaching, scholarship and research functions of the university;<sup>43</sup> the right to fair and just treatment, without discrimination based on sex, nationality and racial status;<sup>44</sup> the right to take part in culture and to enjoy the benefits of scientific progress and its applications within and outside the confines of the university; and the right to participate in university governance.<sup>45</sup>

Students' academic freedom *vis-à-vis* academics includes the right to be taught effectively according to accepted professional principles and norms; the right to a free exchange of ideas between academics and students;<sup>46</sup> the right of access to guidance in their studies;<sup>47</sup> the right to acknowledgment of scholarly work;<sup>48</sup> the right to express their views on (and contribute to the development of) the content of curricula; the right to participate in university governance; and the right to criticise the university and academics and to demand accountability from the institution and individual lecturers.<sup>49</sup>

---

40 1997 UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel in Records of the General Conference: 29th Session, Paris, 21 October to 12 November 1997, Vol 1, Resolutions (Paris: UNESCO 1997) para 74. The 1966 ILO/UNESCO Recommendation was adopted on 5 October 1966 at a conference held in Paris at UNESCO headquarters and organised in close cooperation with the ILO.

41 Paras 17-21 of the 1997 UNESCO Recommendation.

42 Para 22(o) ILO/UNESCO Recommendation.

43 Paras 22(b) & (d).

44 Paras 22(f) & (g) & para 34.

45 Para 17.

46 Para 34.

47 As above.

48 As above.

49 Para 22 of the ILO/UNESCO Recommendation.

## 6 Students' academic freedom, the right to education and democratic enhancement

Students' academic freedom is linked to the right to education.<sup>50</sup> In the General Comment under article 13 of ICESCR, the ESCR Committee noted that 'the right to education can only be enjoyed if accompanied by academic freedom of staff and students'. The Kampala Declaration confirms this in article 1 thereof.

Various international instruments express the vital relevance of education as a tool for the promotion of human rights, peace and democracy in the world. Among these is the Universal Declaration. Article 26(2) of the Universal Declaration provides:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Following its adoption, the UN General Assembly proclaimed the Universal Declaration as 'a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms'. Due to the fundamental relevance and cardinal importance of education for peace, justice, democracy and human rights, article 13 of ICESCR repeats *verbatim* the provision in article 26(2) of the Universal Declaration quoted above.

Thus, academic freedom is meant to promote the enjoyment of the right to education which in turn will help in the use of education to promote human rights, democracy, justice and the rule of law. Consequently, the best way in which the right to education can be applied effectively is when an environment is put in place which is conducive to students enjoying their academic freedom.

Indeed, academic freedom and democracy are not far removed from each other. They enjoy a mutually reinforcing relationship: Academic freedom engenders or supports democracy (at the university and in society) and the other way round.

First, academic freedom is designed to promote democracy on the university campus. Thus, for example, article 20 of the Kampala Declaration stipulates that '[m]embers of the intellectual community have a responsibility to promote the spirit of tolerance towards different views and positions and enhance democratic debate and discussion'. The same document also 'called for the promotion of participatory and democratic methods of teaching, research and

---

<sup>50</sup> Beiter (n 15) 5. See also KD Beiter *The protection of the right to education by international law* (2006). See a contrary view in De Baets (n 15) 2-3. For a critique of both approaches, see Appiagyei-Atua (n 15).

publishing, and high professional and ethical standards'. In practice, a pluralistic approach of encouraging students to exercise judgment in their choice of perspective within the discipline supports democratic relationships. Another is the emphasis placed on the value of students having some element of choice in the teaching methods used. The application of these democratic principles has the tendency to produce a spin-off effect in the larger society when students graduate and carry the practice of democracy with them.

Second, academic freedom is a tool to promote democracy in the larger society. That is, the existence of the space for the enjoyment and exercise of academic freedom can provide the opportunity to expand that space to benefit the society at large in the context of the struggle for human rights and democracy. That is, academics are supposed to utilise their privileged positions to support democracy in society and promote a close relationship between academia and society ('gown-town' relationship). Thus, the Kampala Declaration sets the standard as a useful reference point that the struggle for academic freedom is an integral part of the general struggle for human rights and democracy.<sup>51</sup>

In most African countries students have also played their role in extending the enjoyment of academic freedom beyond the confines of the university space to the streets in support of larger freedoms. For example, during the clamour to return to democracy after the fall of the Berlin Wall, students took an active part in the process, relying on the freedoms of expression, association and assembly, among other freedoms, which they began to assert and exercise on university campuses.<sup>52</sup> The Kampala Declaration unfortunately failed to recognise the role of students in using academic freedom to promote democracy and human rights on the university campuses as well as in the society at large.

The application of these rights and freedoms for students is tested against the enjoyment of academic freedom for students at the University of Ghana, Legon.

## 7 Students' academic freedom at the University of Ghana

Ghana is counted among 14 African countries of which the constitutions contain specific recognition of academic freedom. Ghana is also recognised as one of nine African countries categorised as 'free' with respect to the level of respect for academic freedom in

51 Appiagyei-Atua, Bieter & Karran (n 11).

52 C Mawuko-Yevugah 'From resistance to acquiescence? Neoliberal reform, student activism and political change in Ghana' (2013) 8 *Postcolonial Text* 1 at 12 13. Also, D Finlay 'Students and politics in Ghana' (1968) 97 *Daedalus* 51.

its laws.<sup>53</sup> Focusing on students' academic freedom, Ghana's laws seeking to protect and promote students' rights generally are progressive. Students are recognised as forming part of an academic community and are consequently protected against acts or omissions that exceed the bounds of freedom of expression or academic freedom, including, but not restricted to, those explicitly adopted.<sup>54</sup> Also, discrimination on the grounds of nationality, race, caste, religion, place of origin, political opinions, colour, creed or sex is prohibited in determining admission, registration or graduation of a student of the University, or to hold any advantage or privilege thereof.<sup>55</sup> Further, the Office of the Dean of Student Affairs is to take charge of the counselling and placement of students; the provision of chaplaincy services; the resolution of conflicts among students, and so forth.<sup>56</sup> One may also refer to section 10(4) of the University of Ghana Act in terms of which some of the functions of the Office of the Registrar include providing support and information to all staff and students, including financial support to students, student progress and completions, student discipline and student complaints.

In addition, students are engaged in university governance in various ways through their Students' Representative Council (SRC) (for undergraduate students) facilitating SRC's representation on appropriate bodies and organs of the University.<sup>57</sup> Consequently, students are represented on various boards, committees and other bodies, prominent among which are representation on the University Council;<sup>58</sup> the Board of Nominators to elect a Chancellor;<sup>59</sup> boards of faculties;<sup>60</sup> the Court;<sup>61</sup> Senate;<sup>62</sup> the Council;<sup>63</sup> the student disciplinary board;<sup>64</sup> the tutorial board;<sup>65</sup> and the advisory board for the Dean of Student Affairs.<sup>66</sup> Similar rights and privileges are granted to graduate students through their association, the Graduate Students Association of Ghana (GRASAG).

Also, disciplinary issues are handled through the student disciplinary board with a right of appeal to the University of Ghana

---

53 K Appiagyei-Atua, KD Beiter & T Karran 'A review of academic freedom in Africa through the prism of the UNESCO's 1997 Recommendation' (2016) 14 *Journal of Higher Education in Africa/Revue de l'Enseignement Supérieur en Afrique* 85.

54 Sec 42(1)(iii) Statutes of the University of Ghana, 2011.

55 Sec 29(1).

56 Sec 38(2).

57 Sec 38.

58 Sec 11.

59 Sec 3(3).

60 Secs 28(8) & 25.

61 Sec 19.

62 Sec 23.

63 Sec 20.

64 Sec 43(7).

65 Sec 40(8).

66 Sec 38(5).

Appeals Board, an independent dispute resolution body set up under section 44 of the University Statute.

Academics are enjoined to respect students' academic freedom by making conscious efforts to refrain from promoting any political, religious, racial or ethnic ideology in class.<sup>67</sup> They are also to refrain from any type of harassment or discrimination against students,<sup>68</sup> and should ensure that their relationships with students do not develop in ways that can undermine objectivity in grading, evaluation or assessment.<sup>69</sup>

However, there equally are some provisions in the University of Ghana Act that raise questions as, in principle, they violate academic freedom or are likely to infringe on academic freedom in practice. These include a situation where the Dean of Student Affairs is given the power to grant permission to students before they may join protest marches and demonstrations, within or outside the University. This provision clearly contravenes the decision of the Supreme Court in the *NPP v IGP* case<sup>70</sup> in which it was held that demonstrators do not need to ask for permission from the police before they can exercise their right to freedom of assembly. They are only expected to inform the police. This decision culminated in the enactment of the Public Order Act 491 of 1994.

As well, section 37(5) of the University of Ghana Act gives the Vice-Chancellor, in consultation with the Academic Board, the power to prescribe standards for contesting student offices. Based on this, students whose average grades fall below a certain mark are barred from contesting student political offices. This stipulation also violates the constitutional right of every citizen to contest political office without discrimination of any kind.<sup>71</sup>

Apart from the limitations mentioned above, actualising the positive references in the law seeking to promote and protect academic freedom for students at the University of Ghana presents challenges for students. While the abuses suffered directly from the state in the past have abated in most cases or have become subtler and more indirect, the university management and academics remain the dominant violators of the duties they owe to students.

One of the key issues affecting university/student relations and academic/student relations is the power dynamic which remains largely tilted in favour of the University and the academic as against the student. Therefore, the University and academics are able to apply fear tactics to intimidate students on campus. While the University and academics are able to apply swift sanctions against a student, the

---

67 'Code of conduct for academic staff of the University of Ghana' (2011) 49 *University of Ghana Special Reporter* 1.6.2.

68 Code of Conduct (n 65) para 10.1.

69 Para 10.2.

70 [1992-93] GLR 586.

71 Art 42 1992 Constitution of the Republic of Ghana.

student has limited opportunities, most often involving a complicated process to launch complaints which may take sometimes or year or more to resolve. During this period when students are not sure of the outcome of the complaint, they are left in suspense which is likely to have a negative impact on their studies.

Students are also afraid of reprisals by academics against them should they report academics to authorities. This situation is aggravated by the fact that in most disciplinary processes, the same academics administer the processes. There are situations where reports have been leaked to alleged perpetrators who in turn have reinforced their harassment against the complaining student to abort the process or be threatened with other negative consequences, such as failure in a paper. Therefore, students lack trust in such mechanisms to resolve their complaints against their lecturers and professors. Some student representative councils are also co-opted or have weak bargaining powers to advocate students' rights and to seek representation for abused students. Thus, at the end of the day, students accept the *status quo ante* as the norm.

## 8 Conclusion

Students are among the primary recipients and users of the knowledge produced by academics. They are also the conduit through which knowledge is channelled to society. Therefore, they cannot be left out of the academic freedom equation.

Because of the inter-related and interdependent nature of the elements of academic freedom, where a particular beneficiary's rights are ignored, the other entities are not able to fully enjoy their rights, and society, the ultimate beneficiaries of the enjoyment of academic freedom, turn out to be the biggest losers.

The article concludes that the suppression of students' right to academic freedom has denied many students the right and opportunity to have a democratic engagement and involvement in the conduct of university affairs and in the way in which knowledge is produced and shared. The practice of this non-democratic engagement between the university and academics, on the one hand, and students, on the other, is the norm for some students. They consequently leave the confines of the university after graduation with a questionable understanding of democracy and human rights which subsequently informs their behaviour in their communities, work place as well as in politics. In the end, the lack of democratic engagement with students occasioned by the denial of their academic freedom tends to have a negative impact on the democratic programme in Africa.

Therefore, promoting students' rights and knowledge-sharing on African university campuses will imbibe in the students a respect for

democracy, human rights and the rule of law which they will carry with them from the university into society.



## Digital activism and free expression in Uganda

*Ronald Kakungulu-Mayambala\**

Associate Professor, Human Rights and Peace Centre (HURIPeC), School of Law, Makerere University, Kampala, Uganda  
<https://orcid.org/0000-0002-1161-365X>

*Solomon Rukundo\*\**

Researcher, Mawazo Policy Institute, Kampala, Uganda  
<https://orcid.org/0000-0002-6257-7070>

### Summary

*In recent years in Africa there has been increasing use of digital technologies in terms of political and social activism. In Uganda this takes the form of text messaging, social media activism, blogging and, in some cases, hacktivism. This article examines digital activism in Uganda in light of the guarantee of freedom of expression under international instruments and the Ugandan Constitution. The article begins with an analysis of international and regional instruments that buttress digital activism through their enunciations regarding freedom of expression. The article then takes a critical look at a number of laws, such as the Computer Misuse Act, the Anti-Terrorism Act and the Regulation of Interception of Communications Act, that directly or indirectly restrict digital activism. The article argues that for free expression to be fully exercised in the online environment, laws and policies with provisions in conflict with the Constitution and international instruments will have to be amended or abolished.*

**Key words:** *digital activism; freedom of expression; Uganda; internet; digitalisation*

---

\* LLB (Hons) (Makerere) LLM (Fordham) SJD (Arizona); [rmkakungulu@gmail.com](mailto:rmkakungulu@gmail.com)

\*\* LLB (Hons) (Dar es Salaam); [soloruk12@gmail.com](mailto:soloruk12@gmail.com)

# 1 Introduction

The internet increasingly is becoming a part of our everyday lives. Currently 24,4 per cent of the population on the African continent is estimated to have access to the internet.<sup>1</sup> More people on the continent are gaining access through the proliferation of affordable internet-enabled smartphones. In Uganda, the number of internet users was estimated to be 18,5 million individuals as of June 2018.<sup>2</sup>

In Africa the internet is considerably more politicised than in other parts of the world. Tools such as social media undoubtedly are altering the way in which activism is carried out. These tools facilitate networking, making the mobilisation of people for social or political causes much easier.<sup>3</sup> A study by a United States (US) company, Portland Communications, on the use of the social media platform Twitter in Africa found that in 2018 almost half of the most popular African hash-tags related to political issues.<sup>4</sup> Ugandans, like their African counterparts, use the internet and other electronic technologies to engage in various forms of activism. Activism through electronic technologies takes the form of text messaging on mobile phones,<sup>5</sup> blogging,<sup>6</sup> on-line petitions,<sup>7</sup> social media posts, and the sharing of video recordings.<sup>8</sup>

- 1 'ITU releases 2018 global and regional ICT estimates' ITU Press Release, <https://www.itu.int/en/mediacentre/Pages/2018-PR40.aspx> (accessed 8 March 2019).
- 2 UCC 'Post, broadcasting and telecommunications market and industry Q2 Report, 2017' (2018) 23.
- 3 DK Kalinaki 'How social media [are] transforming Uganda's political and social landscape' *African Centre for Media Excellence* 20 July 2016, <https://acme-ug.org/2016/07/20/how-social-media-are-transforming-ugandas-political-and-social-landscape/> (accessed 16 December 2017).
- 4 Portland Communications 'How Africa tweets 2018', <https://portland-communications.com/pdf/How-Africa-Tweets-2018.pdf> (accessed 8 March 2019).
- 5 IPA 'The impact of a text messaging platform on government services in Uganda' (2016), <https://www.poverty-action.org/study/impact-text-messaging-platform-government-services-uganda> (accessed 8 March 2019). In 2013 the UN used a free, SMS-based citizen reporting system. We captured the views of more than 17 000 young people in a survey about the development priorities in their communities: O Kjørven 'Crowdsourcing the next global development agenda' *The Guardian* 7 May 2013, <https://www.theguardian.com/media-network/media-network-blog/2013/may/07/united-nations-crowdsourcing-global-development> (accessed 12 March 2019).
- 6 P Ampurire 'Blogging on a steady rise in Uganda' *Chimp Reports* 26 October 2015, <https://chimpreports.com/feature-blogging-on-a-steady-rise-in-uganda/> (accessed 8 March 2019).
- 7 'Over 30 000 people sign an online petition to free Bobi Wine' *Dispatch* 22 August 2018, <http://dispatch.ug/2018/08/22/30000-people-sign-online-petition-free-bobi-wine/> (accessed 8 March 2019).
- 8 'How social media has evolved in Uganda' *Daily Monitor* 2 July 2015, <http://www.monitor.co.ug/artsculture/Reviews/How-social-media-has-evolved-in-Uganda/691232-2771872-cmhu0q/index.html> (accessed 27 December 2017).

Digital activism has been defined as the reliance on digital tools to advocate and promote or impede political reform with the desire to effect improvements in society.<sup>9</sup> While digital activism often is associated with on-line action for political causes,<sup>10</sup> it can also be used for non-political activities. For example, in Uganda digital activism was used to encourage support for Miss Uganda, Quiin Abenakyo, when she was among the finalists in the 2018 Miss World competition.<sup>11</sup> Digital activism also has been used to do crowd funding for different causes, such as combating disease or paying the medical bills of patients.<sup>12</sup> Digital activism simply is the continuation of traditional grassroots mobilisation using modern digital tools as aids.

## 2 Forms and tools of digital activism

Vegh<sup>13</sup> classifies digital activism based on the initiative taken by the activist – whether the activist is sending out information, calling for action or initiating an action. He classifies digital activism into three main categories. The first is awareness or advocacy. Here public awareness is built by availing information relating to the cause in an easily accessible way. It focuses largely on events and issues that go unreported, underreported, or misreported among the mainstream news sources. In this way, a digital tool such as the internet is used as an alternative news and information source. Digital activism allows for campaigning for marginalised causes such as gay rights, which would otherwise be difficult to campaign for using traditional mainstream media. Social media platforms such as Facebook have been praised by gay rights activists in Uganda for providing them with a neutral platform where their voices can be heard.<sup>14</sup> Information is made

- 
- 9 MB Chibita 'Digital activism in Uganda' in B Mutsvairo *Digital activism in the social media era: Critical reflections on emerging trends in sub-Saharan Africa* (2016) 69.
  - 10 Eg, the *Encyclopaedia Britannica* defines it as using 'the internet and digital media as key platforms for mass mobilisation and political action'. MA Fuentes 'Digital activism' in *Encyclopaedia Britannica*, <https://www.britannica.com/topic/digital-activism> (accessed 8 March 2019).
  - 11 P Ampurire 'Ugandans launch aggressive online campaign to vote Quiin Abenakyo for Miss World' *Soft Power News* 4 December 2018, <https://www.softpower.ug/ugandans-launch-aggressive-online-campaign-to-vote-quiin-abenakyo-for-miss-world/> (accessed 8 March 2019).
  - 12 Eg, in 2016 an aggressive online campaign raised UGX 300 million (US \$86 000) for the cancer treatment of Carol Atuhairwe. E Aturinde 'Save Carol cancer drive exceeds target' *Daily Monitor*, <https://www.monitor.co.ug/News/National/Save-Carol-cancer-drive-exceeds-target/688334-3189224-29si48/index.html> (accessed 8 March 2019).
  - 13 S Vegh 'Classifying forms of online activism: The case of cyber protests against the World Bank' in M McCaughey & D Ayers *Cyberactivism: Online activism in theory and practice* (2003) 71.
  - 14 J Morgan 'Facebook slams fake report claiming it was pulling out of Uganda over anti-gay law' *Gay Star News*, <http://www.gaystarnews.com/article/facebook-threatens-pull-out-uganda-over-anti-gay-law270214/#gs.C5aOPQ0> (accessed 16 December 2017).

available on-line, and when the public accesses this information awareness about the cause grows.

The second category is organisation or mobilisation. Digital tools can be used to call for action either on-line or off-line. Digital activism can be used to call for and organise off-line action. Here information regarding the date, time and venue of a demonstration or protest is communicated on-line. Digital activism can also be used to engage in an action that would have been possible off-line but which can be done more efficiently on-line. For example, people can engage with the Member of Parliament (MP) of their area on social media. The third category is action or reaction, which basically involves taking action for or against a cause on-line. Here performative actions such as the defacing of websites, e-mail bombs and other forms of hacktivism are done on-line.

Tools such as websites, blogs and social media commonly are used in digital activism in Uganda.<sup>15</sup> The use of the internet has led to the proliferation of multiple activist websites in Uganda. Websites such as *Radio Katwe*<sup>16</sup> have been incredibly vocal in their criticism of government policies and in their revelation of corruption. Radio Katwe in particular was notorious for claiming to expose the hidden wealth of the country's first family. International websites, such as the now notorious document archive website *WikiLeaks*,<sup>17</sup> have also been instrumental in exposing government weaknesses and corruption in Uganda.<sup>18</sup> Blogs such as *Uganda Record*,<sup>19</sup> run by the veteran journalist Timothy Kalyegira, have also been involved in digital activism.

Social media such as *Facebook*, *Twitter*, *WhatsApp* and *YouTube* have been used by everyday Ugandans in digital activism in different forms. They are a source of information with popular news stories being shared by friends, allowing them to spread faster and have wider coverage than previously was possible.<sup>20</sup> Previously, the most common means of receiving news was the radio which had a limited impact due to high regulation and costs.<sup>21</sup> Today anyone with an

15 Chibita (n 9) 71.

16 [www.radiokatwe.com/news.htm](http://www.radiokatwe.com/news.htm) was closed down by the government of Uganda in 2006 and replaced by the blog <http://katwe.blogspot ug/> (accessed 27 December 2017).

17 <https://wikileaks.org/> (accessed 27 December 2017).

18 'WikiLeaks: Museveni dreaded assassination by Gaddafi' *Africa Review* 8 December 2010, <http://www.africareview.com/news/WikiLeaks-say-Museveni-dreaded-assassination-by-Gaddafi/979180-1068646-30gbnkz/index.html#> (accessed 20 December 2017); 'Wikileaks: Kabaka's views on Museveni' *New Vision* 7 September 2011, <http://www.monitor.co ug/News/National/688334-1231792-a5g989z/index.html> (accessed 20 December 2017).

19 [www.ugandarecord.co ug](http://www.ugandarecord.co ug) (accessed 28 December 2017).

20 T Kalyegira 'Can newspapers survive in the digital era?' *Daily Monitor* 11 February 2018, <http://www.monitor.co ug/OpEd/Commentary/Can-newspapers-survive-digital-era/689364-4299648-124c0y8z/index.html> (accessed 10 March 2018).

21 Y Kalyango 'Political news use and democratic support: A study of Uganda's radio impact' (2009) 16 *Journal of Radio and Audio Media* 200.

internet-enabled telephone will regularly receive news shared or passed on by a friend on a social media platform. Social media has bridged the gap between the political elite and the common man as many can now communicate with individuals in high political office via social media platforms. Many high-profile politicians, including the President, have social media accounts where they communicate with citizens and, unlike traditional media such as radio and television, the people communicate back. In 2014 the President of Uganda, Yoweri Museveni, was rated as Africa's most active president on *Twitter*,<sup>22</sup> while his former ally turned opponent, Amama Mbabazi, was rated 'the most conversational world leader' with 95 per cent of his tweets being responses to followers by Burson-Marsteller's *Twiplomacy* study.<sup>23</sup> Social media have given rise to citizen journalism with citizens taking and sharing informative pictures and videos via these platforms. This result is especially useful in circumstances where objective reporting by the established mainstream media houses is likely to be in question, for example during political protests.<sup>24</sup> Pictures and videos have been especially useful in holding the government accountable for brutality by security agencies. In July 2016 supporters of opposition leader, Dr Kiiza Besigye, were brutally attacked by the police while a number of people recorded videos of the incident on their phones. These were soon uploaded onto *YouTube* and went viral with many shared on *WhatsApp*. As a result 13 of the policemen in the videos were charged with assault.<sup>25</sup> In February 2019 an army general and four of his officers assaulted a traffic officer who had stopped them for breaking the traffic rules. A video recording of the incident went viral on social media and the officers were detained.<sup>26</sup>

An emerging but controversial tool of digital activism is hacktivism. This is the use of non-violent but often illegal digital tools to achieve one's goals.<sup>27</sup> It is not always clear where hacktivism has been carried out as some victims, especially governments and companies that hold sensitive data, such as financial institutions, will go out of their way to hide the fact that it occurred. Often it is the elusive perpetrator who announces the incident and takes credit for it. For a government, a successful hack can be humiliating as it undermines its ability to

22 'Museveni most influential African leader on Twitter' *New Vision* 1 July 2014, [https://www.newvision.co.ug/new\\_vision/news/1342213/museveni-influential-african-leader-twitter](https://www.newvision.co.ug/new_vision/news/1342213/museveni-influential-african-leader-twitter) (accessed 10 March 2018).

23 'Twiplomacy study 2014' 24 June 2014, <http://twiplomacy.com/blog/twiplomacy-study-2014/> (accessed 10 March 2018).

24 Z Tufekci *Twitter and tear gas: The power and fragility of networked protest* (2017) 7.

25 'Police brutality: "Officers on the run", Kayihura summoned' *The Observer* 25 July 2016, <http://observer.ug/news-headlines/45538-police-brutality-offending-officers-on-the-run> (accessed 22 December 2017).

26 'Kyaligonza will face the law for beating traffic officer – President Museveni' *NTV*, <http://www.ntv.co.ug/news/national/Kyaligonza-will-face-the-law-for-beating-traffic/4522324-5014668-12ym9td/index.html> (accessed 8 March 2019).

27 NC Hampson 'Hacktivism: A new breed of protest in a networked world' (2012) 35 *Boston College International and Comparative Law Review* 511.

secure data. In May 2010 the Ugandan State House website was hacked into and a conspicuous picture of Adolf Hitler with the swastika, a Nazi party symbol, was posted below that of President Museveni meeting with a Member of Parliament.<sup>28</sup> In August 2012 the hacker collective Anonymous hacked into the Ugandan Office of the Prime Minister's website and left a message protesting against the Anti-Homosexuality Bill.<sup>29</sup> Hacktivism is a controversial tool for digital activism as it inevitably involves breaking local and international laws against hacking.<sup>30</sup>

Even the less obtrusive forms of digital activism in Uganda have attracted the attention of the government. In May 2013 the security minister announced the creation of a social media monitoring centre 'to weed out those who use it to damage the government and people's reputations'.<sup>31</sup> In August 2013 *Facebook* revealed that the government of Uganda was among the 74 countries that had requested information relating to *Facebook* account holders in the first six months of that year.<sup>32</sup> Digital activism in the political sphere is critical as it enables government critics and political activists to broadcast their message without fear of traditional forms of censorship, which target mainstream media houses.<sup>33</sup> When radio and television stations announced that they had been warned by their regulator, the Uganda Communications Commission (UCC), not to host the popular opposition MP, Robert Kyagulanyi, he simply took to his *Facebook* page where he nonchalantly continued sharing his message, posting the following:<sup>34</sup>

- 
- 28 'Hacker posts Hitler photo on State House website' *Daily Monitor* 31 May 2010, <http://www.monitor.co.ug/News/National/688334-929108-brnt54z/index.html> (accessed 16 September 2017).
- 29 CIPESA 'State of internet freedoms In East Africa 2015: Survey on access, privacy and security online' September 2015, [http://www.cipesa.org/?wpfb\\_dl=193](http://www.cipesa.org/?wpfb_dl=193) (accessed 3 October 2016).
- 30 R Solomon 'Criminals or activists? Finding the space for hacktivism in Uganda's legal framework' (2017) 28 *Stellenbosch Law Review* 508.
- 31 F Emorut 'Government plans to monitor social media' *New Vision* 31 May 2013, [https://www.newvision.co.ug/new\\_vision/news/1321505/gov-plans-monitor-social-media](https://www.newvision.co.ug/new_vision/news/1321505/gov-plans-monitor-social-media) (accessed 8 March 2019).
- 32 C Stretch 'Global government requests report' *Facebook* 27 August 2013, <https://newsroom.fb.com/news/2013/08/global-government-requests-report/> (accessed 8 March 2019).
- 33 The censorship of mainstream media houses in Uganda has taken the form of raids and shutdowns. Radio stations have been shut down for airing political controversies. 'UCC closes Kanungu radio for "fuelling public insecurity"' *The Observer* 23 October 2017, <https://observer.ug/news/headlines/55557-ucc-closes-kanungu-radio-for-fuelling-public-insecurity> (accessed 12 March 2019); television stations have been shut down: 'In Uganda, government shuts down new TV station' *CPJ* 7 February 2007, <https://cpj.org/2007/02/in-uganda-government-shuts-down-new-tv-station.php> (accessed 10 March 2018); newspaper offices have been raided and shut down: 'Uganda's *Daily Monitor* raided over Museveni "plot"' *BBC News* 20 May 2013, <http://www.bbc.com/news/world-africa-22599347> (accessed 10 March 2018).
- 34 'Bobi Wine speaks out on being banned from TV, radio shows' *The Tower Post* 30 September 2017, <http://thetowerpost.com/2017/09/30/bobi-wine-speaks-out-on-being-banned-from-tv-radio-shows/> (accessed 10 March 2018).

They should also remember that we are in this age of social media. The world is more connected than before. Tell your friend to tell their friend that I shall still communicate to the world through Facebook, Twitter, and our website. If they stop us from going to radio, we shall send out voice notes on WhatsApp. No matter what happens, we shall speak – because we speak for the people. And the voice of the people is the voice of God.

### 3 Digital activism and freedom of expression

#### 3.1 International law

Article 19 of the Universal Declaration of Human Rights (Universal Declaration)<sup>35</sup> states that everyone has the right to freedom of expression, and this includes the right to ‘impart information and ideas through any media’. Since its adoption in 1948, parts of the Universal Declaration, including article 19, have gained wide acceptance and are now regarded as having acquired legal force as customary international law.<sup>36</sup>

Article 19(1) of the International Covenant on Civil and Political Rights (ICCPR)<sup>37</sup> provides that everyone has the right to hold opinions without interference. Article 19(1) is an unqualified right and is not limited by article 19(3), as will be seen. Although freedom of opinion is not listed among the non-derogable rights in article 4, the United Nations (UN) Human Rights Committee (HRC), the treaty-monitoring body for ICCPR, has argued that it is in fact non-derogable as it can never be necessary to derogate from it even in a state of emergency.<sup>38</sup> This argument is relevant to digital activism as the freedom to hold ideas is a *sine qua non* to disseminating them.

Article 19(2) of ICCPR protects freedom of expression.<sup>39</sup> The article’s emphasis on ‘any other media’ as a form of expression certainly covers new innovations in information and communication technologies (ICT).<sup>40</sup> Blocking access to websites has been held to be a violation of the right to freedom of expression enshrined in article 10 of the European Convention on Human Rights (European Convention), which is similar to article 19 of ICCPR.<sup>41</sup> This right, therefore, supports digital activism as it allows for the dissemination of ideas on-line.

35 Universal Declaration of Human Rights UNGA Res 217 (III).

36 *Filartiga v Pena-Irala* 630 F 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

37 International Covenant on Civil and Political Rights 999 UNTS 171.

38 General Comment 34 on article 19 of the International Covenant on Civil and Political Rights CCPR/C/GC/34, 102nd session Geneva, 11-29 July 2011 para 5.

39 Article 19: ‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’

40 T Sorell ‘Human rights and hacktivism: The cases of Wikileaks and Anonymous’ (2015) 7 *Journal of Human Rights Practice* 391.

41 *Yildırım v Turkey* ECtHR 3111/10 Judgment 18/12/2012.

Article 19(3) of ICCPR sets a three-pronged test for acceptable limitations to freedom of expression under article 19(2). First, the limitation must be provided for by law. This must be a 'national law of general application which is consistent with the Covenant',<sup>42</sup> and must not be 'arbitrary or unreasonable'.<sup>43</sup> Therefore, the law must meet standards of clarity and precision so that people can easily foresee the consequences of their actions in light of it. Second, the law restricting free expression must have a legitimate aim. The list of legitimate aims is not open-ended. They are provided for in article 19(3) of ICCPR, namely, 'respect for the rights and reputations of others, and protection of national security, public order, public health or morals'. They are exclusive and cannot be added to.<sup>44</sup> Finally, any limitation must be absolutely necessary. Even if the limitation is in accordance with a clearly-drafted law and serves a legitimate aim, it must be truly necessary for the protection of the legitimate aim. Any law limiting on-line freedom of expression and, by extension, digital activism must pass muster under these provisions.

In September 2011 the HRC issued General Comment 34<sup>45</sup> in relation to article 19. This is an authoritative interpretation of the minimum standards guaranteed by article 19 of ICCPR. The General Comment emphasises that freedom of expression is necessary for the full development of an individual and constitutes 'the foundation stone for every free and democratic society'. It further notes:

States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile-based electronic information dissemination systems, have substantially changed communication practices around the world.

The General Comment emphasises the fact that the legal framework regulating the media should take into consideration the fact that the Internet has created a global network through which ideas and opinions are exchanged without relying on the traditional mass media intermediaries. Finally, the General Comment clarifies the application of article 19(3) which permits restrictions on the right to free expression. Article 19(3) can never justify the restriction of any human rights and democracy advocacy. It can, however, be employed to justify laws that protect respect for the rights or reputations of others and the protection of national security or of public order.<sup>46</sup> Thus, for example, laws restricting the advertising of tobacco-related products, though limiting freedom of expression, have been considered acceptable.<sup>47</sup>

42 The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4 Principle 15.

43 Siracusa Principles (n 42) Principle 16.

44 Siracusa Principles Principle 21.

45 General Comment 34 (n 38).

46 As above.

47 *RJR-MacDonald Inc v Attorney-General of Canada* (1995) 3 LRC 653.



Freedom of expression in these provisions focuses on freedom to disseminate one's views in the public sphere. The public sphere over time has migrated from physical locations to the internet and has expanded, becoming more global in its reach.<sup>48</sup> As an extension of traditional off-line activism to on-line platforms, digital activism deserves the same level of protection as traditional forms of activism. In June 2012 the Human Rights Council unanimously adopted a resolution on the promotion, protection and enjoyment of human rights on the internet.<sup>49</sup> The Council affirmed that '[t]he same rights that people have off-line must also be protected on-line, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice'.

In June 2016 the Human Rights Council adopted a second resolution on the protection of human rights on the internet.<sup>50</sup> This resolution recognised 'the global and open nature of the internet as a driving force in accelerating progress towards development'. The resolution also called upon states to promote digital literacy and to facilitate internet access. The resolution further called upon states to address security concerns regarding the internet to ensure protection of freedom of expression, privacy and other human rights on-line, so that the internet can remain a vibrant force that generates economic, social and cultural development. The resolution unequivocally condemned all human rights violations committed against individuals for exercising their fundamental freedoms on the internet. Finally, the resolution condemned measures that intentionally prevent or disrupt internet access in violation of international human rights law.

### 3.2 African Charter on Human and Peoples' Rights

Article 9 of the African Charter on Human and Peoples' Rights (African Charter)<sup>51</sup> provides that every individual has the right to receive information and to express and disseminate opinions within the law. In interpreting article 9, the African Commission on Human and Peoples' Rights (African Commission) asserted the 'fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms'.<sup>52</sup> Unfortunately, the full effect of the article appears to be diluted by a claw-back clause

48 T Oladepo 'Digital media activism and Nigeria's public sphere' (2015) 1 *Law, Social Justice and Global Development*, [https://warwick.ac.uk/fac/soc/law/elj/lgd/2016-1/tomi\\_final.pdf](https://warwick.ac.uk/fac/soc/law/elj/lgd/2016-1/tomi_final.pdf) (accessed 12 March 2019).

49 UN Human Rights Council Resolution A/HRC/20/L.13, adopted 29 June 2012.

50 UN Human Rights Council, Resolution A/HRC/32/L.20, adopted 27 June 2016.

51 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

52 *Law Office of Ghazi Suleiman v Sudan II* (2003) AHRLR 144 (ACHPR 2003).

restricting forms of expression to those sanctioned by law.<sup>53</sup> However, the African Commission has found laws restricting freedom of speech to be contrary to article 9.<sup>54</sup> Further, the African Commission has stated before that speech that promotes human rights protection is of special value to society and deserving of protection.<sup>55</sup>

Notably, article 9 includes the right to receive information, which is absent in explicit form in the international human rights instruments discussed above. At the time of their adoption these instruments were not understood to include a right to access information held by public bodies.<sup>56</sup> However, broader interpretations of these international instruments to include the right of access to information have since been adopted.<sup>57</sup> The African Commission in April 2013 adopted the Model Law on Access to Information for Africa. It provides detailed and practical information on the legislative obligations of member states to the African Charter with regard to the right of access to information. The Model Law promotes the establishment of mechanisms to give effect to the right of access to information in a manner which 'enables persons to obtain access to accurate information of information holders as swiftly, inexpensively and effortlessly as is reasonably possible'.<sup>58</sup> The internet is one of the mechanisms which can ensure access to information in a swift and inexpensive manner.

The African Commission in 2002 issued a Declaration of Principles on Freedom of Expression in Africa.<sup>59</sup> This is an amplification of article 9 of the African Charter. In its Preamble the Declaration notes 'the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies'. Principle 1 declares that the right to impart and receive information through any form of communication is an inalienable human right and an essential element of democracy. Principle 2 provides that legal restrictions on freedom of expression must serve a legitimate interest and be necessary in a democratic society. Principle 7 provides that an independent public authority

---

53 R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667. Even in *Law Office of Ghazi Suleiman v Sudan II* (n 52) the African Commission emphasised that freedom of expression has to be exercised within the law.

54 *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009)\_AHRLR 235 (ACHPR 2009).

55 *Law Office of Ghazi Suleiman v Sudan II* (n 52).

56 T Mendel *Freedom of information: A comparative legal survey* (2008) 8.

57 See eg Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression UN Doc E/CN.4/1998/40 28 January 1998 para 14.

58 Sec 3(b) of the Model Law on Access to Information for Africa 2013, [http://www.achpr.org/files/instruments/access-information/achpr\\_instr\\_model\\_law\\_access\\_to\\_information\\_2012\\_eng.pdf](http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdf) (accessed 12 March 2019).

59 Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights 32nd session 17-23 October 2002, Banjul, The Gambia.

should regulate telecommunication and should be adequately protected against political interference. Principle 12 provides that defamation laws should not hold anyone liable for true statements or reasonably-held opinions regarding public figures, that public figures should tolerate a greater degree of criticism and that sanctions should not inhibit the right to freedom of expression. The principle also states that privacy laws should not inhibit the dissemination of information of public interest. The reference in the Preamble to the contribution of information technologies to freedom of expression accentuates the relevance of the principles in the Declaration to on-line freedom of expression.

In 2016 the African Commission passed Resolution 362 on the Right to Freedom of Information and Expression on the Internet in Africa.<sup>60</sup> This Resolution affirms the 'importance of the internet in advancing human and peoples' rights in Africa, particularly the right to freedom of information and expression'.<sup>61</sup> The Resolution calls upon state parties to respect and take legislative and other measures to guarantee the right to freedom of information and expression through access to internet services. States, therefore, should allow easy access to the internet even when it is used to criticise the government. The Resolution, however, urges citizens to exercise their right to freedom of expression on the internet responsibly. What amounts to 'responsible' use of the internet, however, remains unclear. A narrow interpretation of this term is necessary as persons engaging in on-line activism may on occasion use impolite language to communicate dissatisfaction with the *status quo*.<sup>62</sup>

### 3.3 African Union Convention on Cyber Security and Personal Data Protection

Article 25(3) of the African Union Convention on Cyber Security and Personal Data Protection,<sup>63</sup> while acknowledging the need for legal measures to curb the growing threats to cyber security, requires that the adopted measures do not infringe on human rights guaranteed under the national constitution and international conventions, particularly the African Charter. Article 25(3) singles out freedom of expression as one of the key rights vulnerable to stringent and overreaching cyber security laws.

---

60 Resolution on the Right to Freedom of Information and Expression on the Internet in Africa ACHPR/Res 362(LIX) 2016.

61 Resolution (n 60) Preamble.

62 S Rukundo "'My President is a pair of buttocks': The limits of online freedom of expression in Uganda' (2018) 26 *International Journal of Law and Information Technology* 252.

63 African Union Convention on Cyber Security and Personal Data Protection 27 June 2014 (EX CL/846 (XXV)).

### 3.4 East African Community

According to article 6(d) of the Treaty for the Establishment of the East African Community (EAC Treaty),<sup>64</sup> the promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter is one of the fundamental principles. The East African Court of Justice has held that freedom of expression falls within that article.<sup>65</sup> In today's increasingly digital environment the individual's freedom of expression is most conveniently exercised on-line.

### 3.5 Ugandan Constitution

Article 29 of the Constitution of Uganda protects freedom of expression in Uganda. Although the Constitution does not define what freedom of expression entails, the Ugandan Supreme Court in *Obbo*<sup>66</sup> defined it as 'freedom to hold opinions and to receive and impart ideas and information without interference'.<sup>67</sup> The Court also noted that the right to freedom of expression was not confined to 'categories, such as correct opinions, sound ideas or truthful information'. The Court stated:<sup>68</sup>

A person's expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views.

Thus, simply because the mode of expression chosen is impolite or annoying does not justify its suppression. In *Mwenda* sections 39 and 40 of the Penal Code Act, which provided for the crime of sedition, were found to be unconstitutional, the Court noting:<sup>69</sup>

Our people express their thoughts differently depending on the environment of their birth, upbringing and education. While a child brought up in an elite and God-fearing society may know how to address an elder or leader politely, his counterpart brought up in a slum environment may make annoying and impolite comments, honestly believing that that is how to express him/herself.

The Court noted that the people have a right to criticise their leaders rightly and advised that 'leaders should grow hard skins to bear'.

64 Treaty for the Establishment of the East African Community adopted on 30 November 1999, entered into force 7 July 2000 2144 UNTS 255.

65 *Burundian Journalists' Union v Attorney-General* EACJ Ref 7 of 2013.

66 *Obbo & Another v Attorney-General* [2004] 1 EA 265.

67 As above.

68 As above.

69 *Andrew Mujuni Mwenda & Another v Attorney-General* Constitutional Petition 12 of 2005 para 78.

New forms of technology do not warrant a narrower application of the right to freedom of expression.<sup>70</sup> In *Rwanyarare*<sup>71</sup> the Court considered a provision of the Referendum Act 2002<sup>72</sup> which prohibited the use of electronic media to make false, malicious, sectarian and derogatory statements and also prohibited the use of 'exaggerations or using caricatures' and 'derisive or mudslinging words'. Electronic media was defined as including 'television, radio, internet and email and any other similar medium'. The Court found these provisions unconstitutional as they were far-reaching and draconian and could 'only be intended to intimidate the media contrary to the spirit of article 29(1)(a)'.

According to article 43 a limitation to the right to freedom of expression is acceptable where exercising the right would prejudice the rights of others or prejudice public interest. However, for any such limitation to be acceptable it must be a measure that is accepted and demonstrably justifiable in a free and democratic society.<sup>73</sup> In *Obbo*<sup>74</sup> the Supreme Court noted that the Constitution's primary objective is the protection of the guaranteed rights, including freedom of expression, while limiting their enjoyment is an exception to their protection and, therefore, a secondary objective. Although the Constitution provides for both, the primary objective is dominant and can be overridden only in the exceptional circumstances that give rise to that secondary objective. Even when such limitation occurs, only minimal restraint to the enjoyment of the right, required by the exceptional circumstances, is permissible.<sup>75</sup>

## 4 Legislation limiting digital activism in Uganda

### 4.1 Penal Code Act

Section 179 of the Penal Code Act creates the offence of criminal libel. The provision states:

Any person who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, commits the misdemeanour termed libel.

70 X Li 'Hacktivism and the First Amendment: Drawing the line between cyber protests and crime' (2013) 27 *Harvard Journal of Law and Technology* 301; Sorell (n 40).

71 *Rwanyarare v Attorney-General* Constitutional Petition 5 of 1999.

72 The Act had been passed to regulate the referendum in which the people of Uganda would choose to be governed either by the 'Movement system', which was a thinly-veiled one-party system, or the multi-party system.

73 *Obbo* (n 66).

74 As above.

75 As above.

The offence is framed in much the same terms as the civil tort.<sup>76</sup> Although the wording clearly envisages the off-line environment, in *Uganda v Nyakahuma Kalyegira*<sup>77</sup> the Court relied on the definitions of computer output and electronic record in the Computer Misuse Act 2011 (CMA), which included material which can be printed, to find that publication on-line was an offence under section 179. Thus, on-line defamation leaves one liable to prosecution for criminal libel. In considering the limitation that the offence of criminal libel places on freedom of expression, it has been stated that freedom of expression is not a licence to malign others or to repeat unsubstantiated falsehoods. Rather, it is a freedom to be exercised responsibly and with great care so as not to unnecessarily injure the reputations of innocent people.<sup>78</sup> The Ugandan Constitutional Court in *Buwembo*<sup>79</sup> held that section 179 of the Penal Code Act was compatible with freedom of expression guaranteed under the Constitution. The Court reasoned that the importance of free speech had to be weighed against the importance of reputation, and that statements that are defamatory libel, rather than fall under freedom of expression, in fact serve to stifle it as they do not enhance public knowledge and development. Similar provisions have been upheld in other jurisdictions.<sup>80</sup>

However, in today's digital age an offence such as criminal libel inevitably has a chilling effect on freedom of expression. The UN Human Rights Committee in General Comment 34<sup>81</sup> argued that '[s]tates parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty'. Similarly, the African Commission passed a resolution<sup>82</sup> for the repeal of criminal defamation laws. This approach was adopted in the Kenyan case of *Okuta*<sup>83</sup> where the offence of criminal defamation in section 194 of the Kenyan Penal Code was found to be unconstitutional as it infringed the right to freedom of expression. The petitioners in that case were accused of posting defamatory material on a *Facebook* page. Contrary to the Ugandan decision of *Buwembo*, the Court held that the alternative civil remedy was satisfactory and adequate to combat the mischief of defamation. Similarly, in *Konate v Burkina Faso*<sup>84</sup> the African Court on Human and Peoples' Rights (African Court), in declaring a criminal defamation law

76 Secs 180-186 of the Penal Code Act Cap 120.

77 HCT-OO-CR-MC-0001-2013.

78 *Republic v Gachoka & Another* [1999] 1 EA 254.

79 *Joachim Buwembo & Others v Attorney-General* Constitutional Reference 1/2008.

80 *M'membe & Another v The People; M'membe & Others v The People* [1996] 2 LRC 280; *Bernard Sullivan v Attorney-General Seychelles* SCA 25 of 2012.

81 United Nations Human Rights Committee (n 45).

82 169: Resolution on Repealing Criminal Defamation Laws in Africa, <http://www.achpr.org/sessions/48th/resolutions/169/> (accessed 29 November 2017).

83 *Okuta & Another v Attorney-General & Others* Constitutional Petition 397 of 2016.

84 *Konate v Burkina Faso* African Court of Human Rights App 4/2013.

incompatible with freedom of expression, stated that freedom of expression could be infringed only if that restriction was based on an overarching public interest. The Court stated that criminal defamation laws should be used only as a last resort and only to protect against a serious threat to the enjoyment of other human rights, for instance in cases of hate speech and incitement. Similar reasoning was applied in the Zimbabwean cases of *Madanhire v Attorney-General*<sup>85</sup> and *MISA-Zimbabwe v Minister of Justice*,<sup>86</sup> where it was held that criminal defamation laws were unconstitutional as they were not proportionate to the offence.

## 4.2 Computer Misuse Act 2011

### 4.2.1 Cyber harassment

Section 24 of the Computer Misuse Act (CMA) creates the offence of cyber harassment, which is the use of a computer in making obscene requests or threatening to inflict injury to any person or property. The anonymity and ease of communication provided by the internet make cyberspace the ideal roaming ground for people who wish to harass others.<sup>87</sup> The modes of communication available to facilitate cyber harassment include e-mail, blogs, chat rooms, instant messaging services, electronic bulletin boards, and social networking sites.<sup>88</sup>

### 4.2.2 Offensive communication

Section 25 of the CMA prohibits the wilful and repeated use of electronic communication to disturb the peace, quiet or right to privacy of any person without purpose of legitimate communication. This provision is rooted in the right to privacy guaranteed under the Constitution.<sup>89</sup> The test for offensiveness of communication is that it must disturb the peace, quiet or right to privacy of the recipient, must be done repeatedly and must not be legitimate communication. The requirement that the communication disturbs the peace of another is a subjective one, and what may disturb the peace of individuals may vary from one person to another. The requirement that the communication be done repeatedly means that once-off communications, no matter how disturbing, may not meet the threshold to fall under this section. They may, however, fall under

85 Judgment CCZ 2/14; Zimbabwe Const Application CCZ 78/12.

86 Zimbabwe Const Application CCZ/07/15.

87 D Harvey *Cyberstalking and internet harassment: What the law can do* Australian Institute of Criminology, Netsafe.Org.Nz 2 (2003), [http://www.netsafe.org.nz/Doc\\_Library/netsafepapers\\_davidharvey\\_cyberstalking.pdf](http://www.netsafe.org.nz/Doc_Library/netsafepapers_davidharvey_cyberstalking.pdf) (accessed 7 February 2018).

88 S Jameson 'Cyber harassment: Striking a balance between free speech and privacy' (2008) 17 *CommLaw Conspectus* 231.

89 Art 27 Constitution of the Republic of Uganda 1995.

cyber harassment.<sup>90</sup> Finally, there must be no legitimate purpose to the communication, meaning that the offender should have no justifiable reason for sending the communication.

There is little doubt that some form of legislation to protect against on-line harassment and abuse is necessary. However, the provisions on cyber harassment and offensive communication as they stand now are particularly prone to abuse by government authorities to restrict on-line criticism. The CMA provisions have been applied in a number of instances. In December 2016 Swaibu Nsamba Gwogyolonga, a political activist, was arrested and charged with offensive communication contrary to section 25 of the CMA after he had posted on his *Facebook* page a photo-shopped picture of the President dead and lying in a coffin, stating that he would announce and mourn the death of the President when he dies.<sup>91</sup> Stella Nyanzi, a Makerere University lecturer with a considerable social media following and a reputation for tincturing her incisive socio-political analyses with sexual allegory, in early 2017 fell victim to a charge of offensive communication following a caustic *Facebook* post in which she called the President 'a pair of buttocks' and the first lady, who is also the Minister of Education, 'empty-brained'. Her post was a complaint against the President and the first lady reneging on their campaign promise to deliver free sanitary towels to girls in school.<sup>92</sup> She is being prosecuted for offensive communication and cyber harassment contrary to the CMA. Unsuccessful attempts were even made to have her dismissed from her employment as a lecturer at Makerere University as a result of her posts.<sup>93</sup> In December 2017 David Mugema and Jonah Muwanguzi were arrested and charged with offensive communication for having electronically communicated through social media a song titled 'Wumula', the lyrics of which called for the resignation of Yoweri Kaguta Museveni, the President of Uganda.<sup>94</sup>

---

90 Sec 24 Computer Misuse Act 2011.

91 As above.

92 'Fury over arrest of academic who called Uganda's President a pair of buttocks' *The Guardian* 13 April 2017, <https://www.theguardian.com/global-development/2017/apr/13/stella-nyanzi-fury-arrest-uganda-president-a-pair-of-buttocks-yoweri-museveni-cyber-harassment> (accessed 14 December 2017).

93 'Dr Stella Nyanzi suspended from Makerere University job for insulting Janet Museveni' *NTV* 31 March 2017, <http://www.ntv.co.ug/news/local/31/mar/2017/dr-stella-nyanzi-suspended-makerere-university-job-insulting-janet-museveni#sthash.lbtI7UNW.dpbs> (accessed 14 December 2017); 'Makerere University ordered to hear Dr Stella Nyanzi disciplinary case afresh' *Daily Monitor* 21 October 2017, <http://www.monitor.co.ug/News/National/Makerere-University-ordered-Dr-Stella-Nyanzi-disciplinary-case/688334-4149572-2bugkj/index.html> (accessed 14 December 2017).

94 'Court grants bail to artists who annoyed Museveni' *Daily Monitor* 6 December 2017, <http://www.monitor.co.ug/News/National/Court-grants-bail-artists-Museveni-Kamasanyu/688334-4217338-ufcw1mz/index.html> (accessed 15 December 2017).



#### 4.2.3 *Constitutionality of the crimes of cyber harassment and offensive communication*

The wording of the provisions of the Computer Misuse Act certainly is prone to attack. Words such as 'obscene', 'lewd', 'lascivious', 'indecent' and 'disturb the peace, quiet' contained in those provisions are not defined in the Act. It may be argued that this makes the offences unclear contrary to article 28(12), which requires that offences be clearly defined. In the Kenyan case of *Andare v Attorney-General*<sup>95</sup> the petitioner argued that section 29 of the Kenya Information and Communication Act, Cap 411A, which provided that a person who sends a grossly offensive or indecent, obscene or menacing message by means of a telecommunications system for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence. He argued that section 29 of the Act was vague and over-broad, especially with regard to the meaning of 'grossly offensive', 'indecent', 'obscene', 'menacing', 'causing annoyance', 'inconvenience' or 'needless anxiety', thereby offending the principle of legality which requires that a law be clear and precise. The Court held that as the Act did not define the words used, the meaning of those words was left to the subjective interpretation of each judicial officer seized of a matter. The law, therefore, was vague, broad and uncertain. In *Rwanyarare*<sup>96</sup> the Court considered a provision of the Referendum Act 2002<sup>97</sup> which prohibited any person from using electronic media to make statements containing words which are 'malicious', 'sectarian', 'abusive or insulting', 'exaggerations or using caricatures' or 'derisive or mudslinging'. The Court found this provision unconstitutional due to vagueness and the fact that if applied, it would only be applied against the opposition side and not the party in power.

The use of these provisions of the CMA to restrict political criticism unconstitutionally limits the freedom of expression guaranteed in the Constitution and international instruments. As noted above, the Ugandan Constitutional Court in *Mwenda*<sup>98</sup> and the African Commission in its Declaration of Principles on Freedom of Expression in Africa<sup>99</sup> stated that public figures should be required to tolerate a greater degree of criticism. This is especially crucial in the case of political figures as freedom of expression is based on the assumption that political leaders are fallible and, therefore, should be open to criticism.<sup>100</sup> As noted in the cases cited above, the CMA provisions

95 Constitutional Petition 149 of 2015.

96 *Dr James Rwanyarare & Another v Attorney-General* Constitutional Petition 5 of 1999.

97 n 72.

98 *Mwenda v Attorney-General* Constitutional Petition 12 of 2005.

99 Declaration of Principles (n 59).

100 C Anthonissen 'The sounds of silence in the media: Censorship and self-censorship' in R Wodak & V Koller *Handbook of communication in the public sphere* (2008) 407.

have been put to prolific use by powerful political figures to control criticism. This use of legislative provisions effectively communicates the state's ability and power to reach into the digital sphere and punish dissent therein. This inevitably has a chilling effect on on-line freedom of expression. In the Kenyan case of *Robert Alai v Attorney-General*<sup>101</sup> Robert Alai, a prominent social media personality and blogger, had posted on Twitter regarding President Uhuru of Kenya that '[i]nsulting Raila is what Uhuru can do. He hasn't realised the value of the Presidency. Adolescent President. This seat needs maturity.' He was charged with undermining the authority of a public official under section 132 of the Kenyan Penal Code. He sought a declaration that section 132 was unconstitutional. The Court, relying on article 33 of the Kenyan Constitution which guarantees freedom of expression, noted that people 'cannot be freely expressing themselves if they do not criticise or comment about their leaders and public officers'. The Court further stated:<sup>102</sup>

The section does not define the words 'undermining authority of a public officer' leaving it to the subjective view of the person said to have been undermined and/or the court. In a democratic state, constructive criticism of public or state officers is the hallmark of democracy and the means for public accountability. Criminalising criticism is not in accord with a transformative constitution, since senior public officers should routinely be open to criticism. Dissent in opinion should not amount to a crime otherwise this is in effect, suppressing the right to hold different opinion from those in public office.

Thus, laws such as the CMA provisions on cyber-harassment and offensive communication, which lend themselves well to the government as tools of suppression of dissent by restricting criticism of public figures, are of doubtful constitutionality.

### 4.3 Anti-Terrorism Act 2002

Section 7(2)(g) of the Anti-Terrorism Act (ATA)<sup>103</sup> makes serious interference with or disruption of an electronic system part of the offence of terrorism which on conviction carries the death penalty. The maximum sentence for any of the various forms of hacking criminalised under the CMA is 15 years' imprisonment.<sup>104</sup> The actions that would fall under the CMA provisions would also presumably fall under the ATA provisions. Moreover, the Act does not define 'serious interference' with an electronic system. Any kind of hacking could easily fall into this category. As the same criminal actions could fall under either Act, it is likely that the ATA provision can be used where the hacking takes a political hue in the form of hacktivism. The threat of the death penalty certainly is a considerably stronger disincentive than 10 to 15 years' imprisonment. While hacktivism might be a more

---

101 Constitutional and Human Rights Division Petition 174 of 2016.

102 Petition (n 101) para 35.

103 Anti-Terrorism Act 2002.

104 Secs 12-15 Computer Misuse Act 2011.

controversial form of digital activism, it does not warrant the death penalty. Moreover, a comparison of the two provisions in the CMA and ATA reveals that while the CMA offence, which carries the 10 to 15 year penalty, is elaborately defined, the ATA offence, which carries the death penalty, is brief and considerably vague.

Part VII of the ATA provides for the legal interception of communication, including data communication, in the investigation of terrorist activities. The Minister of Internal Affairs is empowered to designate for a period of 90 days any member of the Uganda Peoples' Defence Forces, the Ugandan police force or a government security organisation as an authorised officer.<sup>105</sup> An authorised officer is allowed to intercept the communications of any person for purposes of safeguarding public interest and preventing terrorism.<sup>106</sup> The ATA allows 'telephone calls, faxes, emails and other communications'<sup>107</sup> to be intercepted on suspicion of terrorism. The power of surveillance on suspicion of terrorism thus lies squarely in the hands of the executive branch as there is no requirement of authorisation by a judicial officer. Left unchecked, this implies that the threat of legalised surveillance looms over all who attempt to engage in digital activism in Uganda. By law 'telephone calls, faxes, emails and other communications'<sup>108</sup> can be intercepted on suspicion of terrorism.

#### 4.4 Regulation of Interception of Communications Act

Authorisation for the interception of communication can be given under section 2(2) of the Regulation of Interception of Communications Act (RICA),<sup>109</sup> which allows for the *bona fide* interception of a communication in connection with the provision, installation, maintenance or repair of a telecommunication service. Internet service providers are required to ensure that their telecommunication systems are technically capable of supporting lawful interception, undetectable by the target, at all times.<sup>110</sup> Section 5 of RICA requires intelligence agencies and the police to seek judicial authorisation prior to the interception of communications and must demonstrate only 'reasonable' grounds for broad threats to national security, national economic interests and public safety. Information obtained in excess of what the warrant caters for remains admissible at the discretion of the court under section 7. This provision, which allows for illegally-collected evidence, runs contrary to the principles established that where human rights have been violated in the collection of evidence it will not be admitted.<sup>111</sup> Section 10 requires

105 Sec 18 Anti-Terrorism Act.

106 Sec 19 Anti-Terrorism Act.

107 Sec 19(5)(b) Anti-Terrorism Act.

108 As above.

109 Regulation of Interception of Communications Act 18 of 2010 (RICA).

110 Sec 8 RICA.

111 *Besigye v Attorney-General* Constitutional Petition 7 of 2007; *Uganda v Sekabira* [2012] UGHC 92. However, see *Maycock v Attorney-General* [2010] 3 LRC 1.

that a person in possession of a decryption key where the data collected by interception is encrypted must use it to disclose the encrypted information upon request by the authorised person.

Section 11 requires internet service providers to retain metadata but does not specify the terms and conditions of the retention. This provision is likely to be in conflict with the Data Protection and Privacy Act, which allows for the data subject to request for data in relation to him or her to be erased.<sup>112</sup> RICA does not provide a right to seek redress for individuals that are the subject of a warrant for interception of communication. Thus, if an individual discovers that he or she is under surveillance, the only remedy is a court process which can be lengthy and expensive. The Act also fails to provide a right to notification following an investigation to inform an individual that they had been subjected to communication surveillance. Instead, section 15 places a gag on internet service providers and their employees, preventing them from even revealing statistics and other relevant information on the number and nature of communication interception requests received which hinders transparency,<sup>113</sup> and is contrary to the Data Protection and Privacy Act, which allows the data subject to be informed of any data being processed.<sup>114</sup>

Internet service providers have access to a broad range of sensitive information and data relating to their subscribers, such as metadata, the content of their communications, location, and so forth.<sup>115</sup> Where the government is able to access this information from internet service providers, it likely will hamper digital activism. The state can use this information acquired through surveillance to identify dissidents, anticipate planned dissent and signal its power to the masses, discouraging them from engaging in on-line activism.<sup>116</sup> It is undeniable that under certain circumstances there might be legitimate reasons to intercept communication. In the Indian case of *People's Union for Civil Liberties v Union of India*<sup>117</sup> the Indian Telegraph Act 1885 allowed for the interception of telegraph messages in the event of a public emergency or in the interests of public safety if it was necessary or expedient to do so. A report on 'Tapping of politicians' phones' highlighted several deficiencies in the way in which the law had in practice been applied, such as that interception had continued beyond authorised periods (albeit in certain cases in good faith on oral requests) and that various authorised agencies were

112 Sec 24 of the Data Protection and Privacy Bill 2015.

113 The issuing of 'transparency reports' by internet service providers in which they disclose the requests for information and surveillance received from governments has been acknowledged as one of the mechanisms of maintaining freedom of expression. R MacKinnon et al *Fostering freedom online: The role of internet intermediaries* (2014) 3.

114 Sec 24 Data Protection and Privacy Act 2019.

115 MacKinnon (n 113) 80.

116 AR Gohdes *Repression in the digital age: Communication technology and the politics of state violence* (2014) 28.

117 [1999] 2 LRC 1 (India).

not maintaining files regarding the interception of telephones. The constitutionality of the law providing for interception was challenged. The Court held that the substantive law in the Indian Telegraph Act 1885, setting out the conditions under which the power to order the interception of messages could be exercised, required procedural backing in order to ensure that the exercise of such power was fair and reasonable. In this instance, such procedure had not been laid out. However, the Court noted that where the interception of communication by state authorities is established under procedure by law which prevents the arbitrary exercise of such power, this would not violate the right to privacy or freedom of expression. However, with RICA the challenge is that it is likely that this law will be abused and used by the government to spy on political opponents rather than potential criminals. As was noted in *Rwanyarare*, a law might appear neutral but, given the legal-political realities of the day, is likely to be used against government opponents. In such a scenario, such a law should not be allowed to stand.

#### 4.5 Anti-Pornography Act 2014

The Anti-Pornography Act prohibits the production, trafficking, publishing and broadcasting of pornography.<sup>118</sup> The Act also established the Pornography Control Committee<sup>119</sup> which is empowered, among others, to 'ensure the early detection and prohibition of pornography'.<sup>120</sup> While the government's war on pornography is ostensibly touted as a moral crusade to reclaim the minds of Uganda's youth, it has implications beyond morality. In August 2017 the Minister of Ethics and Integrity announced that Uganda would soon be acquiring a 'pornography-detecting machine'.<sup>121</sup> The machine, purchased at the cost of US \$88 000, was said to be able to detect deleted or current pornographic materials stored on people's computers. The Minister, in an impassioned speech, fulminated against pornography, which he claimed was 'one of the deadliest moral diseases in this country' contributing to 'escalating cases of drug abuse among youths, incest, teenage pregnancy and abortion, homosexuality and lesbianism and defilement'.<sup>122</sup> While some commentators easily dismissed the idea of a pornography-detecting machine as laughable,<sup>123</sup> others noted with suspicion that it was part of a general trend towards greater

118 Sec 13 Anti-Pornography Act 2014.

119 Sec 3 Anti-Pornography Act 2014.

120 Sec 7 Anti-Pornography Act 2014.

121 'Porn detector machine to arrive soon – Minister Lokodo' *The Observer* 28 August 2017, <http://observer.ug/news/headlines/54639-porn-detector-machine-to-arrive-soon-minister-lokodo.html> (accessed 16 December 2017).

122 As above.

123 'Uganda buys a "pornography detection machine" to catch offenders, official says' *The Huffington Post* 8 February 2016, [https://www.huffingtonpost.com/entry/uganda-pornography-detection-machine\\_us\\_57a102c7e4b08a8e8b5fe897](https://www.huffingtonpost.com/entry/uganda-pornography-detection-machine_us_57a102c7e4b08a8e8b5fe897) (accessed 16 December 2017).

surveillance.<sup>124</sup> The purpose of this machine is 'to monitor and or intercept, downloading, watching, sharing and or transmission of electronic pornographic material'.<sup>125</sup> This suggests that the ridiculous-sounding 'pornography detecting machine' may in fact be a more sinister form of Deep Packet Inspection (DPI) technologies<sup>126</sup> that will enable the government to conduct effective surveillance. DPI is a popular form of monitoring for child pornography worldwide and all forms of pornography in countries with stringent obscenity laws. However, it has been noted that while the initial target ostensibly may be pornography, many governments subsequently use these technologies to spy on their citizens.<sup>127</sup> Russia, China and Iran are countries that are noted to have used DPI with considerable success in on-line surveillance and to control the content that their citizens can access.<sup>128</sup>

#### 4.6 Uganda Communications Act 2013

The Uganda Communications Act 2013<sup>129</sup> establishes the Uganda Communications Commission (UCC) and empowers it 'to monitor, inspect, license, supervise, control and regulate communications services'.<sup>130</sup> The Minister of Information and Communication Technologies appoints all members of the Board that governs the UCC.<sup>131</sup> This places the Commission firmly under the control of the executive branch of government and makes it amenable to its influence. This practice is contrary to Principle 7 of the Declaration of Principles on Freedom of Expression in Africa which requires a public authority regulating the telecommunications sector to be independent. The Act in section 86 also empowers the UCC to 'direct any operator to operate a network in a specified manner in order to alleviate the state of emergency'. Under the Constitution it is the President who declares a state of emergency.

124 'Uganda's "pornography-blocking machine" appears to be part of a darker censorship agenda' *iAfrikan* 26 August 2016, <https://www.iafrikan.com/2016/08/26/ugandas-pornography-blocking-machine-appears-to-be-part-of-a-darker-censorship-agenda/> (accessed 16 December 2017).

125 'Lokodo appoints committee to fight pornography' *Daily Monitor* 29 August 2017, <http://www.monitor.co.ug/News/National/Lokodo-appoints-committee-to-fight-pornography/688334-4074914-m7iysl/index.html> (accessed 16 December 2017).

126 This is software that examines a data packet as it passes an inspection point, searching for any defined criteria to decide whether the packet may pass or whether it needs to be routed to a different destination.

127 S Stalla-Bourdillon, E Papadaki & T Chown 'From porn to cybersecurity passing by copyright: How mass surveillance technologies are gaining legitimacy: The case of deep packet inspection technologies' (2014) 30 *Computer Law and Security Review* 670.

128 C Fuchs 'Implications of deep packet inspection (DPI) internet surveillance for society' July 2012 The Privacy and Security Research Paper Series, <http://fuchs.uti.at/wp-content/uploads/DPI.pdf> (accessed 16 December 2017).

129 Sec 4 Uganda Communications Act 2013.

130 As above.

131 Sec 9(3) Uganda Communications Act 2013.

The UCC has generally functioned as another arm of the ruling party taking action against media houses and, through telecommunications companies, against the internet whenever it has been in the government's interests.<sup>132</sup> In that respect, it has frequently taken blatantly unconstitutional actions to aid the government.

#### **4.6.1 Shutting down of websites critical of the government by the Uganda Communications Commission**

The UCC has ordered the shutdown of private websites critical of the government. The Commission appears to order the shutdown of websites on the basis of its general powers of regulation as there is no specific provision in the Communications Act that confers that authority. Websites are stored on servers, which have internet protocol (IP) addresses. All the government has to do is have the UCC order internet service providers and telecommunication companies to block access to a specific IP address.<sup>133</sup> In the run-up to the presidential elections of 2006 the Ugandan government through the UCC ordered MTN, at the time the country's main internet service provider, to block internal access to a critical website called *Radio Katwe*.<sup>134</sup> MTN issued a statement explaining that it decided to comply as Ugandan law 'empowers [UCC] to direct any telecoms operator to operate networks in such a manner that is appropriate to national and public interest'.<sup>135</sup> *Radio Katwe* was notorious for publishing reports that were extremely critical of the President, his family and the ruling party,<sup>136</sup> claiming that the goal was to 'campaign for the end of dictatorship, corruption, persecution, poverty ... in Uganda'.<sup>137</sup> The site claimed to have been receiving up to 71 000 hits in one day.<sup>138</sup> In February 2006 the government blocked access to the website of the *Daily Monitor*, a privately-owned daily newspaper, because it was publishing election results without the authorisation of the Electoral Commission. The blockage was

132 PG Mwesigye 'UCC deserves more attention from media, civil society, and Parliament' *ACME* 29 November 2017, <https://acme-ug.org/2017/11/29/ucc-deserves-more-attention-from-media-civil-society-and-parliament/> (accessed 13 March 2018).

133 'How African governments block social media' *BBC News* 25 April 2016, <http://www.bbc.com/news/world-africa-36024501> (accessed 16 December 2017).

134 'Critical website Radio Katwe blocked on eve of presidential election' *Open Net Africa* 22 February 2006, <http://www.opennetafrika.org/critical-website-radio-katwe-blocked-on-eve-of-presidential-election/> (accessed 12 December 2017); 'UCC ordered blocking Radio Katwe MTN' *New Vision* 20 February 2006, [http://www.newvision.co.ug/new\\_vision/news/1154037/ucc-blocking-radio-katwe-eur-mtn](http://www.newvision.co.ug/new_vision/news/1154037/ucc-blocking-radio-katwe-eur-mtn) (accessed 13 December 2017).

135 *Open Net Africa* (n 134).

136 'Museveni's family ownership of Uganda' *Radio Katwe* 13 May 2015, <http://radiokatwenews2013.blogspot.ug/2015/05/museveni-family-ownership-of-uganda.html> (accessed 12 December 2017).

137 <http://radiokatwenews2013.blogspot.ug/> (accessed 12 December 2017).

138 *Open Net Africa* (n 134).

removed only after the Electoral Commission had declared the official results.<sup>139</sup> The *Daily Monitor* had aimed at declaring results from the different polling stations so that they could be compared to those of the Electoral Commission. The official results of the election subsequently were unsuccessfully contested in *Besigye v Electoral Commission*.<sup>140</sup> In the same period it was reported that the website of the state-owned newspaper, *New Vision*, also had been blocked.<sup>141</sup>

Like many other African governments, the Ugandan government on occasion has cracked down on social media. On 18 February, the day of the 2016 presidential elections, the President ordered the blocking of access to social media platforms such as *Facebook*, *Twitter* and *WhatsApp*. According to the President, the move was prompted by fears of widespread panic among the masses as a result of disinformation spreading.<sup>142</sup> In his own words, the President asserted that he would not tolerate 'people telling lies using social media. Don't joke with the state. It can do more if people keep misbehaving.'<sup>143</sup> However, despite this threatening stance, many people gained access to the social media sites via virtual private network (VPN) applications during the period of the shutdown. VPNs redirect the user's internet activity to a computer in a different country where the blocks have not been imposed. One opposition presidential candidate went so far as to guide people on how to access the VPNs on his social media page.<sup>144</sup> On 12 May 2016, the date of the swearing in of President Museveni for a fifth elective term, internet service providers in Uganda were once again ordered by the UCC to block access to *Facebook*, *WhatsApp* and *Twitter*. According to the UCC the orders had come from state security organs, which cited 'security reasons' for the shutdown.<sup>145</sup> In *Legal Brains Trust Ltd v UCC*<sup>146</sup> a constitutional petition was brought to declare that the shutting down of social media platforms during the election period was unconstitutional. However, the Court dismissed the case arguing

---

139 Chibita (n 9) 69.

140 *Rtd Col Dr Kizza Besigye v Electoral Commission, Yoweri Kaguta Museveni* [2007] UGSC 24.

141 'Government blocks *New Vision*, *Daily Monitor* websites ahead of election' *Radio Katwe* 20 February 2006, <http://katwe.blogspot.ug/2006/02/government-blocks-new-vision-daily.html> (accessed 16 December 2017).

142 'Uganda election: Facebook and WhatsApp blocked' *BBC News* 18 February 2016, <http://www.bbc.com/news/world-africa-35601220> (accessed 13 December 2017).

143 'Museveni endorses Besigye arrest; threatens tighter social media controls' *Chimp Reports* 21 February 2016, <http://www.chimpreports.com/museveni-endorses-besigye-arrest-threatens-tighter-social-media-controls/> (accessed 13 December 2017).

144 *BBC News* (n 142).

145 'Government shuts down social media again' *Daily Monitor* 13 May 2016, <http://www.monitor.co.ug/News/National/Government-shuts-down-social-media-again/688334-3201024-qxvhrxz/index.html> (accessed 16 December 2017).

146 HCMC 16 of 2016.



that the petitioner had not exhausted other remedies such as the tribunal that deals with telecommunications sector issues.<sup>147</sup>

The shutting down of these websites, especially the social media websites, is a severe limitation on digital activism in the country. Shutting down websites that are critical of the government discourages the creation of such websites, which are necessary to hold the government to account. It also denies those who set up these websites their right to disseminate their views and opinions. Shutting down social media is even more frustrating to digital activists. Social media functions as a tool for citizens to provide feedback to government. Ninety per cent of ministries, departments and agencies in Uganda use social media to obtain and respond to citizens' opinions, reviews and questions.<sup>148</sup> Citizen feedback to government acts as a check on bureaucratic abuse and corruption, alerts the government to citizens' needs and concerns, and gives citizens a sense that they have a voice in society.<sup>149</sup>

#### 4.7 Excise Duty (Amendment) Act 2018

In March 2018 the Ugandan government proposed the introduction of a tax on social media. The idea was initiated by the President of Uganda, Mr Yoweri Museveni, who argued that Ugandans were using social media platforms for *lugambo* (gossip), and that the tax was meant to 'raise resources to cope with the consequences of their *lugambo*'.<sup>150</sup> In May 2018 the Excise Duty (Amendment) Act 2018 was passed. This Act introduced the taxation of social media platforms which it referred to as 'over the top services' (OTT). The Act defines OTT as 'transmission or receipt of voice or messages over the internet protocol network and includes access to virtual private networks'.<sup>151</sup> A tax rate of UGX 200 (US \$0,06) is imposed on each OTT service user for 24 hour access.<sup>152</sup> The internet service provider is liable to account for and pay the excise duty.<sup>153</sup>

The tax hinders digital activism as it discourages the use of social media. Social media largely functions as a gateway to information and communications technology and greater internet use, and is the most

147 Similarly, in *ZLHR and MISA Zimbabwe v Minister of State for National Security* Case HC 265/19 the petition against the constitutionality of a social media shutdown was concluded on a technical point without examining freedom of expression.

148 NITA-U, National Information Technology Survey 2017/18 Report 158 (March 2018).

149 M Warschauer *Technology and social inclusion: Rethinking the digital divide* (2003) 177.

150 'President Museveni apparently proposes taxing social media' *Techjaja* 31 March 2018, <https://www.techjaja.com/president-museveni-apparently-proposes-taxing-social-media/> (accessed 12 March 2019).

151 Sec 2 Excise Duty (Amendment) Act 2018.

152 Sec 6(e) Excise Duty (Amendment) Act 2018.

153 Sec 3 Excise Duty (Amendment) Act 2018.

common use of the internet in Uganda.<sup>154</sup> In June 2018, a month before the introduction of the tax, the internet penetration rate in Uganda stood at 47,4 per cent (18,5 million internet users). By September, a mere three months later, it had fallen to 35 per cent (13,5 million users).<sup>155</sup> The decrease in the number of internet users reduces the efficacy of digital activism.

## 5 Conclusion

Digital activism has the nature of social and political activism, making these more widespread and easier. International instruments and constitutions protect freedom of expression and, by extension, digital activism. This protection notwithstanding, various laws are being applied to curtail digital activism. A balanced approach that acknowledges the value of digital activism yet curtails harmful aspects of information and communications technology, such as cybercrime, is needed so that freedom of expression, so critical in this digital age, can thrive.

---

154 UCC 'Access and usage of communication services across Uganda' January 2015, <http://ucc.co.ug/files/downloads/20150130-UCC-access-usage-dissemination.pdf> (accessed 12 March 2019).

155 J Nanfuka 'Social media tax cuts Ugandan internet users by five million, penetration down from 47% to 35%' *CIPESA* 31 January 2019, <https://cipesa.org/2019/01/%EF%BB%BFsocial-media-tax-cuts-ugandan-internet-users-by-five-million-penetration-down-from-47-to-35/> (accessed 12 March 2019).

To cite: I Shale 'Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy' (2019) 19 *African Human Rights Law Journal* 193-218  
<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a10>

## Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy

*Itumeleng Shale\**

Lecturer, National University of Lesotho; Advocate of the courts of Lesotho  
<https://orcid.org/0000-0003-2284-3044>

### Summary

*This article reviews the relationship between international law and domestic law in the legal system of Lesotho. It explores the theories of monism and dualism and their usefulness in the protection of human rights in the legal system of Lesotho. It is argued that while Lesotho traditionally has been categorised as dualist, its conduct from before independence to date is not fully supportive of the tenets of this theory. This status is illustrated through a discussion of Lesotho's approach to international law during its territorial disputes with South Africa, and its attitude towards international instruments ratified both by the United Kingdom on behalf of Lesotho during the time it was a British Protectorate and after independence. The article also analyses the application and rejection of customary international law and international treaties by the courts of Lesotho. On the basis of this analysis it is concluded that the monist-dualist dichotomy no longer is useful in the protection of human rights as reflected in the courts' emphasis that Lesotho has to comply with its international human rights obligations. It is therefore recommended that the dichotomisation be discarded in favour of human rights protection regardless of whether the human rights norms are contained in international or in domestic law.*

**Key words:** *monism; dualism; human rights; domestication; Lesotho*

---

\* LLB (NUL) LLM (Pretoria) PhD (Witwatersrand); itumelengshale@yahoo.com. This article is drawn from the author's PhD thesis titled 'Domestic implementation of international human rights standards against torture in Lesotho' (with further elaboration in the article).

# 1 Introduction

Certainty of the place occupied by international law in any domestic legal system is important. This is more so with respect to the protection of human rights since most human rights standards are contained in instruments adopted at the global, regional and sub-regional levels, in this article collectively referred to as international instruments. Harmonisation of the two legal systems is a state obligation which is contained in the majority of international human rights instruments.<sup>1</sup> This obligation has also been emphasised in the jurisprudence of international courts and tribunals,<sup>2</sup> as well as in Concluding Observations.<sup>3</sup> According to Oppong, the relationship between domestic and international legal systems determines 'the extent to which individuals can rely on internal law for the vindication of their rights within the national legal system'.<sup>4</sup>

As are many countries in the world, Lesotho is a party to several international human rights treaties that create general and specific obligations for state parties. While the massive adoption of international human rights instruments is highly commendable, in order for these instruments to benefit the individuals for whom they are intended, the norms contained therein must be made to matter nationally.<sup>5</sup> Individuals must be able, at the national level, to enforce the rights contained in the ratified instruments.<sup>6</sup> Viljoen summarises the process of aligning national legal systems with the international

---

1 Eg, art 2(2) of the International Covenant on Civil and Political Rights, art 2(1) of the International Covenant on Economic, Social and Cultural Rights, art 2(1) of the Convention Against Torture and art 1 of the African Charter on Human and Peoples' Rights mandate state parties to adopt legislative measures to give effect to their provisions.

2 Eg, in the case of *Abdel Hadi & Others v Republic of Sudan* Communication 368/2009, November 2013, 54th ordinary session, the African Commission on Human and Peoples' Rights held that the state's failure to put in place an adequate legislative framework to protect the integrity of individuals is a violation of art 1 of the African Charter. Similarly, in *Mikhail Pustovoi v Ukraine* Communication 1405/2005 (HRC), 12 May 2014 UN Doc CCPR/110/D/1405/2005(2014) para 11, the Human Rights Committee (HRC) held that in accordance with art 2(3)(a) of ICCPR the state party is under an obligation to ensure necessary modifications to its laws and practice so as to prevent acts that violate the Covenant.

3 Committee Against Torture, Concluding Observations on the combined 4th fourth and 5th periodic reports of Australia, 26 November 2014, UN Doc CAT/C/SR.1284 and 1285 paras 5 & 20, where the Committee welcomed the adoption of national measures aimed at the implementation of the provisions of CAT as positive aspects of the report.

4 RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2006) 30 *Fordham International Law Journal* 3.

5 F Viljoen *International human rights law in Africa* (2011) 10.

6 See Preambles to the UN Charter, the Universal Declaration, ICCPR and ICESCR, all of which recognise that the effective protection of human rights at the national level is the foundation of justice and peace, and of social as well as economic development throughout the world.

human rights standards as 'bringing human rights home'.<sup>7</sup> He argues that when states ratify the international human rights instruments, they undertake to implement the rights contained therein and thereby assume the responsibility to bring the rights home, to the national level.<sup>8</sup> It is at the national level that individuals easily can access and enforce against their own governments the rights and obligations contained in the ratified international human rights treaties.<sup>9</sup> Hence, the principle of subsidiarity requires individuals to exhaust local remedies before approaching an international or regional body to vindicate their human rights.<sup>10</sup>

Lesotho traditionally has been categorised as dualist.<sup>11</sup> It may be argued that Lesotho's dualist approach to international law is inferred from the constitutional supremacy clause in section 2 of its Constitution as well as the fact that other pieces of legislation expressly mention the international instruments which they seek to implement.<sup>12</sup> However, it is illustrated in part 4 of the article that as far as human rights protection is concerned, there has been a paradigm shift in terms of which the courts – although it is not clear whether this was deliberate or not – have applied provisions of international instruments directly without probing into their domestication or otherwise. Because of the lack of a clear constitutional provision on how the courts must treat such instruments, there are also cases in which the courts have totally disregarded international instruments and pronounced that these cannot overrule either Sesotho customary law or statutes if they have not been domesticated into national laws. This inconsistency demonstrates that there is a need to change the stance as the categorisation no longer is helpful.

---

7 Viljoen (n 5) 10.

8 As above.

9 As above.

10 Art 56(7) of the African Charter requires the exhaustion of local remedies. See *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* (2010) AHRLR 102 (ACHPR 2010); see also *Muzerengwa & Others v Zimbabwe* (2011) AHRLR 160 (ACHPR 2011); see also art 22(4)(b) of CAT which requires the exhaustion of local remedies; *H v Sweden* Communication 627/2014 (Committee against Torture), 5 August 2016, UN Doc CAT/C/58/D/627/2014 para 7.5; *EE v The Russian Federation* Communication 479/2011 (Committee against Torture), 26 August 2012, UN Doc CAT/C/50/D/479/2011 para 8.4; and *BR v Italy* Communication 598/2014 (Committee against Torture) 12 June 2016, UN Doc CAT/C/57/D/598/2014 para 6 which were dismissed for failure to exhaust local remedies.

11 TK Saha & L Abdulrauf 'Introductory note on the 1993 Constitution of Lesotho' 25, [www.icla.up.ac.za/images/country\\_reports/lesotho\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/lesotho_country_report.pdf) (accessed 20 March 2019).

12 Eg, part IV of the Penal Code Act 2010 which deals with international crimes specifically states that the terms used in that section, such as torture, enslavement and others, bear the same meaning as that used in international law. The Children's Protection and Welfare Act provides that it applies the principle of best interests of the child as expounded in the Convention on the Rights of the Child (CRC) and African Charter on the Rights and Welfare of the Child.

From a historical perspective the article unpacks the place which international law occupied and continues to occupy in the legal system of Lesotho. The perceptions of states and scholars in this regard are divergent and are expressed from two main theories of incorporation: monism and dualism. These theories often are employed to determine the hierarchy of the two legal systems and to assist courts of law in determining which one will prevail when the two clash.<sup>13</sup> In this article it is argued that from a historical perspective the practical approach to international law in Lesotho does not fit into either of the two theories, which illustrates that an attempt to categorise Lesotho as either monist or dualist is not helpful.

The article is structured into five parts: an introduction; a brief overview of the theories of monism and dualism; a historical perspective on the place of international law in the legal system of Lesotho from the time of independence to date; the judicial application of both international treaties and international customary law; and, lastly, a conclusion that the practice as illustrated in parts 3 and 4 fails to fit into the theories of monism and dualism as discussed in part 2, regardless of whether the instruments presented before court have been adopted at the continental, regional or sub-regional level.

## 2 Theories of incorporation

### 2.1 Monism

The origin of this theory is traced to the natural law school of thought. Its proponents view international law and municipal law as a single unity composed of binding legal rules.<sup>14</sup> They posit that there is a single universal system of law and that international law and municipal law are aspects of such a system. Monists insist that the two legal systems are interrelated parts of one legal structure.<sup>15</sup> Further arguments advanced by the natural law scholars are that whereas international instruments are concluded between and among states, the real subjects of the norms contained therein are individual human beings,<sup>16</sup> and states are given responsibilities to protect those rights for the benefit of individuals.

According to the theory of monism, when confronted with a case, municipal courts are obliged to directly apply rules of international

13 XF Torrijo 'International law and domestic law: Definitely an odd couple' (2008) 77 *Revista Jurídica Universidad de Puerto Rico* 485.

14 JG Starke 'Monism and dualism in the theory of international law' in SL Paulson (ed) *Normativity and norms: Critical perspectives on Kelsenian themes* (1999), [www.oxfordscholarship.com](http://www.oxfordscholarship.com) (accessed 16 August 2017).

15 As above.

16 A Clapham 'The role of the individual in international law' (2010) 21 *European Journal of International Law* 25.

law in the same manner as municipal laws.<sup>17</sup> Where the two legal systems clash, monism gives preference to rules of international law.<sup>18</sup> In its purest form monism dictates that international law prevails over national laws and that a national law that contradicts an international instrument is null and void, even if that national law is a constitution, whether passed prior to or after the state's ratification of or accession to the international instrument in question.<sup>19</sup> The supremacy of international law over municipal law in both international and national decisions thus underlies the theory of monism.

## 2.2 Dualism

Dualism is the direct opposite of monism. Unlike monism, in terms of which international law and national law are viewed as part of one legal system, dualism treats international law and municipal law as two entirely distinct and separate legal systems.<sup>20</sup> Unlike in the case of monism, where the underlying principle is that international law must prevail over domestic law in both international and national decisions,<sup>21</sup> the dualist theory asserts that international law should be limited to international decisions and should not prevail over domestic law in domestic decisions.<sup>22</sup> International law, however, may be resorted to as a guide to interpret domestic law where such a need arises. In relation to dualism Dugard states that domestic courts can apply international law only if (a) it has been adopted by the state; or (b) it has been transformed into domestic law by national legislation.<sup>23</sup> In dualist jurisdictions, international law is regarded as having been incorporated into the domestic legal order only when expressly stated by a legislative enactment or when its articles are included, although not expressly, into domestic law.<sup>24</sup> In these jurisdictions national courts are restricted to the application of domestic laws. Therefore, in order for a rule of international law to be applied, it must first be transformed into national law through legislation, failing which the courts cannot apply it.<sup>25</sup> Hence, dualism is also known as the transformation or adoption theory.<sup>26</sup> In most

17 DP O'Connell 'The relationship between international law and municipal law' (1960) 4 *Georgetown Law Journal* 432.

18 JF Coyle 'Incorporative statutes and the borrowed treaty rule' (2010) 50 *Virginia Journal of International Law* 656.

19 M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 5.

20 O'Connell (n 17) 432.

21 As above.

22 As above.

23 J Dugard *International law: A South African perspective* (2011) 46.

24 Killander & Adjolahoun (n 19) 9. See also *Basotho National Party & Another v Government of Lesotho & Others* Constitutional Case 5/2000 [2003] LSHC 6 22.

25 Killander & Adjolahoun (n 19) 9.

26 As above.

dualist states this transformation is regulated by domestic constitutional law.

Dualism derives from the positive law school of thought which asserts that international law and national law are totally different systems in that they originate from different sources and regulate different subject matters.<sup>27</sup> Positivists assert that states, rather than individuals, are the primary subjects of international law and, therefore, that the application of international law should be limited to the regulation of relationships and the resolution of disputes between states and not between individuals and the state or between individuals at the national level where individuals are subjects of the law.<sup>28</sup>

Dualism was traditionally justified – and some conservative scholars and judicial officers still adhere to this justification – by arguments based on principles of state sovereignty and the separation of powers. This position is reflected in the old decisions of most jurisdictions with a common law background such as Lesotho. For instance, in the case of *Gondwe*<sup>29</sup> Nyirenda J of the Malawian High Court said the following in relation to state sovereignty and the application of international law by national courts:<sup>30</sup>

The doctrine of state sovereignty and supremacy of Parliament in legislating [is] the basis, I believe, upon which, in common law jurisdictions, international law must be incorporated in municipal law for it to be enforceable. It logically follows therefore that the sovereign states have the authority to determine the extent and limit to which they wish to incorporate international law.

Similar sentiments regarding separation of powers were echoed by Steyn CJ in the South African case of *Pan-American World Airways Incorporated v SA Fire and Accident Insurance*, in which he said:<sup>31</sup>

In this country, the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by a legislative process ... In the absence of any enactment giving its relevant provisions the force of law, it cannot affect the rights of the subject.

27 Starke (n 14). See also G Erasmus 'The Namibian Constitution and the application of international law' (1989/90) 15 *South African Yearbook of International Law* 84.

28 Erasmus (n 27).

29 *Gondwe v Attorney-General* [1996] MLR 492 (HC).

30 In Malawi the parliamentary supremacy argument, however, was superseded by the constitutional supremacy clause inserted in the 1994 Constitution which also incorporates the application of international law in the interpretation of the Constitution and in relation to the limitation of and derogation from the rights contained in the Constitution. See RE Kapindu 'The relevance of international law in judicial decision-making in Malawi' in Southern African Litigation Centre et al (eds) *Using the courts to protect vulnerable people* (2015) 77.

31 *Pan-American World Airways Incorporated v SA Fire and Accident Insurance* 1965 (3) SA 150 at 161. With the advent of the 1996 Constitution, the South African position with regard to the relationship between international and national laws has since changed. These changes are discussed later in this part.



The challenge that the courts addressed in these decisions is that in many jurisdictions, that of Lesotho included, the legislature plays no role in the negotiation and ratification of an international treaty. Therefore, the direct application of international instruments would be contradictory to the principle of separation of powers in that the executive would have enacted the law by signing an international instrument, which the court is then called upon to interpret, thus bypassing the legislature in the entire process.

Having outlined the main features of each of these theories, the next part analyses from a historical perspective how international law has interfaced in the legal system of Lesotho from the time of the founding of the Basotho nation to date.

### **3 Relationship between international law and domestic law in Lesotho**

Although research has been conducted on the domestic implementation of international law in other jurisdictions and factors that enable or inhibit such implementation, looking at current literature on the subject, little is known about the place of international law in the legal system of Lesotho except for an emphasis on the fact that Lesotho is a dualist country. This, it is assumed, is based on Lesotho's history which includes the heritage of the Roman-Dutch common law as well as the constitutional supremacy clause in section 2 of the Constitution.<sup>32</sup>

The next parts demonstrate that as far as the protection of human rights is concerned, Lesotho's conduct, including the ratification of international instruments, the enactment of corresponding domestic laws, the submission of reports to relevant treaty bodies, and the courts' reasoning for accepting or rejecting the application of international instruments neither supports its categorisation as dualist nor suggests that Lesotho is monist, thus leading to a conclusion that this categorisation no longer is helpful.

#### **3.1 Position of international law in the legal system of Lesotho prior to independence**

Lesotho was formerly known as Basutoland, named after a nation called the Basotho which occupied the territory during the 1800s.<sup>33</sup> The Basotho nation was founded by Moshoeshe who unified people from a number of clans who had come to him for protection having fled their homelands in the 1800s due to the invasion by Shaka Zulu

---

32 GJ van Niekerk 'Constitutional protection of common law: The endurance of civilian tradition in Southern Africa' (2012) 18 *Fundamina: A Journal of Legal History* 115.

33 S Rosenberg & RF Weisfelder *The historical dictionary of Lesotho* (2013) 472.

and the *boers*.<sup>34</sup> These conflicts drove most indigenous Southern African communities out of their homelands and forced them to seek refuge in Thaba-Bosiu where Moshoeshoe had established a fortress.<sup>35</sup> Moshoeshoe subsequently gathered all those who had come to him for protection and founded the Basotho nation of whom he became King.<sup>36</sup> His Kingdom became known as Basutoland (later named Lesotho).<sup>37</sup>

During the Great Trek, the *boers* left the Cape Colony.<sup>38</sup> In the mid-1820s they crossed the Orange River into Moshoeshoe's territory and allegedly requested from him a right to settle there.<sup>39</sup> Moshoeshoe was of the opinion that he had lent the said territory to the *boers* but later they claimed to have rights over it.<sup>40</sup> These divergent views about the ownership of land led to conflicts between the Basotho who occupied Basutoland and the *boers* who occupied territory in the current South Africa.<sup>41</sup> The conflicts gave rise to a number of bilateral treaties between the two territories, thus bringing international law into play.

The first territorial treaty was signed between Moshoeshoe and Napier who represented Great Britain in 1843.<sup>42</sup> According to this treaty the British recognised Basotho sovereignty over the land between the Orange and Caledon rivers.<sup>43</sup> The *boers*, who had settled in some areas included in the 1843 treaty, did not recognise this description and continued their invasion and attempts to conquer more of Moshoeshoe's land.<sup>44</sup> In 1845 the territorial treaty was altered by Governor Maitland to legally recognise the *boer* settlement.<sup>45</sup> The alteration of the 1843 treaty fuelled more conflict between the Basotho and the *boers*. The British ended up drawing new boundaries which separated the territories, this time leaving less land for Moshoeshoe. These boundaries became known as the Warden Line (named after the British Resident in Bloemfontein, Henry Warden).<sup>46</sup> The Warden Line was not welcomed by Moshoeshoe and his people and a fierce conflict between the British and the Basotho

---

34 The white settlers were also known as the *boers*. S Poulter *Legal dualism in Lesotho* (1981) 1.

35 As above.

36 As above.

37 As above.

38 South African History Online 'Basotho wars: 1858-1868', <http://www.sahistory.org.za/south-africa-1806-1899/basotho-wars-1858-1868> (accessed 14 October 2017).

39 As above.

40 As above.

41 As above.

42 Napier Treaty of 1843.

43 EA Eldredge *A South African kingdom: The pursuit of security in nineteenth century Lesotho* (1993) 50.

44 As above.

45 South African History Online (n 38).

46 Eldredge (n 43) 51.

ensued, resulting in the Battle of Viervoet in 1851 and another in 1852 in the Berea Plateau.<sup>47</sup> The British were defeated in both battles. They then realised that the cost of maintaining sovereignty was too high and they signed the Sand River Convention in terms of which they handed over the disputed territory to the *boers*.<sup>48</sup>

Upon their takeover, the *boers* demanded land beyond the Caledon River, and named the new territory the Republic of the Orange Free State (Free State).<sup>49</sup> The demand for more land ignited new feuds between the Basotho and the *boers*. The President of the Free State, Jacobus Nicolaas Boshoff, declared war against the Basotho, resulting in the War of Senegal in March 1858 in which Moshoeshe was almost defeated.<sup>50</sup> After this war, an uneasy peace between the two territories followed, and in 1861 Moshoeshe requested protection from Britain.<sup>51</sup> Moshoeshe's request for Britain's involvement in the conflict between himself and the *boers* also brought international law into the picture.

In 1865 the Free State launched heavy attacks against Moshoeshe and his people. This conflict became known as the Seqiti War.<sup>52</sup> By the late 1860s, Moshoeshe and the Basotho people were exhausted and on the edge of famine as a result of these struggles.<sup>53</sup> Their total defeat by the *boers* loomed.<sup>54</sup> Moshoeshe then renewed his entreaty for British protection and in March 1868 the Basotho Kingdom was declared a British protectorate.<sup>55</sup> The *boers* discontinued the war and in February 1869, boundaries were agreed upon between Basutoland and the Republic of the Free State, now known as Lesotho and a province of South Africa respectively. These boundaries were drawn in the Convention of Aliwal North.<sup>56</sup>

The above history reflects that from its foundation as a sovereign Kingdom and even when it had become a British protectorate, Lesotho's relationship with its neighbour, South Africa, was governed by international law. The conflicts which Lesotho had with the British, as well as with the *boers*, resulted in the conclusion of several peace and boundary treaties. Moshoeshe viewed the said international law as binding on him and his people. To date, the boundaries between Lesotho and South Africa remain as stipulated in the Aliwal North Convention. However, there is no literature suggesting that international law was applied to solve domestic disputes during Moshoeshe's reign. This situation could be influenced by several

---

47 South African History Online (n 37).

48 Eldredge (n 43) 55.

49 As above.

50 As above.

51 As above.

52 South African History Online (n 38).

53 Poulter (n 34) 2.

54 As above.

55 As above.

56 As above.

factors, such as the fact that during that time Moshoeshoe and his chiefs, who also acted as legislatures, focused more on stabilising their territories and solving territorial disputes than on internal disputes among their subjects.<sup>57</sup> Another factor could be the effect of General Proclamation 2B of 1884 which dictated that domestic disputes were to be resolved by domestic laws.

The British handed the administration of Basutoland to the Cape legislature since it realised that due to non-ending conflicts, its administration would be expensive and not easy to handle.<sup>58</sup> As far as the legal system was concerned, the High Commissioner issued General Law Proclamation 2B of 1884 (Proclamation) which made law that was applicable in the Colony of the Cape of Good Hope at the time to be equally applicable in Lesotho. The Proclamation reads as follows:<sup>59</sup>

In all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope: Provided, however, that in any suits, actions, or proceedings in any court, to which all parties are Africans, and in all suits, outcomes or proceedings whatsoever before any Basotho courts, African law may be administered.

This Proclamation imported Roman-Dutch law and its legal traditions into Lesotho although it still left room for the application of African law (later known as Sesotho customary law). It created a dualist system which still applies today, in which Sesotho customary law operates side by side with the 'received law'.<sup>60</sup> Presumably, it is at this stage that the Roman-Dutch law traditions, including a dualist approach to international law, were imported into the legal system of Lesotho.

During the time when Lesotho was its protectorate, the United Kingdom concluded international treaties and extended their application to Lesotho. At the same time the Cape passed proclamations which were meant to run the country. Proclamation 2B made no reference to international law nor to its status *vis-à-vis* other proclamations that were passed. However, an inference that can be drawn from its wording is that the status of international conventions in Lesotho during its protectorate days would be what obtained in the Cape Colony of Good Hope, which was dualism as influenced by the English legal system.

Although it is argued in this article that the categorisation of Lesotho as dualist is mainly influenced by the British legal system,

57 WCM Maqutu *Contemporary constitutional history of Lesotho* (1990) 17.

58 As above.

59 JE Beardsley 'The common law in Lesotho' (1970) 14 *Journal of African Law* 198.

60 T Thabane & I Shale 'The impact of the African Charter and Women's Protocol in Lesotho' in Centre for Human Rights *The impact of the African Charter and Women's Protocol in selected African states* (2012) 79.

Killander and Adjolohoun warn that 'the description of the English legal system as the epitome of dualism is arguably exaggerated' for a number of reasons. First, customary international law formed and continues to form part of the law of the land in England as well as in many common law countries; second, 'unincorporated treaties still play an increasingly important role, though the courts may not directly apply them'.<sup>61</sup> This objection notwithstanding, it suffices to conclude that the dualist approach to international law in Lesotho became more evident when Lesotho became a British protectorate. Therefore, the English legal system as introduced by Proclamation 2B acts as a cradle for continued dualism in Lesotho.

### 3.2. Position of international law in the legal system of Lesotho post-independence to the state of emergency (1966-1970)

Lesotho continued to be a British Protectorate until 1966 when it had its first democratic elections.

These elections were governed by the first Constitution, which came pursuant to a British Royal Decree in January 1965.<sup>62</sup> The elections prepared Lesotho for independence from Britain, and on 4 October 1966 it gained independence. Following the 1965 elections and the attainment of independence the 1966 Constitution was adopted on the basis of the Independence Order of 1966 passed by the Parliament of Lesotho.<sup>63</sup> It largely followed the British model except that it had a Bill of Rights, which was similar to the United States constitutional practice.<sup>64</sup>

The 1966 Constitution did not make any provision for international law, but had a constitutional supremacy clause.<sup>65</sup> That is, the international instruments to which Lesotho was a party would be applicable only to the extent that they did not contradict provisions of the Constitution.

As far as other laws which had been passed by the Colony of the Cape of Good Hope were concerned, the 1966 Constitution did not do away with these. They continued to operate. Some laws were slowly phased out and today some still form part of the laws of Lesotho. This status is highlighted by Palmer and Poulter as follows:<sup>66</sup>

The newly independent state of Lesotho took over the existing laws that had previously been in force in Basutoland, though in future they were to

61 Killander & Adjolohoun (n 19) 11.

62 M Khaketla *Lesotho 1970: An African coup under the microscope* (1992) vii.

63 Maqutu (n 57) 17.

64 As above.

65 Sec 2 of the Constitution of Lesotho 1966 provided that '[t]he Constitution of Lesotho is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void'.

66 V Palmer & S Poulter *The legal system of Lesotho* (1972) 41; see also TLC Lenka 'A historical and comparative study of human rights violations in criminal investigations in Lesotho' unpublished LLD thesis, University of the Free State, 2010.

be construed with any modifications, adaptations, qualifications and exceptions required to bring them into conformity with the independence legislation, namely the Constitution.

As an acknowledgment of the relevance of international law to Lesotho as a new independent state, in the same month that it gained independence Lesotho ratified three conventions of the International Labour Organisation (ILO).<sup>67</sup> These conventions were later domesticated through the Labour Code Order 1992, which provides:<sup>68</sup>

No provision of the Code or of rules and regulations made thereunder shall be interpreted or applied in such a way as to derogate from the provisions of any International Labour Convention which has entered into force for the Kingdom of Lesotho.

Lesotho also took cognisance of the fact that there were international treaties which the government of the United Kingdom had concluded on its behalf during the time when Lesotho was under British protection. However, Lesotho neither hastened to be bound immediately by these treaties, nor to discharge itself from their obligations altogether. It proposed a 24-month period, running from the date of independence, within which to review its position as regards these treaties. What was to happen to Lesotho's treaty obligations in the interim during this review period was contained in a letter of 22 March 1967 written by the Prime Minister of Lesotho to the Secretary-General of the United Nations (UN). The letter, which is quoted *verbatim* in the judgment, reads as follows:<sup>69</sup>

Your Excellency

The government of the Kingdom of Lesotho is mindful of the desirability of maintenance, to the fullest extent compatible with the emergence into full independence of the Kingdom of Lesotho, [of] legal continuity between Lesotho and the several states with which, through the actions of the government of the United Kingdom, the country formerly known as Basutoland enjoyed treaty relations. Accordingly, the government of the Kingdom of Lesotho takes the present opportunity of making the following declarations:

- 1 As regards bilateral treaties validly concluded by the government of the United Kingdom, on behalf of the country formerly known as Basutoland, or validly applied or extended by the said country to the country formerly known as Basutoland, the government of the Kingdom of Lesotho is willing to continue to apply within its territory on the basis of reciprocity, the terms of all such treaties for a period of twenty-four months from the date of independence (ie until October 4, 1968) unless abrogated by mutual consent. At the expiry of that period, the government of the Kingdom of Lesotho will regard such

67 The Convention Concerning Forced or Compulsory Labour 1930; Right to Organise and Collective Bargaining Convention 1949; and Freedom of Association and the Right to Organise Convention 1948; all of which were ratified on 31 October 1966.

68 Sec 4(b) Labour Code Order 1992.

69 *Joe Molefi v Legal Advisor & Others* [1970] 3 ALL ER 724, 17 June 1970 para 12, [www.historicalpapers.wits.ac.za/inventories/inv\\_pdf/AD1901-52-2-01jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AD1901-52-2-01jpeg.pdf) (accessed 4 April 2017).

of these treaties which could not by application of customary international law be regarded as otherwise surviving, as having terminated.

2

...

3

The government of the Kingdom of Lesotho is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the government of the Kingdom of Lesotho proposes to review each of them individually and to indicate to the depository in each case what steps it wishes to take in relation to each such instrument, whether by way of confirmation of termination or confirmation of succession or accession. During such interim period of review, any state party to a multilateral treaty which has, prior to independence been applied or extended to the country formally known as Basutoland, may, on the basis of reciprocity, rely as against Lesotho on the term of such treaty.

4

It would be appreciated if your Excellency would arrange for the text of this declaration to be circulated amongst all members of the United Nations.

Please accept, Sir, the assurance of my highest consideration.

Signed LEABUA JONATHAN (Prime Minister)

The implications of this letter for Lesotho's international human rights obligations are discussed in more detail in the decision of the Privy Council, which at the time acted as Lesotho's Appeal Court, in the case of *Joe Molefi v Legal Advisors & Others*.<sup>70</sup> What is important to highlight from this letter is that from the time of independence, Lesotho was aware that being a party to international treaties, whether bilateral or multilateral, carries with it certain obligations with which state parties are expected to comply. Hence, immediately upon entry into power the government took a stance as regards such obligations. The letter does not reflect a dualist approach to international law in which case the government would claim that in the absence of any domesticating laws any international instrument to which the British government was a party or made Basutoland a party would not be binding on the government of Lesotho.

After the 24-month review period Lesotho continued to ratify international treaties, such as the four Geneva Conventions 1949,<sup>71</sup> and the Convention of the Privileges and Immunities of the UN 1946.<sup>72</sup> Some aspects of the Geneva Conventions have been domesticated in the Penal Code Act which criminalises grave breaches of international humanitarian law, including torture, committed as

---

70 As above.

71 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (1st Geneva Convention) 12 August 1949; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea (2nd Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War (3rd Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (4th Geneva Convention) 12 August 1949. Lesotho ratified all four Geneva Conventions on 20 May 1968.

72 Convention of the Privileges and Immunities of the UN 1946. Lesotho ratified this Convention on 26 November 1969.

part of war crimes and crimes against humanity.<sup>73</sup> The Penal Code Act specifically makes reference to the Geneva Conventions.<sup>74</sup>

### 3.3 Position of international law in the legal system of Lesotho during the state of emergency (1970-1986)

The 1966 Constitution was suspended in 1970 following Lesotho's second democratic elections. The then ruling party, the Basotho National Party (BNP), which had won the elections in 1965, lost to the opposition Basotho Congress Party (BCP). While the national radio station was announcing the results, the Prime Minister, Leabua Jonathan, made a public statement that Lesotho was in a state of emergency which warranted the suspension of the Constitution 'pending the drafting of a new one'.<sup>75</sup> He said that the declaration of the state of emergency and suspension of the Constitution were necessitated by the fact that the elections were not fair as BNP supporters had been subjected to acts of violence.<sup>76</sup> However, his statement did not allude to any flaws in the Constitution which called for its suspension or re-drafting.<sup>77</sup>

After suspending the Constitution, the Prime Minister then established a Council of Ministers (Council) composed of members of the former cabinet. The Council performed legislative functions, and in 1973 it passed the Lesotho Order of 1973, which established an Interim National Assembly (INA). The INA passed several laws from 1973 to 1986 when the military toppled the government through a *coup d'état*. Among laws passed by the INA was the Parliament Act of 1983, which would act in the place of a Constitution.<sup>78</sup> According to a number of authors who wrote on Lesotho's constitutional changes, the suspension of the Constitution was followed by massive human rights violations and a disregard for international law.<sup>79</sup> It is argued that some of the human rights violations were sanctioned by laws passed by the Council of Ministers and the INA.<sup>80</sup> Lesotho adopted an approach in terms of which the Prime Minister ignored all voices from the international community and stood firm that whatever was happening in Lesotho was Lesotho's problem, to be solved according to the laws of Lesotho, and that international law had no place in the national legal system.<sup>81</sup>

A dualist approach to international law in Lesotho during this period also can be inferred from the fact that there were laws

---

73 Secs 94 & 95 Penal Code Act 2010.

74 As above.

75 Maqutu (n 57) 44.

76 As above.

77 As above.

78 Maqutu (n 57) 14.

79 As above.

80 As above.

81 As above.



promulgated during the period which expressly stipulated that their enactment was meant to give effect to certain principles contained in international human rights instruments to which Lesotho is a party. For example, section 13 of the 1983 Refugee Act of Lesotho made specific reference to the UN Refugee Convention of 1951. The impression given by the express mention of a specific international instrument is that any other convention which is not expressly mentioned in an Act of Parliament is not considered law in Lesotho.

The BNP government continued its international relations and ratified a number of international treaties, including the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1971; the Genocide Convention in 1974; as well as the UN Refugee Convention and its 1967 Protocol in 1981.<sup>82</sup> However, during this period no domestic laws were enacted to implement the provisions of CERD and the Genocide Convention despite the fact that article 2(1) of CERD and article 5 of the Genocide Convention mandate state parties to adopt legislative measures to implement their provisions. As illustrated in the next part the only convention that was applied in the courts of law during this period was the Refugee Convention.

### 3.4 Position of international law in the legal system of Lesotho during military rule (1986-1993)

In 1986 the Royal Lesotho Defence Force (RLDF), under the leadership of Major General Metsing Lekhanya, launched a *coup d'état* against the BNP government.<sup>83</sup> The military regime repealed the 1983 Act and passed Lesotho Order 2 of 1986, which was to operate as the country's Constitution.<sup>84</sup> The military government ruled for approximately five years and in 1991 it was toppled by another group of the army called the 'captains' under the leadership of Colonel Elias Phitšoane Ramaema.<sup>85</sup> The Ramaema military regime set aside the 1986 Order and promulgated Lesotho Order 2 of 1990 as the basis of its power.<sup>86</sup>

Unlike the 1966 Constitution which expressly provided for constitutional supremacy, the 1986 and 1991 Orders did not. Therefore, the place of international law *vis-à-vis* the laws of Lesotho during this time cannot be inferred from them. However, the military regime continued to ratify as well as accede to a number of

---

82 Conventions ratified during this period include CERD 1965; Supplementary Convention on Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery 1956; Convention on Status of Stateless Persons 1954; Genocide Convention 1948; International Convention for Suppression of Unlawful Seizure of Aircraft 1970; Convention against Taking of Hostages 1979; and UN Refugee Convention 1951.

83 Maqutu (n 57) 71.

84 Maqutu (n 57) 4.

85 JA Kalley, E Schoeman & LE Andor *Southern African political history: A chronology of key political events from independence to mid-1997* (1999) 149.

86 As above.

international human rights instruments, including the Convention Governing Specific Aspects of Refugee Problems in Africa 1969;<sup>87</sup> the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); the International Covenant on Civil and Political Rights 1966 (ICCPR); the African Charter on Human and Peoples' Rights 1981 (African Charter); and the Convention on the Rights of the Child 1989 (CRC). It is interesting to note that despite this massive programme of ratification, no state party reports, as required by the treaty bodies overseeing the implementation of these instruments, were submitted by Lesotho during this period. Similarly, reports in respect of treaties that had earlier been ratified or acceded to by the BNP government also were not submitted. The conclusion that the status of international law in the legal system of Lesotho during this period remained unknown is supported by the fact that there is no case law to show the use of international law in Lesotho's domestic courts during this period.

### **3.5 Position of international law in the legal system of Lesotho during democratic rule (1993 to present)**

In 1991, when Ramaema and 'the captains' removed Lekhanya from power, they promised to restore civilian rule. Indeed, in the following year, 1992, preparations for elections and the adoption of a new Constitution were made. Having been under a military regime for almost a decade, Lesotho held democratic elections, which ushered in a new Constitution in 1993. In the quest to align the legal system of Lesotho with international human rights standards, several oppressive laws passed by the self-imposed BNP government and the military regime also were repealed. The 1993 Constitution is in all material terms similar to the 1966 Constitution. It could be argued that the reason for this replication is that there were no concrete reasons which warranted suspension of the 1966 Constitution in the first place. Hence, Parliament found the contents of the 1966 Constitution equally applicable in Lesotho after the 1993 democratic elections. Unlike the constitutions of some other countries, such as the 1996 Constitution of South Africa, the 1993 Constitution of Lesotho is silent on both the status of international treaties and whether these can serve as judicial cause of action in Lesotho.<sup>88</sup> However, just as does the 1966 Constitution, it has the supremacy clause which places all other laws subject to the Constitution.<sup>89</sup>

Since democratic rule in 1993 Lesotho ratified or acceded to several international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Equal Remuneration Convention 1951;<sup>90</sup> the

87 Lesotho ratified the Convention on 18 November 1988.

88 Secs 231 & 232 Constitution of South Africa 1996.

89 Sec 2 Constitution of Lesotho 1993.

90 Lesotho ratified this Convention on 27 January 1998.

Discrimination (Employment and Occupation) Convention 1958;<sup>91</sup> the African Charter on the Rights and Welfare of the Child (African Children's Charter); the Optional Protocol to ICCPR 1966;<sup>92</sup> the ILO Convention against Child Labour 1999;<sup>93</sup> the Abolition of Forced Labour Convention 1957;<sup>94</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Occupational Health and Safety Convention 1981;<sup>95</sup> the UN Convention Against Transnational Organised Crimes 2000;<sup>96</sup> the Protocol Against Smuggling of Migrants 2000;<sup>97</sup> the Optional Protocol to CRC on the Involvement of Children in Armed Conflict 2000;<sup>98</sup> the Protocol to the African Charter on Establishment of the African Court on Human and Peoples' Rights 1998;<sup>99</sup> the Convention for the Suppression of Traffic in Persons 1949;<sup>100</sup> the Optional Protocol to CEDAW 1999;<sup>101</sup> the Convention on Reduction of Statelessness 1961;<sup>102</sup> the Convention on the Rights of Persons with Disabilities (CRPD); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.<sup>103</sup>

During this period the government of Lesotho ratified more instruments than it had done in the past. This era also saw a change in the pattern of submission of state party reports to international treaty bodies.<sup>104</sup> During this period Lesotho seems to have appreciated that state reporting is an obligation which has to be fulfilled, thus practically complying with the reporting obligation which previous regimes had not done. This paradigm shift towards international law was also illustrated in the enactment of laws,<sup>105</sup> and in the application

91 Lesotho ratified this Convention on 27 January 1998.

92 Lesotho ratified the Protocol on 6 September 2000.

93 Lesotho ratified the Convention on 14 June 2001.

94 Lesotho ratified the Convention on 14 June 2001.

95 Lesotho ratified the Convention on 1 November 2001.

96 Lesotho ratified the Convention on 24 September 2003.

97 Lesotho ratified the Protocol on 24 September 2003.

98 Lesotho ratified the Protocol on 24 September 2003.

99 Lesotho ratified the Protocol on 28 October 2003.

100 Lesotho ratified the Convention on 24 September 2004.

101 Lesotho ratified the Protocol on 24 September 2004.

102 Lesotho ratified the Convention on 24 September 2004.

103 Lesotho deposited its instrument of ratification in December 2018. Interview with Ms Nthabiseng Lelisa, legal officer, Ministry of Foreign Affairs on 26 February 2019.

104 African Commission on Human and Peoples' Rights *Initial Report* 2001 and also *Combined Second to Eighth Periodic Report* 2019; Human Rights Committee *The Initial Report of Lesotho* 16 October 1998, UN Doc CCPR/C/81/Add.14; CERD Committee *The Initial Report of Lesotho* 8 September 1998, UN Doc CERD/C/337/Add.1; Committee on the Rights of the Child *The Initial Report of Lesotho* 20 July 1998 UN Doc CRC/C/11/Add.20; CEDAW Committee *Combined Initial to Periodic Reports of Lesotho* 26 August 2010 UN Doc CEDAW/C/LSO/1-4; Committee on Migrant Workers *Initial Report of Lesotho* 13 April 2016, UN Doc CMW/C/LSO/1.

105 Eg, the Sexual Offences Act 2003 and Legal Capacity of Married Persons Act 2006, which were aimed at gender mainstreaming in compliance with non-discrimination as contained in art 1 of ICCPR, ICESCR and CEDAW, art 2 of the African Charter and art 2 of the African Women's Protocol.

of international human rights treaties in the courts of Lesotho, as discussed in detail in the next part. After 1993 the courts started applying international human rights instruments and making pronouncements, albeit inconsistent, which leaned more towards the protection of human rights in accordance with Lesotho's human rights obligations.

## 4 Application of international law in the courts of Lesotho

### 4.1 Courts' application of customary international law

For purposes of this article 'application' refers to the use of customary international law by the courts, either as interpretative guide or as a course of judicial action on its own in the absence of corresponding domestic law. Customary international law, unlike international treaty law (discussed in the next part), seldom is applied or even referred to in the courts of Lesotho. One of the few cases in which a principle of customary international law was implied is the case of *Lekhoaba*.<sup>106</sup> In this case the High Court found comfort in a rule of customary international law against statelessness and held that despite the prohibition of dual citizenship by the Constitution of Lesotho, section 42 of the Constitution bars Parliament from enacting laws the effect of which would render any person stateless. It emphasised that this is 'an immutable principle of the law of nations'.<sup>107</sup> The Court took cognisance of the principle of customary international law, which is emulated in section 42 of the Constitution. What remains uncertain is whether the Court would adopt a similar approach if the Constitution was silent or had a provision which conflicted with this principle of customary international law.

### 4.2 Courts' application of international treaty law

The earliest case after independence in which the question of the application of international treaties in the courts of Lesotho was discussed is the case of *Molefi*.<sup>108</sup> The appellant sought to be declared a refugee in terms of the UN Refugee Convention. The United Kingdom had ratified the Convention and extended its application to Lesotho during its protectorate days. One of the issues was whether the applicant could be declared a refugee under Lesotho law based on the definition of refugee contained in the UN Refugee Convention. The Court of Appeal (Privy Council) was confronted with the interpretation of section 38 of the Aliens Control Act 1966 in contrast to the UN Refugee Convention. It held that the letter written by the Prime Minister of Lesotho to the UN Secretary-General was a positive

<sup>106</sup> *Lekhoaba v Director of Immigration & Another* Const/C/3/2007 [2007] LSHC 6.

<sup>107</sup> *Lekhoaba* (n 106) para 64 (my emphasis).

<sup>108</sup> *Molefi* (n 69).

manifestation of the extent to which Lesotho intended to be bound by international instruments, including the Convention Relating to the Status of Refugees.<sup>109</sup> It further held that on this ground the Appellant was a refugee as defined by the UN Refugee Convention.<sup>110</sup> However, the petitioner's circumstances did not fall within those contemplated in article 38 and, therefore, he could not be declared a refugee in terms of the Aliens Control Act. The Court held that the Refugee Convention was binding on Lesotho only because it had been transformed into the laws of Lesotho by virtue of section 38 of the Aliens Control Act.

The case of *Mohollo Tšoenyane* illustrates the theory of dualism in practice in that the High Court specifically held that whether bilateral or multilateral, in order for international agreements to be relied upon in domestic courts 'they require adoption by domestic legislatures'.<sup>111</sup> In another case, *Basotho National Party & Another v Government of Lesotho and Others*,<sup>112</sup> in which the applicant sought an order directing the government of Lesotho to 'adopt such legislative and other measures necessary to give effect to the rights recognised in international conventions',<sup>113</sup> the Court dismissed the application and stated that 'these Conventions cannot form part of our law until and unless they are incorporated into municipal law by legislative enactment'.<sup>114</sup> The Court emphasised:<sup>115</sup>

The Court cannot usurp the functions assigned the executive and the legislature under the Constitution and it cannot even indirectly require the executive to indirectly introduce a particular legislation or the legislature to pass it or assume itself a supervisory function over the law-making activities of the executive and the legislature.

The refusal by the courts to apply international human rights instruments in the cases of *Tšoenyane* and *BNP* is evidence of a strict dualist approach to international law during Lesotho's early years of democracy. A similar approach is seen later, in 2013, in the case of *Masupha*.<sup>116</sup> This case was lodged by the daughter of a late principal chief. She sought an order declaring section 10 of the Chieftainship Act 1968, on the basis of which succession to office of chief is limited to first-born male children, discriminatory and, therefore, unconstitutional. Among instruments cited to advance the arguments that Lesotho had an obligation not to discriminate on the basis of sex were ICCPR, CEDAW, the African Charter and the Protocol to the

---

<sup>109</sup> As above (unnumbered paras).

<sup>110</sup> As above (unnumbered paras).

<sup>111</sup> *Director of Public Prosecutions v Mohollo Tšoenyane & Others* CR/299/99 (High Court of Lesotho) unreported 25 February 2000 para 6.

<sup>112</sup> *BNP v Government of Lesotho & Others* (n 24).

<sup>113</sup> *BNP* (n 24) para 2.

<sup>114</sup> *BNP* 22.

<sup>115</sup> *BNP* 23.

<sup>116</sup> *Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea & Others* C of A (CIV) 29/2013 [2014] LSCA.

African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). However, the Court held:<sup>117</sup>

These instruments, it is clear, are aids to interpretation *not the source of rights enforceable by Lesotho citizens*. In the present matter, there's no aspect of the process of interpreting section 10 of the [Chieftainship] Act, which leaves its meaning exposed to any uncertainty, to the resolution of which the instruments in question could contribute further than the considerations, which have already been taken into account.

The Court did not rule out international instruments as completely irrelevant to the inquiry, but stated that they could be helpful only as interpretative guides if there was uncertainty in the interpretation of section 10 of the Chieftainship Act. By holding that international human rights instruments to which Lesotho is a party are 'not the sources of rights enforceable by Lesotho citizens', the Court exonerated the state from its international human rights obligations in the absence of an Act of Parliament. That is, despite its being blatantly discriminatory, the Chieftainship Act was upheld and not tested against international human rights standards against discrimination. In the context of this article it may be concluded that the Court erred as it did not take into account the fact that non-discrimination on the basis of sex is an established principle of customary international law which binds all states even in the absence of ratification of an international human rights treaty that outlaws discrimination.<sup>118</sup>

Prior to the *BNP* and *Masupha* cases, the High Court of Lesotho, in the cases of *Sello v Commissioner of Police & Others*<sup>119</sup> and *Law Society of Lesotho v Right Honourable Prime Minister*<sup>120</sup> had approached human rights cases in a more pragmatic manner. The case of *Sello* was an application of *habeas corpus* for production in court of a woman who had been detained under the Internal Security Act (General) 1984 for more than 20 days without access to any visitors. The Court held that while the Internal Security Act authorised such an arrest, the Act should be interpreted bearing in mind the rights of individuals, and further held that it 'may it also be remembered that this Kingdom is a signatory to the Declaration of Human Rights Charter' (*sic*).<sup>121</sup> The Court implied that the rights of the individual as contained in international human rights instruments should be given preference over a domestic law where such law authorises the violation of such rights.

117 *Senate Gabasheane Masupha* (n 116) 28.

118 JP Humphrey 'The implementation of international human rights law' (1978-1979) 24 *New York Law School Law Review* 31; see also ICJ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* Judgment of 5 February 1970, ICJ Reports, 1970 para 34.

119 *Sello v Commissioner of Police & Others* CIV/APN/10/1980 (High Court of Lesotho) unreported 22 February 1980.

120 *Law Society of Lesotho v Right Honourable Prime Minister* C of A (CIV) 5 /1985 (Lesotho Court of Appeal) unreported 3 September 1985.

121 *Sello* (n 119) 17.

The case of *Law Society of Lesotho v Right Honourable Prime Minister* involved the independence of the judiciary in which a former officer of the Attorney-General's office and Director of Public Prosecutions had been appointed as an acting judge.<sup>122</sup> The Court was called upon to interpret the Human Rights Act of 1983, which has since been repealed by the 1993 Constitution. In its interpretation of the Human Rights Act, the Court of Appeal relied on the Universal Declaration of Human Rights (Universal Declaration) and the extent to which it had influenced the Human Rights Act. The Court concluded that the interpretation of the Human Rights Act should be done in accordance with international human rights law.<sup>123</sup> It reiterated the role that international law played in shaping the national legal framework, including the Human Rights Act. The reminder that the Human Rights Act was anchored in international human rights law thus reflects the Court's willingness to align its interpretation with what obtains in the realm of international law.

In the case of *Sole*<sup>124</sup> the Court had to determine whether the right to legal representation as contained in section 12 of the 1993 Constitution could be extended to include an accused person's right to be represented in a criminal trial by a former Director of Public Prosecutions who had been involved on behalf of the state in the investigations leading to his charge. The Court referred to a number of cases from different jurisdictions in the Commonwealth, namely, South Africa, as well as to the European Court of Human Rights, and to a number of international treaties such as ICCPR, the African Charter, the European Convention and the Inter-American Convention. The Court found the *dicta* of the European Court 'instructive'.<sup>125</sup> It considered all arguments and the relevant instruments, and ultimately drew inspiration from a judgment by the European Court. That is, although the Court did not hold that Lesotho has obligations under the European Convention, it used jurisprudence of the European Court, which forms part of international law, to justify its own decision that the right to legal representation is not an absolute right.<sup>126</sup>

In the case of *Lesotho Revenue Authority v Master of the High Court & Others*,<sup>127</sup> the Court held that in interpreting the national laws, as well as the Constitution, a fair balance between the public interest and the rights of the individual has to be established.<sup>128</sup> The Court borrowed the principle of fair balance from article 1 of the European Convention, which had been used by Ackermann JA in the South African case of *First National Bank and Another v Commissioner of South*

---

122 *Law Society of Lesotho* (n 120) 2.

123 *Law Society of Lesotho* 19.

124 *DPP v Sole & Another* [2001] LSHC 63.

125 *DPP v Sole* (n 124) 57.

126 *DPP v Sole* 58.

127 *CIV/APN/67/2004*, [2004] LSHC 55 (*LRA*).

128 *LRA* (n 127) para 90.

*African Revenue Services & Others*.<sup>129</sup> Although the Court's use of the principle of fair balance was not a departure from dualism as it was used to justify the Court's own interpretation of the Constitution, this approach, however, is illustrative of the role that the rights of individuals play in the interpretation of national laws, regardless of the source of such rights.

In cases involving the rights of children, the courts have not flinched from considering CRC and African Children's Charter where the best interests of the child principle is employed. The courts' justification in such instances could be the fact that the Children's Protection and Welfare Act (CPWA) 2011 incorporates the said conventions in the following words:<sup>130</sup>

The objects of this Act are to extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a signatory.

The case of *Malefetsane Mohlomi* was a review of a criminal trial of two accused persons aged 16 and 17 years who had been convicted, together with two adults, for a contravention of the Sexual Offences Act 2003.<sup>131</sup> The Court held that because the 16 and 17 year-olds were children as defined in the CPWA, they ought not to have been tried together with the two adults. It held further that the joint trial was a violation of their rights and ordered a fresh trial which took into account the best interests of the child principle as expounded in CRC and the African Children's Charter.<sup>132</sup>

A similar approach regarding the applicability of the African Charter and CRC was adopted in the cases of *Mapetla v Leboela*<sup>133</sup> and *L v M*,<sup>134</sup> which dealt with the custody of minor children. In the former case the Court specifically held that the international law principle of best interests of the child was particularly relevant in the courts of Lesotho because of section 4 of the Children's Protection and Welfare Act 2011, which reiterates the said principle. In the latter case the Court of Appeal held that the High Court had erred by ignoring arguments based on CRC and the African Children's Charter as these

129 2002 (4) SA 768, cited in *LRA* (n 127).

130 Sec 2 Children's Protection and Welfare Act 2011. Lesotho is a state party, rather than a 'signatory', to these treaties.

131 *Rex v Malefetsane Mohlomi & Others* 14 March 2013 [2013] LSHC 27 paras 1-3.

132 *Malefetsane Mohlomi* (n 131) para 105. For a discussion of children's rights under CRC and the African Children's Charter, see A Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 482.

133 *Leboela v Mapetla* C of A (CIV) 44/2011 [2012] LSCA 2.

134 *L v M* 21 C of A (CIV) 29/2011 [2011] LSCA 29.



international instruments were 'authoritative since Lesotho had ratified them in March 1992 and November 1992 respectively'.<sup>135</sup>

In a similar manner, conventions of the International Labour Organisation (ILO) are applied with ease by both the Labour Court and the Labour Appeal Court because of section 2 of the Labour Code Order 1992, which provides:

In cases of ambiguity, provisions of the Code shall be interpreted in such a way as more closely conforms with the provisions of conventions adopted by the conference of the ILO and of recommendations adopted by it.

The above cases reflect the courts' move from relying exclusively on domestic laws when dealing with human rights to incorporating Lesotho's international human rights obligations in their interpretation. While this move does not contradict the theory of dualism, the cases mark a starting point from which the courts then took a further step and made pronouncements in which they regarded international instruments as sources of rights for the people of Lesotho. The cases in which this paradigm shift is illustrated include the case of *Judicial Officers of Lesotho & Another v the Right Honourable Prime Minister & Another*<sup>136</sup> in which magistrates sought an order declaring Rule 16 of the Judicial Commission Rules, as well as the government directive which assigned magistrate's courts to District Administrators, unlawful and contrary to the principle of separation of powers. The Court held that besides section 118 of the Constitution 'Lesotho is also a party to ICCPR, the African Charter and Universal Declaration of Human Rights, which all impose on state parties, the duty to guarantee independence of the courts'.<sup>137</sup>

Similarly, in *Moosa & Others v Magistrate Ntlhakana & Others*<sup>138</sup> the Court took cognisance of the fact that 'Lesotho has signed the African Union Convention on the African Charter on Human and Peoples' Rights (*sic*) regarding the rights of citizens'.<sup>139</sup> *Makhasane* was a trial for damages arising out of unlawful arrest and detention, as well as verbal and physical abuse.<sup>140</sup> In determining the amount of damages, the Court took into account the fact that the 'African Charter protects a number of civil and political rights, including the right to dignity',<sup>141</sup> and held that such rights had been infringed by the police who unlawfully arrested and detained the complainant.<sup>142</sup>

135 *L v M* (n 134) para 5.

136 *Judicial Officers of Lesotho (JOALE) & Another v The Right Honourable Prime Minister & Another* Constitutional Case 3/2005 [2006] LSHC 150.

137 *Judicial Officers of Lesotho* (n 136) 17.

138 CIV/APN/167/2007 [2007] LSHC 83 (*Moosa*).

139 *Moosa* (n 138) para 40. Lesotho has *ratified* the African Charter on Human and Peoples' Rights.

140 *Makhasane v Commissioner of Police & Others* CIV/T/401/2006 [2011] LSHC 20.

141 *Makhasane* (n 140) (unnumbered paragraphs and pages).

142 As above.

The *Makhasane* case illustrates the shift even more clearly in that the Constitution of Lesotho does not provide specifically for the right to dignity. Therefore, in finding that the plaintiffs' right to dignity had been violated the Court relied on article 5 of the African Charter. Similarly, when making reference to the right to freedom from torture, the Court of Appeal of Lesotho in the case of *Makotoko Lerotholi & Others v Director of Public Prosecutions* held:<sup>143</sup>

Even the police are mandated by the law as well the provisions of international laws and conventions regarding the rights of suspects to which this country is signatory, to treat suspects humanely and in accordance with the law ... the suspects are equally entitled to a fair, human and just treatment in keeping with domestic and international law.

The most celebrated cases in which the courts' pronouncements on international law were very clear are the cases of *Molefi Tšepe*<sup>144</sup> and *Fuma*.<sup>145</sup> These decisions are celebrated not only because of their contribution to the enforcement of the rights of women and people with disabilities, respectively, but also because of the courts' bold and extensive interpretation of Lesotho's international obligations as contained in the international human rights instruments. In the *Tšepe* case the applicant, a male local government elections candidate, sought an order declaring the reservation of a one-third quota of all local government seats for women under the Local Government Elections Act 1998 (as amended by an Amendment Act of 2005) to be discriminatory and unconstitutional. Relying on articles 3 and 26 of ICCPR,<sup>146</sup> HRC General Comment 18,<sup>147</sup> articles 3 and 4 of CEDAW,<sup>148</sup> articles 18(3) and (4) of the African Charter, as well as the SADC Declaration on Gender Equality,<sup>149</sup> the Court held that the Amendment Act was not discriminatory but constituted an affirmative action measure which Lesotho had an international human rights obligation to observe. The Court stated:<sup>150</sup>

If regard be had to Lesotho's international law obligations, these, if anything, reinforce the interpretation of section 18(4)(e) of the Constitution and require equality, which is substantive and not merely formal and restitutionary in its reach.

The *Fuma* case was lodged by a member of the Lesotho Defence Force (LDF) who had been forced to retire in terms of section 24 of the LDF Act on the grounds that he was legally blind because of an HIV infection, among others.<sup>151</sup> He challenged the decision of the LDF to retire him as discriminatory as there was an option of giving him

143 CRI/A/23/2007 (Lesotho Court of Appeal) 7 July 2007 (unreported).

144 *Molefi Tšepe v IEC CIV/APN/135/2005* [2005] LSHC 96.

145 *Fuma v Commander LDF Cons Case 08/2011* [2013] LSHC 68.

146 *Tšepe* (n 144) para 17.

147 *Tšepe* para 18.

148 *Tšepe* para 17.

149 *Tšepe* para 21.

150 *Tšepe* para 22.

151 *Fuma* (n 145) summary.

lighter duties which befitted his condition – as had been done with other visually-impaired army officers. He argued that his HIV status was the only factor on which the decision to retire him was based. In deciding in his favour the Court held:<sup>152</sup>

The unreservedly ratified United Nations Convention on the Rights of Persons with Disabilities stands not only as an aspirational instrument in the matter, but that by default, it technically assumes the effect of municipal law in the country.

Having considered the relevant provisions of CRPD, the Court went further to hold that '[t]he [CRPD] stands not only as an inspirational instrument in the matter but that by default it technically assumes the effect of the municipal law in the country'.<sup>153</sup> The Court found a violation of sections 18 and 19 of the Constitution of Lesotho, which it held had to be interpreted so as not to contradict with Lesotho's obligations under CRPD.

As illustrated above, in the majority of cases the courts were persuaded by the international instruments and were satisfied by the fact that Lesotho had ratified such instruments and, therefore, was bound to act as mandated thereby. The courts raised no issues about whether the relevant treaties had been domesticated or not. This stance notwithstanding, one other visible trend in Lesotho courts is the limited application of international human rights instruments adopted under the auspices of the Organisation of African Unity (OAU) and the African Union (AU). The majority of cases in which international treaties were referred to were continental treaties, and in very few cases treaties that had been adopted at the regional level were referred to or used as interpretative guides.

## 5 Conclusion

While the relationship between international law and national law traditionally has been analysed on the basis of a monist-dualist dichotomy, the discussion of these theories and their impact on human rights protection in Lesotho as well as their contrast with practice challenge their expediency in human rights protection. As Oppong correctly observes, the debates around these theories focus more on the source or pedigree of the norm, that is, whether it emanates from a national or international source, and ignore the content or the substance of the norm in question.<sup>154</sup> This would thus encourage states to violate human rights with impunity knowing that in the absence of the domestication of international human rights instruments victims have no recourse to the national courts of law.

---

<sup>152</sup> *Fuma* para 22.

<sup>153</sup> *Fuma* para 56.

<sup>154</sup> Oppong (n 4) 2.

The cases discussed in the article have illustrated that the courts of Lesotho have gone beyond the monist-dualist dichotomisation in favour of human rights protection. The courts also emphasised the need for compliance with international human rights instruments to which Lesotho is a party. This mutual relationship between the two legal systems, therefore, discards observations of some authors that argue that international law and domestic law 'are definitely an odd couple'.<sup>155</sup> For instance, in the *Makhasane* case the finding of a violation of the right to dignity was based on the African Charter as opposed to the Constitution of Lesotho.

Taking into account the fact that Lesotho currently is undergoing comprehensive national reform, it is important that this shift also be included in the Constitution as one of the ways of enhancing human rights protection and ensuring accountability. This change already has taken place in other Anglophone African countries that during colonisation had inherited Roman-Dutch law. These countries have since adopted new constitutions which clarify the position of international law in their national legal systems. For instance, the Constitution of Zimbabwe contains a provision which mandates courts to take international law into account.<sup>156</sup> Consequently, the Zimbabwean Constitutional Court in the case of *Mudzuru* held that by ratifying CRC and the African Children's Charter, 'Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice'.<sup>157</sup> Similarly, section 39(1)(b) of the South African Constitution mandates courts and tribunals to consider international law when interpreting the Bill of Rights. The clear stipulations on the extent to which international law must be used by courts assist the courts to uniformly approach international human rights treaties.

---

155 Torrijo (n 13) 485.

156 Secs 32 & 46 Constitution of Zimbabwe 2013.

157 *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others* CCZ 12/2015 (Constitutional Court of Zimbabwe) 14 January 2015 & 20 January 2016 27.

## Land-grabbing and the right to adequate food in Ethiopia

Samrawit Getaneh Damtew\*

Legal researcher, African Union; legal researcher, African Committee of Experts on the Rights and Welfare of the Child, Addis Ababa, Ethiopia  
<https://orcid.org/0000-0003-2231-1558>

### Summary

*The post-2008 global land rush was mainly targeted at Africa. With its weak system of governance and abundant arable land and water resources, Ethiopia has been and remains one of the hotspots for land-grabbing in Africa. Land-grabbing has various negative consequences for the human rights of rural communities. Due to the link between food security and land-grabbing, the right to adequate food is the human right most affected. The right to adequate food requires states to refrain from depriving people of access to natural resources that they use to feed themselves; this includes land and water. Although the right to food is progressively realised, the duty not to take retrogressive measures is immediate. As the custodian of the land under the 1995 Constitution the Ethiopian government has since directly concluded deals with investors, displaced communities, and given away land previously used by Ethiopian farmers to the new foreign lessees. Since land-grabbing mainly affects the agrarian rural community, the article analyses the phenomenon of land-grabbing against the type of agriculture practised in Ethiopia, climate change and coping mechanisms of communities, and the livelihood of pastoralists and indigenous people. It demonstrates how land-grabbing is antithetical to the right to adequate food in the context of Ethiopia.*

**Key words:** land-grabbing; right to food; socio-economic rights; Ethiopia

---

\* LLB (Addis Ababa) LLM (Pretoria); [SamrawitGetaneh@africa-union.org](mailto:SamrawitGetaneh@africa-union.org)

# 1 Introduction

In 2008 the world experienced a financial crisis and a steep rise in the price of agricultural produce.<sup>1</sup> Certain Asian and Middle Eastern countries faced a shortage of land and water resources.<sup>2</sup> Furthermore, new quotas for the use of agro-fuels in the European Union (EU) and the United States (US) triggered these countries and their various corporations to look for offshore arable land.<sup>3</sup> This has led to the acceleration of the phenomenon of international large-scale acquisition of land with the aim of ensuring food security, among other things.<sup>4</sup> Various terms are used to describe this land acquisition, including the global land rush, land-grabbing and international land deals. In the article the term 'land-grabbing' is used as the author attempts to highlight the impact of the phenomenon on human rights, specifically on the right to adequate food.

Land-grabbing is defined as the acquisition or lease of relatively large tracts of land along with water and mineral resources by transnational or domestic corporations or investors, to produce food and bio-fuel for international or domestic markets. This largely occurs with no prior consultation with or consent of the local communities that used the land, and without adequate compensation.<sup>5</sup> The real extent of the scale of land-grabbing is not known due to the level of obscurity in which it is done. The World Bank reported that before 2008 the average annual large-scale farm land deals globally covered an area of approximately 4 million hectares. However, by the end of 2009, in the wake of the global financial, food and energy crisis, more than 56 million hectares of land deals were declared, 70 per cent of which was in Africa.<sup>6</sup> A study conducted by Oxfam in 2012 indicated that 230 million hectares of land, an area the size of Western Europe, has been sold or leased as from 2001, most of it having taken place in 2008.<sup>7</sup>

Land-grabbing continues to be an important global issue.<sup>8</sup> Africa remains the main target of the global land rush. The phenomenon has

---

1 S Cardenas 'IMF survey: Global slowdown damages progress in low-income countries' (2009) <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sone/w012309a> (accessed 15 September 2016).

2 Oakland Institute *Understanding land investment deals in Africa: Ethiopia* (2011) 3.

3 As above.

4 As above.

5 ME Margulis, N McKeon & SM Borras *Land-grabbing and global governance: Critical perspectives* (2014).

6 K Deininger & D Byerlee 'Rising global interest in farmland: Can it yield sustainable and equitable benefits?' (2011) *The World Bank* xiv.

7 Oxfam *Land and power: The growing scandal surrounding the new wave of investments in land* (2011) 5.

8 K Nolte, W Chamberlain & M Giger *International land deals for agriculture. Fresh insights from the land matrix: Analytical report II* (2016) vi.

been described by some as a 'neo-colonialist scramble for Africa'.<sup>9</sup> Of the few sub-Saharan countries that are targeted mainly by foreign investors, Ethiopia is prominent and is being described as the epicentre for land-grabbing.<sup>10</sup> Land-grabbing has raised various concerns and issues. One of these concerns is its negative impact on food security and, consequently, the right to adequate food.

The article aims to demonstrate the link between land-grabbing and the right to food in the context of Ethiopia, and challenges this phenomenon using the right to food. Part 2 briefly highlights factors influencing land-grabbing in the socio-geographical and economic background of Ethiopia with a focus on the agricultural sector. Part 3 elaborates on the content of the right to food at international, regional and national levels. It expounds on the obligations of states and measures that ought to be taken in implementing the right to food. It explores the extent of the recognition of the right and its justiciability in Ethiopia. The last part of the article is dedicated to exploring how a right to food approach can be used to address the impact of land-grabbing. It elaborates on how the different stages of land-grabbing threaten the right to food, starting from the negotiation stage and the conclusion of the deal up to displacement and loss of livelihoods. The article concludes by making recommendations to the government of Ethiopia on measures that ought to be taken.

## 2 Land-grabbing in Ethiopia

### 2.1 Role of land in Ethiopia

Ethiopia, one of the poorest countries in the world which is dependent on international food aid, experiences some of the largest international land-grabs.<sup>11</sup> Agriculture is the most important sector in the country. It accounts for 85 per cent of total employment, contributes approximately 50 per cent to the gross domestic product (GDP) and 85 per cent to exports.<sup>12</sup> This makes agricultural land the most significant economic asset of the country. The agricultural sector is heavily dependent on rainfall. This has made the country prone to recurring droughts and famine.<sup>13</sup> In early 2016 Ethiopia was hit by its

9 L Cochrane 'Food security or food sovereignty: The case of land grabs' (2011) *The Journal of Humanitarian Assistance* 5.

10 As above.

11 ActionAid *Lay of the land: Improving land governance to stop land grabs* (2012) 27.

12 J Keeley et al *Large-scale land deals in Ethiopia: Scale, trends, features and outcomes to date* (2014) 10.

13 World Food Programme 'Drought in Ethiopia: 10 million people in need' <https://www.wfp.org/stories/drought-ethiopia-10-million-people-need> (accessed 15 September 2016).

worst drought in 50 years, leaving more than ten million people in need of urgent humanitarian assistance.<sup>14</sup>

Land is the entry point for the realisation of various human rights. Access to food is closely tied to the availability of land on which to grow crops and rear livestock.<sup>15</sup> More than 80 per cent of the Ethiopian population is classified as smallholders, farming an area of one hectare on average.<sup>16</sup> However, the government's strategy for the country's development is focused on large-scale land investment.<sup>17</sup> In 1996 the incumbent Ethiopian People's Revolutionary Democratic Front (EPRDF) government launched the Agricultural Development-Led Industrialisation (ADLI) as a national strategy, which foresaw the progression towards the large-scale commercialisation of farm land.<sup>18</sup> The commercialisation of smallholder farms and the development of bio-fuels are now a part of the development strategy.<sup>19</sup> To this end the government has designed a favourable investment environment to attract direct foreign investment on agriculture.<sup>20</sup>

The development strategy resulted in the creation of federal land banks for priority investments. It included an incentive of a five-year tax holiday for agricultural investors who export at least 50 per cent of their produce.<sup>21</sup> In 2009 the Agricultural Investment Support Directorate (AISD) was established under the Ministry of Agriculture and Rural Development (MoRAD). This was done in response to the growing commercial demand for farm land in Ethiopia.<sup>22</sup> One of the tasks of AISD is to identify and demarcate potential arable land for investment. Accordingly, of the nine regions of Ethiopia the Directorate identified land for agricultural investment in five regions, leaving the other four regions to do the delineation themselves.<sup>23</sup> Consequently, AISD identified 3 673 806 hectares of land in five regions (Oromia, Benishangul Gumuz, Gambella, Southern Nations, Nationalities and Peoples Region/SNNPR, Afar and Somalia) for

---

14 As above.

15 'Ethiopia: Land-grabbing is a human rights violation, no land, no life!' <http://www.durame.com/2016/01/ethiopia-land-grabbing-is-human-rights.html> (accessed 13 October 2016).

16 Country Pasture/Forage Resource Profiles: Ethiopia <http://www.fao.org/ag/agp/agpc/doc/counprof/ethiopia/ethiopia.htm> (accessed 4 October 2016).

17 J Abbink 'Land to the foreigners: Economic, legal, and sociocultural aspects of new land acquisition schemes in Ethiopia' (2011) 29 *Journal of Contemporary African Studies* 515.

18 As above.

19 As above.

20 Federal Democratic Republic of Ethiopia Ministry of Agriculture and Rural Development *Ethiopia's agricultural sector policy and investment framework 2010-2020* (2010) 10.

21 F Makki & C Geisler *Development by dispossession: Land-grabbing as new enclosures in contemporary Ethiopia* (2011) 13.

22 M Fisseha *A case study of the Bechera agricultural development project, Ethiopia* (2011) 9.

23 As above.



agricultural investment.<sup>24</sup> The Federal government removed the negotiation right<sup>25</sup> regarding land deals that are above 1 000 hectares from regional states. Hence, deals are concluded between investors and the federal government.<sup>26</sup>

The aforementioned development strategy led to unprecedented levels of investment in farm land in Ethiopia. The World Bank reported that an estimate of 406 commercial investment projects, covering one million hectares of land, were signed in Ethiopia by 2011.<sup>27</sup> By 2016 approximately half a million hectares of land have been given to foreign investors for the production of food crops alone. This figure excludes land deals that were cancelled and that are less than 500 hectares in extent.<sup>28</sup> In total, seven million hectares of land, equal to the size of Belgium, has since 2007 been transferred to investors.<sup>29</sup> More than one million of these went to foreign investors.<sup>30</sup> The land grabs are done mostly without any kind of prior consultation and without adequate compensation, sometimes with no compensation, to the evicted farmers and community members.<sup>31</sup> Land is leased to investors at a rental of approximately US \$2 per hectare per year.<sup>32</sup> This amounts to one of the lowest rentals globally.<sup>33</sup> According to government data, most of the land deals that are concluded involved land that is considered not to have any pre-existing users and labelled 'wasteland'.<sup>34</sup> However, the reality in various communities indicates otherwise.<sup>35</sup> What the government regards as 'wasteland' is land

24 Ministry of Agriculture *Agricultural investment opportunities in Ethiopia* (2013) 2.

25 Art 52 of the FDRE Constitution gives the power of administering land and other natural resources to regional states. Accordingly, before the establishment of the AISD, the regional states allotted agricultural land to investors according to their own criteria. However, after the establishment of AISD the Federal Government centralised the administration and management of regional lands in the Federal Land Bank. See RA Nalepa et al 'Marginal land and the global land rush: A spatial exploration of contested lands and state-directed development in contemporary Ethiopia' *Geoforum* (2016) 4 <http://dx.doi.org/10.1016/j.geoforum.2016.10.008> (accessed 4 October 2016).

26 Abbink (n 17) 517.

27 D Vhugen & A Gebru *Large-scale acquisitions of land in Ethiopia* (2012) 2.

28 GRAIN *The farmland grab in 2016: How big? How bad?* (2016) 41–45.

29 GRAIN 'Land grab deals' <https://www.grain.org/article/entries/4479-grain-releases-data-set-with-over-400-global-land-grabs> (accessed 1 October 2016).

30 As above.

31 Oakland Institute (n 2) 36.

32 The High-Level Panel of Experts on Food Security and Nutrition *Land tenure and international investments in agriculture* (2011) 30.

33 As above.

34 Future Agriculture *Land-grabbing in Africa and the new politics of food* (2011) 3.

35 Nalepa et al (n 25) 3 5–8; see also A Demena 'The tragic of land-grabbing for bio-fuels in Ethiopia' (2016) <https://ecadforum.com/2016/03/07/the-tragic-truth-of-land-grabbing-for-biofuels-in-ethiopia/> (accessed 1 October 2016). See also M Jaatee & Z Mulataa 'Review of land-grabbing policies of successive regimes of Ethiopia (The major external factor challenging national liberation struggle of peoples of Oromia and Southern Ethiopia)' (2012) 23 <http://gadaa.com/OromoStudies/wp-content/uploads/2012/12/A-final-review-of-land-grabbing-policies-of-successive-regimes-of-Ethiopia-1.pdf> (accessed 1 October 2016). See also

utilised for shifting cultivation, grazing and pastoralism.<sup>36</sup>

This open door policy for agricultural investment in Ethiopia that has led to land-grabbing is sustained by various justifications. The government claims that apart from ameliorating food security, the investments will facilitate technology transfer, create employment, and develop infrastructure.<sup>37</sup> However, there is no data to show the achievements of these benefits or the future possibility thereof. There has been no sign of technology transfer as most smallholders continue to use low-technology farming techniques. Furthermore, it is unclear how large-scale commercial farming that uses intensive capital, herbicides and pesticides, intensive irrigation and large-scale machinery can result in technology transfer to economically-poor smallholders.<sup>38</sup> In terms of infrastructure, the country is undergoing massive infrastructural development in all areas. However, investor-led infrastructure development is insignificant in scale.<sup>39</sup> Most investors are comfortable with the existing infrastructure and do not see the need to become involved.<sup>40</sup> Some of the land investments have led to the employment of locals; however, the wages range from 10 to 20 Ethiopian birr, which is an average of US \$1 per day.<sup>41</sup> This is below the latest global poverty line and the national poverty line of Ethiopia.<sup>42</sup>

## 2.2 Impact of land-grabbing on food security in Ethiopia

Ethiopia has in recent history experienced several droughts and famines. Climate change and the reliance of small-scale farmers on rain-dependent agriculture are the main causes of droughts.<sup>43</sup> Various strategies have been implemented to fight hunger.<sup>44</sup> However, in

---

RA Nalepa 'Land for agricultural development in the era of "land-grabbing": A spatial exploration of the "marginal lands" narrative in contemporary Ethiopia' LDPI Working Paper 40 (2013) 1 7 14-17 [https://www.iss.nl/sites/corporate/files/LDPI\\_WP\\_40.pdf](https://www.iss.nl/sites/corporate/files/LDPI_WP_40.pdf) (accessed 1 October 2016).

36 L Cotula *Land deals in Africa: What is in the contracts?* (2011) 16.

37 Oakland Institute (n 2) 34.

38 As above.

39 As above.

40 As above.

41 Oakland Institute (n 2) 35.

42 D Espen & B Prydz *Estimating international poverty lines from comparable national thresholds* (2016) 2.

43 A Sen *Poverty and famines: An essay on entitlement and deprivation* (1981) 88.

44 The Ethiopian Rural Development Policy and Strategy, which aimed to eliminate dependence on food aid set out the following directions: (1) developing and utilising the knowledge and skills of the country's human resources; (2) effectively exploiting the land resources; (3) preparing and implementing environment and eco-system compatible rural development package; (4) ascertaining market-led agricultural development; (5) improving the rural financial systems; (6) encouraging the private sector to invest in agricultural development; (7) expanding rural development; (8) strengthening other non-agricultural rural based economic activities; <http://extwprlegs1.fao.org/docs/pdf/eth144892.pdf> (accessed 1 October 2016). The National Growth and Transformation Plan of the country 2010-2015 required the adoption of Climate-Change-Resilient

2016 the country faced the worst drought in 50 years, with 10.2 million people estimated to have been in need of emergency food aid. This was in addition to the approximately 8 million people who are on constant annual food aid programmes run by the government.<sup>45</sup> Even though droughts in Ethiopia are caused by a lack of rainfall, the drought leads to famine due to entitlement failure.<sup>46</sup> Moreover, recent threats of famine in the country result from a shortage in national food production and entitlement failure.<sup>47</sup> In previous famines, pastoralists were among the groups most affected. This is not only due to drought but also largely due to displacement from their

---

Green-Agricultural development in an endeavour to increase productivity and produces. <http://extwprlegs1.fao.org/docs/pdf/eth144893.pdf> (accessed 1 October 2016). The report of the 2017 Voluntary National Reviews on SDGs of Ethiopia noted the following on SDG Goal 2: end hunger, achieve food security and improved nutrition and promote sustainable agriculture. The supply of agricultural inputs increased in 2014/2015. In 2015/2016, agricultural extension services given to the farming and pastoral communities reached 15 791 000 households. Small-scale irrigated agriculture is expanded following and in observance of climate change resilient green agricultural development. Sustainable natural resources management system were utilised; the government also encouraged the private sector to invest in agro-ecology compatible agriculture; agricultural inputs identified through agricultural research have been supplied to increase the national agricultural productivity and to increase the volume of agricultural produces. Moreover, it was noted that climate change-caused drought that occurred in the 2015/2016 and 2016/2017 financial years has had a severely adverse impact on the agricultural sector in particular. Drought victims in 2014/2015 were 10.2 million while in 2016/2017 the drought lingered on but the number of victims was reduced to 5.2 million. Consequently, the national performance target set for volume of agricultural produce for the financial year 2015/16 was reduced by 5.9%. Livestock resources were severely impacted. The volume of main food crops produced reduced from the volume produced in 2014/2015. Meat produces reduced to 669 000 tons from the tonnage produced in 2014/2015 which was 1 321 000 tons. The volume of milk produced also reduced. <https://sustainabledevelopment.un.org/content/documents/16437Ethiopia.pdf> (accessed 1 October 2016).

- 45 World Food Programme 'Ethiopia: Current issues and what the World Food Programme is doing' <https://www.wfp.org/countries/ethiopia> (accessed 3 October 2016).
- 46 Entitlement failure is a concept coined by Amartya Sen to explain the cause of famine beyond food shortage. The concept envelopes three sets of elements. The first, a set of endowment, is defined as the combination of all resources legally owned by a person. The entitlement set is defined as the set of all possible combinations of goods and services that a person can legally obtain by using the resources of his/her endowment set. For example, a farmer may use his land, labour, and other resources to produce the food he wants; a labourer may exchange his labour power to secure his food. Entitlement mapping shows the rates at which the resources of the endowment set can be converted into goods and services included in the entitlement set. A person is said to suffer from the failure of food entitlement/entitlement failure when his/her entitlement set does not contain enough food to enable her/him to avoid starvation in the absence of non-entitlement transfers, such as charity. A famine occurs when a large number of people within a community suffer from such entitlement failures at the same time. See S Osmani 'The entitlement approach to famine: An assesement' The United Nations University (1993) 3-5 <https://www.wider.unu.edu/sites/default/files/WP107.pdf> (accessed 1 October 2016).
- 47 S Devereux et al *Famine: Lessons learned* (2017) 17.

lands for expansion of commercial agriculture.<sup>48</sup> This rendered them vulnerable to starvation as the land they were displaced from had served as their backup for the long dry season to be used as grazing land.<sup>49</sup>

The government has stressed its commitment to reducing poverty and increasing food security. However, land-grabbing in reality is exacerbating the already existing hunger and desperation in vulnerable communities. In regions where there is little food security, local communities have developed coping mechanisms such as shifting cultivation, farming in sedentary plots along river banks and relying on forest resources.<sup>50</sup> Land-grabbing in these areas has led to the clearing of forests and shifting of cultivation plots that are crucial buffers for the food security of local stallholders.<sup>51</sup> Furthermore, since investors target land that is close to water, land-grabs hinder access to water for consumption as well as threaten farms on sedentary plots along river lines.<sup>52</sup>

Some areas in the country experience seasonal flooding from rivers. To cope with this, a system of flood retreat agriculture is practised, whereby in the drier season farmers cultivate land on river banks and in rainy seasons they cultivate away from river banks. This practice is predominant in the SNNPR and Gambella regions.<sup>53</sup> The dry season plots in the Gambella region cover seven communities and the land of all communities of the SNNPR regions have been seized by investors. This has led the majority of community members in Gambella and SNNPR to apply for food aid in order to offset lost production.<sup>54</sup>

The situation is further aggravated by the emphasis on the export of food. Large-scale agricultural investors are encouraged and given incentives by the Ethiopian government to export their produce,<sup>55</sup> sacrificing food security for foreign exchange. This is more than welcomed by foreign investors whose target already was the foreign market. It further pushes local investors to export crops in order to benefit from government incentives. As ironic as it sounds, the country in which millions of people depend on international food aid for survival now predominately exports food and cash crops.<sup>56</sup>

---

48 E. Elias *Pastoralists in Southern Ethiopia: Dispossession, access to resources and dialogue with policy makers* (2008) 11-19.

49 As above.

50 Oakland Institute (n 2) 36.

51 As above.

52 D. Rahmato 'Land to investors: Large-scale land transfers in Ethiopia' (2011) *Forum for Social Studies* 21.

53 G. Schoneveld *The governance of large-scale farmland investments in sub-Saharan Africa: A comparative analysis of the challenges for sustainability* (2013) 69.

54 As above.

55 Rahmato (n 52) 9.

56 Ethiopia's top 10 exports <http://www.worldstopexports.com/ethiopias-top-10-exports/> (accessed 10 September 2016).

A study conducted on the impact of land-grabbing in the Gambella region, a hotspot for investors, reveals that thousands of people are displaced from their fertile lands and relocated to mostly dry and poor quality lands.<sup>57</sup> More than 42 per cent of the total land is either under negotiation for lease or has already been leased to investors.<sup>58</sup> By 2014 more than 420 large-scale land deals were registered in the Gambella region.<sup>59</sup> Many of the displaced communities face hunger, some to the extent of starvation.<sup>60</sup> Communities that were once able to feed themselves are rendered hopeless recipients of food aid, if available.<sup>61</sup> Shifting cultivators, who cultivate land in different locations as a coping mechanism for climate change, were forced to settle on a single crop and pastoralists are forced to abandon their cattle.<sup>62</sup> The relocation of people is done under the infamous 'villagisation' programme of the government, which is alleged to be aimed at improving the socio-economic situation of the community by bringing them closer to health care, educational and other service facilities.<sup>63</sup> However, instead of getting the promised improved access to government services, communities are left to starve.<sup>64</sup> Furthermore, the villagisation programme is conducted by force, where those who refuse to be relocated are beaten up and arrested.<sup>65</sup>

Even when a land-grab does not directly result in the displacement of farmers from their land, it has adverse consequences on the food security of the local communities. A study conducted in the Oromia region on the Bercha Agricultural Development Project, owned by an Indian company called Karaturi Agro PLC, indicates these consequences.<sup>66</sup> The government leased 10 700 hectares of land for 30 years to the company for the purpose of the agricultural project. The project aims to produce food crops to be exported to India. The land that was given to the company used to be the communal grazing land of the inhabitants of the area.<sup>67</sup> The community decided to use the land for communal grazing after realising that the increase in cultivation was threatening the sustainability of their livestock. However, the government leased the land under the pretext that it was idle, non-cultivated land.<sup>68</sup> The loss of the grazing area and the

---

57 Human Rights Watch 'Waiting here for death': Forced displacement and 'villagisation' in Ethiopia's Gambella region (2012) 2.

58 As above.

59 F Gebresenbet 'Land acquisitions, the politics of dispossession, and state-remaking in Gambella, Western Ethiopia' (2016) *Africa Spectrum* 12.

60 Oakland Institute *Unheard voices the human rights impact of land investments on indigenous communities in Gambella* (2013) 5.

61 As above.

62 As above.

63 As above.

64 As above.

65 Oakland Institute (n 60) 7.

66 ILC & CIRAD *A case study of the Bechera agricultural development project, Ethiopia* (2011) 1.

67 ILC & CIRAD (n 66) 11.

68 ILC & CIRAD 34.

resulting drastic decrease in the availability of fodder forced the majority of the members of the local community to sell their livestock, thereby threatening their livelihood.<sup>69</sup> Furthermore, a roadblock constructed by the company has blocked access to rivers and other water sources used by locals. In addition, a deep ditch dug alongside the commercial farm has blocked the way to the nearby Gibe River which previously was used by farmers to water livestock.<sup>70</sup> Newly-wed couples that are starting a family were unable to get land for farming. Alternatively, they practise share-cropping on a very small land with a share of 50 per cent on average, which does not earn them enough to survive a year.<sup>71</sup>

The company promised to dig water wells and construct schools and clinics for the community, but none of this materialised.<sup>72</sup> The only benefit to the community was that a few persons were employed as guards and others were employed seasonally (only for a few months in a year) as skilled labourers. They earn salaries of approximately \$2 dollars per day as skilled labourers and about \$0,5 per day as non-skilled workers.<sup>73</sup>

Apart from smallholder farmers and pastoralists, another group that is gravely impacted by this phenomenon are indigenous people.<sup>74</sup> There are several indigenous communities in Ethiopia, among them small communities living along the Omo Valley of the SNNPR region.<sup>75</sup> The indigenous communities of the Omo valley,<sup>76</sup> especially, have faced various human rights violations through the establishment of 100 000 hectares of private commercial farming and other large developmental projects.<sup>77</sup> Communities of the Omo Valley rely mainly on the Omo River for growing crops and replenishing grazing land.<sup>78</sup> They have been subjected to a forced villagisation programme accompanied by arbitrary detention, beatings and intimidation.<sup>79</sup> Indigenous communities of the Omo Valley have been displaced from their ancestral lands, forced to reduce the number of their cattle, abandon the Omo River and shift to a sedentary lifestyle.<sup>80</sup>

---

69 ILC & CIRAD 42.

70 ILC & CIRAD 36.

71 ILC & CIRAD 33.

72 As above.

73 ILC & CIRAD (n 66) 28.

74 Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (2007) 4.

75 ACHPR & IWGIA 'Report of the ACHPR Working Group of Experts on Indigenous Populations/Communities' (2005) 18.

76 The communities that are directly affected include the Mursi, Suri, Kwegu, Daasanach, Nyangatom, Karo, Hamar and Bodi indigenous people.

77 Human Rights Watch 'What will happen if hunger comes?' *Abuses against the indigenous peoples of Ethiopia's Lower Omo Valley* (2012) 2.

78 As above.

79 Human Rights Watch (n 77) 48.

80 As above.

Land-grabbing for commercial agriculture and other projects are projected to affect the livelihood of approximately 200 000 people in the Omo Valley of Ethiopia.<sup>81</sup> It is estimated that a total number of 270 000 indigenous people have been forcefully displaced from the Omo valley and western Gambella regions.<sup>82</sup> The forced changes in lifestyle, reduced access to water resources and lack of adequate compensation have rendered the communities vulnerable to hunger.<sup>83</sup>

### 3 Right to adequate food

As the right most affected by land-grabbing, the right to food requires closer inspection. Below I elaborate the elements of the right to food, starting from international and regional treaties up to the national recognition of the right in Ethiopia. The various levels of state obligations are explained along with the justiciability of the right in Ethiopia.

The right to adequate food is founded in international human rights law. It has been incorporated in the Universal Declaration of Human Rights (Universal Declaration). The Declaration states in article 25 that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food'.<sup>84</sup> The right to adequate food was later incorporated, in a similar fashion, in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Covenant, which is a binding instrument, reiterated the right to adequate food and included the fundamental right to be free from hunger. Freedom from hunger is the only right in ICESCR identified as fundamental, indicating the vital nature of the right as it is a basic necessity for life.<sup>85</sup> Article 11 further enumerates states' obligations in the implementation of the right. Among other things, state parties have an obligation to take measures to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge. Furthermore, state parties have an obligation to take measures to ensure an equitable distribution of world food supplies in relation to need.

Despite its early explicit recognition, the right was seldom invoked on the international platform. In fact, the first time the right to food

---

81 Human Rights Watch (n 77) 1.

82 M Jaatee 'Land-grabbing and violations of human rights in Ethiopia' (2016) <http://www.farmlandgrab.org/post/view/25706-land-grabbing-and-violations-of-human-rights-in-ethiopia> (accessed 1 October 2016).

83 As above.

84 Art 25 Universal Declaration.

85 Art 11 ICESCR.

was raised was at the 1996 World Food Summit.<sup>86</sup> The Summit was held in response to the sharp increase in the price of cereals, widespread undernourishment and a sharp decline in international food aid.<sup>87</sup> At the Summit world leaders demanded that the right to food contained in ICESCR be further clarified and given teeth. The main reason for invoking the right to food at the time was the fact that despite growing technology and increasing food availability per person, globally more than 800 million people remain hungry.<sup>88</sup>

Following the Summit, the Committee on Economic, Social and Cultural Rights (ESCR Committee) adopted a General Comment clarifying the right to food, in response to the request made.<sup>89</sup> General Comment 12 clarified the right to food and outlined the three levels of obligations of states in relation to the right. In clarifying the right to food, the Committee stated that the right should be realised progressively. It identified the core content of the right to be

the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>90</sup>

All the elements of the core content of the right are very important and hence they were elaborated further. Availability was defined to include 'feeding oneself directly from productive land or other natural resources'.<sup>91</sup> This outlook of availability places in perspective the importance of land rights in the realisation of the right to food, especially for those whose livelihood is related closely to the use of land.

The ESCR Committee identified three levels of obligations placed on governments in relation to the right to food. These are the obligation to respect, which entails refraining from arbitrary interference with the enjoyment of the right;<sup>92</sup> the obligation to protect, which relates to the duty of ensuring that the right is not infringed upon by third parties;<sup>93</sup> and the duty to fulfil, which incorporates the duty to facilitate and provide food. The duty to facilitate food entails enabling the enjoyment of the right by strengthening access to resources and means to ensure livelihoods, and ensure food security. The duty to provide food demands the

---

86 World Food Summit 1996 [http://www.fao.org/docrep/x2051e/x2051e00.htm#p83\\_5958](http://www.fao.org/docrep/x2051e/x2051e00.htm#p83_5958) (accessed 6 October 2016).

87 As above.

88 As above.

89 ESCR Committee General Comment 12.

90 General Comment 12 para 8.

91 General Comment 12 para 12.

92 General Comment 12 para 15.

93 As above.



provision of food when people are not in a position to feed themselves owing to situations beyond their control.<sup>94</sup> In undertaking their duty to respect, protect and fulfil the right to food, states are expected to comply with the principles of participation, the rule of law, accountability and transparency.<sup>95</sup>

Regionally, the African Charter on Human and Peoples' Rights (African Charter) does not explicitly recognise the right to food. However, the progressive jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) has made the incorporation of the right to food possible. In its decision in *SERAC*<sup>96</sup> the Commission stated that the right to food was an implied right in the African Charter.<sup>97</sup>

The right to food is closely related to several other rights. The right to property, which includes access to land, is one of these rights. The jurisprudence of the African Commission indicates that the right to property, which is enshrined in the African Charter, includes the right to land.<sup>98</sup> Furthermore, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) explicitly recognises the right to food security of women and imposes on states the obligation to take measures to provide women with access to land and other resources for food production.<sup>99</sup>

### 3.1 Right to food in Ethiopia

The right to food is not explicitly recognised in the Constitution of Ethiopia. However, Ethiopia has ratified both ICESCR and the African Charter. 'All international agreements ratified by Ethiopia are an integral part of the law of the land.'<sup>100</sup> As such, the protections provided in ICESCR and the African Charter are important normative guarantees in the Ethiopian legal framework. Furthermore, fundamental rights provided for in the Constitution have to be 'interpreted in a manner conforming to the principles of ... international instruments adopted by Ethiopia'.<sup>101</sup> Hence, where the interpretation of domestic law is involved, international treaties serve as authoritative guidelines.

---

94 As above.

95 C Golay & I Biglino 'Human rights responses to land-grabbing: A right to food perspective' (2013) 34 *Third World Quarterly* 1632.

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

97 *SERAC* (n 96) para 64.

98 *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 128.

99 Art 15(a) African Women's Protocol.

100 Art 9 FDRE Constitution.

101 Art 13 FDRE Constitution.

Food is mentioned in the Constitution not as a right but as a social objective that is subject to resource availability.<sup>102</sup> However, the land rights of peasants and pastoralists to access farming and grazing land without payment and their protection from eviction are recognised in the Constitution.<sup>103</sup> This recognition is important for the realisation of the right to food in the context of land-grabbing. Moreover, the recognition of a right is not enough to ensure protection, unless one is able to enforce it in a court of law. Hence it is critical to examine the justiciability of the right to food in Ethiopia.

### 3.2 Justiciability of the right to food in Ethiopia

A right is said to be justiciable if it can be subjected to trial in a judicial or quasi-judicial body.<sup>104</sup> The unnecessary controversy about the justiciability of socio-economic rights is not peculiar to the Ethiopian legal system. Some argue that socio-economic rights are not justiciable in Ethiopia as they are incorporated in the National Policy Principles and Objectives.<sup>105</sup> However, all the elements necessary for the justiciability of the right to food in Ethiopia have been fulfilled. First, the right to food is recognised by virtue of its inclusion in treaties ratified by Ethiopia as an integral part of the national law.<sup>106</sup> In this regard, the doubt surrounding the direct applicability of international instruments in the domestic courts of Ethiopia has been put to rest by the landmark decision of the Cassation Division of the Federal Supreme Court in the *Demissie* case, where the Convention on the Rights of the Child (CRC) was applied directly.<sup>107</sup> The second element is the existence of a competent and impartial judicial or quasi-judicial body with the power to entertain allegations of the violation of the right. Indeed, courts have the constitutional power to interpret and enforce all laws in Ethiopia.<sup>108</sup> The third element is the existence of a remedy. There are several possible remedies for different types of violations of the right to food. Right to food litigation in the Supreme Court of India is an example of how a violation of the right may be argued and the possible remedies that may be rendered.<sup>109</sup> Even though the Constitution of India does not explicitly incorporate the right to food, the Supreme Court of India has stated in the well-known *People's Union for Civil Liberties* case that the right to food is part of the right to life. In this case it was alleged that the government

102 Art 90 FDRE Constitution.

103 Arts 40(4) & (5) FDRE Constitution.

104 A Tesfaye 'Justiciability of socio-economic rights in the Federal Democratic Republic of Ethiopia' unpublished LLM thesis, Addis Ababa University, 2010 11.

105 Tesfaye (n 104) 51.

106 S Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 276.

107 *Miss Tsedale Demissie v Mr Kifle Demissie* (2006) 23632 (Federal Supreme Court of Ethiopia Cassation Division).

108 Art 79(1) FDRE Constitution.

109 International Development Law Organisation *Realising the right to food legal strategies and approaches* (2014) 39.

of India had violated the right to food by failing to distribute the available food stock to drought-affected citizens.<sup>110</sup> In an interim order, the Indian Supreme Court ordered the government to provide food for vulnerable communities in areas of scarcity and to implement a system of transparency and the creation of awareness of assistance programmes.<sup>111</sup>

However, the role of Ethiopian courts in adjudicating human rights matters remains to be seen, owing to various factors. Their function as custodians of human rights has been shifted to other organs, namely, the House of Federation, which is a political body, and the Council of Constitutional Inquiry.<sup>112</sup> Moreover, when it comes to the right to food, no court case has as yet alleged the violation of the right.<sup>113</sup> In the history of the country, hundreds of thousands of people have died due to famine that could have been averted through government action. Moreover, to date every year millions of people depend on food aid for their survival and thousands are forced into hunger as a result of government policies and actions. Despite these facts, so far no court case has been brought alleging the violation of the right to food.<sup>114</sup>

---

110 *PUCL v Union of India & Others* <http://www.hrln.org/hrln/right-to-food/pils-a-cases/255-pucl-vs-union-of-india-a-others-.html> (accessed 23 October 2016).

111 *People's Union for Civil Liberties v Union of India & Others* (2001) 196 4 & 5 (Supreme Court of India Interim Order of 2 May 2003).

112 AK Abebe 'Human rights under the Ethiopian Constitution: A descriptive overview' (2011) 5 *Mizan Law Review* 65-69.

113 Many reasons can be given as to why the right to food has not been a subject of court proceedings. Some argue that socio-economic rights are not justiciable. However, I have noted in this section that socio-economic rights, specifically the right to food, are theoretically justiciable in Ethiopia. For more on this, see A Tesfaye *Justiciability of socio-economic rights in the Federal Democratic Republic of Ethiopia* (2010) 88. Others argue that the FDRE Constitution limits the power of courts. Courts in Ethiopia do not have the power to undertake judicial review, and their power to interpret the Constitution has been given to the Council of Constitutional Inquiry (CCI) and the House of Federation. There are instances where a matter alleging a violation of fundamental rights contained in the Constitution is brought before a court and the court refers the matter to the CCI. For more on this, see C Mgbako 'Silencing the Ethiopian courts: Non-judicial constitutional review' (2008) 31 *Fordham International Law Journal* 266, [https://www.academia.edu/26494018/Silencing\\_the\\_Ethiopian\\_Courts\\_Non-Judicial\\_Constitutional\\_Review\\_and\\_its\\_Impact\\_on\\_Human\\_Rights](https://www.academia.edu/26494018/Silencing_the_Ethiopian_Courts_Non-Judicial_Constitutional_Review_and_its_Impact_on_Human_Rights) (accessed 9 April 2019). Also see AK Abebe 'Access to constitutional justice in Ethiopia' in PS Togia et al (eds) (2014) 64, [https://www.academia.edu/18708196/Access\\_to\\_constitutional\\_justice\\_in\\_Ethiopia](https://www.academia.edu/18708196/Access_to_constitutional_justice_in_Ethiopia). Also see Dawit 'Adjudication of FDRE Constitution' <https://www.abysinnialaw.com/component/k2/itemlist/user/734-dawit> (2019) (accessed 9 April 2019).

114 One of the reasons for this is the narrow space for civil society and strict funding and membership limitations of civil society that work on human rights protection. See Abebe (n 113) 65-66.

## 4 A right to food response to land-grabbing

In this part of the article the author first analyses how the different stages of land-grabbing threaten the right to food. Following that possible responses to the threat posed by land-grabbing, such as titling and export restriction, are critically analysed. Finally, various measures are suggested, taking into account the available interdisciplinary knowledge related to agriculture. The author advocates the need for a human right to land and the legal recognition of various uses of land. In addition the positive role to be played by investors is highlighted.

As discussed above, the right to food can be realised in two ways, namely, by directly feeding oneself using natural resources or by purchasing food for consumption. From this it may logically be inferred that preventing someone from being able either to feed themselves or to purchase food is a *prima facie* violation of the right to food. The ability to utilise land for cultivation or grazing is an important element of the right, especially in a predominately agrarian country such as Ethiopia. Therefore, the government has a duty to respect, protect and fulfil this element of the right.<sup>115</sup> The former UN Special Rapporteur on the Right to Food, Olivier de Schutter, links land-grabbing and the violation of the right to food as follows:<sup>116</sup>

The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor.

This statement indicates that the effect of land-grabbing on the right to food goes beyond disabling those who depend on land to feed themselves. It also adversely affects poor local consumers who rely on the food market if the crops produced are destined for export. Smallholders that are unable to compete in the market with large commercial farmers are also affected if the crops are dumped on the local market. This opens up a dilemma as to what the response of states should be to overcome the negative effects of land-grabbing. That is the dilemma of opting to export crops produced on large investor farms at the expense of risking local food security, or opting for restricting exports at the risk of jeopardising the livelihood of small farmers that cannot compete on the local market with large investors. This in turn raises the bigger question of the possibility of co-existence of large-scale industrial farms and small-scale family farms without

---

<sup>115</sup> FIAN *Land-grabbing in Kenya and Mozambique* (2010) 11.

<sup>116</sup> Report of the Special Rapporteur on the Right to Food, Olivier de Schutter 'Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge' (2009) para 4.

threatening the right to food.<sup>117</sup> De Schutter, who proposed a paradigm shift that dismisses both options, made this observation.<sup>118</sup> However, before exploring this, it is necessary to illustrate how the pertinent stages of land-grabbing threaten or violate the right to food in the Ethiopian context, that is, the negotiation and conclusion of the land lease, and the displacement of local communities.

#### 4.1 Negotiation and conclusion of the deal

The Ethiopian government exercises control over land as the custodian on behalf of the public. Thus, large-scale land deals are concluded between the government and investors.<sup>119</sup> Farmers with titles over their land can also lease the land for a short period. However, since customary land rights are not fully recognised, in cases where such land users are concerned, the government has exclusive legal authority to lease the land.<sup>120</sup> Hence, it is the government that decides whether land is underutilised or idle and destines it for investment. According to the government, most of the land given to investors is deemed unutilised land.<sup>121</sup> However, the data used to determine land availability lacks credibility.<sup>122</sup> It does not take into account the multiple uses of the land by peasants and agro-pastoralists.<sup>123</sup> In addition, such data as well as satellite-based land demarcations underestimate land used for shifting cultivation and land used by pastoralists.<sup>124</sup> Hence, this entails the displacement of people from the land they use for subsistence and the loss of grazing land, forest resources and water resources that are vital for the livelihood and survival of communities.<sup>125</sup>

The protection of the right to adequate food demands that the government acts in accordance with principles of accountability, transparency and people's participation.<sup>126</sup> When states take measures that are aimed at or that are likely to affect local food security, they have the obligation to inform and consult all relevant actors.<sup>127</sup> Furthermore, as far as indigenous people are concerned, their ancestral land should not be confiscated without their prior free and informed consent.<sup>128</sup> This entails conducting consultations in a way that is understandable to the indigenous community and

---

117 O de Schutter 'How not to think of land-grabbing: Three critiques of large-scale investments in farmland' (2011) 38 *The Journal of Peasant Studies* 259.

118 As above.

119 Oakland Institute (n 2) 25.

120 Cotula (n 36) 16.

121 Oakland Institute (n 2) 17.

122 Rahmato (n 52) 7-10.

123 As above.

124 Cotula (n 36) 17.

125 Oakland Institute (n 2) 38.

126 ESCR Committee General Comment 12 para 23.

127 Golay & Biglino (n 95) 1633.

128 'Respecting free, prior and informed consent Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land

acquiring their consent without any kind of intimidation or duress.<sup>129</sup> In other words, if they do not consent, their land should not be confiscated. However, the Ethiopian government does not inform or consult with the local population before giving land to investors.<sup>130</sup> Due to the lack of consultation, the views and interests of the land users are not taken into consideration in land deals. As the government is the custodian of land on behalf of the people, meaningful consultation is necessary to identify whether a certain project is in the public interest or not. Studies conducted in the Gambella and Oromia regions, as outlined in part 2, are an indication of the need for accountability, transparency and participation.

## 4.2 Displacement and loss of livelihood

Land-grabbing has led to the displacement of hundreds of thousands of rural dwellers, including farmers, pastoralists and indigenous people in Ethiopia.<sup>131</sup> The main concern expressed by displaced people is the lack of food in their new locations.<sup>132</sup> Furthermore, the new locations mostly are far from water sources and access to farming land is not guaranteed, and if it is, the land more than likely is much less fertile.<sup>133</sup> If communities that rely on land for subsistence are displaced, they should receive adequate compensation and arable land that takes into consideration the type of cultivation suitable to the geo-climatic condition of the area. If this is not done, communities that were able to feed themselves will be vulnerable to hunger and will rely on food aid, as evidenced in the Gambella, SNNPR and Oromia regions of Ethiopia.<sup>134</sup> This amounts to a violation of the duty to respect the right to food since it entails an action by the state that deprives individuals of access to productive resources.<sup>135</sup>

At this juncture the jurisprudence of the African Commission deserves closer examination. In the *Endorois* case<sup>136</sup> the Commission found that the displacement of the Endorois people, an indigenous pastoralist community in Kenya, for the erection of a wildlife reserve and their transfer to a semi-arid area that is not suitable for pastoralism threatened their survival and violated several rights in the

---

acquisition' Food and Agricultural Organisation of the United Nations *Governance of Tenure Technical Guide* No 3 4-5.

129 As above.

130 Rahmato (n 52) 5.

131 Anywaa Survival Organisation 'Land-grabbing and violations of human rights in Ethiopia' <http://www.anywaasurvival.org/land-grabbing-and-violations-of-human-rights-in-ethiopia/> (accessed 19 October 2016).

132 Oakland Institute (n 2) 40.

133 Anywaa Survival Organisation (n 131).

134 As above.

135 Golay & Biglino (n 95) 1634.

136 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) paras 235, 238, 244, 268 & 298 (*Endorois* case).

African Charter, including their right to property and the development and their right to natural resources.<sup>137</sup> Although the African Commission did not find a violation of the right to food, it made the crucial link between the displacement of an indigenous community from ancestral land, their loss of livelihood and the threat to their survival. This link is important for the realisation of the right to food of such communities. Furthermore, the Commission took a strong stand on land rights, inspired by the UN Declaration on the Rights of Indigenous Peoples and the jurisprudence of the Inter-American Court of Human Rights. It stated that 'the jurisprudence under international law bestows the right of ownership rather than mere access'.<sup>138</sup> The African Commission further stressed the issue of peoples' participation by stating that 'ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries'.<sup>139</sup>

This jurisprudence is relevant to the displacement of indigenous people in Ethiopia. The Ethiopian government does not recognise an ownership right of indigenous people to their ancestral land and, therefore, easily displaces them without consultation and compensation. Recognising the ownership right of these communities is paramount for their protection. The justification given by the Ethiopian government is the same as the justification given by the Kenyan government: In both cases the displacement was done in the 'public interest'.<sup>140</sup> Kenya and Ethiopia share a similar situation when it comes to the displacement of indigenous communities for 'developmental' reasons or for 'public interest'. The Omo Valley of Ethiopia, where indigenous communities affected by land-grabbing are located, extends into Kenya. Indigenous communities on the Kenyan side of the region find themselves in a similar situation.<sup>141</sup> The ruling and findings of the African Commission in the *Endorois* case may be used to challenge the land-grabbing-induced forced displacement of indigenous communities in Ethiopia that has resulted in the loss of their livelihoods and violated their right to adequate food.

In this regard, a communication has been brought before the African Commission against the government of Ethiopia for violations of the rights of indigenous people of the Lower Omo Valley, which discloses the forced relocation of communities to clear land for large plantations and other projects.<sup>142</sup> The communication has passed the stage of admissibility,<sup>143</sup> and the African Commission has urged the

---

137 As above.

138 *Endorois* (n 136) para 204.

139 As above.

140 *Endorois* (n 136) para 100.

141 Human Rights Watch (n 77).

142 35th Activity Report of the African Commission on Human and Peoples' Rights (2013) 8.

143 As above.

government of Ethiopia to cease forced relocations while it undertakes an investigation of human rights violations.<sup>144</sup>

When the right to food is violated, states have an obligation to ensure that the victims get access to an effective remedy.<sup>145</sup> The domestic courts of Ethiopia should also play their part in addressing such violations, which are against the Constitution and international treaties that Ethiopia has ratified. Lessons can be learnt from the jurisprudence of other African countries that are facing similar problems. In the *Baleke* case the High Court of Uganda dealt with the forced eviction of peasants that had been customary tenants of land in Uganda.<sup>146</sup> The tenants were evicted against their will and received no compensation. The Ugandan government gave the land to German investors for the establishment of a coffee plantation. Through this act the evicted people lost their livelihoods and faced starvation. The High Court of Uganda held agents of the state liable for the act and ordered compensation to be paid to the 2 041 individuals evicted. In addition to finding agents of the state liable for the forced eviction, the Court stated:<sup>147</sup>

The German investors had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and as honourable businessman and investors they should have not moved into the land unless they had satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them. But instead they were quiet spectators and watched the drama as cruel and violent and degrading eviction took place through partly their own workers. They lost all sense of humanity.

This decision exemplifies how courts can ensure private actors' responsibility to respect human rights in accordance with the Guiding Principles on Business and Human Rights. The Guiding Principles require businesses to put in place 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'.<sup>148</sup> The decision also contextualises the specific responsibility placed on private actors in General Comment 12 of the ESCR Committee, which is to operate in a manner that is conducive to ensuring the right to adequate food of locals.<sup>149</sup>

Apart from respecting the enjoyment of the right to adequate food and ensuring an effective remedy for the violation of the right, states have an obligation to take measures to realise the right progressively.

144 African Commission on Human and Peoples' Rights investigates Ethiopia and Botswana' <http://www.zegabi.com/articles/5838> (accessed 15 October 2016).

145 Golay & Biglino (n 95) 1633.

146 *Baleke & Others v Attorney-General of Uganda & Others* (2002) Civil Suit 179 (High Court of Uganda).

147 *Baleke* (n 146) para107.

148 United Nations Guiding Principles on Business and Human Rights (2011) para 15(b).

149 ESCR Committee General Comment 12 para 20.



This includes undertaking agrarian reform to ensure the efficient utilisation of natural resources as well as an equitable distribution of food.<sup>150</sup> The next part of the article explores suggested measures that states can take to realise the right to food in an agrarian society. It also suggests measures to prevent or reduce the negative impact of land-grabbing.

### 4.3 Measures for the progressive realisation of the right to adequate food in the context of land use

One important development after the advent of contemporary land-grabbing is the adoption of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (Voluntary Guidelines).<sup>151</sup> The main goals of the Guidelines were to achieve food security and to ensure the realisation of the right to adequate food.<sup>152</sup> Even though there is no international consensus on tenure rights being human rights, the Guidelines make it clear that tenure rights are important for the realisation of various human rights and, notably, the right to adequate food.<sup>153</sup>

The Voluntary Guidelines complement the Voluntary Guidelines on the Right to Food that were adopted by FAO much earlier with the aim of ensuring the progressive realisation of the right to food.<sup>154</sup> The addition of the new Guidelines is an affirmation of the necessity to move towards a human rights-based approach to natural resource management, specifically land management. However, these Guidelines have not resulted in a reduction in land-grabbing, mainly owing to their non-binding nature. At the regional level, the Guiding Principles on Large-Scale Land Investments in Africa<sup>155</sup> urge such types of investments to respect the human rights of local communities.

#### 4.3.1 Ensuring security of tenure

There were several suggested responses to the challenges of land-grabbing. One such response was the introduction of titling schemes in rural areas where farmers did not have titles to their land. This emanated from the apparent correlation between weak land tenure security and high levels of land acquisition.<sup>156</sup> Ethiopia is one of those

150 Arts 11(2)(a) & (b) ICESCR.

151 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' *Food and Agriculture Organisation of the United Nations* (2012) <http://www.fao.org/3/a-i2801e.pdf> (accessed 15 October 2016).

152 CFS *Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security* (2012) vi.

153 FAO *Voluntary guidelines on the governance of tenure at a glance* (2012) 8.

154 FAO CFS (n 152).

155 AU Guiding Principles on large-scale land-based investments in Africa (2014) 7.

156 Nolte (n 8) 20.

countries characterised by weak land tenure security and large-scale land acquisitions.<sup>157</sup>

The aim of the titling scheme is to ensure security of tenure, thereby tackling the problem of a lack of transparency in land deals, and to equip local communities with a tool to exercise their property rights. Ensuring security of tenure will facilitate the realisation of the right to food as well as empower those whose livelihoods depend on land and other natural resources. Through such schemes it was believed that farmers would have greater choice since it will give them the option of selling the land to exit from agriculture. Furthermore, they can mortgage the land and have access to credit, which they can use to invest in the land.<sup>158</sup> The titling schemes were also believed to increase efficiency as land theoretically would go to the most efficient user through transaction. The Ethiopian government has already conducted the largest nationwide land registration and certification programme in Africa.<sup>159</sup>

However, such schemes may be far from ideal once implemented. There are three main problems with titling schemes. First, land does not necessarily go to the most efficient user but rather to those with the most capital, and the poor are priced out. Hence, these schemes do not always benefit the poor.<sup>160</sup> This means that land may end up in the hands of those who will not make efficient use of it, and it will be deprived by the market from those that would use it efficiently. Small subsistence farmers are the most efficient users of agricultural land.<sup>161</sup>

The second problem is related to its effect on women. Titling places women at a disadvantage because the land is mostly registered in the name of a man who is considered the 'head of the house'. Therefore, it will legalise the traditional disadvantage women face with land ownership and control.<sup>162</sup> Ethiopia implemented joint titling schemes, which in theory are supposed to ensure equal land rights of women and men. However, the disparities in implementation in various regions and the triumph of gender roles over legal norms have resulted in a disadvantage for women.<sup>163</sup>

The last major problem with titling is that it does not secure the right of access to communal land for grazing, fishing, collecting wood or the rights or interests of those who use the forest for hunting and

---

157 As above.

158 De Schutter (n 117) 270.

159 S Bezu & S Holden 'Demand for second-stage land certification in Ethiopia: Evidence from household panel data' (2014) 14 *Land Use Policy* 193.

160 De Schutter (n 117) 269.

161 FAO (n 153) xi.

162 O de Schutter 'The role of property rights in the debate on large-scale land acquisitions' (2015) 6 *International Development Policy Series* 32.

163 Brief: The gender implications of joint titling in Ethiopia' <http://www.focusonland.com/fola/en/countries/brief-the-gender-implications-of-joint-titling-in-ethiopia/> (accessed 16 October 2016).

gathering.<sup>164</sup> These resources are paramount for the protection of the right to food of various communities in Ethiopia. Forest resources are used as a buffer food supply. Communal grazing lands are crucial for livestock production. Various communities, including indigenous people, practise fishing, hunting and gathering for subsistence.<sup>165</sup> Hence, it is paramount to consider a right over these resources for the effective protection of the right to adequate food.

The best way to make security of tenure benefit land users without falling in the trap of titling schemes is by distinguishing it from the conventional understanding of property rights. The property rights lens is based on the creation of a market for land rights. However, it should rather be understood as a right that allows communal tenure as well as protecting land users from eviction.<sup>166</sup> First, the registration of land rights should be based on mapping by the local community. This will ensure that the interests of the local community will be safeguarded, ensuring that grazing, fishing and other activities that are important for the survival and well-being of the community will not be overlooked. However, when mapping is delegated to the local community, it should be done in such a way that the voices and interests of women and other minority groups are equally entertained. Another useful tool to ensure security of tenure is the strengthening of anti-eviction laws to protect land users from forced displacement. It is also important to develop tenancy laws to protect tenants from being evicted and from excessive rental charges and share-cropping.<sup>167</sup> Finally, the introduction of land reform for solving the excessive concentration of land and reducing rural poverty is advisable. Moreover, the land rights of indigenous communities should be respected irrespective of the lack of titles.

These measures are useful for ensuring land tenure without falling in the pitfall of titling schemes. However, they are not sufficient to combat the food security challenges that result from land-grabbing. The emergence of a human right to land and of different types of land use that recognise the needs of indigenous people, pastoralists and small-scale farmers and ensures gender equality are essential.<sup>168</sup>

#### **4.3.2 Export restrictions as a solution**

Another response to the negative impact on the right to food of land-grabbing was the suggestion of introducing export restrictions. This is to ensure that food crops produced on large investor farms go to the local market, thereby increasing the availability of local food.<sup>169</sup> The first challenge to such a measure comes from the World Trade

---

164 De Schutter (n 162) 31.

165 Oakland Institute (n 48) 8.

166 De Schutter (n 117) 269.

167 De Schutter (n 162) 35.

168 Golay & Biglino (n 95) 1634.

169 Future Agriculture (n 34) 3.

Organisation (WTO) rules. Imposing such export restrictions is contrary to the Agreement on Trade-Related Investment Measures (TRIMs) of the WTO.<sup>170</sup> Even though Ethiopia is not yet a member of the WTO, it has started the process of accession.<sup>171</sup> Upon accession, the country will be required to fully comply with the requirements under the TRIMs agreement.<sup>172</sup>

Second, the bargaining power of states that compete and desperately try to attract investors is insignificant. States are unlikely to push for such clauses in land deals. In the case of Ethiopia, the government is more interested in the foreign currency that comes with export than any other variable. Hence, there is a strong desire to promote export rather than restrict it. This is evidenced by the incentives given to investors, both local and foreign, who export their products.<sup>173</sup>

The above impediments make the proposed solution of imposing export restriction difficult and unlikely to be implemented. Moreover, even if somehow it is implemented, such a restriction on export may not necessarily solve the problem of local food security. The food security challenge that emanates from land-grabbing is mainly due to the loss of livelihoods of rural communities. As stated before, the right to food is 'violated if ... the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply priced food, produced on the more competitive large-scale plantations'.<sup>174</sup> Therefore, imposing restrictions on food exports and dumping food on the local market are not solutions for net food-seller<sup>175</sup> farmers.<sup>176</sup> It may be desirable for small-scale farmers that are net food buyers. However, there is a large population of net food sellers that will be disadvantaged.<sup>177</sup> The majority of small-scale farmers in Ethiopia who produce food crops are net food sellers, and the dumping of food on the market by large investors will oust them from the market and threaten their livelihood.

---

170 TRIMs Agreement: Agreement on Trade-Related Investment Measures 1994 art 2.

171 WTO Accessions [https://www.wto.org/english/thewto\\_e/acc\\_e/acc\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/acc_e.htm) (accessed 20 October 2016).

172 United Nations Conference on Trade and Development *Elimination of TRIMs, the experience of selected developing countries* (2007) 111.

173 Makki & Geisler (n 21).

174 De Schutter (n 117).

175 'A household which is a *net-seller* of food staples is defined as a household that sells more food on the market either in weight or in value (that is quantity times price) than what they buy on the market for a given season or a year, either in relation to a single staple or to a combination of staple foods – depending on how one wants to construct the profile. A household that is a *net-buyer* buys more food staples (either in weight or value) on the market than they sell for a given season or a year. Urban households, for example, are typically characterised as net-buyers as they often do not produce their own food and rely mostly on markets to buy their food.' See 'How to estimate household net-seller/buyer status and the welfare impact of shocks?' (2019) *World Food Programme* 3.

176 La Via Campesina *Declaration of rights of peasants: Women and men* (2009) 3.

177 M Aksoy & A Isik-Dikmelik *Are low food prices pro-poor? Net food buyers and sellers in low-income countries* (2008) 14.

Therefore, the government has to find a balance between imposing restrictions on exports, thereby risking threatening the livelihoods of local small-scale producers through internal dumping and, on the other hand, not imposing any export restrictions, but in the process threatening the local food availability.

#### 4.3.3 *Investing in small-scale farming*

In analysing the various suggested solutions to land-grabbing, it was revealed that neither titling nor restrictions on exports provide an adequate solution in addressing the issue. The inadequacy of these measures poses the bigger question, namely, the desirability of the co-existence of small-scale labour-intensive farming and large-scale mechanised commercial farming.<sup>178</sup> In fact, various principles and guidelines that were introduced to regulate and provide a human rights-based standard to large land acquisitions faced continuous criticism from civil society and agrarian associations for legitimising land-grabbing instead of denouncing it.<sup>179</sup>

For various reasons, small-scale family farming is favoured and believed to be the best way of ensuring the right to adequate food. It is also the best way to reduce rural poverty, as the reasoning below demonstrates. First, most of the world's poor are smallholder farmers, and this is also true for Ethiopia. Investing in improving their livelihood directly contributes to the reduction of rural poverty.<sup>180</sup>

Second, small-scale farming promotes the creation of employment because its methods are labour-intensive as opposed to large-scale commercial farming, which is characterised by the use of machinery. A study conducted on the alleged benefits of large-scale land acquisitions in Africa has shown that they do not result in as much employment as they promise.<sup>181</sup>

Third, small-scale family farming has stronger multiplier effects in the local economy. An increase in the income of smallholders will develop the market for local service providers and local industries.<sup>182</sup> On the other hand, if all the benefits of a large piece of land went to one landowner, they are more likely to invest it in luxury products or large machinery that will not have a multiplier effect in the local economy.

Fourth, small-scale family farming is highly productive per hectare. This is partly because smallholders make the best out of the limited resources they have available to achieve the best possible outcome,<sup>183</sup> when measured in terms of resource productivity and not labour productivity. Studies reveal an inverse relationship between the size of

---

178 De Schutter (n 162).

179 De Schutter (n 162) 254.

180 *FAO Strategic work of FAO to reduce rural poverty* (2016) 4.

181 Cotula (n 36).

182 De Schutter (n 162) 5.

183 De Schutter (n 117) 260.

a farm and total productivity.<sup>184</sup> Finally, small-scale farms are better for environmental conservation as they are aligned with agro-ecology.<sup>185</sup> The environment is directly linked to food production, and protecting it and ensuring sustainability enhance accessibility of food for both current and future generations.<sup>186</sup> Small-scale family farmers use methods of crop rotation and shifting cultivation in addition to combining crop production with livestock production. This protects the soil and enhances productivity.<sup>187</sup> On the other hand, large-scale mechanised farms practise mechanised monoculture, resulting in soil erosion and pollution.<sup>188</sup>

This does not mean that foreign and other private investors have no positive role to play. There are various ways in which investors can invest in farm land without necessarily taking control of the land and changing its use, in other words without grabbing land. One such way is contract farming. This allows farmers to benefit from investment without losing access to their land, and if properly managed, it can provide a win-win situation.<sup>189</sup>

An experience from Mali indicates such a possibility. A company named Biocarburant SA bought land to build a processing plant for the production of bio-fuel from *Jatropha*.<sup>190</sup> Through collaboration with local farmers' cooperatives, the company processes *Jatropha* that is produced by the farmers themselves on their own lands. The farmers have a share in the bio-fuel production. Furthermore, the growing of *Jatropha* does not threaten their food security, as it is a plant that can be intercropped with maize.<sup>191</sup> This type of investment respects the land use of the farmers, does not threaten their food security since the type of bio-fuel crop produced is one that can be cultivated with a food crop, and benefits the farmers by creating a market for their produce and giving them a share in the investment.

## 5 Conclusion and recommendations

Land-grabbing in Ethiopia is a gross violation of the right to adequate food. The government is transgressing its duty to respect the right by

184 Industrial agriculture, agro-ecology and climate change' <https://www.ecoliteracy.org/article/industrial-agriculture-agroecology-and-climate-change> (accessed 22 October 2016).

185 'Only small farmers and agro-ecology can feed the world' <https://www.tni.org/en/article/un-only-small-farmers-and-agroecology-can-feed-world> (accessed 16 October 2016).

186 ESCR Committee General Comment 12 para 7.

187 Industrial agriculture, agro-ecology and climate change (n 184).

188 As above.

189 De Schutter (n 117) 262.

190 'Commercial *Jatropha* biodiesel production with small-scale farmers' [http://www.worldagroforestry.org/sites/default/files/grp1\\_workshops/Trees%20for%20Farmers/G.%20Poster%20exercise/Posters/Ard%20Lengkeek.pdf](http://www.worldagroforestry.org/sites/default/files/grp1_workshops/Trees%20for%20Farmers/G.%20Poster%20exercise/Posters/Ard%20Lengkeek.pdf) (accessed 22 October 2016).

191 De Schutter (n 117) 262.

forcefully evicting communities from the land they rely on for subsistence and relocating them in an unfavourable environment with no compensation for their loss. It also takes away vital resources such as water, forests and grazing land and handing it to investors. The investment in farm land does not in any way improve the lives of these local communities. It does not result in an improvement in services and infrastructure. The little employment that they create are jobs that pay salaries that are considered below the poverty line. Furthermore, taking into account the advantages and disadvantages of large-scale commercial farming for which land is being grabbed, the priority given to it is not in line with the duty of the government to take appropriate measures for the progressive realisation of the right in line with available scientific knowledge.

The Ethiopian government should undertake agrarian reform aimed at empowering small-scale farming. In particular, land registration should be revisited to incorporate communal land use. It should also take into account the importance of grazing land, water sources, shifting cultivation and other practices necessary for livelihood. Furthermore, the gender gaps of joint land registration, in the implementation phase, should be rectified. Agricultural extension programmes aimed at smallholders should be strengthened and expanded.

Agricultural investments should not in any way jeopardise local food security or lead to the forced displacement of communities and their relocation to a less favourable environment. The 'villagisation' or forced relocation programme should be halted immediately and those who are displaced should be reinstated or compensated adequately. If relocations are carried out, the government should ensure that it is indeed beneficial for the public through consultation with those directly affected. Furthermore, the government should adopt rules and procedures in accordance with the Basic Principles and Guidelines on Development-Based Evictions and Displacement. The rights of indigenous people to their ancestral land should be respected. They should not be relocated without their full consent. Furthermore, the government should put in place mechanisms to ensure transparency and good governance in land management. Moreover, the civil society space should be widened, allowing for agrarian-based civil societies to be able to advocate human rights.

In addition, farm land investors must recognise their responsibility to conduct their activities in a manner that does not violate human rights. In particular, they should create a human rights due diligence process to prevent any violations. Furthermore, they should agree upon a code of conduct with the government in collaboration with civil society as well as local community representatives, to ensure that their activities do not in any way jeopardise the enjoyment and progressive realisation of the right to adequate food.

## Human rights violations of persons with albinism in Tanzania: The case of children in temporary holding shelters

*Ines Kajiru\**

Post-doctoral Fellow, School of Applied Human Sciences, University of KwaZulu-Natal, South Africa

<https://orcid.org/0000-0002-1919-1148>

*John C Mubangizi\*\**

Professor and Dean, Faculty of Law, University of the Free State, South Africa

<https://orcid.org/0000-0002-1408-268X>

### Summary

*Albinism is a genetic condition that occurs in people of all races and in all parts of the world. In Tanzania, and in many other places where it occurs, children living with albinism constantly are subjected to discrimination, stigmatisation, persecution and ridicule. However, the most disturbing phenomenon is the mindless killing of these children. The threat of being murdered forces some of these children to flee from their homes and communities. In an attempt to address the situation and to protect these children, the Tanzanian government has established temporary holding shelters. This article explores the challenges faced by children at these temporary holding shelters and the extent to which their rights are violated. Despite Tanzania's ratification of the 1989 UN Convention on the Rights of the Child in 1991, which compels it to prevent violence against children and to uphold the right of all children to human dignity and physical integrity, human rights violations against these children abound. It is evident that the Tanzanian government's commitment to protect all children, as required by the Law of the Child Act, is lacking in implementation and effectiveness. The article utilises secondary data*

---

\* LLB LLM (Mzumbe) PhD (KwaZulu-Natal); [ikajiru@gmail.com](mailto:ikajiru@gmail.com)

\*\* LLB (Makerere) LLM (Cape Town) LLD (KwaZulu-Natal); [Mubangizijc@ufs.ac.za](mailto:Mubangizijc@ufs.ac.za)



*obtained through a review of relevant documents. The findings point to a lack of security, care and protection of the children in temporary holding shelters. It is concluded that the Tanzanian government needs to take effective and sustainable steps towards the elimination of all forms of violence against children, generally, and against children with albinism, in particular. The government also is urged to improve the conditions in these shelters in order to uphold the rights of the children residing there as provided for under international as well as domestic law.*

**Key words:** *human rights; albinism; children; discrimination; shelters*

## 1 Introduction

Albinism is a condition that occurs due to the 'absence of pigmentation in the epidermis that normally gives colour to the skin, the hair and the irises of the eye'.<sup>1</sup> As a result, it 'may be accompanied by vision and eye problems and may ultimately lead to skin cancer'.<sup>2</sup> Although albinism occurs in people of all races and in almost all parts of the world, it is more prevalent in certain regions than in others. Tanzania has the highest prevalence of albinism in Africa and it is estimated that one in every 2 000 people suffers from this condition.<sup>3</sup> Tanzania also has the 'highest reported levels of discrimination and violence against people with albinism on the African continent'.<sup>4</sup>

Historically, around the globe children with albinism faced appalling discrimination, stigmatisation and social exclusion that often culminated in physical attacks and killings.<sup>5</sup> In the twenty-first century the killing of children with albinism for many years has continued almost unabatedly in Tanzania.<sup>6</sup> This situation mainly is because society continues to believe that bearing a child with albinism is a curse.<sup>7</sup> Moreover, persons with albinism are killed for ritual purposes as it is believed that the potions witchdoctors concoct from these people's body parts possess magical powers capable of bringing great

---

1 SA Kirk, J Gallagher & NJ Anastasiow *Educating exceptional children* (2000) 54.

2 S Judith 'Albinism Gale Encyclopaedia of Children's Health: Infancy through adolescence' (2006), <http://www.encyclopedia.com/topic/Albinism.aspx> (accessed 20 January 2018).

3 Under the Same Sun (UTSS) 'The Tanzania Albino Society estimates that there are more than 150 000 people with albinism in Tanzania' (2012) *Assessment Report of Centres for PWA*.

4 UTSS 'Attacks of persons with albinism' Report of 15 August 2013, where it is noted that 55 persons with albinism have been attacked, many of whom were mutilated.

5 J Paul 'Strategies to address vulnerable populations' (2012), <http://hir.harvard.edu/strategies-to-address-vulnerable-populations?page=0,2> (accessed 12 February 2018).

6 AR King et al 'Facts about albinism: International Albinism Day' (2004), University of Minnesota, <http://www.cbc.umn.edu/iac/facts.htm> (accessed 14 January 2018).

7 As above.

wealth and fame if consumed or rubbed onto the body.<sup>8</sup> It has been reported that witchdoctors have a preference for the use of children's body parts as children are believed to be innocent and pure. Therefore, potions made from the body parts of children with albinism generally are deemed more potent in producing the desired results.<sup>9</sup>

The threat of being killed has compelled many persons with albinism to flee from their homes and communities, becoming internally-displaced persons (IDPs).<sup>10</sup> IDPs are defined as 'persons forcibly uprooted from their homes by violent conflicts, gross violations of human rights and other traumatic events but who remain within the borders of their own countries'.<sup>11</sup> This definition adequately describes persons with albinism who, since the killings increased in 2007 and 2008 in Tanzania, have had to flee their homes to seek sanctuary in places with better security – real and perceived.<sup>12</sup> Children with albinism are placed in these centres, known as temporary holding shelters, either by government intervention or through the initiatives of individuals.<sup>13</sup>

The discussion in the article focuses on the violation of the human rights of children with albinism in temporary holding shelters. These rights include, but are not limited to, the right to security and protection, care and support; freedom from torture, inhuman and degrading treatment; the right against discrimination; the right to education; the right to health care; and the right to an adequate standard of living. First, however, it is important to understand the contextual background to the existence of temporary holding centres in Tanzania.

## 2 Temporary holding shelters in Tanzania

As a wave of ritual killings and amputations of persons with albinism, especially children, began to spread in Tanzania in 2007, the government initiated measures designed to ensure the physical safety of children with albinism. One such measure was to issue a provisional emergency response to the surge of attacks by establishing so-called temporary holding shelters where children with albinism could be housed for their protection.

8 UTSS 'Children with albinism in Africa: Murder, mutilation and violence' (2013), <http://www.underthesamesun.com/aboututss> (accessed 14 January 2018).

9 As above.

10 As above.

11 SV de Mello 'Guiding principles on internal displacement', [https://www.un.org/ruleoflaw/files/guiding\\_principles\[1\].doc](https://www.un.org/ruleoflaw/files/guiding_principles[1].doc) (accessed 14 January 2018).

12 UTSS 'Children with albinism: Violence and displacement' Report submitted to the UN Committee on the Rights of the Child 2014, [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/TZA/INT\\_CRC\\_NGO\\_TZA\\_18032\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/TZA/INT_CRC_NGO_TZA_18032_E.pdf) (accessed 14 January 2018).

13 As above.

Generally, existing boarding schools were converted into these 'holding shelters', particularly in the Lake Zone region that is situated in North-Western Tanzania.<sup>14</sup> These boarding schools initially had been designated by the government for children with various disabilities or conditions warranting some level of special care.<sup>15</sup> For example, Buhangija in Shinyanga was a boarding school for children with hearing and visual impediments, but in 2009 the government converted it into a temporary holding shelter for children with albinism.<sup>16</sup> Mitindo boarding school also was converted into a centre for persons with albinism.<sup>17</sup> This step was taken in 2007 when various reports about the killing of persons with albinism became public knowledge.<sup>18</sup>

It should be pointed out that these schools had not been designed to accommodate the large number of children with albinism that fled from their homes in fear of their lives. A report by the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism indicated that there were more than 32 known schools and other facilities that were converted into shelters in the country.<sup>19</sup> However, information presented and discussed in this article pertains to only nine centres that are located in the Lake Zone region of North-Western Tanzania which is notorious for the atrocities committed against persons with albinism, especially children. A number of killings of albino children have also been reported in this region.<sup>20</sup> The centres are Mugeza Bukoba Rural in Kagera; Kabanga Kasulu in Kigoma; Buhangija Shinyanga Urban in Shinyanga; Furaha Tabora Urban in Tabora; Pongwe Tanga in Tanga; Mitindo in Mwanza; Kitengule Karagwe in Kagera; Bukumbi Misungwi in Mwanza; and Missionaries of Charity Tabora in Tabora.<sup>21</sup>

---

14 African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) Report on Investigative Mission on the Situation of Children with Albinism in Temporary Holding Shelters – Tanzania (2016), [http://globaldisability.org/wp-content/uploads/2016/01/Report-on-the-Investigative\\_Mission\\_on\\_the\\_Situation\\_of\\_Children\\_with\\_Albinism\\_ACERWC-March-2016.pdf](http://globaldisability.org/wp-content/uploads/2016/01/Report-on-the-Investigative_Mission_on_the_Situation_of_Children_with_Albinism_ACERWC-March-2016.pdf) (accessed 5 April 2019).

15 UTSS Report (n 12).

16 Human Rights Watch "'It felt like a punishment'": Growing up with albinism in Tanzania' (2017), <https://www.hrw.org/news/2019/02/09/it-felt-punishment-growing-albinism-tanzania> (accessed 1 April 2019).

17 UTSS Report (n 12).

18 UNICEF/UTSS 'Situation assessment of the centres of displaced persons with albinism in the Lake Zone and Tanga Regions: Findings From Under The Same Survey' (2012), <http://www.underthesamesun.com/resources> (accessed 5 April 2019).

19 Human Rights Council 'Report of the Independent Expert on the enjoyment of human rights by persons with albinism on her mission to the United Republic of Tanzania' (2018), <https://reliefweb.int/report/united-republic-tanzania/report-independent-expert-enjoyment-human-rights-persons-albinism> (accessed 2 April 2019).

20 African Children's Committee Report (n 14).

21 Human Rights Council (n 19). See also UTSS 'A report on situation assessment of the centres of displaced persons with albinism in the Lake Zone and Tanga Regions' (2014) 54.

Ordinarily, children with albinism were brought to the shelters through government directives to district and community leaders to bring them in, whereas other children were referred through individual initiatives.<sup>22</sup> Individual initiatives also resulted in the relocation of children with albinism to urban centres where their lives were not as much at risk.<sup>23</sup> Government orders to protect persons with albinism had to be enforced by district commissioners, who were mandated to oversee the security of these persons in their respective districts.<sup>24</sup> Local leaders simply responded to orders from the district commissioner that all children with albinism from their respective areas must be relocated to the temporary holding shelters. Should anything happen to any of these children, the district commissioners would be held responsible.<sup>25</sup> Unfortunately, this initiative meant that children had to be removed from their homes and families by government officials with or without any consultation or consent, and placed in shelters where they effectively were isolated from society and their families.<sup>26</sup>

A matter of concern is that there were no designed procedures through which the children were to be removed and admitted to these centres.<sup>27</sup> In some cases children were forcibly taken by police officers from parents who were reluctant to release them, whereas others were picked up at bus stands without their parents' knowledge.<sup>28</sup> These 'temporary holding' shelters became akin to orphanages as some parents took advantage of the opportunity to abandon their children if they did not want them due to societal prejudice and rejection.<sup>29</sup> Many children with albinism have been abandoned in these centres for years without any contact with their parents.

In terms of ownership some of the centres are managed under the auspices of the government, particularly the Ministry of Education and Vocational Training, the Ministry of Health and Social Welfare, and District or Municipal Councils, while others are owned by faith-based organisations.<sup>30</sup> Some shelters thus are government sponsored while others are sponsored by non-governmental organisations (NGOs)

---

22 UNICEF/UTSS (n 18).

23 As above.

24 African Children's Committee Report (n 14).

25 As above.

26 UTSS Report (n 12).

27 Human Rights Watch (n 16).

28 Tanzania Albino Society 'An island refuge for Tanzania albino people' (2016) <https://www.pri.org/stories/2016-06-20/island-refuge-tanzanias-albino-people> (accessed 2 April 2019).

29 UTSS Report (n 12).

30 UNICEF and UTSS 'Sexual abuse cases reported in assessed schools and centres hosting internally displaced children with albinism and other children with disabilities' (2011) Report to the Ministry of Education and Vocational Training (MoEVT), <https://www.underthesamesun.com/sites/default/files/Centres%20Holding%20Displaced%20PWA%20-%20A%20Report%20from%20Tanzania%20-%202012.pdf> (accessed 2 April 2019).

such as the Missionaries of Charity in Tabora.<sup>31</sup> Under the Same Sun (UTSS) has played an important role in sponsoring hundreds of children of all ages residing in these shelters.<sup>32</sup> A noteworthy initiative is that UTSS and other NGOs financially support the production of sun cream, the first initiative of its kind in this country.<sup>33</sup> The cream, known as 'KiliSun', which helps to protect persons with albinism against the sun's rays, is distributed to all the centres.<sup>34</sup> Moreover, UTSS has accepted its education advancement mandate by sponsoring 66 students with albinism on its education scholarship programme.<sup>35</sup>

### 3 Legal framework for the rights of children with albinism in Tanzania

The concept of human rights was devised as an umbrella concept for the protection of people from discriminatory and oppressive state policies.<sup>36</sup> The Universal Declaration of Human Rights, 1948 (Universal Declaration)<sup>37</sup> establishes a basic human rights principle that 'all human beings are born free and equal in dignity and rights'.<sup>38</sup> Moreover, vulnerable groups such as women, indigenous people and children have been assigned special protection by the United Nations (UN) legal framework, with the obligation on governments to domesticate these provisions in their local laws.

The protection of children's rights under international law can be traced back to the first Declaration of the Rights of the Child that was adopted by the League of Nations in 1924. This was a brief document containing only five principles that guided member states in terms of child welfare. An extended version of this text was adopted by the UN General Assembly in 1948, which was followed by a revised version that was adopted by the General Assembly in 1959 as the UN Declaration on the Rights of the Child. However, the Declaration was not binding as an international treaty.<sup>39</sup> In 1978 a proposal for a new convention on children's rights was submitted by Poland to be

---

31 As above.

32 Human Rights Watch (n 16).

33 African Children's Committee Report (n 14).

34 As above.

35 As above.

36 MA Glendon 'The rule of law in the Universal Declaration of Human Rights' (2004) 2 *Northwestern Journal of International Human Rights* 4.

37 Adopted by General Assembly Resolution 217 A (III) of 10 December 1948.

38 Art 1 Universal Declaration of Human Rights (1948).

39 S Bourne 'Children's rights: A brief introduction to the history and principles of the United Nations Convention on the Rights of Child' (2017), <https://www.linkedin.com/pulse/childrens-rights-brief-introduction-history-united-nations-bourne> (accessed 13 February 2018).

adopted in 1979. However, this proposal was not adopted before 1989 due to consistent constraints and issues.<sup>40</sup> The Convention on the Rights of the Child (CRC) of 1989<sup>41</sup> was based on Poland's draft proposal, with some amendments. In essence it was recognised by all signatories that the 1959 Declaration on the Rights of the Child did not adequately reflect the needs of many of the world's children.<sup>42</sup> This gap was addressed by the CRC<sup>43</sup> and, in Africa, by the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>44</sup> Both instruments emphasise the best interests of the child.

Article 4 of CRC makes it mandatory for governments to take every available measure to protect and respect children's rights. States that ratified the Convention thus agreed to take every step in reviewing their laws relating to children. CRC also includes processes for assessing states' legal, social and economic services as well as their educational and health systems. However, every government is responsible for taking basic action and for guaranteeing that the minimum values and primary rules of the Convention are met.<sup>45</sup> It is thus the duty of every state to create a bedrock environment while ensuring that its children's rights are protected so that they are enabled to grow in order to achieve their prospective goals as worthy citizens. In accomplishing this obligation new laws may have to be enacted or inadequate laws may have to be amended.

On the African regional level the African Children's Charter emphasises that a child's best interests are paramount in every aspect of human behaviour.<sup>46</sup> At the national level, the Bill of Rights, which is entrenched in the Constitution of the United Republic of Tanzania of 1977, enshrines equality as the principle for all and prohibits discrimination on all grounds. The Constitution guarantees and protects human rights in all aspects of human life. It is important at this point to note that the founding values of the Constitution, namely, human dignity, equality, freedom, privacy and security,<sup>47</sup> also include freedom from any form of discrimination. The Constitution also provides for the right to freedom, privacy and

---

40 As above.

41 General Assembly Resolution 44/25 of 20 November 1989.

42 As above.

43 Art 3 of the UN Convention on the Rights of the Child (CRC), adopted by Resolution 44/25 of the UNGA on 20 November 1989; entered into force 2 September 1990.

44 Art 4 of the African Charter on the Rights and Welfare of the Child, adopted by the Assembly of Heads of State and Government in 1990; entered into force 29 November 1999.

45 K Abraham & T Mathew *Children rights manual: Handbook for parliaments* (2011) 24.

46 Art 4 African Children's Charter, <http://www1.umn.edu/humanrts/africa/afchild.htm> (accessed 14 February 2018).

47 Arts 13(d), 15 & 16.

personal security; the right to dignity<sup>48</sup> and the right not to be tortured in any way; and the right not to be treated or punished in a cruel, inhuman or degrading manner as indicated in article 13(6)(e) of the Constitution. This means that children with albinism have inherent rights, including the right to the protection of their human dignity.

Also, it is important to note that article 30(1) of the Tanzanian Constitution clearly states that no person should act in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest. Clearly, discrimination on the basis of race, gender and any other factor is prohibited under the Tanzanian Bill of Rights. This determination implies that the interpretation of human rights provisions takes precedence over other legal rights as they are so broadly conceived and are located at the pinnacle of the protection of society.<sup>49</sup> The interpretation of the Bill of Rights thus comprises overt value judgments that amount to acts of creation and imagination.<sup>50</sup>

Efforts to prevent violence should be part of a government's national commitment to uphold the rights of each individual and to protect his or her human dignity and physical integrity. This commitment is reflected in the Tanzania Law of the Child Act, 2009<sup>51</sup> and the Persons with Disabilities Act.<sup>52</sup> The Law of the Child Act incorporated all important elements of CRC, its Optional Protocols and other standards that were necessary to create a protective atmosphere for children. The Act defines a child as 'a person below the age of 18 years'.<sup>53</sup> Although the Act makes no specific mention of children with albinism, it is a milestone in the quest for upholding children's rights as it includes a structure for a child protection system that is intended 'to prevent and respond to violence, abuse, neglect and the exploitation of children'.<sup>54</sup> It also contains provisions regarding guardianship, custody, foster care or adoption, residential care, mental well-being, and access to essential services such as health care and education.<sup>55</sup>

Despite constitutional and legislative protection, between 2000 and 2017, 189 incidences of violence, including 76 murders, were

---

48 Art 16.

49 GT Baloyi 'When culture clashes with individuals' human rights: A practical theological reflection on the dignity of widows' (2017), [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2074-77052017000100013](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2074-77052017000100013) (accessed 14 January 2018).

50 *Matiso & Others v Commanding Officer, Port Elizabeth Prison & Another* 1994 (4) SA 592 597.

51 Act 21 of 2009.

52 Act 9 of 2010.

53 Secs 4(1)-(2) deal with the best interests of the child.

54 Sec 9(3)(a).

55 Sec 13(1).

recorded involving persons with albinism as victims, and approximately 45 per cent of those killed were children.<sup>56</sup> Based on the impact and implications of these events 'the government made financial and time-bound commitments to strengthen child protection through various national plans of action that would be regularly monitored'.<sup>57</sup> Regulations and rules were drafted (the Child Protection Rules and Regulations, 2015) to operationalise the Law of the Child Act more effectively, but evidence points to the fact that implementation by some of the responsible departments is almost non-existent.<sup>58</sup> It must be pointed out that this failure is not due largely to a lack of trying by government. For example, the Child Development Policy of 2008 is currently being revised to ensure that children are protected against violence, abuse and exploitation. The Law of the Child Act is expected strongly to complement and give legal force to the policy. Moreover, the second National Costed Plan of Action for Most Vulnerable Children 2013-2017 (NCPA II) provides an overarching framework to address child protection in Tanzania.

Section 4 of the Persons with Disabilities Act<sup>59</sup> entails respect for human dignity, the freedom of individuals to make their own choices and the independence of persons with disabilities. This section also asserts non-discriminatory practices in every domain. However, it is the duty of the responsible Minister to take 'appropriate legislative and administrative measures ... with a view to achieving the full realisation of [the] rights of persons with disabilities as set out under the Act'.<sup>60</sup> In this regard the government is required to –

- (a) ensure that all persons with disabilities are equal, and are fully entitled without any discrimination to the equal protection and benefits of this Act;
- (b) prohibit all forms of discrimination on the basis of disability and guarantee the persons with disabilities equal and effective legal protection against discrimination on all grounds; and
- (c) for purposes of promoting equality and elimination of all forms of discrimination, take all appropriate measures to ensure that reasonable changes are provided to persons with disabilities of all ages and gender.<sup>61</sup>

Despite all the advances in the legal framework regarding children's rights, there is clear evidence that the implementation of these rights does not occur at the same speed as the development of legislation and policies. This gap raises doubts as to whether legislation that

56 UNICEF Report 'Building a holistic child protection system, step by step, in the United Republic of Tanzania' (2015), [https://www.unicef.org/protection/files/Tanzania\\_CP\\_system\\_case\\_study.pdf](https://www.unicef.org/protection/files/Tanzania_CP_system_case_study.pdf). (accessed 6 April 2019).

57 As above.

58 As above.

59 Act 9 of 2010.

60 Secs 5(2), (3) & (4) of the Act.

61 Sec 6 of the Act. This wording is similar to that used in the UN Convention on the Rights of Persons with Disabilities.



governs children's rights and the agents that are mandated to implement this legislation really act in the best interests of the child, as paradoxical conditions seem to indicate otherwise.

## 4 Violation of children's rights in temporary holding shelters

### 4.1 Discrimination and stigmatisation

As shown above, there is no shortage of legal mechanisms at international, regional or national level for protecting the rights of children. With specific reference to discrimination, article 2 of CRC<sup>62</sup> requires that all children be fairly and respectfully treated regardless of their race, gender or language. CRC explicitly imposes duties and responsibilities on parents and any other person who takes care of children to protect and preserve their rights. All care givers of children should ensure that their charges are protected from being physically or mentally harmed or mistreated.<sup>63</sup> Moreover, it is the duty of the government to ensure proper care for and the protection of children from neglect, violence and abuse.<sup>64</sup> Clearly, children with albinism, as does every other child, fall within the ambit of the law as provided above, regardless of any condition that makes them look different from other children. The provisions of CRC are at the heart of children's rights, categorically stating that all children are entitled to be free of any kind of discrimination and that all children are entitled to fair treatment.

At the domestic level, article 12 of the Tanzanian Constitution of provides:

- (1) All human beings are born free and are all equal.
- (2) Every person is entitled to recognition and respect for his/her dignity.

Article 13(4) articulates the principle of non-discrimination as follows: 'No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.'

Section 9(3)(a) of the Law of the Child Act protects children from discrimination, violence, abuse, neglect and any other act that exposes them to physical and moral hazards and oppression. Section 13(1) forbids any person from subjecting a child to torture or to any other cruel, inhuman punishment or degrading treatment, including any cultural practice that dehumanises or is injurious to the physical and mental well-being of a child.

---

62 General Assembly Resolution 44/25 of 20 November 1989.

63 Art 19 CRC.

64 As above.

Whereas the protection of children against discrimination is guaranteed under national and international law, children with albinism in Tanzania, especially those residing in temporary holding shelters, continue to suffer discrimination on the basis of their skin colour and their distinctive features.<sup>65</sup> One would expect that the rights of children with albinism in holding centres would be protected by the caregivers to whom they are entrusted.<sup>66</sup> However, this expectation seems to be a fallacy as these children reportedly suffer severe discrimination at the hands of matrons, patrons, teachers and security guards who have no sympathy for them.<sup>67</sup> According to Kajiru, discrimination against these children is a daily occurrence.<sup>68</sup> As a consequence some of these children's self-confidence is destroyed, and they feel embarrassed and rejected with no opportunity to enjoy life as other children do.<sup>69</sup> The plight of children with albinism raises the concern that Tanzania's commitment to CRC and the Law of the Child Act is mere lip service as the implementation of these instruments clearly is a problem.

#### 4.2 The right to security and safety

Article 25 of CRC provides that children who are looked after by a person other than their parents have the right to security and a living environment that is safe and secure and has appropriate arrangements for comfort and sustenance. This provision means that their care and treatment should always be based on the principle of 'serving the best interests of the child'.<sup>70</sup> As far as article 25 is concerned the Tanzanian government is obliged to ensure the security of every child living in a temporary holding shelter. It should be acknowledged that the government has accepted its responsibility in this regard, as the establishment of temporary holding shelters for the protection of this vulnerable group of children was a step in the right direction. However, grave concerns have been raised that the safety and security of a child with albinism is compromised in these centres, and that their situation seems to deteriorate rather than improve.<sup>71</sup> A report by UNICEF/UTSS indicates that some centres have dilapidated doors while some doors have no locks.<sup>72</sup> Mugezi was mentioned in this regard. It was also reported that some centres have no fences, making it easy for community members with nefarious

---

65 African Children's Committee Report (n 14).

66 I Kajiru 'The clash between harmful cultural beliefs and human rights: A case study of atrocities against people with albinism in Tanzania' PhD thesis, University of KwaZulu-Natal, 2018 175.

67 Kajiru (n 66) 176.

68 As above.

69 As above.

70 TC Louie & MS Gloudina 'The voice of the child: Experiences of children in middle childhood regarding Children's Court procedures' (2017) 53 *Social Work Stellenbosch* 5.

71 African Children's Committee Report (n 14).

72 As above.

intentions to gain free access to the centre and endanger the lives of the children who are hunted for their body parts.<sup>73</sup> The reason these children are moved to a shelter is to find a place where they will be safe from attacks and killings, yet easy access to the centres exposes them to dire threats.<sup>74</sup> Moreover, security officers and guards reportedly are ineffectual and irresponsible and some of them are too old to manage the task.<sup>75</sup> According to the UTSS report some security guards performed their duties while unarmed and some slept in their offices throughout the night.<sup>76</sup> The African Children's Committee Report further added that these centres clearly are not conducive to maintaining these children's safety and security.<sup>77</sup> For instance, the lack of electricity and water provision in some centres is a persistent problem.<sup>78</sup> In some cases the children complained that they were 'forced to walk for long distances without an escort through bushes or forests to fetch water and firewood'.<sup>79</sup> All these children were afraid either of being attacked or bitten by snakes. The children in these centres are sent out to milk cows, cut grass for the cows, till the land and perform other tasks without physical protection.<sup>80</sup> Therefore, they are constantly exposed to risk and insecurity in an environment where they should feel protected.<sup>81</sup> Therefore, it is no wonder that many of these children are psychologically and emotionally disturbed and that they struggle to function as 'normal' children.

Despite the government's efforts in establishing these so-called temporary holding shelters for the purpose of protecting children with albinism from attacks and killings, the conditions in these centres are shocking as violations of children's rights sometimes occur more within these walls than outside.<sup>82</sup> The report reveals that many centres have a dilapidated infrastructure with very few members of staff. Security measures also are inadequate. The children constantly are at risk of being attacked as no adequate safety measures have been put in place.

### 4.3 The right to an adequate standard of living

Article 25 of the Universal Declaration provides a general overview of the standard of living that is deemed adequate for the health and well-being of people, and includes 'medical care and [the] necessary social services'. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains similar provisions and

---

73 As above.

74 UTSS Report (n 12).

75 As above.

76 As above.

77 African Children's Committee Report (n 14).

78 As above.

79 As above.

80 As above.

81 As above.

82 As above.

stipulates that '[e]veryone has the right to an adequate standard of living for himself and his family'. As far as children are concerned, this means that they are entitled to a standard of living that is good enough to meet their physical, mental and emotional needs. In this regard it is the duty of the government to ensure that children live in a secure environment, enjoy an adequate standard of living, are housed in sufficiently spacious conditions and live in a wholesome environment. The provision of an adequate standard of living depends on and is determined by the existence of the necessary facilities and infrastructure. However, available evidence points to the fact that little attention has been given to the development of quality infrastructure to accommodate children with albinism in state institutions. As a result, adequate health care and education are lacking in the temporary holding shelters where children with albinism are accommodated.<sup>83</sup>

Evidence also revealed the fact that even the dormitories where these children are housed are fraught with problems such as poor ventilation and insufficient beds and mattresses, as two to three children generally are obliged to share a bed or mattress.<sup>84</sup> Poor sanitation, a limited number of toilets and a lack of security lighting also are problems that affect these children's lives, resulting in a violation of the right to health and an adequate standard of living. Overcrowding also is a factor, as the large number of children does not tally with the few personnel that have to care for them.<sup>85</sup> Therefore, caregivers' responsibilities seem to outweigh their human capacity and capabilities, which is further exacerbated by financial constraints. It is in this context that workers' attitudes and their treatment of the children are characterised by obvious violations of these children's rights. Overcrowding leads also to severe health problems.

The right to an adequate standard of living entails the right to adequate and nutritious food, good quality health care, safe drinking water, a clean and safe environment, and information to help the children stay healthy.<sup>86</sup> Many children in the shelters suffer from various stages of skin cancer, a high crime rate, discrimination, food shortages, malnutrition, a lack of resources such as appropriate reading materials, and vision impairments.<sup>87</sup> The Tanzanian law on disability is broad enough to recognise persons with albinism as a group of persons with disabilities.<sup>88</sup> The Persons with Disabilities Act is

---

83 African Children's Committee Report (n 14).

84 As above.

85 As above.

86 Art 24 CRC.

87 J Burke, TJ Kaijage & JJ Langba 'Media analysis of albino killings in Tanzania: Social work and human rights perspective' (2014) 8 *Ethics and Social Welfare* 125.

88 V Marcon 'Albinism in Tanzania: A human rights issue: An experience of monitoring the "white blacks"' Master's dissertation, Università Degli Studi Di Padova, 2014 40.

the primary legal instrument in this regard and defines disability to include 'the loss or limitation of opportunities to take part in normal life ... due to physical, mental or social factors'.<sup>89</sup> Unfortunately the condition of albinism is accompanied by health issues that adversely affect those living with it, with the result that children with albinism need special attention, care and support. Because they suffer from skin discolouration and visual impairment and are highly prone to contracting cancer and other diseases, they consistently require special health treatment.<sup>90</sup> Thus, it is evident that the definition in the Act appropriately covers persons with albinism, in general, and children with albinism, in particular.<sup>91</sup> However, despite the potential of the Act to protect children with albinism, the reality is that the purported protection rarely is applied and seldom materialises.<sup>92</sup> The result is a dire lack of appropriate education that accommodates the visual disability and special needs of children with albinism.<sup>93</sup>

Clearly, the conditions in the temporary holding shelters do not serve the best interests of children with albinism as they effectively perpetuate human rights violations against them.<sup>94</sup> For many of the children being housed in a centre is similar to being detained, as these centres lack the necessary facilities to support a life that is free of abuse.<sup>95</sup> The government, therefore, is urged to take cognisance of the implications of the violation of these children's human rights and to develop sustainable and effective policies that will address these children's social protection, housing needs and access to public spaces, especially because these children have to live away from their natural family environments and homes.

#### 4.4 The right to education and the paucity of educational resources

Children with albinism, as are all children, are entitled to live in an environment where all the necessary educational resources are readily available. Article 28 of CRC states that '[a]ll children have the right to a primary education, which should be free'. Young people also should be encouraged to reach the highest level of education of which they are capable.<sup>96</sup> Article 29 provides that education should optimally 'develop each child's personality, talents and abilities. It should encourage children to respect others' human rights as well as their own and other cultures.'<sup>97</sup> Also, it should 'help them learn to live

---

89 Sec 3 Persons with Disabilities Act 2010.

90 UTSS (n 8).

91 Persons with Disabilities Act 2010.

92 African Children's Committee Report (n 14).

93 As above.

94 UTSS (n 8).

95 As above.

96 RC Sprinthal, GT Schmutte & L Siros *Understanding educational research* (1991) 89.

97 As above.

peacefully, protect the environment and respect other people'.<sup>98</sup> All these goals are achievable if resources are available and sufficient.<sup>99</sup> Not only is the lack of resources one of the factors that can cause any institution to fail to achieve its goals, but it can also cause stagnation in the academic, health and psychosocial development of children.<sup>100</sup> The UTSS report indicates that almost all the centres investigated have a shortage of teaching and learning materials and other related facilities and that the children living there suffer because of the scarcity of both human and non-human resources.<sup>101</sup> Moreover, many of these centres have a shortage of staff and of adequately trained personnel to address the needs of these children.<sup>102</sup>

According to Human Rights Watch insufficient teaching and learning materials, the shortage of classrooms and desks and overcrowded classrooms in these centres are alarming realities.<sup>103</sup> Article 17 of CRC stipulates that children are entitled to information and materials that are of social and cultural benefit and that are derived from a diversity of community, national and international sources. Access to such information and materials is essential for children with albinism who need to realise their right to participate fully in education through, amongst others, cultural and artistic activities.<sup>104</sup> States are encouraged

to ensure that children are provided with the widest possible access to different media and thus to information and materials related to their own and other cultures in a language that they understand, including sign language and Braille, and by permitting exceptions to copyright laws in order to ensure the availability of printed materials in alternative formats.<sup>105</sup>

In so doing care must be taken to protect and preserve children's learning processes.<sup>106</sup> However, it has been reported that there are neither enough teaching materials nor enough teachers to help the children in the temporary holding centres.<sup>107</sup> Reports also reveal that there are no support materials such as video magnifiers, large-print textbooks, audio tapes, large-print copies of board notes, and the use of computers to supplement reading and to enable the children to stay abreast of technological developments.<sup>108</sup>

---

98 As above.

99 As above.

100 As above.

101 UTSS (n 8).

102 As above.

103 Human Rights Watch (n 16).

104 As above.

105 As above.

106 As above.

107 UTSS (n 8).

108 As above.

#### 4.5 The right to rest, leisure and recreational activities

Leisure, rest, play and recreation are essential to the health and well-being of children and promote the development of creativity, self-confidence, imagination, self-efficacy, emotional strength and physical, social and cognitive skills. Playing and leisure contribute to all aspects of learning as 'they are a form of participation in everyday life and are of intrinsic value to the child in terms of the enjoyment and pleasure they afford'.<sup>109</sup> Research highlights that 'playing is also central to children's spontaneous drive for development and that it plays a significant role in the development of the brain, particularly in the early years'.<sup>110</sup> Leisure, rest, play and recreation 'facilitate children's capacities to negotiate, regain emotional balance, resolve conflicts and make decisions'.<sup>111</sup> Through engaging in leisure, play and recreation, children learn by doing, experimenting with new ideas and exploring and experiencing the world around them and, in so doing, they learn to understand and construct their social and cultural position within the world.<sup>112</sup>

As early as in the 1950s the international community acknowledged the importance of a child being able to play and enjoy recreation as evidenced by the Declaration of the Rights of the Child of 1959.<sup>113</sup> Article 7 of the Declaration states that '[t]he child shall have full opportunity for play and recreation [and that] society and the public authorities shall endeavour to promote the enjoyment of this right'. CRC further strengthens this statement and explicitly states that state parties should 'recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child, and to participate freely in cultural life and the arts'.<sup>114</sup> The right to leisure is also provided for in the African Children's Charter.<sup>115</sup> The recognition of the value of leisure, play and recreation in a child's life is recognised in the Tanzanian Law of the Child Act.<sup>116</sup>

According to the UN Committee on the Rights of the Child<sup>117</sup> there are particular groups of children that face difficulties, particularly in relation to the enjoyment and conditions of equality of their rights as defined in article 31. Such groups include children with disabilities, girls, poor children, children belonging to minorities and indigenous

109 UNESCO *Education for the twenty-first century: Issues and prospects* (1998).

110 IPA World 'Children's right to play and the environment' Discussion paper prepared by the International Play Association: Promoting the Child's Right to Play for the UN Committee on the Rights of the Child Day of General Discussion, 2016 Children's Rights and the Environment, <http://ipaworld.org/wpcontent/uploads/2016/05/IPA-Play-Environment-Discussion-Paper.pdf> (accessed 14 February 2018).

111 As above.

112 As above.

113 Proclaimed by UN General Assembly Resolution 1386(XIV) of 20 November 1959.

114 Art 31.

115 Art 12 African Children's Charter.

116 Sec 8(1)(g).

117 General Comment 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art 31).

children.<sup>118</sup> It is undeniable that environments that encourage leisure, play and recreational opportunities provide conditions for creativity. Opportunities to exercise competence through self-initiated play 'enhance motivation, physical activity and skills development; immersion in cultural life enriches playful interactions; and enough rest ensures that children have the necessary energy and motivation to participate in play and creative engagement'.<sup>119</sup>

The conditions of children with albinism that reside in temporary holding shelters in Tanzania clearly are inconsistent with international norms and standards and with Tanzanian legislation. The report by the UTSS categorically states that children in these centres have no room for sports, play, games and any leisure activities as no timetable or schedule indicates such activities.<sup>120</sup> At the Buhangija centre, for example, no time is allocated for games or sport and no teacher has been employed for this purpose.<sup>121</sup> In general, there are no structured and organised activities for children with albinism that reside in the shelters. Equally important is 'the need to create time and space for children to engage in spontaneous play, recreation and creativity and to promote societal attitudes that support and encourage such activities'.<sup>122</sup> The report by Human Rights Watch indicated that there is poor recognition and implementation of the rights to leisure, rest and recreation in the temporary holding shelters.<sup>123</sup>

#### 4.6 The right to psychosocial care and support

Article 39 of CRC clearly provides that children who experience neglect, exploitation, abuse or other forms of violence should be supported to assist recovery and reintegration. Children who have been exposed to the devastating effects of any conflict and inhumane treatment especially are entitled to emotional, social and psychosocial care.<sup>124</sup> Many children with albinism have experienced deprivation, abuse and stigmatisation, and many have witnessed atrocities and suffered overwhelming grief even before arriving at the shelters.<sup>125</sup> Therefore, they need 'appropriate support if they are to grow into capable and compassionate adults and active citizens engaged in their communities'.<sup>126</sup> The purpose of psychosocial services, psychological

---

118 As above.

119 A Gopnik et al *Children and development: The importance to play* (1999), <https://www.mheducation.co.uk/openup/chapters/0335212999.pdf> (accessed 17 February 2018).

120 UTSS (n 8).

121 As above.

122 IPA World (n 110).

123 Human Rights Watch (n 16).

124 GJ Duncan & GJ Brooks 'Family poverty, welfare reform, and child development' (2000) 17 *Child Development* 188.

125 African Children's Committee Report (n14).

126 As above.



first aid and professional self-care is to help reduce the stress caused by major life events that children or families have had to face, including experiences of significant ill-treatment.<sup>127</sup> Psychosocial support is the best process for children in the aftermath of a disaster, as it 'promotes effective coping strategies to mitigate the impact of the disaster as well as any associated bereavement and secondary stressors'.<sup>128</sup> Child care centres thus are expected to offer guidance to traumatised children and to impart their knowledge of risk factors in order to help them adjust mentally and physically.<sup>129</sup> If the process is handled sensitively, it will strengthen the ability of the children to feel loved, cared for and protected.<sup>130</sup>

Therefore, it is important to ensure that children with albinism participate meaningfully in issues affecting them. They should be heard and allowed to express their feelings and needs and they should be guided towards appreciating their history and identity.<sup>131</sup> Moreover, they should be encouraged to set goals and reach their potential. These goals can be achieved only if they have positive, nurturing relationships and connections in their lives, and if they are provided with life skills and safe spaces to live and play.<sup>132</sup>

All services that 'involve children (for example education, health and humanitarian support in emergencies) should be delivered in a way that takes account of their psychosocial well-being'.<sup>133</sup> There is no doubt that children with albinism in temporary holding shelters in Tanzania in one way or another have been victims and have survived various atrocities.<sup>134</sup> Many of them suffer from psychological disturbances for different reasons.<sup>135</sup> For example, some were abandoned by their parents; others are victims of attacks or have witnessed atrocious attacks or the killing of family members with albinism.<sup>136</sup> The damage and pain these children experience may last a lifetime if they are not given psychosocial care and support.

Opportunities that entrench the rights of children with albinism under article 39 of CRC can be harnessed as a valuable means to guide these children to externalise their traumatic or difficult life experiences in order to make sense of their past and better cope with their future. The government and other stakeholders aim to help these children recover from the atrocities and other discriminatory acts they

---

127 DJ Schonfeld & T Demaria 'Providing psychosocial support to children and families in the aftermath of disasters and crises' (2016) 136 *Pediatrics* 1.

128 As above.

129 As above.

130 As above.

131 Human Rights Watch (n 16).

132 Office of the Minister for Children in Ireland 'Policy on diversity and equality guidelines for childcare provider' (2006), [https://www.dcy.gov.ie/documents/childcare/diversity\\_and\\_equality.pdf](https://www.dcy.gov.ie/documents/childcare/diversity_and_equality.pdf) (accessed 14 February 2018).

133 As above.

134 UTSS (n 8).

135 UTSS Report (n 12).

136 As above.

have experienced by placing them in the holding shelters. However, their expectations are not being met, as reports indicate that children with albinism lack quality care, support and love often in hazardous environments.<sup>137</sup> The lack of trained personnel with professional skills to help children who are traumatised or bereaved and those who suffer loneliness seems to remain a problem. Although laws and policies for their care are in place, implementation issues persist. Similarly, appropriate programmes and activities and resources for the optimal development of these children remain lacking.<sup>138</sup>

A number of provisions in CRC address issues of 'parental guidance, parental responsibilities, separation from parents, family reunification, recovery of maintenance for a child, children deprived of a family environment, illicit transfer and non-return of a child, abuse and neglect, physical and psychological recovery and social reintegration'.<sup>139</sup> It would appear that these provisions are violated as some families use the centres to 'dump' the 'burden' that they perceive children with albinism to be.<sup>140</sup> The majority of families visit these centres only occasionally, or not at all.<sup>141</sup> Many families choose to stay away from their children and leave them to fend for themselves. This neglect serves only to exacerbate the denial of these children's right to psychosocial care and support.

#### **4.7 Freedom from cruel, degrading and inhuman punishment or treatment**

Article 37 of CRC provides that '[n]o one is allowed to punish children in a cruel or harmful way'. This provision means that even in a case where a child breaks the law he or she should not be treated cruelly. In terms of discipline the Convention does not specify what forms of punishment parents or guardians should use. However, any form of discipline involving violence is unacceptable. It is, however, the duty of states parties to CRC to 'take effective legislative, administrative, judicial or other measures to prevent child from being subjected to torture or cruel, inhuman or degrading treatment or punishment'.<sup>142</sup> As such, there are non-violent and effective ways to discipline children – ways that are appropriate to the children's level of development and that take their best interests into consideration. In most countries laws already define what forms of punishment are considered excessive or abusive. CRC gives each government the space to review and enact its own laws that are in line with the Convention. Tanzania's Law of the Child Act attempts to cover the demand and to protect children from

---

137 As above.

138 UNICEF/UTSS (n 18).

139 Arts 5, 9, 10, 11, 18(1) & (2), 19-21, 25, 27(4) & 39.

140 UTSS (n 8).

141 As above.

142 Art 16(1) CRC.

all forms of violence, which include beatings that cause harm as contained in the definition of child abuse.<sup>143</sup>

Nevertheless, children with albinism continue to experience cruel treatment and degrading punishment in the temporary holding shelters, including corporal punishment. Corporal punishment is defined as 'any punishment in which physical force is used and is intended to cause some degree of pain or discomfort, however light'.<sup>144</sup> It includes slapping or hitting a child with a belt, cane or the hand; shaking, kicking, or pinching; pulling its hair or throwing a child; forcing a child to stay in an undignified or uncomfortable position; scaring a child; burning a child; or compelling excessive physical exercise as a form of discipline. The UTSS report exposed the violation of children's rights in the centres as evidence was found that the children were subjected to corporal punishment and other inhumane treatment.<sup>145</sup> According to the report children complained about corporal punishment which was prevalent in almost all these centres.<sup>146</sup> The report indicated that children complained of severe and random beatings for no apparent reason.<sup>147</sup> This practice clearly is a violation of children's rights and an offence under article 37 of CRC. In some instances teachers and care givers were reported to have punished children by making them stand in the sun to suffer sunburn.<sup>148</sup>

Mental and emotional torture also occurs as it was reported that some children were terrified by the threat that they would be returned to their villages to be killed.<sup>149</sup> Shelter leaders in the Mugeza centre particularly were accused of using this form of abuse.<sup>150</sup> This threat was used to force the children to do whatever the leaders ordered them to do, regardless of whether the act violated their rights or not.<sup>151</sup> Such acts of violence, accompanied by corporal punishment, harm these children physically and psychologically and endanger their health. Article 37 of CRC, article 12 of the Tanzanian Constitution, section 13 of the Law of the Child Act and sections 4, 5 and 6 of the Persons with Disabilities Act strongly prohibit such actions.

---

143 Sec 3 Law of the Child Act of 2009.

144 CRC Committee General Comment 8 para 22, <http://tb.ohchr.org/default.aspx?Symbol=CRC/C/GC/8> (accessed 18 February 2018).

145 UTSS (n 8).

146 As above.

147 As above.

148 UNICEF/UTSS Report (n 18).

149 As above.

150 As above.

151 As above.

## 5 Conclusion

Many children with albinism in Tanzania have been forced to abandon their homes and flee for their lives to seek refuge in temporary holding shelters. However, it is clear from the foregoing discussion that the atrocious reality of continued abuse, marginalisation and denial of their human rights tend to continue at these centres where they hoped to find safety and sustenance. It is our view that the Tanzanian government should take cognisance of the legal framework it has adopted as its basic obligation to work towards the elimination of all forms of violence against children, and specifically children with albinism who reside in temporary holding shelters. The government is duty-bound to investigate the discrimination, stigmatisation, abuse and violence that children with albinism face on a daily basis and take significant steps towards improving the standard of living of these children. These steps can be taken by developing strategies for the implementation of the Law of the Child Act, the UN Convention on the Rights of the Child and other relevant national and international laws.

These strategies could include the training of personnel to provide social and emotional services to children with albinism and by equipping them with knowledge about the use of activities and tools that will support and encourage these children to live healthy and fulfilled lives. They also could include taking measures to remove the barriers that prevent these children from having an effective education. More professional people from the social welfare department should be employed to render services to children with albinism. Moreover, the infrastructure at these centres should be improved and there should be regular monitoring and evaluation visits by knowledgeable officials to ensure that the holding shelters function effectively as rescue centres for children. Finally, but importantly, public education programmes regarding children with albinism should be established and strategies developed to allow these children to reunite with their families on a regular basis. These actions would go a long way towards minimising, if not eradicating, violations of the human rights of children with albinism in Tanzania, generally, and in temporary holding shelters, in particular.

## Greasing the wheels of legal aid in criminal proceedings in Ghana: An evaluation of the legal and regulatory framework

*Isidore Kwadwo Tufuor\**

Barrister and Solicitor of the Supreme Court of Ghana; Lecturer, Faculty of Law, Ghana Institute of Management and Public Administration (GIMPA), Accra, Ghana  
<https://orcid.org/0000-0002-6191-811X>

### Summary

*The provision of legal aid to deserving indigent accused persons in criminal proceedings in Ghana is fraught with numerous operational challenges. Despite the country's ratification of key international legal instruments on legal aid, its strategies for incorporating the letter and spirit of the right to legal aid in its Constitution and enabling legislations have been problematic. Furthermore, several regulatory drawbacks affect the implementation of the public legal aid schemes, especially in criminal proceedings. Consequently, a large number of accused persons, ignorant of the intricacies of the criminal adjudicatory system which is adversarial in nature, are forced despairingly to defend themselves in person at their peril. This article argues that revamping legal aid and guaranteeing its sustainability in criminal proceedings can be achieved only through a review of the normative structure of the right to legal aid and its implementation framework under the public legal aid schemes. The article concludes that the legal and regulatory frameworks governing the operations of legal aid exhibit serious shortcomings that whittle down the country's limited efforts at enforcing its international obligation to provide state-funded counsel to deserving indigent accused persons. The article adds to the general discourse on the promotion of legal aid in criminal proceedings in Ghana, where the extant scholarship primarily focuses on inadequate funding as the cause of an inefficient system.*

---

\* BA (Ghana) LLB (Ghana) DSEF (Senegal) LLM (Fordham USA) LLD(Fort Hare); [itufuor@gimpa.edu.gh](mailto:itufuor@gimpa.edu.gh)

**Key words:** *legal aid; indigency; accused persons; criminal proceedings; self-representation*

## 1 Introduction

Representing oneself in criminal proceedings in Ghana is not always a voluntary choice or a wishful exercise of the right to self-representation.<sup>1</sup> Many accused persons<sup>2</sup> habitually are compelled desperately to represent themselves because they are too poor to afford the undeniably high cost of legal services.<sup>3</sup> The introduction of legal aid as a universal human rights norm plays a critical role in guaranteeing access to free legal representation for financially-deprived persons involved in criminal proceedings. It is in this sense that the right to legal aid earns its attributes as an 'essential element of a fair, humane and efficient criminal justice system that is based on the rule of law',<sup>4</sup> and also as a 'foundation for the enjoyment of other rights including the right to a fair trial'.<sup>5</sup> Consequently, denying indigent persons access to legal aid not only violates their right to a fair trial but also constitutes an indictment of the criminal justice system of any country.

The criminal justice system of Ghana has institutionalised certain schemes of legal aid for financially-deprived accused persons in compliance with its obligations under international human rights law.<sup>6</sup> Despite this effort, the question of accessibility to free legal services by deserving indigent accused persons nonetheless remains a matter of concern as the phenomenon of self-representation continues unabated in criminal proceedings which are of an adversarial nature.<sup>7</sup>

- 
- 1 Ghanaian Constitution, art 19(2)(f), granting accused persons the right to represent themselves in criminal proceedings.
  - 2 Where the context demands, reference to 'accused person' includes 'suspect of crime' involved in pre-trial criminal proceedings.
  - 3 See Ghana Bar Association *Scale of fees* (2015). Initial consultation fees range from between GH¢1 000 for lawyers of ten or more years' practice, to GH¢500 for lawyers with under five years of practice. For an extended initial consultation, hourly rates may range between GH¢1 000 and 2 000 for lawyers of ten or more years' practice, and between GH¢300 and 1 000 for lawyers with under five years of practice. Brief fees for bail applications in criminal trials in the High Court and circuit courts vary between GH¢2500 and GH¢15 000; GH¢15 000 to GH¢30 000 for misdemeanour trials; GH¢30 000 to GH¢60 000 for felony trials; and GH¢20 000 to GH¢150 000 for trials on indictment. Criminal watching briefs range between GH¢10 000 and GH¢30 000. The prevailing exchange is approximately 1 US dollar to 5,52 Cedis.
  - 4 United Nations *Principles and guidelines on access to legal aid in criminal justice systems* UN/RES/67/187 (2012) para A (1) (Annex).
  - 5 As above.
  - 6 See eg Latham & Watkins 'Pro bono practices and opportunities in Ghana' (2015) *The Pro Bono Institute Latham and Watkins LLP* 228.
  - 7 MK Amidu 'Right to state-appointed counsel in criminal justice administration under the Constitution' (1992) *Review of Ghana Law* 159. This is generally the case in most countries as they lack the necessary resources and capacity to provide

This article particularly examines the legal and regulatory framework of legal aid delivery in criminal proceedings in Ghana. It is submitted that the ratification procedure of the right to legal aid and the regulatory framework for its implementation are beset with various legal and operational challenges affecting the efficiency and accessibility of legal aid in criminal proceedings. After this introduction, the background to legal aid in Ghana is provided through an analysis of the right to legal aid in international human rights law, the Ghanaian Constitution and the enabling statutes that set up the public legal aid schemes. This analysis is followed by an examination of the institutional framework and implementing strategies of the public legal aid schemes and a discussion of the legal complexities and operational challenges that arise. Thereafter, some workable strategies to secure the benefit of the right to legal aid to deserving indigent accused persons are explored.

## 2 A universal right to legal aid in criminal proceedings

Exercising the right to legal representation for accused persons in an adversarial criminal trial is the most immediate means by which the imbalance of trial skills and competencies between a legally-trained prosecutor and an accused is mitigated.<sup>8</sup> However, this assumption becomes meaningless when accessibility to legal assistance is curtailed by a lack of financial means. In that case, reliance on legal aid becomes the only viable mechanism for realising the benefits of the right to legal assistance in cases of indigency.

In effect, a basic concept undergirding the operation of criminal law in modern domestic jurisdictions is that access to justice in criminal proceedings 'depends on the enforcement of the rights to due process, to a fair trial, and to legal representation'.<sup>9</sup> Particularly in Ghana, the values of the constitutional guarantees of legal representation for all persons involved in criminal proceedings,<sup>10</sup> whether suspected of having committed a crime or charged with an offence, lie in certain social realities, in that a large section of the population has very little or no knowledge of the law and its workings both in theory and in practice. These incidents therefore require the helping hand of counsel to navigate the procedural and evidentiary

---

legal aid for all indigent accused persons. See, eg, UN (n 4) para A(5). The adversarial system pitches the parties in a legal contest where the judge is neutral and relatively passive. See *Sasu v Amuah-Sekyi* [1987-1988] 1 GLR 294 296.

8 P Roberts & A Zuckerman *Criminal evidence* (2010) 62. This observation is particularly applicable to the adversarial system.

9 Conference on Legal Aid in Criminal Justice *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* (2004) Preamble.

10 Arts 14(2) & 19(2)(f) of the Ghana Constitution guarantee the right to counsel in pre-trial proceedings and during trial respectively.

labyrinths that govern proceedings in the classical adversarial regime of criminal adjudication in Ghana.<sup>11</sup> This observation aligns with the popular theory that even intelligent and educated lay persons cannot understand the skills of the practice of the law.<sup>12</sup>

Thus, as has been rightly posited, a trial conducted without defence counsel for the accused, in the absence of a valid waiver of legal representation, is of itself unfair.<sup>13</sup> The trial is even more unfair in cases where the accused is deprived of legal representation simply because of poverty.<sup>14</sup> Consequently, an assumption in the scheme of enforcement of criminal procedural rights is that where the legal system affords a theoretical right to legal assistance the state is enjoined to provide accused persons with the means to its realisation.<sup>15</sup> In that regard, international law enjoins member states of the United Nations (UN) to provide free legal aid to individuals that lack the financial wherewithal to meet the cost of legal services.<sup>16</sup> Consequently, denying indigent accused persons of this entitlement amounts to a denial of the right to legal representation and, thus, of the right to a fair trial.<sup>17</sup> The right to legal aid today is recognised as one of the universally-guaranteed minimum protections for accused persons within the scope of fair trial rights in virtually all human rights instruments, both universal and regional.<sup>18</sup>

### 3 Strategy of ratification of the right to legal aid in Ghana

Due process rights of accused persons in Ghana are entrenched in the highest law of the land through the process of constitutionalisation,

11 See, eg, Amidu (n 7) 174.

12 *Powell v Alabama* 287 US 45 68-69 (1932), also affirmed in *Gideon v Wainwright* 372 US 335 344-45 (1963).

13 See, eg, Didcott J in *S v Khanyile & Another* 1988 (3) SA 795 (N) 800. See L Itoh 'Why South Africa should embrace Gideon: An analysis of the right to counsel and why it should be extended to all defendants' (2012) 44 *International Law and Politics* 951 at 963. The author claims at 965 that '[s]ince standards for a fair trial include defendant's right to be represented by counsel, any violation of that right renders the trial unfair regardless of the cause including defendant's lack of resources'.

14 See *Khanyile* (n 13) 810.

15 A Sanders & R Young *Criminal justice* (2000) 25.

16 As above.

17 PM Bekker 'The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa' (2004) 37 *Comparative and International Law Journal of Southern Africa* 180.

18 See art 14(3)(d) United Nations General Assembly (UNGA) International Covenant on Civil and Political Rights (ICCPR) (1966); art 6(3)(c) European Convention on Human Rights; art 8(2)(e) American Convention on Human Rights; African Commission *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (2003) para H(a); UNGA *Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment and Rule 93 of the UN Standard Minimum rules for the Treatment of Prisoners* (1988) Principle 17(2); art 7(1)(c) African Charter on Human and Peoples' Rights.



mainly for the purpose of reinforcing the call for their justiciability.<sup>19</sup> However, among these procedural protections the nature and status of the right to legal aid as a module of the right to a fair trial remains somewhat unclear, particularly due to the unconventional procedure for its domestication adopted by the country.

Ghana's obligation to provide free state-funded counsel to indigent accused persons involved in criminal proceedings derives principally from its ratification, without any reservation, of articles 14(3) and 7(1) of the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter) respectively.<sup>20</sup> Generally, the Ghana's Bill of Rights, enacted under chapter 5 of its national Constitution,<sup>21</sup> is a near total reproduction of the internationally-guaranteed norms in ICCPR. However, as far as the right to free legal aid is concerned, Ghana's approach to its domestication is largely influenced by the text of the African Charter and the jurisprudence of the African Court on Human and Peoples' Rights (African Court), the former being less elaborate than the provision on legal aid in ICCPR.<sup>22</sup>

In respect of the right to defence in criminal trials ICCPR guarantees, in a pertinent part, that the right of the accused is<sup>23</sup>

to defend himself in person or through legal assistance of his own choosing ... and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case, if he does not have sufficient means to pay for it.

The African Charter, however, marks an apparent departure from the content of this provision, which ostensibly and partly accounts for the stifled realisation of the right to legal aid and its dimmed effect in Ghana. Although guaranteeing 'the right to defence to include the right to be defended by counsel of choice',<sup>24</sup> article 7(1) of the African Charter does not expressly prescribe a right to free legal aid.<sup>25</sup> Likewise, article 19 of the Constitution of Ghana, which copiously enacts the fair trial rights of accused persons in criminal proceedings, does not guarantee a right to free legal assistance in cases where an

---

19 It is one the strategies of incorporation of international human rights norms into domestic legal systems. See GL Neuman 'Human rights and constitutional rights: Harmony and dissonance' (2002-2003) 55 *Stanford Law Review* 1881.

20 Ghana ratified ICCPR on 7 September 2000 and the African Charter on 24 January 1989.

21 In force since 3 January 1993.

22 *Nganyi & Others v United Republic of Tanzania*, Application 6/2013 (18 March 2016) para 166.

23 Art 14(3)(d) ICCPR.

24 Art 7(1)(c) African Charter.

25 *Isiaga v United Republic of Tanzania*, Application 32/2015 (21 March 2018) para 77.

accused person does not have the financial resources personally to secure legal representation.<sup>26</sup>

This lacuna, however, does not relieve Ghana of its international obligation to provide free legal assistance to deserving indigent accused persons. The African Commission on Human and Peoples' Rights (African Commission), in discharging its duty to protect and promote human rights through the interpretation of the African Charter, gives due recognition to the right of indigent accused persons to free legal aid. Under its non-binding Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,<sup>27</sup> each member state, including Ghana, is required to extend legal aid to accused persons who cannot afford to hire an attorney, where the interests of justice, assessed on the basis of the seriousness of the offence and the severity of the penalty, so require.<sup>28</sup>

The jurisprudence of the African Court also imposes a fundamental obligation on member states to provide free legal aid to indigent accused persons. The Court states that free legal aid is 'a right intrinsic to the right to fair trial, particularly, the right to defence guaranteed under article 7(1)(c) of the Charter'.<sup>29</sup> Thus, to close the gap between the two standards under ICCPR and the African Charter, the African Court enjoins an interpretation of the obligations of member states that are also signatories to the ICCPR under article 7(1)(c) to be carried out in light of the provisions of article 14(3)(d) of ICCPR.<sup>30</sup> Consequently, for indigent and lay accused persons charged with serious crimes carrying severe punishment and who do not have the means to recruit their own legal counsel, the interests of justice require member states to assign counsel free of charge.<sup>31</sup> In the opinion of the African Court the essence of providing legal aid in appropriate cases is to ensure a fair judicial process, thereby avoiding

26 See clause 2(f) which guarantees only the right of accused persons to defend themselves in person or through legal assistance of their own choosing. This is contrasted with the position of the South African Constitution, eg, which guarantees a constitutional right of indigent arrested persons and accused persons to have legal practitioners assigned to them at the expense of the state, if injustice would otherwise result. See secs 35(2)(c) & 35(3)(g) of the Constitution of the Republic of South Africa, 1996.

27 Principles and Guidelines (n 18).

28 Paras H(a) & (b). See also *Avocats sans Frontières (on behalf of Bwampamye) v Burundi* (2000) AHRLR 48 (ACHPR 2000) para 30.

29 *Alex Thomas v The United Republic of Tanzania* Application 7/2013 (20 May 2016) para 123.

30 *Nganyi* case (n 22) para 165.

31 *Mohammed Abubakari v United Republic of Tanzania* Application 7-2013 (3 June 2016) para 138-139. The Court adopts the African Commission's standard for determining the interest of justice based on the seriousness of the offence and the severity of the punishment; *Alex Thomas* case (n 29) para 123; *Nganyi* case (n 22) para 168. Under the jurisprudence of the European Court, four factors are taken into account in determining whether the 'interest of justice' requires the provision of free legal aid: (a) the seriousness of the offence; (b) the severity of the potential sentence; (c) the complexity of the case; and (d) the social and personal situation of the defendant; *Nganyi* case (n 22) para 177.

any possibility of a miscarriage of justice.<sup>32</sup> More importantly, it remains the responsibility of the state to *proprio motu* offer free legal aid even in the absence of any express request by an accused.<sup>33</sup> Herein lies Ghana's international obligation to provide legal aid to deserving indigent accused persons.<sup>34</sup>

Although lacking an express statement of the right to legal aid among the due process protections of accused persons under its Bill of Rights, the Constitution of Ghana also presents a rather strange and unconventional embodiment of a right to legal aid in article 294. The provision which figures in chapter 26, entitled 'Miscellaneous' and is outside of the scope of the Bill of Rights, provides as follows:<sup>35</sup>

- (1) For purposes of enforcing any provisions of the Constitution, a person is entitled to legal aid in connection with any proceedings relating to this Constitution, if he has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings.
- (2) Subject to clause (1) of this article, Parliament shall by or under an Act of Parliament regulate the grant of legal aid.
- (3) Without prejudice to clause (2) of this article, Parliament may under that clause provide for the granting of legal aid in such matters other than those referred to in clause (1) of this article as may be prescribed by or under that Act.

The legal basis and policy consideration undergirding this entitlement to legal aid and the seclusion of its implementation outside the scope of Bill of Rights are not readily known or ascertained in literature or the jurisprudence of the courts. Despite this observation, the right guaranteed in article 294 retains its status as a constitutionalised right, establishing parity of authority and prominence with other human rights protections in the Bill of Rights.

However, an intriguing question arises as to whether article 294 provides a due process or constitutional right to legal aid in criminal proceedings in Ghana. The position of the law in this respect also remains far from clear.<sup>36</sup> In fact, some legal scholars have too hastily concluded that article 294 provides the constitutional source of a right

32 *Nganyei* case para 182.

33 *Isiaga* case (n 25) para 79; *Nganyei* case (n 22) para 182. Where an indigent accused person is not informed of this right or does not invoke this right, the onus is on the judicial authorities to activate the right. See *Alex Thomas* case (n 29).

34 Sight should not be lost of art 33(5) of the Constitution of Ghana which gives implicit recognition to the right to legal aid. It provides that '[t]he rights, duties and guarantees relating to the human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned, which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man'.

35 A similar provision was enacted under the earlier democratic Constitutions of Ghana, namely, arts 171 & 212 of the 1969 and 1979 Republican Constitutions respectively.

36 See United Nations Office on Drugs and Crime (UNODC) *Access to legal aid in criminal justice systems in Africa: Survey report* (2011).

to legal aid in criminal proceedings in Ghana.<sup>37</sup> It is, however, undeniable that an unambiguous and plain reading of article 294(1) presents a limited scope for its enjoyment. The law clearly guarantees a right to legal aid to indigent persons involved in constitutional proceedings only. In practical terms it merely provides institutional support for the exercise of the civic right of every person in Ghana to institute an action in court for purposes of enforcing the Constitution itself.<sup>38</sup> As a result, the right to legal aid in non-constitutional matters is not expressly guaranteed in article 294(1).

Notwithstanding this antithetical position, an argument may be made for the recognition of a constitutional right to legal aid in criminal proceedings from the provisions of article 294(1).<sup>39</sup> Clearly, the language of the provision does not make any direct reference to a right to legal aid in criminal proceedings. However, proceedings relating to the enforcement of constitutional rights can be defined to include those instituted to enforce the due process rights of accused persons and criminal suspects guaranteed under the Constitution.<sup>40</sup> When read along these conceptual lines, article 294(1) reasonably implies a constitutional right to legal aid of indigent suspects as far as proceedings instituted for the enforcement of their constitutional rights in criminal proceedings are concerned.<sup>41</sup> Despite the logic of this deductive conclusion, one must be wary not to assume that a criminal proceeding seeking to establish the guilt or innocence of an accused person necessarily is a proceeding for the enforcement of a provision of the Constitution, nor is the provision in the nature of a due process right of accused persons as far as criminal proceedings are concerned.

In fact, clause (3) of article 294 reinforces the position that there is no express constitutional right to legal aid in Ghana except in constitutional proceedings. This provision empowers Parliament, while enacting laws to regulate the granting of legal aid in constitutional proceedings, also separately to enact laws regulating legal aid in non-constitutional matters.<sup>42</sup> It clearly underlines the distinction between the right to legal aid in constitutional proceedings and legal aid entitlements in non-constitutional matters, including criminal proceedings.

---

37 See, eg RAS Morhe 'An overview of legal aid for criminal cases in Ghana: The history and challenge of providing legal aid' (2012) 38 *Commonwealth Law Bulletin* 105.

38 See Ghana Constitution, art 2(1) which grants the right to any person in Ghana to institute legal actions for the enforcement of the provisions of the Constitution.

39 See Amidu (n 7) generally.

40 Amidu (n 7) 162.

41 Amidu 174.

42 Ghana Constitution, art 294(3): 'Without prejudice to clause (2) of this article, Parliament may, under that clause provide for the granting of legal aid in such matters other than those referred to in clause (1) of this article as may be prescribed by or under that Act.'

The conundrum on the import of article 294 lies in the fact that this provision has not been judicially examined in terms of its guarantee or otherwise of a right to free legal assistance by indigent suspects and accused persons in criminal proceedings. Its effect as far as dealing with the stark reality of widespread cases of self-representation in criminal trials in Ghana also has yet to be considered. Again, a textual analysis of article 294 begs the question whether the provision intends an embodiment of the due process right to legal aid as recognised under international law. The main concern is that this provision does not appear to implement a right to 'free' legal assistance in cases of indigency.<sup>43</sup> Although guaranteeing the provision of legal aid to indigent parties in legal proceedings, it stops short of endorsing a claim that such legal services are indeed to be 'free' or 'at no cost' to deserving accused persons and at the expense of the state. Where necessary, some level of financial commitment is required on the part of the beneficiaries of legal aid.<sup>44</sup> This is despite the fact that the practical implementation of legal aid to a large extent envisages the provision of free legal services funded by the state. Thus, a finding to the effect that the ratification of the right to legal aid in Ghana falls below the standard envisaged under its obligation in international law indeed is conclusive.

#### 4 Legal aid schemes in criminal proceedings in Ghana

As noted earlier, the Ghanaian Constitution entrusts the regulation of legal aid in all non-constitutional matters, including criminal proceedings, to Parliament.<sup>45</sup> In the discharge of this obligation, the legislature has secured legal aid delivery under two public schemes in force in the country. These are the Court-Assigned Counsel Scheme established under the Courts Act<sup>46</sup> and the Legal Aid Scheme created by the Legal Aid Commission Act (LACA).<sup>47</sup> In practice these Acts constitute the two comprehensive forms of institutional assistance to indigent suspects and accused persons in criminal proceedings.<sup>48</sup>

By these schemes the courts in Ghana are tasked to assign state-funded counsel to deserving indigent and unrepresented persons

43 See UNODC (n 36) 6, which states that the reference in the Ghanaian Constitution to the right to legal aid is not clear.

44 See discussion in part 4 below.

45 Ghana Constitution, art 294(2): 'Parliament shall by or under an Act of Parliament regulate the grant of legal aid.'

46 Act 459 of 1993.

47 Act 977 of 2018. It repealed the then Legal Aid Scheme Act (Act 542 of 1997).

48 The two schemes also regulate the granting of legal aid in constitutional proceedings. The only requirement for the granting of legal aid in such cases is proof that the beneficiary of the right is a person who has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings. Under the Court-Appointed Counsel Scheme, this determination is to be made by the judge or magistrate under sec 114(3) of the Courts Act, while the Legal Aid Commission assumes the same responsibility under sec 2(b) of LACA.

facing criminal prosecution. In the alternative, such financially-deprived suspects and accused persons may apply for free legal assistance under the LACA. Under both schemes, the provision of legal aid is more of a privilege than a right. Legal aid in the Ghanaian context is defined as

representation by a lawyer, including all such assistance as is given by a lawyer, in the steps preliminary or incidental to any proceedings or arriving at or giving effect to a compromise to avoid or to bring to an end any proceedings.<sup>49</sup>

In practice, the two schemes apply diverse criteria for determining indigency and for granting legal aid, resulting in a lack of uniformity in the standards of legal aid administration in criminal matters generally.<sup>50</sup>

#### 4.1 Court-Assigned Counsel Scheme

The Courts Act of Ghana sets up the hierarchy of courts and determines their respective jurisdictions. It also empowers the various courts under the legal system to assign lawyers by way of legal aid to unrepresented parties before them where the interests of justice so require. The Court-Assigned Counsel Scheme (CACS) applies generally to all private parties to litigation in both civil and criminal cases. Thus, in criminal proceedings the scheme applies to both suspects of crime and accused persons ushered before the court in criminal proceedings. Although this potentially is an effective regime to provide legal aid for the poor, the CACS has not been efficiently managed to deliver on its expectations, thus requiring a critical look at its operational framework.

##### 4.1.1 Operations of the Court-Assigned Counsel Scheme

Section 114 of the Courts Act vests the superior courts of Ghana<sup>51</sup> with authority to assign a lawyer by way of legal aid to any suspect of crime or accused person who is too poor to hire counsel and who is

49 See Ghana Constitution, art 294(4), quoted above and as re-enacted by the Courts Act, sec 114(4). The Legal Aid Commission Act does not define legal aid.

50 This implementation strategy of the law on legal aid in Ghana is very different from the approaches adopted by countries such as the United States and South Africa which set very clear standards for qualification for free legal assistance. In the United States, eg, free legal representation is assigned to indigent accused persons in all cases, including misdemeanour cases where the accused person standing trial faces a penalty of a term of imprisonment however short. See *Argersinger v Hamlin* 407 US 25 (1972). South Africa adopts the 'substantial injustice' test which applies a three-factor test in determining whether or not to assign counsel in trials of indigent accused persons. Basically, these have been listed to include the complexity of the case; the level of education and indigence of the accused; as well as the severity of the punishment or sentence. See PJ Schwickard 'A constitutional revolution in South African criminal procedure?' in P Roberts & J Hunter (eds) *Criminal evidence and human rights: Reimagining common law traditions* (2012) 24.

51 In order of authority these are the Supreme Court, the Court of Appeal and the High Court/regional tribunals.

facing criminal prosecution before the court or tribunal.<sup>52</sup> The lower courts, consisting of the District and Circuit Courts, may also assign lawyers to the same categories of indigent suspects and accused persons appearing before them, but with the prior approval of the Chief Justice.<sup>53</sup> This procedural requirement, in a judicial administrative system that is already engulfed in operational bureaucracies, presents another bottleneck in the swift implementation of the law. The majority of criminal cases in Ghana are brought before and handled by the District and Circuit Courts. A large number of accused persons on trial before these courts appear without legal representation. With the sheer volume of cases involving unrepresented accused persons appearing before them, the obligation imposed on Circuit Court judges and District Magistrates to refer every single decision to assign legal aid to an indigent accused person for the Chief Justice's approval is onerous and aberrant. It is also noted that the CACS is a contributory criminal legal aid and, by design, not an entirely free scheme of legal aid. Even though enacted to assist the indigent, it contemplates the exaction of a financial contribution from all persons who are assigned state-funded counsel.<sup>54</sup>

The assignment of legal representation by the various courts and tribunals under the CACS is subject to certain standards determined by a 'means' and a 'merit' tests. By the 'means' test, the CACS provides legal aid to accused persons who 'are financially unable to obtain the services of a lawyer'.<sup>55</sup> Indigency in this context is widely defined. It is measured based on the economic status and financial inability of the accused to secure legal services at the market value. The financial implications for each offence for which an accused person stands trial is determined by the nature of the offence and the concomitant nature of the proceedings against him or her. The Ghana Bar Association (GBA) scale of fees, which details the certified legal fees according to the nature of the proceedings, provides a valuable guide in determining whether or not an accused person is in the position personally to afford counsel.<sup>56</sup>

The 'merit' test, for its part, is based on a judicial assessment of the need to assign counsel in any particular case. The purpose of the 'merit' test generally is to ensure 'a correct identification of such cases where injustice would arise if legal aid was refused'.<sup>57</sup> The law grants

---

52 Sec 114(1) Courts Act.

53 Sec 114(2) Courts Act.

54 Secs 114(6) (b) & (c) of the Courts Act, which contemplate legal aid beneficiaries to contribute towards the cost of legal aid. See also n 82 below.

55 Sec 114 (1) Courts Act.

56 Ghana Bar Association (n 3).

57 Sanders & Young (n 15) 494. Also at 496 the authors note, on the contrary, that '[i]t cannot be safely predicted in advance which cases might lead to injustice, if representation was not provided. Good legal representation can lead to the emergence of previously hidden aspects of the case, render problematic the prosecution's version of events, and raise questions about the integrity of the procedures followed.'

a discretion to the judge or magistrate to assign counsel only where in his or her opinion it is in the interests of justice that the indigent party should have legal aid.<sup>58</sup> The factors to be taken into account in determining the 'interests of justice' have not been determined by law or by the courts. This void notwithstanding, Ghana remains obligated under the jurisprudence of the African Court to adopt a standard for determining the interests of justice based on the seriousness of the offence and the severity of the punishment.<sup>59</sup> The law, however, vests the courts with a wide discretion in applying the 'interests of justice' test. It imposes a permissive duty on the judge, who 'may' assign counsel within the wide parameters only of his or her sole discretion.<sup>60</sup> It is therefore expected that in certain instances legal aid may be refused even in cases involving difficult points of law and/or facts.<sup>61</sup>

The principal reason for subjecting the substantive right to state-funded counsel to this exercise of discretion by the judge in cases of indigency is mainly financial. There is an almost infeasible truth expressed in the country's inability to provide counsel for each and every deserving indigent suspect or accused person. Therefore, guaranteeing an unqualified right to legal representation for all indigent accused persons who are unable personally to afford counsel would certainly paralyse an already overburdened criminal justice system. The situation in Ghana, therefore, rejects the view that the state inherently is saddled with the responsibility to afford counsel to every accused person who cannot provide one for him or herself. The underlying justification for this strategic assumption of legal aid is mainly two-fold. The first alludes to the fact that legal representation cannot be said to be a necessary condition for the effective defence of every criminal charge. The second relates to the impracticability of obtaining state-funded counsel for every accused under any legal aid scheme.

Again, lawyers assigned under the CACS do not render legal services *pro bono*. They are entitled to be paid legal fees from the Consolidated Fund,<sup>62</sup> as determined by the Minister of Justice, acting in consultation with the Chief Justice.<sup>63</sup> Thus, it is a state-funded scheme. Realistically, there is a limit both to the number of lawyers who can provide legal assistance and to the funds that the state can

---

58 Secs 114(1) & (2) Courts Act.

59 See n 31.

60 Sec 114(1) of the Courts Act, which states in part that the superior courts 'may assign a lawyer by way of legal aid to a party to proceeding before the court or tribunal' (my emphasis).

61 Saunders & Young (n 15) 494, stating a similar observation in respect of the legal aid scheme in England.

62 Defined by the Ghana Constitution, art 176(1). It refers to a fund containing 'all revenues or moneys raised or received for the purposes of, and on behalf of the government and other revenues raised or received in trust, for or on behalf of the government'.

63 Sec 114(5) Courts Act.



reasonably be expected to make available to sustain this scheme of legal aid. In the end, the leading objective of the CACS must be to ensure that injustice does not arise through an accused being prevented by a lack of means from effectively defending him or herself before the court. The overriding standard must be that in all cases the accused must be given a reasonable opportunity to bring forward and argue all the matters that may constitute a defence to a charge or which can mitigate the gravity of the offence.<sup>64</sup>

#### **4.1.2 Practical problems associated with the operations of the Court-Assigned Counsel Scheme**

Generally, the CACS has not been effectively implemented. Despite its institution more than 25 years ago the scheme has not been efficiently used to assist the increasing number of indigent suspects and accused persons who have no financial means of accessing legal services.<sup>65</sup> However, the real problem is an administrative lapse in the process of implementation of the scheme. Section 114(6) of the Courts Act mandates the Minister of Justice in consultation with the Chief Justice to make regulations for the full operation of the CACS. The anticipated legislative instrument is intended to postulate such modalities, including (a) the conditions for the grant of legal aid; (b) the assessment of disposable capital, income or property for the purposes of contribution towards legal aid; (c) the extent of contribution to be made by the beneficiary of legal aid; as well as (d) the right to and nature of legal advice.<sup>66</sup> This statutory directive to date has not been carried through. Courts presently assign counsel to deserving indigent and unrepresented accused persons, but on a very small scale. This limited practice, however, essentially is more a call to offer *pro bono* services than it is about implementing the CACS.

In addition to this administrative lapse, other general reasons account for the non-performing status of the CACS. A serious concern involves a general sense of dissatisfaction with the quality of legal services rendered by some lawyers assigned to provide legal aid in Ghana.<sup>67</sup> Not much attention is paid to the nature and quality of legal services rendered by court-appointed counsel to indigent accused persons. There are no institutional mechanisms to evaluate and assess the discharge of their services as far as providing effective assistance to the beneficiary suspect or accused person is concerned. According to a survey report compiled in 2011 on Access to Legal Aid in Criminal

64 See, eg, Saunders & Young (n 15) 494-495.

65 Amidu (n 7) 176.

66 Secs 114(6) & (7) Courts Act.

67 See observations by Dotse JSC in *Zainabu Naske Bako-Alhassan v Attorney-General* [24/04/2012] Suit J1/22/2012 (unreported).

Justice Systems in Africa,<sup>68</sup> '[le]ss than 20% of cases assigned to lawyers are successfully completed every year' in Ghana. The study also found that cases assigned to lawyers for legal assistance under the CACS generally are not given the necessary attention. Equally, there is no proper supervision to ensure effective delivery.<sup>69</sup> As a result, indigent accused persons confronted with choosing between an unavailable and uncaring counsel and self-representation would opt for the latter as the only real alternative to legal representation. The Ghanaian bench also appears generally to have dampened the rigours of its statutory power to assign counsel to deserving indigent accused persons. The courts rarely exercise their power to appoint counsel for indigent accused in the interests of a fair trial and justice as the law requires.<sup>70</sup> This judicial attitude, however, may be logically defended by the lack of the long-awaited regulations needed to fully implement the CACS.

Consequently, there are many poor persons who are arrested, restricted and detained or charged with a crime and who continue personally to defend their cause in criminal proceedings before the courts. The sole exception concerns cases where accused persons are charged with the capital offence of murder who, according to the practice of the courts, are automatically assigned counsel for their defence at the trial.<sup>71</sup>

A clarion call made by Taylor J more than three decades ago to stimulate the courts' exercise of their power to assign counsel to indigent accused persons in deserving cases remains relevant today. As the judge stated, it is about time Circuit Court judges and District Court magistrates that adjudicate the majority of criminal cases turn their attention to the provisions of section 114 of the Courts Act in order to avoid unnecessary injustices that have become all too frequent in the operations of the criminal law.<sup>72</sup> As he held in his judgment,

[i]n order to safeguard the liberty of citizens, it was essential that indigent and illiterate persons, ignorant of the legal process and accused of serious crimes carrying harsh penalties, were not left to their own devices but assigned counsel by way of legal aid.<sup>73</sup>

Finally, the statutory directive to exact financial contributions on the already indigent accused persons who have been assigned legal

68 See UNODC (n 36) 13, referring to the National Development Planning Commission, Government of Ghana, Poverty Reduction Strategy Paper – 2006, Annual Progress Report, IMF Country Report 09/237 Washington DC, International Monetary Fund, 2009, [www.imf.org/external/pubs/ft/scr/2009/cr09237.pdf](http://www.imf.org/external/pubs/ft/scr/2009/cr09237.pdf) (accessed 26 August 2016). This is compared to the estimated percentage of legal aid cases completed in 2006 which is approximately 18%.

69 As above.

70 Amidu (n 7) 173.

71 Amidu 159 167.

72 Taylor J in *Kpekero v The Republic* [1980] GLR 580 588, *obiter*.

73 As above.

representation may rather stifle the achievement of the noble cause of the CACS. In addition to their financial contributions, suspects or accused persons who are assigned counsel are not exempted from paying the prescribed fees in respect of court documents, processes or costs of preparing appeal records. The CACS in essence remains a scheme of legal aid that is not free. If meaning is to be given to the provision of legal aid by way of assignment of free legal representation within the intendment of the universal policy under articles 14 and 7(1) of ICCPR and the African Charter respectively, then legal steps must be taken to ensure that legal assistance offered under the CACS is provided at no cost to a beneficiary who is unable to pay. It is very important at this stage of the development of the country to align the Ghanaian position on the law with its obligations to provide truly free legal aid under international law.

## 4.2 Ghana Legal Aid Scheme

The Ghana Legal Aid Scheme (GLAS) is a public service body within the Ghanaian justice delivery system.<sup>74</sup> It is established under the Legal Aid Commission Act (LACA) alongside the CACS, to ensure the effective delivery of legal aid to indigent persons in both civil and criminal proceedings in Ghana. More specifically, the GLAS is tasked under its enabling statute to provide legal assistance to indigent litigants and all such persons who institute proceedings for the prosecution or defence of their rights under the Constitution.<sup>75</sup> It seeks to ensure that this category of persons are not denied justice simply because they are unable personally to afford counsel of their choice.<sup>76</sup>

In criminal proceedings, more particularly, the GLAS aims to protect indigent suspects of crime and accused persons against the powerful and resourced office of the prosecution represented by the Attorney-General.<sup>77</sup> The GLAS establishes a Public Defenders' Division to assist indigent accused persons and suspects of crimes, whether on bail or on remand, in order to guarantee their human and fair trial rights.<sup>78</sup> One may theorise that the GLAS provides a platform where indigent suspects and accused persons effectively can assert their right to legal aid in the criminal justice system. These laudable policies undergirding the establishment of this scheme, however, remain goals yet to be achieved by the criminal justice administration.

---

74 Welcome to Legal Aid Scheme, Ghana, <http://www.legalaidghana.org/web/> (accessed 1 March 2019).

75 Sec 2 LACA.

76 *Republic v Lukman* [2003-2005] 1 GLR 125 130.

77 *Amidu* (n 7) 127.

78 Sec 22 LACA.

#### 4.2.1 *Operations of the Ghana Legal Aid Scheme*

The implementation of the GLAS is entrusted entirely to the authority and direction of the Board of Legal Aid Commission which is tasked to assign legal aid to deserving indigent persons facing criminal proceedings. Lamentably, legal aid in criminal trials under the GLAS also is a privilege and not a right. Indigent accused persons are bound to make an extra-judicial application for legal aid to the Commission, which is vested with the discretion either to grant or refuse the application.<sup>79</sup> A refusal decision may be appealed to a Review Committee.<sup>80</sup> The application process is not entirely free. The Commission may request an applicant to pay a fee to cover expenses incidental to the determination of his or her application.<sup>81</sup>

As in the case of the CACS the GLAS essentially is a contributory legal aid scheme. The Commission may require an applicant to pay an amount by way of contribution or towards the payment of costs awarded against him or her in the proceedings.<sup>82</sup> In addition to receiving the free assistance of a lawyer an accused person who qualifies for legal aid under the GLAS also is exempted from paying the prescribed fees in respect of the filing of court processes, the cost of judicial forms, the cost of service of filed processes and the cost of preparing records of proceedings and records of appeal.<sup>83</sup>

The GLAS identifies two categories of accused persons who may be entitled to legal aid, and applies two main criteria in setting up the qualification thresholds for legal aid. First, the LACA provides a 'merit' test by guaranteeing an automatic grant of legal aid to all unrepresented accused person charged with offences punishable by life imprisonment.<sup>84</sup> A patent shortfall in the law is its omission of accused persons charged with capital offences from the scope of persons who automatically qualify for free legal assistance. In this context, the predecessor law to the LACA, the Legal Aid Scheme Act (LASA)<sup>85</sup> provided broader coverage as it guaranteed full and unqualified statutory rights to free state-funded counsel to all accused persons charged with offences punishable by death or life imprisonment.<sup>86</sup> This lapse must be addressed.

The second category of accused persons entitled to legal aid under the GLAS is defined by a 'means' test. This class refers to indigent

---

79 Secs 38 & 39 LACA.

80 Secs 46-48 LACA.

81 Sec 39 LACA.

82 Sec 40(1) LACA. See also sec 3(2)(h) enjoining the Commission to 'specify the circumstances in which contributions shall be made by legally-assisted persons and the means of calculation of the contribution'.

83 Sec 45 LACA.

84 Sec 22(g)(i) LACA.

85 Act 542 of 1997, immediately in force before the entry into force of the LACA.

86 Sec 24(2) LACA. These offences include treasonable offences and murder punishable by death, as well as manslaughter which is punishable by life imprisonment.

accused persons charged with offences other than crimes punishable by a term of imprisonment for life. It refers to accused persons who, objectively assessed, cannot afford the services of a lawyer and desire to be represented by counsel.<sup>87</sup> Strikingly, the scheme does not set the threshold of indigency. The LACA, however, vests the Commission with wide discretionary powers to determine those persons who in its opinion may be granted legal aid.<sup>88</sup> The Commission equally is vested with the power to set the threshold of indigency.<sup>89</sup> For such indigent accused persons the Commission may in each case determine conditions for granting legal aid, including the Commission's entitlement to costs recoverable in any proceedings and the payment by the applicant of contributions to the Commission.<sup>90</sup> The Commission equally determines priorities in the provision of legal aid between different applicants.<sup>91</sup> The law guarantees the right of an indigent applicant only to appeal a refusal decision of the Commission before a Legal Aid Review Committee.<sup>92</sup> Sadly, the Committee meets once every three months, a period long enough to jeopardise the rights of an accused in a matter pending before the court.

In any case, applying the 'means' test requires an objective assessment of the prevailing socio-economic circumstances of the times as well as the overall financial set-up of legal service delivery in the country. The net is wide enough to accommodate a good number of accused persons indigent enough as to be unable to afford legal services. In determining the 'means' test the Commission should, however, guard against adopting the minimum wage as a threshold for indigency, as was the case under the repealed LASA. This standard of determining indigency under the old regime indubitably was one of the main causes of the high incidence of self-representation in criminal trials in Ghana. The vulnerability of such a standard lies in the fact that using the minimum wage as the threshold for indigency leaves a sizeable number of the population outside the scope of protection. There are individuals who earn the minimum wage but yet are unable to afford the high cost of legal services.<sup>93</sup>

The present daily minimum wage in Ghana is GH¢10.65, the approximate equivalent of less than \$2.00, making an approximate monthly minimum wage of GH¢320, being the approximate equivalent of less than \$60. Disturbingly, even the monthly minimum wage in Ghana falls far below the GBA-approved fees for only initial consultations with lawyers in criminal matters.<sup>94</sup> Consequently, a number of accused persons who may not be standardly indigent may

---

87 Sec 22(g)(ii) LACA.

88 Sec 3(1)(a) LACA.

89 Secs 3(1)(c) & 3(2)(f) LACA.

90 Sec 3(1)(d) LACA.

91 Sec 3(1)(b) LACA.

92 Sec 12 LACA.

93 UNODC (n 36) 20.

94 See Ghana Bar Association (n 3).

still be unable to afford the high cost of legal services, and thus are compelled to appear unrepresented in criminal proceedings.<sup>95</sup> The Commission must take a cue from the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems of 2012 in establishing the parameters of the 'means' test under the LACA. To that effect Guideline 1 provides that

[w]henever states apply a means test to determine eligibility for legal aid, they should ensure that persons whose means exceed the limits of the means test who cannot afford, or do not have access to, a lawyer in situations where legal aid would otherwise been granted and where it is in the interests of justice to provide such aid, are not excluded from receiving assistance.<sup>96</sup>

It is also noted that the process of vetting legal aid applications by the Commission is insufficiently regulated. Guidelines for the approval or rejection of applications are unknown and rest purely within the discretion of the Commission.<sup>97</sup> There are no legal instruments or regulations guiding the exercise of this discretion. The entire process of considering legal aid applications, therefore, lacks the necessary transparency. It is crucial that such a power in the hands of the Commission should be exercised with the utmost judicious consideration. In exercising its authority to grant or refuse legal aid, the Commission must be guided by the administrative threshold of fairness and candidness, and eschew tendencies of arbitrariness, capriciousness or bias either by resentment, prejudice or personal dislike.<sup>98</sup>

#### **4.2.2 Problems associated with operations of the Ghana Legal Aid Scheme**

Generally, and in more practical terms, the GLAS has been largely ineffective and is saddled with practical and operational difficulties. It generally takes little commendation beyond the letters of its mission statement and enacting provisions. The GLAS is funded by money provided by Parliament as well as by donations and gifts.<sup>99</sup> Notably, the problem of chronic underfunding basically has paralysed the operations of the scheme.<sup>100</sup> The GLAS is poorly funded and its budget is woefully inadequate to sustain its operations. The GLAS

95 See also WB Harvey *Law and social change in Ghana* (2015) 192-193, also indicating that many indigent accused persons have no assistance, except sometimes benefiting from the charitable work of individual lawyers.

96 UN (n 4) Guideline 1, para 41(a).

97 Sec 3(d) LACA. The Commission is solely responsible for considering and approving applications for legal aid. See also Amidu (n 7) 180, who states that '[t]he cumbersome process and requirements involved do not make it useful to many indigent arrested, restricted, detained or accused persons as it is dependent on an extra-judicial application to a Board [now a Commission] by the affected person. His case may have been disposed of before it is granted.'

98 See Ghana Constitution, art 296.

99 Sec 27 LACA.

100 See Latham & Watkins (n 6) 230 fn 14.

works with legal personnel consisting of legal practitioners.<sup>101</sup> Every lawyer assigned to provide legal aid under the scheme is entitled to be paid such remuneration out of the Legal Aid Fund as the Commission may determine.<sup>102</sup> Unfortunately, the GLAS has been unable to fully settle its financial obligations to legal practitioners selected to work for it.<sup>103</sup> The magnitude of cases involving self-represented illiterate and indigent accused persons in the various courts across the length and breadth of the country attests to the financial struggle and failings of the scheme.

The GLAS also is understaffed and ill-equipped. There is a shortage of experienced lawyers working for the scheme generally due to low remuneration and poor access to legal aid offices.<sup>104</sup> The sheer number of suspects and accused persons who require legal aid has overwhelmed the scheme which already lacks the systems and resources to ensure adequate legal representation for the indigent. As of the year 2018 the GLAS could boast only of a paltry number of 23 lawyers serving a whole country of over 28 million people, both in civil and criminal cases.<sup>105</sup> A relatively small number of lawyers in the country are available to attend to the needs of the growing population.<sup>106</sup> The GLAS intends to consolidate a pool of lawyers from across the country to work as its legal personnel to provide legal aid to the poor. The National Service Board<sup>107</sup> is mandated to assign to the GLAS a number of lawyers to their national service with the scheme.<sup>108</sup> In addition, a call is made to lawyers voluntarily to offer legal aid.<sup>109</sup> It is obvious that this plan to boost the human capacity under the GLAS has not yet attained the necessary result. Consequently, many suspects and accused persons who would otherwise benefit from legal aid today appear unrepresented in criminal proceedings.

Therefore, it is not surprising that in the year 2012 a Ghanaian citizen issued a writ of summons in the Supreme Court of Ghana

---

101 Sec 18 LACA.

102 Sec 35(c) LACA.

103 See also <http://www.legalaidghana.org/web/index.php/news/latest-news> (accessed 13 February 2016).

104 Generally, see Morhe (n 37).

105 In 2013 there were 14 lawyers. See 'Access to justice in Africa: The experience of the legal aid scheme in Ghana' 21 February 2013, <http://www.leitnercenter.org/news/94> (accessed 25 August 2016). There are only 23 lawyers under the Ghana Legal Aid Scheme for a population of 28 million people, <https://www.amnesty.org/en/countries/africa/ghana/report-ghana/> (accessed 24 February 2018).

106 UNODC (n 36) 11. There are currently fewer than 4 000 lawyers serving the entire country.

107 Established under the Ghana National Service Act 426 of 1980. It is in charge of the control and management of the national service scheme.

108 Sec 18(c) LACA. The service requires newly qualified graduates to undertake a period of compulsory service to the state as part of their civic responsibility.

109 As of the year 2017, there were approximately 200 private lawyers offering legal aid. See <http://www.legalaidghana.org/web/index.php/news/66-las-policy-dialogue-on-the-use-of-paralegals-in-ghana> (accessed 1 March 2019).

requesting for a formal recognition of the legal status of lay persons in representing themselves in court.<sup>110</sup> She requested the Court to give due recognition to the right of private individuals that are non-professional lawyers to access the law courts in all manners of cases and to have equal treatment with lawyers when conducting their own cases. She again sought a formalisation of the rights of unrepresented litigants in the law courts, such that the rules of procedure applicable in the courts of law will not effect any hardship and/or prejudice against them. Her reliefs also included the simplification and streamlining of the rules of procedure to help such self-represented persons to prosecute their cases effectively, even if not professionally efficiently.<sup>111</sup> Much to the chagrin of the plaintiff and all persons unable to afford counsel and desirous to represent themselves in legal proceedings before the courts, the Supreme Court dismissed her claims. The Court held that the legal system in Ghana cannot have a pluralistic or dualist system of procedure for self-represented and represented litigants. In brief, there can be no special concessions for self-represented non-professional litigants within the general framework of the rules of procedure.

The Supreme Court in the judgment delivered by Dotse JSC also minced no words when in his introductory remarks he held that the suit in a way was a condemnation of the legal aid system in Ghana. As he rightly observed, the GLAS appears not to have any regulatory framework to ensure that persons who benefit from legal aid are given competent legal advice and service. The Supreme Court recommended a review of the then Legal Aid Scheme Act to ensure that the conduct of legal aid cases assigned to lawyers is monitored by authorities in the scheme. This is to prevent situations where accused persons would desire personally to handle their briefs in court rather than through counsel assigned under legal aid. With the coming into force of the LACA and its lack of provisions on this matter of concern to the judiciary, not much change is expected in this regard.

Again, the Supreme Court re-reinforced the call for the Ghana Bar Association to consider institutionalising a mandatory *pro bono* legal scheme for indigent litigants. There is no formalised *pro bono* system in Ghana and few lawyers actually provide *pro bono* services in Ghana.<sup>112</sup> A few civil society organisations also volunteer free legal assistance to indigent accused persons. Although their contributions are highly lauded, these private organisations generally face financial and logistical challenges in meeting the growing demand for free legal services in criminal matters in the country.<sup>113</sup> The way of out

---

110 Zainabu Naske Bako-Alhassan (n 67).

111 As above.

112 See Latham & Watkins (n 6) 231. See also n 109.

113 Some organisations include Help Law Ghana; Legal Resource Centre; Women's Initiative for Self-Empowerment; International Federation of Women Lawyers; Ark Foundation; Access to Justice run by the African Centre for Development and Policy; and Pro Bono Lawyers Network.



this impasse is government's re-dedication to the values of fair trial and criminal justice for all accused persons who are too poor to secure the services of counsel. The state must strengthen the workings of the GLAS through a radical enhancement of its financial resources and seek an effective implementation of the provisions the LACA to increase the capacity of its working force.

## 5 Way forward

Put together, the operations of the legal aid schemes attempt to fill the gap in the law created by the explicit absence of a constitutional due process right to free legal aid in criminal proceedings in Ghana. However, all the legal provisions and institutional efforts towards providing free legal assistance in cases of indigency woefully have failed to cater for the large number of deserving suspects and accused persons. Access to legal aid generally is unavailable at all stages of the criminal proceedings and its coverage is most inadequate to deal with the large number of individuals who are unable to procure the ever-increasing expensive services of counsel. With these facts, the only practical implication will be the continuing rise in the number of self-represented accused persons in criminal trials.

If the problem of self-representation in criminal proceedings is to be addressed effectively, due consideration must be given to the need to address the various legislative, administrative and financial problems that have engulfed the smooth operation of legal aid in the country. Most importantly, the proper domestication of the text of article 14(3) of ICCPR on the right to assignment of free state-funded counsel in cases of indigency must be done. This process must translate into a clear enactment of a right to legal aid which must be elevated to the level of a constitutional right.<sup>114</sup>

Again, the Ghanaian criminal justice system must take a cue from the useful strategies advocated under the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa<sup>115</sup> to advance the cause of legal aid in Ghana. A first engagement will require expanding the scope of legal service providers. Beyond the government's efforts legal aid service providers should include a wide range of stakeholders, including non-governmental organisations (NGOs); community-based organisations (CBOs); non-religious organisations; faith-based organisations; professional bodies and associations; as well as academic institutions.<sup>116</sup> In that case, judi-care programmes, justice centres and law clinics can be developed and added to present schemes of legal aid.<sup>117</sup> The efforts of those NGOs

---

114 See, eg, UN (n 4) Principle 1(14).

115 Lilongwe Declaration (n 9).

116 UN (n 4) Principle 1.

117 UN (n 4) Principles 6 & 7 and Guideline 16(70).

that already are in the business of providing legal aid must be commended and also coordinated. In addition, the criminal justice system must aim at diversifying legal aid service providers in the country. At present, only lawyers qualify to provide legal aid services in pre-trial and trial proceedings in criminal matters. The number of practising lawyers in criminal matters, however, is inadequate to meet the legal aid needs of the rising number of suspects and accused persons in the country.<sup>118</sup>

To that effect Ghana must follow through its agenda to recognise the status of non-lawyers in criminal proceedings, including law students in legal clinics, legal assistants and paralegals.<sup>119</sup> Working towards attaining 'Goal 16' of the Sustainable Development Goals on legal empowerment and access to justice for all, the LACA seeks to address the challenges of access to justice and envisages the development of a system of paralegals and paralegal assistants in legal aid delivery.<sup>120</sup> Steps must be accelerated to establish structured accredited courses to train such paralegals.

It is also important for the government to exhibit a political will to address the financial challenges of the public legal aid schemes. The government must allocate sufficient funds to legal aid schemes to meet the costs of their administrative and operational needs.<sup>121</sup> The Ghanaian government already has adopted the Constitutional Review Commission's proposal to establish the GLAS as an independent constitutional body which is to be funded by other independent constitutional bodies.<sup>122</sup>

It is necessary for the government and the private sector to collaborate to raise the necessary funding.<sup>123</sup> The Bar Association, the General Legal Council and the judiciary must define standards for the provision of *pro bono* services by lawyers. *Pro bono* legal services must be recognised as an important duty in the legal profession. Lawyers should be provided and assisted with the necessary logistical and professional support systems to ensure an effective system of *pro bono* legal services. For now, in the absence of a legislation mandating the provision of *pro bono* legal services in Ghana, there is the need to encourage such free services as part of lawyers' ethical duties. However, steps must be taken to crystallise this ethical duty into a legislative requirement for the annual renewal of practising licences for lawyers and law chambers. Finally, legal education in Ghana must be made more accessible to persons intending to profess as lawyers,

118 <http://www.legalaidghana.org/web/index.php/news/66-las-policy-dialogue-on-the-use-of-paralegals-in-ghana> (accessed 1 March 2019).

119 Lilongwe Declaration (n 9) Principle 7); UN (n 4) Guidelines 14(67) & 16(71)(e).

120 Sec 3(2)(g) LACA.

121 UN (n 4) Guideline 12(16)(a); Lilongwe Declaration (n 9) Principles 1 & 9.

122 [http://constitutionnet.org/sites/default/files/crc\\_research\\_report.pdf](http://constitutionnet.org/sites/default/files/crc_research_report.pdf) 667 para 176 (accessed 1 March 2019). See also [http://ghana.gov.gh/images/documents/crc\\_report\\_white\\_paper.pdf](http://ghana.gov.gh/images/documents/crc_report_white_paper.pdf) 43 (accessed 1 March 2019).

123 Principle 9 Lilongwe Declaration (n 9).

as it remains the surest route towards ensuring wider access to justice for all.

## 6 Conclusion

Several legal and regulatory barriers contrive to whittle down the value and benefits of the right to legal aid to needy accused persons in criminal proceedings in Ghana. The domestication procedure of the right to legal aid and the legal strategies for its implementation have been the bane of legal aid delivery in the country, which is obviously in dire straits. For now, the laudable parliamentary intentions in enacting these laws for the benefit of indigent accused persons and suspects of crime who are unable personally to hire the services of counsel remain generally illusory. The rhetoric of a fair trial and the quality of justice delivery in criminal proceedings continue to be eroded by the stark imposition of self-representation in cases where accused persons cannot afford legal representation. Eventually, as legal aid remains out of the reach of indigent accused persons in violation of their right to a fair trial, it is only a matter of time before the courts lose judicial legitimacy. Having ratified the Protocol to the African Charter on the Establishment of the African Court which allows individuals and NGOs to bring cases on human rights violations to the African Court, Ghana stands to face a myriad of suits on account of its failure to provide legal aid.

Great opportunities exist to reinforce the general scheme of legal aid in Ghana in order to redress the degenerating trends of involuntary self-representation arising from the sole factor of the poverty of accused persons or criminal suspects. The first decisive initiative falls on the country to take a bold step for the full implementation of the text of article 14(3)(d), as implied by article 7 of the African Charter, regarding the provision of free legal assistance to all accused persons who do not have the financial means to secure legal representation. The remaining remedial measures must take the form of policy changes and financial commitments towards revamping the operations of legal aid under the current schemes of legal aid.

## A capabilities approach to remedies for systemic resource-related socio-economic rights violations in South Africa

Shanelle van der Berg\*

Research Fellow, Department of Public Law, University of Stellenbosch, South Africa

<https://orcid.org/0000-0001-6935-8818>

### Summary

*The judiciary plays a key role in holding the government accountable for its socio-economic policies. By adhering to certain tenets that underlie both South Africa's transformative Constitution and Sen and Nussbaum's capabilities approach, courts can promote the foundational values of dignity, equality and freedom, broaden participation and ensure accountability. Since government's priorities are most clearly reflected in its budgetary allocations, courts should apply a capabilities-based standard of proportionality review where it is claimed that a socio-economic right has been violated due to disproportionate resource allocation. In this article, the focus shifts to the implications of adopting a capabilities approach at the remedial phase of adjudication. Given that the South African Constitution demands 'effective' relief where a constitutional right has been infringed, it is argued that efficacy can be assessed by a remedy's ability to realise the capabilities that form the content of the infringed socio-economic right. Furthermore, where socio-economic rights are infringed upon on a systemic level through unreasonable resource allocation, key principles that inform a capabilities*

---

\* BA LLB LLD (Stellenbosch); shanellevdb@gmail.com. The financial assistance of the National Research Foundation (NRF) towards this research study is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily to be attributed to the NRF. This article was written in the author's erstwhile capacity as Mellon Early Research Career Fellow, Socio-economic Rights and Administrative Justice Research Project (SERAJ), Faculty of Law, Stellenbosch University, South Africa. Thanks are due to the insightful comments provided by two anonymous referees. Any remaining errors are my own.

*approach to adjudication can be incorporated into the design of structural interdicts to ensure lasting capability realisation and institutional reform. Where all these principles are observed, effective relief can ensue. Finally, the incorporation of these principles into remedial design can help mitigate separation of powers-based concerns that the judiciary lacks the institutional competence and legitimacy required to adjudicate complex, polycentric matters of government resource allocation.*

**Key words:** socio-economic rights; South African Constitution; effective remedies; capabilities approach

## 1 Introduction

Justiciable socio-economic rights mean little without domestic legal systems that afford access to effective remedies for rights violations.<sup>1</sup> While most international and regional human rights instruments oblige state parties to fulfil human rights and provide remedies where violations are alleged,<sup>2</sup> many national jurisdictions lack a principled basis on which to formulate effective relief. Drawing from the South African Constitutional Court and other jurisprudence, this article proposes a paradigm for use by the judiciary to craft effective remedies while not encroaching upon the separation of powers doctrine. The conceptual framework draws from tenets common to both South Africa's transformative Constitution and Sen and

1 South Africa recently faced a crisis in its social security administration which exposed millions of vulnerable grant beneficiaries to the complete denial of their right to social assistance, as guaranteed by sec 27 of the Constitution of the Republic of South Africa, 1996. The predicament arose after a 2014 judgment of the Constitutional Court that the South African Social Security Agency (SASSA) had run an unlawful tender process for the administration of social grants by a third party provider; *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) (*Allpay I*). In order not to jeopardise the vital interest that grant beneficiaries have in uninterrupted grant payment, the resultant declaration of invalidity was suspended until a new tender process was run, or SASSA took over the administration of grants at the expiration of the invalid contract on 31 March 2017; *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) (*Allpay II*). However, the Constitutional Court subsequently on several occasions had to intervene to further extend the operation of the contract due to non-performance and false assurances provided by SASSA. *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC) (*Black Sash I*); *South African Social Security Agency v Minister of Social Development* 2018 10 BCLR 1291 (CC) (SASSA); *Black Sash Trust v Minister of Social Development (Freedom Under Law Intervening)* 2018 12 BCLR 1472 (CC) (*Black Sash II*).

2 In the African regional context, see art 7(1)(a) of the African Charter on Human and Peoples' Rights. See further M Ssenyonjo 'Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 Years since the adoption of the African Charter' (2011) 29 *Netherlands Quarterly of Human Rights* 358 371.

Nussbaum's capabilities approach.<sup>3</sup> The Constitution seeks to '[i]mprove the quality of life of all citizens and free the potential of each person',<sup>4</sup> whereas the capabilities approach congruently asks to what extent people have the potential (or substantive freedom) to choose the lives they have reason to value.<sup>5</sup> This framework may be adapted for use by African jurisdictions that entrench justiciable socio-economic rights,<sup>6</sup> and may further aid other jurisdictions that do not yet provide for effective remedies where socio-economic rights are infringed.<sup>7</sup> Whereas judicial intervention is ultimately no panacea in the face of systemic government intransigence, a sound theoretical grounding nevertheless makes effective relief possible.

The article builds on previous research studies that sought to demonstrate that the adoption of a capabilities approach to adjudication practically can assist and theoretically justify the South African judiciary's review of government resource allocation decisions that impact socio-economic rights.<sup>8</sup> Since government's priorities are most clearly reflected in its budgetary allocations, courts should apply a capabilities-based standard of proportionality review where it is claimed that a socio-economic right has been violated due to disproportionate resource allocation.<sup>9</sup> In the article the focus shifts to the implications of adopting a capabilities approach at the *remedial* phase of adjudication of government resource allocation decisions that impact socio-economic rights. Given that the Constitution demands 'effective' relief where a constitutional right has been infringed, it is argued that efficacy can be assessed by a remedy's ability to realise the capabilities that form the content of the infringed socio-economic right. Where socio-economic rights are infringed upon on a systemic level through unreasonable resource allocation, key principles that inform a capabilities approach to adjudication can be incorporated into the design of structural interdicts to ensure lasting capability realisation and institutional reform.

---

3 A Sen *Development as freedom* (1999); A Sen *The idea of justice* (2009); MC Nussbaum *Women and human development: The capabilities approach* (2000); MC Nussbaum *Creating capabilities* (2011).

4 Preamble to the South African Constitution.

5 Sen (1999) (n 3) 74.

6 Eg, the Constitution of Ghana (1992) and the Constitution of Kenya (2010).

7 See eg the case of Cameroon, as expanded in AA Agbor 'Pursuing the right to an effective remedy for human rights violation in Cameroon: The need for legislative reform' (2017) 20 *Potchefstroom Electronic Law Journal* 27.

8 See generally S van der Berg 'A capabilities approach to the judicial review of resource allocation decisions impacting on socio-economic rights' unpublished LLD thesis, University of Stellenbosch, 2015; S van der Berg 'The need for a capabilities-based standard of review for the adjudication of state resource allocation decisions' (2015) 31 *South African Journal on Human Rights* 330; S van der Berg 'Ensuring proportionate state resource allocation in socio-economic rights cases' (2017) 134 *South African Law Journal* 576.

9 For the need to apply a capabilities-based standard of review, see Van der Berg (2015) (n 8).

First, courts should direct a process of *participation and informational broadening* to ensure that the capability needs underlying the violated socio-economic rights are comprehensively determined. Next, courts must provide *explicit* normative guidelines to guide government and all stakeholders in their engagement efforts with a view to formulating improved allocative plans. Simultaneously, courts should require government to present explicit evidence of the processes followed to arrive at a proportionate remedial plan. Finally, the revisability of judgments should be catered for by retaining judicial supervision. Where all these principles are observed, effective relief can ensue. Moreover, the incorporation of these principles into remedial design can help mitigate separation of powers-based concerns that the judiciary lacks the institutional competence and legitimacy required to adjudicate complex, polycentric matters of government resource allocation.

The article commences with an exposition of the South African judiciary's remedial powers by highlighting key jurisprudential examples that illustrate the range of remedies at courts' disposal. It is subsequently argued that the judiciary should overcome its ostensible reluctance to retain supervision following findings of socio-economic violations, and suggests that participatory structural interdicts may strike an appropriate balance between the need for effective relief and maintenance of the separation of powers between different branches of government. Finally, a capabilities approach to remedies is espoused.

## 2 South African judiciary's remedial powers

### 2.1 A capabilities approach to remedies in the context of South Africa's project of transformative constitutionalism

South Africa remains one of the most unequal countries in the world, and over half of its population continues to live in poverty.<sup>10</sup> It is within this context that South Africa's Constitution should be viewed. South Africa's project of 'transformative constitutionalism' envisions a process of 'constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.<sup>11</sup> In order to achieve a substantively equal society, the realisation of the various socio-economic rights enshrined in the Constitution is essential.<sup>12</sup> This, in turn, requires significant resources to be expended by government in order to redress the

10 Stats SA *Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017) 17.

11 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 150.

12 Eg secs 26, 27, 28 & 29 of the Constitution.

systemic and infrastructural imbalances inherited from South Africa's apartheid past. Constitutional transformation furthermore requires a shift from a 'culture of authority' to a 'culture of justification', in terms of which the exercise of public power must be justified with reference to value-based reasons.<sup>13</sup>

The capabilities approach of Sen and Nussbaum, which centres on the question as to whether people possess the substantive freedom or 'capabilities' to choose meaningful lives, resonates strongly with South Africa's constitutional project, in general, and the inclusion of justiciable socio-economic rights, in particular. It has been demonstrated elsewhere that the capabilities approach can assist courts in imbuing socio-economic rights with context-dependent content, thereby aiding the judiciary in subjecting impugned government allocative decisions to proportionality review.<sup>14</sup> Moreover, it has been shown that certain tenets central to both South Africa's project of transformative constitutionalism and the capabilities approach can be distilled and applied throughout the adjudicatory process.<sup>15</sup> Where courts are tasked with formulating effective remedies for systemic, disproportionate government resource allocation that results in the infringement of socio-economic rights, three of these principles become particularly relevant: First, participation is crucial to a project of transformative constitutionalism,<sup>16</sup> and finds its corollary in Sen's emphasis on public reasoning and informational broadening.<sup>17</sup> Next, substantive reasoning on the part of all public actors, including the judiciary, is integral to a culture of justification,<sup>18</sup> and is congruent with the requirement for explicitness in the making of evaluative judgments in terms of the capabilities approach.<sup>19</sup> Finally, these tenets must be combined with judicial supervision in order to ensure effective remedies. Supervision enables revisable judgments, for which the need is recognised by Sen.<sup>20</sup>

The capabilities approach, therefore, can inform the judicial implementation of South Africa's project of transformative constitutionalism, and contribute to the formulation of effective relief

13 E Mureinik 'A Bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31-32.

14 See Van der Berg (2015) (n 8).

15 Van der Berg (2017) (n 8) 576.

16 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351-354; S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 29-32.

17 Sen (1999) (n 3) 56-57, 110, 274, 284; Sen (2009) (n 3) 44.

18 Mureinik (n 13) 32; M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *South African Public Law* 155-156-161-165; Langa (n 16) 353.

19 Sen (1999) (n 3) 30, 75; Sen (2009) (n 3) 4-109-110.

20 S Fredman *Human rights transformed: Positive rights and positive duties* (2008) 109; Sen (2009) (n 3) 107.



where socio-economic rights are infringed on a systemic level through unreasonable resource allocation.

## 2.2 Remedial powers under the Constitution

The South African judiciary enjoys wide remedial powers under the Constitution. Anyone who enjoys *locus standi* in terms of the broad provision in section 38 'has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights'.<sup>21</sup> Where a socio-economic right is infringed by a resource allocation decision, courts are empowered to grant 'appropriate' relief. A capabilities approach to remedies implies that 'appropriate' relief must be relief aimed at the realisation of the capabilities which the relevant infringed socio-economic right protects.<sup>22</sup> The Constitution and a capabilities approach to adjudication justify the judiciary's remedial competence, even where relief calls for increased resource allocation, or for institutional reform in order to ensure effective resource allocation.<sup>23</sup> Section 172 of the Constitution expands on the remedial powers of the courts:

- (1) When deciding a constitutional matter within its power, a court –
  - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including –
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Where resource allocation is disproportionate to the socio-economic capabilities at stake, the unjustifiable infringement of a socio-economic right occurs. Courts are obliged under section 172(1)(a) to declare such allocative decision invalid. However, a declaration of invalidity runs the risk of leading to polycentric results. It would accordingly be 'just and equitable' to suspend such a declaration of invalidity<sup>24</sup> and to couple such order with a structural interdict<sup>25</sup> to allow government to formulate a plan to rectify an unconstitutional resource allocation decision and thereby fulfil the infringed socio-economic right. By conceptualising of the structural interdict as a flexible remedy that grants the state leeway to conceive suitable

21 Sec 38 Constitution.

22 For the relationship between capabilities and functionings, see Sen (1999) (n 3) 75.

23 Sen (1999) (n 3) 141-143.

24 Sec 172(1)(b)(ii) Constitution.

25 For the potential of the structural interdict to mitigate polycentric effects and effect capability realisation, see further part 3.2 below.

remedial plans, relief of this nature may deter courts from invoking the separation of powers doctrine to limit their remedial obligations.<sup>26</sup>

### 2.3 Remedial approach of the Constitutional Court in qualified socio-economic rights cases

Where qualified socio-economic rights are at issue, the availability of resources – and the reasonableness of allocative decisions – always are of central significance. This is due to the fact that the rights of access to adequate housing, health care services, sufficient food and water, and social assistance, are all subject to the constitutional qualification that the state should take reasonable measures, *within its available resources*, to progressively realise each of these rights.<sup>27</sup> Therefore, it is instructive to analyse the Constitutional Court's approach to remedies where complex, polycentric matters of resource allocation were at issue.

#### 2.3.1 *The potential inefficiency of declaratory orders*

In *Government of the Republic of South Africa v Grootboom*<sup>28</sup> (Grootboom case), the Court issued a declaratory order regarding the constitutional shortcomings of the state's housing policy.<sup>29</sup> This judgment thus is a prime example of pitfalls that may accompany the issuing of declaratory orders where systemic shortcomings go beyond mere government inattentiveness in formulating socio-economic policy.<sup>30</sup> In terms of the declaratory relief issued, the Court held that '[s]ection 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing'.<sup>31</sup> Regrettably, the order was not expeditiously implemented and a delay of over three years ensued before the state devised a revised housing policy that catered for those in urgent need.<sup>32</sup> During this period all persons 'in desperate need'<sup>33</sup> of

26 CC Ngang 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take "other measures"' (2014) 14 *African Human Rights Law Journal* 655.

27 Secs 26(2) and 27(2) of the Constitution both qualify the various socio-economic rights set out in secs 26(1) and 27(1), respectively.

28 2001 (1) SA 46 (CC).

29 The Constitutional Court previously made the negotiated settlement between the parties an order of court, dated 21 September 2000 (on file with author) which was implemented to a certain extent. K Pillay 'Implementing *Grootboom*: Supervision Needed' (2002) 3 *ESR Review* 13 14; Liebenberg (n 16) 401.

30 For the circumstances in which declaratory orders may constitute effective relief, and for further examples of the use of declaratory orders by South African courts, see P Swanepoel 'The potential of structural interdicts to constitute effective relief in socio-economic rights cases' unpublished LLM dissertation, University of Stellenbosch, 2017 64-69.

31 *Grootboom* (n 28) para 99.

32 Liebenberg (n 16) 401-403.

33 *Grootboom* (n 28) para 52.

temporary housing continued to live in 'intolerable conditions',<sup>34</sup> without access to any type of shelter. It is clear that in such conditions severe basic capability deprivation occurs.<sup>35</sup> Not even elementary functioning outcomes,<sup>36</sup> such as possessing adequate shelter, enjoying basic services or attaining a basic state of good health, can be achieved in such circumstances. In this case, a capabilities approach to a remedy would thus have required the participation of all stakeholders to identify the capability needs at stake and respond accordingly. Moreover, the retention of supervision may have helped to ensure that the state revised its programme expeditiously. The retention of supervision would have been justified in light of the grave capability deprivation that occurred in the absence of provision for emergency housing relief.

### 2.3.2 *A reluctance to retain supervision*

Subsequently, in *Minister of Health v Treatment Action Campaign (No 2)* (TAC case)<sup>37</sup> the Constitutional Court clarified that, contrary to the state's arguments, courts are not limited to issuing declaratory orders only.<sup>38</sup>

There is ... no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and *has to find the resources to do so*.

In terms of TAC, courts are therefore empowered to grant orders that affect policy and resource allocation,<sup>39</sup> while remaining sensitive to the institutional roles of the different branches of government under the separation of powers doctrine.<sup>40</sup> According to the Court, where the nature of the right infringed, the nature of the infringement<sup>41</sup> and the circumstances of the particular case so demand, 'courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation'.<sup>42</sup> The Court concluded that structural

34 As above.

35 Sen (1999) (n 3) 20 perceives poverty as constituting basic capability deprivation.

36 'Functionings' represent achievements or what a person can actually do, whereas capability sets represent the substantive freedom to choose different functioning combinations. Capabilities, therefore, constitute the real *opportunities* that people have to realise various lifestyles, rather than the choices they actually make. 'Functionings' represent a supple concept, which can include basic states of being (eg being adequately nourished) as well as more complex states of being (eg being able to participate effectively in community life). Sen (1999) (n 3) 75.

37 2002 (5) SA 721 (CC).

38 TAC (n 37) para 99 (my emphasis).

39 TAC para 99.

40 TAC para 113.

41 TAC para 106.

42 TAC para 113.

interdicts do not breach the separation of powers doctrine, 'particularly when the state's obligations are not performed diligently and without delay'.<sup>43</sup>

However, in issuing declaratory and mandatory orders, the Court again declined to retain supervisory jurisdiction, stating that a structural interdict was unnecessary since 'government has always respected and executed orders' of the Court.<sup>44</sup> *TAC* concerned government policy in respect of the provision of anti-retroviral medication to HIV positive, pregnant mothers, and thus engaged the right of access to adequate health care services. Given the delayed implementation of a revised housing policy in *Grootboom*, and certain provinces' recalcitrance in implementing the orders made in *TAC*,<sup>45</sup> the Court's reluctance to issue a structural interdict was inapt. *In casu*, the failure to provide immediate and effective relief would lead to the deaths of a significant number of HIV-infected infants and the capability deprivation of an exceptionally vulnerable group (infants) would be absolute. The urgent necessity of protecting these vital capabilities, therefore, would have justified a capabilities approach to a remedy in the form of a structural interdict.

### 3 Overcoming the judicial reluctance to issue structural interdicts in qualified socio-economic rights cases

#### 3.1 Constitutional and institutional competence

From the above discussion it emerges that the Constitutional Court has been reluctant to grant structural remedies (or to delegate this function to the High Courts) in cases where qualified socio-economic rights were at issue.<sup>46</sup> Instead, the Court has seemingly conceptualised the structural interdict as a 'remedy of last resort'.<sup>47</sup>

---

43 *TAC* para 112.

44 *TAC* para 129. This judgment is illustrative and not the only instance where a South African court has declined to retain jurisdiction.

45 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* 325 333-334; C Hoexter *Administrative law in South Africa* (2012) 562-563.

46 In contrast, the Constitutional Court has issued supervisory remedies in cases where the unqualified right to education, enshrined in sec 29(1)(a) of the Constitution, was at stake. *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC). The Court has also asserted its competence to issue mandatory orders and retain supervision in cases where civil and political rights were at stake. See *August v Electoral Commission* 1999 (3) SA 1 (CC); *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC) (voting rights of prisoners) and *Sibiya v Director of Public Prosecutions: Johannesburg* 2005 (5) SA 315 (CC) (replacement of death sentences with appropriate forms of punishment).

47 *TAC* (n 37) paras 112 & 129.

only to be granted 'where governments are incompetent or intransigent with respect to the implementation of rights'.<sup>48</sup>

### 3.1.1 *Judicial responsibility for the granting of effective relief*

Davis ascribes the judicial reluctance to grant managerial remedies where qualified socio-economic rights are concerned to the same factor arguably responsible for the Court's resort to a 'proceduralised', normatively weak model of reasonableness review,<sup>49</sup> namely, the Court's hesitancy to encroach upon the terrain of the executive or legislative branches of government.<sup>50</sup> The Supreme Court of Appeal has also voiced its separation of powers-based concerns regarding the structural interdict:<sup>51</sup>

Structural interdicts ... have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights ... Then there is the problem of sensible enforcement: the state must be able to comply with the order within the limits of its capabilities, financial or otherwise.

However, it must be borne in mind that the separation of powers allocates adjudicative responsibility to the judiciary. This includes the power to grant effective remedies. In *Allpay II*, in which the Constitutional Court issued what it termed a structural interdict<sup>52</sup> in respect of the running of a new tender process for the payment of social security grants, the Court emphasised this point:<sup>53</sup>

There can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights.

48 Roach & Budlender (n 45) 327. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 109.

49 D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?"' in H Botha, A van der Walt & J van der Walt (eds) *Rights and democracy in a transformative constitution* (2003) 33.

50 D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 *South African Journal on Human Rights* 301 311. See further S van der Berg 'Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?' (2013) 29 *South African Journal on Human Rights* 376 382.

51 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) (*Modderklip*) para 39.

52 *Allpay II* (n 1) para 71.

53 *Allpay II* para 42.

### 3.1.2 *The structural interdict as an effective and participatory remedy*

The structural interdict potentially embodies an effective and participatory remedy that can overcome traditional concerns that courts lack the constitutional and institutional competence required to adjudicate complex resource allocation decisions. By accommodating these concerns at the remedial stage of adjudication, the need for deference in applying a capabilities-based standard of review to allocative decisions is obviated.

Legitimacy concerns are mitigated by conceptualising the structural remedy as a dialogic engagement among all stakeholders, including the legislature. Stakeholders thus express their agency through participation, and simultaneously influence the formulation of public policy that can potentially lead to new legislation. This possibility was recognised in *Doctors for Life International v Speaker of the National Assembly*<sup>54</sup> in the context of participation in the legislative process.<sup>55</sup>

The participation by the public on a continuous basis provides vitality to the functioning of representative democracy ... It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people.

Furthermore, a structural interdict affords leeway to the executive to design a plan for the procurement of additional resources aimed at capability realisation, or for the effective implementation of existing allocations.<sup>56</sup> Besides the government's recalcitrance in adhering to court orders or cases where non-compliance would cause irremediable damage,<sup>57</sup> Roach and Budlender identify a third situation where the structural interdict would be appropriately granted. According to the authors, courts should feel fortified in granting a managerial remedy where a mandatory order is stated in general terms, due to the nature of the duty involved<sup>58</sup> or the need to grant the state as much latitude as possible to devise its own plan.<sup>59</sup> This may be the case where

54 2006 (6) SA 416 (CC).

55 *Doctors for Life International* (n 54) para 115.

56 Roach & Budlender (n 45) 334.

57 Where basic capability deprivation occurs due to unreasonable resource allocation, non-compliance with a court order will potentially lead to irremediable damage. *Black Sash I* (n 1) serves as an example of government recalcitrance and where non-compliance would have left millions of social grant beneficiaries destitute.

58 Eg to allocate 'reasonable' or 'proportionate' resources to the fulfilment of a socio-economic right. However, see part 4.2 below regarding the importance of explicitness both in granting a structural interdict (explicitness on the part of the court) and complying therewith (explicitness on the part of the state).

59 Roach & Budlender (n 45) 334. In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC) the Court stated that '[s]uch relief ... is appropriate when the court does not wish to prescribe to the respondent the detail of what steps must be taken' (para 50).

broad structural reform is necessary, or where the remediation of the law or conduct in question raises complex, polycentric issues. The authors explain the benefit of a structural interdict to the state in such instances:<sup>60</sup>

It may provide governments with a timeline to follow. The approval of a plan by the court can allow the government to move forward with the implementation of its plan secure in the knowledge that implementation will constitute compliance with its obligations. The court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance but rather an invitation to the government to formulate a plan in order to achieve compliance with the Constitution.

Allowing the state latitude ensures that the executive can devise a plan with which it can comply within the limits of its financial capacity. A capabilities-infused structural interdict, therefore, can complement a fluid conceptualisation of the separation of powers doctrine.<sup>61</sup> Rodríguez-Garavito elaborates: 'Dialogic judgments tend to outline procedures and broad goals and, in line with the principle of separation of powers, place the burden on government agencies to design and implement policies.'<sup>62</sup>

By affording the state the discretion to devise an allocative plan in consultation<sup>63</sup> with a broad range of stakeholders, concerns regarding the judiciary's competence to review allocative decisions can be addressed at the remedial stage of adjudication.

### 3.2 Polycentricity

The polycentricity inherent in state resource allocation decisions is often highlighted as a bar to their justiciability.<sup>64</sup> Nevertheless, in *August* the Constitutional Court held: 'We cannot deny strong actual claims timeously asserted by determinate people, because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups.'<sup>65</sup>

Yet the potential of a decision to result in unknown ramifications for a complex web of other issues is increased in proportion to the range

60 Roach & Budlender (n 45) 334.

61 Liebenberg (n 16) 436; CF Sabel & WH Simon 'Destabilisation rights: How public law litigation succeeds' (2004) 117 *Harvard Law Review* 1016 1090.

62 C Rodríguez-Garavito 'Beyond the courtroom: The impact of judicial activism on socio-economic rights in Latin America' (2011) 89 *Texas Law Review* 1669 1691.

63 See part 4.1 below.

64 L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353 394. Resource allocation decisions are polycentric, since a judgment on a specific instance of resource allocation could result in unforeseen consequences for other budgetary allocations. Unforeseen consequences for budgetary allocations could result where groups in need of resources are left unrepresented in litigation.

65 *August* (n 46) para 30.

of interests not represented before a court.<sup>66</sup> At the remedial stage of adjudication, '[f]airness requires a consideration of the *interests of all those who might be affected by the order*'.<sup>67</sup> However, given that increased budgetary allocation can impact on different votes in the national budget and even on the macro-economic obligations of the state, it will seldom be possible to accommodate all the interests at stake. Nevertheless, the emphasis that a capabilities approach to adjudication places on informational broadening can significantly extend the scope of represented interests.<sup>68</sup> The information available to the court for the formulation of an appropriate remedy can be expanded through, for example, the use of *amicus curiae* interventions or the consideration of other expert evidence. An even wider array of perspectives can be incorporated into remedial design by requiring the state to engage with a broad range of stakeholders and report back to the court.

Moreover, the latitude afforded to the state to formulate a constitutionally compliant allocative plan, coupled with the retention of supervision, promotes the flexibility needed to cater for adjustments in light of the materialisation of initially unforeseen consequences. The Constitutional Court has observed that 'any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable'.<sup>69</sup> The polycentric nature of resource allocation decisions can therefore be accommodated by the granting of structural interdicts which allow for changes in allocative plans as circumstances change.

Sabel and Simon further point out the capacity of 'experimentalist' remedies, including structural interdicts, to deal with polycentric effects as they arise:<sup>70</sup>

Just as the court's liability determination destabilizes relations and practices within the defendant institution, so does it ramify to other institutions and practices. These ramifications ... are the web effect. The web effect makes it possible to address sequentially – in a sequence determined in the course of problem-solving itself – reforms too complex to be addressed whole. This effect is polycentricity viewed as an aid, not an obstacle, to problem solving.

The retention of supervision therefore allows a court to modify its orders sequentially, as circumstances change or initially unavailable information comes to light. Without the retention of supervision and the establishment of a dialogic relationship between the court and other branches of government, unforeseen consequences of a particular court order cannot be accommodated. A traditional

66 C Mbazira 'Confronting the problem of polycentricity in enforcing socio-economic rights in the South African Constitution' (2008) 23 *South African Public Law* 30 41.

67 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 43 (my emphasis).

68 See part 4.1 below.

69 *Modderklip* (n 51) para 49.

70 Sabel & Simon (n 61) 1080.



remedy, such as a simple mandatory order without the retention of supervision, does not allow for similar flexibility. However, the flexibility inherent in the structural interdict must be combined with explicit normative parameters, set by the court, in order to ensure constitutional resource allocation decisions.<sup>71</sup>

## 4 A capabilities approach to remedies

A capabilities approach to remedies posits that where the infringement of a socio-economic right entails the deprivation of critical capabilities, a remedy that can *effectively* vindicate those capabilities is required. Whereas the remedy will thus be directed at remediating the infringement of the socio-economic right, its effectiveness can be measured by its success in realising the capabilities underlying the right.

The structural interdict can be designed so as to incorporate three capabilities-based features that are mutually reinforcing and conducive to effective relief: First, the structural interdict can facilitate participation by a wide range of stakeholders. Second, any order that compels the state to engage with stakeholders and respond accordingly can be accompanied by explicit normative guidelines that outline the broad contours of what proportionate resource allocation may necessitate. Finally, the retention of supervision will allow the court to monitor compliance with its orders, and to revise its orders as needed in light of the challenges identified by an ongoing process of participation.

All three features of a capabilities approach to the structural interdict are mutually supporting and combine to encapsulate an effective remedy. The features will thus overlap with each other during the remedial process. First, a court will facilitate participation prior to issuing an initial order. The first order will be accompanied by explicit normative guidelines. A process of participation will then continue among the state and various other stakeholders. The results of the participatory process may in turn require the court to adapt its initial normative guidelines. The retention of supervision makes an ongoing process of participation and the revision of orders possible.

### 4.1 Participation and informational broadening

Under South African's transformative Constitution, participation should be promoted in all spheres of government and in any decision that may have an impact on rights.<sup>72</sup> Participation thus is a key foundational requirement that should be facilitated by the judiciary as

71 For a discussion regarding the importance of explicit, normative parameters in granting a structural remedy, see part 4.2 below.

72 Klare (n 11) 155; D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614 622-623.

part of a collaborative partnership with other branches of the state,<sup>73</sup> aimed at the realisation of the ideals encapsulated by the Constitution. Participation is also a central tenet of a capabilities approach to adjudication, in that it fosters the agency of those whose capabilities are affected by state allocative decisions.<sup>74</sup> Participatory capabilities<sup>75</sup> are intrinsically valuable. They are also instrumentally important in that participation can shape the government's allocative policy and so lead to the realisation of other capabilities that are prerequisites for meaningful participation in the social, economic and political *milieu*.

The informational base used for making evaluative judgments, likewise, is of central significance to the capabilities theory.<sup>76</sup> Thus, a capabilities approach to adjudication uses the informational base of *capabilities* as the measure against which resource allocation as well as remedial effectiveness can be judged. For remedial action to be effective, capability needs in a given contextual setting as well as the potential means for meeting such needs must be identified. The information must be sufficient to demonstrate the costs of remedying capability deprivation, as well as the resources potentially at the state's disposal for this purpose. The information available to a court and the state for the formulation and implementation of a remedy must thus be broadened to the greatest extent practicable.

A capabilities approach to the emphasis of remedies on informational broadening through participatory processes resonates strongly with Rodríguez-Garavito's proposal for strongly interpreted rights, dialogic remedies and strong monitoring:<sup>77</sup>

Dialogic decisions tend to open a monitoring process that encourages discussion of policy alternatives to solve the structural problem detected in the ruling ... the minutiae of the policies arise during the course of the monitoring process, not in the judgment itself ... [T]his constitutional dialogue involves a broader spectrum of stakeholders in the monitoring process. In addition to the court and state agencies directly affected by the judgment, implementation involves victims whose rights have been violated, relevant civil-society organizations, international human rights agencies, and other actors whose participation is useful.

It is thus through a process of informational broadening – starting in the courtroom,<sup>78</sup> expanding to other stakeholders and returning to

73 For a discussion of a collaborative partnership between all branches of government in the Indian context, see *People's Union for Democratic Rights v Union of India* 1983 1 SCR 456 469.

74 For the importance of agency, see Sen (1999) (n 3) 19 38-41 53.

75 Participatory capabilities are those related to social, economic and political participation.

76 For the importance of informational broadening and participation, see Sen (1999) (n 3) 56-57.

77 Rodríguez-Garavito (n 62) 1691-1692.

78 Participation should be observed in the exercise of all public power, including the drafting of legislation and formulation of policies related to resource allocation. *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 (2) SA 311 (CC) para 625. Participation in the allocative

the courtroom for approval and normative guidance – that capabilities-focused allocative choices can be ensured.

#### 4.1.1 *Informational broadening in the courtroom*

Informational broadening must commence in court in order to effectively apply a capabilities-based standard of review, and to formulate an appropriate remedy aimed at achieving proportionate resource allocation. Where relevant capabilities and interests are not considered, allocative policy may remain under-inclusive or ineffective. By assimilating a multitude of perspectives, the formulation of an effective remedy directed at proportionate resource allocation is possible.<sup>79</sup>

One way in which the judiciary can initiate the process of informational broadening is to direct the joinder of all relevant parties. Joinder will be appropriate where a party has a substantial interest in the matter.<sup>80</sup> Joinder furthermore can circumvent problems related to legitimacy and institutional competence by allowing relevant organs of state to participate in matters within their expertise.<sup>81</sup> By citing the national and provincial governments at the initiation of the proceedings, provision can be made for the inclusion of all relevant organs of state while fostering intergovernmental participation and accountability.<sup>82</sup> The non-joinder of parties with an interest in the adjudication of state resource allocation decisions can thus have a critical bearing on the possibility of an effective remedy.<sup>83</sup>

Another way in which informational broadening can occur in the courtroom is by drawing from the Indian Supreme Court's experience in appointing commissions to provide information, help in the design of remedies and monitor implementation where necessary.<sup>84</sup> The Constitutional Court recently appointed a panel of experts to monitor

---

process will thus be one factor a court should consider in applying a capabilities-based standard of review. Once a resource allocation decision is found to be unreasonable or disproportionate, thus infringing a socio-economic right, participation as informational broadening again becomes crucial.

79 Mbazira (n 66) 43.

80 G Muller 'The impact of section 26 of the Constitution on the eviction of squatters in South African law' unpublished LLD thesis, University of Stellenbosch, 2011 231. See further G Muller & S Liebenberg 'Developing the law of joinder in the context of evictions of people from their homes' (2013) 29 *South African Journal on Human Rights* 554.

81 *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC) para 13.

82 Eg, 'the government of the Republic of South Africa' and the 'Premier of the Province of the Western Cape' were cited in *Grootboom* (n 28). A similar approach was followed in *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).

83 Rule 8(1) of the Rules of the Constitutional Court GN R1675 in GG 25726 of 31 October 2003 states: 'Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party.'

84 PN Bhagwati 'Judicial activism and public interest litigation' (1985) 23 *Columbia Journal of Transnational Law* 561 575-577; J Cassels 'Judicial activism and public interest litigation in India: Attempting the impossible?' (1989) 37 *American Journal of Comparative Law* 495 500 506.

the payment of social grants and SASSA's progress in making adequate arrangements for the distribution of social grants in the future.<sup>85</sup>

In addition, *amicus curiae* interventions constitute a valuable mechanism for broadening the information available to the reviewing court and the state in order to formulate effective remedies.<sup>86</sup> An *amicus curiae* 'acts in the interests of the broader society rather than of specific individuals, focusing on the broader implications of a case'.<sup>87</sup> *Amici curiae* can thus alert the court and state to any overlooked and unrepresented interests. They may also identify at least some of the polycentric effects that might result from ordering the state to devise and implement reasonable allocative decisions.<sup>88</sup> In *Allpay II* the Constitutional Court highlighted the multi-dimensional approach necessary to formulate a 'just and equitable' remedy and the Court's inability to identify all the interests that may be affected by its order.<sup>89</sup> *In casu*, one of the *amici curiae*'s submissions that any order made should not result in the interruption of social grants was duly noted by the Court.<sup>90</sup> The *amicus curiae*, therefore, brought the capabilities of the unrepresented grant beneficiaries squarely into focus for the Court to consider in formulating an appropriate remedy.

Courts may further utilise provisions that allow for the appointment of expert referees with the consent of the parties in technical, complex and polycentric matters such as those related to resource allocation.<sup>91</sup> The findings of such referees can subsequently be incorporated into the normative guidelines issued by a court along with a participatory remedy and the retention of supervision. Finally, courts can order the formulation of specialised task forces to investigate the allocative needs of litigants and those similarly placed, in order for any resultant resource allocation decision to be proportionate to the capability needs thus identified.<sup>92</sup>

---

85 SASSA (n 1).

86 Rule 10 of the Rules of the Constitutional Court GN R1675 in GG 25726 of 31 October 2003 makes provision for *amicus curiae* interventions.

87 L Chenwi 'Litigating socio-economic rights through *amicus* briefs' (2009) 10 *ESR Review* 7 8.

88 See further *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 9; Hoffmann (n 67) para 63; M Heywood 'Debunking "conglomerate talk": A case study of the *amicus curiae* as an instrument for advocacy, investigation and mobilisation' (2001) 5 *Law, Democracy and Development* 133.

89 *Allpay II* (n 1) paras 39-40.

90 *Allpay II* para 27.

91 Sec 19b of the Supreme Court Act 59 of 1959; J Fowkes 'How to open the doors of the court: Lessons on access to justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434 457; D Butterworth, J d'Oliviera & C de Moor 'Are South African administrative law procedures adequate for the evaluation of issues resting on scientific analyses?' (2012) 129 *South African Law Journal* 461 476 n 42.

92 See *Madzodzo* (n 82), where a dedicated Furniture Task Force was established in order to identify the furniture needs of the relevant schools. This enabled an estimation of the budgetary resources required to meet said needs.

#### 4.1.2 Informational broadening among the state and other stakeholders

In addition to fostering participation in the courtroom, courts can issue participatory remedies in combination with explicit normative guidelines and the retention of supervision.<sup>93</sup> One of the most promising developments in socio-economic rights jurisprudence is the innovation of requiring meaningful engagement both as a prerequisite for reasonable socio-economic policy and as a remedy in appropriate cases.<sup>94</sup> In *Port Elizabeth Municipality v Various Occupiers*<sup>95</sup> Sachs J stated:<sup>96</sup>

[T]he procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions.

Meaningful engagement was first utilised as a remedy in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*.<sup>97</sup> In this case the Constitutional Court issued an interim order for the City of Johannesburg to engage meaningfully with potential evictees from buildings that posed a health and safety risk. The Court linked the duty to engage meaningfully with several constitutional duties owed to occupiers that are intricately connected to the fundamental rights of dignity and life.<sup>98</sup>

Meaningful engagement has also been ordered as part of a structural interdict at the High Court level. In *NAWONGO 1*<sup>99</sup> the

93 Van der Berg (n 50). Participatory remedies must be preceded by strong, substantively interpreted rights during the application of a capabilities-based standard of review. Rodríguez-Garavito (n 62) 1691-1692.

94 B Ray 'Proceduralisation's triumph and engagement's promise in socio-economic rights litigation' (2011) 27 *South African Journal on Human Rights* 107 116-120 argues that engagement, if properly developed and institutionalised, can constitute an effective tool for the poor with which to vindicate their socio-economic rights. Once institutionalised, an order of meaningful engagement will gradually become less resource intensive.

95 2005 (1) SA 217 (CC). The remedy of meaningful engagement was foreshadowed in *Grootboom* (n 28) para 87.

96 *Port Elizabeth Municipality* (n 95) para 39.

97 2008 (3) SA 208 (CC).

98 *Occupiers of 51 Olivia Road* (n 97) para 16.

99 *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2010] ZAFSHC 73 (5 August 2010) (NAWONGO 1). Three further orders were made: *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011) (NAWONGO 2); *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State* (1719/2010) [2013] ZAFSHC 49 (28 March 2013) (NAWONGO 3); and *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State* (1719/2010) [2014] ZAFSHC 127 (28 August 2014) (NAWONGO 4) where the allocative policy was finally upheld as constitutional.

Court issued a structural interdict aimed at bringing the Free State Department of Social Development's funding policy for the funding of non-profit organisations (NPOs) that provide social welfare services to those in need in the province in line with its constitutional and statutory obligations. In *NAWONGO 2* the Court ordered the state to meaningfully engage with the under-funded NPOs in order to bring its funding policy in line with its constitutional obligations.<sup>100</sup> However, when *NAWONGO 3* came before the Court, the state had not complied with the engagement order. The state's failure to engage with the NPOs and thereby broaden the information available to it was consequently reflected in its still constitutionally deficient funding policy. In castigating the state for its non-compliance, the Court emphasised that '[m]eaningful engagement is a minimum required for formulating social welfare policy'<sup>101</sup> and, as the facts of the case show, for socio-economic *allocative* policies as well. One factor leading to the ineffective design of a constitutional allocative policy in this case was thus likely the state's failure to engage with a broad range of stakeholders.

Meaningful engagement thus can be used as a mechanism to identify which capabilities are at stake. Once this information is known, allocative decisions can be revised accordingly.

#### **4.1.3 Informational broadening within different spheres and organs of state**

In *Grootboom* the need for co-operation between different spheres of government in their efforts to realise socio-economic rights was highlighted.<sup>102</sup> As observed by Pillay, a breakdown in communication between different spheres of government following the order in *Grootboom* resulted in uncertainty regarding who bore the responsibility for resource allocation, and consequently in ineffective allocative decisions.<sup>103</sup> The requirement for informational broadening therefore requires different spheres of government and organs of state to co-operate and share information.

The duty of different organs of state to co-operate *inter se* has subsequently been emphasised by the Constitutional Court in several cases in which the right to education was implicated.<sup>104</sup> In *Rivonia Primary School*<sup>105</sup> the Court repeated the need for 'proper

100 *NAWONGO 2* (n 99) para 28 order 2.

101 *NAWONGO 3* (n 99) para 15.

102 *Grootboom* (n 28) para 68.

103 K Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 6 *Law, Democracy and Development* 255 267-268.

104 Sec 29 of the Constitution. *Head of Department, Department of Education, Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC); *MEC for Education in Gauteng Province & Others v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC).

105 *Rivonia Primary School* (n 104).

engagement between all parties affected',<sup>106</sup> and highlighted 'the damage that results when some functionaries fail to take the general obligation to act in partnership and co-operation seriously'.<sup>107</sup> Inter-governmental co-operation where complex, polycentric resource allocation decisions are concerned is of similarly critical importance. This is confirmed by the very *raison d'être* of the Intergovernmental Fiscal Relations Act 97 of 1997, the purpose of which is stated to be '[t]o promote co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters'.<sup>108</sup> When different departments of state need to engage with each other on macro-economic matters in order to remediate unreasonable resource allocation decisions,<sup>109</sup> informational broadening among different spheres of government and organs of state becomes imperative in terms of a capabilities approach to remedies.<sup>110</sup>

Participation at the remedial stage of adjudication thus fosters the fundamental constitutional values of openness and responsiveness,<sup>111</sup> while forming an indispensable component of a capabilities approach to remedies. To furthermore foster the value of accountability and promote a culture of justification, a capabilities approach to remedies additionally requires explicitness.

## 4.2 Explicitness

A capabilities approach to the adjudication of state resource allocation decisions demands explicit reasoning when making evaluative judgments regarding the weighting and prioritisation of diverse capabilities and other interests.<sup>112</sup> Explicitness in the adjudicative process further resonates with the demands of a culture of justification under South Africa's transformative Constitution.<sup>113</sup> Explicit normative parameters can aid the state in understanding its constitutional obligations and enable it to devise an effective allocative plan. By also requiring the state to explicitly indicate its progress in formulating and implementing a remedial plan, accountability is fostered. In *Magidimisi*

106 *Rivonia Primary School* para 72.

107 *Rivonia Primary School* para 74. S Liebenberg 'Deepening democratic transformation in South Africa through participatory constitutional remedies' (2015) *National Journal of Constitutional Law* (forthcoming).

108 Preamble to the Intergovernmental Fiscal Relations Act.

109 See *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP) para 80 where the Court acknowledged that, while difficult, a case could arguably be made to challenge vote allocations in the national budget.

110 The involvement of, eg, the National Treasury where critical socio-economic capabilities are imperilled by unreasonable resource allocation is of crucial importance. See, eg, *Madzodzo* (n 82) para 3; Treasury Regulations GN R556 in GG 21249 of 31 May 2000 as amended by GN R225 in GG 27388 of 15 March 2005.

111 Sec 1(d) Constitution.

112 Sen (1999) (n 3) 75. For the importance of explicitness under a transformative constitution, see Van der Berg (2017) (n 8) 576.

113 Mureinik (n 13) 32; Pieterse (n 18) 156, 161, 165.

*NO v The Premier of the Eastern Cape*<sup>114</sup> the High Court elucidated the benefits of structural interdicts:<sup>115</sup>

[Structural interdicts] have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst it has also assisted the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties.

To constitute a capabilities approach to remedies, explicitness should therefore be observed both by a court in granting a structural interdict and by the state in devising a new allocative plan subject to approval by the relevant court.

#### 4.2.1 *Judicial explicitness*

A participatory remedy directed at informational broadening in itself may not constitute effective relief. A capabilities approach to remedies requires meaningful engagement and similar procedural remedies to be accompanied by explicit normative guidelines and the retention of judicial supervision.<sup>116</sup> Liebenberg argues for the provision of explicit normative guidelines where meaningful engagement is ordered:<sup>117</sup>

If not combined with sufficient normative interpretative guidance on what the particular constitutional right requires of the duty-bearers, other groups similarly placed may not be able to derive the systemic benefits which should flow from constitutional rights litigation ... The potential radiating benefits of constitutional litigation will not be generated as organs of state will be left with insufficient guidance regarding the normative parameters and objectives of engagement processes – parameters and objectives which should be inextricably linked to the substantive interests and values which the relevant rights were designed to protect.

By combining an explicit order with an ongoing process of participation and the retention of supervision, provision is also made for the adaptation of the order in light of information yielded by the process of engagement described above. Michelman explains revisability in the context of democratic experimentalism:<sup>118</sup>

As the discursive benchmarking moves along and the emerging answers gain public recognition and authorization, the court might turn up the heat on deployment of its powers of review. At a relatively early stage, what

114 2006 JDR 0346 (B).

115 *Magidimisi* (n 114) para 32.

116 See Liebenberg (n 107). See further L Chenwi 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*' (2009) 2 *Constitutional Court Review* 371 389-391 for criticism of the Constitutional Court's failure to set normative parameters and its 'sheer unwillingness' to make determinations on substantive issues in *Olivia Road* (n 98).

117 Liebenberg (n 107).

118 FI Michelman 'Constitutionally binding social and economic rights as a compelling idea: Reciprocating perturbations in liberal and democratic constitutional visions' in HA García, K Klare & LA Williams (eds) *Social and economic rights in theory and practice* (2015) 277 288-289.



the court presumes to dictate will be agendas of questions to be addressed and answered by one or another stakeholder group or class. At later stages, the court starts calling for substantive compliance with the emergent best-practice standards ... The screws tighten on what can count as cogent or 'reasonable'. The court serves as arbiter but it never has or claims a door-closing last word.

The need for the reassessment of initial judgments regarding the effective realisation of capabilities is also recognised by Sen, who acknowledges that initially unforeseen consequences may need to be addressed.<sup>119</sup> The requirements for explicitness and informational broadening through participatory processes thus dynamically interact with each other. This symbiotic relationship can be catered for by the ongoing nature of the structural interdict.

In its meaningful engagement jurisprudence, the South African Constitutional Court has sought to provide explicit parameters to guide the engagement between government and affected parties, especially in the housing context. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*<sup>120</sup> (*Joe Slovo*) the Court issued a detailed supervisory order that sought to regulate the minutia of the ultimate objects of the process of meaningful engagement *in casu*. As Ray observes, *Joe Slovo* enabled courts to control the meaningful engagement agenda.<sup>121</sup>

In *Section 27 v Minister of Basic Education*<sup>122</sup> the High Court was approached in an attempt to solve the structural failure to realise the right to basic education in the Limpopo province. *In casu*, the widespread non-delivery of textbooks to schools was at issue. The Court commenced its judgment by elaborating the normative importance of the right to education. Importantly, the Court recognised that education was vital for people to be able to reach their potential, and contributed to the general upliftment of society.<sup>123</sup> Having provided a rich normative framework for the adjudication of the matter at issue, the Court held that the Department of Basic Education's failure to deliver textbooks to schools in Limpopo constituted an infringement of the right to basic education.<sup>124</sup> The Court proceeded to grant the relief requested by the applicants in the form of a detailed structural interdict, which included ordering the department to devise a comprehensive remedial plan to address the severe educational shortcomings that resulted from a lack of textbooks. Without prescribing the content of the plan, the Court provided explicit guidelines outlining the contours

119 Sen (2009) (n 3) 106.

120 2010 (3) SA 454 (CC).

121 Ray (n 95) 112. See further Van der Berg (n 50).

122 2013 (2) SA 40 (GNP).

123 *Section 27* (n 122) paras 1-4.

124 *Section 27* para 32.

of the plan.<sup>125</sup> In providing these explicit guidelines, the Court's approach was wholly congruent with a capabilities approach to remedies. However, the department did not comply with the initial order and a further order was necessitated. Nonetheless, the implicit utilisation of a capabilities approach to remedies yielded valuable structural benefits such as the mobilisation of public opinion, shedding light on the crisis in education experienced in South Africa, and highlighting accountability and efficiency deficits in government.<sup>126</sup>

Even where state compliance cannot be guaranteed, a capabilities approach to remedies transforms a court into a deliberative platform where government action can be subjected to public scrutiny. Explicitness in the form of substantive, normative reasoning is critical for the promotion of meaningful public scrutiny, debate and subsequent mobilisation of non-judicial actors. A capabilities approach to remedies can thus facilitate structural reform, even if it is initially ineffective in extracting compliance from a recalcitrant government.<sup>127</sup>

#### 4.2.2 *State explicitness*

Just as a reviewing court should adhere to the capabilities tenet of explicit reasoning, the state also should explicitly indicate how its remedial allocative plan complies with a relevant court order. *Hlophe v City of Johannesburg Metropolitan Municipality*<sup>128</sup> is an example of the state failing to display explicitness in its remedial action. In this case the City of Johannesburg was obliged to provide alternative accommodation to residents of a privately-owned building prior to eviction.<sup>129</sup> The matter came to be heard by Satchwell J following the City's non-compliance with two previous court orders.<sup>130</sup> Both previous orders had required the City to provide detailed reports

125 F Veriava *The 2012 Limpopo textbook crisis: A study in rights-based advocacy, the raising of rights consciousness and governance* (2013) 38.

126 As above.

127 In contrast, when the issue of textbook delivery again came before the Court in *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP), the Court declined to issue a structural interdict. Given the litigation history in this matter, the recalcitrance and intransigence of the Department and the implication of a fertile capability (the deprivation of which can have dire consequences for the freedom, dignity and equality of learners without textbooks), the Court's approach *in casu* eschews a capabilities approach to remedies and cannot be supported.

128 2013 (4) SA 212 (GSJ).

129 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) confirmed the state's obligation to provide alternative accommodation where people are evicted from privately-owned buildings.

130 *Hlophe v City of Johannesburg Metropolitan Municipality* GSJ 12-06-2012 Case 20127/2011 and *Hlophe v City of Johannesburg Metropolitan Municipality* GSJ 13-02-2013 Case 48103/2012 and 20127/2011.

regarding the 'nature and location' of the temporary accommodation the City was obliged to provide.<sup>131</sup> However, the City concluded in its first resulting report that it would be impossible for it to comply with the order to provide alternative accommodation due to 'the lack of available buildings and financial and other resources'.<sup>132</sup> The second order<sup>133</sup> again required the City to file a further report, and stated in detail what information the report was to contain.<sup>134</sup> When the City responded by filing another inadequate report, Satchwell J proceeded to condemn the lack of explicitness displayed by the City.<sup>135</sup>

[T]he City was ordered to detail certain specified information viz 'the nature and location of the accommodation to be provided'. This both reports failed to do. General elucidation of accommodation provided to other persons is of no assistance to the court; information about other buildings which are not available for use in housing these occupiers does not take resolution of this matter any further; mission and vision and policy development are irrelevant to the particular task ordered by the court; budgetary and asset constraints were not sought by the court.

The Court accordingly ordered a further report to be filed, and spelled out the *minutiae* of what the report should contain in the hope that explicit instructions 'might focus the minds of both politicians and functionaries on the work needed to be done by the City to meet its Constitutional obligations'.<sup>136</sup> The City finally responded by tendering alternative accommodation.<sup>137</sup> Unfortunately, whereas recalcitrance on the part of the state is the most common justification for granting a structural interdict, neither explicitness – nor effectiveness – can always be extracted from intransigent officials.

The City subsequently lodged an appeal with the Supreme Court of Appeal claiming that a *mandamus* directing functionaries to perform their constitutional obligations is never appropriate.<sup>138</sup> The Supreme Court of Appeal rejected this argument<sup>139</sup> but proceeded to set aside the detailed reporting order issued by Satchwell J on the basis that only the nature and location of alternative accommodation were at issue before the court *a quo*.<sup>140</sup> However, the Supreme Court of Appeal's further finding that the reporting order breached the

131 *Hlophe* (n 130) para 11.

132 *Hlophe* para 13.

133 *Hlophe* (n 130).

134 *Hlophe* para 15.

135 *Hlophe* para 21.

136 *Hlophe* para 27. An interim order to meaningfully engage with the applicants was issued in *Hlophe* (n 130).

137 For a summary of this protracted litigation, see SERI 'Hlophe and Others v City of Johannesburg and Others ("Hlophe")' (2013) SERI-SA <http://www.seri-sa.org/index.php/19-litigation/case-entries/196-hlophe-and-others-v-city-of-johannesburg-and-others-hlophe> (accessed 15 September 2014).

138 Respondent's heads of argument in *City of Johannesburg v Hlophe* SCA Case 1035/2014.

139 *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) para 26.

140 *City of Johannesburg* para 27.

separation of powers in that it purported 'to give directions to the City in respect of what is required to comply with its constitutional obligations to provide temporary accommodation to homeless persons in general' cannot be supported.<sup>141</sup>

### 4.3 Supervision

The effectiveness of a remedy can be assessed by determining to what extent it can realise the capabilities underlying the infringed socio-economic right. Capability realisation, therefore, is the measure against which the effectiveness of a remedy can be judged. In *Fose*<sup>142</sup> the Constitutional Court echoed the need for effective remedies:<sup>143</sup>

In our context an appropriate remedy must mean an *effective* remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced ... *The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.*

By adopting a capabilities approach to remedies, courts are able to discharge their responsibility by shaping innovative, effective remedies. However, participatory processes aimed at informational broadening and explicit reasoning are not sufficient. In addition, the retention of supervision is a crucial element of an effective remedy.<sup>144</sup>

Supervisory jurisdiction is not only justified where the state has demonstrated intransigence, but also where basic socio-economic capabilities are imperilled by unreasonable resource allocation decisions. Without an effective remedy, 'irremediable' damage can result to those whose capabilities are being deprived as a result of the right-infringement.<sup>145</sup> By monitoring the various participatory processes aimed at informational broadening, courts can ensure that relevant capabilities and concomitant allocative needs are properly identified in a situation of bargaining parity.<sup>146</sup> Furthermore, the continued involvement of the court allows it to adapt its orders based on the information that comes to light during the process of engagement. Supervision is also necessary to ensure that revised resource allocation decisions are not only aimed at capability realisation for the parties to the litigation, but also to others similarly situated.<sup>147</sup>

Courts can accordingly discharge their constitutional duty to devise effective remedies by compelling the state to report back to the court

---

141 *City of Johannesburg* para 28.

142 *Fose* (n 88).

143 *Fose* (n 88) para 69 (my emphasis).

144 Rodríguez-Garavito (n 62) 1691-1692. The retention of supervision is made possible by the broad provision made for remedies in sec 172 of the Constitution and by sec 8 of PAJA.

145 Roach & Budlender (n 45) 334.

146 Liebenberg (n 107).

147 As above.

regarding the steps it has taken to formulate reasonable allocative decisions in consultation with a broad range of stakeholders. Such plans must be made subject to judicial approval, and should facilitate further public scrutiny. In *Allpay II*<sup>148</sup> a reporting back order, and not a structural interdict, was granted. State reports thus were not subjected to judicial approval. The subsequent discharge of judicial supervision, based on false reassurances provided by the Department of Social Development, almost led to a catastrophe in social grant administration,<sup>149</sup> thereby highlighting the crucial importance of retained judicial supervision where systemic socio-economic rights infringements are at issue. In appropriate cases, a court may revise its order and adapt its initial explicit normative guidelines in light of the information garnered during the process of engagement. Where participatory processes have not been sufficiently adhered to, a court can issue explicit instructions compelling the state to rectify defects in relation to its engagement efforts. In so doing, the state can remedy any *lacunae* in its allocative plan that resulted from the participation deficit in the engagement process.

Where the state files a report regarding its progress in formulating and implementing reasonable resource allocation decisions, other stakeholders should be granted the first opportunity to comment on such a report. This may to some extent alleviate the supervising court's burden. The assistance of organisations or *ad hoc* commissions<sup>150</sup> may also be solicited in order to supervise the implementation of the order, with the court only approving plans or issuing further directions at protracted intervals.<sup>151</sup> The retention of supervision can thus catalyse a truly collaborative partnership between the courts, the state, and all stakeholders that have an interest in reasonable resource allocation decisions aimed at socio-economic capability realisation.

## 5 Conclusion

A capabilities approach to remedies postulates relief that may effectively vindicate the capabilities underlying a socio-economic right that was infringed upon through disproportionate resource allocation. The effectiveness of a remedy thus can be assessed against the

148 *Allpay II* (n 1).

149 *Black Sash I* (n 1).

150 For the use of commissions in India to monitor the implementation of remedies, see Bhagwati (n 84) 575-577; Cassels (n 84) 500 506.

151 A supervising court must explicitly define roles and functions to avoid the confusion that resulted when the South African Human Rights Commission agreed to 'monitor' state compliance with its constitutional obligations in the wake of the judgment in *Grootboom* (n 28). See Pillay (n 29) 14. See further M Ebadolahi 'Using structural interdicts and the South African Human Rights Commission to achieve the judicial enforcement of economic and social rights in South Africa' (2008) 83 *New York University Law Review* 1565 1602-1605.

measure of capability realisation. Furthermore, in this article it was argued that a capabilities approach to remedies requires the incorporation of three features that interact with each other in the common pursuit of ensuring effectiveness. These are participation aimed at broadening the information available to the court and the state for the formulation of an effective remedy; explicitness in the provision of normative guidelines by the court and the formulation of a remedial plan by the state; and the retention of supervision by the court. It was further shown that the structural interdict can be designed so as to include all three these crucial capabilities-based features.

Moreover, a capabilities approach to the design of a structural interdict is capable of substantially addressing concerns that courts are constitutionally and institutionally incompetent fora for the adjudication of polycentric resource allocation decisions. The capabilities precept to broaden the information available to the state to the greatest extent possible in revising its allocative decisions grants the state sufficient latitude to devise its own allocative plans within its spheres of competence. A court thus provides normative parameters in which such remediation must occur, but leaves the details of allocative decisions to the branches of government best equipped to grapple with matters of resource allocation. Furthermore, the flexibility inherent in a participatory remedy coupled with on-going judicial supervision enables polycentric consequences to be dealt with sequentially, as they arise. Polycentric effects are also minimised in proportion to the range of interests identified and represented through a process of informational broadening.

A capabilities approach to remedies thus aims at institutionalising capabilities-focused resource allocation decisions for the benefit of all those whose socio-economic rights remain unfulfilled.

## An empirical study of the early cases in the pilot equality courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

*Louis Botha*

Associate, Cliffe Dekker Hofmeyr, Johannesburg, South Africa

*Anton Kok*

Associate professor, Department of Jurisprudence, Faculty of Law, University of Pretoria, South Africa

<https://orcid.org/0000-0002-2746-2286>

### Summary

*In this article the authors consider the early complaints lodged at the pilot equality courts. Since their inception the equality courts have been underutilised. These early complaints are considered against three themes relating to effective legislation: (1) the legislature must be realistic; (2) different groups of people will be influenced in different ways by a new law; and (3) Parliament should see to it that its laws are popularised. In conclusion the authors offer recommendations on how the utilisation of the equality courts may be improved, among others that equality court personnel should be adequately trained; one forum should be created where any discrimination-related complaint may be lodged; plain language promotional materials should be developed; the parts of the Act that relate to the promotion of equality must come into force; and the workings of the equality courts should be included in the Life Orientation curriculum in schools.*

---

\* BCom LLB LLM (Pretoria); [louis.botha@cdhlegal.com](mailto:louis.botha@cdhlegal.com)

\*\* BCom LLB LLM LLD (Pretoria); [anton.kok@up.ac.za](mailto:anton.kok@up.ac.za)

**Key words:** *Promotion of Equality and Prevention of Unfair Discrimination Act; equality courts; effective legislation; societal transformation*

## 1 Introduction value of research

South Africa seemingly is the only African country that has put in place an all-encompassing legislative framework combating state and private discrimination based on an open-ended list of prohibited grounds. (An exhaustive scoping exercise of African anti-discrimination legislation falls outside of the domain of the article.) Many African countries' constitutions contain anti-discrimination principles, but these are usually not mirrored in domestic laws. The Regional Office for Southern Africa (ROSA) of the United Nations High Commissioner for Human Rights had previously indicated that it would have worked towards achieving an 'increased number of national anti-discrimination and equality legislation' by 2013.<sup>1</sup> Some African countries have enacted labour legislation that prohibits discrimination on a number of grounds.<sup>2</sup> For example, Kenya has passed legislation to prohibit discrimination based on race or ethnicity in employment in its National Cohesion and Integration Act and its Employment Act.<sup>3</sup> Some African countries have criminalised discrimination,<sup>4</sup> which South Africa has not (yet) done. As at 31 July 2014, 27 sub-Saharan African countries had adopted HIV-specific legislation – not all these would have been anti-discriminations laws – to address the legal issues raised by the HIV and AIDS epidemics.<sup>5</sup> On the other hand, many African countries have passed deeply problematic laws targeting lesbian, gay, bi-sexual, transgender and intersex (LGBTI) communities.<sup>6</sup>

In this article we focus on one of the South African legislative tools – the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>7</sup> – and examine the early cases lodged at the pilot equality courts

1 <https://www.ohchr.org/EN/Countries/AfricaRegion/Pages/SouthernAfricaSummary10.aspx> (accessed 25 January 2019).

2 Eg Botswana: <https://allafrica.com/view/group/main/main/id/00011743.html> (accessed 25 January 2019).

3 [www.equalrightstrust.org/ertdocumentbank/Kenya\\_Part\\_3\\_Legal.pdf](http://www.equalrightstrust.org/ertdocumentbank/Kenya_Part_3_Legal.pdf) (accessed 25 January 2019).

4 Eg Mauritania: <https://www.cnbcafrica.com/apo/2018/02/01/mauritania-un-rights-experts-urge-immediate-reform-of-flawed-antidiscrimination-law/> (accessed 25 January 2019); Tunisia: <https://theArabweekly.com/tunisia-become-second-african-country-legally-prohibit-racial-discrimination> (accessed 25 January 2019); and Rwanda: <https://www.newtimes.co.rw/section/read/210899> (accessed 25 January 2019).

5 [http://www.unaids.org/en/resources/presscentre/featurestories/2015/february/20150211\\_nigeria\\_law](http://www.unaids.org/en/resources/presscentre/featurestories/2015/february/20150211_nigeria_law) (accessed 25 January 2019); PM Eba 'HIV-specific legislation in sub-Saharan Africa: A comprehensive human rights analysis' (2015) 15 *African Human Rights Law Journal* 224.

6 <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon> (accessed 25 January 2019).

7 Act 4 of 2000 (Equality Act).



that were established in terms of this Act. The lessons taken from this very modest survey may be of assistance to African legislatures that may be considering similar broad-based anti-discrimination laws.

The ostensible aims of the Equality Act are to facilitate the socio-economic transformation of South Africa, and to create a caring South African society.<sup>8</sup> Parliament created equality courts to realise this vision. The Equality Act explicitly targets the effects of past discrimination, which arguably is the reason for the vast disparities in wealth, income and resources in South Africa. The drafters of the Equality Act assumed that the equality courts would effectively address a significant number of incidents of unfair discrimination. While the equality courts have certainly been utilised since their inception in 2003, the number of complaints lodged at these courts fell well short of the target initially forecast.<sup>9</sup>

From the limited information that we were able to obtain, we determined to what extent the Equality Act and the equality courts have contributed to the project of transforming South African society. We conclude by making a number of proposals on how the Equality Act's ability to achieve its transformative aims may be strengthened.

The Act has as one of its goals the establishment of forums where discrimination disputes may be raised and resolved.<sup>10</sup> A number of provisions in section 2 of the Act, which contains the objects of the Act, may be read to create this aim.<sup>11</sup> Section 2(b)(i) states that the Act aims at giving effect to the letter and spirit of the Constitution, in particular 'the equal enjoyment of all rights and freedoms *by every person*'.<sup>12</sup> This subsection anticipates a procedure whereby individual claimants will be able to ensure the enjoyment of their human rights.<sup>13</sup> Section 2(b)(iv) contains another object of the Act, namely, 'the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution'. This subsection, read with sections 2(d),<sup>14</sup> 2(f),<sup>15</sup> 4(1)(b),<sup>16</sup> 16 and the regulations to the Act, makes it clear that the Act aims at the creation

---

8 In earlier research Kok tabulated a number of possible purposes of anti-discrimination legislation. A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24 *South African Journal on Human Rights* 445 451.

9 In the Draft Project Plan drafted by the Chief Director, Transformation and Equity and the Chief Director, Legislation in the Department of Justice and Constitutional Development (copy in possession of authors), it was estimated that in the first year of operation 1,5 million people would use the dispute resolution mechanisms established in terms of the Act.

10 JA Kok 'A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' LLD thesis, University of Pretoria, 2008 9.

11 As above.

12 Our emphasis.

13 Kok (n 10) 9.

14 '[T]o provide for procedures for the determination of circumstances under which discrimination is unfair'.

15 '[T]o provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed'.

of inexpensive, accessible, informal dispute resolution mechanisms in the format of equality courts.<sup>17</sup>

To assess the potential impact of these courts, we conducted a telephonic survey of the 47 so-called 'first phase equality courts', all of which are situated at magistrate's courts, as identified by the Department of Justice and Constitutional Development (DOJ) on its website.<sup>18</sup> This telephonic survey was conducted during the second half of 2009 as part of a post-doctoral research project to identify those equality courts that had received the most complaints with a view to approach these courts, to gain access to the case files and to conduct further empirical research.<sup>19</sup> The researcher who contacted these pilot courts initially attempted to use a set list of questions on the number and nature of the complaints lodged at these courts: How many equality court cases have been heard/complaints laid since the court's inception; how many cases have been heard/complaints have been laid in each year since inception; what were these cases about, i.e. did they relate to discrimination/hate speech/harassment and on which prohibited ground(s); has the court handed down any judgments? However, as most of these pilot courts could not offer much information, he then proceeded to base his questions on whatever information these courts could offer. The authors did not regard the nature of the information sought as research on human subjects and therefore did not apply for ethical clearance at the Faculty of Law's research ethics committee. All of the information sought would have been a matter of public record available at each of the courts. Instead of incurring substantial costs to travel to each of the courts to draw the equality court files and tabulate the available information, the researcher telephoned each of the courts to obtain whatever information was available. In many instances the researcher could not speak to the equality court clerk and had to make do with whoever was available to speak to. In some instances no trained equality court clerk was available. Some of the staff members contacted offered off-the-cuff anecdotal views on the low number of complaints lodged at the equality courts. We included these views in this article to enrich the analysis of the data obtained but anonymised their responses. No systematic survey of clerks' views was undertaken or intended. Where we do mention some of these views, it is to offer an example or to elucidate a point we make in the article. We tabulate below the findings of this telephonic survey and compare it to (i) the

---

16 'In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply: ... (b) access to justice to all persons in relevant judicial and other dispute resolution forums.'

17 Kok (n 10) 10.

18 [http://www.doj.gov.za/EQCact/eqc\\_eqc%20structures.htm](http://www.doj.gov.za/EQCact/eqc_eqc%20structures.htm) (accessed 18 December 2009). See also [http://www.pmg.org.za/docs/2003/appendices/030404dept\\_justice.htm](http://www.pmg.org.za/docs/2003/appendices/030404dept_justice.htm) (accessed 10 September 2014) where reference is made to the establishment of 47 first-phase equality courts.

19 We will refer to this survey as the '2009 survey'. At the time of writing the authors were in possession of 994 equality court case files.

findings of a survey conducted by Kok in 2005 as part of his doctoral thesis;<sup>20</sup> and (ii) a survey conducted by the South African Human Rights Commission (SAHRC) in 2005 and 2006.<sup>21</sup>

The findings of these surveys, along with feedback provided by court officials during the 2005 and 2009 surveys, are then assessed with reference to three of the four criteria of effective legislation as proposed by Kok,<sup>22</sup> namely, that (i) the legislature must be realistic;<sup>23</sup> (ii) different groups of people will be influenced in different ways by a new law;<sup>24</sup> and (iii) to have any hope of legislating effective laws, Parliament should see to it that its laws are popularised.<sup>25</sup> The fourth criterion, that 'the values (implicitly) underpinning a given new law should not run too far ahead of society's contemporaneous *mores*',<sup>26</sup> could not be accurately assessed due to the methodology used for gathering the information set out below.

---

20 Kok (n 10) 623-642 ('2005 survey'). The 2005 survey focused on the 60 pilot courts as listed in a booklet entitled *Equality for all* published under the auspices of the Department of Justice. These courts differ from the pilot courts listed on the Department of Justice's website when the 2009 survey was conducted.

21 See Kok (n 10) 623-642 ('SAHRC survey').

22 A Kok 'The potential effectiveness of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2008) 33 *Journal for Juridical Science* 42.

23 The goal of the law maker must be realisable through law; the required change must be able to be implemented and to be strongly enforced; rules will be enforced that are highly visible, cost little and do not affect competition; enforcement agents must be committed to the behaviour required by the law, even if not to the values implicit in it; a law that does not establish a clear standard or that is ambiguous or too flexible will facilitate avoidance; the change-inducing law must provide for effective remedies; to have any hope of effective enforcement, the state driving social change must be relatively powerful, and must have significant technological surveillance facilities available; the enforcement mechanism should consist of specialised bodies and the presiding officers of these enforcement mechanisms must receive training to acquire expertise.

24 Large organisations with specialised personnel that are well-equipped to interpret rules will probably be committed to implementing new laws, but small businesses, individual home owners, small landlords and individuals will probably not have sufficient knowledge, and implementation on this level will be very difficult to achieve; laws put in place to assist or protect the economically weak will have limited impact; laws such as these should be complemented by active and effective non-governmental support.

25 The use of the law will increase if the educational system is used in a well-directed way as a 'nationally inclusive socialising agent'; the required change must be communicated to the large majority of the population; laws that include incentives to encourage lawyers to use the new law and to inform clients of the existence of the new law, are more likely to be effective; the state driving social change must be able to rely on vast mass media communication.

26 The purpose behind the legislation must at least to a degree be compatible with existing values; laws set up in opposition to powerful economic values and interests may also (eventually) fail; laws that facilitate action that people want to take or that encourage voluntary change is likely to be more effective than compulsory change; models or reference groups must be used for compliance; laws are more effective when introduced to change emotionally neutral and instrumental areas of human activity; law must make conscious use of the element of time in introducing a new pattern of behaviour.

To date very little empirical research has been undertaken to assess the (potential) effectiveness of the equality courts. Kruger conducted a study in 2007 and 2008 regarding the number of complaints, relating to racism, that had been received by the equality courts situated in Pretoria, Johannesburg, Durban and Cape Town in order to determine how the Act was implemented, and found that relatively few complaints had been made to the equality courts since their inception and that this limited the opportunities of these courts to establish themselves as meaningful catalysts of social change.<sup>27</sup> The Refugee Rights Unit at the University of Cape Town, in approaching the equality court on two occasions on behalf of victims of xenophobic violence, also remarked that based on their experience, in practice it seemed that these courts were being underutilised.<sup>28</sup> This article makes a modest contribution to the empirical research that has been done regarding the (potential) effectiveness of the equality courts and should be used as a basis for further and more current empirical studies to examine whether any progress has been made in addressing the problems hampering the potential effectiveness of the Act that were identified here.

## 2 Provincial breakdown: Findings from the 2005, 2009 and SAHRC surveys

In this part we set out the findings of the 2009 survey along with the findings from the 2005 and SAHRC surveys for courts in each province. Where no or limited information was forthcoming or if a court forming part of the 2009 survey did not form part of the other two surveys, this is also indicated. The phrase 'not yet established' indicates that the equality court in question had not yet been established when a particular survey was conducted.

---

27 R Kruger R 'Small steps to equal dignity: The work of the South African equality courts' (2011) 7 *Equal Rights Review* 27-39.

28 J de Jager 'Litigating the rights of refugees in the equality courts' Working Paper Series (Paper 3 of 2011) University of Cape Town, Refugee Rights Unit 5.

**Table 1: Summary of the findings from the 2005, 2009 and SAHRC surveys**

Province	Court	Number of complaints received		
		2009 survey	2005 survey	SAHRC survey
KwaZulu-Natal	Pietermaritzburg	27 (6 in 2009)	1	5
	Verulam	4 <sup>a</sup>	4	9
	Ngutu	0	0	0
	Ladysmith	1	1	0
	Port Shepstone	1 (in 2009)	Not part of survey	Not part of survey
	Durban	No information forthcoming <sup>b</sup>	150	No information forthcoming
Western Cape	Atlantis	2	2	2
	Blue Downs	1	Not listed as equality court	1
	George	1	1	1
	Worcester	2 (both in 2009)	2	0
	Kenhardt	0	1	0
Northern Cape	De Aar	0	1	2
	Carnavon	0	Not part of survey	Not part of survey
	Postmasburg	0	Not part of survey	0
	Upington	0 in 2009 <sup>c</sup>	Number does not exist	17
	Calvinia	0	Not part of survey	0
	Polokwane	3 (2 in 2009)	1	No information forthcoming
Limpopo	Makhado	1 (in 2009)	1	1
	Bela-Bela	3	0	No information forthcoming
	Mapulaneng	No equality court	0	No information forthcoming

	Mokerong	No equality court	9	No information forthcoming
	Ritavi	3 (in 2009)	0	3
Free State	Bethlehem	4	1	No information in survey
	Odendaalsrus	2	0	Not part of survey
	Kroonstad	0	0	No equality court
	Jagersfontein	No equality court	0	Not part of survey
North West	Potchefstroom	31 (14 in 2009)	7	37
	Bafokeng	1	No information forthcoming	3 <sup>d</sup>
	Vryburg	0	2	0
Eastern Cape	Port Elizabeth	No information forthcoming	No information forthcoming	Not part of survey
	Somerset West <sup>e</sup>	No information forthcoming	Not part of survey	Not part of survey
	Zwelitsha	0	0	Not yet established
	Aliwal North	1	No information forthcoming	Not part of survey
	Umzimkhulu	0	No information forthcoming	Not part of survey
	Elliotdale	No equality court	0	Not part of survey
Gauteng	Wonderboom	No equality court	0	0
	Kempton Park	No equality court	2	6
	Johannesburg	61 (37 in 2009) <sup>f</sup>	No information forthcoming <sup>g</sup>	54
	Germiston	14	No information forthcoming	3
	Randburg	8 (all in 2009)	0	Not part of survey

	Pretoria	45 in 2009 <sup>h</sup>	8	77 <sup>i</sup>
Mpumalanga	Nkomazi	0	Not part of survey	Not part of survey
	Eerstehoek	19 (13 in 2009)	0	Not part of survey
	Evander	No equality court	0	1
	Middelburg	42 (23 in 2009)	2	8
	Kwa-Mhlanga	0	Not part of survey	Not part of survey
	Secunda	No equality court	Not part of survey	Not part of survey
Total		276	196	230

- a. We were told that four judgments had been handed down but were not given the total number of complaints received.
- b. We were later told that 64 complaints were received in 2009.
- c. No information was provided for previous years.
- d. Survey indicates that the clerk had a new register for 2006 and that there were no records for 2004 and 2005.
- e. Somerset West is actually situated in the Western Cape, but was listed as falling in the Eastern Cape. This is most probably a mistake that was made in the *Equality for all* booklet. Somerset East was one of the courts that formed part of the 2005 and SAHRC surveys.
- f. We were only given information from complaints received in 2008 and 2009.
- g. The relevant member of staff refused to provide Kok's research assistant with any information and argued that such a request should be channelled via the Magistrate's Commission.
- h. No information was provided to us for previous years.
- i. Referred to as 'Pretoria Central' court in this survey.

As far as reporting by the Department of Justice is concerned, the number of equality court cases for April 2008 to March 2009 (financial year) was 447, according to the Department's Annual Report.<sup>29</sup> A breakdown per province, which is not in the Annual Report, reveals the following:<sup>30</sup>

Provinces	1 <sup>st</sup> Quarter	2 <sup>nd</sup> Quarter	3 <sup>rd</sup> Quarter	4 <sup>th</sup> Quarter	TOTAL
1 Eastern Cape	08	01	01	05	15

29 This number is for all the equality courts countrywide and not only those that formed part of our survey.

30 This table was provided to us by Ms Lynette Bios, who was a Senior State Law Advisor in the Department of Justice when she provided it to us in December 2009.

2 Free State	00	02	01	00	03
3 Gauteng	03	19	10	29	61
4 Kwazulu-Natal	35	26	11	21	93
5 Limpopo	01	02	00	00	03
6 Mpumalanga	46	48	29	68	191
7 Northern Cape	15	02	01	00	18
8 North West	06	05	05	07	23
9 Western Cape	20	05	08	07	40

As not all the courts in the 2009, 2005 and SAHRC surveys could provide us with accurate information, it is difficult to say how many complaints had been received by each court. However, it could probably be safely stated that based on the information from these surveys and from the DOJ's Annual Report, the courts were underutilised and, with the benefit of hindsight, the drafters of the Act, who envisaged that 1,5 million people would use the equality courts in the first year of the Act's operation,<sup>31</sup> were unrealistic.

### 3 Analysis: Why were the equality courts not being utilised?

In this part of the article we identify possible reasons for the underutilisation of the equality courts based on relevant criteria for effective legislation. The information in this section, unless otherwise indicated, was obtained in the course of conducting the 2009 survey.

#### 3.1 The legislature must be realistic

It is crucial that equality clerks, equality magistrates and court personnel in general are committed to assisting complainants when they approach these officials. At two courts in Gauteng we found that the equality court clerks either went to great trouble to assist complainants to complete the necessary complaint forms or to make a point of telling people about the equality court when they came to the magistrate's court where the equality court is situated. In other instances the court personnel did not adopt this attitude. In one instance, a clerk told us that limited marketing had been done for fear of equality courts being 'abused', and at another court the supervisory official we spoke to indicated that the Act had not had the desired effect as equality clerks were not very willing to go out into the community and promote the Act. Where such an attitude of unwillingness prevails, the Act will not have its intended effect.

31 This view was stated on page 6 of the Draft Project Plan drafted by the Chief Director, Transformation and Equity and the Chief Director, Legislation in the Department of Justice and Constitutional Development; see Kok (n 10) 99-100.



In theory specialised enforcement bodies – equality courts – had been set up across the country, but it is questionable whether presiding officers had received adequate and sustained training.<sup>32</sup> Presiding officers<sup>33</sup> and equality clerks<sup>34</sup> are required to complete a training course in terms of the Act before they can be appointed to act in these capacities. A case heard by the Bethlehem equality court, which was incorrectly referred to the civil court due to the magistrate indicating that the court could not order the *quantum* of damages sought by the complainant, is a possible example of inadequate training as section 21(2)(d) of the Act gives any equality court the power to award damages or compensation in favour of the complainant, and as the Act has done away with the ordinary monetary limit on magistrate's courts. Even if the amount requested exceeded the monetary jurisdiction of a magistrate's court, a magistrate's court sitting as an equality court can still grant such an amount of damages in favour of the complainant, provided that such an order must be confirmed by a High Court that has jurisdiction over the matter, in terms of section 19(3)(a) of the Act.

Although most of the courts had trained personnel, it is problematic that many of the courts contacted during the 2009 survey did not even have an equality court or a person who was trained to perform the functions of an equality clerk. The magistrate's courts in Kempton Park,<sup>35</sup> Evander,<sup>36</sup> Mokerong, Mapulaneng, Jagersfontein,<sup>37</sup> Secunda<sup>38</sup> and Wonderboom had neither an equality clerk nor an equality court when we contacted them. The equality courts in Carnavon and Elliotdale did not have equality clerks, as they had been transferred to other courts in 2008. There was also no equality clerk in Germiston<sup>39</sup> and Polokwane<sup>40</sup> when we contacted the courts, meaning that 11 of the 47 first-phase courts that we contacted (almost 25 per cent) did not have a trained equality clerk who could deal with complaints if any were received.

Fortunately, in terms of section 17(1)(b) of the Act, the presiding officer concerned may appoint any competent officer in the DOJ to act as a clerk until a clerk has been designated or appointed in terms of section 17(1)(a) of the Act. However, this is not an ideal situation, if

---

32 Kok (n 10) 58.

33 Sec 16(2) of the Act.

34 Sec 17(2) of the Act.

35 We were told that there were offices available that would be utilised for the equality court and the family court.

36 We were told that the equality court would be set up in future. A person was sent to attend the training course for equality clerks in May 2009.

37 The court falls within the district of the Fauresmith magistrate's court, from where the equality court would operate.

38 We were told that although an equality court would be set up there, this never materialised.

39 We were told that the position was vacant.

40 Other clerks that had not completed the training course were being utilised at the equality court.

one considers the extensive and specialised role played by an equality clerk in assisting complainants to complete the complaint forms. This much is evident from paragraph 5 of the Act's regulations, which sets out the additional functions of the clerk, and particularly subparagraph 5(e), which states that the clerk must assist illiterate or disabled persons in completing the requisite documents, and subparagraph 5(f)(iv), which states that the clerk must assist an unrepresented person by, *inter alia*, reading or explaining any documentation to him or her, which could include the provisions of the Act.

From an accessibility viewpoint, it would have been better if a 'one stop shop' were created for all discrimination complaints as opposed to the current situation where workplace-related incidents are usually heard in the Labour Court in terms of the Employment Equity Act, while all other complaints are heard in the equality courts.<sup>41</sup> For the 2009 survey an Area Court Manager informed us that one of the reasons for the lack of complaints received by that equality court was that potential claimants' grievances often arose in a workplace context, meaning that it had to be dealt with by the Labour Court as opposed to the equality court. At another equality court, the clerk also opined that many people who approached the court confused labour law matters with equality court matters.

### **3.2 Different groups of people will be influenced in different ways by a new law**

In this respect, it is important to note that people's interpretation of what happens to them depends on their social surroundings and not on the law.<sup>42</sup> For instance, the Court Manager at one of the equality courts situated in a rural area believed that although a lot of discrimination takes place amongst the community, people rather reverted to traditional courts than the equality courts, because of their strong cultural roots. During the 2009 survey we found that a number of equality courts had been underutilised or not at all although people in these communities had been made aware of the equality courts.

At one of the equality courts, the presiding magistrate we spoke to stated that issues of inequality were not a problem as only black people lived in this township community. Interestingly, he mentioned that people had 'come in droves' to bring complaints in terms of the Domestic Violence Act. The magistrate's statement regarding issues of inequality is problematic, as it presumes that issues of inequality only arise where people live in a community comprised of people from different racial and cultural backgrounds. This goes against the spirit

---

41 Kok (n 10) 58.

42 J Griffiths 'The social working of anti-discrimination law' in T Loenen & PR Rodrigues *Non-discrimination law: Comparative perspectives* (1999) 315-318, as cited in Kok (n 10) 52.

of the Act, which lists 17 prohibited grounds<sup>43</sup> on which discrimination, hate speech and harassment may not take place. A number of these grounds are not related to race or culture, such as gender, disability<sup>44</sup> and sexual orientation. HIV and AIDS, although not listed as a prohibited ground, is also a ground on which discrimination can take place in such communities,<sup>45</sup> especially considering the high estimated number of people in South Africa who are HIV positive.<sup>46</sup> The magistrate's opinion is a good example of how people are not aware of the ambit and purpose of the Act and of the range of complaints that may be lodged with an equality court. At one of the rural equality courts, the Area Court Manager suggested that there might not be a need for an equality court in smaller areas. In another small-town equality court, the equality clerk indicated that people who were aware of the Act seemed to misunderstand its purpose and approached the equality court for the 'smallest things'. The clerk did not explain exactly what she meant by this, but presumably these were complaints that could not be heard by the equality court. Arguably 'the smallest things' are precisely the kind of matters that should be brought to equality courts so that courts can assist in creating a more caring South African society.

The equality courts in Worcester and Kenhardt had been approached with enquiries relating to the issue of unfair dismissal, which had to be dealt with by the Labour Court.<sup>47</sup> In Kenhardt, for example, potential complainants often confused labour-related issues

---

43 See the definition of prohibited grounds in sec 1(a) of the Act.

44 Sec 2(c) of the Act states that the Act is in particular concerned with eradicating hate speech, discrimination and harassment on the grounds of gender, disability and race.

45 HIV/AIDS can be a prohibited ground based on para (b) of the definition of prohibited grounds, which states that a ground will be a 'prohibited ground' if it (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in para (a) of the definition of prohibited grounds. Furthermore, sec 34(1) of the Act mandates the Minister of Justice to consider including HIV/AIDS status as a prohibited ground in the definition in para (a) and that the Equality Review Committee makes a recommendation to the Minister in this regard, within one year of the commencement of the Act. Thus far nothing has come of this.

46 According to the World Health Organisation, South Africa has the biggest HIV epidemic in the world and it is estimated that approximately 5,6 million people were HIV positive in 2009; [http://www.who.int/hiv/pub/progress\\_report2011/regional\\_facts/en/index.html](http://www.who.int/hiv/pub/progress_report2011/regional_facts/en/index.html) (accessed 28 November 2012).

47 Sec 157(1) of the Labour Relations Act states that the Labour Court has the exclusive jurisdiction to hear matters pertaining to the unfair dismissal of a person. Furthermore, sec 5(3) of the Act states that the Act does not apply to any person to whom and to the extent to which the Employment Equity Act 55 of 1998 applies. This provision can exclude the Equality Court's jurisdiction to hear a matter regarding unfair discrimination or harassment in the workplace, as secs 6(1) and 6(3) of the Employment Equity Act prohibit unfair discrimination and harassment respectively. See eg the judgment in *Strydom v Chiloane* 2008 (2) SA 247 (T) and Kok's criticism of the case. A Kok 'Which is the appropriate forum when hate speech occurs in the workplace: The Equality Court or Labour Court?' *Strydom v Chiloane* 2008 (2) SA 247 (T)' 2009 (24) *SA Public Law* 651.

with matters of equality, with the equality court being approached by farm workers who had been evicted from farms. Also, in Atlantis two cases were dismissed as they clearly fell outside the court's jurisdiction. At an equality court in a larger town, the clerk commented that mostly 'well-educated' people had approached the court. In similar vein, an office manager at a small-town equality court stated that the reason for no complaints being brought was, *inter alia*, that most complainants were illiterate. The Acting Court Manager at one of the courts stated that one of the reasons for the lack of complaints was that people rather brought claims that involved money. This could be seen as an unintended consequence of the Act's aim of transforming South African society through a 'changing of hearts',<sup>48</sup> as infringements of equality in terms of the Act do not involve money *per se*, although section 21(2)(d) of the Act lists the payment of damages as one of the remedies that an equality court can order. The office manager at an equality court situated in a remote and poor area suggested that approaching the equality court to address incidents of discrimination, harassment or hate speech was not a priority for residents in the area as they had other more pressing concerns.

In some instances the 2005 survey also showed how a lack of knowledge led to no complaints being brought. This occurred at the Mapulaneng equality court where the clerk stated that no complaints had been reported, *inter alia*, as people thought that you could not approach the courts for something 'as simple as' discrimination or hate speech despite the fact that discrimination was prevalent in the area due to many different ethnic groups living there, including foreigners.<sup>49</sup> The Evander equality clerk also stated that no complaints had been received as discrimination did not occur on a wide scale or that it was of a minor nature when it did take place.<sup>50</sup> The clerk at the Ritavi equality court reported that the complaints received had not been followed up due to residents not thinking that hate speech spoken by their superiors qualified as an offence and as confusion existed between the Act and the Domestic Violence Act.<sup>51</sup> What is clear from all of this is that, based on the information obtained from equality court clerks, in general the public did not seem to understand the purpose of the Act and under which circumstances the equality court could be approached.

### 3.3 Parliament should see to it that its laws are popularised<sup>52</sup>

Kok previously argued that the poor implementation of the training programme for judicial officers gave an indication that the

---

48 Kok (n 10) 44.

49 Kok 624.

50 Kok 627.

51 Kok 624.

52 What is implied here is that Parliament should play an appropriate oversight role in ensuring that the Department of Justice has proper and sustained popularisation programmes in place.

Department of Justice was not capacitated to play a meaningful role in enforcing compliance with the Act.<sup>53</sup> He also noted the serious discrepancies that existed between the findings of the 2005 survey and the SAHRC survey, which were conducted at more or less the same time.<sup>54</sup> Taking into account courts in the table above from which information was forthcoming, a comparison of the statistics from the 2005 and SAHRC surveys reveals discrepancies at the following equality courts: Pietermaritzburg, Worcester, De Aar, Upington, Ritavi, Makhado, Polokwane, Bethlehem, Potchefstroom, Vryburg, Kempton Park, Germiston, Pretoria, Evander and Middelburg. This means that at almost a third of the courts, different information was provided to Kok during the 2005 survey and to the SAHRC when conducting its survey, which could indicate that poor record keeping took place.

Similar discrepancies arose in the 2009 survey: For instance, at the Ladysmith equality court both the 2009 and 2005 surveys found that only one case had been reported, but where the 2009 survey indicated that the matter had been settled, the 2005 survey found that the matter had been referred to an alternative forum. The Wonderboom equality court reported during the 2009 survey that no equality court had been set up nor an equality clerk appointed since the court's inception in 2004, although the equality clerk reported in the 2005 survey that no complaints had been received. The George equality court indicated during the 2005 and 2009 surveys that only one case had been received but indicated different outcomes for this case, assuming that the correct information was provided to us during both surveys.

According to Motsaathebe and Mnjama, good record keeping is fundamental to the efficient operation of the legal system of a country, the administration of justice and the protection of citizens' rights.<sup>55</sup> Poor record keeping could therefore be an indication that the equality courts were not being run by court personnel in such a way as to advance the aims of the Act.

The 2009 survey also showed that 11 courts were either without an equality clerk or had no equality court whatsoever. This is a further indication of the problem of incapacity that hampered the DOJ at the time. Although no information was forthcoming from the Durban equality court during the 2009 survey, the court was extremely helpful when we approached them again during 2011 and subsequently in conducting empirical research. The 2005 survey showed that this court had dealt with approximately 150 cases from the period July 2004 to March 2006 of which 81 cases had been finalised, with 27 of these finalised cases being decided in favour of

---

53 Kok (n 10) 58.

54 Kok 57.

55 L Motsaathebe L & N Mnjama 'Managing court records: A survey of record-keeping practices in selected countries' (2009) 7 *Mousaion* 132 133.

the respondent.<sup>56</sup> This shows that there are certain courts that are well capacitated to receive and deal with complaints in a manner that promotes the objects of the Act.

Earlier research indicated that many potential users of the equality courts (individual victims of discrimination) were not aware of the courts.<sup>57</sup> Excluding the courts where incorrect numbers were provided by the DOJ and where no information was forthcoming, 20 of the 47 courts had not received any complaints whatsoever according to the 2009 survey. This means that almost half of the courts that were contacted had not received any complaints. At a number of equality courts, the court official we spoke to expressed the belief that people in the area were not aware of the Act and of the equality court due to insufficient marketing of the equality court. Some of these clerks thought that better marketing or outreach programmes might lead to more complaints being received by this court.

In some cases, public awareness campaigns did take place, but did not have the desired effect. For example, at a rural equality court the 2005 survey found that the lack of complaints received was due to a lack of awareness among the community,<sup>58</sup> but subsequent efforts to promote the equality court by advertising it in the community and by making pamphlets available in Zulu,<sup>59</sup> did not have the desired effect as no complaints had been received according to the 2009 survey. The clerk at the Wonderboom equality court indicated during the 2005 survey that no complaints had been received despite advertisements and media coverage of the court.<sup>60</sup>

---

56 Kok (n 10) 639-641.

57 Kok 69.

58 Kok 638.

59 Although we found in the 2009 survey that it was the exception rather than the rule for pamphlets or other information about the court to be made available in one of the official languages other than English, this situation must change in light of the North Gauteng High Court's order handed down in 2012, that the Act and all related paperwork has to be translated into all 11 official languages. The Court gave this order after Mr Cerneels Lourens had taken the Minister of Justice, Mr Jeff Radebe, to court for failing to make the Equality Act and its prescribed forms available in all 11 official languages at all courts. Mr Lourens contended that this failure was in violation of sec 31(2)(b) of the Act, which states that the Minister of Justice must make the Act available in all official languages within a period of two years after the commencement of the Act. P de Bruin 'Taalstryder hof toe oor wet se vorms' *Beeld* <http://www.beeld.com/Suid-Afrika/Nuus/Taalstryder-hof-toe-oor-wet-se-vorms-20120409> (accessed 21 November 2012). In court papers, the Minister conceded that at most courts the forms were available only in English and Zulu. He agreed to have the Act and all related paperwork translated into all 11 languages and this settlement was made an order of court. P de Bruin 'Oorwinning vir blinde taalvegter' *Beeld* <http://www.beeld.com/Suid-Afrika/Nuus/Oorwinning-vir-blinde-taalvegter-20120423> (accessed 21 November 2012).

60 Kok (n 10) 626.

Public awareness must arguably be maintained over the long term.<sup>61</sup> According to the DOJ's Annual Report<sup>62</sup> for the 2008/2009 financial year, more than 300 outreach workshops had been conducted in promoting the Act, the Promotion of Access to Information Act 2 of 2000 and the Promotion of Administrative Justice Act 3 of 2000.<sup>63</sup> The report also claimed to have reached more than two million readers through supplements placed in all national newspapers.<sup>64</sup> Finally, the report mentioned that educational programmes had been flighted on air using the Justice Airwaves, Khaya Legal Talk and Law on Call radio programmes, which reached over three million listeners across the country.<sup>65</sup> A ministry spokesman also stated in July 2009 that 'a number of awareness campaigns' were 'being carried out'.<sup>66</sup> If one assumes that the two aforementioned awareness campaigns reached different groups of people, approximately 5 million people were reached in total. Alternatively, at least 3 million people were made aware of the Act if one assumes that both awareness campaigns reached the same people. Therefore, it was not possible to determine the exact amount of people that had been made aware of the Act itself, but whether this was the case or not, one is inclined to say that 447 complaints in the financial year 2008/2009 is indicative of a public awareness campaign that had been ineffective.

This ineffectiveness is also evident from what we were told by some courts during the 2009 survey. In George, information sessions held with people and non-governmental organisations (NGOs) in the community did not lead to an increase in complaints with only one case being reported during both the 2005 and 2009 surveys. The court personnel at the Worcester equality court had also distributed pamphlets although this did not result in an increase in the number of complaints. At the Zwelitsha equality court no complaints had been received despite the community having been made aware of the Act through various launches that were held. Efforts by court officials at various other courts also proved to be unsuccessful. At Germiston and

---

61 Kok 53. The clerk at the Kenhardt Equality Court also stated during the 2009 survey that the Court needed to hold outreach programmes more regularly to increase the number of complaints received.

62 Department of Justice Annual Report 2008/2009, Part 2: Programme Performance 8 (Annual Report).

63 As above. These Acts are mentioned under the heading 'Develop and promote the Constitution'.

64 *Pretoria News, The Star, Daily News, Cape Argus, Daily Sun* and *Sowetan* are mentioned here.

65 Annual Report (n 71) 8-9.

66 C Mboyisa 'Equality courts will stay' *The Citizen* 13 July 2009. The equality court clerk at Kwa-Mhlanga in Mpumalanga also indicated that an equality court indaba was due to take place on 28 October 2009 where they would discuss why the court had received no complaints. This indicates that at least some attempt was being made to ensure that the equality courts are effective.

Randburg<sup>67</sup> pamphlets were handed out about the equality court at the court premises. Officials from the Verulam equality court distributed pamphlets about the equality court to and made them available at local police stations, attorneys' offices and legal aid offices. Information from one of the equality courts was conflicting as we were told that a number of outreach programmes had been held, but also that not much advertising had been done as it would lead to people abusing the equality courts. All the courts listed above saw either no increase or a very small increase in the number of complaints received. Only the equality court in Eerstehoek saw an increase in the number of complaints received compared to other equality courts – 19 complaints had been received according to the 2009 survey compared to no complaints received when the 2005 survey was conducted. Based on this information, much more needed to be done to bring the equality court's existence and availability to the attention of the general public.

The vast majority of the courts that had received no complaints whatsoever were situated in small towns with a small population. The courts situated in larger centres had received a larger number of complaints, as is evident from the fact that the courts in Pretoria, Johannesburg, Middelburg and Durban had received the largest number of complaints in 2009. However, this is not the case in all major cities as the equality courts in Pietermaritzburg and Randburg had only received a few complaints each in 2009. This indicates that there seemed to be greater awareness of the Act among people who live in larger centres, but one does get the sense that people were generally not well informed and unaware of the Act and the equality court as a dispute resolution forum. The Department of Justice needs to do more to promote the Act and the equality courts. For instance, equality courts and what constitutes discrimination or hate speech in terms of the Act can be taught to high school students by incorporating it into the life orientation course of the high school curriculum. The existence of the equality courts and examples of discrimination and hate speech should be promoted at public meeting places such as taxi ranks, as this is a form of transport utilised by a large number of individuals in South Africa, especially poor and less affluent individuals who are envisaged to be the main beneficiaries of the Act.

## 4 Conclusion

Through the creation of equality courts, the Act ostensibly has a very important role in facilitating South Africa's transformation.<sup>68</sup> The Act's

---

67 We were told by the equality clerk that the Department of Justice was slow to send him posters regarding the Act, which were to be used for marketing purposes.

68 Preamble of the Act.



objectives as well as its constitutional origin<sup>69</sup> mean that the remedies that the Act seeks to provide through the establishment of equality courts must be accessible to all.<sup>70</sup>

It is also of crucial importance for the equality courts to be easily accessible by the public and that the contact information provided to the public in the DOJ's *Equality for all* booklets and on its website is correct. In eight of the nine provinces we encountered a number of problems in contacting some of the courts during the 2009 survey due to incorrect contact information provided by the DOJ. The numbers for the Pietermaritzburg, Ladysmith, Upington, Nkomazi, Middelburg, Polokwane, Vryburg, Kempton Park, Pretoria, Port Elizabeth, Somerset West and Elliotdale equality courts were incorrect. In each instance we attempted to obtain the correct number from directory enquiries, but in the case of Port Elizabeth we were still unable to reach the equality court. The DOJ should have taken greater care to ensure that the numbers provided by it were correct in all these instances. At the end of 2009 the incorrect numbers provided for the first-phase equality courts remained on the DOJ's website.<sup>71</sup>

If government is to fulfil its commitment of making every effort to ensure that these courts are fully functional and continue to serve the public,<sup>72</sup> then correcting the mistakes such as the information provided would be a good starting point. The DOJ must also ensure that each equality court has an equality clerk appointed or designate a person to act as equality clerk, as it is bound by the Act to do so.<sup>73</sup> Only when this happens and the public makes more frequent use of the equality courts to resolve issues dealing with equality, can we say that the courts are efficient and that the Act to some extent is achieving its purpose, which the 2005, 2009 and SAHRC surveys unfortunately showed was not the case.

Subsequent to the 2009 surveys, we approached the Durban, Johannesburg and Pretoria equality courts with a view to obtaining copies of the actual case files to do more in-depth empirical research. We were able to obtain 564 of the case files from the 594 complaints heard by the Durban equality court between 2003 and 2012, only 97 case files from the Pretoria equality court<sup>74</sup> pertaining to complaints heard between 2008 and 2012, and 186 case files of the 200 complaints heard by the Johannesburg equality court between 2004 and 2012. Unfortunately, this research study confirmed that equality courts, even those in these three large cities, were still not receiving a

69 The Act was enacted pursuant to sec 9(4) of the Constitution, which states that national legislation may be enacted to prevent or prohibit unfair discrimination.

70 See sec 4(1)(b) of the Act which states that 'access to justice to all persons in relevant judicial and other dispute resolution forums' is one of the guiding principles of the Act when proceedings are instituted.

71 [http://www.doj.gov.za/EQCact/eqc\\_eqc%20structures.htm](http://www.doj.gov.za/EQCact/eqc_eqc%20structures.htm) (accessed 18 December 2009).

72 Preamble of the Act.

73 Sec 17(2)(b) of the Act.

large number of complaints after 2009. The legislature should consider amending the Act so that the equality court can also hear labour-related discrimination disputes as it might lead to an increase in the number of complaints received. A large number of complaints received by anti-discrimination tribunals in other countries were employment-related. For example, a survey of cases heard by anti-discrimination tribunals in Canada between 1996 and 2003 showed that a vast majority of the 385 complaints received were employment-related.<sup>75</sup> Finally, the Act should be translated into plain language or promotional material such as pamphlets should explain in very simple language what discrimination, hate speech and harassment are, unlike the current booklet on the Act in which the definitions of these terms are merely set out as they appear in the Act.<sup>76</sup> We submit that these changes will contribute to the public making use of equality courts more extensively and will increase the effectiveness of the Act through the public's use of equality courts. That said, the regulations and sections of the Act dealing with the promotion of equality should be operationalised as soon as possible, as this arguably is the most significant reason why the Act has not had its envisaged impact.

---

74 According to the equality clerk many of the case files for complaints brought in 2009 and before then were destroyed in a fire during 2010. See <http://www.news24.com/SouthAfrica/News/Blaze-closes-Pretoria-Magistrates-Court-20101027> (accessed 9 December 2014). However, the clerk could not give us the exact number of complaints received up to the end of 2012 and said that he also did not know where many of the case files were.

75 See Kok (n 10) 434-575.

76 <http://www.justice.gov.za/EQCact/docs/2011eqc-a5-booklet.pdf> (accessed 9 December 2014).

To cite: M Mhango 'The right to equality and access to courts for government employees in South Africa: Time to amend the Government Employees Pension Law' (2019) 19 *African Human Rights Law Journal* 337-360  
<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a16>

## The right to equality and access to courts for government employees in South Africa: Time to amend the Government Employees Pension Law

Mtendeweka Mhango\*

Professor of Law, National University of Lesotho, Roma  
<https://orcid.org/0000-0001-7976-4473>

### Summary

*This article comments on the South African Government Employees Pension Law by highlighting a constitutional defect arising out of the parallel pension regime in the country which has yet to be resolved. Since the 1996 amendments to the Pension Funds Act Law, members of pension funds governed by that Act have enjoyed the advantage of access to a specialised pension tribunal known as the Office of the Pension Funds Adjudicator, whose functions are performed by the Pension Funds Adjudicator. The problem is that members of government funds do not have access to the Office of the Pension Funds Adjudicator nor does any legislation specific to government funds make provision for a similar advantage and benefit. While this article focuses its analysis on the impugned provisions of the Government Employees Pension Law, the arguments advanced against those provisions apply with equal force to legislation establishing other government funds. The article argues that the Government Employees Pension Law is unconstitutional to the extent that it does not afford members of the Government Employees Pension Fund the advantage of and access to the dispute resolution services at the Office of the Pension Funds Adjudicator or a similar tribunal. Although this article concerns itself with the position in South Africa, the constitutional argument is relevant to other countries (in Africa and elsewhere) that have comparable legal regimes in place.*

**Key words:** *pension fund; equality; fair trial; dispute resolution; employees; pension benefits*

---

\* BA (Morehead State) JD (Michigan State) LLM (Wayne State) LLD (South Africa); [mo.mhango@nul.ls](mailto:mo.mhango@nul.ls). The author wishes to thank the reviewers for their comments.

# 1 Introduction

In the early 1990s South Africa underwent radical democratic and constitutional reforms. These reforms had a direct impact on the \$207 billion private pension funds industry.<sup>1</sup> Among the specific areas affected by these reforms are (a) the manner in which pension funds are governed by requiring equal representation between employees and employers on the boards of management;<sup>2</sup> (b) the manner in which pension disputes are resolved through the establishment of a specialised pension tribunal;<sup>3</sup> and (c) the manner in which pension benefits are designed and administered by subjecting pension funds to the Bill of Rights.<sup>4</sup> However, for the purpose of this discussion the most important impact of those reforms was the policy decision taken by the government to maintain a parallel legal regime for private pension funds. As a result of this decision, the general rule is that all private pension funds in South Africa are governed by the Pension Funds Act 24 of 1956. The exception to that rule is those private pension funds (referred to as government funds) that are governed by specific statutes unique to those government funds. This set of government funds include the Government Employees Pension Fund

- 1 Willis Towers Watson 'Global pension assets study 2017' <https://www.willistowerswatson.com/en/insights/2017/01/global-pensions-asset-study-2017> (accessed 3 May 2017).
- 2 For further discussion on the governance of pension funds in South Africa, see J Murphy 'Alternative dispute resolution in the South African pension funds industry: An ombudsman or tribunal?' (2001) 7 *Journal of Pensions Management* 27-29. See also M Mhango 'Adjudicating insurance and pension products under the South African Pension Funds Act 24 of 1956' (2014) 28 *Speculum Juris* 102-105; and C Marumoagae 'Do boards of trustees of South African retirement funds owe fiduciary duties to both the funds and fund members? The debate continues' (2012) 15 *Potchefstroom Electronic Law Journal* 554.
- 3 For further discussion, see N Jeram 'The Pension Funds Adjudicator: A jurisdictional nightmare' (2005) 38 *Industrial Law Journal* 1825; M Mhango 'Does the South African Pension Funds Adjudicator perform an administrative or judicial function?' (2016) 20 *Law, Democracy and Development* 24.
- 4 See *Sebola v Johnson Tiles (Pty) Ltd & Others* [2002] 3 BPLR 3242 (PFA) (rule formulated for an illegitimate purpose and therefore *ultra vires* and unconstitutional); *Jooste v MPF Management Services (Pty) Ltd & Others* [2000] 11 BPLR 1234 (PFA) (suggesting that the Adjudicator is empowered to strike down or rewrite pension fund rules where illegality or unconstitutionality is found); *Kransdorff v Sentrachem Pension Fund & Another* [1999] 9 BPLR 55 (PFA) (found that unreasonable withdrawal benefit rules violated the constitutional right to property); *Olivier v Mine Employees Pension Fund* [2002] 11 BPLR 4068 (PFA); *Wilson v Orion Fixed Benefit Pension Fund & Others* (1) [1999] 9 BPLR 89 (PFA); *Martin v Beka Provident Fund* [2000] 2 BPLR 196 (PFA) (the complainant who had been involved in a domestic same-sex relationship with the deceased sought payment of the spouse's pension and death benefits in terms of the rules of the fund. The rule discriminated between heterosexual partners and same-sex partners in its definition of spouse. The Adjudicator found that the discrimination on the grounds of sexual orientation was offensive and rendered the definition unconstitutional. He ordered the trustees to amend the rule accordingly.)

(GEPF);<sup>5</sup> the Post Office Retirement Fund;<sup>6</sup> and the Transnet Pension.<sup>7</sup>

One of the benefits of the current parallel pension regime is that it allows the government of the day greater control in the affairs of government funds on matters that affect the national budget. This is relevant given that most government funds, particularly the GEPF, are organised as defined benefit funds where issues of the adequacy of funding levels may have significant political and economic consequences.<sup>8</sup> In other words, at the core of the concern and the need for greater control is the fact that an employer who participates in a defined benefit fund, such as the government of South Africa in this context, guarantees the pension benefits regardless of the investment performance of government funds.<sup>9</sup> In the South African setting, this guarantee, especially in relation to the GEPF, is quite significant and justifies the parallel private pension regime to ensure greater control of government funds.

Sustaining a parallel pension regime has had the negative effect of significant omissions by the political branches of the state of South Africa to keep up with the reforms in the Pension Funds Act and other modernisation efforts applied to the increasingly dynamic private pension system. This omission has led to constitutional problems, some of which have in recent years been resolved by the judiciary.<sup>10</sup>

---

5 Established in terms of the Government Employees Pension Law, Proclamation 21 of 1996.

6 Established in terms of the Post Office Act 44 of 1958.

7 Established in terms of the Transnet Pension Fund Act 62 of 1990.

8 For a discussion of some of the funding and other challenges in public pension funds, see D Hess 'Protecting and politicising public pension fund assets: Empirical evidence on the effects of governance structures and practices' (2005) 39 UC Davis Law Review 187; F Hess & J Squire 'But the pension fund was just sitting there ...': The politics of teacher retirement plans' (2010) 5 *Education Finance and Policy* 587; T Fitzpatrick & A Monahan 'Who's afraid of good governance? State fiscal crises, public pension underfunding, and the resistance to governance reform' (2015) 66 *Florida Law Review* 1317.

9 See sec 31 of the Government Employees Pension Law which provides that '[t]his Law shall bind the state and the government shall be responsible for meeting the obligations of the Fund, whether properly funded or not, in favour of its members, pensioners and beneficiaries: Provided that any change in the investment policy of the Fund referred to in section 6(7) or the benefit structure of the Fund, as provided for in the rules which may have an effect on the government's financial obligation towards the Fund, shall be subject to the approval of the Minister: Provided further that the Minister's approval shall not be required in the event of changes to the benefit structures brought about by agreements reached in the bargaining structures for the public service.'

10 See *Pretorius & Another v Transnet Second Defined Benefit Fund & Others* [2014] ZAGPPHC 526; 2014 (6) SA 77 (GP). See also L Shrosbree 'To what extent does section 37D of the Pension Funds Act protect employers from dishonest conduct by their employees' (2005) 37 *Industrial Law Journal* 17 (arguing that sec 37D of the Pension Funds Act provides greater protection to members of pension funds than sec 21(3)(c) of the Government Employees Pension Law by requiring the procurement of a civil judgment against the member as the legal basis for the possible deduction of pension benefits by a pension fund. The author notes that unlike the Pension Funds Act, the Government Employees Pension Law does not make a civil judgment necessary. Instead, it simply requires that the amount of

For instance, in *Wiese v Government Employees Pension Fund*,<sup>11</sup> the High Court found the Government Employees Pension Law unconstitutional as it failed to provide equal protection and benefit of the law, as guaranteed by section 9(1) of the Constitution, afforded to non-member spouses of members of pension funds subject to the Pension Funds Act. In other words, unlike divorced spouses of members of pension funds regulated by the Pension Funds Act, who enjoyed the benefit of the 'clean break principle' which gave them immediate access to their share of the pension interest at the date of divorce, divorced spouses of members of the GEPP and other government funds did not enjoy the same benefit upon divorce. Two years after *Wiese* was decided and the government complied by amending the Government Employees Pension Law, a similar cause of action was lodged in *Ngewu v Post Office Retirement Fund*.<sup>12</sup> As was the case in *Wiese*, the Constitutional Court found that the omission of the clean break principle from the provisions of the Post Office Act rendered that Act invalid.

The article comments on the Government Employees Pension Law by highlighting another constitutional defect arising out of the parallel pension regime in South Africa, which has yet to be resolved. Since the 1996 amendments to the Pension Funds Act, members of pension funds governed by that Act have enjoyed the advantage of access to a specialised pension tribunal known as the Office of the Pension Funds Adjudicator (OPFA), whose functions are performed by the Pension Funds Adjudicator (Adjudicator).<sup>13</sup> The problem here is that members of government funds do not have access to the OPFA, nor does any legislation specific to government funds make provision for a similar advantage and benefit. While the article focuses its analysis on the impugned provisions of the Government Employees Pension Law, the arguments advanced against those provisions apply with equal force to legislation establishing other government funds.

The parallel pension regulatory regime is not unique to South Africa. The Kingdom of Lesotho has a similar set-up whereby public employees are compelled to become members of the Public Officers Defined Contribution Pension Fund which is regulated by its own specific legislation known as the Public Officers Defined Contribution Pension Fund Act 2008,<sup>14</sup> while other private pension funds are regulated by the Income Tax (Superannuation and Life Assurance)

---

loss to the employer on the basis of which a deduction is sought must have been proved in court.)

11 *Wiese v Government Employees Pension Fund* (2011) 4 All SA 280 (WCC) (*Wiese 1*). See also *Wiese v Government Employees Pension Fund & Others* 2012 (6) BCLR 599 (CC).

12 2013 (4) BCLR 421 (CC).

13 See sec 30B of the Pension Funds Act.

14 For a discussion, see M Mhango & NV Dyani-Mhango 'Reform of the death benefit provisions in Lesotho's public sector pension fund: Lessons from South Africa and Swaziland' (2016) 24 *African Journal of International and Comparative Law* 199; M Mhango 'Constitutional challenges in the implementation of a

Regulations 1994 and the soon to be promulgated Pension Bill of 2018. In addition, while most African countries have adopted specific statutory social security schemes to cover public employees in ways that are distinct from the South African situation, the constitutional arguments and analysis advanced in this article, involving the right to equality and access to courts as well as the imperative for special dispute resolution procedures similar to that of the OPFA, are relevant to many other African countries.

The article argues that the Government Employees Pension Law is unconstitutional to the extent that it does not afford members of the GEPP the advantage of and access to the dispute resolution services at the OPFA or similar tribunal. The article is divided in four parts. Part 1 discusses a few relevant provisions of the Government Employees Pension Law. Part 2 examines the dispute resolution system in the Pension Funds Act to demonstrate some of the advantages enjoyed by members of pension funds governed by that Act. Part 3 examines the current constitutional equality framework and jurisprudence to demonstrate the invalidity of the Government Employees Pension Law. Given that the constitutional defects highlighted in the article cannot be substantively cured through judicial review because of separation of powers imperatives, the last part of the article draws attention to a range of constitutional and policy considerations that the executive and legislature need to take into account in order to cure the constitutional defects.

## 2 Relevant parts of the Government Employees Pension Law

The GEPP is a defined benefit pension fund, which means that it guarantees benefits to all of its 1,2 million active members and 400 000 and more pensioners.<sup>15</sup> It is the largest pension fund in Africa, and is ranked among the top 20 largest pension funds in the world in terms of assets under its control and administration. The GEPP was established by section 3 of the Government Service Pension Act 57 of 1973, and was renamed and continues to exist as a juristic person by virtue of section 2 of the Government Employees Pension Law. The objectives of the GEPP are encapsulated in section 3 of the Government Employees Pension Law, which provides that '[t]he object of the Fund shall be to provide the pensions and certain other related benefits as determined in this Law to members and pensioners and their beneficiaries'.

Section 6 of the Government Employees Pension Law vests the management and governance of the GEPP in a board of trustees,

---

compulsory pension fund: The case of Lesotho (2014) 131 *South African Law Journal* 408.

15 See [www.gepp.gov.za](http://www.gepp.gov.za) (accessed 25 March 2019).

which is comprised of both the employer and employees. This section provides, in pertinent parts, as follows:

- (1) There is hereby established a board which shall be known as the Board of Trustees and which shall be constituted as prescribed.
- (2) The Board shall manage the Fund and shall in respect thereof exercise the powers, perform the functions and carry out the duties conferred upon, assigned to or imposed upon it in terms of this Law.
- (3) Members and pensioners of the Fund shall be entitled to representation on the Board, which representation shall collectively be equal in number to the representation by the employer as prescribed.
- (4) The first meeting of the Board shall take place at a time and place to be determined by the Minister, and any subsequent meeting of the Board shall take place at a time and place determined in terms of the rules.
- (5) The procedure to be followed at a meeting of the Board, the quorum for such a meeting, and the majority of votes required for a decision of the Board, shall be as prescribed.
- (6) The Board may delegate any of its powers, functions or duties to a management committee, committee or person to be exercised, performed or carried out, subject to such conditions as may be determined by the Board.
- (7) The Board, acting in consultation with the Minister, shall determine the investment policy of the Fund.

In addition to conferring the power to manage the GEPP on the board of trustees, the Government Employees Pension Law confers additional powers on the board of trustees to make rules or regulations for the GEPP. In this regard, section 29 of the Government Employees Pension Law is instructive. It provides:

- (1)(a) Subject to the provisions relating to negotiations regarding the terms and conditions of employment contained in any law applying in respect of labour relations arrangements in the public service, including education, and subject to negotiations in accordance with any labour relations legislation or arrangements applicable to the South African Police Service, the South African National Defence Force, the National Intelligence Agency and the South African Secret Service regarding their terms and conditions of employment, the Board shall make rules with regard to –
  - (i) the constitution of the Board and the management and administration of the Fund;
  - (ii) the payment of contributions to the Fund and the payment of benefits from the Fund to or in respect of members on their retirement, discharge, resignation or death;
  - (iii) any matter in respect of dormant members of the Fund;
  - (iv) any matter required or permitted to be prescribed under this Law, and, generally, for the better achievement of the objects and purposes of this Law.
- ...
- (5) The Rules shall be binding on the government, the Fund, its members and pensioners and their beneficiaries or any other person who has a claim against the Fund.

Unlike the Pension Funds Act, the Government Employees Pension Law does not establish a tribunal such as the OPFA nor does it



establish any other mechanism or procedures to resolve disputes arising from its implementation. The only reference to a dispute resolution system is contained in Rule 10 of the GEPP, which governs the recognition of pensionable service. Rule 10 reads, in pertinent parts, as follows:

10 Recognition of previous and other periods of services as pensionable service

Subject to the provisions of the rules any part or the whole of any of the undermentioned periods may at the written request of a member and with the approval of the Board be recognised as pensionable service –

.....

10.6 a period of NSF Service,<sup>16</sup> provided that a period of NSF Service may only be recognised on the following conditions:

- (a) the former member of a non-statutory force or service, or beneficiary of a former member on a non-statutory force or service where the former member of a non-statutory force or service is deceased, completes an application form as formulated by the Fund, and returns the completed form to the Fund within a period of eighteen months after the date of commencement of this rule, provided that the Board may, on good cause shown, consider an application submitted after the eighteen months period referred to in this paragraph: Provided further that when the application form, submitted by a beneficiary of a former member of a non-statutory force or service, is considered by the Board the Board may in the case of a dispute between beneficiaries regarding the application decide in its sole discretion whether to and to what extent to recognise the NSF Service applied for ...

In terms of the above provision the board of trustees of the GEPP has a complete discretion to resolve, in the first instance, any pension dispute between beneficiaries concerning recognition of pensionable service. Presumably, in the event that beneficiaries are not satisfied with the contemplated resolution by the board of trustees they may approach a court. However, what is clear is that the OPFA is not an option for such disgruntled beneficiaries. The legal position is different for similar members or beneficiaries under the Pension Funds Act. This position is outlined below.

---

16 This term is defined in the rules of the GEPP as 'the period between the date on which a former member of a non-statutory force or service joined his or her respective former forces or services (as reflected on his or her service certificate) and the date of their taking up employment, or entering into an agreement with or their attestation into the employer, provided that such service will only be recognised for the period after the former member of a non-statutory force or service attained the age of sixteen years, so that service prior to the age of sixteen years will not be regarded as NSF Service. In the case of a beneficiary of a former member of a non-statutory force or service, NSF Service means the period of NSF Service of the former member of a non-statutory force or service through whom the beneficiary is entitled to a benefit in terms of the Fund'.

### 3 Dispute resolution framework under the Pension Funds Act

As alluded to earlier, the constitutional reforms of the 1990s directly impacted on the pension funds industry. In one of the earliest studies of this impact, particularly in relation to private pension dispute resolution in South Africa, Murphy correctly observed:<sup>17</sup>

Pursuant to recommendations made by the Mouton Committee of Investigation into a Retirement Provision System for South Africa, the Pension Funds Act in South Africa was amended to create a special process by which complaints against pension funds can be investigated and decided.

It is important to point out that the Mouton Committee recommended the establishment of the OPFA as the Pension Funds Act did not make provision for an independent body to resolve disputes between members of private pension funds and their pension funds.<sup>18</sup> Yet, the Registrar of Pension Funds was flooded with complaints by pension fund members and beneficiaries despite the Registrar not being conferred with the authority to dispose of pension disputes.<sup>19</sup>

Political parties represented in Parliament in 1996 supported the creation of the OPFA. In his speech supportive of the OPFA, Dr Botha of the Freedom Front Plus Party made the following remarks, which capture the problem and solution at the time:<sup>20</sup>

The appointment of the [Adjudicator] is the second matter I want to single out, which we support very strongly. At the moment ... no provision exists for the hearing and adjudication of complaints in the pension funds industry. The registrar of pension funds also has insufficient powers to deal with complaints effectively. Members do have access to courts, but we all know that this is very expensive, lengthy and complex. The Mouton Committee to which the Deputy Minister referred, recommended the appointment of an ombudsman with only conciliatory powers, but that is not good enough either. It has been recommended that an Adjudicator should be appointed for pension funds [and with sufficient powers]. This

17 See 'The Report of the Committee of Investigation into a Retirement Provision System for South Africa' 323 (1992) (Mouton Committee Report); Murphy (n 2) 28; Jeram (n 3) 1827. See also Mhango (n 2) 103 (discussing pension reforms in the 1990s); M Sigwadi 'Dispute resolution and the Pension Funds Adjudicator' (2004) 12 *Juta's Business Law Journal* 2; N Jeram 'Jurisdiction of the Pension Funds Adjudicator in respect of complaints by underwritten insurers' (2010) *Insurance and Tax Journal*; L Nevondwe & K Odeku 'An analysis of the role of the Pension Funds Adjudicator in South Africa' (2013) 4 *Mediterranean Journal of Social Sciences* 829.

18 See Mouton Committee Report (n 17) 324.

19 See Mouton Committee Report (n 17) 323. The Registrar is a creature of statute established under sec 3 of the Pension Funds Act read with sec 1 of the Financial Services Board Act 97 of 1990 to supervise and regulate private pension funds that are subject to the Pension Funds Act. However, see the Financial Sector Regulation Act 9 of 2017 which repealed the Financial Services Board Act and created the Financial Sector Conduct Authority to replace the Registrar.

20 *Hansard*, Parliamentary Debates 12 March 1996 469-472.

Adjudicator can contribute positively to the protection of members. The details are set out in the Bill. The Adjudicator will also serve as an economic and effective mechanism to deal with complaints.

In the end, through an amendment to the Pension Funds Act, which came into effect in April 1996, the OPFA was established. In terms of section 30B(2) of the Pension Funds Act, the work of the OPFA is performed by the Adjudicator, whose function is to dispose of complaints relating to private pension funds in a 'procedurally fair, economical and expeditious manner'.<sup>21</sup> A complaint, which is the primary source of the Adjudicator's jurisdiction, is defined in section 1 of the Pension Funds Act as follows:<sup>22</sup>

Complaint means a complaint of the complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules and alleging –

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to the fund between the fund or any person and the complainant.

In order to promote access to justice the courts have ruled that the dispute resolution provisions in the Pension Funds Act should be broadly construed to incorporate lay complainants, who may not be able to formulate their complaints with legal precision.<sup>23</sup> In other words, a mere letter, including a handwritten letter, by a lay complainant which contains sufficient allegations should be deemed to fall within the definition of a complaint.<sup>24</sup> In justifying a broad construction of the jurisdiction of the Adjudicator in favour of

21 Sec 30D of the Pension Funds Act. See also Mhango (n 2) 104.

22 See *Pienaar v Consol Group Pension Fund* PFA/GA/97/98 (unreported), where an employer failed to file a disability claim with the Fund on behalf of the complainant. In a dispute seeking to order the employer to provide evidence to the Fund for the consideration of the disability claim, the Adjudicator held that the dispute was not a complaint as defined in the Pension Funds Act; *Seethal v Metal and Engineering Industries Permanent Disability Scheme* PFA/KZN/2719/01 (unreported) where it was held that a permanent disability scheme does not fall within the definition of a pension fund organisation; *Stassen v Central Retirement Annuity Fund* 2001 (3) BPLR 1792 where the Adjudicator held that he did not have jurisdiction to hear a dispute relating to a divorce order where the court order was not served on the Fund; and *Alais v Telkom Pension Fund* 2006 (1) BPLR 67 (PFA) where it was held that the Adjudicator has no jurisdiction to determine whether or not a reorganisation of an employer has taken place even where pension matters are involved.

23 *Central Retirement Annuity Fund v Adjudicator of Pension Fund* (2006) 4 All SA 251; *Mungal v Old Mutual Life Assurance Co SA Ltd* 2010 (6) SA 98 (SCA); M Mhango and N Dyani-Mhango 'Reflections on transformative pension adjudication' (2017) 38 *Industrial Law Journal* 2173.

24 As above.

untrained complainants, the Supreme Court of Appeal in *Mungal* reasoned as follows:<sup>25</sup>

The complaints in this case were conveyed to the adjudicator in letters written by Mungal and Freeman. Needless to say they were not framed in the language of the definition but I do not think the form in which a complaint is made is critical. Chapter VA clearly contemplates complaints being made by lay persons who are not expected to have studied the definition with legal expertise and to have framed their complaints accordingly. More important than the form in which the complaint is expressed is the substance of the complaint. If the various elements of the definition are inherent in the complaint that seems to me to sufficiently bring it within the terms of the definition notwithstanding that they have not been expressed in those terms.

After investigating a complaint as defined, the Adjudicator is empowered to 'make the order which any court of law may make',<sup>26</sup> which 'shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court'.<sup>27</sup> Further, any person who is aggrieved by a determination of the Adjudicator may apply to an appropriate High Court for relief in terms of section 30P of the Pension Funds Act, in which case the High Court 'may consider the merits of the complaint ... and may make any order it deems fit'.<sup>28</sup> In its interpretation of the scope of section 30P, the Supreme Court of Appeal in *Meyer v Iscor Pension Fund*<sup>29</sup> declared:<sup>30</sup>

From the wording of s 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the Adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by s 30P(2) to a consideration of 'the merits of the complaint in question'. The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined.

Against this background, the OPFA became operational in 1998.<sup>31</sup> Since then, it has played a significant role in the development of pension jurisprudence.<sup>32</sup> Nonetheless, policy questions remain unresolved around the jurisdictional reach of the Adjudicator, including the question whether the Adjudicator performs

25 *Mungal* (n 23) 8.

26 Sec 30E(1)(a) Pension Funds Act.

27 Sec 30O(1) Pension Funds Act.

28 Sec 30P(2) Pension Funds Act.

29 (2002) ZASCA 148; (2003) 1 All SA 40 (SCA).

30 *Meyer* (n 29) 8.

31 Nevondwe & Odeku (n 17) 819.

32 See Jeram (n 3) 1836; S Khumalo 'Jurisprudential role played by the Pension Funds Adjudicator in South African law' (2006) 28 36-37 <http://www.bowman.co.za/FileBrowser/ArticleDocuments/Pension-Funds-Adjudicator-Jurisprudential-Role.pdf> (accessed 7 March 2015) (arguing that the Adjudicator has been at the forefront of introducing constitutional and administrative jurisprudence into South African pension law); and Mhango (n 3) 24.

administrative or judicial powers or whether it has advanced transformative adjudication over the years.<sup>33</sup> Whatever the answers to these policy questions might be, the Adjudicator continues to operate and provide the benefit of judicial services to members of the public whose pension funds are regulated under the Pension Funds Act.

## 4 Constitutional framework on equality

### 4.1 *Harksen* inquiry

The problem highlighted in this article involves a conflict between the provisions of the Government Employees Pension Law and the rights to human dignity in section 10 of the South African Constitution; access to social security in section 27 of the Constitution; access to courts in section 34 of the Constitution; and the right to equality in section 9 of the Constitution. Section 9, which at this stage is the focus of the article, provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The courts have held that the above provision protects both formal and substantive equality.<sup>34</sup> Formal equality is contemplated in subsection (1), whereas subsection (2) contemplates substantive

33 See Mhango & Dyani-Mhango (n 23); Jeram (n 3) 1825 (arguing that due to the badly-drafted mandate of the Adjudicator, the resolution of pension disputes is a jurisdictional nightmare and pension fund members are consistently confronted with a series of points *in limine*); Khumalo (n 32) 39 (generally agreeing that there are many problems surrounding the jurisdiction of the Adjudicator); Mhango (n 3) 20-45.

34 See *Minister of Finance & Others v Van Heerden* 2004 (6) SA 121 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC); *South African Police Service v Barnard* 2014 (6) SA 123 (CC) para 28 (where it was held that 'the foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more

equality. It is in this context that the Court has emphasised that the society envisioned by the Constitution is one based on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>35</sup> It has consistently held that the achievement of equality (formal or substantive) is one of the fundamental objectives of the Constitution.<sup>36</sup> In one of the earliest cases dealing with the right to equality, the Court explained the following difficulties faced by any modern government:<sup>37</sup>

It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently ... Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good ...

In light of the above and in order to deal with the complexities of enforcing the right to equality and determine whether or not an Act of Parliament violates that right, the Court developed a three-staged inquiry in *Harksen v Lane* under the interim Constitution of the Republic of South Africa Act 200 of 1993, the provisions of which were replaced by the Constitution. The inquiry is described by the Court as involving the following questions:<sup>38</sup>

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

---

than record or confer formal equality', and reasoned that '[w]e care about equality – both formal and substantive – because we recognise the equal and inherent worth of all human beings'); *City Council of Pretoria v Walker* 1998 (2) SA 363 para 73 (where it was held that the equality clause in the Constitution clearly calls for formal equality and more); *AB & Another v Minister of Social Development* [2016] ZACC 43 (where it was held that the right to equality provides a mechanism to achieve substantive equality which, unlike formal equality that presumes that all people are equal, tolerates difference).

35 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).

36 *Bato Star Fishing* (n 35) para 74.

37 *Prinsloo v Van der Linde* 1997 (6) BCLR 759; 1997 (3) SA 1012 paras 24-25.

38 *Harksen v Lane* 1998 (1) SA 300 (CC) para 50.

- (i) Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- (ii) If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(2).

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

The courts have consistently applied the above inquiry to determine numerous allegations of breaches of the right to equality, particularly those alleging violations of subsection (1) of that right.<sup>39</sup>

#### 4.2 Applying the *Harksen* inquiry to the Government Employees Pension Fund Law

In *Wiese v Government Employees Pension Fund*, which dealt with an issue similar to the one being examined here, the High Court considered whether the Government Employees Pension Fund Law was constitutionally invalid due to its failure to apply the clean break principle. The case arose after the Pension Funds Act and Divorce Act 90 of 1979 were concurrently amended in 2007 to grant divorcees of members of pension funds governed by the Pension Funds Act immediate access to their pension benefits on the date of divorce. Prior to these amendments, divorcees' pension benefits would accrue to them only upon certain exit events such as retirement or resignation by the main pension member. The problem was that the non-member spouse was prejudiced because the value of his or her benefit did not grow during the waiting period before the exit event by the main member. Yet, the main pension member would benefit from the growth in value of the benefit during this period. As the High Court explained, the effect of the 2007 reforms is that they

39 See *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC); (2014) 35 ILJ 2981 (CC) 51 (suggesting that the *Harksen* test applies to allegations of breaches of sec 9(1) of the Constitution and not sec 9(2)). See also *Khosa & Others v Minister of Social Development* 2004 (6) SA 505 (CC); *National Coalition for Gay and Lesbian Equality* (n 34); *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); *National Union of Metal Workers of South Africa obo Members v Element Six Production (Pty) Ltd* [2017] ZALCJHB 35; *Van Heerden* (n 34).

amended the date of accrual of the pension benefits for a non-member spouse so that the non-member spouse's pension benefits accrue on the date of divorce.<sup>40</sup> In other words, following the reforms the non-member spouse no longer has to wait until the main pension member exits the fund in order to gain access to his or her pension benefits. There is no doubt that these reforms brought forth advantages to non-member spouses of pension members in South Africa.

The problem is that the advantages from the 2007 amendments did not apply to the Government Employees Pension Fund Law. In applying the *Harksen* inquiry to this case, the High Court found that the differentiation in that case was between non-member spouses of members of pension funds regulated by the Pension Funds Act and non-member spouses of members of the GEPPF. It also found that the differentiation arose out of Parliament's omission to apply the 'clean break' principle on divorce to non-member spouses of members of the GEPPF. The government did not defend the rationality of the differentiation nor did the Court find any legitimate government reason for the differentiation. The Court held that the omission in the Government Employees Pension Fund Law to provide the application of the 'clean break' principle rendered it in conflict with section 9(1) of the Constitution. For separation of powers necessities, the Court rejected to read-in words into the Government Employees Pension Fund Law as a remedy in favour of a suspended declaration of invalidity to allow Parliament to remedy the defect. In his study of constraints on judicial review, Okpaluba has correctly noted that 'as an incident of separation of powers, courts often state that they are ill-equipped to grant orders that could have multiple social and economic consequences'.<sup>41</sup> This appears to be what motivated the High Court from not granting the reading-in remedy.

By the time the case reached the Court for confirmation of the order of invalidity as required by the section 167(5) of the Constitution, Parliament had amended the Government Employees Pension Fund Law to address the defect. The Court found that the substantive cause of action by the plaintiff had been rendered moot by that legislative intervention, and that the resolution of the validity of the Government Employees Pension Fund Law would have no practical effect on the parties. Therefore, it held that it was not in the interests of justice to consider the matter.

---

40 *Wiese 1* (n 11) para 8. See also S Mothupi 'Some practical effects of the Financial Services Laws General Amendment Act 2008 on amending section 37D(4) of the Pension Funds Act' (2010) 22 *SA Mercantile Law Journal*; C Marumoagae 'A non-member spouse's entitlement to the member's pension interest' (2014) 17 *Potchefstroom Electronic Law Journal* 2488.

41 C Okpaluba 'Constraints on judicial review of executive conduct: The juridical link between the Marikana mineworkers' imbroglio and the Gauteng E-tolling saga' (2015) 2 *Journal for South African Law* 286 287.



A similar cause of action was lodged in *Ngewu* challenging the Post Office Act for its omission to provide for a 'clean break' principle in its provisions. Despite the fact that the parties settled the matter, the Court found that the differentiation between the payments of divorced spouses' interests regulated by the Pension Funds Act and the Government Employees Pension Fund Law versus the Post Office Act was irrational due to the omission of the 'clean break' principle in the Post Office Act.<sup>42</sup> The Court reasoned that this differentiation did not meet the standard of equality before the law and equal protection and benefit of the law.

As in *Wiese*, the government did not defend the impugned law nor did it seek to justify it. The Court declared the relevant provisions of the Post Office Act invalid and suspended the order of invalidity for eight months to allow Parliament to cure the constitutional defect. The Court also held that in the event that the defect was not cured within the stipulated time frame, the order to read-in section 24A of the Government Employees Pension Fund Law into the Post Office Act would automatically come into effect. Section 24A of the Government Employees Pension Fund Law was the provision that was passed to cure the constitutional defect identified by the High Court in *Wiese*.

The jurisprudence in *Wiese* and *Ngewu* is relevant to the problem which has preoccupied the pages of this article. There is a clear differentiation between members of the GEPA and members of pension funds governed by the Pension Funds Act with respect to access to justice at the OPFA. The differentiation arises out of the failure by Parliament to make provision for a specialised pension tribunal for members of the GEPA. Given that the Pension Funds Act affords members of pension funds governed by it the advantage of access to justice at no cost, there is no rational reason why the same advantage should be withheld from their counterparts in the GEPA. Unlike their counterparts under the Pension Funds Act, members of the GEPA have to incur substantial legal costs in order to vindicate their rights under the Government Employees Pension Fund Law and its rules. Recently, the Durban High Court highlighted this problem. In explaining why the losing party should not be liable for legal costs of litigation, the High Court in *Ntshangase v Government Employees Pension Fund* reasoned:<sup>43</sup>

During the course of argument I enquired from counsel for the respondent as to whether any provision existed in the rules of the respondent for a cost-effective and expeditious dispute resolution mechanism, or for a referral of disputes to an entity like the ... Adjudicator ... The respondent ought to make a conscientious attempt to have disputes resolved efficiently and in a cost-effective manner for members or beneficiaries who may feel aggrieved at a decision. Counsel for the respondent was unable to refer me to any provision in the rules for such mechanism. Moreover, the complete

---

42 *Ngewu* (n 12) para 17.

43 *Ntshangase v Government Employees Pension Fund* Case 6166/16 11 August 2017 (unreported) para 22.

failure of the respondent to engage with the applicant over the issue of the amount of the benefit to be paid following the death of the deceased is regrettable. In light of this, I am of the view that the applicant, although the losing party, should not be liable for costs.

Despite the above reasoning and conclusion, the judgment in *Ntshangase* highlights the difficulties faced by members and beneficiaries of the GEPPF due to the absence of a dispute resolution provision in the Government Employees Pension Fund Law. It is clear from the *Ntshangase* judgment that at the very least members and beneficiaries of the GEPPF, who opt to vindicate their rights in court, have to pay for their own legal costs of litigation. The high cost of legal services and its impact on the underprivileged in South Africa has been well articulated by many commentators, including recently by Chief Justice Mogoeng when he observed that '[l]itigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen'.<sup>44</sup>

For this reason, the legislative history of the Pension Funds Act is unambiguous that the legislature conceived of a way to give the poor and marginalised access to justice through the OPFA, where members of the pension funds can get the same judicial services that are available in the courts of law at no cost.<sup>45</sup> However, the current state of affairs, which prevents members of the GEPPF from access to free judicial service at the OPFA, is indefensible and requires urgent legislative intervention. However, what type of legislative interventions or policy considerations are required to be considered?

## 5 Constitutional considerations

### 5.1 Separation of powers

There are a myriad constitutional and international law considerations and policy options that the executive and the legislature will have to consider in its efforts to cure the defect in the Government Employees Pension Law. For reasons of the separation of powers, these considerations and options cannot properly be determined through the institution of judicial review. In other words, this is not a situation where, when approached by a litigant, the judiciary can simply grant a reading-in remedy because there are a range of policy choices available to the elected branches of government. The courts have developed an approach to deal with problems associated with circumstances where there may be more than one rational way of

44 See *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 52.

45 See *Hansard*, Parliamentary Debates 12 March 1996 469-472.

dealing with a particular social challenge.<sup>46</sup> In this regard, the Court in *Bel Porto School Governing Body*<sup>47</sup> reasoned as follows:<sup>48</sup>

The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.

The High Court acknowledged and applied the above approach in *Wiese* when it rejected the plaintiff's argument urging a reading-in remedy.<sup>49</sup> The High Court offered the following three reasons, namely, that (i) reading-in should not be preferred if it is likely to result in budgetary intrusion;<sup>50</sup> (ii) since there were a range of constitutionally defensible choices, including different choices for GEPI versus other private pension funds governed by the Pension Funds Act, it was appropriate to allow the legislature to grapple with those choices rather than the courts usurping that power;<sup>51</sup> (iii) a reading-in remedy could have far-reaching and unforeseen consequences, and courts should be wary of granting such remedy when a full legislative process of drafting and consultation could bring to light difficulties or unintended consequences unforeseen by a court.<sup>52</sup> What is clear from the separation of powers jurisprudence of the Court is that while a reading-in remedy is permissible, courts are cautious in granting it.<sup>53</sup> Hence, it is submitted that the elected branches of government need proactively to address the current

46 See *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC) para 65; *Bel Porto School Governing Body & Others v Premier of the Western Cape Province & Another* 2002 (3) SA 265; 2002 (9) BCLR 891 para 49.

47 *Bel Porto School Governing Body* (n 46).

48 *Bel Porto School Governing Body* (n 46) para 49.

49 *Wiese 1* (n 11) paras 33-37.

50 *Wiese 1* para 29, citing *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC).

51 *Wiese 1* paras 33-37.

52 *Wiese 1* para 38.

53 See *Director of Public Prosecutions Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 183; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 75 (where it was held that '[i]n deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution'); *De Lange v Smuts NO* 1998 (3) SA 785 (CC); *Van der Merwe* (n 50) para 73 (where the Court stated that '[r]eading words into a provision arises when it is necessary to add words in order to cure it of constitutional inconsistency ... The "cured" provision must be consistent with the Constitution and its basic values. The result of the curative process must interfere with the statute as little as possible. The remedial step should be capable of sufficient precision and should be as faithful as possible to the legislative scheme at hand. Lastly, the resort to the surgical remedies of severance and reading-in should not be preferred if they are likely to lead to an unsupportable budgetary intrusion').

constitutional defect in the Government Employees Pension Law in order to prevent possible court intervention.

## 5.2 South Africa's dispute resolution framework: What the government should consider when amending the Government Employees Pension Law

In this final part of the article I examine the constitutional framework on the adjudication of disputes that will have to be considered by the legislative and executive branches of government. The primary reason that compels this examination is that the Constitution is the supreme law and any law or conduct in conflict with it is invalid.<sup>54</sup> It is well established that South African constitutional law entitles everyone to the right to a fair and public hearing by a court or another independent and impartial tribunal in the determination of his or her legal rights and obligations. This right finds expression in section 34 of the Constitution, which provides that '[e]veryone 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'.

The above provision embodies the legal framework on dispute resolution in South Africa, of which the scope has been determined by the Court. In *De Lange v Smuts* the Court dealt with the constitutionality of a presiding officer at an insolvency inquiry, who was empowered to commit a recalcitrant examinee to prison under section 66 of the Insolvency Act 24 of 1936. In resolving this dispute, the Court had to determine whether the presiding officer, for purposes of section 34, is either a court or another independent and impartial tribunal or forum. In the course of adjudication, the Court made some important judicial remarks regarding the scope of section 34. These remarks are important for the executive and legislature to consider in the context of devising a remedy for the defects in the Government Employees Pension Law.

---

54 See *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 27 where it was held that '[t]he Court's order does not invalidate the law; it merely declares it to be invalid ... In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is invalid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person's rights are threatened or infringed by the offending law or not'; *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (Jafta dissenting) paras 134-136 (stating that 'legislation that was passed after the Constitution came into operation became invalid from inception. This is because section 2 tells us that such legislation is invalid ... But the declaration of invalidity of law or conduct does not invalidate the law or conduct in question. The court order merely declares the law or conduct invalid. In contrast it is the Constitution itself which invalidates laws or conduct inconsistent with it').

The Court in *De Lange* ruled that any dispute that can be resolved by application of law has to comply with section 34, that is to say, the dispute must be resolved before a court or, where applicable, another independent and impartial tribunal.<sup>55</sup> According to *De Lange*, when dealing with a section 34 problem, the crucial inquiry is whether a forum involved is either a court or another independent and impartial tribunal or forum.<sup>56</sup> If the answer is in the affirmative, the next inquiry will be whether it is appropriate to have the issues in dispute decided by such court or tribunal.<sup>57</sup> Given that questions of what constitutes an independent and impartial tribunal or forum had not been comprehensively determined in South Africa prior to *De Lange*, the Court relied heavily on Canadian case law on these questions to develop South African law.

In this context, the Court found that there were three essentials conditions that characterise a court or another independent and impartial tribunal or forum. These are (a) security of tenure, which embodies the requirement that the decision maker be removable only for just cause and be secure against interference by the executive branch of government;<sup>58</sup> (b) a considerable degree of financial security free from arbitrary interference by the executive branch of government that could affect the independence of a tribunal or forum; and (c) institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function, judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.

According to the Court's reasoning in *De Lange*, while there is a close link between independence and impartiality, these nonetheless are separate requirements. Independence relates to the traditional value of judicial independence both in relation to the state of mind of the decision maker, but also their status or relationship to others.<sup>59</sup> On the other hand, the Court explained that impartiality speaks to a state of mind of the decision maker in connection with the issues and the parties in an individual case.<sup>60</sup> Accordingly, since both independence and impartiality are fundamental to individual and public confidence in the administration of justice, it is important that any tribunal or forum should be perceived as independent as well as

---

55 *De Lange* (n 53) para 66. In an earlier case, *Nel v Le Roux* NO 1996 (4) BCLR 592; 1996 (3) SA 562 (CC) para 14, the Court left open the question of whether a functionary in an independent and impartial tribunal or forum referred to in sec 22 of the interim Constitution (the predecessor to sec 34) in all cases had to be a judicial officer, who ordinarily functions as such, in the judicial arm of government.

56 *De Lange* (n 53) para 42.

57 As above.

58 *De Lange* (n 53) paras 70-71. See also I Currie & J de Waal *The new constitutional and administrative law* (2001) 299-301.

59 *De Lange* (n 53) para 71.

60 *De Lange* para 71, citing *R v Valente* (1985) 24 DLR (4<sup>th</sup>) 161 169-175.

impartial.<sup>61</sup> Borrowing from the Canadian Supreme Court decision in *R v Valente*,<sup>62</sup> the Court in *De Lange* declared that the requirement of independence under section 34 means that the 'status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force such as business or corporate interests or other pressure groups'.<sup>63</sup>

To put it differently, section 34 is designed not only to protect against interference from executive or legislative branches of government, but also the inherent dangers from private interests. This interpretation of the scope of section 34 is consistent with the general design of the Constitution, which applies to both state and private action.<sup>64</sup> There are other standards and measures of accountability inherent in section 34, such as the public nature of court proceedings, judicial reason-giving in judgments, the deliberative nature of civil procedure, the judicial appointment process and the doctrine of *stare decisis*.<sup>65</sup>

Recently, in *Financial Service Board*<sup>66</sup> the High Court applied the above principles to determine whether a tribunal set up under the Financial Services Board Act 1990 was in line with section 34 of the Constitution. In this case, a member of the Financial Service Board (FSB) was appointed to the Appeals Board which is established in terms of section 26A of the Financial Services Board Act. The primary purpose of the Appeals Board is to resolve any dispute brought by a person aggrieved by a decision made by the FSB. The provisions establishing the Appeals Board were challenged on the basis that they were inconsistent with the section 34 of the Constitution. The argument advanced to attack the validity of the Appeals Board was that the presence of a member of the FSB on the Appeals Board exhibited institutional bias and a lack of independence required by sections 34 and 33 of the Constitution.<sup>67</sup>

In dismissing the challenge, the High Court relied heavily on Canadian authorities. It reasoned that individual and structural independence were not ends in themselves, but were desirable for the faith in the impartiality of a tribunal which they promote. Conradie J noted that the overall objective of guaranteeing independence is to ensure a reasonable perception of impartiality at an institutional and

61 *De Lange* para 71.

62 *Valente* (n 60) 161.

63 *Valente* (n 60) para 72, citing *R v Genereux* (1992) 88 DLR (4<sup>th</sup>) 110.

64 See sec 8 of the Constitution.

65 See *De Beer v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC). See also M Mhango 'Transformation and the judiciary' in C Hoexter & M Olivier (eds) *The judiciary in South Africa* (2014) 75.

66 *Financial Service Board v Pepkor Pension Fund* (2000) 4 BPLR 347 (C).

67 See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC) paras 135 & 142-153 (suggesting that secs 34 and 33 of the Constitution are mutually exclusive).

not subjective level. He further observed that the test to determine this type of bias is whether, having regard to the parties who appear before a decision maker, a fully-informed person would harbour a reasonable apprehension of bias in a substantial number of cases. Based on this reasoning, Conradie was satisfied that the Appeals Board was an independent tribunal as envisaged by section 34 of the Constitution. As a result, he ruled that section 26(1) of the Financial Service Act was constitutionally valid. The decision in *Financial Service Board* was welcomed by some commentators, who observed that '[a]s a matter of practical necessity considerable deviations from the standard of independence set for courts will have to be tolerated when it comes to tribunals'.<sup>68</sup>

Therefore, the constitutional position in South Africa in relation to the resolution of disputes is that any dispute that can be resolved by application of law requires its determination to comply with section 34; that such disputes must be resolved publicly before a court or a tribunal.<sup>69</sup> The legislature and the executive have to apply their minds to these constitutional considerations in addressing the defects in the Government Employees Pension Law.

From the foregoing analysis it is clear that the executive and the legislature have several options. Among these are, first, that they could amend the legislation and grant GEPA members access to the OPFA notwithstanding the problems associated with that tribunal; second, that they could establish a stand-alone tribunal and provide complainants with the right to appeal to the High Court as is the case under section 30P of the Pension Funds Act. In the event that a stand-alone tribunal is preferred, there are further options available to the political branches of the state. These include that (i) in terms of the constitution of tribunal members, the political branches of the state, under the authority of *Financial Service Board*, have an option to appoint a member of the Board of Trustees of the GEPA to occupy a position on the tribunal: (ii) the political branches will have to grapple with the question whether complainants to the tribunal will enjoy the right to legal representation at the tribunal. In this context, a policy decision will have to be made having due regard to section 3(3) of the Promotion of Administrative Justice Act 2000, which grants an administrator the discretion to permit a person to obtain legal representation in serious or complex cases, and the judgment by the Supreme Court of Appeal in *Hamata*,<sup>70</sup> which confirmed the right to

68 Currie & de Waal (n 58) 300 fn144.

69 *De Lange v Smuts* (n 53) para 66.

70 *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* [2002] ZASCA 44 (noting that the factors that ought to be considered in determining whether legal representation may be granted include 'the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential seriousness of the consequences of an adverse finding, the availability of suitably qualified lawyers ... the fact that there is a legally trained "judicial officer" presenting the case against the [respondent], and any other factor relevant to the fairness or otherwise of

legal representation in certain complex cases;<sup>71</sup> (iii) the policy makers will have to consider issues of security of tenure of tribunal members, which embodies the requirement that a decision maker be removable only for just cause and be secure against interference.<sup>72</sup> This aspect could enhance public confidence in the tribunal and carries with it budgetary implications, which are matters that fall within the domain of the elected branches of government;<sup>73</sup> (iv) the legislature and the executive will have to consider whether the tribunal would be conferred with the power to make decisions (over questions of fact and law)<sup>74</sup> that will be deemed a civil judgment by a court of law;<sup>75</sup> (v) given the jurisdictional difficulties experienced by the Adjudicator, the legislature and executive may have to consider granting broad jurisdictional powers to the envisaged tribunal taking into account recent transformative jurisprudence.<sup>76</sup> For instance, I submit that in order to fall within the jurisdiction of the tribunal, the focus must expressly be placed on the substance of a complaint and not the form of the complaint. Ordinary complainants should not be expected to

---

confining the [respondent] to the kind of representation for which the representation rule expressly provides, will have to be considered'). See also *Minister of Public Works & Others v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para 1184E (where it was held that 'ultimately, procedural fairness depends in each case upon the balancing of various relevant factors, including the nature of the decision, the rights affected by it, the circumstances in which it is made, and the consequences resulting from it').

- 71 For a proposition that the Pension Funds Act does not prohibit legal representation at the complainant's own cost, see *Henderson v Eskom & Another* (1999) 12 BPLR 353 (PFA); *Osbourne v MM Retirement Annuity Fund & Others* (2008) 3 BPLR 228 (PFA); *San Giorgio v Cape Municipal Pension Fund* (2007) 2 BPLR 255 (PFA).
- 72 *De Lange v Smuts* (n 53) paras 70-71.
- 73 See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC); *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) SA 223 (CC).
- 74 *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, 80 Eur Ct HR (Ser A) 1; *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1 para 51; *Bryan v United Kingdom* (1995) 21 EHRR 342, 44/1994/491/573 (HUDOC).
- 75 See also sec 30(1) of the Pension Funds Act which in relation to the Adjudicator provides that 'any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be'. See sec 143(1) of the Labour Relations Act 66 of 1995, which provides that the Commission for Conciliation, Mediation and Arbitration (CCMA), a dispute resolution body established in terms of that Act, of which the arbitration awards are 'final and binding and may be enforced as if it were an order of the Labour Court'; and sec 64(1) of the Competition Act 1998 which provides that 'any decision, judgment or order of the Competition Tribunal or Competition Appeal Court may be served, executed and enforceable as if it were an order of the High Court'. See *Mantsho v Managing Director of the Municipal Employee Pension Fund* [2015] ZAGPPHC 408 (where it was held that rulings of the Adjudicator are enforceable).
- 76 See *Mungal v Old Mutual Life Assurance Co SA Ltd; Freeman v Old Mutual Life Assurance Co SA Ltd* (2010) 1 BPLR 11 (SCA) para 8 (holding that law complainants should not be expected to frame their complaints with legal expertise); *Hoffmann v Pension Funds Adjudicator* (2011) ZAWCHC 446; (2012) 2 All SA 198 (WCC); and *Central Retirement Annuity Fund v Adjudicator of Pension Fund* (2006) 4 All SA 251.



frame their complaints with legal precision; (vi) the question of accessibility is another aspect that will have to occupy the minds of policy makers. As one commentator has correctly observed, this deals with whether hearings would be held in the English language only or include other official languages of South Africa.<sup>77</sup>

Related to this question is the issue of whether the proceedings would require personal attendance and the giving of direct evidence by complainants or whether hearings would be conducted by means of documentary evidence alone.<sup>78</sup> The legislature and the executive will have to apply their minds to questions of enforcement of the tribunal rulings taking into account existing problems in other legislative frameworks.<sup>79</sup> The problems around the enforceability of tribunal rulings has in recent years been the subject of debate and academic examination in South Africa.<sup>80</sup> In order to devise an effective solution to the problems affecting the GEPP, the legislature and the executive will have to consider existing research and conduct new research on the subject. Aside from the above constitutional and policy considerations, the legislature and the executive will need to have regard to international law,<sup>81</sup> a topic that is beyond the scope of this article.

## 6 Conclusion

In *Barkhuizen v Napier*<sup>82</sup> Justice Ngcobo explained the importance of the guarantee to seek the assistance of courts or tribunals in section 34 of the South African Constitution. He noted that '[a]n orderly and fair resolution of disputes is fundamental to the stability of an orderly society, and vital to a society that, like ours, is founded on the rule of law'.<sup>83</sup>

Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court. He therefore noted that 'section 34 not only reflects the foundational

---

77 M Nyenti 'Reforming the South African social security adjudication system: Innovative experiences from South African non-social security jurisdictions' (2016) 19 *Potchefstroom Electronic Law Journal* 1 7-8.

78 As above.

79 Nyenti (n 77) 10-11.

80 C Marumoagae 'Recognition of the concept of contempt of "determination" of the Pension Fund Adjudicator's determination: A missed opportunity – With particular reference to *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* (37226/14) [2015] ZAGPPHC 408 (26 June 2015)' (2017) 50 *De Jure* 175-185.

81 See *S v Makwanyane* 1995 (3) SA 391; *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC). See N Dyani 'An opportunity missed for male rape survivors in South Africa: *Masiya v Director of Public Prosecutions and Another*' (2008) 52 *Journal of African Law* 284.

82 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

83 *Barkhuizen v Napier* (n 82) para 31.

values that underlie our constitutional order, it also constitutes public policy'.<sup>84</sup>

The article has argued that the omission of dispute resolution procedures from the Government Employees Pension Law is a violation of the equal protection and benefit of the law and the guarantees in section 34 of the Constitution. It has been maintained that there is a positive constitutional obligation on the part of the state 'to respect, protect, promote and fulfil the rights in the Bill of Rights'.<sup>85</sup> In the present context, the executive branch has the authority and obligation, in terms of sections 85(2)(b) and (d) of the Constitution, proactively to develop policy and prepare and initiate legislation to cure the current constitutional defect.<sup>86</sup> At the same time, the legislature has the obligation to cure the current constitutional defect by passing legislation that seeks to amend the Government Employees Pension Law. I have suggested that the two elected branches of government have various options on how to cure this defect. I have provided some of the policy and constitutional considerations that would need to be considered by these branches of government.

Finally, since the right to equality and access to courts in the South African Constitution mirror similar procedures in articles 14 and 26 of the International Covenant on Civil and Political Rights<sup>87</sup> (which was ratified by most African countries and hence forms part of their normative framework) and articles 3, 7 and 19 of the African Charter, the arguments advanced in the article are relevant to and applicable to many of these African countries.

---

84 *Barkhuizen v Napier* para 33.

85 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (where it was held that 'in some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection'); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) (where it was ruled that 'in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights'); *Glenister* (n 46 above) paras 189-190 (where it was held that sec 7(2) of the Constitution, which provides 'the state to respect, protect, promote and fulfil the rights in the Bill of Rights', imposes a positive obligation on the state and its organs – to provide appropriate protection to everyone through laws and structures designed to afford such protection).

86 See *Electronic Media Network Limited v ETV (Pty) Limited* (2017) ZACC 17 paras 2-16 (where in rejecting the plaintiff's substantive challenge to the executive's policy choices on digital migration, the Court reasoned that 'one of the core features of [executive] authority is national policy development. For this reason, any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the executive').

87 Entered into force 23 March 1976.

## Editorial: Special focus on the functional dimensions of the right to development

*Carol C Ngang\**

Researcher, Free State Centre for Human Rights, University of the Free State,  
South Africa

<https://orcid.org/0000-0001-7222-4693>

The shift in development thinking from the narrow focus on economic growth towards a combined focus on human rights and development that occurred in the 1990s witnessed the birth of a range of rights-based approaches with a common goal to achieve larger human freedoms, improved well-being and to redress the multiple effects of poverty that continues to amplify underdevelopment and the myriad of other developmental challenges. While Marks identifies seven of the rights-based approaches,<sup>1</sup> including the right to development, it is worth stating that the right to development existed long before other rights-based approaches to development came into existence. Although the composite framework for human rights and development makes room for a plurality of models for achievement, Perry observes that the right to development uniquely combines the multifaceted dimensions of development, poverty eradication and human rights.<sup>2</sup>

In spite of this optimistic perception, the right to development has not been sufficiently explored to the betterment of the livelihood circumstances of the impoverished. With the universal acknowledgment that there is a right to development, albeit that most developed countries do so only in principle, the peoples of the developing parts of the world to whom it has relevance should by their entitlement to such a right be assured of the full enjoyment of the substantive

---

\* LLB (Yaoundé) IDHA (Fordham) SUSTLAW (Antwerp) LLM LLD (Pretoria); NgangCC@ufs.ac.za

1 SP Marks 'The human rights framework for development: Seven approaches' (2003) *François-Xavier Bagnoud Centre for Health and Human Rights* 12.

2 R Perry 'Preserving discursive spaces to promote human rights: Poverty reduction strategy, human rights and development discourse' (2011) 7 *McGill International Journal of Sustainable Development Law and Policy* 78.

guarantees that are embodied in what development is intended to achieve. The concept of development is quite ambiguous; often understood in very relative terms and not subject to any universally-acceptable standard. Our working definition of development draws from the human development index model that measures development in terms of living standards.<sup>3</sup>

No matter how development is perceived and whatever form it takes, it ultimately aims at the attainment of improved well-being for the human person, especially for the peoples in developing countries. Based on this understanding, the right to development would be said to have been achieved when an equilibrium in living standards has been attained for all peoples or, at minimum, achievable when the systems and opportunities are created and made accessible for all peoples to equally aspire for the highest attainable standard of living guaranteed to all peoples.<sup>4</sup> Looking beyond the controversies and the inadequacies that have constrained the realisation of the right to development, it is vital to admit that the dearth of research on the subject has played a significant role.

Part of the commitment to ensure that the abstract guarantees on the right to development translate into creating a sustainable impact is to ensure that its composite dimensions sufficiently inform policy measures on the obligation to create the conditions and to facilitate the processes to drive an effective right to development practice and consequently to maximise aspirations for better living standards and improved human well-being. In accordance with human rights standards, the responsibility to achieve this purpose is attributed to the state. The Declaration on the Right to Development stipulates that '[s]tates have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals', and the primary responsibility to create the conditions favourable to the full realisation of the right to development.<sup>5</sup> The African Charter on Human and Peoples' Rights (African Charter) also provides as a matter of binding law that '[s]tates shall have the duty, individually or collectively, to ensure the exercise of the right to development'.<sup>6</sup>

This special focus section of the *African Human Rights Law Journal* explores these functional requirements to illustrate some policy and practical measures with regard to what implementation entails and how the right to development may apply in actual circumstances. All

---

3 United Nations Development Programme *Human Development Report 1990* (1990) 9-16.

4 Universal Declaration of Human Rights adopted by the United Nations General Assembly, Resolution 217 A(III) of 10 December 1948 Preamble para 8.

5 Arts 2(3), 3(1) & 4(2) Declaration on the Right to Development Resolution A/RES/41/128 adopted by the UN General Assembly on 4 December 1986.

6 Art 22(2) African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity in Nairobi, Kenya on 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5; 1520 UNTS 217.

six contributions in this special focus section fundamentally concur in the argumentation that the implementation of the right to development remains a major concern and, accordingly, point out the lapses as well as the policy and practical measures that need to be taken. Two of the contributions examine the right to development globally within the context of international law and the Sustainable Development Goals; three are centred on Africa with an emphasis on matters relating to structural transformation; and one is more country-specific as it explores the right to development with regard to transformative constitutionalism in South Africa.

Igbinedion assesses the value of the right to development under international law which, he argues, provides a feeble framework for implementation, particularly taking into consideration the challenges of underdevelopment in sub-Saharan Africa. He argues that the lack of defined roles for rights holders and duty bearers misleads developing countries into vain expectations of assistance in their development efforts. He suggests a deconstruction of the current international law architecture on the right to development as a means to ensure its enforceability.

De Man's contribution explores the extent to which the global sustainable development framework for development incorporates the realisation of human rights into the development goals that are envisaged to be achieved by 2030. She makes the point that although the sustainable development agenda is compatible with rights-based standards, particularly in the area of participation, it primarily is limited in terms of implementation as well as monitoring and evaluation to ensure that the full spectrum of advantages offered under rights-based approaches to development can be achieved.

Focusing on the 2063 African agenda for development, Stevens looks at the World Trade Organisation with the aim to determine how African member states could explore the multilateral trade system to 'raise standards of living', 'ensure full employment' and 'sustainable development' through advancing the right to development within the trade discipline. With reference to multilateral trade practices, programmes and policies, she argues in favour of the right to development within the multilateral trade framework, which she says is a valuable tool for actualising the structural transformation objectives contained Agenda 2063.

Kamga takes a pan-African view in looking at the right to development in Africa where the aspiration for freedom, equality, justice and development remains a far-fetched idea. He makes the argument that a right to development-informed pan-Africanism has the potential to expand opportunities for development for the African people. He posits a reconceptualised form of pan-Africanism that emphasises Africa's sovereignty over its natural wealth and resources and the obligation to adopt a people-centred constitutionalism and responsive national policies to ensure the well-being of the African peoples.

Ngang's article demonstrates that Africa is confronted with a systems problem resulting from the lack of an adequate model to deliver on the promise to accelerate improved standards of living and the attainment of human well-being in larger freedom for the peoples of Africa. To this end he gives an account of the right to development governance as a functional model with the potential to actualise the collective advancement of Africa, which guarantees to the impoverished African peoples the entitlement to socio-economic and cultural development and redress on the range of other daunting development challenges on continent.

In exploring the question whether transformative constitutionalism, which is interpreted to imply the right to development, could achieve radical transformation in South Africa, Shai contends that it is unattainable because of insufficient theorisation of what radical transformation actually entails. He suggests that instead of pursuing transformative constitutionalism and the right to development as a means to achieve radical transformation, radical transformation should rather be seen as the starting point to inform transformative constitutionalism and the right to development.

## Systems problem and a pragmatic insight into the right to development governance for Africa

Carol C Ngang\*

Researcher, Free State Centre for Human Rights, University of the Free State,  
South Africa

<https://orcid.org/0000-0001-7222-4693>

### Summary

*This article draws from a previous publication by the same author and aims to provide an account of the concept of the right to development governance as a rights-based model for development suited to addressing the realities and myriad of development challenges confronting the African continent. In spite of Africa's diverse socio-economic, cultural and geo-political dynamics, the continent has occupied centre stage in the human rights and development discourse, most often presented in a negative light as the birth place of conflicts and instability, disease, extreme levels of poverty, endemic corruption, democratic insufficiencies, governance malpractices and general decline in an otherwise prosperous world. While efforts to speed up transformation have over the years multiplied at various levels, Africa is reported to be making very slow progress in meeting development goals. The situation necessitates the question: What is the problem? In responding to this question, the article achieves a threefold purpose. First, it demonstrates that the development challenges with which Africa is confronted are a systems problem requiring a rights-based solution in the form of a context-specific model to accelerate improved standards of living and the attainment of human well-being in larger freedom. Second, it illustrates that Africa is retarded in development because of the lack of an adequate model to deliver on the promise to ensure improved living standards for the peoples of the continent. Third, it*

---

\* LLB (Yaoundé) IDHA (Fordham) SUSTLAW (Antwerp) LLM LLD (Pretoria); NgangCC@ufs.ac.za. This article is a revised version of a paper presented at the 2nd International Conference on the Right to Development that took place at the Centre for Human Rights, University of Pretoria, South Africa, in August 2018. I am grateful to the conference participants for the helpful feedback and also to the anonymous reviewers for their instructive comments.

*explores the practical dimensions of the right to development governance as a functional model with the potential to ensure the collective advancement of Africa, which guarantees to impoverished peoples an entitlement to socio-economic and cultural development.*

**Key words:** *systems problem; neo-legalism; governance malpractices; democratic deficits; right to development governance; human rights and development; Africa*

## 1 Introduction

In a previous article I make the argument for conceptualising the right to development governance as a home-grown rights-based development model suited to addressing the realities and the myriad of development challenges confronting the African continent.<sup>1</sup> Under 'right to development governance' I mean a pragmatic model which is central to framing the political and socio-economic and cultural systems to ensure improved living standards in Africa. The conceptualisation of this model draws from a range of binding and non-binding instruments, which all envisage that socio-economic and cultural development can and, in fact, ought to be achieved.<sup>2</sup> Added to this is the need for a functional development model, which should enable Africa to advance in the area of improved well-being for the people much more than it is today.

Notwithstanding Africa's diverse socio-economic, cultural and geo-political dynamics, which suggest a huge potential for development,

---

1 See CC Ngang 'Towards a right to development governance in Africa' (2018) 17 *Journal of Human Rights* 107.

2 Art 22 African Charter on Human and Peoples' Rights, adopted in Nairobi, Kenya, on 27 June 1981; art 10 African Youth Charter, adopted in Banjul, The Gambia, on 2 July 2006; art 19 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in Maputo, Mozambique, on 11 July 2003; Preamble African Charter on Democracy, Elections and Governance, adopted in Addis Ababa, Ethiopia, on 30 January 2007; Constitution of the Republic of Cameroon 1972 and amended Preamble, read together with art 65; art 58 Constitution of the Democratic Republic of Congo (DRC) 1996; art 43 Constitution of the Federal Republic of Ethiopia 1994; art 7 Constitution of the Republic of Benin 1990; art 30 Constitution of the Republic of Malawi 1994; Transforming our world: The 2030 Agenda for Sustainable Development Resolution A/RES/70/1 adopted by the UN General Assembly on 27 September 2015, para 10; paras 11 & 24 UN Millennium Declaration Resolution A/55/L.2 adopted by the UN General Assembly on 8 September 2000; Rio Declaration on Environment and Development adopted at the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Principle 3; para 1(10) Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights UN Doc A/CONF.157/24, 25 June 1993; para 42 Report of the Meeting of Experts of the First Ministerial Conference on Human Rights in Africa, Kigali, Rwanda, 5-6 May 2003 EXP/CONF/HRA/RPT(II); para 2 Grand Bay Declaration and Plan of Action adopted by the First OAU Ministerial Conference on Human Rights held in Grand Bay, Mauritius, April 1999; para 6 Solemn Declaration on Gender Equality in Africa adopted by the AU Assembly of Heads of State and Government in Addis Ababa, Ethiopia, July 2004.



the continent has often been presented in a negative light as the least developed region in the world; a birth place of conflicts and instability, disease, extreme levels of poverty, endemic corruption and insensible leadership resulting in democratic insufficiencies, governance malpractices and general decline, which together describe unacceptably low standards of living. While development intervention efforts have over the years multiplied and Africa is reported to have experienced unprecedented economic growth, living standards have not improved for the large majority of the African peoples and, thus, progress in meeting human development targets remains a major problem.<sup>3</sup> Ten of the world's 13 poorest and least developed countries are in Africa.<sup>4</sup>

So, what is the problem in or with Africa? In over half of a century after independence, why is Africa unable to sustain appropriate processes to ensure improved living standards for its peoples? These questions are posed with the understanding that without stating the actual problem that Africa is confronted with, it would be difficult to craft appropriate remedies to address the replicating challenges mentioned above. In the face of these challenges, the last decade has experienced an increasing shift towards rights-based approaches, including the right to development, in dealing with them. With regard to the entitlement guaranteed to the peoples of Africa to aspire for development as a human right, further questions that need exploring are: What does the right to development aim to achieve? What determines progress towards making the right to development a reality in Africa?

In phrasing a response to these questions, I aim to illustrate that the development challenges with which Africa is confronted essentially are of a human rights nature – more exactly, a denial of the right to development – necessitating a remedy mechanism that responds directly to that problem. The theory of cause and effect (causality), which governs the relations between events,<sup>5</sup> explains that a denial of the right to development would invariably result in the kind of development challenges, characterised by low standards of living that is common in almost all of Africa. A sustainable remedy would require looking not at the effect but at the cause of the problem, implying an unlikelihood that a remedy of a different nature would be appropriate in redressing Africa's development setbacks or that a functional

---

3 K Beegle et al *Poverty in a rising Africa* (2016) xi-xii; S Sako & G Ogiogio 'Africa: Major development challenges and their capacity-building dimensions' (2002) The African Capacity Building Foundation – Occasional Paper 1 3-4; AJ Ali 'The right to development in Ethiopia' in E Brems, C van der Beken & SA Yimer (eds) *Human rights and development: Legal perspectives from and for Ethiopia* (2015) 70; R Kiely 'The crisis of development' in R Kiely & P Marfleet (eds) *Globalisation and the Third World* (1998) 24.

4 PJ Magnarella 'Achieving human rights in Africa: The challenge for the new millennium' (2000) 4 *African Studies Quarterly* 18.

5 ND Goodman 'Learning a theory of causality' (2010) MIT, *Department of Brain and Cognitive Sciences* – Pre-print 2.

solution could be found by pursuing overtly unrelated approaches to development.

To elucidate on this argument, I proceed in part 2 to define Africa's development challenges as a systems problem that disallows the realisation of the right to development. Meanwhile, as explained in part 3, the right to development necessitates an enabling environment, which requires looking at the outcomes factor as well as the procedural measures to ensure its realisation. In part 4 I provide an analysis of the right to development governance as a mechanism for gauging development in Africa or by which the standard of living could be measured. In conclusion, I reiterate the argument that unless Africa recognises that it is confronted by a human rights problem necessitating the right to development governance model as a remedy mechanism, aspirations for better living conditions will remain unattainable.

## **2 Systems problem that disallows the right to development**

### **2.1 Deviation from the capability and self-determination standards**

The history of Africa, dating back to the periods of colonialism, has been characterised by conventional systems that primarily only promote paternalism, subjugation, structural inequalities, exclusion and deprivation. The emergence of the human rights movement in the mid-twentieth century triggered the need for systemic changes, on account of which liberation from colonial rule was achieved on the basis of the right to self-determination. Self-determination entitles the peoples of Africa to freely make political choices and to pursue socio-economic and cultural development in accordance with the policies they have freely chosen.<sup>6</sup> The entitlement to self-determination is corroborated by the guarantee of sovereign ownership over natural wealth and resources, which should be disposed of only in the interests of the African peoples who, it is stated, may under no circumstance be deprived of their wealth and resources.<sup>7</sup>

Although other factors might have contributed to the decolonisation project, at the core of the African liberation struggles was the fact that the colonised peoples were exploited, dehumanised, abused and denied basic rights and freedoms. Decolonisation then meant that a new system would be established through which these ills would be corrected. It also meant by all reasonable calculation that

---

6 Common Article 1(1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, Resolution 2200A (XXI) adopted by the UN General Assembly in December 1966; art 20(1) African Charter.

7 Common Article 1(2) of ICCPR and ICESCR; art 21(1) African Charter.

the systems that sustained the abuse of human rights and the denial of basic freedoms would be abolished. On account of the right to self-determination, which is known to embody the right to development, the peoples of Africa are granted the liberty to adopt a governance model to ensure genuine freedoms and to formulate policies suitable for ensuring that socio-economic and cultural development is achieved. Particularly requisite of such policies is the need to regulate the wanton exploitation of the continent's resources.

As pointed out in the introductory part, the recorded setbacks to development in Africa, which translate into very low standards of living, suggest that the prevailing *status quo* remains one of programmed poverty. This, as I argue, is sustained by inherited or borrowed models that have no bearing on addressing the range of development challenges, and by home-grown models which rather compromise the realisation of the right to development. Granted that poverty is a violation of human rights,<sup>8</sup> it follows that the peoples of Africa are not by nature created to be poor. They are impoverished – rendered poor – by political design through the systems that strip them of the intrinsic entitlements that are supposed to guarantee equality of opportunity for development and also of the basic freedoms to aspire for better standards of living. Poverty limits the articulation of creative potentials and, thus, robs the African peoples of the resilience and the coping capacity to escape poverty.

The right to development in Africa is conceptualised with recognition of the potential to self-sustain and to self-govern which,

---

8 D Brand et al 'Poverty as injustice' (2013) 16 *Law, Democracy and Development* 273-275; F Doz Costa 'Poverty and human rights from rhetoric to legal obligations: A critical account of conceptual frameworks' (2008) 5 *SUR – International Journal on Human Rights* 86-88; MF Prada *Empowering poor through human rights litigation* (2011) 7; T Campbell 'Poverty as a violation of human rights: Inhumanity or injustice?' (2003) CAPPE – Working Paper 2003/9 1-19; T Pogge (ed) *Freedom from poverty as a human right: Who owes what to the very poor?* (2008) 2-11; Statement by former UN High Commissioner for Human Rights, Mary Robinson (1997-2002) quoted in United Nations Development Programme 'Poverty reduction and human rights: A practice note' <http://www.undp.org/poverty/practicenotes/povertyreduction-humanrights0603.pdf> (accessed 24 July 2018), (noting: 'I am often asked what is the most serious form of human rights violations in the world today, and my reply is consistent: extreme poverty'); Statement by former UN Secretary General, Kofi Anan, quoted in UN Office of the High Commissioner for Human Rights 'Human Rights in Development' <http://www.unhchr.ch/development/poverty-01.html> (accessed 24 July 2018) (stating: 'Whenever we lift one soul from a life of poverty, we are defending human rights. And whenever we fail in this mission, we are failing human rights'); Statement by former UN Higher Commissioner for Human Rights, Navi Pillay; quoted in '25th Anniversary of the Declaration on the Right to Development' [www.un.org/en/events/righttodevelopment/](http://www.un.org/en/events/righttodevelopment/) (accessed 24 July 2018) (pointing out that '[i]t's not an act of nature that leaves more than one billion people around the world locked in the jaws of poverty. It's a result of the denial of their fundamental human right to development.')

according to capability theorists, ought not to be limited if human-centred development is to be achieved.<sup>9</sup> The capability theory builds on the need to expand opportunities and choices and, consequently, to advance the capacity of the African peoples to freely set their own development priorities. To this end, Sen's conception of development as freedom implies that the systems that shape development processes ought to allow for expansion of the human capability to function, the liberty to explore opportunities within the often constrained socio-economic and political space, and the agency to define acceptable standards for sustained livelihood.<sup>10</sup>

As the basis for the realisation of human rights, capabilities are recognised as inborn entitlements representing the dignity and *worth* of the human person in aiming at the highest attainable standard of living in larger freedom from fear and from want, which within the African context is rather constrained by political determinants and socio-economic factors. The capability approach which, according to Fudaka-Parr, centres on the 'primacy of people; their well-being as the purpose of development and their agency as an essential element of the development process', 'offers a coherent philosophical framework for thinking about the full range of development challenges, starting with the question of how development should be defined'.<sup>11</sup>

Necessitating free expression, the capabilities approach embodied in the right to self-determination and also in the right to development is supposed to shape not only the narrative but, importantly, also the policy framework for development in Africa. With the understanding that the underlining purpose of development is to improve human well-being, the African development agenda ought to be defined by the right to development standard as emphasised in the Preamble and in article 22 of the African Charter on Human and Peoples' Rights (African Charter). The right to development literally translates from the African Charter as an integrated process for equalising opportunities for the advancement of all peoples to participate in and to enjoy the benefits obtaining from socio-economic and cultural development.<sup>12</sup> Contrary to the many different interpretations, the African conception of the right to development acknowledges the collective potential of all the peoples of Africa to participate in the development process without restraint and to be able to determine a

---

9 M Nussbaum *Creating capabilities: The human development approach* (2011) 17-18; A Sen *Development as freedom* (1999) 3-11 87-95; A Sen 'Development as capability expansion' in S Fudaka-Parr & AK Shiva Kumar (eds) *Readings in human development: Concepts, measures and policies for a development paradigm* (2003) 6-11.

10 Sen (1999) (n 9) 87-95.

11 S Fudaka-Parr 'Theory and policy in international development: Human development and capability approach and the Millennium Development Goals' (2011) 13 *International Studies Review* 123.

12 See H Armiwulan 'Development and human rights' (2008) *China Human Rights* 32.

policy agenda that allows for fairness and the equitable distribution of development gains.<sup>13</sup>

It should be emphasised that the right to self-determination and, of course, the right to development are primarily collective in nature, engendering the opportunity to exercise the functioning to self-sustain and to self-govern and, in consequence, to explore the alternative to define development in a transformative manner as aiming to achieve broad-scale improved well-being as a central priority. This has been the optimism of the peoples of Africa which, however, over time has gradually dissipated. Pent-up expectations for greater freedoms, improved capabilities and expanded opportunities for better living standards have had to compete with capitalist policies that require aspirations for human well-being to cede to economic demands that have predominated the development agenda and define it primarily in fiscal and growth terms.

Although the framework for development in Africa recognises that there is a right to development, the disconnect between the theoretical guarantees of that right and the mechanism for its realisation is apparent in the overt pursuit of capitalistic approaches when its realisation requires more of a socialist orientation.<sup>14</sup> The African conception of a human right to development is embedded in socialist thought. Proponents of African socialism hold the view that to liberate the continent from historical injustices requires broad-based transformation, equal opportunities for development, egalitarian patterns of redistribution, equitable access to the resources to ensure a net improvement in living standards and an emphasis on the worth of the human person as the primary drivers of development rather than as tools to be used to achieve economic growth targets.<sup>15</sup>

---

13 For contrary interpretations of the right to development, see K de Feyter 'Towards a framework convention on the right to development' (2013) *Friedrich Ebert Stiftung* 17; ME Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' in SP Marks (ed) *Implementing the right to development: The role of international law* (2008) 17; A Sengupta 'Development cooperation and the right to development' (2003) *Copyright © 2003 Arjun Sengupta* 20; A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 880 (proposing the right to development to be achieved through development cooperation which, however, basically takes away the right of participation and ownership of the development process from the African peoples).

14 MA Lebowitz 'The path to human development: Capitalism or socialism?' (2009) 60 *Monthly Review* <https://monthlyreview.org/2009/02/01/the-path-to-human-development-capitalism-or-socialism/> (accessed 20 March 2019).

15 E Akyeampong 'African socialism, or the search for an indigenous model of economic development?' (2017) *Harvard University – African economic history Working Paper Series* 36/2017 1-18; K Nkrumah 'African socialism revisited' in Peace and Socialism Publishers *Africa: Nationalism and social revolution* (1967) 4; P Rich 'African communalism' (1976) *The Black Sash* 14-15.

Without discounting the important role that economic growth plays in achieving development, as some scholars have highlighted,<sup>16</sup> the right to development is contravened when development policies are designed to focus only on achieving growth statistics. This is evident across Africa where development is measured principally in terms of growth rates, a measure by which a number of countries demonstrate significant levels of economic achievement.<sup>17</sup> Contrasted with the United Nations Development Programme (UNDP) classification for the same countries, most African countries with high growth rates fall within the lowest ranking on the human development index.<sup>18</sup> For example, Equatorial Guinea, which in spite of an impressive double digit economic growth rate of 23,6 per cent, only ranks at the 141st position in human development.<sup>19</sup>

The pursuit of economic growth impedes development by stripping the poor of inherent entitlements, subjugating them to want and misery and portraying them as not deserving of the opportunities that are supposed to avail to all peoples as envisaged by the right to development. This is closely linked to the globalisation agenda which, in spite of its insufficiencies, has become the framework that shapes and defines development in Africa, as I proceed to explain.

## 2.2 Neo-legalism and the global development agenda

The acquisition of independence from colonial rule created the expectation that a new dispensation would be established for Africa, to be sustained through socio-economic and cultural development. While this expectation failed to be realised, it became obvious to the peoples of Africa only some 20 years later that the nominal independence (devoid of socio-economic and cultural self-determination) obtained in the 1960s was not translating into improved standards of living. It then necessitated the adoption of the African Charter with an endorsed undertaking to prioritise the right to socio-economic and cultural development. Even so, making the right

16 S Kamga & S Heleba 'Can economic growth translate into access to rights? Challenges faced by institutions in South Africa in ensuring that growth leads to better living standards' (2012) 9 *SUR – International Journal on Human Rights* 82; A Sengupta et al 'The right to development and human rights in development: A background paper' (2004) The Norwegian Centre for Human Rights – Research Notes 07/2004 6-8; A Sengupta 'The human right to development' (2004) 32 *Oxford Development Studies* 184-185.

17 S Radelet 'Emerging Africa: How 17 countries are leading the way' Centre for Global Development Brief (September 2010) [https://www.cgdev.org/sites/default/files/archive/doc/full\\_text/EmergingAfrica/Radelet\\_EmergingAfrica.html](https://www.cgdev.org/sites/default/files/archive/doc/full_text/EmergingAfrica/Radelet_EmergingAfrica.html) (accessed 3 April 2019). The following ten countries are indicated to have some of the most impressive economic growth rates in Africa: Ethiopia 4,1 per cent; Mozambique 5,3 per cent; Sudan 4,7 per cent; Uganda 3,8 per cent; Rwanda 3,7 per cent; Chad 3,4 per cent; Tanzania 3,0 per cent; Burkina Faso and Sierra Leone 2,8 per cent; Mali 2,5 per cent; Lesotho and Nigeria 2,3 per cent.

18 United Nations Development Programme 'Human development reports: 2018 statistical update' United Nations Development Programme <http://hdr.undp.org/en/2018-update> (accessed 3 April 2019).

19 See Radelet (n 17) & UNDP (n 18).

to development a reality has remained a major challenge not only because of a lack of the commitment to do so but, as I argue, because of acquiescence to a 'neo-legalism' that practically disallows the realisation of the right to development.

Under neo-legalism I understand the post-colonial global framework where despite admittance into the United Nations (UN) system, developing countries are systematically denied recognition as equal sovereign subjects of international law, which in the main only applies to protect developed countries.<sup>20</sup> Neo-legalism is by nature aligned to the concepts of neo-colonialism and neo-liberalism which, in combination, undermine the quest by developing countries for global balance and, therefore, also dilutes the international law principle of sovereign equality. It deprives developing countries of the right to assert a legitimate entitlement to higher standards of living and conditions of socio-economic and cultural advancement on the basis of equal rights and self-determination as guaranteed in article 55 of the UN Charter.

Neo-legalism applies, for example, in the context of global trade and the climate change crisis. Even though Africa has largely not been involved in formulating the global trade rules (crafted principally by developed countries) or in generating the climate change crisis (as much as industrialised countries do), it is obligated to comply with the established global norms in these domains. Neo-legalism operates on the indeterminate principle that without sufficient economic clout, developing countries do not qualify to influence global decision making. Consequently, Africa has remained excluded from geopolitics and representation in major international decision-making fora and processes where universal standards and the barometers for measuring those standards are set and required to apply uniformly.

The idea of clustering into a global compact where human rights and problems of a socio-economic and cultural as well as humanitarian nature could be redressed in a concerted manner as stated in articles 55 and 56 of the UN Charter, creates hope for equitability in the attainment of higher standards of living for all peoples around the world. However, because of the inability to assert the right to sovereign equality, the very essence of adhering to universal norms robs developing countries of the potential to measure up equally with developed countries in terms of aspiring for higher standards of living.<sup>21</sup>

---

20 CC Ngang 'Differentiated responsibility under international law and the right to development paradigm for developing countries' (2017) 11 *Human Rights and International Legal Discourse* 287; A Anghie *Imperialism, sovereignty and the making of international law* (2005) 52; E Kwakwa 'Emerging international development law and traditional international law: Congruent or cleavage?' (1987) 17 *Georgia Journal of International and Comparative Law* 453.

21 See F Kirchmeier 'The right to development: Where do we stand? State of the debate on the right to development' (2006) Friedrich Ebert Stiftung – Occasional Paper 23 12.

Poverty remains a daunting setback to global development which in accordance with the provisions of the UN Charter demands a concerted international response as a legal obligation.<sup>22</sup> However, as Mahalu observes, the UN has instead espoused the practice of allocating to 'almost all instruments related to development a rather ambiguous legal character', which only prescribes moral norms that states may or may not comply with.<sup>23</sup> The neo-legalism that obtains from this arrangement thus allows the pursuit of the global development agenda predominantly through soft law in the form of resolutions and declarations intended to insulate developed countries of legal responsibility in redressing the historical wrongs committed against developing countries or in dealing with poverty and related development challenges.<sup>24</sup>

It may be argued that the UN is not a world government and, therefore, has no legitimacy to impose its will on a sovereign state. According to my argument this is where the systems problem actually originates. The UN was created to accomplish a triple mission to secure global peace and security, to ensure universal adherence to human rights standards, and to promote global development. It also provides an operational framework for the articulation of contemporary international law. As regards global peace and security, the UN has always found justification to enforce its will, especially when the interests of developed countries (the makers of global policies) are at stake. However, relating to human rights and development, which constitute the primary concern of developing countries, the approach has generally been more pacific, characterised by compromises as was demonstrated with the adoption of the Declaration on the Right to Development (RTD Declaration). Despite the recognition in the 1993 Vienna Declaration that the right to development is a human right similar to every other human right that is legally recognised under international human rights law, the Declaration has remained soft law.

The politics of economic globalisation and dominance of the market economy that fuels the practice of neo-legalism allows developed countries, because of the authority they exert, to set the agenda and the pace for global development, provide the funding and, of course, determine the rules ('conditionalities') for compliance and the manner of implementation. Accordingly, developing countries are earmarked for targeted development interventions within the framework of development assistance and, thus, charged

22 See arts 55 & 56 of the UN Charter 1945.

23 CR Mahalu 'Human rights and development: An African perspective' (2009) 1 *Leiden Journal of International Law* 19.

24 See generally Thomas Pogge's works on poverty: T Pogge 'The Sustainable Development Goals: Brilliant propaganda?' (2015) *Annals of the University of Bucharest – Political Science Series* ISSN 1582-2486 1-15; TW Pogge 'Severe poverty as human rights violation' (2003) UNESCO Poverty Project 1-38; T Pogge 'Real world justice' (2005) 9 *The Journal of Ethics* 29; T Pogge 'World poverty and human rights' (2005) 19 *Ethics and International Affairs* 1-7.



simply with implementation and reporting back in accordance with imposed donor conditionalities with which recipient countries must comply. In seeking to satisfy donor conditionalities, African governments have generally been misled into setting their priorities wrongly by focusing on issues relating to political governance and democratisation, while the circumstances on the ground demanded that more attention be directed towards socio-economic and cultural development necessary for developing the productive capabilities of the peoples of Africa.

The obviously biased global system that disallows developing countries from defining development in their own terms triggered the campaign for a new international economic order (NIEO), which was pioneered mostly by African countries in anticipation of rupturing the *status quo* of global imbalances and development injustices.<sup>25</sup> However, the NIEO campaign failed on account of the lack of sufficient economic leverage by developing countries to influence the politics that inform global governance. The RTD Declaration evolved from this background with the emphasis on development cooperation as a means to enable developing countries to attain comprehensive levels of development and to eliminate obstacles that may hinder the development process.<sup>26</sup>

The compromises that informed the adoption of the RTD Declaration were born out of the fear that the legal recognition of the right to development would compel developed countries to remedy the damages inflicted on developing countries. Kirchmeier describes the fears nursed by developed countries in the sense that the legal recognition of the right to development would empower developing countries to make legitimate demands which developed countries would be constrained to fulfil.<sup>27</sup> Denying legal recognition of the right to development basically implies depriving Africa and other developing countries of the entitlement to assert socio-economic and cultural self-determination against the pressures exerted by developed countries under the banner of development cooperation.

Unlike the framework for cooperation under the UN Charter that envisages 'respect for the principle of equal rights and self-determination', the non-binding cooperation framework provided by the RTD Declaration has taken precedence as the basis for extraterritoriality in the provision of development assistance as a means to achieve the right to development.<sup>28</sup> Shue explains that

---

25 R Adeola 'The right to development under the African Charter: Is there an extraterritorial reach?' in CC Ngang, S Kamga & V Gumedé (eds) *Perspectives on the right to development* (2018) 36.

26 Declaration on the Right to Development adopted by General Assembly Resolution 41/128, 4 December 1986, arts 3(3) & 4(2).

27 Kirchmeier (n 21) 11-12.

28 O de Schutter et al 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084; G Ooms & R Hammonds 'Global

'where the state with the primary duty to protect rights fails – for lack of will or capacity – to fulfil its duty, some other agent ... must step in and provide the missing protection'.<sup>29</sup> This is conceived mainly from the viewpoint that developing countries need help, entailing the provision of development assistance to satisfy that need.<sup>30</sup> However, Pogge contends that an effective remedy is not to be found in charity-based assistance but rather in the duty to redress the harm inflicted on the poor through the unjust global system.<sup>31</sup> On the contrary, the perpetrators of these injustices have remained reticent about a legal obligation to repair the damages that their actions cause to the impoverished.<sup>32</sup>

Although non-state actors, particularly extractive industry multinationals, are involved in extensive projects that impact negatively on the livelihood of local peoples, the neo-legalism practically insulates them from accountability for wrongful actions. A case in point is the abusive exploitation of crude oil by Shell Corporation in the Niger Delta region of Nigeria, resulting in massive oil spills that cause severe environmental damage that adversely affects the local population.<sup>33</sup> However, in making a case in this regard in the *SERAC* litigation, legal action could not be brought against Shell under the African Charter because as a basic principle of international law, non-state actors are not bound by treaties to which they are not party.

It requires the Nigerian government as well as other state governments in Africa to take appropriate measures to regulate the activities of the multinational corporations and non-state actors operating within their territories, which unfortunately they have largely failed to do. Notwithstanding the fact that multinational corporations are increasingly required to comply with human rights standards in their operations, as yet there is no legally enforceable

---

constitutionalism, responsibility to protect, and extra-territorial obligations to realise the right to health: Time to overcome the double standard (once again)' (2014) 13 *International Journal for Equity in Health* 2-4; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights adopted by the International Commission of Jurists, 28 September 2011, paras 1-44; SI Skogly 'Extra-national obligations towards economic and social rights' (2002) *International Council on Human Rights Policy* 1.

29 H Shue *Basic rights: Subsistence, affluence, and US foreign policy* (1996) 176-177.

30 Sengupta (2002) (n 13) 880; De Feyter (n 13) 17; Salomon (n 13) 17; Sengupta (2003) (n 13) 20; L Siitonen 'Political theories of development cooperation: A study of theories of international cooperation' (1990) *UN University WIDER* 15-16; K Arts & A Tamo 'The right to development in international law: New momentum thirty years down the line?' (2016) 63 *Netherlands International Law Review* 239-242; J Hausermann 'A human rights approach to development: Some practical implications for WaterAid's work' (1999) *Rights and Humanity* 5.

31 Pogge (2005) (n 23) 35.

32 OO Oduwole 'International law and the right to development: A pragmatic approach for Africa' (2014) *International Institute of Social Studies* 8; Kirchmeier (n 21) 11.

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

mechanism to guarantee realisation. Uvin observes that multinational corporations often only employ the human rights narrative to gain moral high ground and the legitimacy to 'redefine the conditions of misery and exploitation for the rest of the world'.<sup>34</sup>

Contrary to the rights-based standards that envisage the simultaneous realisation of development and human rights, the neo-legalism prioritises the growth of the market economy more than the observance of human rights. Economic growth, of course, is inevitable for development but its realisation in isolation does not guarantee that improved living standards will be achieved for all peoples. Thus, in contrast to impressive economic growth rates, empirical evidence holds that living standards in Africa have regressed. The situation is exacerbated by the fact that African governments have failed to take seriously the right to development enshrined in article 22 of the African Charter.

In the absence of a robust policy framework or the leverage to explore the development space, the peoples of Africa are constrained to conform to the forged normalcy of dependency, domination and the wanton exploitation of the African heritage. If improved living standards are to be achieved and sustained in Africa, the context posits the need to reaffirm the right to development as a model for governance and people-centred development programming. While it necessitates a drastic shift from the neo-legalism that portrays Africa's development challenges as a global problem but does not provide contextually relevant remedies, the governance and democratic practices in Africa make the systems problem even more compounded, as I proceed to explain.

### 2.3 Democratic deficits and governance malpractices

When the Organisation of African Unity (OAU) was established in 1963, one of its core founding purposes was '[t]o co-ordinate and intensify efforts their cooperation and efforts to achieve a better life for the peoples of Africa'.<sup>35</sup> It required and apparently still requires responsive leadership and a functional system to ensure the attainment of this purpose. However, as Appiagyei-Atua rightly intimates, the system in place has rather been one of 'bumps on the road'<sup>36</sup> resulting from a string of deficits and malpractices that have progressively defined the kind of unorthodox political culture that Africa is known for. These deficits and malpractices are documented in the repertoire of relevant literature and do not necessitate recounting here. Because the role of the state (represented by a legitimate

34 P Uvin 'On high moral ground: The incorporation of human rights by the development enterprise' (2002) 17 *The Fletcher Journal of Development Studies* 8.

35 Charter of the Organisation of African Unity adopted in Addis Ababa, Ethiopia, on 25 May 1963, art 2(1)(b).

36 K Appiagyei-Atua 'Bumps on the road: A critique of how Africa got to NEPAD' (2006) 6 *African Human Rights Law Journal* 524.

government) is central to achieving the right to development, I highlight the issue of unconstitutional changes of government to illustrate how it breeds anarchical leadership and corruption, which combine in a systemic manner to frustrate the processes for development, which should normally result in a better life for the peoples of Africa.

As part of the endeavour to ensure that an improved standard of living is guaranteed to the peoples of Africa, a range of regional and domestic legal instruments and institutional mechanisms have increasingly prescribed the norms that should lay the framework for the exercise of the rule of law, sane democracy, efficient governance, the observance of human rights and the realisation of the right to development. To be more proactive, unconstitutional changes of government are identified as road bumps that slow down the processes for development in Africa, necessitating additional practical measures by way of laying down the general rules on governance and the conduct of democratic elections as a means to remedy the situation.<sup>37</sup>

The Preamble to the African Charter on Democracy, Elections and Governance (African Democracy Charter), for instance, highlights the commitment 'to promote the universal values and principles of democracy, good governance, human rights and the right to development'. It presupposes that if these values and principles are adhered to, improved living standards would be attained. Accordingly, Udombana makes the case for considering democratic governance not only as a guiding principle but in essence as a human right, particularly relevant for Africa.<sup>38</sup> Unfortunately, Africa has continued to be threatened by systemic disruptions that go quite contrary to the established standards for democratic governance and, by inference, contrary to the guarantees on the right to development.

It is reported that there have been at least 200 *coups d'état* across Africa since the 1960s,<sup>39</sup> not excluding the recent theatrical yet graceful removal of the recalcitrant ailing Robert Mugabe from power in Zimbabwe in 2017. Besides the forceful and often violent take-over of power by the use of military force, Africa has repeatedly experienced a sequence of palace *coups* where incumbent heads of state have robbed their contenders (and hence the electorate) of legitimate victory at elections and, thus, retained power unconstitutionally. Because unconstitutional changes of government contravene the law, it is logical to argue that it renders the legitimacy of the government that takes over power illegally null and void and,

---

37 See African Charter on Democracy, Elections and Governance (n 2); Lomé Declaration, adopted by the OAU Assembly of Heads of State and Government in Lomé, Togo, July 2002; Declaration on the Principles Governing Democratic Elections in Africa adopted in Durban, South Africa, July 2002.

38 NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1223.

39 Aljazeera 'Inside story' *Aljazeera News*, 18 September 2015.

consequently, dispossesses the government that does so of legal recognition.

The 2000 Declaration for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration) underscores the fact that governments that accede to power through unconstitutional means will not be 'recognised by the OAU [AU]' and would be 'suspended from participating in the policy organs of the OAU [AU]'. Controversially, governments in Africa that have come to power or retained power through unconstitutional means have not only gone on to rule for several years (often beyond constitutionally stipulated mandates) but have also been fully integrated within the structures of the African Union (AU) and its policy organs. It remains unclear and questionable how and at what point these unlawful governments eventually gained legitimacy. Although the Lomé Declaration does not impose any legally-binding obligation because of its soft law status as a declaration, it is worth making reference to, in order to question the effectiveness of the processes to establish legitimate governance and a functional system for development in Africa.

Unconstitutional changes of government (by military force or through the ballot box) have been a recurrence in Africa to the point that the few countries that have not recorded such an experience make up the exception more than the rule. It creates conditions of instability that disrupts the development process. In contravention of the norms that forbid unconstitutional changes of government, these governments have more often than not eventually gained recognition (under conditions of legalism rather than legality or legitimacy) which, in turn, provides a breeding space for the kind of repressive political leadership and deep-rooted corruption that have impacted adversely on the extent to which the right to development is envisaged to be achieved. The right to development imposes an obligation to create an enabling environment to facilitate its realisation, to which I now turn.

### **3 Enabling environment for development**

An enabling environment for development in the context of this article represents both an imaginary and a realistic space within which states are required to create favourable conditions to ensure that the right to development is achieved without constraint.<sup>40</sup>

#### **3.1 Outcomes factor**

In very lucid terms, development ought essentially to be defined by what it aims to achieve which, within the rights-based framework, entails improving living standards for all peoples. It requires looking at the outcome factor which, drawing from article 22(1) of the African

---

40 RTD Declaration (n 26) art 3(1); arts 7, 8(1) & 10.

Charter, is qualified by the legal promise to all the peoples of Africa to have the equal opportunity to *enjoy* the right to socio-economic and cultural development. It is worth reiterating that the emphasis on socio-economic and cultural development is intended to ensure that an improved living standard is achieved in an inclusive manner. Further to this assurance, to reap equitable benefits from the development process, the freedom and identity of the African peoples must be situated at the core of governance and development planning.

This conceptual framing of the right to development is of strategic importance in shaping development thinking in Africa which, in contrast to the stipulation in the Preamble to the Africa Charter, wrongly prioritises civil liberties, political freedoms and the reform of democratic processes as the basis for creating development. Reports on the human rights situation in Africa frequently point out abuses relating mostly to civil and political rights, which for the most part only portray Africa as failing in democratic governance. There is very little reporting on violations of socio-economic and cultural rights and the right to development. While it is worth acknowledging that unresponsive leadership and democratic deficits have become the bane to development on the continent, the right to development illustrates that the peoples of Africa are confronted more with insufficiencies in socio-economic and cultural development than with the need for sensible politics and the reform of governance processes.

While political development may be relevant for the achievement of the right to development, it is not inherent to human well-being and, therefore, its absence may not necessarily devalue the right to development. It adds no substantial value to human well-being if, for instance, democratic reforms render the political processes flawless and free of malpractices, and also guarantee the full range of fundamental human rights (to life, to vote, to enjoy a fair trial, and so forth), civil liberties and political freedoms (of expression, of movement, and so forth). On the flipside, however, impoverished peoples are unable to afford the most basic necessities such as education, food, water, shelter and primary health care for daily survival and livelihood sustainability, or are deprived of the cultural practices that define them as a people. The failure to achieve desirable levels of well-being in Africa could be attributed to the fact that governance and development on the continent are defined and overly shaped by politics and the exercise of state power, which supersedes and trumps aspirations for socio-economic and cultural development and the well-being of the African peoples.

On the contrary, when populations are sufficiently empowered socio-economically and culturally, their free, active and meaningful participation in politics would be spontaneous and productive. This is definitely what the drafters of the African Charter had in mind when they explained in the Preamble that it is only when socio-economic and cultural development has been achieved that the enjoyment of

civil and political rights can effectively be guaranteed. Because the right to development in Africa is couched in legal terms with imposed obligations to respect, to protect and to fulfil, it provides the means for ensuring that the rule of law is applied, that justice is established to protect the impoverished from deprivation, exploitation and related development injustices, and that aspirations for improved well-being are attained.

The right to development governance is situated within this context as a framework model to define the modalities for state action in advancing socio-economic and cultural development, and to set the standards for holding the state to legitimate accountability. As a protective mechanism, as Kunanayakam notes, it guarantees that peoples are not treated as objects to be utilised to achieve development objectives but as the central subject or the primary focal point around which development should revolve.<sup>41</sup> Gawanas further explains that to put people at the centre of the development process means to invest in their capabilities and to expand their preferences for better living standards.<sup>42</sup>

When Doudou Thiam and Cardinal Etienne Duval pioneered the call in the late 1960s for a proclamation of the right to development, they were in principle advocating a development praxis defined by the goal to achieve optimal improvement of living standards for the impoverished peoples of Africa.<sup>43</sup> Kéba M'baye's seminal article in 1972 further articulates the view that development entitles every person to better living standards as a matter of human rights.<sup>44</sup> As the commissioned Chairperson of the Committee of Experts who drafted the African Charter, M'baye's perception of improved living standards for the peoples of Africa as the end goal of development, greatly informed the formulation of the African conception of the right to development as enshrined in the African Charter.

The emphasis on *all peoples* as stated in article 22(1) is justified by the reasoning that living standards need to be equalised across the continent. Of course, this aspiration is unrealistic in an Africa where prevailing situations demonstrate that development gains do not directly translate into better living conditions. This provokes nerve-racking questions in relation to the endless pursuit of futile policies, which over the years have failed to produce tangible results. Having

---

41 T Kunanayakam 'Report of the Working Group on the Right to Development on its 14th session' (2013) Human Rights Council A/HRC/24/37 4-5; RTD Declaration (n 26) art 2(1).

42 B Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 145.

43 See Ngang (n 1) 111-112; F Ouguerouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 298.

44 K M'baye 'Le droit au développement comme un droit de l'homme: Leçon inaugural de la troisième session d'enseignement de l'Institut International des Droits de l'Homme' (1972) 5 *Revue des Droits de l'Homme* 505.

identified the outcome factor as the requisite first step in ensuring the effective implementation of the right to development, the proceeding action entails exploring the procedural measures for creating people-centred development in Africa.

### 3.2 Procedural measures

A comprehensive understanding of the standard laid down in the Preamble and in article 22 of the African Charter is instrumental in determining the process for creating development, understood as aiming to achieve improved living standards. Besides imposing the traditional duty for realisation on states, article 22 also ascribes a corresponding duty on all the peoples of Africa to *exercise* the right to development. The liberty to exercise the right to socio-economic and cultural development gives the African peoples the responsibility to take tangible action in developing their capabilities to ensure that they contribute productively to development with due regard to their 'freedom and identity'.<sup>45</sup> By this, the African Charter recognises the potential of the African peoples to make independent and informed development choices.

The Charter enjoins state parties to ensure that the development space is free of constraints and allows the opportunity for the right to development to be achieved.<sup>46</sup> This is predetermined by the fact that the outcome factor informs the development process while the development process in turn justifies the outcome.<sup>47</sup> If the process is wrongly conceived, it is unlikely that the anticipated outcome of better living standards would be achieved. In this light the right to development is portrayed as the right to a comprehensive process that is envisaged to translate into substantive guarantees of genuine freedoms, self-determination and the capacity to make policy choices for the collective benefit of the African peoples. Related to this are three interrelated procedural measures that are central to the realisation of the right to development.

The first of these procedural measures, deduced from the radical promise to all the peoples of Africa, requires their broad-based involvement in the development process and, accordingly, imposes an obligation to ensure that participation not only is conducive but also gainful to the African peoples in terms of improved living standards. Popular and meaningful participation guarantees that crafting

---

45 Art 22(1) African Charter.

46 OC Okafor "'Righting" the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples' Rights' in SP Marks (ed) *Implementing the right to development: The role of international law* (2008) 60; A Mmari 'The challenges surrounding the implementation of the right to development in the African Charter on Human and Peoples' Rights in light of the *Endorois case*' LLM dissertation, University of Pretoria, 2012 23; Kirchmeier (n 21) 11; art 22(2) African Charter.

47 W Rodney *How Europe underdeveloped Africa* (1973) 1; Sengupta (2004) (n 16) 183-184; Sengupta (2002) (n 13) 848-852.



solutions to Africa's development challenges must involve the peoples of Africa which, however, has not always been the case. Owing to the perception of Africa as a target for development intervention, its development master plans have generally been conceptualised by foreign stakeholders, while the peoples of Africa are only required to comply with implementation in accordance with prescribed conditionalities.

The structural adjustment programmes, for instance, were exclusively an IMF/World Bank initiative, crafted with the assumption, as Dicklitch and Howard-Hassmann argue, that it was intended to release the productive capacity of the African peoples and thus stimulate economic growth, without which socio-economic rights would not be achieved.<sup>48</sup> Even though the Millennium Development Goals (MDGs) were envisaged to respond to Africa's development woes, including especially the goal to reduce poverty by half, it is not unknown that the MDGs were conceived and drawn up in 'relative casualness' in the basement of the UN office in New York by a small team of UN officials led by Lord Mark Malloch-Brown.<sup>49</sup> The implementation of the MDGs in Africa would probably have been much more successful if their formulation involved context-specific remedies to the issues that are particular to the African continent.

Participation entitles the peoples of Africa to be seen not as objects of charity or victims of development deserving to be helped, but as proactive development actors with the potential to shape the processes that impact adversely on their lives. Malloch-Brown's confession of how '[t]he development of the MDGs was a bit like nuclear fusion' begs the question of how and to what extent the global agenda incorporated African concerns into that fusion other than to earmark Africa simply as destined to receive development assistance. With the acknowledgment that development is situational and people-driven, participation anchors on the extent to which freedoms and the expansion of capabilities are guaranteed to engineer transformation in Africa.

While global initiatives have not provided an adequate framework for the realisation of socio-economic and cultural development, home-grown frameworks such as the New Economic Partnership for Africa's Development (NEPAD) and the Lagos Plan of Action have either also failed or lack the appropriateness to sustain the hopes of the peoples

---

48 S Dicklitch & R Howard-Hassmann 'Public policy and economic rights in Ghana and Uganda' in S Hertel & L Minkler (eds) *Economic rights: Conceptual, measurement, and policy issues* (2007) 325–327.

49 M Tran 'Mark Malloch-Brown: Developing the MDGs was a bit like nuclear fusion' *The Guardian* <https://www.theguardian.com/global-development/2012/nov/16/mark-malloch-brown-mdgs-nuclear> (accessed 22 August 2018). Malloch-Brown has confessed that '[t]he development of the MDGs was a bit like nuclear fusion', combining a 'human-rights based approach embodied in the Human Development Report; a World Bank pro-market structural adjustment strategy; and the target-setting mindset of rich donors in the Development Assistance Committee of the Organisation for Economic Co-operation and Development'.

of Africa. The current 2063 Agenda for Development provides reasons to be optimistic, but as long as the donor-recipient relationship between the AU and its funding partners, such as the European Union (EU) and China, is not decisively ruptured, the realisation of the right to development would remain far-fetched.

Contrary to the more expanded understanding of participation as entailing the active and meaningful involvement of the peoples in decision making, contribution to and sharing equitably in the benefits deriving from the development process, participation in Africa still is largely conceived primarily in terms of representation where the involvement of the population (electorate) is only measured and esteemed to be legitimate by the regularity of their votes in the ballot box. While representative democracy is crucial for creating development, it has rather mostly bred 'powerful' politicians in Africa, whose contribution to the development process predominantly has been counter-productive to the aspiration for improved living standards for the impoverished populations.

The second important procedural measure for the realisation of the right to development is the obligation to adopt adequate national development policies which, in order to respond relevantly to the need for improved living standards, must be capable of addressing the socio-economic and cultural realities that impact adversely on livelihood in Africa. On a broad scale, the policy framework should aim at the constant improvement in human well-being, on the basis of their active, free and meaningful participation and in the equitable distribution of the benefits resulting from the development process.<sup>50</sup> This requirement translates into a specific legal duty to adopt relevant 'legislative and other measures', without which the entitlement to socio-economic and cultural development would not be achieved.<sup>51</sup>

Interestingly, unlike with socio-economic and cultural rights, the right to development does not subscribe to the principle of progressive realisation on the basis of resource availability. Its realisation is contingent on the taking of policy measures, which must be accomplished immediately in assurance that the process for improved living standards could then be sustained. In addition to article 22, the provision on self-determination in the African Charter guarantees that the peoples of Africa 'shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen'.<sup>52</sup>

In spite of these assurances, there is reason to be worried about the persistent pursuit of policies that manifestly contravene the right to development in Africa. While there has been an increase in development interventions and policy measures intended to ameliorate living conditions in Africa, Arbour observes that what is

---

50 Art 2(3) RTD Declaration.

51 Art 22 African Charter, read together with art 1.

52 Art 20(1) African Charter.

essential is not the quantity of policy decisions that are taken, but the tangible contribution of those policy decisions to improving the livelihood circumstances of the impoverished peoples whose rights are constantly denied.<sup>53</sup> For Kennedy, development policy formulation entails making choices among policy alternatives with the aim to achieve optimal development outcomes and to ensure equitable redistribution and balanced development.<sup>54</sup>

If this thinking is to apply to Africa, the national development policy frameworks ought to show evidence of choice between people-centred development and the pursuit of economic growth, essentially because poverty constitutes a major development challenge in Africa much more than the need to advance the market economy. While economic growth is instrumental for development, poverty eradication presents a more urgent priority and, therefore, needs to inform the policy choices for Africa. Accordingly, national development plans are expected to demonstrate greater commitment to getting rid of poverty. On the contrary, the development plans of most African countries tend to focus on misplaced policy choices. The South African 2030 National Development Plan, for example, portends to focus on building human capabilities and in expanding opportunities as a means to eradicate poverty and to curb inequality in the country.<sup>55</sup> However, the 429-page document tilts more towards nation building and growing the economy and only summarily makes reference to people's participation in the development process on the last page.<sup>56</sup>

Lastly, an enabling environment for development requires extensive resource mobilisation, in accordance with which the African Charter sets obligatory standards. State parties are duty-bound to comply with these standards to ensure that socio-economic and cultural development is achieved with due regard to the equal enjoyment of the African common heritage. Read together with article 21(5), the Charter obligates state parties 'to undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'.<sup>57</sup> By this commitment state parties are enjoined to sustainably manage and redistribute the continent's resources to the benefit of the peoples of

---

53 UNOHCHR 'Statement by Ms Louise Arbour, United Nations High Commissioner for Human Rights on the opening of the 61st session of the Commission on Human Rights (Geneva 14 March 2005)' <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2799&LangID=E> (accessed 21 May 2018).

54 D Kennedy 'The rule of law as development' in J Hatchard & A Perry-Kessaris (eds) *Law and development: Facing complexities in the 21st century: Essays in honour of Peter Slinn* (2003) 18-19 26.

55 National Planning Commission *National Development Plan: Vision for 2030* (2011); see the Foreword by Minister Trevor Manuel.

56 National Planning Commission (n 55) 429.

57 Art 21(5) African Charter.

Africa. Controversially, most African governments, in contravention of this provision, have rather colluded with foreign multinationals to plunder the resources to which the peoples of Africa are entitled.

On account of the continent's resource potential, the peoples of Africa are entitled to enjoy the highest attainable standard of living. In reality, they have over the decades suffered deteriorating standards as a result of dispossession and the wanton and abusive exploitation of those resources; in most cases by foreign multinationals, but also by African governments or a complicity of both, as in the case of the Nigerian government's collusion with Shell Petroleum in the abusive exploitation of crude oil within the Ogoni community in the Niger Delta.<sup>58</sup> Many other local and indigenous communities in Africa, including the Endorois and the Ogiek in Kenya, have been forced to surrender their ancestral lands for the benefit of a governmental project (a game reserve), with the attendant impact on the well-being of the affected peoples.<sup>59</sup> The quest for land redistribution in South Africa clearly articulates a similar problem. Despite the constitutional promise to improve the quality of life and to free the potential of every citizen, access to and ownership of land has remained the exclusive preserve of a small (mostly white) fraction of the population, amounting to a denial of equality of opportunity for development for the over 80 per cent of the black population.

It is crucial to admit that the implementation of the right to development in Africa has remained constrained owing to a combination of convoluted factors. These factors include governance problems that breed endemic corruption, the very low levels of development in many African countries as well as the attendant global competition for economic growth. The policy framework of most African countries thus tend to prioritise the pursuit of economic growth, which is mischaracterised to represent development with the understanding that human rights would be looked into after economic growth has been achieved.

The capitalist dispensation that evolves from the pursuit of economic growth (justified by the need for the accumulation of more and more wealth in the hands of individuals) then provides the foundation for Africa's political economy where it is legitimate for public functionaries and politicians to loot state treasuries and appropriate national wealth with impunity. It also provides the rationale for the new Africa where, contrary to the spirit of communalism, it becomes acceptable for Africans with more political connections or economic clout to deprive other Africans, especially the poor and less privileged, of their entitlement to the common

---

58 SERAC case (n 33).

59 See eg *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) paras 269-298; *African Commission on Human and Peoples' Rights (Ogiek Community v Republic of Kenya)* (2017) Appl 6/2012 paras 201-217; see also CC Ngang 'Indigenous peoples' right to sustainable development and the green economy agenda' (2015) 44 *Africa Insight* 31-46.

heritage. This compounds the systems problem that I have alluded to earlier, which disallows the right to development and, thus, short-circuits the legal obligation that enjoins state governments to ensure improved well-being and better living standards for all the peoples of Africa.

## 4 Right to development governance barometer

### 4.1 Functional dimensions

The right to development governance is formulated as a functional model that combines and emphasises the rule of law, and the African conception of human rights with the emphasis on socio-economic and cultural development as an assurance of the collective advancement of the African peoples. Collective advancement, as a central tenet of the right to development governance, represents the idea that the peoples of Africa should be able to define development in their own terms, with due consideration of the existing diversities and consequently guarantee equality of opportunities, meaningful participation as well as equitable redistribution of available resources and the benefits resulting from the development process.

It involves the duty to eradicate tendencies of domination that impoverish and strip the African peoples of the capabilities to shape their own development future,<sup>60</sup> to consolidate the gains of political independence and accelerate the quest for socio-economic and cultural emancipation,<sup>61</sup> and to redress the effects of the globalisation that impacts adversely on living standards in Africa.<sup>62</sup> Agenda 2063 recognises that since 1963 the future of the continent has largely been inspired by the spirit of pan-Africanism, a focus on decolonisation and 'development based on self-reliance and self-determination ... and people-centred governance'.<sup>63</sup> To flout these prerequisites means that the right to development will not be achieved, justifying its functional dimension as a rights-based model for engineering socio-economic and cultural self-determination and a benchmark for legitimate accountability.<sup>64</sup>

---

60 J Eckel 'Human rights and decolonisation: New perspectives and open questions' (2010) *Essay-Reviews* 111.

61 Preamble Constitutive Act of the African Union adopted in Lomé, Togo, on 11 July 2000.

62 Hausermann (n 30) 20.

63 African Union Commission 'Agenda 2063: The Africa we want' (2015) *African Union* para 19.

64 Ngang (n 1) 107-122; P Oyugi 'The right to development in Africa: Lessons from China' in CC Ngang, SD Kamga & V Gumede (eds) *Perspectives on the right to development* (2018) 284; Ngang (2017) (n 19) 278-280; UN Human rights *Realising the right to development: Essays in commemoration of the 25th anniversary of the Declaration on the Right to Development* (2013) 495; WP Nagan 'The right to development: Importance of human and social capital as human rights issues' (2013) 1 *Cadmus Journal* 30; SP Marks 'The human rights framework for

Noting that the right to development presents the opportunity to define the tangible dimensions of 'development' in Africa with respect to the peoples' primary concerns as 'they strive to break out of poverty and underdevelopment',<sup>65</sup> Uvin contends that '[t]here is no politically grounded analysis of what stands in the way of his approach'.<sup>66</sup> Drawing from its African origins and the rationale behind its formulation, there is no justification why the right to development is not being considered as the key instrument for regulating people-centred development practice on the continent. As a framework model established by law, the right to development incorporates the duty to craft development policies that respond to the African peoples' aspirations for socio-economic and cultural self-determination.<sup>67</sup>

The right to development governance is conceived to guide consistency in policy formulation, development programming and implementation decision making and, therefore, should direct the manner in which Africa is governed and also shape thought patterns and actions with regard to the roles and contributions that the peoples of Africa owe as a responsibility in setting the basis for gauging living standards on the continent. For the most part it necessitates the advancement of human productive capabilities, guarantees of genuine freedoms and liberties in exploring opportunities to development and setting a minimum threshold for determining the attainment of collective well-being for all the peoples of Africa.

The right to development governance requires African governments to be focused more on domestic policy making and development programming oriented towards addressing the socio-economic and cultural needs of the African peoples than seeking to achieve global targets or donor conditionalities that are predominantly defined by the politics of global dominance. The rapidly-growing presence of China in Africa, for instance, has been the subject of mixed reaction and controversy among the peoples of Africa. While China denies its 'invasion' of Africa as neo-colonialism, Sun explains that China is more interested in its own political aggrandisement, economic gains and diplomatic ambition for global dominance than in mutual benefits through the south-south cooperation that it purports to promote.<sup>68</sup>

---

development: Seven approaches' (2003) *François-Xavier Bagnoud Centre for Health and Human Rights* 12; NJ Udombana 'The Third World and the right to development: Agenda for the next millennium' (2000) 22 *Human Rights Quarterly* 769-770; Sen (n 9) 1 87 147-148.

65 Oduwole (n 32) 4.

66 Uvin (n 34) 8.

67 Arts 1, 20(1), 21(1) & 22(2) African Charter; art 2(3) RTD Declaration.

68 Y Sun 'Africa in China's foreign policy' (2014) *John L Thornton China Centre and Africa Growth Initiative* 1-2.

## 4.2 Context-related capabilities

Development in Africa does not need to trail behind contemporary forms of industrialisation and modernisation. I have earlier advanced the argument that with historical evidence of ancient African civilisations, advancement on the continent needs to be defined by the extent to which the peoples of Africa can produce, innovate and invent, based first and foremost on the immediate needs and the local resource potential marketable consumables. In line with the socio-economic and cultural needs and the resources available to meet those needs, technology and industrialisation in Africa are likely to take an exclusive dimension, which is supposed to then determine the specific capabilities to be developed in conformity with the aspiration contained in Agenda 2063 to forge a uniquely African model for development and transformation.<sup>69</sup>

Although Agenda 2063 underscores the fact that in order to achieve transformation, the African population needs to be sufficiently empowered, instead of seeking ways to develop the relevant capabilities, for some unexplained reason African policy makers believe in and, thus, emphasise the need for technology transfer as a means to engineer development on the continent.<sup>70</sup> While technology transfer has repeatedly been emphasised in different international instruments as a means to support the efforts of developing countries for advancement,<sup>71</sup> it is inconceivable that industrialised countries would genuinely commit to transfer the technologies (for which in most instances they enjoy a monopoly) to developing countries. Doing so would mean ceding exclusive intellectual property rights over their inventions or products, something that is extremely unlikely to happen. Stemming from this is the crucial indictment to ensure that the training and educational systems in Africa are restructured to produce not only a literate population but a versatile and productive people with the capabilities to engineer the kind of transformation that is relevant for the continent.

## 4.3 Liberties and freedoms

The UNDP articulates the fact that human development is incomplete without basic freedoms, a reality that has throughout history characterised liberation struggles.<sup>72</sup> Poverty and underdevelopment are historical phenomena, deeply rooted in extensive dispossession and denial of the liberty to assert the right to socio-economic and cultural development. The right to development is framed within the

69 Paras 74(e) & (h) African Union Commission (n 63).

70 See African Union Commission (n 63) paras 52-58 in contrast to para 72(0).

71 S Amin *Imperialism and unequal development* (1977) 169; see also United Nations *Compendium of international arrangements on transfer of technology: Selected instruments* (2001).

72 UNDP *Human development report 1990* (1990) 16.

universal standard reading of human rights as those birth rights that arise out of inborn aspirations for basic freedoms and a life worth living with dignity, respect and protection, without which the African person cannot enjoy the quality of life that they have reason to value.<sup>73</sup> Contrary to the perception of freedoms and liberties as relating only to civil and political rights, to sustain living standards of the dimension envisaged by the right to development is achievable only to the extent that genuine liberties and freedoms in asserting socio-economic and cultural self-determination are guaranteed to all the peoples of Africa.

It is worth reiterating that the right to development grants the opportunity to make development choices, which includes the freedom to reject systems that do not work for Africa. While the UNDP identifies literacy as a key indicator for measuring living standards, in as much as the liberty to choose between alternative educational systems remains constrained, scoring high on literacy would comply with ticking the box for that indicator but with minimal practical benefit to Africa. Between 2015 and 2016, as part of the nationwide campaign for free university education in South Africa, students' grievances included demands for a decolonisation of the higher education curriculum as a means to ensure that learning is tailored to respond to local realities and the developmental priorities of the country. Unfortunately, the student protests were brutally suppressed and their legitimate demands for free, quality and decolonised education jettisoned by the South African government, which interestingly is mandated to ensure that the right to education enshrined in article 29 of the Constitutions is fulfilled.

#### 4.4 Minimum threshold for collective well-being

The African conception of the right to development necessitates setting a minimum threshold for determining collective well-being through legitimate guarantees of equality of opportunity for socio-economic and cultural development to all the peoples of Africa.<sup>74</sup> According to Sengupta, countries can develop in many different ways, but if these various ways by which development takes place do not guarantee equality of opportunity, then it violates the right to development.<sup>75</sup> The universal entitlement to the highest attainable standard of living lends credence to the fact that it is essential to standardise living conditions across the world by virtue of the fact that

---

73 See J Mubangizi 'Towards a new approach to the classification of human rights with specific reference to the African context' (2004) 4 *African Human Rights Law Journal* 94.

74 See SP Marks 'Obligations to implement the right to development: Political, legal and philosophical rationales' in BA Andreassen & SP Marks (eds) *Development as a human right: Legal, political and economic dimensions* (2006) 59-60; A Sengupta 'Realising the right to development' (2000) 31 *Development and Change* 848.

75 Sengupta (n 74) 848.



whatever the context, development ultimately aims at the attainment of human well-being.

However, owing to the unique characteristics that differentiate the peoples of Africa and to ensure that they do not fall through the cracks of the global system, it is difficult to endeavour to define the standard threshold for livelihood by applying a uniform measuring instrument. Such a determination can only be made in relation to specific contexts, which incontestably is a function of the value systems (culture) that define the lifestyle of different peoples around the world. A recognition of the distinctiveness of the African identity and value systems, thus, is central to determining the minimum threshold for their collective well-being. Because matters relating to community value systems, lifestyle and well-being can only be defined by the peoples involved, I contend that universally-accepted indicators for gauging development (economic growth rate and the human development index) do not convincingly equate to improved living standards and, therefore, add no concrete value to the living conditions of the peoples of Africa.

The economic growth measurement for development focuses primarily on advancing the market economy while the UNDP barometer simply portrays the extent of global imbalances by which Africa has consistently ranked lowest on the human development index compliance listing.<sup>76</sup> It is worth noting that in spite of reported remarkable improvements in human development,<sup>77</sup> no African country has since 1990 risen above the 63rd ranking occupied by Seychelles. In 2010 Libya ranked 67th but, following the military assault by NATO in 2011, has regressed to 102nd position in the most recent classification. To elucidate on the argument that the human development criteria do not necessarily add value to living standards, I make reference to the *literacy* and *income* indices to illustrate the limitations of their application in the African context.

Literacy levels are reported to be increasingly high across Africa,<sup>78</sup> suggesting that acquiring knowledge in terms of being able to read and write and to graduate from school with a qualification is not an issue. However, with regard to the contribution of education to development, the contrasting levels of underemployment, the lack of access to opportunities because of inaccurate skills, resulting in the importation of both soft and hard skills; services, technology, machinery and even basic consumables, demonstrates that literacy does not equate to productivity and, hence, does not translate into

76 AfDB, OECD, UNDP, ECA 'Human development in Africa' in AfDB, OECD, UNDP, ECA *Africa economic outlook* (2013) 73-88.

77 See eg *Africa economic outlook* (2017) 101-109.

78 Literacy levels in the following African countries are estimated as follows: Seychelles, Equatorial Guinea and South Africa, 95 percent; São Tomé and Príncipe, 92 per cent; Libya, Namibia and Mauritius, 91 per cent; Gabon, 89 per cent; Cape Verde and Botswana, 88 per cent; Burundi, Swaziland and Zimbabwe, 87 per cent.

development. African governments has largely failed to transform the education systems inherited at independence,<sup>79</sup> to ensure that they respond appropriately to the development priorities on the continent. For instance, although the export of primary products (raw materials) is known to be a major constraining factor to development in Africa, the education system is yet to be designed to produce the skills and technology required to transform these primary products into consumable exportable goods.

The income index by which poverty and underdevelopment are measured by the US \$1,5 per day baseline is erroneously intended to be applied universally despite the fact that not every society defines well-being in monetary terms. The US \$1,5 measurement would apply in a capitalist context where the dollar determines purchasing power and, hence, is conveniently used as a measuring instrument to determine living standards. In Africa, large sections of the population do not operate within a capitalist market economy where wealth is measured per head count, but rather within a communal system where wealth is predominantly a shared possession, which the African Charter recognises as a 'common heritage'.<sup>80</sup> Applying the income index in this context, therefore, is unlikely to provide an accurate measurement of living standards.

Going by the income benchmark in gauging development explains why over the years many African countries have consistently been ranked as extremely poor, heavily indebted, and least developed. Only lately have some of these countries reluctantly been considered as emerging economies. In most local communities in Africa, wealth, especially land and the natural resources found thereon, are collectively owned by the entire community and not by specific individuals. Development in this context can only be determined in function of the collective entitlement to the material things that guarantee well-being to all the members of the community. By implication, the income measurement constrains the extent to which appropriate remedies could be crafted to eradicate poverty and to remedy Africa's development challenges.

The exigency to eradicate and to remedy the range of other development challenges translates into a duty to ensure the full realisation of the right to development. Undeniably, while much of Africa's past has been shaped by external pressures, the present and the future remain a determination that only the peoples of Africa can make on the basis of an entrenched right to development, which by virtue of its legal protection by the African Charter imposes an absolute obligation that compels Africa to define its own standards for

---

79 K Nkrumah *Africa must unite* (1963) xiii. Nkrumah observed that the colonial education systems were designed to sustain colonialism and to promote imperial ideologies with no concrete bearing on local realities except to create 'much ignorance and few skills'.

80 Art 22(1) African Charter.

development. Unfortunately, for the reasons that have been explained in this article, African governments have fared poorly in satisfying the duty to make the right to development practically relevant in redressing the day-to-day livelihood experiences of their impoverished peoples.

## 5 Conclusion

In the face of multiplied efforts to accelerate development in Africa, it is worth reiterating that without recognition of the fact that the peoples of Africa are collectively confronted with a human rights problem, notably a denial of the right to development, endeavours to improve living standards on the continent will remain beyond reach. While the right to development has evolved in Africa since the late 1960s, essentially as a paradigm originally conceived to redress human rights abuses and development injustices, its practical implementation has for no justified reason been disregarded and its intended purpose thwarted and distorted. Consequently, the way development is understood and practised creates problems, with which the peoples are largely ill-equipped to deal because of the constraints that limit access to opportunities and the incapability to assert entitlement to socio-economic and cultural self-determination.

The argument advanced in the article is to the effect that Africa is legally obligated and, indeed, has the potential to deal with the compelling state of socio-economic and cultural challenges that constrain living standards on the continent. As indicated in article 5 of the RTD Declaration, in order to achieve and sustain improved standards of living, decisive measures need to be taken to eliminate obstacles to development. Unfortunately, these obstacles are generated and sustained by the deep-rooted systems that define and regulate how the peoples of Africa are conditioned to operate in ways that alienate them from the realities on the ground. It requires reformulating the governance system by creating a functional model that sets the minimum threshold for collective well-being.

A denial of the right to development, which is identified in the article as the cardinal problem that robs the peoples of Africa of better living standards, cannot be remedied by a lesser standard that limits entitlement to socio-economic and cultural self-determination. These forms of self-determination lie at the core of the duty to adopt a governance and development praxis that is uniquely African. The cultural component of the right to development in Africa requires promoting a distinctive cultural identity with its associated value systems, which should not be mistaken to connote primitivity, nativism or backwardness, but should rather be seen as a means of asserting exclusive self-determination. This, in essence, is the substance of the right to development in respect of which states are granted both the right and the duty to formulate domestic development policies that reflect the aspirations of their peoples.

Conceived in this light, the right to development governance necessitates not only a reform of existing laws or the ratification of more and more treaties, but a revolutionary transformation of the African thought patterns and functional modalities. Efforts in this regard remain challenged by the inordinate resistance to substitute the malfunctioning systems that limit socio-economic and cultural development and aspirations for better living standards on the continent. The extent to which better conditions and higher standards of living could be achieved and sustained in Africa can only be determined by a firm commitment to giving practical effect to the right to development as a governance model for engineering socio-economic and cultural development. Without practically asserting the right to development, entailing the peoples of Africa to define development in terms of their inherent aspirations for well-being, the rest of the world would be justified to impose their conception of what development should be for Africa. That is what European colonialism did and what Chinese imperialism currently is doing, with the conscious or unconscious acquiescence of the peoples of Africa.

## Finding value for the right to development in international law

*Simeon A Igbiniedion\**

Senior Lecturer, Department of Jurisprudence and International Law, University of Lagos, Nigeria  
<https://orcid.org/0000-0003-4888-8136>

### Summary

*This article explores the value of the right to development declared by the United Nations General Assembly in 1986 in the context of challenges of underdevelopment in sub-Saharan Africa. Declared over 30 years ago, the right to development remains a paper tiger because of its legal unenforceability. Difficulties associated with enforceability are exacerbated by the failure of the Declaration's sponsors to clearly identify the duty bearers relative to the right. The article argues that the juridical status of the right ignores the mutuality between right and duty in human rights discourse and deceives developing states into believing or expecting that developed states would provide the means and resources to develop developing states. It further argues that such disconnect between right and duty is detrimental to attempts at enforcement, especially where the parties involved are sovereign states that act at the international plane principally by consent or consensus. The detachment of the legally enforceable duty from the right weakens the force of international law and, regrettably, validates the Austinian view on international law as international positive morality. Such a scenario not only has undermined the capacity of developing states to take the destiny of their development into their own hands and look within for economic salvation, but also triggered a situation where public officials in these states engage in maladministration and complacent plunder of the common wealth of their countries. Therefore, the current architecture of the right to development needs to be reconstructed so that some uncertain parts of the obligation therein can be weeded out in order to allow for the enforceability of the right. This measure is expected to infuse some sanity into the human rights discourse and more responsible conduct in developing states.*

**Key words:** *right to development; duty bearers; human rights; international law; plunder of the common wealth*

---

\* LLB (Lagos) BL (Abuja) LLM PhD (Tokyo); [sigbiniedion@unilag.edu.ng](mailto:sigbiniedion@unilag.edu.ng)

## 1 Introduction

Development comprises any form of advancement or progress either at the national or international level. The principle of the sovereign equality of states<sup>1</sup> suggests that each state has the capacity to determine its roadmap to development. However, because such a principle is merely a juristic supposition, in reality developmental capacity differs from state to state.<sup>2</sup> Thus, there are state actors that find it extremely difficult to develop because their ability alone is inadequate. It is against this background that the right to development is to be appreciated. This right was first legally recognised by the African Charter on Human and Peoples' Rights (African Charter).<sup>3</sup> Since the Charter entered into force the African Commission on Human and Peoples' Rights (African Commission) has been mandated to examine the nature of development in intra- and inter-state disputes in Africa.<sup>4</sup>

In contrast, the right to development was declared by the United Nations General Assembly (UNGA) Resolution on the Declaration on the Right to Development (RTD Declaration) of 1986.<sup>5</sup> Unlike the African Charter, the RTD Declaration is applicable to members of the UN (including African states). Different to the African Charter, which is legally enforceable, the RTD Declaration is not. Because the main focus of the article is on the UNGA-declared right to development involving developed and developing states, the African Charter provision on development falls outside the scope of the article.

The RTD Declaration creates the legal capacity in the state through the right to development to develop or to be developed. Although the former does not evoke controversy, the latter does. In the case of the former, the right to development empowers states to develop as they desire.<sup>6</sup> However, in respect of the latter it creates the legal norm that enables developing states to claim the dividends of development from developed states.<sup>7</sup> In this regard, developing states cite the grant of foreign aid by developed states to them as evidencing their right to development.<sup>8</sup> However, developed states, upon whom such a

---

1 Art 2(1) UN Charter 1945.

2 This reflects in art 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which permits state parties to develop relative to the quantum of their resources.

3 The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986; (1982) ILM 58.

4 See part 2 below.

5 See A/RES/41/128 (4 December 1986).

6 See, eg art 2(3) RTD Declaration.

7 Art 4(2) RTD Declaration.

8 MA Tadeo 'Reflections on the right to development: Challenges and prospects' (2010) 10 *African Human Rights Law Journal* 340 (stating that developing countries pinpoint slavery, colonialism and the neo-colonial socio-economic hegemony of the north as justifications for their legal right to seek development assistance from developed countries).

burden to develop developing states has been laid, have rejected this.<sup>9</sup> They argue that they offer foreign aid gratuitously and voluntarily to developing states in the course of inter-state relations for reasons that do not include or contemplate the fulfilment of any legal duty.

From the two diametrically opposed positions, there is no argument that nothing is ordinarily wrong with the right to development, but there are matters arising out of the steps taken by the RTD Declaration to concretise or legalise the right to development. Incidentally, such steps are more important than the right itself because the right to development is but an empty shell in the absence of its firm concretisation in, for example, legalisation.

This article examines the value of the right to development amidst challenges of underdevelopment in sub-Saharan Africa. The right to development, which was declared by the UNGA 33 years ago, remains illusive by reason of its indeterminacy, uncertainty or unenforceability. In order to overcome these defects, the article advocates the deconstruction of the right to development, especially those aspects relating to the duty of developed states to develop developing states. Part 1 introduces the article, while part 2 considers the subject of development. Part 3 examines the ingredients of the right to development. In part 4 the article argues for the deconstruction of the right and part 5 concludes the discussion.

## 2 Development

There are controversies surrounding the meaning of 'development'. Consequently, the meaning associated with the term is bound to reflect the ideological orientation of the researcher. Such orientation includes historical, sociological, political and economic perspectives on development. However, within the context of the right to development there appears to be the consensus that development is connected to the liberty of the individual. Thus, Sen defines development as a process of expanding the real freedoms that people enjoy.<sup>10</sup> It is upon the basis of such freedom that people make rational choices relative to their preferences, peculiarities and prejudices. Similarly, Seers perceives development as the reduction of poverty, unemployment and inequality from high levels to

9 Tadeo (n 8) 339 (observing that developed countries deny the right to development as creating any legal obligation on their part to economically or technically assist developing countries).

10 A Sen *Development as freedom* (1999) 1; see also K Iqbal 'The Declaration on the Right to Development and implementation' (2007) 1 *Political Perspectives* 10. For a critique of Sen, see B Tungodden 'A balanced view of development as freedom' 6 July 2001 <https://www.cmi.no/publications/file/953-a-balanced-view-of-development-as-freedom.pdf> (accessed 10 May 2018).

controllable heights.<sup>11</sup> Therefore, while a country that is able to minimise or control the enumerated economic indices is regarded as 'developed', another that falls short of such capacity is termed 'underdeveloped'. Furthermore, Todaro and Ajagun expand the meaning of development by characterising it as the re-organisation and re-orientation of the entire economic, social, political, cultural and religious systems with the aim of making life more meaningful.<sup>12</sup>

The importance of the economy in realising development cannot be over-emphasised. Marx makes this clear when he argues that the superstructure reflects the substructure, that is, the economic base.<sup>13</sup> However, because human freedom is the nucleus or nerve centre of development, there is less emphasis on national economic growth and more interest in the economic development of the individual. Economic growth, which is the ability of an economy to produce goods and services, measures<sup>14</sup> national income and output in terms of gross national product (GNP)<sup>15</sup> or growth per capita income.<sup>16</sup> Sen regards as narrow-minded the identification of development with the growth of GNP or rise in personal incomes, industrialisation, technological advancement or social modernisation.<sup>17</sup> This view is in harmony with that of Seers, who prefers individual economic development – gauged by reference to the economic indices of poverty, unemployment and inequality – rather than the index of per capita income.<sup>18</sup> Therefore, development is measured in terms of its social impact, that is, the extent to which it is people-oriented or improves the quality of lives of people. It is from such orientation that human development is derived.

Human development is an improvement in the fortunes of men or women to boost their capacity to overcome the inadequacies of their environment. Human development not only concerns meeting the bare, basic or existential exigencies of individuals, as contained in Maslow's hierarchy of needs (food, clothing and shelter). Rather, it is placing humans in a material condition where they could live a life of fulfilment and satisfaction. It is in this context that both Sen and Seers agree that the purpose of human development is to reduce poverty,

---

11 D Seers 'The meaning of development' <https://www.ids.ac.uk/files/dmfile/themeaningsdevelopment.pdf> (accessed 10 May 2018).

12 BA Adah & UD Abasilim 'Development and its challenges in Nigeria: A theoretical discourse' (2015) 6 *Mediterranean Journal of Social Sciences* 276.

13 JM Elegido *Jurisprudence* (2000) 70-72.

14 J Soares Jr & RH Quintella 'Development: An analysis of concepts, measurement and indicators' (2008) *Brazilian Administration Review* 104.

15 Iqbal (n 10) 10.

16 SK Kutor 'Development and underdevelopment of the African continent: The blame game and the way forward' (2014) 4 *Research on Humanities and Social Sciences* 15.

17 Sen (n 10) 1.

18 Seers (n 11) 5.



inequality, unemployment and deprivation, and to broaden choice.<sup>19</sup> According to the United Nations Development Programme (UNDP), such an approach focuses on people, their opportunities and choices. The UNDP demonstrates this through its annual Human Development Reports.<sup>20</sup> One of the indices upon which the Human Development Report is based is the Human Development Index, which is a summarised measure of average achievement in key dimensions in human development: a long and healthy life, knowledge, and a decent standard of living.<sup>21</sup> For analytical purposes the Human Development Report classifies countries into four levels of development: very high human development; high human development; medium human development; and low human development. Unfortunately, in the Human Development Index reports from 1990 to 2015 many sub-Saharan African countries have consistently been categorised as low human development countries.<sup>22</sup> Such dismal record persists to date.

The statistics of the UNDP harmonise with the sociological experience of sub-Saharan Africa. The economies of most of the countries in this group are in a very bad shape, poorly managed, and the people live in abject poverty and material deprivation. The continent thirsts for economic development that would financially empower the citizens to take care of their needs with relative ease. Signé states that notwithstanding Africa's robust economic growth from 2000 to 2015, the absolute number of the poor has increased on the continent. According to Signé the World Bank estimates that Africa had at least 50 million more poor people in 2013 compared to 1990.<sup>23</sup> On his part, Heidhues laments that despite the fact that a number of sub-Saharan African countries had relatively favourable development prospects and income levels compared to those in Southeast Asian countries upon attainment of statehood, most Asian states have surpassed African states in terms of development and income levels.<sup>24</sup>

The international community has been concerned about the abject poverty on the continent. Specifically, developed states have

19 W Nafziger 'From Seers to Sen: The meaning of economic development' 2 <http://www.rrojasdatabank.info/widerconf/Nafziger.pdf> (accessed 8 June 2018).

20 UNDP 'Human Development Reports' <http://hdr.undp.org/en/humandev> (accessed 15 December 2018).

21 UNDP 'HDR' <http://hdr.undp.org/en/content/human-development-index-hdi> (accessed 10 June 2018). In its 1991 report the HDR improved upon these three variables. See UNDP 'HDR 1991' [http://hdr.undp.org/sites/default/files/reports/220/hdr\\_1991\\_en\\_complete\\_nostats.pdf](http://hdr.undp.org/sites/default/files/reports/220/hdr_1991_en_complete_nostats.pdf) (accessed 11 June 2018).

22 UNDP *HDR 2016: Human development for everyone* (2016) 202-205.

23 L Signé 'Why has Africa's fast economic growth left more poor people behind and how do we fix it?' Foresight Africa 2018 Report (Africa Growth Initiative at Brookings) 11 January 2018 Cap 3 44, [https://www.brookings.edu/wp-content/uploads/2018/01/foresight-2018\\_chapter-3\\_web\\_final1.pdf](https://www.brookings.edu/wp-content/uploads/2018/01/foresight-2018_chapter-3_web_final1.pdf) (accessed 13 June 2018).

24 F Heidhues 'Why is development in sub-Saharan Africa so difficult: Challenges and lessons learned' (2009) 3 *Review of Business and Economic Literature* 398.

committed themselves to foreign aid for the benefit of Africa. Foreign aid is a generic name for all types of assistance that a country derives from other countries or multilateral agencies and financial institutions to fill noticeable gaps, especially in production, savings and investments.<sup>25</sup> It may be packaged as grants, loans, foreign direct investment, overseas development assistance, debt forgiveness, joint ventures and technical assistance.<sup>26</sup> Mosley defines aid as money transferred on concessional terms by the governments of rich countries to the governments of poor countries.<sup>27</sup> The necessity for foreign aid is grounded in the incapacity of the recipient state to internally generate the necessary capital to fund critical sectors of its economy. Many developing states find themselves in this situation. Consequently, developed states for decades have been funnelling aid to these developing states. Since the independence of most African states in the 1960s economists and development experts have argued that more aid means more capacity of the government to deliver the goods. Thus, by 2000 (that is, for the previous 40 years) an amount in excess of \$568 billion has been spent by developed states as aid in Africa.<sup>28</sup> In his conviction of the utility of further aid to Africa, former British Prime Minister Tony Blair described the African continent as a 'scar on our consciences',<sup>29</sup> and at the World Economic Forum in Davos in January 2005 he called for 'a big, big push forward' in Africa to end poverty, financed by an increase in foreign aid.<sup>30</sup> Ultimately, in July 2005 the G-8 agreed to double foreign aid to Africa, from \$25 billion to \$50 billion annually.<sup>31</sup>

Moreover, in 2000 the UNGA declared the Millennium Development Goals (MDGs), which set some goals including the goal to halve poverty by 2015.<sup>32</sup> At the expiration of the period over 150 world leaders under the auspices of the UNGA adopted another set of goals named the Sustainable Development Goals (SDGs),<sup>33</sup> which set

25 JS Omotola & H Saliub 'Foreign aid, debt relief and Africa's development: Problems and prospects' (2009) 16 *South African Journal of International Affairs* 88.

26 As above.

27 M Ali & A Zeb 'Foreign aid: Origin, evolution and its effectiveness in poverty alleviation' (2016) 11 *The Dialogue* 108.

28 W Easterly 'Can foreign aid save Africa?' December 2005 3, <https://www.csbsju.edu/Documents/Clemens%20Lecture/Clemens2005.pdf> (accessed 14 March 2019).

29 'Blair promises to stand by Africa' *BBC News* London 2 October 2001, <http://news.bbc.co.uk/2/hi/africa/1575428.stm> (accessed 9 November 2018).

30 As above.

31 As above.

32 UN 'United Nations Millennium Declaration (55/2)' <http://www.un.org/millennium/declaration/ares552e.htm> (accessed 15 June 2018).

33 Adopted on 25 September 2015 at the United Nations Sustainable Development Summit; see UNDP 'World leaders adopt Sustainable Goals' 25 September 2015, <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2015/09/24/undp-welcomes-adoption-of-sustainable-development-goals-by-world-leaders.html> (accessed 12 July 2018).

some goals connected with goals in the MDGs to be delivered at the latest by 2030.<sup>34</sup>

Global efforts have been somewhat replicated at the continental level. The Heads of State and Government of the African Union (AU) in 2001 adopted and in 2002 ratified the development model known as the New Partnership for Africa's Development (NEPAD). NEPAD is the pan-African strategic framework for the socio-economic development of the continent. Its principal objectives include eradicating poverty; placing African countries (both individually and collectively) on a path of sustainable growth and development; halting the marginalisation of Africa in the globalisation process; accelerating the empowerment of women; and fully integrating Africa into the global economy.<sup>35</sup>

What all these efforts demonstrate is that humans are the centre piece of development and a state can be said to be genuinely developed only when its citizens, or at least most of them, have been raised above poverty. However, much poverty remains in Africa, a circumstance that has prompted concerted efforts by the international community to increase financial aid to the continent. Against this background, the article proceeds to the next section to examine the right to development.

### 3 Right to development

The entry into legal discourse of the right to development is attributed to Senegalese jurist Kéba M'baye who, while presenting a paper at the International Institute of Human Rights in Strasbourg in 1972, initiated the idea of such a right.<sup>36</sup> Although such initiation could best be described in the language of Hume as dressing an 'ought' proposition in the garment of an 'is' proposition,<sup>37</sup> M'baye's academic declaration was seminal as it raised the tempo of the debate on the suitability of the right. Ultimately, nine years later the Organisation of African Unity (now the AU) legally recognised the right to development through the African Charter in 1981,<sup>38</sup> and five years later the UNGA adopted the RTD Declaration.<sup>39</sup> It is worth

34 UN Sustainable Development Goals <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed 15 June 2018).

35 See African Union 'New Partnership for Africa's Development (NEPAD)' <https://au.int/en/organs/nepad> (accessed 27 December 2018).

36 I Bunn 'The right to development: Implications for international economic law' (2000) 15 *American University International Law Review* 1433. See, however, OC Okafor 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in UN Human Rights (ed) *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) 374.

37 B Bix *Jurisprudence: Theory and context* (2004) 56.

38 African Charter (n 3).

39 See UNGA Resolution (n 5).

noting that whereas the African Charter is an international instrument legally binding on African states, the RTD Declaration, as the name implies, is a global declaration short of firm legal obligation. Nevertheless, the Declaration was a significant demonstration of the UNGA's high regard for the right to development.

At the UN, the RTD Declaration was sponsored by developing states and supported by Eastern Europe which used their numerical strength to vote, by a recorded vote of 146 in favour, one against (United States) and eight abstentions (Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom).<sup>40</sup> Beyond the reference to M'baye in connection with the recognition of the right to development, Iqbal traces the roots of the right to development from the decolonisation era of the 1960s through the UNGA Declaration and Programme of Action on the Establishment of the New International Economic Order (NIEO) 1974<sup>41</sup> to the adoption of the Charter of Economic Rights and Duties of States 1974.<sup>42</sup> As Marks puts it:<sup>43</sup>

It emerged from the legitimate preoccupation of newly independent countries with problems of development and the dominance of east-west issues on the agenda of the Commission on Human Rights, marginalizing the concerns of the political South, except for racial discrimination, apartheid, and foreign occupation, which did receive special consideration.

The preambular provisions of the RTD Declaration largely attest to this history. These provisions proceed from the platform of recognising development as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. Thereafter, the provisions make specific reference to the Universal Declaration of Human Rights (Universal Declaration); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR), instruments concerning the right of peoples to self-determination, state obligations towards the observance of human rights and the NIEO.

While article 1 of the RTD Declaration declares the right to development to be an inalienable human right implying individual participation in the developmental process and the full realisation of the right of peoples to self-determination, article 2 emphasises the

40 S Marks & R Malhotra 'The future of the right to development' 3, <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/134/2017/07/Marks-Malhotra-The-Future-of-the-Right-to-Development-2017.pdf> (accessed 20 November 2018).

41 GA Res 3201 (S-VI), UN GAOR 6th Special Sess, Agenda Item 6 2229th Plen Mtg 1, UN Doc A/RES/1302 (S-VI) (1974).

42 GA Res 3281 (XXIX) (12 December 1974). See Iqbal (n 10) 4-5.

43 S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 141.

human person as the central subject of development and the active participant in and beneficiary of the right. In the family of human rights, there are several generations of rights including first generation rights,<sup>44</sup> second generation rights,<sup>45</sup> third generation rights and the rest.<sup>46</sup> The right to development belongs to the third generation rights, which are solidarity, peoples', group or societal rights, including the rights to self-determination, the environment, humanitarian assistance, peace, communication, and common heritage.<sup>47</sup>

### 3.1 Right to development advocacy

Perhaps because of the history behind its coming into being, the right to development has generated much controversy that has pitted proponents against opponents along the north-south divide. Developing states and scholars sympathetic to the cause see the right to development as the mother of all rights. According to Bedjaoui the right to development is a core right from which all other rights derive,<sup>48</sup> and flows from and has the same nature as the right to self-determination.<sup>49</sup> Also, ICESCR obligates states to cooperate for the development of all countries.<sup>50</sup> Moreover, and quite empirically, an overwhelming number of states support the right to development.<sup>51</sup> In article 22 the African Charter obligates state parties to protect the right to development. Notably, Africa is the only continent that has transformed the right to development from moral rhetoric to legal obligation. According to Okafor '[t]he existence of article 22 of the African Charter is proof positive that this right transcends the realm of soft international human rights law'.<sup>52</sup> The legal obligation the article imposes on African states has generated rich and robust jurisprudence on the right to development. As at December 2018 the African Commission has handled seven complaints on the right to development.<sup>53</sup> In the process of doing so, the Commission has expounded and ruled on the legitimacy or propriety of claims and

---

44 ICCPR 1966.

45 ICESCR 1966 (n 2).

46 Such as the rights of women and children and animal rights; see A Oyeboade *International law and politics: An African perspective* (2003) 197-200.

47 Marks (n 43) 138; AV Cornescu 'The generations of human's rights' 5-6, [https://www.law.muni.cz/sborniky/dny\\_prava\\_2009/files/prispevky/tvorba\\_prava/Cornescu\\_Adrian\\_Vasile.pdf](https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/tvorba_prava/Cornescu_Adrian_Vasile.pdf) (accessed 7 October 2018).

48 Bunn (n 36) 1435.

49 B Ibhawoh 'The right to development: The politics and polemics of powers and resistance' (2011) 33 *Human Rights Quarterly* 91.

50 See eg art 1(2) ICESCR.

51 Marks & Malhotra (n 40).

52 Okafor (n 36) 374; see also K Arts & A Tamo 'The right to development in international law: New momentum thirty years down the line?' (2016) 63 *Netherlands International Law Review* 226.

53 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009); *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009); *Socio-Economic Rights and Accountability Project v Nigeria* (2008)

counter-claims on the right to development. For example, in the *Endorois* case<sup>54</sup> the African Commission held that the

right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.<sup>55</sup>

The African Commission has also had occasion to make important pronouncements on the article in other cases, including the case of *Democratic Republic of Congo v Burundi, Rwanda and Uganda*.<sup>56</sup>

### 3.2 Hostility towards the right to development

However, antagonists (comprising most developed states and intellectuals from these states) harbour a deep-rooted aversion to the concept of the right to development. Ibhawoh succinctly captures such perspectives as follows:<sup>57</sup>

In the discussions leading up to the adoption of the DRD, the debate focused mainly on whether the right to development is merely a moral and hortatory claim, or a legal or quasi-legal claim. Questions were raised about the foundational basis of the right, its legitimacy, justiciability, and coherence. The United States, joined by several other Western countries, objected to several perceived defects of the notion of a right to development relating to its failure to give due attention to economic liberties and entrepreneurship, its relation to questionable economic and social rights, and its conceptual confusion and conflicts of jurisdiction with trade and other international issues.

Thus, the principal ground upon which such antagonism towards the right to development is based is its legal imprecision or uncertainty. Bunn enumerates the particulars of such uncertainty to include the ambiguity of the right, the vagueness of the identity of the rights holders and duty bearers, the uncertainty over the nature of individual or collective responsibility, and the non-justiciability or non-enforcement of the right.<sup>58</sup> In this part I discuss these objections

---

AHRLR 108 (ACHPR 2008); *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004); *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004); *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003); *Peter Odiwuor Ngoge & 3 Others v The Republic of Kenya* Communication 524/15. See African Commission 'Decisions on Communications' <http://www.achpr.org/communications/decisions/?a=878> (accessed 12 June 2019).

54 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

55 *Endorois* case (n 54) para 277.

56 (2004) AHRLR 19 (ACHPR 2004).

57 Ibhawoh (n 49) 87.

58 Bunn (n 36) 1435; M Miyawa 'The international dimension of the right to development: Where is the gapping crack of accountability for non-state actors' (2016) 3 *The Transnational Human Rights Review* 41.

except for that on non-justiciability, which is reserved for discussion in part 4.

As far as the ambiguity of the right is concerned, Vandenbogaerde explains that the right to development has been controversial among states and scholars due to its lack of conceptual clarity. He further claims that the enduring failure of states to agree on a common conceptual framework to develop the right to development has greatly affected the normative validity of the right.<sup>59</sup> Similarly, Cathy criticises the various formulations of the rights of people (including the right to development) to pursue their economic development as a virtually obsessive repetition of the right of economic self-determination.<sup>60</sup> He further states that the claim that states make to a right to economic self-determination primarily serves as an ideological representation, reducing basic concepts to pure ideology. He concludes that such reduction is an indication of a crisis in legal theory. In relation to the vagueness of the right holders and duty bearers, Ghai castigates the right to development for a lack of clarity on the identity of those who are to enjoy the benefit and those to suffer the duty associated with the right.<sup>61</sup> As articulated by Iqbal:<sup>62</sup>

The language of the Declaration is vague, imprecise and unclear in some respects. First, it is not clear whether the individual is the subject or the beneficiary of the RTD ... 'The individual as a subject' and as a 'beneficiary' creates sufficient jurisprudential confusion and vagueness.

### 3.3 Critique of the right to development

Vagueness indeed is evident in some of the provisions of the RTD Declaration. Article 2(3) provides for the right and duty of states to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals. This provision may be interpreted as a restatement of the obligation of the territorial state to formulate such policies for the well-being of its citizens or persons living within its territory. However, the reference to 'entire population and of all individuals' is ambiguous. The phrase could be interpreted as the citizens or persons within the state's territory or as persons living anywhere in the world. Based on the principle of territoriality<sup>63</sup> and the need for certainty, the former is preferable to the latter.

59 A Vandenbogaerde 'The right to development in international human rights law: A call for its dissolution' (2013) 31 *Netherlands Quarterly of Human Rights* 188.

60 A Cathy 'From the right to economic self-determination to the right to development: A crisis in legal theory' (1984) 3 *Third World Legal Studies* 73.

61 Bunn (n 36) 1435; Miyawa (n 58) 41 notes that Ghai has toned down in view of subsequent development.

62 Iqbal (n 10) 12-14.

63 A Aust *Handbook of international law* (2010) 43.

Article 3(1) provides that states have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development.<sup>64</sup> Here it is supposed that each state, based on its own peculiar economic model or ideology, will create such conditions favourable to the economic fortunes of its citizens. Could it also mean that each state is duty bound to do so in order to enhance the development of persons outside its jurisdictional radar? More specifically, is the developed state required to develop the developing state? Salomon appears to answer this in the affirmative.<sup>65</sup> Nevertheless, such requirement imposed on a developed state to project its developmental tentacles beyond its borders is too general and reinforces the vagueness of the right to development.

Furthermore, article 3(3) of the RTD Declaration obligates states to co-operate with each other in ensuring development and eliminating obstacles to development.<sup>66</sup> This article complements article 3(1). Although the duty to cooperate for international development is a long-standing element of international law,<sup>67</sup> Salomon notes that 'these external obligations challenge the classical assumption of international human rights law which is rooted in the protection of individuals against abuse by their own state'.<sup>68</sup> Moreover, the obligation implied in inter-state cooperation is not clear. For example, what conduct may qualify as enhancing development or eliminating obstacles? In view of the primary duty of the state to promote its interests even in inter-state intercourse, how does one state shoulder the task of developing persons or entities abroad where doing so conflicts with its national interests?<sup>69</sup> It is highly doubtful that the state has the legal responsibility to promote the right to development of the citizens of foreign countries. All these buttress the ambivalence of the right. Similarly, article 3(3) further enjoins states to fulfil their

64 See Miyawa (n 58) 52 (criticising the neglect of the non-state actor in the scheme of allocating responsibilities).

65 ME Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' (2008) 5, <http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-16-Salomon.pdf> (accessed 15 March 2019) (attributing such perspective to (a) the impact on human rights of powerful actors external to the developing state advancing rules governing world markets that are widely criticised for being inequitable; (b) the pervasive influence of international economic organisations that continue to espouse neoliberalism (or its more recent variant); and (c) the corresponding reduction in domestic autonomy that limits the ability of states – particularly poor and less influential states – to decide independently their own economic and social policies).

66 O Olusegun & O Ajigboye 'Realising the right to development in Nigeria: An examination of legal barriers and challenges' (2015) 6 *Afe Babalola University Journal of Sustainable Development and Policy* 152.

67 Arts & Tamo (n 52) 239-242; see also Salomon (n 65) 4-5.

68 See Salomon (n 65) 6.

69 It is trite that every sovereign state has the duty to promote or protect its national interest even when it conflicts with that of another state. It is only when the advancement of such interest is contrary to its international obligation that the state is expected to abandon such interest.



duties in such a manner as to promote a new international economic order (NIEO). Significantly, developed states have ceaselessly voiced their opposition to the NIEO and its being smuggled through the back door into the RTD Declaration further revives or strengthens the hostility of the developed states towards the right to development.<sup>70</sup>

Building on article 4(1), which commits states to the formulation of international development policies for facilitating the full realisation of the right, article 4(2) makes provision for sustained action to promote the more rapid development of developing countries. Article 4(2) undoubtedly makes it clear that the duty bearers are the developed states while the rights holders are the developing states. However, because responsibility is basically territorial, developed states have never missed an opportunity to reject the possibility, however remote, of making them responsible for the development of other sovereign states or persons who live therein.<sup>71</sup>

Obviously, the discordant tunes from both sides of the divide on this matter testify to the ambiguity of the right to development. However, the argument of Salomon is interesting as it strikes at the root of the opposition of developed states to the assumption or imposition of such responsibility. According to Salomon, in contrast to the position of developed states, the right to development is concerned with a structural disadvantage that engenders the poverty afflicting half the global population and that, therefore, it is not preoccupied with the state's duties to its nationals, but with its duties to people in far off places or foreign jurisdictions.<sup>72</sup> Nevertheless, it remains to be seen how this perspective can be translated into the state practice of developed states. In reflection of the uncertainty surrounding the right to development, Cathy describes the right as corresponding more to the affirmation of a principle than to the recognition of a 'true subjective' right,<sup>73</sup> a perspective equally echoed

---

70 See Marks (n 43) 143 (stating that the United States government, under the Reagan administration, had clarified that the RTD Declaration should not be used as a means of resuscitating the NIEO in as much as it vowed that the United States would not allow the Declaration to create any entitlement to a transfer of resources or permit aid, being a matter of sovereign decision of donor countries, to be subject to binding rules under the guise of advancing every human being's right to development).

71 See F Kirchmeier 'The right to development: Where do we stand?' (2006) Friedrich Ebert Stiftung Occasional Paper 23 12 (stating that the biggest fear of developed countries is that the right to development could be seen as a 'right to everything' and therefore allow states or individuals from any state to sue rich nations for the fulfilment of what is perceived to be necessary for their enjoyment of the right to development).

72 Salomon (n 65) 11 12.

73 Cathy (n 60) 75; see also S Jha 'A critique of right to development' (2012) 1 *Journal of Politics and Governance* 21 (noting that one of the major criticisms of the RTD Declaration is the imperfect nature of obligations and the articles of the Declaration being at best a few policy commitments and not justifiable entitlements of the peoples of the world).

in Brownlie's view that 'the right constitutes a general affirmation of a need for a programme of international economic justice'.<sup>74</sup>

It is in view of the uncertainty that has dogged the right to development that the UN has been making frantic efforts to develop modalities thereof.<sup>75</sup> Instructively, the right to development for the past 33 years has remained at the realm of rhetoric,<sup>76</sup> a development that has prompted Vandenbogaerde to call for its dissolution.<sup>77</sup> Arguing along this line, this article advocates the deconstruction of the edifice of the right to development as presently constituted but for reasons different from those presented by Vandenbogaerde. While Vandenbogaerde argues that the current human rights mechanisms already cater for the right to development, the article anchors its advocacy on factors indigenous to developing states, an aspect to which the discussion now turns.

## 4 Deconstructing the right to development

Against the background of the many loose ends of the right to development, this part advocates the deconstruction of the right with the aim of weeding off some parts of the whole of the right. Specifically, the part does this by reconsidering the legality or legitimacy of the right, the abuses associated with the foreign aid regime, and the negative impact of the supposed entitlement to development funded by developed states on Africans' belief or confidence in their capacity to self-develop without necessarily looking beyond their territorial borders for economic salvation.

### 4.1 Legal status of the right to development

There are rights and there are rights. The history of the oppression of humanity and state repression of dissenting voices across ages probably justifies the increasing enlargement of the family or generation of human rights.<sup>78</sup> The distinction between *lex lata* (the law as it is) and *lex feranda* (the law as it ought to be) specifically speaks to the enforceability of rights. The legal indeterminacy or uncertainty of the right to development makes its unenforceability obvious. In their desire to ward off a violation of or interference with our interests, legal analysts usually invoke the language of rights without necessarily caring about their enforceability. However, enforcement matters especially where the violator or trespasser is unwilling to make amends as and when due. In a bid to confine a right to the realm of enforceability, Hohfeld proposes a thesis to the

---

74 Quoted in Salomon (n 65) 4.

75 Vandenbogaerde (n 59) 190-192.

76 See Marks (n 43) 137.

77 Vandenbogaerde (n 59) 187.

78 See Oyeboade (n 46) 197-200.

effect that to every right there is a correlative duty.<sup>79</sup> In other words, where the right holder claims a right, there must be a duty bearer against whom such right is claimed. The utility of this assertion is that the victim of the right violation should be able to claim compensation against a specific, identifiable person, entity or institution. Otherwise the victim's remedy will be in abeyance and such outcome may bring the legal rule authorising such remedy into disrepute.<sup>80</sup> Such detachment of legally enforceable duty from right weakens the force of international law and regrettably validates the Austinian view on international law as international positive morality.

The RTD Declaration unambiguously identifies developing states as rights holders. Conversely, it imposes the correlative duty of realising the right on developing states and their citizens, and on developed states. Although matters have arisen as to the nature of the obligation so imposed on the trinity, the focus of our analysis – which is the duty imposed on developed states – raises many issues, including the scope of such obligation and the propriety of imposing an obligation on a sovereign state for the benefit of another sovereign state.

The imposition of a right to development-related obligation on one sovereign state for the sake of another sovereign state is problematic. This is particularly so where developed states have used the opportunity provided by every forum to reject such obligation purportedly owed to developing states.<sup>81</sup> Of course, there are several moral bases upon which such obligation could be justified, including the responsibility of developed states for colonising developing states and the inequity in the international economic order that has simultaneously made developing states poor and developed states rich.<sup>82</sup> Nevertheless, the legitimacy of contemporary international law rests principally on the consent or consensus of its subjects.<sup>83</sup> Therefore, a right claimed by developing states but which the mainstream developed states have perpetually or persistently objected to would be difficult to enforce.<sup>84</sup>

The obligation under the right to development undoubtedly may manifest in a developed state granting financial aid to a developing state. However, such obligation is rather ambiguous. For example, in what quantity or quality will such aid appear in order to satisfy the intentment of the right to development? Is it sufficient for a developed state to provide financial assistance to a developing state even when such grant is actuated less by the genuine need of the recipient state but more by the donor's interests, for instance, that of using the aid as bait to recruit the recipient state as a partner-in-

79 See Bix (n 37) 128.

80 See H Kelsen *General theory of law and state* (2006) 118-9.

81 See Kirchmeier (n 71).

82 Salomon (n 65) 5; W Rodney *How Europe underdeveloped Africa* (1986).

83 M Shaw *International law* (2005) 10.

84 A Cassese *International law* (2005) 162-163.

progress in the battle against terrorism?<sup>85</sup> It is worth noting that aid given under this context may not generate growth or support people's welfare. In fact, it may even be a lifeline for an inept, corrupt or repressive government as was the case during the Cold War when donor states and multilateral financial institutions made aid available to many developing states (ruled by dictators) even when they knew that the resources were finding their way to the private Swiss bank accounts of ruling families and their accomplices.<sup>86</sup>

Obviously, from the analysis above the right cannot be justiciable or enforceable because there is no foundation therefor. In a situation where there is such ideological disagreement on the status of the right to development, it is not surprising that the right remains in limbo notwithstanding the fact that it is gradually ageing.

#### 4.2 Abuses of foreign aid

Aid is an alternative source of funding for possibly alleviating the economic misery of recipient states that are in dire need of the capital to finance developmental projects and welfare programmes. African countries have received more than \$568 billion in foreign aid.<sup>87</sup> Unfortunately, the output has failed to reflect the input as an overwhelming number of scholars have demonstrated that aid hurts more than it helps.<sup>88</sup> For example, Akonor argues that foreign aid has failed to lift Africa out of its economic mess despite the continent's receipt of approximately \$600 billion since the 1960s.<sup>89</sup> This is buttressed by the fact that at the time the amount of aid rose, Africa's growth rate concurrently fell.<sup>90</sup> On his part Deaton emphasises the negative impact of aid on development even in places beyond Africa. According to Deaton:<sup>91</sup>

85 See eg T Cassidy 'How foreign aid affects terrorism: Studying the channel of social spending' (2010) 19 *Issues in Political Economy* 69 (quoting the US Office of Management and Budget's 2004 overview of international assistance programmes, to the effect that the US will provide extensive assistance to states on the front lines of the anti-terror struggle, both in terms of financial assistance and training and support for allied governments, including Afghanistan, Colombia, Jordan, Pakistan and Turkey).

86 P Glynn et al 'The globalisation of corruption' in KA Elliot (ed) *Corruption and the global economy* (1997) 10-11.

87 Easterly (n 28) 3.

88 See eg G Mhaka 'Foreign aid hinders development in Africa' 23 October 2013, <http://www.chronicle.co.zw/foreign-aid-hinders-development-in-africa/> (accessed 20 July 2018).

89 K Akonor 'Foreign aid to Africa: A hollow hope?' (2008) 40 *International Law and Politics* 1074; T Ayodele et al 'Perspectives on aid: Foreign assistance will not pull Africa out of poverty' (2005) *African Cato Institute Economic Development Bulletin* 1, <https://object.cato.org/pubs/edb/edb2.pdf> (accessed 16 August 2018).

90 A Swanson 'Why trying to help poor countries might actually hurt them' 13 October 2015, [https://www.washingtonpost.com/news/wonk/wp/2015/10/13/why-trying-to-help-poor-countries-might-actually-hurt-them/?hpid=hp\\_hp-top-table-main-obamas-aid-2015%3Ahomepage%2Ft%3A-swanon&utm\\_term=.622109549005](https://www.washingtonpost.com/news/wonk/wp/2015/10/13/why-trying-to-help-poor-countries-might-actually-hurt-them/?hpid=hp_hp-top-table-main-obamas-aid-2015%3Ahomepage%2Ft%3A-swanon&hpid=hp_hp-top-table-main-obamas-aid-2015%3Ahomepage%2Ft%3A-swanon&utm_term=.622109549005) (accessed 13 October 2018).

91 As above.

[M]any economists were noticing that an influx of foreign aid did not seem to produce economic growth in countries around the world. Rather, lots of foreign aid flowing into a country tended to be correlated with lower economic growth.

Yet, in the midst of all these controversies many African states appear to be precariously dependent on foreign aid.<sup>92</sup>

Similarly, aid fosters corruption in Africa. Corruption, which is the abuse of public power for private ends,<sup>93</sup> arguably is the most intractable problem on the continent. The conduct is notorious for having undermined the development potential of Africa by serving as a vessel for secreting the resources of the continent into the estates and bank accounts of private persons located within and outside Africa.<sup>94</sup> It is worth recalling that many African states are endemically corrupt and much of the resources involved are sourced from natural resources such as oil, gas and minerals.<sup>95</sup> Unfortunately, the legal systems of many African states are unable to bring offenders to justice either through effective prosecution or disgorgement or restitution of the ensuing unjust enrichment.<sup>96</sup>

There is a direct or proportionate nexus between aid and corruption: the higher the aid the more the rate of corruption.<sup>97</sup> Where aid is offered by one government to another, sovereignty is implicated. Although donors usually couple their grants with some form of conditionality, a level of discretion is given to the recipient government, in its sovereign capacity, to execute the projects to

---

92 Brautigan & Knack define aid dependency as 'a situation in which the government is unable to perform many of the core functions of governments, such as the maintenance of existing infrastructures or the delivery of basic public services, without foreign aid funding and expertise'; see Omotola & Saliub (n 25) 90.

93 PJ Henning 'Public corruption: A comparative analysis of international corruption conventions and United States law' (2001) 18 *Arizona Journal of International and Comparative Law* 802-803.

94 N Kofele-Kale *International law of responsibility for economic crimes: Holding heads of state and other high-ranking state officials individually liable for acts of fraudulent enrichment* (1995) 171.

95 Studies have shown that the more naturally endowed a country is, the higher the extent of corruption therein. See eg JV Zhan 'Natural resources and corruption: Empirical evidence from China' <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047842.pdf> (accessed 10 October 2018).

96 SA Igbiniedion 'A critical appraisal of the mechanism for prosecuting grand corruption offenders under the United Nations Convention against Corruption of 2003' (2009) 6 *Manchester Journal of International Economic Law* 56.

97 See eg M Sundsten 'Foreign aid and corruption: Ethical aspects of foreign aid' (2016) 18-19, cap III, <https://www.diva-portal.org/smash/get/diva2:937768/FULLTEXT01.pdf> (accessed 12 June 2019). See also U Efobi et al 'Foreign aid and corruption: Clarifying murky empirical conclusions' 2014, Working Paper, <http://hdl.handle.net/10419/123633> (accessed 12 June 2019) (arguing that aid aimed at social infrastructure and debt relief fuels corruption whereas aid targeted at the development of economic infrastructure, multi-sector and programme assistance reduces it).

which the grant relates.<sup>98</sup> From the profile of Africa as an intractably corrupt continent, the funds in the hands of the recipient state or government would be susceptible to manipulation, wasteful expenditure and outright corruption. Such money suffers the same fate as revenue internally generated from natural resources. Aid money is seen as a windfall or manna sent from heaven because it is appropriated and spent with little or no accountability and can even be misappropriated by the corrupt elites in government.<sup>99</sup> For example, of the \$22 million that the International Monetary Fund (IMF) loaned to Haiti, Jean-Claude Duvalier privatised or pocketed \$20 million.<sup>100</sup> Consequently, aid encourages unproductive and wasteful expenditure, and strengthens the government and not the institutions of the state. Therefore, aid has come to be understood as a source of corruption in Africa and, therefore, compounds the already serious problem of transparency and accountability on the continent.<sup>101</sup>

Moreover, although the genuine intention and the humaneness of those who advocate more aid for Africa may be undoubted, the intention or motives of state donors are questionable. Research indicates that aid grant is actuated not necessarily by the need or the economic exigency of the beneficiary but by the political or economic preference, inclination or expediency of the donor.<sup>102</sup> Citing other researchers, Tavares notes that aid is uncorrelated with the recipient country's growth, poverty incidence or development drive. For example, Deaton notes that the United States gives aid 'for "us", not for "them" – to support our strategic allies, our commercial interests

98 Within the context of repatriating plundered assets to original state owners, this much was emphasised in the tripartite Memorandum of Understanding between Nigeria, Switzerland and the World Bank regarding the repatriation of \$322,5 million recovered Abacha loot to Nigeria: Global Forum on Asset Recovery 'Summary of discussions' (2017) 3, [https://star.worldbank.org/sites/star/files/final\\_gfar\\_post\\_session\\_report\\_for\\_posting.pdf](https://star.worldbank.org/sites/star/files/final_gfar_post_session_report_for_posting.pdf) (accessed 29 November 2018).

99 *The Encyclopaedia of World Problems and Human Potential* 'Corruption and mismanagement of foreign aid' (2018) <http://encyclopedia.uia.org/en/problem/137140> (accessed 12 June 2019) (observing that much of the aid to Romania in the early 1990s, intended for orphans and institutionalised inmates of psychiatric homes, allegedly was diverted into the hands of corrupt officials and intermediaries who sold it at a profit on the black market, notably in neighbouring countries). See also A Grech 'The role of aid theft in Africa: A development question' 15 April 2017, <http://www.developmentinaction.org/the-role-of-aid-theft-in-africa-a-development-question/> (accessed 12 June 2019) (referring to the October 1998 edition of *Financial* as asserting that 'half the \$500 million which the World Bank gave the country *Russia* to restructure its coal industry has gone missing – even as coal miners sat outside the main government offices in protest against months without wages').

100 K Hinterseer *The political economy of money laundering in a comparative legal context* (2002) 63-64.

101 See eg Sundsten (n 97); MV Ndinda 'Governance and foreign assistance in Africa: A case study of Kenya' October 2016, [http://erepository.uonbi.ac.ke/bitstream/handle/11295/99849/Muli\\_Governance%20and%20foreign%20assistance%20in%20Africa.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/99849/Muli_Governance%20and%20foreign%20assistance%20in%20Africa.pdf?sequence=1&isAllowed=y) (accessed 9 December 2018).

102 J Tavares 'Does foreign aid corrupt?' (2003) 79 *Economics Letters* 100.

or our moral or political beliefs, rather than the interests of the local people'.<sup>103</sup> Similarly, Akonor observes that the primary true objective cited for African aid is to reduce poverty in order to provide a bulwark against terrorism.<sup>104</sup> It is also in this context that the attempt by the West to influence African culture, and perhaps to advance minority rights, with aid can be understood. For instance, at a time when Nigeria was on the verge of enacting legislation prohibiting same-sex marriage or union,<sup>105</sup> the United States, the United Kingdom and some international agencies issued a veiled threat to withhold aid from countries that were prohibiting this act.<sup>106</sup>

Therefore, the recipient is used as an instrument, or a means to the end of satisfying the whim of the donor. From the perspective of justice this outcome can be problematic. Although aid is ordinarily a benefit, penological theories may be invoked to explain the burden in using aid as an instrument. In the theories, the purposes of punishment include retribution and deterrence.<sup>107</sup> While retribution is deontological, that is, as an end in itself (focusing on the turpitude of the offender's conduct), deterrence is consequentialist, that is, looking at the consequences the punishment of one will have on another.<sup>108</sup> Penalisation based on deterring others triggers opposition. This is because the penalty is imposed on the offender for the sake of deterring a prospective offender from acting similarly. Foreign aid becomes a burden to the beneficiary where the donor offers it not as an end in itself or to genuinely meet the developmental challenges of the beneficiary but for the donor's end of protecting its peculiar interest or carving a sphere of influence for itself. We can legitimately use this penological argument as a weapon against foreign aid. In granting aid to recipients, many of the donors package the aid under the impression that it is meant to alleviate the poverty or parlous condition of the recipient state whereas ultimately they are satisfying their whim and caprice. Giving aid to Africa is not an end in itself – an end to African growth – but a means to the end of fulfilling the narrow interests of aid donors. In other words, aid has become a channel through which donors put up the facade of altruistically or

103 Swanson (n 90).

104 Akonor (n 89) 1073.

105 Nonetheless, Nigeria enacted the Same-Sex Marriage (Prohibition) Act 2014. Although this article does not address the controversial subject of homosexuality, the Nigerian rejection of same-sex marriage – which is rooted in its African cultural understanding of marriage being between a man and a woman – remains the dominant position in most African countries with the exception of a few countries.

106 See eg 'Obama fights Nigerian anti-gay Bill, threatens to cut off aid' 9 December 2011, <https://www.forbes.com/sites/mfonobongnsehe/2011/12/09/obama-fights-nigerian-anti-gay-bill-threatens-to-cut-off-aid/#235c1e6f4f7b> (accessed 12 September 2018); 'Countries that ban homosexuality risk losing aid, warns David Cameron' 30 October 2011 <https://www.theguardian.com/politics/2011/oct/30/ban-homosexuality-lose-aid-cameron> (accessed 12 September 2018).

107 JB Mitchell 'Crimes of misery and theories of punishment' (2012) 15:4 *New Criminal Law Review* 474.

108 Bix (n 37) 119.

humanitarianly helping Africa out of their economic woods, while their real or substantive aim is to promote their national or strategic interests. Africa is being used as a tool to achieve a desired end. It is high time the practice was halted of enabling donors to make vast amounts of capital out of the misfortunes of Africa with an aid regime that does not necessarily address the peculiar needs of the recipients.

### 4.3 Lethargy

The result of the influx of foreign aid is that Africa tends to overly depend on it. Aid has been used to spoon-feed African states to such an extent that it has taught the continent nothing but the shape of the spoon. Aid dependency has lulled the continent into the lethargy of believing that there can be no life outside of aid even when it is common knowledge that the aid regime is merely palliative and not programmed to bring lasting economic freedom.<sup>109</sup> Consequently, to paraphrase Tony Blair, African aid dependency has indeed made the continent the scar on the consciences of the world<sup>110</sup> and a laughing stock in the comity of nations.

Because aid is sourced externally, it is perceived as 'free' money which is not as amenable to accountability and prudent spending as funds generated locally. In the absence of such incentive to account or spend wisely, aid (as well as domestically-generated national patrimony) becomes vulnerable to massive looting. Indeed, many African rulers are notorious for having embarked on the complacent plunder of such resources<sup>111</sup> for personal and familial benefits. Consequently, governments become somewhat disconnected or distanced from the people. In other words, reliance on aid has rendered governments less accountable and prone to indulging in wasteful expenditure, leading to a weakened relationship between the government and the people.<sup>112</sup>

It should be noted that all these traces of bad governance occur simultaneously with the failure of the government to provide the basic infrastructure needed to meet the existential exigencies of the citizens and the nation. The availability of foreign aid has made African rulers lazy in responding to the critical needs of citizens. For instance, when natural or human-induced disaster strikes on the continent, against which no contingency has been made,<sup>113</sup> African rulers respond

109 D Moyo 'Why foreign aid is hurting Africa' *Africa News* 21 March 2009, <https://pols306.files.wordpress.com/2011/08/moyo-on-aid-in-africa-wsj.pdf> (accessed 9 December 2018).

110 *BBC News* (n 29).

111 See G Kreijen *State failure, sovereignty and effectiveness* (2004) 30.

112 See M Murshed & MM Khanaum 'Impact of foreign aid in the economic development of recipient country' (2012/2013) 2 *Journal of the Bangladesh Association of Young Researchers* 36; Swanson (n 88).

113 In the event of any natural disaster, African states' low capacity to respond effectively is glaring, and they make up for this by rapidly requesting external help or support; see eg GFDD 'Report on the status of disaster risk reduction in sub-Saharan Africa' November 2010 v.



feebly and then surrender to the fate of self-pity and console themselves with tales of the evils of slave trade or colonisation perpetrated by the West.<sup>114</sup>

Furthermore, with the free flow of foreign aid, African rulers have become unimaginative about turning their economies around despite all the sound and fury they frequently make about diversifying them in order to overcome the instability from fluctuation in world market prices.<sup>115</sup> They have lost their sense of creativity or initiative to think or work around the economic predicament of their countries. Therefore, foreign aid has engendered or generated in developing states the lethargy that has triggered their lack of confidence in themselves and their belief in their internal capacity to develop without necessarily being aided by developed states.<sup>116</sup>

In many African countries governments usually shy away from introducing tax regimes because tax payers would become more critical of their conduct. However, without foreign aid the government will have no choice but to impose taxes or more taxes to fund development. This will exact a huge price from the government. It cannot fiddle with tax payers' money, at least not for too long as tax payers will be more sensitive to and demand transparency and accountability. Ultimately, this will reduce the complacency of the ruling class and empower the people to not only have a say but also to have a way in the conduct of governance. Put differently, such relationship will generate respect for the rule of law, transparency and accountability. This development will signal the advent of home-grown developmental approaches that can genuinely be implemented with the cooperation of the rulers and the citizens.

The argument of this article is that the right to development is good on paper but poor in practice. It is beautifully packaged to lift the burden of poverty and lack from the shoulders of most, if not all, the peoples of the world. However, such communitarian zeal cannot be transformed into reality because the critical actors (the West and China) have vehemently rejected the burden associated with the right to development. Therefore, the article advocates the deconstruction of the right to development with a view to expunging the uncertain

---

114 JA Alemazung 'Post-colonial colonialism: An analysis of international factors and actors marring African socio-economic and political development' (2010) 3 *The Journal of Pan-African Studies* 62. However, the former President of the US, Barack Obama, admonished African leaders against blaming their colonial history for their economic woes: 'Africa should stop blaming history for its economic problems'— is Obama right?' <https://www.theguardian.com/world/2014/jul/30/sp-obama-africa-colonial-excuses-poll> (accessed 30 November 2018).

115 S Hove, 'Why Africa must shift from dependence to diversification, now' 15 December 2017, <http://quantumglobalgroup.com/africa-must-shift-dependence-diversification-now/> (accessed 1 December 2018).

116 FW Immanuel 'Are Western aids to Africa the solution to the embattled continental economy' July 2011, <http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/africa/Fillemon-Wise-Immanuel-Are-Western-Aids-To-Africa-The-Solution-To-The-Embattled-Continental-Economy.pdf> (accessed 15 September 2018).

element in the right (the legal obligation imposed on unwilling developed states to finance the development of developing states).

In order to support this argument, this part considered the importance of the mutuality of right and duty in legal obligation, the harmful effects of the aid regime (including the lethargy it has generated in the creative spirit of the African) and advocacy for the rejection of foreign aid. The article takes the position that such deconstruction and the attendant elimination of the uncertain legal obligation will clearly and unambiguously establish the territorial state as the power with the legal obligation to create the enabling environment for human and national development. This may erase from the minds of the rulers and the ruled alike that development must be externally imposed rather than being home-grown. It will create an avenue for the ruled to own the development processes of their countries and to demand greater transparency and accountability from their rulers. These steps will make governments realise that they need to pander to the whims and fancies of their people and to eliminate governmental misconduct if they are to survive. However, that this measure frees developed states of any responsibility for developing states does not mean that developed states will no longer participate in inter-state cooperation for development. Rather, it will rest the anxiety of developed states about the right to development and even encourage them to genuinely and freely extend assistance (even much more than they have been doing) to developing states. We would probably then succeed in not making the right to development a sedative or an ideological construct that is high on promise but low on fulfilment.

## 5 Conclusion

This article sought to find value for the right to development because it has been unable to deliver on its promises to the beneficiaries. Notwithstanding the fact that the right was declared over 30 years ago, it still is at its infancy and in search or need of further development amidst underdevelopment challenges in African states. The article considered development from the perspectives of the state and the individual and closely examined the latter. In doing so it singled out human development for discussion since the human being is the nucleus of the discussion on the right to development. The article noted that relevant developmental indices demonstrate that African states are extremely poor in human development. It is in view of this poverty that developed states have sought to intervene through the mechanism of foreign aid.

The right to development is indeterminate or uncertain. Specifically, the right is more apparent than real as it fails to pay due regard to the Hohfeldian scheme of a right being coupled with a correlative duty, as demonstrated by the divergence on the right between developing and developed states. The right to development

was conceived in controversy and brought to life in controversy. But having come this far, it is time to make the right less controversial and to lay to rest all anxieties associated with it. Consequently, the article made a case for the deconstruction of the right to development with the aim of expunging some parts of its whole, including its aspirational or programmatic aspects, the legal obligation placed on developed countries to generally develop, and specifically provide foreign aid and other forms of assistance to developing states. It is in such deconstruction that the real value of the right to development is demonstrable.

In its deconstructed state the right to development is capable of jolting African states from the lethargy or slumber of falsely believing that developed states owe African states the legal duty to develop them and, specifically, that foreign aid is the magic wand to transform their economies. More importantly, the drying up of the well of handouts from the West as a result of the re-branding of the right to development has the potential to galvanise African elites to the realisation that African development must be home-grown and not manufactured in any of the capital cities of the world.

Finally, it is hoped that Africans (including the rulers and the ruled) will see an opportunity for greater African human development in the regime of the refurbished right to development and to take the destiny of the continent in their own hands.

## A call for a 'right to development'-informed pan-Africanism in the twenty-first century

*Serges Djoyou Kamga\**

Associate Professor, Thabo Mbeki African Leadership Institute, University of South Africa

<https://orcid.org/0000-0003-3583-055X>

### Summary

*The pan-Africanism ideology originated from the subjugation of the African people, which manifested itself through slavery, and was followed by the foreign domination of the African development space. In addressing the problem, intellectuals (both in the diaspora and in Africa) came together through various activities that led to the adoption of the Organisation of African Unity in 1963, and informed its transition into the African Union in 2002. Notwithstanding the apparent independence and unity of the continent, Africa's aspiration for freedom, equality, justice and development remains a dream. This article aims to demonstrate that pan-Africanism remains relevant to reclaim Africa's rightful place in the world. To this end it argues that the 'right to development' concept can lead to the development of Africa. It submits that a 'right to development'-informed pan-Africanism would lead to development of the African people. Pan-Africanism should be geared towards the realisation of development recognised as a human right as codified in the African Charter on Human and Peoples' Rights and in other international instruments. This approach calls on Western powers and international institutions that shape the global development agenda to ensure that the international environment is conducive to the development of all, including Africans. Furthermore, it urges Western powers to respect the sovereignty of African countries over their wealth and natural resources. It also calls on African leaders to adopt a people-centred constitutionalism, to cooperate with each other and to adopt responsive national policies for the well-being of the African peoples and to establish an environment conducive to a vibrant civil society.*

---

\* Lic-en-droit (Yaoundé II) LLM LL.D (Pretoria); [dkamgsa@unisa.ac.za](mailto:dkamgsa@unisa.ac.za) or [sergesalaindk@gmail.com](mailto:sergesalaindk@gmail.com)

**Key words:** *pan-Africanism; right to development; political independence; socio-economic rights; cultural self-determination; human rights and development; Africa*

## 1 Introduction

The idea of pan-Africanism was constructed on the need to free Africa from the chains of imperialism and to enable African countries to ascend into the concert of nations on an equal footing with others.<sup>1</sup> While the idea of pan-Africanism was led in the diaspora by intellectuals such as Henry Sylvester-Williams, WEB du Bois, Marcus Garvey and Franz Fanon, to name a few, in Africa the movement was spearheaded by Hastings Banda of Malawi, Kwame Nkrumah of Ghana, Obafemi Awolowo and Namzi, both from Nigeria, and Jomo Kenyatta of Kenya. The movement developed and in 1963 led to the establishment of the Organisation of African Unity (OAU) with the core objective of putting an end to colonialism and apartheid as well as uniting the continent for the well-being of its people. In 2002 the OAU was transformed into the African Union (AU) without diversion from its pan-Africanist mandate revolving around African unity, development and peace and a better life for the people of Africa.

Yet, in spite of the apparent independence of African states, and now the 'Africa is rising' narrative,<sup>2</sup> African countries remain largely excluded from the global economy, and as a result are among the poorest in the world. Poverty, hunger, diseases, a lack of education and other basic needs for human dignity are daily realities on the continent. This happens amidst a huge quantity of wealth and natural resources, which do not benefit the African people but benefit those who set the prices and define the rules and terms of trade relating to those resources. At the same time Afro-optimists still rely on the pan-African ideology, which in reality has failed to free the African people from fear and from want. This situation, therefore, casts serious doubts on the relevance of pan-Africanism. Put differently: Is pan-Africanism still relevant in the twenty-first century?

This article argues that although pan-Africanism remains relevant for unity and a better life in Africa, there is a strong need to rethink the concept. There is a need to rely on a human rights-informed pan-Africanism or, to be specific, to apply a 'right to development'-informed pan-Africanism to improve people's lives in Africa. This is essential because human rights and the right to development are inherent to all human beings; they are entitlements that cannot be bargained away. The right to development theory not only compels the international community to set up an international environment

1 N Azikiwe 'The future of pan-Africanism' <http://www.blackpast.org/1962-nnamdi-azikiwe-future-pan-africanism> (accessed 6 October 2018).

2 See eg *The Economist* 'Africa is rising, a hopeful continent' (2013).

conducive to the flourishing of rights to foster a better life for all, but also compels nation states to take adequate legal and policy measures at national levels to ensure a good standard of living. The article argues that a right to development-informed pan-Africanism will not only shield the people of Africa from the exploitation, domination and impoverishment caused by Western countries and global institutions, but that it will also protect them against the power of tyrants in their own countries. As a result they will enjoy a better standard of living. Looking at pan-Africanism from a right to development perspective posits a new discursive space for the improvement of human well-being in Africa. This approach provides a platform to examine the vision of pan-Africanism through the lens of the right to development.

In terms of structure the article is divided into four parts, including this introduction. The second part explains the concept of pan-Africanism, and clarifies why it is essential to carve a new road to secure its relevance in the twenty-first century. The third part of the article demonstrates how a right to development-informed pan-Africanism can unite the continent and improve people's lives as was originally conceived by its initiators. The central argument of this part is that reliance on a pan-Africanism-informed right to development is key to securing freedom for the people of Africa from the forces of imperialism as well as from the tyranny of African dictators. The fourth part provides the concluding remarks.

## **2 Vision of pan-Africanism and the need to carve a new road for its relevance in the twenty-first century**

### **2.1 Pan-Africanist vision**

The idea of pan-Africanism originated from five centuries of domination, exploitation, humiliation and indignity inflicted on the African people through the slave trade, colonialism and imperialism.<sup>3</sup> Subsequent to this subjugation of Africa, the notion of pan-Africanism was coined to address the issue. The first pan-African conference to address the problems of African people worldwide was held in 1900, when Henry Sylvester-Williams convened a conference in London. The delegates discussed the need to create a movement to campaign for African peoples' rights. A crucial outcome of the conference was to promote the idea of 'oneness in experience' that has vindicated itself throughout the history of pan-Africanism.<sup>4</sup> Subsequently, under the leadership of WEB du Bois, at the end of World War I in 1919 the first

---

3 IG Shivji 'Pan-Africanism and the challenge of East African Community integration' Paper presented at the EAC 10th Anniversary Symposium 13-14 November 2009, Arusha, Tanzania (2009) 3 (on file with author); also <https://www.pambazuka.org/pan-africanism/pan-africanism-and-challenge-east-african-community-integration> (accessed 10 October 2018).

4 Eriya Kategaya on the net, [https://www.newvision.co.ug/new\\_vision/news/1300679/pan-africanism-relevant](https://www.newvision.co.ug/new_vision/news/1300679/pan-africanism-relevant) (accessed 10 October 2018).

pan-African congress was held in Paris, France. The core demands at this event focused on the claim for equality of races and the prohibition of discrimination against black people. A fifth pan-African congress was held in Manchester, United Kingdom, in 1945, at the end of World War II. Unlike at the first congress where most participants were from the diaspora, in Manchester the majority of the delegates arrived from Africa. Chaired by George Padmore, the conference was marked by the presence and speeches of pan-Africanists such as Du Bois and Kwame Nkrumah. The latter did not shy away from promising 'strong and vigorous action to eradicate [colonialism/imperialism]', which he identified as 'one of the major causes of war'.<sup>5</sup> The pan-Africanist vision was also advanced by Jomo Kenyatta who, through a manifesto titled 'Challenge to colonial powers', highlighted the need to fight colonialism in all its forms in ensuring that Africa remains for Africans.<sup>6</sup> As correctly argued by Shivji, Kenyatta's strategy included reliance on 'a kind of social democracy',<sup>7</sup> which necessitates state control of the basic means of production and distribution, as well as prominence on the citizens' liberty and freedoms.<sup>8</sup>

After the pan-African conferences and congresses, equipped with the pan-Africanist ideology that shaped African nationalism at the country level,<sup>9</sup> African leaders had to act to liberate the continent. On the one hand, Julius Nyerere advocated regional integration or federalism at the sub-regional level.<sup>10</sup> On the other hand, Nkrumah called for the immediate unity of Africa in the form of the United States of Africa. He observed: 'We are committed to the idea of pan-African unity and we are afraid that our economic interest in federation will clash with our ideological interests in African unity. There will be no federation because it would prevent African unity. We must come together all at once.'<sup>11</sup> Nonetheless, these approaches are not mutually exclusive. According to Shivji 'both regional and continental unity – whether economic or political – has to be cast in a pan-African vision which by definition is anti-imperialist'.<sup>12</sup> However, as will be shown below, so far neither of these approaches has become a reality, thereby urging a need to rethink pan-Africanism.

---

5 L Levering *WEB du Bois: The fight for equality and the American century 1919-1963* (2000) 514.

6 Shivji (n 3) 3.

7 As above.

8 G Padmore *Pan-Africanism or communism?* (1956) 21-22.

9 Shivji (n 3) 3.

10 J Nyerere 'The second scramble' in JK Nyerere (ed) *Freedom and unity* (1966) 204-208.

11 Shivji (n 3) 5.

12 Shivji 8.

## 2.2 Need to rethink pan-Africanism

As indicated above, historically the concept of pan-Africanism emerged from the need to liberate Africa and its people from the yoke of colonialism. At its centre, there was a need to ensure the political and economic independence of African countries, unite these countries and ensure a better and more dignified life for all Africans. An assessment of these core objectives of pan-Africanism and the emergence of various international blocks in time of globalisation will shed some light on why it is important to rethink pan-Africanism.

The independence of Africa was at the centre of the 1963 OAU Charter,<sup>13</sup> which underlined the principle of state sovereignty, territorial integrity and independence and the eradication from the continent of all forms of colonialism.<sup>14</sup> Eradicating colonialism encompassed the self-determination of African countries and the abolition of apartheid in South Africa. The notions of independence and self-determination were and remain crucial for pan-Africanism. El-Obaid and Appiagyei-Atua observe: 'The right to self-determination has special relevance to Africa, since it occupies a central position in its modern political history.'<sup>15</sup> Echoing this view, Shivji writes: 'The experience of national and anti-imperialist struggles ... shows that the "right of peoples and nations to self-determination" remains central in Africa to-day'.<sup>16</sup> The notion of independence has two pillars: political self-determination or independence, and economic independence.

The independence of Ghana followed by the subsequent political independence of African countries in the 1960s as well as the end of colonialism in Namibia in 1990 and apartheid in South Africa in 1994 were great achievements of pan-Africanists. It was a manifest application of the pan-Africanist motto of 'hands off Africa! Africa must be free!'<sup>17</sup>

However, political independence is reduced to nothing by neo-colonialism that continues to violate African political autonomy. In this regard many African countries still consult with formal colonial masters in taking decisions. For instance, African French-speaking countries are still influenced by Paris, France.<sup>18</sup> Similarly, the influence

13 Adopted on 25 May 1963 in Addis Ababa, Ethiopia.

14 Arts 2 & 3 OAU Charter.

15 EA El-Obaid & K Appiagyei-Atua 'Human rights in Africa: A new perspective on linking the past to the present' (1996) 41 *McGill Law Journal* 838.

16 IG Shivji 'State and constitutionalism: A new democratic perspective' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 36.

17 In 1958 the All-African People's Conference met under the banner 'Hands off Africa! Africa must be free'.

18 A Cowell & Special to the New York Times 18 April 1982 'Former African colonies retain strong French ties' <https://www.nytimes.com/1982/04/18/world/former-african-colonies-retain-strong-french-ties.html> (accessed 5 October 2018); M Venkatachalam & A Niang 'Despite the rhetoric, Macron isn't about to loosen France's paternalistic grip in Africa' *Quartz Africa* 3 June 2017 <https://qz.com/africa/998126/emmanuel-macron-will-not-change-frances-francafrique-grip-in-africa/> (accessed 5 October 2018).



of Britain in former British colonies cannot be overemphasised.<sup>19</sup> In this regard Nagel writes: 'In Britain's former colonies we can still find visible traces of British influence in language, education, politics and culture.'<sup>20</sup> This is to say that although colonialism seems to be dead, neo-colonialism, which hinders political independence, is very much alive. In this context, in spite of some progress it cannot be argued without reservation that the idea of pan-Africanism leads to full political liberation in Africa.

On the economic terrain African countries remain the weakest link in the global economy.<sup>21</sup> African economies have for years been bogged down by unfair trade rules and high tariffs; the prices of commodities have been unstable and have negatively affected African economies; and interest rates have risen at the will of powerful countries.<sup>22</sup> Bond summarises the catastrophic situation in these terms: 'The economic structure of Africa's neo-colonial societies was relatively homogenous, suffering from international commodity price fluctuations, an overdose of foreign debt and "dependency"'.<sup>23</sup>

Global institutions such as the World Trade Organization (WTO) and international financial institutions such as the International Monetary Fund (IMF) and the World Bank did not assist much in improving African economies. Instead of assisting, the World Bank and IMF-sponsored structural adjustment programmes of the 1980s and early 1990 created havoc in Africa.<sup>24</sup> Far from improving economic conditions in Africa, these institutions have been tools for Western hegemony.<sup>25</sup> So far, even with the 'Africa is rising' narrative, unfortunately 39 out of 54 African countries are among the lowest-ranked countries in the 2018 Human Development Indices and Indicators of the United Nations Development Programme (UNDP).<sup>26</sup> This suggests that in these countries the maternal mortality rate, the lack of education and widespread poverty are among the highest in the world.<sup>27</sup> This led one commentator to argue that

[u]nderdevelopment in Africa is the direct consequence of continued imperialism of the Western capitalist nations on African states and the weak

19 J-L Nagel 'The legacy of an empire' <https://ndla.no/en/node/109145?tag=71082> (accessed 5 October 2018).

20 As above.

21 RS Foncesca 'The World Trade Organization: Africa's dilemma' in H Stephan & M Power (eds) *The scramble of Africa in the 21st century: From the old world to the new* (2012) 241.

22 P Bond 'Cultivating African anti-capitalism' *Z Magazine* (2003).

23 As above.

24 A Ismi 'Impoverishing a continent: The World Bank and the IMF in Africa' Report commissioned by the Halifax Initiative Coalition <http://www.halifaxinitiative.org/updir/ImpoverishingAContinent.pdf> (accessed 5 October 2018).

25 RW Cox *Production, power, and world order: Social forces in the making of history* (1987) 212.

26 See [http://www.hdr.undp.org/sites/default/files/2018\\_human\\_development\\_statistical\\_update.pdf](http://www.hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf) (accessed 5 October 2018).

27 As above.

economic, political and socio-cultural structures created by colonialism and sustained by imperialism-in-continuum.<sup>28</sup>

In other words, Africa's ongoing impoverishment is directly linked to imperialism that deprives the continent of its wealth. This situation simply illustrates the failure of pan-Africanism to secure socio-economic independence for African states, hence the need to revisit the approach, otherwise the concept of pan-Africanism may lose its relevance.

### 2.3 African unity

African unity was an important building block of pan-Africanism. The sanctity of unity was highlighted by the establishment of the OAU in 1963 and the constant calls for unity by the organisation. The content of African unity was explained by Dubois in one of his speeches entitled 'The future of Africa', delivered on his behalf by his wife. Dubois wrote:<sup>29</sup>

If Africa unites, it will be because each part, each nation, each tribe gives up a part of the heritage for the good of the whole. That is what union means; that is what pan-Africa means: When the child is born into the tribe, the price of his growing up is giving a part of his freedom to the tribe.

As alluded to earlier, while Nkrumah called for the immediate unity of Africa, Nyerere was a proponent of regional integration. This in itself was not the problem as the continent realised that both approaches could go hand in hand to defeat imperialism. Therefore, while calling for the unity of the continent, regional integration was also considered by the founders of the OAU. In an effort to integrate the continent, African states committed themselves to setting up sub-regional economic blocs. Thus far eight of these blocs, recognised by the AU, have been established.<sup>30</sup> Theoretically these blocs should lead to freedom of movement of goods and people on the continent.

So far the sub-regional institutions have mainly concentrated on intra-regional trade promotion through preferential measures, the establishment of common currency areas and the coordination of macro-economic policies to achieve a level of convergence.<sup>31</sup> However, efforts are limited by the fact that 'some of the sub-regional economic arrangements have remained loosely structured in their

28 PWO Oguejiofor 'The interrelationships between Western imperialism and underdevelopment in Africa' (2015) 6 *Arts and Social Sciences Journal* 1.

29 HL Gate (ed) *The world and Africa and colour and democracy (The Oxford WEB Du Bois)* by WEB Du Bois (2007) 198; see also JC Hall *Mercy, mercy me: African-American culture and the American sixties* (2001) 196.

30 These are the Arab Maghreb Union (AMU/UMA); The East African Community (EAC); the Intergovernmental Authority on Development (IGAD); the Southern African Development Community (SADC); the Common Market for Eastern and Southern Africa (COMESA); the Economic Community of Central African States (ECCAS); and the Community of Sahel-Saharan States (CENSAD).

31 Kategaya (n 4).

roles with national economies continuing to operate largely autonomously and thus continuing to be subjected to greater manipulation and marginalisation by the rich countries'.<sup>32</sup>

As far as the freedom of movement of people is concerned, besides the current progress in the Economic Community of West African States (ECOWAS) where people do not need a visa to travel across the sub-region, in many sub-regions freedom of movement of persons is yet to become effective. This was illustrated by various xenophobic attacks in the sub-regions. For instance, in West Africa, ECOWAS, Ghanaians were asked to leave Nigeria in what was known as 'Ghana must go'.<sup>33</sup> In Central Africa, the Economic Community of Central African States (ECCAS) (most often referred to as CEMAC, in line with its French title), Gabon and Equatorial Guinea closed their borders to Cameroonians.<sup>34</sup> Similarly, the Southern African Development Community (SADC) region was wrecked by xenophobic attacks in South Africa<sup>35</sup> and in Botswana.<sup>36</sup> These examples clearly show that another pan-Africanist objective, namely, the unity of African people, is yet to be achieved. In fact, as correctly argued by Oni and Okunade,

[d]ocumented xenophobic attacks across the continent do not underscore a united African people and government, rather a more fragmented, self-centred and self-serving people supported by state actions and regulations and regulations encapsulated in national interests.<sup>37</sup>

Unfortunately, African leaders so far have not been able to give up part of their countries' sovereignty 'for the good of the whole'. Unity is hindered by the fact that several leaders cling to their position of heads of state, focus on their sovereignty and self-interest and not on the continental interest, and do not present a united position, but care more for their country's or personal interest. Such an approach is detrimental to the unity and integration of the continent and *par ricochet* fosters neo-colonialism. This situation clearly shows that under the current implementation of pan-Africanism the continent has failed to unite politically and to integrate economically. Mkandawire

32 As above.

33 I Toju 'South Africa's xenophobic attack and the Ghana-must-go case – Politics' *Nairaland* 28 February 2017 <https://www.nairaland.com/3654526/south-africas-xenophobic-attack-ghana-must-go> (accessed 6 October 2018); EO Oni & Okunade 'The context of xenophobia in Africa: Nigeria and South Africa in comparison' in AO Akinola (ed) *The political economy of xenophobia in Africa: Advances in African economic, social and political development* (2018) 37.

34 YK Nsom 'CEMAC region: Equatorial Guinea, Gabon accused of stalling free movement' *Cameroon Post* 15 January 2014.

35 Oni & Okunade (n 33); see also D Mavhinga 'Xenophobic violence erupts in South Africa: Local group's march against immigrants in Pretoria today turned violent' Human Rights Watch Report 24 February 2017.

36 M Dube 'Botswana being taken over by creeping xenophobia despite government "compassionate" policy' *The East African* 14 November 2014, <http://www.theeastafrican.co.ke/magazine/Xenophobia-in-Botswana-despite-policy-/434746-2522696-fy83bp/index.html> (accessed 6 October 2018).

37 Oni & Okunade (n 33) 47.

underlines the failure of the pan-Africanist project in uniting the continent as follows:<sup>38</sup>

Political unification and economic integration of the continent have so far failed to materialise, at least when assessed against the dreams of the main figures of the pan-African movement, documents and programmes prepared for pan-African conferences, and declarations and speeches of African leaders. They failed when compared to other regional co-operation projects in other continents. They failed in relation to the continent's well-defined and clearly perceived needs. They failed in the face of the motive force of pan-Africanism in African speeches.

The failures highlighted here simply demonstrate that it is essential to rethink pan-Africanism or else the ideology will remain a mere slogan without significance.

### 2.3 Dichotomy between pan-Africanism and nationalism

The dichotomy between pan-Africanism and nationalism is linked to the challenges to African unity. While African nationalism may be equated to political revolt against colonialism, pan-Africanism is the aspiration for continental solidarity and equality.<sup>39</sup> Both these concepts are significant for the liberation of Africa as a whole. However, African nationalism, which echoes the love or attachment one has for one's specific nation, is likely to neutralise pan-Africanism, which is the ultimate outcome. Addressing students on the occasion of the inauguration of Kenneth Kaunda as the Chancellor of the University of Zambia in 1966, Nyerere observed:<sup>40</sup>

Pan-Africanism demands an African consciousness and an African loyalty [nationalism]; on the other hand is the fact that each pan-Africanist must also concern himself with the freedom and development of one of the nations of Africa. These things can conflict. Let us be honest and admit that they have already conflicted.

This is an acknowledgment that pan-Africanism creates nationalism, which starts at home, as one cannot work for freedom of a whole without thinking of self in the context of nationalism. The danger is that being nationalist can be counterproductive for pan-Africanism as one is inclined to work first and foremost for the development of one's nation before seeing how it can be translated at the sub-regional or continental level. This problem is illustrated with the advent of emerging economies.

In recent times the advent of emerging economies has led to the establishment of new blocs aiming to address specific concerns of their member states. As a result, ideologies such as pan-Africanism are diluted as specific African countries will pay allegiance to a specific

38 Mkandawire pleads for a new brand of pan-Africanism, <http://www.panapress.com/Mkandawire-pleads-for-new-brand-of-Panafricanism--12-555998-72-lang2-index.html> (accessed 10 October 2018).

39 N Sithole *African nationalism* (1968).

40 Nyerere (n 10) 208.

group and not pay attention to the pan-African vision but rather to self-interest,<sup>41</sup> as their actions are informed by nationalism.

For instance, the groups of BASIC (Brazil, India, South Africa and China) and BRICS (Brazil, Russia, India, China and South Africa) often take specific stances on trade issues that may be contrary to the pan-African vision on the issue. In these contexts, South Africa's view is likely to be more in line with these economic interest groups or its national interest and not necessarily pan-Africanist. Decisions, therefore, are informed by 'competing national, regional, or factional interests'<sup>42</sup> that member countries have to deal with. In this context, nationalism is likely to be the defining factor and pan-Africanism would be added as an afterthought or incidentally.

Due to its size and the changing global economy, the pan-Africanist ideology has been weakened by the rise of a strong incentive for African countries to join groupings and adhere to world institutions based on their self-interest or loyalty to their nation and not ideology. As a result, African countries do not always speak with one voice at international fora. One rarely sees an African position on world affairs, but rather various African views which confirm that nationalisms are still at play.

Another hindrance facing pan-Africanism is the problem of multiple memberships by some of African countries, a fact also informed by nationalism. For example, some African countries that are members of the African Group of the WTO are at the same time also affiliated to the African, Caribbean and Pacific (ACP) group and least-developed countries (LDCs). All these groupings have their dominant interests and positions that are not necessarily linked to pan-Africanism.

Even though holding multiple memberships to groups may well be the opportunity for pan-Africanist nations to look for partners to advance their ideologies and needs, negotiations in international fora generally are informed by self-interest or nationalism. Landers observes:<sup>43</sup>

Following the global economic slowdown, which has turned the global development agenda into highly contested terrain, with many countries seeking to reshape it completely in order to try and restore their comparative economic advantage, maintaining unity among the countries of the South [and African in particular] itself, has become a real challenge.

---

41 L Swart 'The emergence of the Group of 77' in L Swart & J Lund (eds) *The Group of 77: Perspectives on its role in the general assembly* (2011) 5.

42 Swart (n 41) 23.

43 L Landers 'Statement at the symposium G77 and China at 50: South Africa/Africa and the changing multilateral diplomacy of the South' Pretoria 25 July 2014 <http://www.dfa.gov.za/docs/speeches/2014/land0725.html> (accessed 10 October 2018).

In sum, the advent of the BASIC, BRICS and others groupings in which African nations seek their national prosperity has led to the comment that 'pan-Africanism is death'.<sup>44</sup> However, it is submitted that pan-Africanism is not death, but needs rethinking and a shift towards the right to development approach. This will assist in striking a balance between pan-Africanism and nationalism and keeping it relevant.

## 2.4 Pan-Africanism and human rights in Africa

One of the main objectives of pan-Africanism was to ensure a better standard of living for all or a life with dignity and a life where human rights are treasured in Africa. In this respect the pioneers of pan-Africanism stressed that 'our independent status' will be meaningless if it does not enable us to 'attain full human rights and human dignity as citizens'.<sup>45</sup> So, from its onset pan-Africanism was associated with freedom and human rights. In this respect, a paragraph of the Declaration of the 1945 pan-African congress reads:<sup>46</sup>

We are determined to be free. We want education. We want the right to earn a decent living; the right to express our thoughts and emotions, to adopt and create forms of beauty. We will fight in every way we can for freedom, democracy, and social betterment.

Put differently, concepts of freedom, the right to education, the right to employment, freedom of expression and the right to decent lives, which echo the human rights discourse, were essential in the pan-African vision. It is important to note that the rights echoed in the 1945 Declaration are individual rights.

Besides individual rights, collective or group rights were also at the centre of pan-Africanism. In this context human rights were for all Africans as a people; they were claimed from the colonial masters. As correctly argued by El-Obaid and Appiagyei-Atua, national freedom, for example, was seen as *national* freedom, not *individual* freedom. The class struggle was to be between the 'developed' and 'developing' nations.<sup>47</sup> This interpretation of human rights was well captured by the OAU Charter. The latter recognised 'the inalienable right of all people to control their own destiny';<sup>48</sup> that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples';<sup>49</sup> and the 'responsibility [of African states] to harness the natural and

44 MA Jmal "'Pan-Africanism is dead", "dictatorship is born": Africa needs a new breed of core pan-Africanists' <https://www.facebook.com/OfficialMumiaAbuJamal/posts/pan-africanism-is-dead-dictatorship-is-born-africa-needs-a-new-breed-of-core-pan/10153117045137665/> (accessed 5 October 2018).

45 Kategaya (n 4).

46 El-Obaid & Appiagyei-Atua (n 15) 823.

47 El-Obaid & Appiagyei-Atua (n 15) 828.

48 Preamble para 1 OAU Charter.

49 Para 2 OAU Charter.

human resources' of the continent 'for the total advancement of our peoples in spheres of human endeavour'.<sup>50</sup>

This led Sharpe to argue that 'at a time when the rest of the world was more concerned about civil and political rights, the African [continent] reflected the human rights concern about equality and non-domination of most Africans'.<sup>51</sup> In this context the notions of the rule of law and good governance were not an issue and national inequalities characterised by the gap between the political elites and the citizens were accepted.<sup>52</sup>

In sum, the specific lack of a focus on individual rights in the OAU Charter led to the critique that the 'OAU's commitment to human rights was vague and weak'.<sup>53</sup> However, this was corrected in the AU Constitutive Act which puts a strong emphasis on respect for human rights. This is specific in its right to encroach upon the sovereignty of a member state where massive violations of human rights such as war crimes, genocide and crimes against humanity occur.<sup>54</sup> Moreover, the AU is empowered to impose sanctions such as 'the denial of transport and communication links with other member states, and other measures of a political and economic nature' on member states that do not comply with the decisions and policies of the AU, including on human rights.<sup>55</sup> Furthermore, prior to the creation of the AU in 2002, the African Charter on Human and Peoples' Rights (African Charter),<sup>56</sup> with a clear provision on the right to development,<sup>57</sup> was adopted. Many other human rights instruments subsequently were also adopted to strengthen the African legal architecture for the protection of human rights in Africa.<sup>58</sup>

However, in most parts of Africa human rights are yet to become a reality. The violation of human rights and the rule of law is illustrated by the high level of corruption on the continent, the high level of

50 Para 3 OAU Charter.

51 ME Sharpe 'The challenge to international human rights' April 2003 [https://www.carnegiecouncil.org/publications/articles\\_papers\\_reports/905](https://www.carnegiecouncil.org/publications/articles_papers_reports/905) (accessed 10 October 2018).

52 El-Obaid & Appiagyei-Atua (n 15) 828.

53 As above.

54 Art 4(h) AU Constitutive Act.

55 Art 23(2) AU Constitutive Act.

56 Adopted in Nairobi in 1981, entered into force in 1986.

57 Art 22 African Charter.

58 Instruments for the protection of human rights in Africa include the African Convention on the Rights and Welfare of the Child, adopted in Addis, Ababa, Ethiopia, on 11 July 1990, entered into force 29 November 1999; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted on 11 July 2003 in Maputo, Mozambique, entered into force in 2005; the African Youth Charter adopted on 2 July 2006 in Banjul, The Gambia, entered into force on 8 August 2009; the African Charter on Democracy, Elections and Governance adopted in Addis Ababa, Ethiopia, on 30 January 2007, entered into force on 15 February 2012; and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted on 23 October 2009 in Kampala, Uganda, entered into force on 6 December 2012.

poverty and indignity illustrated by the lack of basic needs such as sanitation, education, housing and adequate health care that hinders the realisation of human rights in Africa. These are some of the challenges faced by African people who are often among those who die at sea while attempting to enter Europe illegally in search of a better life. The human rights challenges facing the continent is testimony to the fact that the idea of pan-Africanism is yet to yield result on issues of human rights because, as correctly argued by Nkrumah, 'the complete emancipation of this continent, our independent status' would be unfinished business if it does not 'help to attain full human rights and human dignity as citizens in [African] countries'.<sup>59</sup> Therefore, it could be argued that the pan-Africanism ideology as advanced by its precursors is yet to ensure the protection of human rights in Africa and consequently should be revisited.

Overall, so far the pan-African objectives of ensuring political and economic self-determination, African unity and integration, and establishing a continent where dignity and respect for human rights are realities are yet to be realised. Furthermore, the dichotomy between pan-Africanism and nationalism does not provide an environment in which pan-Africanism can thrive. Nevertheless, rethinking pan-Africanism by looking at it from the lens of the right to development could assist in ensuring that pan-Africanism yields positive results as was originally envisaged by its forerunners.

### **3 Rethinking pan-Africanism: A right to development approach**

This part of the article prescribes reliance on the right to development discourse in rethinking pan-Africanism. To this end, it deconstructs the discourse and shows how its formulation can assist the continent in reaching its well-deserved place on the world stage. This part unpacks the right to development discourse and, accordingly, proceeds to establish the responsibility of the international community, African countries at the regional level, countries of the Global South as well as the nation state in addressing factors of Africa's subjugation.

#### **3.1 The right to development: An overview**

Secured in the 1986 UN Declaration on the Right to Development (RTD Declaration)<sup>60</sup> and in the African Charter,<sup>61</sup> the right to development is a multifaceted human right made up of a bundle of rights with an emphasis on their indivisibility and interdependence. Focusing on the nexus between development and human rights, right to development theorists examine the livelihoods of individuals and

---

<sup>59</sup> Nkrumah as quoted by Kategaya (n 4).

<sup>60</sup> UN General Assembly Resolution 41/128 of 1986.

<sup>61</sup> Art 22 African Charter.



communities and how national and international factors can improve their conditions. From this perspective, the right to development is an articulation of rights which, while mainstreaming human rights into economics, compels states to ensure that development policies and programmes resulting from international relations and corporation are equitable and not detrimental to the achievement of human rights in other states. The right to development is defined as:<sup>62</sup>

- (1) an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised;
- (2) the human right to development also implies the full realisation of the right of peoples to *self-determination* which includes, subject to the relevant provisions of both international covenants on human rights, *the exercise of their inalienable right to full sovereignty over all their natural wealth and resources*.<sup>63</sup>

This provision suggests that the right to development has five characteristics:

- The right to development is attached to the human condition and, as such, is non-negotiable.
- It fosters the right to participation of beneficiaries.
- It is a process that ends with all human rights and fundamental freedoms being achieved.
- It is an individual and collective right.
- The right to development is central to the right of people to self-determination.

These features of the right to development echo the objectives of pan-Africanism and are summarised by Azikiwe as follows:<sup>64</sup>

[T]he right of African states to equality of sovereignty irrespective of size and population; the right of each African state to self-determination and existence; the right of any African state to federate or confederate with another African state; respect for the principle of non-interference in the internal and domestic affairs of African states *inter se* and the inviolability of the territorial integrity of each African state. These are well-known accepted principles of international law.

Ultimately, complying with these recognised principles of international law would secure the right of African peoples and individuals to the relentless enhancement of their standard of living and to a national and global enabling environment favourable to a 'just, equitable, participatory and human-centred development respectful of all human rights'.<sup>65</sup>

62 Preamble para 2 & art 1 African Charter.

63 Art 1 RTD Declaration (my emphasis).

64 Azikiwe (n 1).

65 For an overview of the history of the task force, see High-Level Task Force on the Implementation of the Right to Development, Right to Development Criteria and Operational Sub-Criteria, UN Doc.A/HRC/15/WG.2/TF/2/Add.2 (Annex).

Under the right to development regime there are three levels of states' responsibilities. First, states are to act collectively in global and regional partnerships. Second, they should act individually in adopting and implementing policies that affect persons not within their jurisdiction. Third, they are to act individually as they formulate national development policies and programmes affecting persons within their borders or jurisdiction.<sup>66</sup> It could be argued that a right to development reading of pan-Africanism compels the international community, countries in the Global South as well as the national government to take appropriate measures to achieve the political and economic independence of African countries. These measures should also lead to respect for African countries' autonomy over their wealth and resources and ensure that human rights are paramount on the continent. A failure to do so would be a violation of inalienable human rights and recorded as such.

### 3.2 Responsibility of the international community towards African people

Although controversial, the right to development theory calls on the international community, including UN member states, global institutions as well as transnational companies, to ensure the realisation of the right to development across the world.<sup>67</sup> These stakeholders have important roles to play in tackling all aspects of imperialism.

#### 3.2.1 UN member states

Under articles 55 and 56 of the UN Charter the international community is to improve the standard of living for all through international cooperation. Building on this obligation, article 4(1) of the RTD Declaration provides that '[s]tates have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development'. The obligation of the international community towards victims of colonialism is even more clear in article 5 of the RTD Declaration:<sup>68</sup>

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from *apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.*

66 High-level Task Force (n 65) Annex I.

67 SD Kamga *The right to development in the African human rights system* (2018) 45-71.

68 My emphasis.

This provision, which reads like a statement from a pan-Africanist anthem, compels the international community to take action to remedy the injustices suffered by African countries. It suggests that the international community has the obligation to ensure that the international environment is conducive to the realisation of the right to development. Therefore, clothing the issues of Africa's economic independence in a human rights uniform obliges the international community to take action to ensure that Africa is effectively independent economically. In this regard the international community is obliged to address unfair trade rules that keep Africa's economies low and insignificant. It is obliged to rely on international cooperation to ensure that Africa's wealth and natural resources are not looted, but first benefit African people. This will be in line with international law in the form of UN Resolution 1803, which provides for '[p]ermanent sovereignty over natural resources'.<sup>69</sup> This Resolution cascaded down to the Common Article 1 of the two 1966 Covenants,<sup>70</sup> and was confirmed by the International Court of Justice in its judgment of 19 December 2005 in the *Case concerning armed activities on the territory of the Congo*.<sup>71</sup> This means that pan-Africanists should craft their call for self-determination in terms of international law, which is 'a legal shield against infringements of their economic sovereignty'.<sup>72</sup> This approach will further the pan-African call to respect African countries' sovereignty over their wealth and natural resources.

Furthermore, the international community has the obligation to ensure that partnership agreements with African countries do not jeopardise their economic independence or regional integration. In this regard, initiatives such as the Economic Partnership Agreements (EPAs) should strongly consider the developmental needs of African countries.<sup>73</sup> While the EPAs between the European Union (EU) and ACP countries seek to ensure that trade arrangements are compatible with WTO rules, so far they have been disruptive of Africa because

---

69 General Assembly Resolution 1803 (XVII) of 14 December 1962.

70 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976; International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976.

71 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment ICJ Reports 2005 168 paras 243-246.

72 N Schrijver 'Self-determination of peoples and sovereignty over natural wealth and resources' in UN Human Rights (ed) *Realizing the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) 95.

73 For more on the EPAs, see S Djoyou Kamga 'Economic Partnership Agreements: Another tool for the scramble of Africa or a viable undertaking for the continent's development?' in M Muchie et al (eds) *Unite or perish: Africa fifty years after the founding of the OAU* (2014) 247; see also SO Olorunfoba *Regionalism and integration in Africa: EU-ACP economic partnership agreements and Euro-Nigeria relations* (2015).

they reduce poverty to trade issues without attention to human rights. Gathili writes:<sup>74</sup>

When poverty is induced by trade policies such as the heavy agricultural subsidies in Western markets that displace cheaper produce from developing countries, the ability of government to safeguard socio and economic rights is undermined.

In other words, partnerships between Africa and the West should be informed by the need to uplift people and, therefore, should rely on a human right approach. This also entails giving the opportunity to African leaders to negotiate as equal partners and not based on a partnership between the horse and the rider or an asymmetric partnership between European countries and Africans to the detriment of the latter. Given the asymmetric nature of EPA negotiations, the Italian Vitorrio Agnoletto, member of the European Parliament, writes that '[t]he [EU] Commission has been able to apply the notion of divide and conquer ... I think this is the logic the European Commission will continue to follow.'<sup>75</sup>

While many UN member states refuse to be held accountable for human rights beyond their borders, it is imperative to note that decisions taken at the global level in the name of globalisation affect people's lives in the Global South. Consequently, the global law and policy makers should ensure that their decisions do not lead to the impoverishment of African countries. Linking this responsibility to the right to development, Aguirre writes that '[t]he RTD is versatile and promotes global responsibility for globalization'.<sup>76</sup> In other words, globalisation should not provide a bridge to violate African countries' sovereignty. Put differently, the obligation of UN member states to foster the right to development in Africa could be interpreted as a clear request to ensure that other countries 'keep their hands off' Africa, which needs to enjoy its political and economic self-determination.

### 3.2.2 *Global institutions*

Global institutions are the WTO, the World Bank and the International Monetary Fund (IMF), the other role players in securing Africa's political and economic independence.<sup>77</sup> At the WTO, for instance, it is imperative to ensure that decisions relating to trade are development-friendly, especially for African countries. Following this road will be complying with UN Resolution 523(VI) on integrated economic

74 JT Gathili 'The Cotonou Agreement and economic partnership agreements' in UN Human Rights (n 72) 271.

75 D Cronin 'TRADE: Barroso's EPA intervention to be more than symbolic' <http://www.ipsnews.net/2008/01/trade-barrosorsquos-epa-intervention-to-be-more-than-symbolic/> (accessed: 11 October 2018).

76 D Aguirre *The human right to development in a globalised world* (2008) 10; see also L Wenar 'Responsibility and severe poverty' in T Pogge (ed) *Freedom from poverty as a human right* (2007) 255.

77 Kamga (n 69) 49-62.

development and commercial agreements in which the General Assembly clearly provides that 'commercial agreements shall not contain economic or political conditions violating the sovereign rights of the underdeveloped countries, including the right to determine their own plans for economic development'.

Similarly, development initiatives by international financial institutions should not hinder African nations' development. For example, the World Bank should ensure that development projects conducted under its auspices do not violate the rights and livelihoods of communities. Therefore, this responsibility should be included in the discourse on pan-Africanism with clear accountability mechanisms. Moreover, at the IMF level initiatives such as debt relief for African countries should be considered to enable Africans to realise their right to development. This is important because, as Puvimanasinghe correctly argues:<sup>78</sup>

[D]ebt repayment may take place at the expense of peoples' most basic rights such as food, health and education, and conditions linked to debt relief can undermine a country's policy space and a people's ability to determine its own development path.

The responsibilities of these institutions originate from their central place in designing global policies that affect African countries and peoples. In this respect global trade policies from the WTO should ensure not only a better standard of living for all, including Africans, but should also guard against the exploitation of African peoples. Similarly, international financial institutions such as the World Bank and the IMF have similar responsibilities as far as global financial policies are concerned. A failure to ensure that their policies advance the right to development simply is a violation of pan-Africanism.

### 3.2.3 *Role of transnational companies*

Although the human rights discourse was originally designed to protect people against the power of the state, transnational companies now are more powerful than many states, leading to arguments to advance their responsibility to protect human rights and the right to development in particular.<sup>79</sup> A transnational company that loots resources, pollutes the environment, engages in land-grabbing and other forms of abuses violates the right to development and becomes a barrier to Africa's development. Therefore, multinational companies investing in Africa should use a human rights-based approach in ensuring that their activities do not violate human rights. Situations such as those witnessed in the Niger Delta in Nigeria, where the mining of oil has been detrimental to the rights to

78 S Puvimanasinghe 'International solidarity in an interdependent world' in UN Human Rights (n 72) 190.

79 Aguirre (n 78) 11.

health, food and livelihoods,<sup>80</sup> are contrary to the objectives of pan-Africanism. Similarly, the mining of diamonds and other minerals in the Democratic Republic of the Congo and other parts of the continent without regard to the right to development of communities is unacceptable, as it deprives Africa of its economic autonomy, which is at the centre of pan-Africanism. That is to say that the pan-African discourse should include the 'need to take up the activities and effects of TNCs on, for example, employment practices, the environment and general effects on the economies of host countries as well as on total inflows and outflows of currency and funds from Africa'.<sup>81</sup>

Ultimately, casting pan-Africanism in legal terms and, specifically, the right to development terminology is important to stress the legal entitlement guaranteed to Africans. Although international law has its weaknesses, especially as far as implementation is concerned, it is instrumental in terms of standard-setting, hence the call for a pan-Africanism with a legal flavour and, specifically, right to development features. This approach relies on international law to call on the violators of Africans' dignity to keep their 'hands off Africa'.

### 3.3 Regional and South-South cooperation

Pan-Africanism was born through cooperation by Global South thinkers as well as Africans in the diaspora. Therefore, it is important to explore how cooperation within the right to development discourse could enhance pan-Africanism. This endeavour should be undertaken within the framework of regional cooperation as well as south-south cooperation.

#### 3.3.1 Regional cooperation

International cooperation should not be limited to engagement between the West and African countries. The OAU Charter urged its members 'to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'.<sup>82</sup> Furthermore, article 19 of the African Charter stipulates that '[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.' Similarly, article 20(1) of the African Charter amplifies this by asserting:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely

80 J Donovan 'Shell's complicity in human rights violation abuses in the Niger Delta' <https://royaldutchshellplc.com/2016/12/27/shells-complicity-in-recent-human-rights-abuses-in-the-niger-delta/> (accessed 11 October 2018). For more on these violations, see *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

81 F Azzam 'The right to development and implementation of the Millennium Development Goals' in UN Human Rights (n 72) 358.

82 Art 2(1)(e) OAU Charter.

determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

For this to happen, Africans must work together and collaborate with one another. This requirement was well formulated in article 22 of the African Charter, which reads as follows:

- (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 22(2) prescribes both individual and *collective* actions by states so as to ensure the realisation of the right to development. This compels African states to cooperate with one another to seek solutions to ensure the achievement of the right. In line with this provision, African countries have to set aside narrow national interests for the benefit of the entire continent. The duty to act *collectively*, to ensure the enjoyment of the right to development is a legal prescription that compels African countries to prioritise broader continental interests over those of the nation. Factoring this into pan-Africanism will help mitigate the effect of narrow nationalism that hinders the effectiveness of the pan-African discourse.

Applying regional cooperation with a special objective to advance the right to development on the continent can only strengthen the discourse on pan-Africanism. From this perspective, African frameworks for development should be tapped into in order to better people's lives in Africa. This means that African institutions, such as the New Partnership for Africa's Development (NEPAD)<sup>83</sup> and its governance tool known as the African Peer Review Mechanism (APRM),<sup>84</sup> should be nurtured to secure the right to development for African citizens. This is to say that far from relying exclusively on cooperation with the West, global institutions and multinational companies, African countries also have the obligation to rely on one another to deliver a better Africa as dictated by the pan-Africanist ideology. Failure to do so will not secure the relevance of pan-Africanism in the twenty-first century.

---

83 Assembly of Heads of State and Government of the African Union, 37th ordinary session/5th ordinary session of the African Economic Community, Lusaka, Zambia, 9-11 July 2001, Declaration on the New Common Initiative, Document AHG/Decl.1(XXXVII); Assembly of the African Union, 1st ordinary session, Durban, South Africa, 9-10 July 2002; Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD) Document ASS/African Union/Decl.1(I).

84 Declaration on Democracy, Political, Economic and Corporate Governance, Document AHG/235 (XXXVIII) annex I.

### 3.3.2 *South-South cooperation*

South-South cooperation refers to cooperation between countries from the Global South. According to Puvimanasinghe, South-South cooperation can be characterised as echoing

[a] joint struggle for justice, and bonds that were nurtured in a spirit of solidarity and friendship. It implies cooperative interaction through building solidarity based on mutual benefit among developing countries in their struggle to compensate for their relative lack of global power.<sup>85</sup>

African leaders should look beyond cooperation with other African countries by including South-South cooperation on their agendas. In this vein, they should approach countries in the Global South as they generally share similar concerns about development issues. This approach entails striking alliances with countries in South America, the Caribbean and Asia as well as other countries that suffer global marginalisation. Historically, this approach led to the Bandung Conference in which the Global South came together to frame what was needed for its development. A similar approach led to the establishment of the Non-Aligned Movement and the Group of 77 (G77),<sup>86</sup> later joined by China, who together spearheaded the claim for the right to development, which ended up being recognised in the RTD Declaration.<sup>87</sup>

South-South cooperation shows that notwithstanding the challenges posed by narrow nationalism discussed earlier, many countries that feel disenfranchised will be willing to come together for a greater cause. Even with the advent of emerging economies with multiple groupings or alignments based on nationalism, if the issue of the right to development is well formulated in various countries or between them through bilateral discussions, this question is likely to surface in different groupings and fora and trickle down to African countries. Even though this approach cannot entirely solve the challenges of nationalism that hinder African unity, it is likely to assist in alleviating its negative impact on pan-Africanism.

In sum, to address the global injustices that in the first place led to the idea of pan-Africanism, international cooperation is mandatory. Such cooperation framed in the human rights discourse compels all actors and role players in the international community to ensure that Africa is given its rightful place in world affairs and that its citizens enjoy a good standard of living. Moreover, international cooperation

---

85 Puvimanasinghe (n 78) 191.

86 'The Group of 77 is the largest intergovernmental organisation of developing countries in the United Nations, which provides the means for the countries of the south to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote south-south cooperation for development'; see [https://www.southafrica-newyork.net/pmun/SA\\_G77.html](https://www.southafrica-newyork.net/pmun/SA_G77.html) (accessed 7 October 2018).

87 1986 UN Declaration on the Right to Development, General Assembly Resolution 41/128.



should also comprise regional collaboration between African countries as well as South-South engagement between all marginalised countries or the Global South that meet to advance their concerns. These avenues are likely to address the challenges posed by nationalism as the question of the right to development will become a cross-cutting issue in all countries of the South, as their cooperation will be informed by common interest.

### 3.4 Responsibility of national governments towards African people

Not only was imperialism an obstacle to African unity and to development and the enjoyment of the right to development in Africa, but the African elite that replaced the colonial masters also became an obstacle to the enjoyment of this right. Therefore, to give relevance to pan-Africanism, national governments should play their role of primary duty bearers of human rights by laying a solid constitutional framework informed by pan-Africanism and establishing an environment conducive to a flourishing civil society.

#### 3.4.1 *Adopting a pan-Africanist-informed constitution*

A pan-Africanist-informed constitution should seek a better life for citizens; it should be participatory and human-centred with the ultimate objective to serve people. According to article 3(1) of the RTD Declaration, states have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development. This entails terminating the wave of tyranny that followed the departure of the colonial masters.

The objectives of pan-Africanism were to confront not only the international antagonists of Africa, but also national adversaries. After the departure of the colonial masters many African countries were ruled by 'strong men' such as Jean Bedel Bokassa in Central African Republic, Mubutu Sesseko in Zaire (now the Democratic Republic of the Congo) and Idi Amin Dada in Uganda, who personified every aspect of government, including executive, legislature and the judiciary powers in their countries. The tenets of pan-Africanism were abandoned and the countries were run by their accomplices to the detriment of the African people. Abdoulaye Bathily, a former Minister in the office of the President of the Republic of Senegal, writes:<sup>88</sup>

The broad anti-colonial coalition broke up in most countries to give way to dictatorship, personality cult, rise of state nationalism at the expense of pan-Africanism. The common vision for national liberation and unity and economic advancement was replaced among party members by tribalism,

88 Abdoulaye Bathily, Senior Minister, Office of the President of the Republic of Senegal 'Panafricanisme et Renaissance Africaine' <http://www.dri.gouv.sn/sites/default/files/ins-ua/PANAFRICANISME%20ET%20RENAISSANCE%20AFRICAIN.pdf> (accessed 13 June 2019).

ethnic solidarity and other sectarian affiliations. Most positive gains of the anti-colonial struggles were lost during the 70s to the 80s.

A pan-Africanist-informed constitution entails adopting a supreme law characterised by the separation of powers between the three branches of government, each of them enjoying full independence.<sup>89</sup> With the advent of constitutionalism in the 1990s, many African countries adopted a constitution with an apparent separation of powers. However, many of these countries were characterised by presidentialism or a regime in which the pre-eminence of the executive was incontestable as its representative appointed the members of the judiciary and had an indirect or direct say in what takes place in the legislature.<sup>90</sup>

Under the current mode of separation of powers, many African leaders have been in power for 20 years or longer. As Lord Acton observed some centuries ago, 'all power tends to corrupt, and absolute power corrupts absolutely'.<sup>91</sup> The truth of this assertion had been tested in post-colonial Africa. In some African countries, where there is a presidential term limit, the latter had been revised or amended through so-called 'consultation' with the legislature or a referendum to ensure presidency for life. Numerous African leaders cling to power or attempt to do so by various means, including cultivating systemic corruption and tribalism as a system of government.<sup>92</sup> This attitude on African soil defeats the objectives of pan-Africanism, which is all about delivering security and well-being to the African people. In other words, due to democratic deficits many countries in this part of the world are yet to ensure that respect for the rule of law and human rights become a reality. In addition, the accountability of their governments remains questionable. This state of affairs cannot advance pan-Africanism, as the precursors of the ideology were fighting for the citizens of Africa and not for a group of leaders with their accomplices. In fact, the current lack of unity and effective regional integration in Africa is linked to dictatorship at national level where the dictator is the alpha and the omega and the

---

89 For more on the separation of powers, see K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 105-108.

90 K Prempeh 'Progress and retreat in Africa: Presidents untamed' (2008) 19 *Journal of Democracy* 110; SEE also HS Adjolohoun 'Between presidentialism and a human rights approach to constitutionalism: Twenty years of practice and the dilemma of revising the 1990 Constitution of Benin' in MK Mbondenyi & T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from sub-Saharan Africa* (2013) 245.

91 CM Fombad 'The constitution as a source of accountability: The role of constitutionalism' (2010) 2 *Speculum Juris* 46.

92 KJ Maphunye 'Weaning African leaders off addiction to power is an ongoing struggle' <https://www.timeslive.co.za/news/africa/2018-04-17-weaning-african-leaders-off-addiction-to-power-is-an-ongoing-struggle/> (accessed 7 October 2018).

sole person in charge of deciding on 'anything coming from the outside world',<sup>93</sup> whether from the global or regional level.

Generally, despots hide behind state sovereignty to avoid any compromise that is likely to reduce their power even where Africa's unity and integration are at stake. In the process human rights are violated as tyrants use all means to cling to power. As Acheampong rightly argues, '[t]he hardships of developmental dictatorship are well known: Liberty is suppressed; labour is regimented and exploited; freedom of movement is curtailed; personal choice is severely restricted.'<sup>94</sup> Acheampong calls for a change of gear, arguing that pan-Africanism should 'also aim at casting aside the cloak of national sovereignty behind which governments have committed serious crimes against their people'.<sup>95</sup> In many African countries human rights and the right to development are non-existent as the funds needed for their realisation are embezzled in an environment where corruption and a lack of accountability are daily realities.

It becomes urgent to rethink pan-Africanism by ensuring the adoption of constitutions with strong and effective principles of the separation of powers. Azikiwe described a model constitution for pan-Africanism as follows:<sup>96</sup>

The constitutional implications of pan-Africanism present to its builders a challenge to create a heaven on earth for African humanity. Therefore, the powers of the executive must be clearly defined, bearing in mind that in most of the progressive states of the world, heads of states exercise powers formally and heads of governments formulate policy and do the actual governing. Nevertheless, the vogue is to accept the supremacy of the legislature, as a forum for airing the views of the electorate and strengthening the hand of the executive. Pan-Africanists must also guarantee the independence of the judiciary, not necessarily by stratifying judges as a select and privileged elite but by ensuring that they shall perform their functions without fear or favour and at the same time be responsible to the people for their actions and behaviour. To obtain maximum efficiency in the machinery of administration, the civil service must be insulated from partisan politics. As for the people themselves, their fundamental rights must be guaranteed and entrenched in [the Constitution].

Furthermore, it is imperative to establish independent constitutional institutions such as a human rights commission and an ombudsman to oversee the enforcement of the right to development. In this way these institutions will support the three branches of government in giving effect to the right to development. Their activities are instrumental as they will foster constitutionalism which at the national level is the backbone of the right to development. Fombad writes that

93 Mkandawire pleads for A new brand of pan-Africanism, <http://www.panapress.com/Mkandawire-pleads-for-new-brand-of-Panafricanism--12-555998-72-lang2-index.html> (accessed 7 October 2018).

94 KA Acheampong 'Human rights and the African renaissance' (2000) 5 *African Journal of Political Science* 112.

95 Acheampong (n 94) 119.

96 Azikiwe (n 1).

constitutionalism watches the way the government 'protects its citizens as well as the government as to what to do or not to do'.<sup>97</sup> In other words, constitutionalism provides a framework for the government's accountability which is essential for the achievement of the right to development at the national level and, as such, fosters pan-Africanism.

In sum, a pan-Africanist-informed constitution will compel the government to work for its people or face the might of the law. Nevertheless, for this to happen the emphasis should be on the level of participation of people through civil society organisations.

### ***3.4.2 Establishing an enabling environment for a vibrant civil society***

Given the history of dictatorship (by the former colonial masters and their successors), which hinders development in Africa, besides credible constitutionalism it is imperative to enable civil society to play its role of watchdog in controlling the powers of the state and the market, which often poses a threat to human rights and the right to development. While the notion of civil society is broad and open to various definitions, this article espouses the definition of the UN Office of the High Commissioner for Human Rights (OHCHR) that considers civil society as

[i]ndividuals and groups who voluntarily engage in forms of public participation and action around shared interests, purposes or values that are compatible with the goals of the UN: the maintenance of peace and security, the realisation of the development and the promotion and respect for human rights.<sup>98</sup>

In the context of a right to development-informed pan-Africanism, civil society should play a role in keeping an eye not only on leaders within their jurisdiction, but even beyond so as to ensure that their activities do not jeopardise the right to self-determination over their territory and resources as well as human dignity, which are central to the pan-African discourse. Locating the importance of civil society within the right to development, Puvimanasinghe writes that '[i]n realizing the right to development, civil society can be the vital impetus in moving forward in the common interests of all, despite the divisions which have traditionally coloured the intergovernmental debate'.<sup>99</sup>

In a right to development-informed pan-Africanism, civil society organisations would be empowered to lead campaigns and activism for the promotion of human rights both at the local and global levels. They will foster good governance and the rule of law that are core elements of pan-Africanism. The former UN Secretary-General, Ban Ki-Moon, observed that '[a] free and independent civil society is the

<sup>97</sup> Fombad (n 91) 51.

<sup>98</sup> UN OHCHR *A practical guide for civil society: Civil society space and the United Nations Human Rights System* (2014) 3.

<sup>99</sup> Puvimanasinghe (n 78) 192.

foundation for healthy, responsive governance at the local, national and global levels'.<sup>100</sup> Sharing this view, Puvimanasinghe indicates that global civil society seems to hold the solutions for sustainable development.<sup>101</sup> In the quest for sustainable development, global civil society has played a crucial role and may hold the key to a shared future.

In discharging their functions civil society organisations will be at the forefront of activism to ensure that pan-Africanism no longer is a rhetoric that seems far away from the African citizens who appear to have been forgotten in the equation. In this context civil society will be instrumental in building pan-Africanism from below by ensuring that whoever speaks in the name of citizens does so deservedly.

Another benefit of a vibrant civil society is that it will not only embark on activism for social justice at the local/national level, but can also join hands with other organisations working on social justice at the sub-regional and global levels. Based on the search for 'common good', civil society organisations can strike partnerships beyond their borders to be more efficient in dealing with local issues including subjugation from local dictators and hegemony from former colonial masters. In other words, a local civil society has the potential to attract partners willing to join in the fight against national tyrants, imperialists as well as transnational corporations that violate human rights echoed through pan-Africanism principles.

Under article 71 of the UN Charter, the Economic and Social Council has the obligation to consult civil society organisations, including those from Africa, on global policy at the UN. This provides a platform to these organisations to penetrate the global policy arena to interrogate national and international activities that hinder pan-Africanism and its quest for global justice. Access to the UN enables civil society to be involved in law making at the global level and to fight for those adversely affected by international norms and policies that violate human dignity through subjugation of a people by global powers.

Although some civil society organisations face challenges related to their legitimacy, funding and capacity, their importance cannot be undermined because in general they promote accountability in advancing the rule of law necessary for the enjoyment of a better life to be brought about by pan-Africanism. Having said that, the accomplishment of a civil society organisation is conditioned by a conducive environment to be established by the government that is obliged to do so in the context of a right to development-informed pan-Africanism.

---

100 Secretary-General Ban Ki-Moon, video message to the 25th session of the UN Human Rights Council, March 2014.

101 Puvimanasinghe (n 78) 192.

Overall, for pan-Africanism to be relevant in the twenty-first century it is imperative that African patriots confront domestic and international antagonists of African unity by any means necessary to create a stronger, democratic, powerful, productive and just Africa. Focusing on international factors of subjugation only will not be enough to ensure the relevance of pan-Africanism. Adopting a right to development-informed pan-Africanism will capture both the local and the global conditions for the well-being of Africans. In this perspective, as correctly argued by Nkandawire, pan-Africanism is expected to

adopt a more democratic and more participatory process as a basis for the Panafrican project ... Failure to do so will lead to the total irrelevancy, even if this is not a mathematical sum of the preoccupations of the new social movements for which pan-Africanism provides a new framework to implement local and national programmes.<sup>102</sup>

#### 4 Concluding remarks

The aim of this article is to examine the relevance of pan-Africanism in the twenty-first century. It argues that to remain relevant, pan-Africanism needs to be informed by the right to development discourse. The article unpacks the notion of pan-Africanism, which aims to free Africa from the shackles of colonialism, imperialism and global inequities that frustrate the development of the continent. It notes that the pan-African objectives of political and economic independence are yet to be fully realised. Similarly, African unity and the enjoyment of human rights, which are central to pan-Africanism, remain illusory.

Therefore, the article calls for a right to development-informed pan-Africanism, which will not only ensure that the international community is held accountable for the violation of Africa's sovereignty over its territory and resources, but will also ensure accountability of national tyrants who hinder the realisation of the pan-African ideals. It finds that focusing exclusively on external factors of subjugation would not free Africa from poverty and underdevelopment. It concludes that tackling both internal factors (fostering constitutionalism and empowering civil society) and external considerations (neo-colonialism and domination or asymmetric relations between Africa and developed countries) as prescribed by the right to development discourse would be significant in securing the relevance of pan-Africanism in the twenty-first century.

---

102 Mkandawire (n 93).

## The Sustainable Development Goals and the rights-based approach to development: Compatible or missing the point?

*Annelie de Man\**

Coordinator, Advocacy Division, Free State Centre for Human Rights,  
University of the Free State, South Africa  
<https://orcid.org/0000-0003-2026-5797>

### Summary

*The Millennium Development Goals have been criticised for the limited role that human rights have played in their design and implementation. When the timeline for the achievement of the MDGs drew near the attention turned to formulating a new development compact that would succeed them. In order to address the critiques of the MDGs a rights-based approach to development has been proposed to form the basis for the formulation, implementation and monitoring of the new set of goals. With the 2030 Agenda for Sustainable Development, and the 17 Sustainable Development Goals, adopted on 25 September 2015, it falls to be questioned to what extent the 2030 Agenda incorporates human rights in all stages of development programming. This article undertakes such an examination. To this end the article analyses to what extent the SDG framework is in line with the principles of a rights-based approach to development, namely, equality and non-discrimination, accountability, participation, empowerment and the interrelatedness of human rights. It concludes that although the 2030 Agenda in some areas is compatible with the principles of a rights-based approach to development, especially the principle of participation, more should be done with respect to the implementation, monitoring and evaluation of the SDGs to ensure that the full spectrum of advantages offered under a rights-based approach to development can be achieved.*

---

\* LLD (Free State); [anneliedm@gmail.com](mailto:anneliedm@gmail.com)

**Key words:** *rights-based approach to development; Sustainable Development Goals; human rights; equality and non-discrimination; participation; accountability; empowerment; interrelatedness and indivisibility*

## 1 Introduction

Over the past few decades the focus of development practice and theory was on human development, which culminated in the Millennium Development Goals (MDGs) adopted in 2000. For the next 15 years the MDG framework took centre stage in international and national development agendas. However, despite its achievements the MDGs have since their adoption received a number of criticisms. Many of the critiques raised against the MDG agenda were based on the argument that human rights played a limited role in their design, implementation and monitoring. When the timeline for the achievement of the MDGs drew near, attention turned to formulating a new development compact that would succeed them.

On 25 September 2015 the United Nations (UN) General Assembly (UNGA) adopted the 2030 Agenda for Sustainable Development consisting of 17 new goals, coined the Sustainable Development Goals (SDGs). The newly-formulated goals encompassed the three pillars of sustainability, namely, economic, social and environmental development.<sup>1</sup> The main objective of the SDGs, which came into force in January 2016, is to address new development priorities and challenges, as well as to close the gaps left by the MDGs.<sup>2</sup> As with the original goals, the SDGs will be employed to inform national and international development priorities and action plans.<sup>3</sup>

- 
- 1 AK Abashidze et al 'Achievement of Sustainable Development Goals (2016-2013): International legal dimension' (2016) 9 *Indian Journal of Science and Technology* 2 <http://www.indjst.org/index.php/indjst/article/view/102168/73993> (accessed 13 February 2019); DR Kanter et al 'Translating the Sustainable Development Goals into action: A participatory backcasting approach for developing national agricultural transformation pathways' (2016) 10 *Global Food Security* 71; N Kumar et al 'Strategies for achieving the Sustainable Development Goals (SDGs) in South Asia: Lessons from policy simulations' (2016) United Nations Economic and Social Commission for Asia and the Pacific, South and South-West Asia Development Papers 1601 7 [http://www.unescap.org/sites/default/files/20160825\\_SDG%20PolicyStrategies%20South%20Asia\\_SSWA\\_DP\\_1601\\_final\\_for%20upload.pdf](http://www.unescap.org/sites/default/files/20160825_SDG%20PolicyStrategies%20South%20Asia_SSWA_DP_1601_final_for%20upload.pdf) (accessed 13 February 2019); AR Nunes et al 'The importance of an integrating framework for achieving the Sustainable Development Goals: The example of health and well-being' (2016) *BMJ Global Health* 1 <http://gh.bmj.com/content/1/3/e000068> (accessed 13 February 2019); G Vaggi 'Making the Sustainable Development Goals work' (2016) 3 *International Journal of Cooperation and Development* 34 41; MA Rosen 'Sustainable development: A vital quest' (2017) 1 *European Journal of Sustainable Development* 2 10.
  - 2 Transforming our World: The 2030 Agenda for Sustainable Development, adopted 25 September 2015 paras 16-17; Kumar et al (n 1) 7.
  - 3 P Bergling & S Jin 'The new black on the development catwalk: Incorporating rule of law into the Sustainable Development Goals' (2015) 24 *Washington International Law Journal Association* 435.



Under the umbrella of sustainable development, defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs', the framework of the SDGs aims to eradicate poverty by the end of 2030.<sup>4</sup> Furthermore, sustainable development incorporates a multitude of disciplines, including 'science, engineering, environment, ecology, economics, business, sociology, [and] philosophy'.<sup>5</sup> As aptly summarised, 'the ultimate goal of the SDGs is to promote a new world view and provide the beginnings of a plan to end poverty without imposing significant costs on earth's life support systems'.<sup>6</sup>

When the focus shifted to the formulation of a new development agenda that will follow the MDGs, various bodies of the UN, UN member states, international organisations, non-governmental organisations (NGOs), civil society, human rights and development practitioners, as well as scholars in a multitude of fields, called for the post-2015 agenda to be based on international human rights laws and principles. To this end a rights-based approach to development has been proposed to form the basis of the formulation, implementation and monitoring of the new set of goals. Following a rights-based approach to development when formulating and implementing development frameworks, such as the new post-2015 agenda, holds a number of advantages. It is also argued that the human rights framework provides the strongest and most accepted moral basis on which development can be based.

This article uses the term 'rights-based approach to development' which 'cover[s] any kind of rights and is locally determined as a result of power relations' as an umbrella term which specifically includes a human rights-based approach. The latter 'builds on the international normative system of rights and the obligations undertaken by (most) states, which makes possible a growing international consensus on the content of the rights and the corresponding responsibility of the duty-holders'.<sup>7</sup> The difference between the two approaches can be described as follows:<sup>8</sup>

[A human rights-based approach] represent[s] a narrower focus (normatively and legally speaking), whilst arguably possessing a stronger moral claim to legitimacy. By contrast, the [RBA] represent a more broad-based focus (again, normatively and legally), thereby enabling appeals to a

---

4 World Commission on Environment and Development *Our common future* (1987) ch 2 para 1 <http://www.un-documents.net/our-common-future.pdf> (accessed 13 February 2019). See also Rosen (n 1) 2.

5 Rosen (n 1) 2.

6 O Gaffney 'Sustainable Development Goals: Improving human and planetary well-being' (2014) 82 *Global Change* 20 23.

7 Eide quoted in D Banik 'Support for human rights-based development: Reflections on the Malawian experience' (2010) 14 *The International Journal of Human Rights* 34 37.

8 H Miller 'Rejecting "rights-based approaches" to development: Alternative engagements with human rights' (2015) *Journal of Human Rights* 4 <http://dx.doi.org/10.1080/14754835.2015.1103161> (accessed 13 February 2019).

more expansive discourse of rights (which for instance may extend towards notions of citizenship).

The aim of the article is to analyse the content of the 2030 Agenda to determine to what extent it is in line with human rights standards in formulation, implementation and monitoring. In other words, the article investigates whether the 2030 Agenda is compatible with a rights-based approach to development or whether it fails to answer the various calls for a more human rights-friendly agenda as mentioned above. To this end, part 2 discusses some of the critiques raised against the MDGs from a human rights perspective. This is followed by an overview of the path leading to the formulation of the SDGs to demonstrate, on the one hand, the importance placed on human rights through this process and, on the other, the need for the final framework to be based on human rights. Part 4 explores the relationship between the SDGs and their predecessor, the MDGs, keeping in mind the critiques mentioned. The final part explores the compatibility of the SDG framework, in all its phases, and the foundational principles of a rights-based approach to development.

## 2 Successes and failures of the Millennium Development Goals

The creation of the MDGs offered the world a global compact on development priorities according to which the international community and individual states could model their respective development plans. As once stated by Bill Gates, the MDGs represent 'the best idea for focusing the world on fighting global poverty'.<sup>9</sup> It has made development more political and central to the global discourse.<sup>10</sup> The massive international support that the goals have galvanised has caused it to become viewed as a 'critical indicator of the international system's ability to set and follow through on practical targets for a partnership for development'.<sup>11</sup> Between 2000 and 2015 the MDGs made significant advances in achieving its established targets.<sup>12</sup> According to the UN, the implementation of the MDG framework has 'saved the lives of millions and improved

---

9 T Paulson 'Back in time: Bill Gates speaks at UN, 2008, on the Millennium Development Goals' 25 September 2012 <http://www.humanosphere.org/global-health/2012/09/bill-gates-speaks-at-un-on-the-millennium-development-goals/> (accessed 13 February 2019).

10 NK Poku & J Whitman 'The Millennium Development Goals: Challenges, prospects and opportunities' (2011) 32 *Third World Quarterly* 3 7.

11 G Schmidt-Traub 'The Millennium Development Goals and human rights-based approaches: Moving towards a shared approach' (2009) 13 *The International Journal of Human Rights* 72.

12 For the final list of progress made under the MDGs, see UN 'Millennium Development Goals Report' (2015) 4-7 [http://www.un.org/millenniumgoals/2015\\_MDG\\_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf) (accessed 17 February 2019).

conditions for many more'.<sup>13</sup> Moreover, it placed the eradication of poverty centrally on the international development agenda.

However, when the period allocated for the achievement of the MDGs expired, many development challenges remained unaddressed, including significant levels of inequality and poverty.<sup>14</sup> Even before the end of 2015 many academics and scholars expressed the need for a more inclusive, sustainable and effective development agenda to follow the MDG framework.<sup>15</sup> From a human rights perspective various reasons were offered for some of the failings of the MDGs.

Even though it has been said that human rights and the MDGs have the same goals in mind, namely, to alleviate human suffering and increase human development, there are many significant differences between the two frameworks.<sup>16</sup> Alston strongly argues that in reality the MDGs are capable of only giving expression to a limited number of economic, social and cultural rights, and only gives symbolic expression to civil and political rights.<sup>17</sup> Moreover, MDG 1 speaks about poverty in general and does not address the root causes thereof.<sup>18</sup> On the other hand, human rights adhere to a more 'holistic understanding of poverty and its structural causes' and perceive human development in its broadest sense.<sup>19</sup> As already mentioned in the criticisms above, the focus of the MDGs is limited to improving certain human capabilities. Other dimensions of human development, namely, socio-cultural, political and protective capabilities, are overlooked. A development approach based on human rights not only incorporates the full spectrum of development capabilities, but also addresses the root causes of poverty and the lack of progress. Furthermore, when one studies the practical implementation of the goals, it is evident that there are many differences between the two frameworks.<sup>20</sup> Aleyomi and Ise Olorunkanmi argue, and many authors agree, that national development policies and plans that are

13 UN (n 12) 4.

14 UNDP 'UNDP support to the implementation of Sustainable Development Goal 1' (2016) 3 [http://www.undp.org/content/dam/undp/library/Sustainable%20Development/1\\_Poverty\\_Jan15\\_digital.pdf?download](http://www.undp.org/content/dam/undp/library/Sustainable%20Development/1_Poverty_Jan15_digital.pdf?download) (accessed 17 February 2019).

15 See TC Glendinning 'Book review: Millennium Development Goals: Looking beyond 2015' (2013) 4 *African Review of Economics and Finance* 301.

16 P Nelson 'Human rights, the Millennium Development Goals, and the future of development cooperation' (2007) 35 *World Development* 2042; S Kuruvilla et al 'The Millennium Development Goals and human rights: Realizing shared commitments' (2012) 34 *Human Rights Quarterly* 148.

17 P Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 760.

18 Nelson (n 16) 2046.

19 M von Engelhardt 'The Millennium Development Goals and human rights at 2010: An account of the Millennium Summit Outcome' (2010) 2 *Goettingen Journal of International Law* 1136. See also W van Ginneken 'Social protection, the Millennium Development Goals and human rights' (2011) 42 *Institute for Development Studies Bulletin* 115.

20 Kuruvilla et al (n 16) 148.

formulated and implemented in line with human rights principles will reach a higher level of success than those under the MDGs.<sup>21</sup>

Moreover, goals and rights are theoretically different from each other.<sup>22</sup>

Goals are distinctly utilitarian, calculated to maximise welfare gains, of which the disadvantages have been mentioned. Rights make a normative claim that human dignity entitles each person to certain kinds of treatment and to protection from others.

Nelson gives two examples of the differences between goals and rights. The first example relates to the notion of agency. In essence, human rights belong to an individual, although in some circumstances it may be conferred on a group. The MDGs, on the other hand, were ascribed to states and international organisations that negotiate and agree on their content. Individuals form the objects of the goals, and not agents who can demand their fulfilment. Rights, on the other hand, create correlating duties that an individual can demand to be fulfilled.<sup>23</sup>

Second, the targets set under the MDGs make them capable of being monitored, thereby providing a 'framework for accountability'.<sup>24</sup> Nelson disagrees with this and holds that monitoring does not automatically result in accountability. Even though goals can be embedded in duties to make them mandatory, additional processes, consequences and sanctions have to be put in place, especially at the national level, to ensure that society is capable of holding governments accountable for their failures or inaction.<sup>25</sup> On the other hand, legally-recognised rights carries with them an imbedded accountability framework. It is thus argued that the value that accountability processes under the human rights framework adds is of immense importance for the realisation of goals based on recognised rights.<sup>26</sup>

Although a number of criticisms have been raised against the MDG framework, the advances made towards human development have been immense. However, it is argued that if a rights-based approach to development had been followed, more of the MDGs would have been achieved. However, it should be borne in mind that as both frameworks share a number of challenges and have their own unique strengths, they can be used to mutually reinforce one another. It is recommended that drawing synergies between the two agendas, and

21 MB Aleyomi & JO Ise Olorunkanmi 'Africa and the Millennium Development Goals: Constraints and possibilities' (2012) 5 *Journal of Alternative Perspectives in the Social Sciences* 53-69.

22 Nelson (n 16) 2045.

23 As above.

24 Fukuda-Parr quoted in Nelson (n 16) 2045.

25 Nelson (n 16) 2045-2046.

26 Nelson (n 16) 2046; A Flynn-Schneider 'Inter-governmental organisations' (2014) 21 *Human Rights Brief* 1 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1906&context=hrbrief> (accessed 17 February 2019).

stronger collaboration between development and human rights actors and organisations, will be the best way forward to enhance global human development. Therefore, it may be accepted that the adoption of an internationally-agreed development agenda can hold various advantages if the critiques and failings of the MDGs are effectively addressed. It therefore falls to be questioned whether the 2030 Agenda on Sustainable Development, adopted as the follow-up global development agenda to the MDGs, was able to overcome these defects and are better aligned with human rights.

### 3 Formulation and content of the Sustainable Development Goals

#### 3.1 Lead-up to the formulation of the Sustainable Development Goals

During the 2012 Rio+20 UN Conference on Sustainable Development, based on a preparatory proposal by Colombia and Guatemala, it was agreed that a new set of global development goals should be formulated to follow the MDGs.<sup>27</sup> In 2012 a UN Systems Task Team, consisting of 50 experts representing a number of UN bodies and international organisations, including academics, was established by the UN Development Programme (UNDP) and UN Department of Economic and Social Affairs to commence the drafting of the post-2015 development agenda.<sup>28</sup> The task team delivered its first report in July 2012, titled *Realizing the Future We Want for All*, which outlined the UN's vision on international development post-2015.<sup>29</sup> In the report human rights are identified as one of the three foundational principles 'constitut[ing] the common, underlying elements necessary to address and resolve, through transformative change, the global trends and challenges that people will face in the post-2015 era'.<sup>30</sup> During July 2012 a High-Level Panel of Eminent Persons advising the UN Secretary-General on the post-2015 agenda was established. The Panel produced a report in May 2013 which proposed 12 goals and 54 targets based on five 'transformative shifts',

27 UN 'The future we want' (2012) Outcome document of the United Nations Conference on Sustainable Development – Rio+20 para 18 [http://www.un.org/disabilities/documents/rio20\\_outcome\\_document\\_complete.pdf](http://www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf) (accessed 17 February 2019). See also Gaffney (n 6) 20; JH Knox 'Human rights, environmental protection, and the Sustainable Development Goals' (2015) 24 *Washington International Law Journal Association* 517 524; Vaggi (n 1) 38.

28 Bergling & Jin (n 3) 437.

29 UN Systems Task Team on the post-2015 UN Development Agenda 'Realising the future we want for all' (2012) Report to the Secretary-General [http://www.un.org/millenniumgoals/pdf/Post\\_2015\\_UNTTreport.pdf](http://www.un.org/millenniumgoals/pdf/Post_2015_UNTTreport.pdf) (accessed 17 February 2019); L Saner Yiu & R Saner 'Sustainable Development Goals and Millennium Development Goals: An analysis of the shaping and negotiation process' (2014) 36 *Asia Pacific Journal of Public Administration* 89 92.

30 UN Systems Task Team on the post-2015 UN Development Agenda (n 29) para 57. See also paras 58 & 59.

namely, (a) leave no one behind; (b) sustainability; (c) jobs and inclusive growth; (d) peace and institutions; and (e) global partnership.<sup>31</sup> Unfortunately the report has been criticised for not addressing the structural causes of poverty.<sup>32</sup>

Running parallel to these two groups were highly-inclusive participatory and bottom-up processes organised by the UN.<sup>33</sup> The unprecedented high number of UN consultations preceding the formulation of the goals is argued to represent 'the biggest consultation exercise the world has ever seen'.<sup>34</sup> The outcome document of the Rio+20 conference, 'The future we want', recognised that people's opportunities 'to influence their lives and future, participate in decision making and voice their concerns were fundamental for sustainable development'.<sup>35</sup> In order to make this a reality the outcome document called for an Open Working Group, consisting of 30 representatives from member states functioning under the auspices of the UNGA, to be established with the mandate of deciding on the processes that should be followed in formulating the post-2015 development goals.<sup>36</sup> On 22 January 2013 the working group began a series of inclusive consultative and participatory processes. At the same time, and in order to formulate a 'people-centred, development agenda', the UNDP conducted their own consultation processes which included 11 thematic-based consultations, face-to-face surveying under the My World Survey with

- 
- 31 UN High-Level Panel of Eminent Persons on the Post-2015 Development Agenda 'A new global partnership: Eradicate poverty and transform economies through sustainable development' (2013) 7-12 <http://www.post2015hlp.org/wp-content/uploads/2013/05/UN-Report.pdf> (accessed 17 February 2019). See also P Narayanan et al 'Re-imagining development: Marginalised people and the post-2015 agenda' in T Thomas & P Narayanan (eds) *Participation pays: Pathways for post-2015* (2015) 139-140; Saner Yiu & Saner (n 29) 102.
  - 32 P Narayanan et al 'Re-imagining development: Marginalised people and the post-2015 agenda' in Thomas & Narayanan (n 31) 139.
  - 33 See CE Brolan et al 'Back to the future: What would the post-2015 global development goals look like if we replicated methods used to construct the Millennium Development Goals?' (2014) 10 *Globalization and Health* 3 11; L Caprani 'Five ways the Sustainable Development Goals are better than the Millennium Development Goals and why every educationalist should care' (2016) 30 *Management in Education* 102.
  - 34 Caprani (n 33) 102. See also X Li 'Soft law-making on development: The Millennium Development Goals and post-2015 development agenda' (2013) 10 *Manchester Journal of International Economic Law* 362 367; UN 'United Nations Summit on Sustainable Development 2015: Informal summary' (2015) 1 <https://sustainabledevelopment.un.org/content/documents/8521Informal%20Summary%20-%20UN%20Summit%20on%20Sustainable%20Development%202015.pdf> (accessed 18 February 2019); OHCHR 'Human rights and the 2030 Agenda for Sustainable Development' <http://www.ohchr.org/EN/Issues/MDG/Pages/The2030Agenda.aspx> (accessed 9 October 2017).
  - 35 UN (n 27) para 13. See also C Cazabat 'Integrating civil participation into sustainable development practice' (2016) 5 *European Journal of Sustainable Development* 25 29.
  - 36 Bergling & Jin (n 3) 439; G MacNaughton & DF Frey 'Decent work, human rights and the Sustainable Development Goals' (2016) 47 *Georgetown Journal of International Law* 607 643.

citizens of member states, electronic surveys, as well as consultations with political leaders, international organisations, civil society, businesses and scholars.<sup>37</sup> Through these processes nearly 8,5 million votes regarding the development priorities that should be included in the post-2015 agenda were recorded.<sup>38</sup>

In September 2014 the Open Working Group presented their proposal on the SDGs to the UNGA.<sup>39</sup> The outcomes of the abovementioned and various other UN processes formed the content of the UN Secretary-General's Synthesis Report, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet*, presented to the UNGA in December 2014.<sup>40</sup> This formed a 'conceptual guide for the remainder of the formulation process' by proposing six essential elements for the post-2015 agenda, namely, 'dignity, people, prosperity, planet, justice [and] partnership'.<sup>41</sup> The last mentioned document formed the basis of a series of intergovernmental negotiations on the proposed goals.<sup>42</sup>

At the UN Sustainable Development Summit on 25 September 2015, 17 new international development goals, known as the SDGs, were adopted by UN member states under the 2030 Agenda for Sustainable Development.<sup>43</sup> The adoption of the Agenda garnered renewed support from governments, high-level organisations and civil society towards the achievement of international development goals.<sup>44</sup>

---

37 S Kumar et al 'Millennium Development Goals (MDGs) to Sustainable Development Goals (SDGs): Addressing unfinished agenda and strengthening sustainable development and partnership' (2016) 41 *Indian Journal of Community Medicine* 1-2. See also Sustainable Development Knowledge Platform 'Post-2015 process' <https://sustainabledevelopment.un.org/post2015> (accessed 9 October 2017); Li (n 34) 367; Brolan et al (n 33) 3 11; UNDP 'World leaders adopt Sustainable Development Goals' 25 September 2015 <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2015/09/24/undp-welcomes-adoption-of-sustainable-development-goals-by-world-leaders.html> (accessed 9 October 2017); Caprani (n 33) 102; MacNaughton & Frey (n 36) 643.

38 Cazabat (n 35) 29.

39 UN Open Working Group of the General Assembly on Sustainable Development Goals 'Open Working Group proposal for Sustainable Development Goals' (2014) <https://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf> (accessed 18 February 2019).

40 UNGA 'The road to dignity by 2030: Ending poverty, transforming all lives and protecting the planet' (2014) Synthesis report of the Secretary-General on the post-2015 agenda [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/69/700&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/69/700&Lang=E) (accessed 18 February 2019).

41 Bergling & Jin (n 3) 439. See also Vaggi (n 1) 41.

42 South African Institute of International Affairs 'Factsheet: The journey to the Sustainable Development Goals', <http://www.saiia.org.za/news/factsheet-the-journey-to-the-sustainable-development-goals> (accessed 9 October 2017); Saner Yiu & Saner (n 29) 103-104.

43 2030 Agenda (n 2).

44 See UN (n 34) 1.

### 3.2 Content of the 2030 Agenda for Sustainable Development

The 2030 Agenda for Sustainable Development consists of 17 goals, 168 targets and 241 indicators.<sup>45</sup> The Agenda, which came into force on 1 January 2016, covers the three core dimensions of sustainability, namely, economic growth, social progress and environmental protection.<sup>46</sup> According to the UNSG at the time, Ban-Ki Moon, the Agenda provides 'a to-do list for people and planet, and a blueprint for success'.<sup>47</sup>

The 17 goals have been grouped into five categories, namely, (a) people; (b) planet; (c) prosperity; (d) peace; and (e) partnership.<sup>48</sup> The first seven goals were formulated to address the gaps left by the MDGs and will require meeting basic human development needs. On the other hand, Goals 8 to 10 enhance 'common drivers and cross-cutting issues that are essential to advance sustainable development across all of the dimensions'. In addition, Goals 11 to 15 are focused on enhancing environmental sustainability, while Goals 16 and 17 aim to utilise a global partnership for development and the implementation of the goals.<sup>49</sup> The main slogan of the goals is to *leave no one behind*, which emphasises the special focus that must be placed on the most vulnerable and marginalised in society.<sup>50</sup> It is proposed that the Agenda is people-centred with a focus on human rights and social justice. Some view the Agenda as transformative in nature as it 'seek[s] to end poverty and hunger once and for all, while safeguarding the planet'.<sup>51</sup> Moreover, under the Agenda the interrelatedness and indivisibility of the goals and the need to pursue all the goals in a comprehensive manner are acknowledged.<sup>52</sup>

45 See 2030 Agenda (n 2); UNGA 'Final list of proposed Sustainable Development Goal indicators' (2016) Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators <https://sustainabledevelopment.un.org/content/documents/11803Official-List-of-Proposed-SDG-Indicators.pdf> (accessed 18 February 2019).

46 2030 Agenda (n 2) para 2. See also M Hajer et al 'Beyond cockpit-ism: Four insights to enhance the transformative potential of the Sustainable Development Goals' (2015) 7 *Sustainability* 1651-1652; J Kercher & C Mahler 'Sustainable Development Goals: An opportunity for the realisation of human rights in and by Germany' (2015) 1 <http://www.ssoar.info/ssoar/handle/document/43813> (accessed 18 February 2019); Kumar et al (n 1) 9; D Nabarro 'Transforming our world: How sustainable development will help us achieve zero hunger' in International Food Policy Research Institute et al (eds) 2016 *Global hunger index: Getting to zero hunger* (2016) 23.

47 K Willis 'Viewpoint: International development planning and the Sustainable Development Goals (SDGs)' (2016) 38 *International Development Planning Review* 105.

48 In accordance with the UNSG's 2014 Synthesis report (n 40). See also 2030 Agenda (n 2) Preamble; Vaggi (n 1) 41.

49 Kumar et al (n 1) 9-11.

50 2030 Agenda (n 2) para 4.

51 Nabarro (n 46) 23. See also UN (n 34) 1.

52 2030 Agenda (n 2) Preamble, paras 5, 17, 18 & 55. See also UN (n 34) 1-2; Nabarro (n 46) 24.



The SDGs are viewed as universally applicable development goals. However, it is the primary responsibility of each member state to adapt the goals to their own national contexts.<sup>53</sup> Article 55 of the Agenda clearly states that

[t]argets are defined as aspirational and global, with each government setting its own national targets guided by the global level of ambition but taking into account national circumstances. Each government will also decide how these aspirational and global targets should be incorporated into national planning processes, policies and strategies.<sup>54</sup>

In contrast to the MDG framework the 2030 Agenda places equal obligations on both developed and developing countries.<sup>55</sup> Furthermore, due to its broad and inclusive nature, the co-operation of all stakeholders across a variety of sectors, whether at local, regional or international level, is required to ensure the success of the goals.<sup>56</sup>

The Agenda also provides a number of guidelines for follow-up and review processes. According to the Agenda, review processes will be conducted on a voluntary basis, be country-led and will take account of local contexts, realities, respective capacities and resources as well as levels of development. Respect must be given to national policy space and priorities and account must be given to the three dimensions of sustainable development. Global progress, including means of implementation, must also be monitored. Importantly, monitoring and review processes must be 'open, inclusive, participatory and transparent' as well as 'people-centred, gender-sensitive, respect human rights and have a particular focus on the poorest, most vulnerable and those furthest behind'.<sup>57</sup> Furthermore, the Agenda makes provision for a High-Level Political Forum on Sustainable Development to act under the authority of the UN Secretary-General and the UN Economic and Social Council (ECOSOC), with the task of 'reviewing global progress, identifying lessons learned, providing recommendations and guidance, and identifying emerging issues and trends'.<sup>58</sup> In order to assist with these processes the Agenda calls for '[q]uality, accessible, timely and reliable disaggregated data ... to ensure that no one is left behind'.<sup>59</sup>

53 UN (n 34) 1 9; 2030 Agenda (n 2) para 55; Caprani (n 33) 103; Kanter et al (n 1) 71; M Mesnard & W Hynes 'New approaches to economic challenges and the Sustainable Development Goals: The way forward' in P Love (ed) *Debate the issues: New approaches to economic challenges* (2016) 164; Nabarro (n 46) 24. See also Hajer et al (n 46) 1652.

54 2030 Agenda (n 2) para 55.

55 Kercher & Mahler (n 46) 1; 2030 Agenda (n 2) para 2; Nabarro (n 46) 23.

56 Nunes et al (n 1) 1.

57 2030 Agenda (n 2) paras 74(d) & (e).

58 Nabarro (n 46) 27.

59 2030 Agenda (n 2) paras 48 & 74(g).

## 4 Comparison between the Millennium Development Goals and Sustainable Development Goals

The MDGs played a significant role in placing development, including human development, at the centre of international politics.<sup>60</sup> However, the goals faced a number of criticisms and failed to reach all its chosen targets. One of the main objectives in formulating the SDGs and their targets was to address the development challenges not included under the MDG framework. These include issues of climate change, increasing inequality and universal peace and justice.<sup>61</sup> Moreover, the UNDP has stated that compared to the MDG framework '[t]he SDGs have a more ambitious agenda, seeking to eliminate rather than reduce poverty'.<sup>62</sup> The UNDP claims that the SDGs 'go much further than the MDGs, addressing the root causes of poverty and the universal need for development that works for all people ... The [SDGs] will now finish the job of the MDGs, and ensure that no one is left behind'.<sup>63</sup> Furthermore, the UN Office of the High Commissioner for Human Rights (OHCHR) stated that the 2030 Agenda 'provides a transformative vision for people and planet-centred, human rights-based, and gender-sensitive sustainable development', unlike the narrow vision of development followed under the MDG framework.<sup>64</sup> However, it should be borne in mind that the SDGs have the advantage of building on the lessons learned under the MDGs and carrying forward the development successes already achieved.<sup>65</sup>

A number of differences between the two agendas can be identified. The top-down and closed-off approach followed in the formulation of the MDGs was put aside for the more inclusive processes and people-centred strategies followed in the drafting of the SDG agenda. This has the potential of establishing a stronger sense of ownership by development actors, as well as the beneficiaries of development projects based on the SDGs. Moreover, the 2030 Agenda offers a larger role to the private sector and civil society in development processes.<sup>66</sup> Whereas the MDGs focused only on the obligations of developing countries, the SDGs, also known as the Global Goals, are applicable to all countries.<sup>67</sup> As already stated, the

---

60 See Vaggi (n 1) 40.

61 UNDP (n 37); Kumar et al (n 37) 2.

62 UNDP (n 37).

63 UNDP Pakistan '2030 Agenda for Sustainable Development' <http://www.pk.undp.org/content/pakistan/en/home/post-2015/sdg-overview.html> (accessed 10 October 2017).

64 OHCHR (n 34).

65 Kumar et al (n 37) 2.

66 Brolan et al (n 33) 11; Kercher & Mahler (n 46) 2; Caprani (n 33) 103; Kumar et al (n 37) 2-3.

67 OHCHR (n 34); Gaffney (n 6) 20; Kercher & Mahler (n 46) 1; 2030 Agenda (n 2) para 55; Nabarro (n 46) 23. See also Willis (n 47) 107-110.

new framework also places an equal burden on all countries towards the global achievement of the goals. Furthermore, the MDGs mainly focused on achieving quantitative targets, ignoring the quality of progress achieved. The SDG framework requires the achievement of qualitative standards, in addition to its quantitative targets and indicators.<sup>68</sup> As a good example, the targets and indicators under the education goal of both frameworks can be compared (Goal 2 of the MDGs and Goal 4 of the SDGs).

The 17 SDGs also can be perceived as much broader than the preceding eight MDGs. However, some view the large number of goals as too widespread, incapable of being effectively monitored and measured, as well as a non-continuation of the simplicity of the original framework.<sup>69</sup> Others view the SDGs as overlapping and overly ambitious compared to its predecessors.<sup>70</sup> However, it has been argued that the SDGs are much more comprehensive than the original goals. This not only relates to the increased number of goals and targets.<sup>71</sup> For example, SDG 5, 'Achieve gender equality and empower all women and girls', goes much further than the mere obligation of promotion of gender equality under the MDGs. The goal under the SDG framework also includes targets related to violence against women and girls; unpaid domestic and care work; forced marriages; gender mutilation; and equal access to economic and political resources.<sup>72</sup> The SDGs also give expression to all types of human rights, including civil and political rights, which were not sufficiently addressed under the MDG framework.<sup>73</sup> The OHCHR has stated that the SDG framework gives a clearer recognition of human rights and, unlike its predecessor, is grounded in international human rights law.<sup>74</sup> However, the SDG framework holds one significant advantage over the MDGs. Under the MDG framework progress was limited to a certain number of individuals or percentage of society. The aim of the SDGs, on the other hand, is to ensure progress for all and achieve the global eradication of poverty.

---

68 Caprani (n 33) 103.

69 Caprani (n 33) 102; Nunes et al (n 1) 1-2; Willis (n 47) 106.

70 Vaggi (n 1) 42.

71 A Jha et al 'Accelerating achievement of the Sustainable Development Goals: A game changer in global health' (2016) 352 *The British Medical Journal* 1 [https://sustainabledevelopment.un.org/content/documents/969226\\_Jha\\_Accelerating%20achievement%20of%20the%20sustainable%20development%20goals.pdf](https://sustainabledevelopment.un.org/content/documents/969226_Jha_Accelerating%20achievement%20of%20the%20sustainable%20development%20goals.pdf) (accessed 18 February 2019); Willis (n 47) 107.

72 Willis (n 47) 106-107.

73 OHCHR (n 34).

74 As above. See also 2030 Agenda (n 2) para 10.

## 5 2030 Agenda for Sustainable Development and rights-based approaches to development

As mentioned, when the time came to start looking beyond the MDGs time frame, many agreed that human rights should play a central role in the formulation and implementation of the next global development agenda. Various critiques have been raised against the human rights framework, the most important of which, for this discussion, is that of the 'universality' of human rights.<sup>75</sup> This critique holds that human rights, as contained in the Universal Declaration of Human Rights (Universal Declaration),<sup>76</sup> dictates liberal, Western values, and no space is allowed for 'multi-culturalism', 'relativism', or 'contextualism'.<sup>77</sup> It is argued that as a product of the Enlightenment era, the human rights framework is inevitably contextualised within in an essentially Western and modernist framework.<sup>78</sup> Against this critique it may be argued that concepts of human dignity and worth, the notion that everyone should be treated according to a certain minimum standard, and ideas regarding respect for others are included in a number of other religious, philosophical and cultural ideologies, including Judaism, Islam, Buddhism, Hinduism and Christianity, and in Greek, Arabic and Indian philosophy.<sup>79</sup> Moreover, through the principle of participation a rights-based approach to development aims to take account of local beliefs, traditions and cultures so as not to impose foreign values on local communities. Many agree that human rights are seen as universal moral values with distinctive legal, moral and political components. Even though various critiques have been raised against the high moral standing of human rights, individuals, organisations and governments from a variety of political beliefs, cultures and ideologies have globally accepted the values contained in the international human rights framework as the highest moral authority.<sup>80</sup>

Various academics have also expressed their support for the adoption of a rights-based approach to development under the 2030 Agenda.<sup>81</sup> For example, Alston argues that following a rights-based

75 For an in-depth discussion of these critiques, see A de Man 'Critiques of the human rights framework as a foundation for a human rights-based approach to development' (2018) 43 *Journal for Juridical Sciences* 84.

76 UNGA 'Universal Declaration of Human Rights' adopted 10 December 1948.

77 C Brown 'Universal human rights: A critique' (1997) 1 *The International Journal of Human Rights* 41 54; S Hopgood *The end times of human rights* (2013) 19.

78 J Ife *Human rights and social work. Towards rights-based practice* (2008) 5. For a full analysis of this argument, see M Freeman *Human rights: An interdisciplinary approach* (2011) 119-155.

79 Miller (n 8) 7.

80 See eg ME Winston *The philosophy of human rights* (1989) v; R Cruft et al 'The philosophical foundations of human rights: An overview' in R Cruft et al (eds) *Philosophical foundations of human rights* (2015) 1.

81 E Dorsey 'Falling short of our goals: Transforming the Millennium Development Goals into millennium development rights' (2010) 28 *Netherlands Quarterly of*

approach to development can overcome many of the failures of the MDG framework, thereby ensuring the most effective post-2015 agenda.<sup>82</sup> Abashidze et al argue that the formulation of national goals, targets and strategies as well as the duties of different role players, whether in the public or private sphere, should be framed in accordance with the international human rights obligations of respective states.<sup>83</sup> As stated by Amnesty International:<sup>84</sup>

Any new framework should address discrimination comprehensively, establish global and national targets and timelines to fulfil minimum essential levels of economic, social and cultural rights for all, and ensure that there are effective national and international accountability mechanisms to monitor the realisation of goals aimed at addressing poverty and exclusion and to provide redress for failures to respect and promote human rights.

In 2012 the UN Task Team called for the formulation of the post-2015 agenda to be based on equality, human rights and sustainability.<sup>85</sup> Moreover, at the 2012 Rio+20 conference UN member states confirmed their intention to develop post-2015 goals that are in accordance with international human rights law.<sup>86</sup> This was further acknowledged in a 2013 statement by 332 civil society organisations that called for the post-2015 agenda to be based on 'the inherent dignity of people as human rights-holders, [and] domestic governments as primary duty-bearers'.<sup>87</sup> The joint statement further called for the empowerment of individuals to hold duty-bearers accountable, including under the international human rights legal system, and for the agenda to be based on the core human rights principles of universality, transparency, participation, equality, non-discrimination and accountability.<sup>88</sup> The Chairpersons of the UN human rights treaty bodies also confirmed in 2013 that sustainable development in the post-2015 era would require the explicit

---

*Human Rights* 516 519-521; Van Ginneken (n 19) 115; A Caliri 'Analysis of Millennium Development Goal 8: A global partnership for development' (2014) 15 *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People-Centred Development* 275-276.

82 P Alston 'A human rights perspective on the Millennium Development Goals' (2004) Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development para 23 [http://pacific.ohchr.org/docs/A\\_HR\\_perspective\\_on\\_MDGs\\_P\\_Alston.doc](http://pacific.ohchr.org/docs/A_HR_perspective_on_MDGs_P_Alston.doc) (accessed 18 February 2019).

83 Abashidze et al (n 1) 3-4.

84 Amnesty International 'Combating exclusion: Why human rights are essential for the MDGs' (2010) 7 *SUR International Journal for Human Rights* 55 71. See also Schmidt-Traub (n 11) 80.

85 UN Systems Task Team (n 29) 58-64.

86 UN (n 27) para 7. See also Kercher & Mahler (n 46) 2.

87 Joint statement by 332 civil society organisations 'Human rights for all post-2015' 10 December 2013 <https://sustainabledevelopment.un.org/content/documents/5123joint.statement.dec10.pdf> (accessed 18 February 2019). See also MacNaughton & Frey (n 36) 644-645.

88 As above.

recognition of the link between development and human rights.<sup>89</sup> Moreover, Ban-Ki Moon, UN Secretary-General from 2007 to 2016, on a number of occasions has confirmed the importance of human rights for development. This includes statements in his 2014 Synthesis Report and the 2013 report to the UNGA where he calls for a follow-up framework that is 'a far-reaching vision of the future firmly anchored in human rights and universally accepted values and principles, including those encapsulated in the UN Charter, the Universal Declaration of Human Rights, and the Millennium Declaration'.<sup>90</sup> Unfortunately, the Secretary-General has been criticised for missing the opportunity to clearly illustrate how existing human rights obligations can be incorporated into the development arena.<sup>91</sup>

Following a rights-based approach to development in all stages of development programming holds various advantages for development projects. These include strengthened accountability measures; the provision of explicit guidelines and benchmarks through authoritative interpretation of rights; the provision of a holistic view of human development; and ensuring equitable and sustainable progress. Moreover, a rights-based approach to development in several ways gives explicit expression to the Declaration on the Right to Development (RTD Declaration).<sup>92</sup> The foundational principles of rights-based approaches, namely, equality and non-discrimination, accountability, participation, indivisibility and interrelatedness of human rights are mentioned throughout the RTD Declaration.

Bearing in mind the principles of a rights-based approach to development and the benefits that can be achieved when this approach is followed, it may be argued that formulating and implementing the post-2015 global development agenda in line with a rights-based approach to development is the best possible means of giving effect to the abovementioned calls, statements and arguments. Therefore, it should be examined to what extent all phases of the 2030 Agenda, which includes formulation, implementation, monitoring and evaluation, are guided by human rights standards that are in line with a rights-based approach to development.

Under this approach development goals must thus be formulated in line with international human rights laws and obligations. In terms of the final set of goals and targets under the 2030 Agenda, a group of

---

89 MacNaughton & Frey (n 36) 645-646.

90 UNGA 'A life of dignity for all: Accelerating progress towards the Millennium Development Goals and advancing the United Nations development agenda beyond 2015' (2013) Report of the Secretary-General para 75 <http://www.un.org/millenniumgoals/pdf/A%20Life%20of%20Dignity%20for%20All.pdf> (accessed 18 February 2019). See also Knox (n 27) 517-524; MacNaughton & Frey (n 36) 644.

91 Knox (n 27) 526.

92 UNGA 'Declaration on the Right to Development' adopted 4 December 1986.

civil society organisations has stated that 'the goals and targets are consistent with existing human rights standards in some quite significant ways'.<sup>93</sup> According to Kercher and Maler the majority of goals correspond with existing human rights, for example Goal 4 and the right to education, and Goal 3 and the right to health.<sup>94</sup> Governments have also emphasised the strong links between the SDGs and human rights, as can be seen from the following excerpts from the 2030 Agenda:<sup>95</sup>

We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realisation of human potential and contributing to shared prosperity.<sup>96</sup>

The new Agenda is guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome Document. It is informed by other instruments such as the Declaration on the Right to Development.<sup>97</sup>

In doing so, we reaffirm our commitment to international law and emphasize that the Agenda is to be implemented in a manner that is consistent with the rights and obligations of states under international law.<sup>98</sup>

We reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We emphasise the responsibilities of all states, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.<sup>99</sup>

However, according to the UN 2003 Common Understanding, development goals and targets must be based on international standards and aimed *directly* towards the protection and fulfilment of human rights as contained in the Universal Declaration and other international human rights instruments. Unfortunately, some view the goals as 'underwhelming' in their expression of human rights

---

93 As quoted in Knox (n 27) 525.

94 Kercher & Mahler (n 46) 2.

95 UN (n 34) 1.

96 2030 Agenda (n 2) para 8.

97 2030 Agenda para 10.

98 2030 Agenda para 18.

99 2030 Agenda para 19.

principles.<sup>100</sup> It is further argued that none of the goals is explicitly framed in terms of human rights.<sup>101</sup> This is a significant failure concerning a rights-based approach to development and represents a missed opportunity to clearly outline the respective obligations of the different duty bearers in achieving the various SDGs. As a result one is left to question to what extent the other development phases of the 2030 Agenda are in line with the principles espoused under a rights-based approach to development, in order to ensure the maximum level of success under the SDG framework.

### 5.1 Equality and non-discrimination

Under international human rights law everyone has the right to be treated equally and without unfair distinction. When following a rights-based approach to development duty bearers have the responsibility to identify and address inequalities, discriminatory practices and unjust distributions of power and resources that underlie development challenges.<sup>102</sup> To the extent that the 2030 Agenda gives expression to human rights in the formulated SDGs, it explicitly holds that all goals and targets are universally applicable to all countries, developed and developing alike.<sup>103</sup>

With its bold mission statement of 'leave no one behind', the 2030 Agenda highlights the need to focus development objectives and strategies on all human beings.<sup>104</sup> Moreover, by requiring disaggregated data to monitor and review progress, the Agenda ensures that the vulnerable and marginalised are included in all phases of development. Therefore, the 2030 Agenda goes much further than the MDGs, which required targets to be achieved for only a certain percentage of the population. Furthermore, under the original goals progress was only expressed in terms of national or global averages, leaving significant monitoring gaps.

On the other hand, the SDGs have been criticised for being too vague to provide useful practical guidance.<sup>105</sup> For instance, goals and targets related to non-discrimination refer only to the reduction of inequality in general and fail to mention specific groups that might be more vulnerable to discrimination in certain contexts, such as

100 MacNaughton & Frey (n 36) 662. See also T Pogge & M Sengupta 'The Sustainable Development Goals (SDGs) as drafted: Nice idea, poor execution' (2015) 24 *Washington International Law Journal Association* 571-576; Knox (n 27) 525-536; Abashidze et al (n 1) 3.

101 Pogge & Sengupta (n 100) 576-577; MacNaughton & Frey (n 36) 663.

102 OHCHR 'Frequently asked questions on a human rights-based approach to development cooperation' UN Publications: Geneva 2006 8 <http://www.ohchr.org/Documents/Publications/FAQen.pdf> (accessed 18 February 2019).

103 2030 Agenda (n 2) paras 5 & 55.

104 2030 Agenda (n 2) para 4.

105 Knox (n 27) 536.



indigenous groups that are more likely to be harmed by environmental changes.<sup>106</sup> This can hamper adherence to the principle of equality and non-discrimination as required under a rights-based approach to development.

## 5.2 Accountability

A rights-based approach to development empowers individuals to make use of local mechanisms, whether political, administrative, judicial or quasi-judicial, to hold duty bearers accountable for their respective human rights and development obligations.<sup>107</sup> Moreover, a rights-based approach to development creates the opportunity for actors, other than the state, such as donors, private service providers and even non-governmental organisations (NGOs), to be included in the accountability process.<sup>108</sup>

The MDG framework was severely criticised for its lack of effective monitoring and accountability measures. With regard to the 2030 Agenda, the OHCHR is in agreement that an accountability mechanism which clearly outlines the duties of all states, developed and developing alike, and other relevant stakeholders, including international organisations, is necessary so as to avoid the mistakes of the MDGs.<sup>109</sup> Not only obligations but also the purpose of and the means to exercise accountability measures must be objectively agreed upon, clearly defined and employed with an intention of empowerment of rights-holders.<sup>110</sup> The measures outlined must adhere to internationally-agreed human rights standards. Moreover, it is of vital importance that access to justice and measures of redress must be equally available to all rights holders.<sup>111</sup> States have the obligation to remove any economic or social barriers to access redress

106 Knox (n 27) 534-536.

107 K Mechlem 'Food security and the right to food in the discourse of the United Nations' (2004) 10 *European Law Journal* 631 646; M Darrow & A Tomas 'Power, capture, and conflict: A call for human rights accountability in development cooperation' (2005) 27 *Human Rights Quarterly* 471 512; UNDP 'Human rights and the Millennium Development Goals: Making the link' (2006) 23 <http://www.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/human-rights-and-the-millennium-development-goals/Human%20Rights%20and%20the%20MDGs.pdf> (accessed 18 February 2019). See also V Abramovich 'The rights-based approach in development: Policies and strategies' (2006) 88 *CEPAL Review* 45-47; P Uvin 'From the right to development to the rights-based approach: How "human rights" entered development' (2007) 17 *Development in Practice* 597 603.

108 OHCHR 'Draft guidelines: A human rights approach to Poverty Reduction Strategies' (2002) para 230 <https://www.refworld.org/pdfid/3f8298544.pdf> (accessed 18 February 2019); OHCHR (n 102) 7; B O'Dwyer & J Unerman 'Enhancing the role of accountability in promoting the rights of beneficiaries of development NGOs' (2010) 40 *Accounting and Business Research* 451 454.

109 Pogge & Sengupta (n 100) 573-574.

110 Darrow & Tomas (n 107) 518-519.

111 CG Mokhiber 'Towards a measure of dignity: Indicators for rights-based development' (2001) 18 *Statistical Journal of the United Nations Economic Commission for Europe* 155 159. UNDG 'The human rights-based approach to

mechanisms, and in some instances to provide legal services themselves.<sup>112</sup> It is essential to educate, build the capacity of and empower citizens to make use of accountability measures available to them to claim their rights.<sup>113</sup> Moreover, transparency and access to high quality and disaggregated information is essential to ensure that citizens can make effective use of accountability measures.

Unfortunately, like its predecessor the 2030 Agenda is not legally binding. The Agenda, however, does require the creation of a 'robust follow-up and review mechanism to ensure that commitments are translated into time-bound results'.<sup>114</sup> At the adoption of the goals it was agreed that the UN plays an important role in this regard. There was a strong call for relevant reforms and realignments in order to equip the organisation for this role. As mentioned above, under the Agenda a High-Level Political Forum must be established to review, through multi-stakeholder engagement, progress towards the achievement of the goals on an annual basis and give expression to the universal mandate of the new global partnership.<sup>115</sup> Moreover, the Agenda calls for review processes at national, regional and global levels to ensure strengthened accountability to all citizens.<sup>116</sup> The Agenda places on each government the primary duty for accountability, review and follow-up measures regarding development processes focused on the implementation of the goals.<sup>117</sup> In this regard Goal 16 plays an essential role. Under this goal provision is made for the establishment of effective, accountable and inclusive institutions, the assurance of equal access to justice and access to all relevant information. Under Goal 17.8 UN member states have also highlighted the need for capacity building in data collection and 'improved, credible and realistic statistical data' to ensure an effective review and follow-up process.<sup>118</sup> Provision is also made for the disaggregation of data according to the most significant grounds of discrimination.<sup>119</sup> Moreover, para 74 of the Agenda provides clear

---

development cooperation: Towards a common understanding among UN agencies' (2003) 3 <http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> (accessed 18 February 2019).

112 Abramovich (n 107) 45.

113 UNDP (n 107) 24; O'Dwyer & Unerman (n 108) 454; Van Ginneken (n 19) 113.

114 UN (n 34) 4. See also 2030 Agenda (n 2) para 72.

115 J Lee 'Common questions on the Sustainable Development Goals: What is the High-Level Political Forum on Sustainable Development? (United Nations Foundation) <https://unfoundation.org/blog/post/common-questions-on-the-sustainable-development-goals-what-is-the-high-level-political-forum-on-sustainable-development/> (accessed 18 February 2019); M Halle & R Wolfe 'Architecture for review and follow-up of the SDGs: Options for the High-Level Political Forum' (International Institute for Sustainable Development – Briefing Note 2015) 3 <https://www.iisd.org/sites/default/files/publications/architecture-review-follow-up-sdg-options-hlpf.pdf> (accessed 18 February 2019).

116 2030 Agenda (n 2) paras 47 & 73.

117 2030 Agenda para 47.

118 UN (n 34) 4.

119 2030 Agenda (n 2) para 48.

principles to which all follow-up and review processes, irrespective of the level at which they take place, must adhere.<sup>120</sup>

As can be seen from the above, the 2030 Agenda is explicit in the accountability measures it requires and the guidelines that must be adhered to as required under a rights-based approach to development. Moreover, member states have committed themselves to making high-quality, reliable and properly disaggregated data available for these processes. However, even though the participation of all citizens in review processes is highlighted, no mention is made of building the capacity of rights holders to make use of mechanisms to hold duty bearers accountable. Reference is made only to building the capacities of development actors to meet their obligations, to take part in review processes and to establish accountability measures. The goals are also criticised for not sufficiently addressing the respective roles of *all* development actors and stakeholders in their implementation, which can hamper accountability measures.<sup>121</sup> Moreover, the Agenda does not clearly articulate who is responsible for what which, as with the MDG framework, can place most of the burden on developing countries, in contradiction to the Agenda's statements on equality between countries.<sup>122</sup>

### 5.3 Participation

The principle of free, active and meaningful participation in all phases of the development process is based on the recognition of and respect for individual agency, as well as the right to have a say in decisions, in this case development objectives and processes, that affect one's life. Through participatory processes development actors must gain a better understanding of local contexts, the daily challenges faced by respective community members, as well as the possible negative effects related to proposed development strategies. All impacted individuals must be given the opportunity on an equal basis to express their needs and desires. Moreover, it is the duty of development actors to build the capacity of community members to effectively engage in participatory processes, which includes the obligation to make all relevant information available to all stakeholders.<sup>123</sup> Development actors must be sensitive to any hindrances to equal participation, such as ensuring physical access to participatory spaces for the disabled and elderly.

As part of its means of implementation the Agenda proposes a 'revitalised Global Partnership' that will 'facilitate an intensive global engagement in support of implementation of all the goals and targets, bringing together governments, the private sector, civil

---

120 2030 Agenda para 74.

121 Pogge & Sengupta (n 100) 573.

122 See 2030 Agenda (n 2) para 13.

123 OHCHR (n 108); AA Frediani 'Sen's capability approach as a framework to the practice of development' (2010) 20 *Development in Practice* 173 182.

society, the United Nations system and other actors and mobilising all available resources'.<sup>124</sup>

Through the adoption of the goals, governments recognised that continued inclusiveness of all stakeholders is essential in achieving the goals.<sup>125</sup> In order to achieve this the goals view access to information as essential.<sup>126</sup> The Agenda also recognises the important contribution that NGOs, volunteers and private sector organisations and actors can make towards the achievement of the goals. Under the Agenda it is the duty of national governments to facilitate and coordinate their various contributions. According to Cazabat this is in line with the human development approach, which views development as *coming from* 'the people'.<sup>127</sup>

The highly participatory and inclusive approach followed in the formulation of the goals must be commended. Moreover, a number of the goals are focused on ensuring equal participation of everyone in all spheres of life, namely, Goal 4, 'Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all'; Goal 5.5, 'Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life'; and Goal 10.2, 'By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status'.<sup>128</sup> Furthermore, the Preamble to the Agenda refers to the participation of all stakeholders in mobilising the necessary means to implement the Agenda.<sup>129</sup>

Once again, the 2030 Agenda goes much further than the MDG framework which was viewed as an externally-driven and top-down development approach, formulated by government actors with limited input by NGOs and civil society organisations. Unfortunately, throughout the rest of the Agenda very little mention is made of the participation of local citizens and community members in national and local development processes geared towards the achievement of the SDGs. The focus largely is on the participation of duty bearers, such as various development actors, which include states, non-governmental and civil society organisations, as well as private sector actors. Where mention is made of rights holders, the Agenda indeed makes provision for the equal participation of all persons and the requirement that all stakeholders should have access to all relevant information. However, except for the goals mentioned above, no other reference is made to building the capacities of community members to participate effectively and to be able to influence

---

124 2030 Agenda (n 2) para 39. See also paras 60-71.

125 2030 Agenda (n 2) para 3.

126 Cazabat (n 35) 30.

127 Cazabat 31. See also 2030 Agenda (n 2) para 52.

128 2030 Agenda (n 2).

129 2030 Agenda Preamble.

decisions in the formulation, implementation and monitoring of development processes. Moreover, it is argued that the Agenda would have gone a long way towards implementing the principles of a rights-based approach to development if it explicitly stated the right to participation as an invaluable human right.

#### 5.4 Empowerment

According to the principles of a rights-based approach to development all people must be empowered to demand development as a right, and become rights-holders with legitimate claims that can be enforced through accountability measures. It is the aim of the rights-based approach to development to expand the opportunities of people to meet their own needs by recognising their inalienable human rights. All people must be empowered through capacity building to take part, on an equal footing, in all phases of development.

As can be seen from the two parts above the empowerment of rights holders effectively to take part in participatory and accountability processes and to overcome social, economic and political barriers within these processes is very limited. The extent to which it features in the Agenda is limited to goals and targets that must be met, and not as an essential part of a means of implementation, monitoring and evaluation of development process. This reflects the greatest disconnect between the 2030 Agenda and the principles of a rights-based approach to development.

#### 5.5 Interrelatedness of human rights

Under a rights-based approach to development the interrelatedness and interconnection of all human rights are emphasised. This means that all types of rights must be pursued under development processes to ensure the sustainability of these processes. As already stated, the formulated SDGs give expression to all types of human rights, including civil and political rights, which were not sufficiently addressed under the MDG framework.<sup>130</sup> Moreover, the 2030 Agenda states that the SDGs are 'integrated and indivisible', giving expression to this essential principle of the rights-based approach to development.<sup>131</sup> The goals also mimic the interrelatedness of various goals and relevant human rights as contained in the MDG framework, for example, goals on preventing malaria and other diseases and the right to health.

---

130 OHCHR (n 38).

131 2030 Agenda (n 2) Preamble paras 5, 17, 18 & 55; Nabarro (n 46) 24.

## 6 Conclusion

In the final stages of the MDG framework, attention turned towards the development agenda that will succeed the initial goals. The UN and its member states, as well as various academics and practitioners, continuously called for the post-2015 agenda to be based on human rights. The 2030 Agenda for Sustainable Development signifies the next step forward in international development. Following on the 2000 MDG framework the new agenda aims to go further by addressing remaining development priorities and including all in development goals and processes. Based on the three pillars of sustainable development, namely, economic growth, social progress and environmental protection, the Agenda covers five categories of goals, namely, people, planet, prosperity, peace and partnership. Compared to the MDGs, the post-2015 framework therefore is much more comprehensive in the number of goals included, as well as the targets related to each goal. Moreover, the SDG framework is focused more on human development by being people-centred, gender-sensitive and human rights-based.

It has been argued that a rights-based approach to development is best suited to answer the calls for a human rights-based post-2015 agenda. It thus fell to be examined to what extent all phases of the 2030 Agenda, which includes formulation, implementation, monitoring and evaluation, are guided by human rights standards and thus in line with a rights-based approach to development. It was determined that the goals and targets formulated under the Agenda do not sufficiently express a rights-based approach, as none of the SDGs is *directly* geared towards the protection, promotion, fulfilment of and respect for human rights. This failure proposed a second question for examination: Are the rest of the development phases under the 2030 Agenda in line with the principles of a rights-based approach to development and, if not, what can be done to rectify this?

As far as the principle of free, active and meaningful participation of all in development processes that affect people's lives is concerned, it was determined that the participation of local citizens in local development processes geared towards the achievement of the SDGs received very little attention. Moreover, insufficient reference is made to building the capacities of rights holders to effectively participate in these processes. The focus largely is on the participation of duty bearers. It has been argued that the Agenda could have gone a long way in implementing the principles of a rights-based approach to development if it explicitly had stated the right to participation as an invaluable human right. With regard to accountability, the 2030 Agenda is very clear on the necessity of effective accountability processes at all levels as well as the principles to which they must adhere. The need to support these processes through the availability of high-quality, reliable and properly disaggregated data is also

highlighted. However, the goals have been criticised for not sufficiently addressing the respective roles of all development actors and stakeholders in the monitoring and evaluation of the goals contrary to the requirements of a rights-based approach to development. Moreover, as under the principle of participation, reference is made only to the capacities of development actors. References to building the capacities of rights holders to access and take part in accountability processes in an equal and effective manner are severely lacking. In contrast to the people-centred focus of a rights-based approach to development and the requirement of empowering rights holders, the means of implementation, monitoring and evaluation of the 2030 Agenda is focused much more on development actors than on the people it intends to assist. As far as the rest of the principles under a rights-based approach to development are concerned, namely, equality and non-discrimination and interrelatedness of rights, it may be argued that the Agenda gives sufficient expression to these principles although more still can be done to achieve the equality of all in development processes. Therefore, it may be concluded that although the 2030 Agenda in some areas is compatible with the principles of a rights-based approach to development, more should be done in the implementation, monitoring and evaluation of the SDGs to ensure that the full spectrum of advantages offered under a rights-based approach can be achieved.

To cite: C Stevens 'Reviving the right to development within the multilateral trade framework affecting (African) countries to actualise Agenda 2063' (2019) 19 *African Human Rights Law Journal* 470-493  
<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a22>

## Reviving the right to development within the multilateral trade framework affecting (African) countries to actualise Agenda 2063

Clydenia Stevens\*

PhD Student, University of KwaZulu-Natal, Durban, South Africa  
<https://orcid.org/0000-0003-0712-501X>

### Summary

*The African Union through Agenda 2063 aspires to build 'a prosperous Africa based on inclusive growth and sustainable development' and to ensure that Africa becomes 'a strong, united, resilient and influential global player and partner'. Similarly, the World Trade Organization aims to ensure that member states through the multilateral trade system can 'raise standards of living', 'ensure full employment' and 'sustainable development'. Both institutions seem to be aware that African countries are underdeveloped and require assistance to address the cohort of political and socio-economic challenges, and the implementation of particular practices and policies in order for the continent to be a force in the multilateral trade arena. Indeed, the unequal economic relations between states in the multilateral trading system add to the afflictions of African countries. The position of the right to development as a recognised human right has become an acceptable and settled notion. This article aims to provide and identify possible ways whereby the international community and African countries can rescue the right to development from the 'conceptual mudslinging and political quicks, in which it has been mired all these years' in the trade discipline. Indeed, trade goes hand-in-hand with development but 'is not the sole determinant for*

---

\* LLB LLM (Western Cape); [stevens@ukzn.ac.za](mailto:stevens@ukzn.ac.za). This article was prepared while the author was a doctoral candidate at the School of Law, University of KwaZulu-Natal, and contains some matters raised in her doctoral thesis. I am indebted to Mr Christopher Gevers and Prof Shannon Bosch of the University of KwaZulu-Natal for carefully providing constructive criticism on earlier drafts of the article, which shaped the work. I would also like to thank Dr Carol Ngang for his assistance and the reviewers for their insightful comments. However, all shortcomings and views expressed herein remain those of the author.



*development', and there is a need to revive the right to development in the multilateral trade framework as trade is a valuable tool for actualising Africa's Agenda 2063 and the development of African countries. The article provides a succinct overview of the right to development and particular multilateral trade practices, programmes and policies and puts forward an argument of how Africa's attempt to address its economic, political and social ills can be addressed through Agenda 2063.*

**Key words:** *right to development; multilateral trade; World Trade Organization; Agenda 2063*

## 1 Introduction

The African Union (AU) through Agenda 2063 aspires to build 'a prosperous Africa based on inclusive growth and sustainable development' and to ensure that Africa becomes 'a strong, united, resilient and influential global player and partner'.<sup>1</sup> Furthermore, it aspires to ensure that 'Africa's agriculture will be modern and productive, using science, technology, innovation and indigenous knowledge'.<sup>2</sup> Agenda 2063 may be considered a strategy for corroborating the initiatives of the AU and the United Nations (UN) and can be construed as a 'revived plan' for addressing the economic, political and social difficulties facing Africa. In its implementation plan (2014-2023) to integrate Africa, Agenda 2063 aims to ensure the 'free movement of goods, services and capital and to increase the volume of intra-African trade especially in agricultural value added products threefold, by 2023'.<sup>3</sup> The Guiding Principles, which include subsidiarity, accountability and transparency, inclusiveness and integration, are key to the overall implementation of the Agenda.

History suggests that, for various reasons, African countries are underdeveloped, a situation which thwarts their participation in the multilateral trade arena. While the unbalanced economic relations between states in the multilateral trading system add to the challenges these countries face, it is not the sole attributor.<sup>4</sup> The question is whether these challenges can be overturned by means of internal African trade cooperation that is spearheaded through Agenda 2063 and related plans. As such, the impact of Agenda 2063 should be considered in respect of the position of African countries

---

1 African Union Commission 'Agenda 2063: The Africa we want' Aspirations 1 and 7 (2015) <http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> (accessed 25 May 2018).

2 As above.

3 African Union Commission 'Agenda 2063: The Africa we want: A shared strategic framework for inclusive growth and sustainable development: First ten-year implementation plan 2014-2023' (2015) 21-23 <http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> (accessed 25 May 2018).

4 E Kessie & Y Apea 'The participation of African countries in the multilateral trading system' (2004) 12 *African Yearbook of International Law* 9-10.

and the operation of the current practices, programmes and policies of the World Trade Organisation (WTO) and other agencies.

Limited market access, exorbitant non-tariff measures and other barriers are some of the leading concerns for Southern African Development Community (SADC) and Economic Community of West African States (ECOWAS) members.<sup>5</sup> Frequently, the underdevelopment of African countries generally is placed at the door of perpetual reliance on mainly trade policies, programmes and binding international conventions that are not specifically suited to their economic circumstances. Despite the allure of the promised membership to this multilateral body governing international trade, African countries are still left out in the cold. To remedy the situation the continent, through Agenda 2063, seeks to develop the 'right strategies to finance its own development and further reduce aid dependency'.<sup>6</sup> Currently, many African developing and least developed countries are heavily reliant on official development assistance and other forms of development assistance to enable their multilateral, regional and bilateral economic participation.<sup>7</sup> Agenda 2063 is dissimilar to the array of 'one-size-fit-all' programmes proffered by the WTO and other agencies, and is more focused on an African plan for actualising the right to development.

If Agenda 2063 aims to streamline Africa's position in the international economic order, the realisation and implementation of the right to development must be an integral component of this 'master plan'. In order for this Agenda to make a difference it would need to identify and address the prevailing impediments in the multilateral trading system that affect the objectives of the acclaimed Agenda and thus the prospect of future development. Development unquestionably is the 'catch phrase' of Agenda 2063, similar to the disillusioned Doha Development Agenda (DDA). However, there appears to be a difference as the Agenda (at least on paper) is strategic in relation to the methods and modes of implementation to achieve the necessary development in Africa. An ideal development framework would encompass coherent and inclusive political, economic and social governance, which requires individual and collective cooperation.

Notwithstanding the vehement call for the realisation and implementation of the right to development after the

---

5 United Nations Conference on Trade and Development (UNCTAD) 'Regional integration and non-tariff measures in the Economic Community of West African States (ECOWAS)' (2018); UNCTAD/DITC/TAB/2018/1 [https://unctad.org/en/PublicationsLibrary/ditctab2018d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ditctab2018d1_en.pdf); United Nations Conference on Trade and Development (UNCTAD) 'Non-tariff measures and regional integration in the Southern African Development Community' (2014) (UNCTAD/DITC/TAB/2014/5) [https://unctad.org/en/PublicationsLibrary/ditctab2014d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ditctab2014d5_en.pdf) (accessed 5 March 2019).

6 African Union Commission (n 3).

7 MA Tadeo 'Reflections on the right to development: Challenges and prospects' (2010) 10 *African Human Rights Law Journal* 339.

commemoration of the 25th anniversary of the Declaration on the Right to Development (RTD Declaration)<sup>8</sup> in 2011, and the ample recognition of the link between human rights and development, the place of the right to development in multilateral trade remains unclear. In particular, the normative and legal framework of multilateral trade reflects the perplexing nature of these interlinked areas. A relevant example here is the above-mentioned Doha Round, or the so-called 'Development Round', which has placed development at its centre, although the focus has since then faded. Given the challenges faced by African countries in the multilateral trading system, a discussion on the implementation of the right to development is crucial.

Owing to the broad nature of the right to development and the common practice of couching it in the human rights framework, it often is 'narrowly understood when analysed from an economic growth perspective'.<sup>9</sup> It is submitted that the interpretation of the right to development does not have to be through a singular approach, but can encompass different lenses (human rights, economic, social, political, legal and cultural) as the nature of the right to development lends itself to such flexibility. Thus, by following such an all-encompassing approach, the interpretation and implementation of the right to development will be key to (i) addressing inequity in multilateral trade; (ii) achieving Agenda 2063; and (iii) strengthening regional economic integration efforts.

The structure of the article is as follows: Part 2 highlights the salient features of the right to development, as specifically contained in the RTD Declaration and the African Charter on Human and Peoples' Rights (African Charter).<sup>10</sup> This is followed by an in-depth discussion in part 3 of the WTO's approach to development, where current policies and practices implemented by the institution to 'enable' development are discussed. Part 4 elaborates on the above-mentioned AU Agenda 2063 objectives, with a view to understanding the rationale for this plan and to deliberate on the relevance of current external and internal tools and programmes to enable development in African countries. The conclusion and recommendations follow in part 5.

The discussion on the need to situate the right to development within the framework of multilateral trade to actualise the African Agenda for development aims to provide and identify potential ways whereby the international community and African countries can rescue the right to development from the 'conceptual mudslinging

---

8 Art 3(3) Declaration on the Right to Development GA Res A/RES/41/128 1986 (United Nations 1986).

9 C Ngang 'Towards a right-to-development governance in Africa' (2018) 17 *Journal of Human Rights* 108.

10 African Charter on Human and Peoples' Rights adopted in Nairobi on 27 June 1981 OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58.

and political quicks in which it has been mired all these years'<sup>11</sup> in the trade discipline.

## 2 Right to development

### 2 Meaning of the right to development

Generally identified as a 'third generation solidarity right', the right to development is recognised at the international, regional and national levels.<sup>12</sup> Described as a means to 'mark the development of human rights through time',<sup>13</sup> the emergence of solidarity rights in the twentieth century – similar to civil-political and socio-economic rights – has to be understood within the historical context and processes.<sup>14</sup> Solidarity rights did not replace civil-political or socio-economic rights, but owing to the evolution in human rights they are essential for the promotion and realisation of these rights.<sup>15</sup> In fact, by so doing development of the individual and community is assured. Unfortunately, solidarity rights also have to face the same challenges (if not more) encountered by socio-economic rights. In respect of a lack of resources, despite the ample arguments dismissing the myth of their separateness, the different treatment of the three divisions of human rights continues.

Sengupta sheds some light on the rationale for the continuation of this different treatment. According to the author, particularly the right to development usually is merely observed as an 'aspirational right, which can only be aimed at but not realised'.<sup>16</sup> Stevens and Ntlama<sup>17</sup> argue that the right to development definitely is an umbrella right and, thus, a failure to meet the cluster of human rights in turn amounts to a failure to meet the right to development. Similarly, Schrijver elaborates that the right to development can be viewed as a 'cluster right, bringing together civil and political rights on the one

11 Navi Pillay, former UN High Commissioner for Human Rights on the occasion of the commemoration of the 25th anniversary of the Declaration on the Right to Development in 2011, <http://www.up.ac.za/en/> (accessed 25 March 2018).

12 A Sengupta 'Preface' in SP Marks (ed) *Implementing the right to development: The role of international law* (2008) 7-8. Shrijver also reiterates that the right to development 'gets its legitimacy' from the Charter of the United Nations (UN), the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); E Gokce 'Session 2: The right to development: A tool to boost coherence between trade, development and human rights?' taken from N Schrijver Panellists, 15 September 2010 [https://www.wto.org/english/forums\\_e/public\\_forum10\\_e/session02\\_summ\\_e.doc](https://www.wto.org/english/forums_e/public_forum10_e/session02_summ_e.doc) (accessed 14 June 2018).

13 C Wellman 'Solidarity, the individual and human rights' (2000) 22 *Human Rights Quarterly* 640.

14 As above.

15 Wellman (n 13) 641.

16 Sengupta (n 12) 8.

17 C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016) 20 *Law, Democracy and Development* 51.

hand and economic, social and cultural rights on the other'.<sup>18</sup> Indeed, if one follows conventional theories, when human rights are protected trade will flow, economies will stabilise and growth will be realised.<sup>19</sup>

Mubangizi argues that due to the interchangeable use of development in different disciplines, its meaning and processes are altered to fit into that specific discipline or even paradigms.<sup>20</sup> As such, the term often has been used in the following variations: 'human development', 'economic development' and 'sustainable development'.<sup>21</sup> However, a dual argument in respect of this also can be contemplated. Defining the term narrowly could result in restraining the application and confining it to a singular box, which would compromise the 'umbrella argument' discussed previously. Meanwhile, if it was defined in a broader context that encompasses all the different variables of politics, economics, human rights and so forth, it could result in a more holistic developmental position.

Despite the elegant wordiness of the concept<sup>22</sup> and the advances made, Cheru points out that there remains a 'gap in translating the right to development into policy and practice'.<sup>23</sup> Hansungule also questions the appropriateness of the current definition of the right to development, and the United Nations Conference on Trade and Development (UNCTAD) formula in 'categorising' countries according to their level of development.<sup>24</sup> Notably, within the respective framework of human rights and multilateral trade there are ample different substantive and procedural approaches, but both share the core objective of development.

In spite of these different approaches, the right to development certainly influences political decisions and economic plans as its very being is centred on the progression of these unpredictable disciplines. Furthermore, in light of the entitlement and duties imparted by article 22 of the African Charter, Agenda 2063 encapsulates these notions and recognises that development cannot materialise if these issues are not dealt with in an appropriate and sustainable order and, thus, calls

---

18 Gokce (n 12).

19 SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 94.

20 JC Mubangizi 'A human rights-based approach to development in Africa: Opportunities and challenges' (2014) 39 *Journal of Social Sciences* 68.

21 As above.

22 Vandenbogaerde writes: 'However, the right to development and its subsequent claims are actually much older and were born out of the era of decolonisation where they found a re-articulation, in the language of rights, of long-standing claims which had been evident both throughout much of the period of colonialism and the years immediately following liberation.' A Vandenbogaerde 'The right to development in international human rights law: A call for its dissolution' (2013) 31 *Netherlands Quarterly of Human Rights* 189.

23 F Cheru 'Developing countries and the right to development: A retrospective and prospective African view' (2016) 37 *Third World Quarterly* 1268.

24 M Hansungule 'Keynote address' presented at 2nd International Conference on the Right to Development, Centre for Human Rights, University of Pretoria, South Africa, 15-17 August 2018 (on file with author).

for 'particular attention to paid to the right to development'.<sup>25</sup> Indeed, the African Charter recognises the link between civil and political and economic, social and cultural rights and development. As such, the domestication and implementation of the African Charter and other related instruments<sup>26</sup> are key to the success of Agenda 2063.

Furthermore, articles 1 and 2 of the RTD Declaration extend the meaning of development from the economic framework to the social, cultural and political sphere, thus recognising the so-called 'umbrella effect' of the right to development. Ideally, if the aspirations of Agenda 2063 are to be achieved, scholars should stop regarding the right to development as a separate right. The right should aptly be considered an 'umbrella right', under which all rights function and without which economic development would be unattainable. By expressly acknowledging the right to development as being an 'umbrella right', it would muffle those arguments that question the relevance of the right to development.<sup>27</sup> These opposing sentiments undeniably are derailing the advances made to the right to development, especially since the debate now is focused on identifying sustainable mechanisms to enable the realisation of this right.

## 2.2 Whose right to development?

M'baye emphasised that '*every person* should enjoy in just measure the goods and services produced thanks to the effort of solidarity of the members of the community'.<sup>28</sup> The wording of the RTD Declaration unequivocally reiterates that everyone is 'entitled to participate in, contribute to, and enjoy economic, social, cultural and political development'.<sup>29</sup> By means of the Millennium Declaration, which states that '[w]e are committed to making the right to development a reality for everyone and to freeing the *entire human race* from want',<sup>30</sup> Piron adds that the right to development has been

25 Preamble African Charter.

26 Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and African Women's Protocol; African Union Commission (n 3) 77-78.

27 J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) *California Western International Law Journal* 473-477; J Srirang 'A critique of right to development' (2013) 1 *Journal of Politics and Governance* 17-22.

28 R Ozoemena & M Hansungule 'Development as a right in Africa: Changing attitude for the realisation of women's substantive citizenship' (2014) 18 *Law, Democracy and Development* 226 (my emphasis).

29 Article 1(1) states that '[t]he right to development is an inalienable human right by virtue of which *every human person* and *all peoples* are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised'.

30 General Assembly United Nations Millennium Declaration Resolution adopted by the General Assembly A/RES/55/2 18 September 2000 para 11.

reaffirmed as a universal and inalienable human right.<sup>31</sup> It intrinsically is both an individual and collective right. As observed from the African Charter, the role of states (acting on the international, regional and national plane)<sup>32</sup> and the individual (whether acting on his or her own accord or collectively within community structures) is recognised.

Furthermore, since development is a precondition for social life,<sup>33</sup> the RTD Declaration recognises the human person not only as the 'central subject of [the] development process and that development policy should therefore make the human being the main participant and beneficiary of development',<sup>34</sup> but also identifies states as the duty bearers for the responsibility of development. Hence, the individual not merely is a beneficiary but also a key role player in enforcing the right to development and facilitating the processes in the realisation of development.<sup>35</sup>

The right to development commonly and incorrectly<sup>36</sup> is referred to as a 'developing country right', mainly due to these nations' former involvement and their insistence on the inclusion of the right in the prevailing human rights dialogue. The right to development, however, certainly is not aimed at developing countries only. Indeed, the right to self-determination<sup>37</sup> and the subsequent decolonisation of African countries were key factors that encouraged the call for the realisation of development aid programmes. Article 1(2) of the RTD Declaration gives homage to this:

The human right to development also implies the full realization of the right of *peoples* to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

As such, these events and discourses have led to the right to development being regarded as the means to addressing the

- 
- 31 L Piron 'The right to development: A review of the current state of the debate for the department of international development' (2002) 9 <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2317.pdf> (accessed 12 September 2018).
  - 32 SDA Kamga 'Realising the right to development: Some reflections' (2018) 16 *History Compass* 2-10.
  - 33 Stevens & Ntlama (n 17) 52.
  - 34 Preamble to the RTD Declaration paras 12 & 13; RF Oppong 'Trade and human rights: A perspective for agents of trade policy using a rights-based approach to development' (2006) 6 *African Human Rights Law Journal* 126-127.
  - 35 E Gokce 'Session 2: The right to development: A tool to boost coherence between trade, development and human rights?' Taken from J Hivonnet Panellists, 15 September 2010 [https://www.wto.org/english/forums\\_e/public\\_forum10\\_e/session02\\_summ\\_e.doc](https://www.wto.org/english/forums_e/public_forum10_e/session02_summ_e.doc) (accessed 14 June 2018).
  - 36 According to Sengupta, many developed countries also joined the 'sponsorship of the right' as the right to development quite rightly enjoyed by individuals from developing and developed countries; Sengupta (n 12) 7-8.
  - 37 The right to self-determination is proffered as the legal basis for the claim of colonial countries to self-rule and decolonisation; J Dugard *International law: A South African perspective* (2011) 99.

challenges faced by the so-called Third World. Sengupta concedes that developing countries in most circles are regarded as the 'principal sponsors'<sup>38</sup> of this right. Reacting to the various arguments, Stevens and Ntlama contextualise the link between developing countries and the right to development, and the role in the economic emancipation of these countries, by explaining:<sup>39</sup>

The emergence of developing countries from the restraint and bondage of colonialism made them search for *measures designed to cultivate the right to development* in order to gain economic independence and thus the restructuring of their previous economic status quo. This was driven by the *eagerness to bridge the gap on economic development in relation to the unevenly balanced distribution of resources between developed and developing countries.*

Moreover, these authors dispel the misguided notion that the right to development is new to the international framework, when in fact it actually was born out of the period of decolonisation. Expectedly, then, it was parallel to the recognition of former colonial states and their inhabitants emerging from the shackles of colonial rule to advance the economic, political and social dimensions. In this respect, Vandenbogaerde acknowledges that 'the implementation of the right to development has been slow'.<sup>40</sup> Furthermore, the author equates the slow pace to the 'highly political nature' of the right.<sup>41</sup> Nevertheless, in reality development is an all-encompassing process that needs time and proper planning to be realised, knowing the internal and external struggles faced by many (African) countries.<sup>42</sup> Even though developing countries were the principal proponents of this right, many developed countries joined the movement's sponsorship, and the right is exercised and enjoyed by individuals from both developed and developing countries, similar to other recognised human rights. Thus, the outcomes of the right to development dispel the argument that its sole existence is for developing countries. According to Sengupta, many of the debates on the position of the right to development as a recognised human right have become an acceptable and settled notion.<sup>43</sup> However, in reality human beings have not always been the 'central object' of development.<sup>44</sup> Thus, the responsibility of the facilitation, subsequent implementation and ensuring the effectiveness and sustainability of the right to development for all stakeholders concerned is not settled.

---

38 Sengupta (n 12) 7-8.

39 Stevens & Ntlama (n 17) 50 (my emphasis); see also Ozoemena & Hansungule (n 28) 224.

40 Vandenbogaerde (n 22) 189.

41 As above.

42 Oppong (n 34) 127 urges that when dealing with the right to development, one must be careful not to confuse the 'process' and the 'right'.

43 Sengupta (n 12) 7-8.

44 Oppong (n 34) 126.



### 3 Development in the World Trade Organization: 'Economic growth is not an end in itself'<sup>45</sup>

Following the economic devastation caused by the two World Wars and the subsequent depressions, the international community sought to reconstruct the world order. Despite some of the so-called 'birth defects'<sup>46</sup> of the General Agreement on Tariffs and Trade (GATT),<sup>47</sup> this legal instrument which operated as a *de facto* organisation<sup>48</sup> for a long time chartered trade relations between the contracting parties. Furthermore, it was considered favourably by some authors because of the flexibility it offered (commonly referred to as the GATT *à la carte*) and the minimal intrusiveness in respect of the rights and powers of the contracting parties.<sup>49</sup> On the other hand, the development of the economies of developing and least developed countries not necessarily was a key focus of the GATT. When this instrument was drafted and negotiated, most developing and least developed countries remained under the control of their colonial occupiers. The GATT thus was unable to muster the continued social, political and economic divide between the north and the south and to coordinate policies and practices that could serve the development needs of these countries.

However, throughout the early part of the GATT negotiations (between 1947 and 1994) some effort was made to consider the challenges faced by developing and least developed countries. As such, having surpassed the complicated negotiations at the Uruguay Round<sup>50</sup> and 'Battle of Seattle',<sup>51</sup> developing and least developed countries had a renewed interest and bravery forged by their overwhelming numerical advantage, to bring to the fore those issues of concern to them, but which had been neglected in previous trade discussions. This encounter would have to take place at the helm of the newly-formed trade institution. In 1995 the WTO with great fanfare revived the trade relations among the contracting parties of

---

45 <http://www.un.org/en/events/righttodevelopment/> (accessed 21 June 2018).

46 JH Jackson *The World Trade Organization: Constitution and jurisprudence* (1998) 37.

47 GATT 1947: General Agreement on Tariffs and Trade 30 October 1947, 61 Stat Pt 5, 55 UNTS 194.

48 Jackson (n 46) 37.

49 A Saurombe & HIV Nkabinde 'Reforming the multilateral decision-making mechanism of the WTO: What is the role of emerging economies?' (2013) 16 *Potchefstroom Electronic Law Journal* 429-436.

50 The Uruguay Round negotiating results were formally signed at Marrakesh, Morocco in 1994, and after being ratified by the required number of nations entered into force on 1 January 1995.

51 In 1999, at the start of Third WTO Ministerial Conference, thousands of protestors met to show their displeasure at the WTO whom they considered in 'developing its rules and procedures for promoting free trade, had not given adequate, or any, consideration to labour rights, environmental problems, or human rights'; C Summers 'The battle in Seattle: Free trade, labour rights, and societal values' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 61-62.

GATT 1994<sup>52</sup> and other nations. This institution would replace the *status quo* under the previous regime, by having a development-inclusive focus. Furthermore, the WTO promised to provide a 'common institutional framework for the conduct of trade relations among its members in matters relating to the agreements and associated legal instruments'.<sup>53</sup> There undoubtedly was apprehension about how the new institution would function and address the specific needs of developing and least developed countries. The reason for the lack of 'interest' in development is because development often is referred to as a mere 'non-trade concern'.<sup>54</sup> However, development is an integral part of the objectives of the WTO and the fostering of a fair international trade system that is important for actualising development.

The WTO ambitiously seeks to administer the trade agreements between its members; to serve as a forum for trade negotiations and settle trade disputes; to review or monitor members' trade policies by the Trade Policy Review Mechanism (TPRM); to cooperate with relevant international organisations; and to provide technical assistance to developing and least developed members.<sup>55</sup> This mandate is given impetus by the institution's principles, which include:<sup>56</sup>

- non-discrimination (most-favoured nation and national treatment principle);<sup>57</sup>
- free trade gradually through negotiation;
- predictability, through binding agreements and transparency;
- promoting fair competition; and (of particular relevance)
- encouraging development.

These principles form the backbone of the WTO and its stated purpose to liberalise and erode obstacles to multilateral trade (however it also impacts regional and bilateral trade). Furthermore, the principles are given effect by practices, policies and programmes that ensure the operation of the WTO through the various agreements, covering goods, services and intellectual property.<sup>58</sup> Lastly, but of great importance, is a consideration of the extent to which the current WTO framework enables the realisation of the right to development.

52 GATT 1994: General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) (GATT 1994).

53 WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994) (Marrakesh Agreement or WTO Agreement); Article II: 1 of the WTO Agreement.

54 Other so-called non-trade concerns include environment and human rights; Gokce (n 12).

55 Art III WTO Agreement.

56 <http://www.wto.org> (accessed 12 June 2018).

57 Provided for in GATT 1994 (n 52) arts I and II.

58 Saurombe & Nkabinde (n 49) 430.

### 3.1 Enablers of development?

Trade goes hand-in-hand with development, but 'is not the sole determinant for development'.<sup>59</sup> At the same time, when trade can ensure development, this ultimately could lead to 'new goals of human happiness and well-being'.<sup>60</sup> Arguably, it is impossible for development to flourish where there is extreme economic and social under-development. The multilateral trading system has been beneficial for developed states, but there is an acknowledgment that even with the WTO, developing countries, especially African states, have been unable to reap the supposed benefits. Some scholars who argue that this organisation is more aligned with developed country needs have put the responsibility for this state of affairs at the inner caucus of the WTO.<sup>61</sup> In order to properly entertain this matter several pertinent issues manifested within the WTO need to be discussed:

#### 3.1.1 The 'single undertaking'

Unlike the GATT, the WTO purportedly is more focused on encouraging development and to ensure the expansion of trade and involvement of the less developed world. It is commonly reasoned that WTO agreements were sold as a solitary package, the idea being that at their core these agreements are irrefutably linked. Also, the rationale for the construction of the 'single undertaking' was to ensure certainty and predictability in the trade relations between member states. Knowing the potholes that normally arise within treaty-making processes in public international law and the inconsistency with the previous GATT, the drafters were keen to avoid similar difficulties. However, Saurombe and Nkabinde argue that instead of generating the certainty, the current set-up within the WTO has 'made it impossible to reach agreement because countries are at different levels of economic development and follow different approaches in implementing their agendas'.<sup>62</sup> Moreover, the 'single undertaking', compared to the GATT *à la carte*, is limiting the national policy space

59 E Gokce 'Session 2: The right to development: A tool to boost coherence between trade, development and human rights?' Panellist discussion on 15 September 2010 [https://www.wto.org/english/forums\\_e/public\\_forum10\\_e/session02\\_summ\\_e.doc](https://www.wto.org/english/forums_e/public_forum10_e/session02_summ_e.doc) (accessed 14 June 2018).

60 A Sengupta 'Realising the right to development' (2000) 31 *Development and Change* 554.

61 M Khor *Implications of some WTO rules on the realisation of the MDGs* Third World Network August 2005, [www.twtn.my/title2/par/mk004.doc](http://www.twtn.my/title2/par/mk004.doc) (accessed 21 August 2015); J Stiglitz & A Charlton *Fair trade for all: How trade can promote development* (2006) 1.

62 Saurombe & Nkabinde (n 49) 440. Alonso elaborates that '[d]evelopment problems and capacities are diverse in accordance with countries' conditions; and, consistently, any inclusive development agenda must be more complex and comprehensive than ever before'; JA Alonso 'Development cooperation to ensure that none be left behind' March 2018 *Committee for Development Policy Background Paper* 39 ST/ESA/2018/CDP/39, <https://www.un.org/development/desa/dpad/cdp-background-papers/> (accessed 25 March 2019).

of states, thus especially inhibiting the growth and economic prosperity of African countries. This has resulted in such states imploring the WTO to allow for enhanced policy space and flexibilities in the multilateral trading system.

### 3.1.2 *Special and differential treatment*

Contrary to the WTO envisaged plan it is argued that the 'single undertaking' also further weakens the Special and Differential Treatment (SDT) provisions.<sup>63</sup> The singular purpose of the SDT, a central feature of the past GATT (Article XVIII) and now the WTO system, is to address the needs of members that are not at a required stage of development, in order to implement measures and actively participate as such.<sup>64</sup> These measures date back to the pre- and post-Uruguay Round. Ademola Oyejide explains that the SDT

constitute[s] a set of rights and privileges that apply to developing and least-developed country members and from which industrial countries are excluded. In effect, these provisions are meant to grant developing countries and least-developed countries (LDCs) more favourable access to the markets of the industrial countries and to give them *substantial policy discretion with respect to their own domestic markets*.<sup>65</sup>

As such, after the Uruguay Round the SDT provisions allow developing and least-developed countries 'special rights', affording them some leeway in respect of meeting their trade obligations.<sup>66</sup> However, De Vylder comments that the SDT not necessarily is envisioned to strengthen such countries' trade and development.<sup>67</sup> This assemblage of SDT provisions in the different agreements has been put into place to gradually reduce the dependence on such assistance, but the continuing lack of development ignites frequent questions about their actual significance.<sup>68</sup> Ngang's argument may provide a rational explanation for the ineffectiveness of programmes such as SDT, as he contends

63 The special provisions include longer time periods for implementing agreements and commitments; measures to increase trading opportunities for developing countries; provisions requiring all WTO members to safeguard the trade interests of developing countries; support to help developing countries build the capacity to carry out WTO work, handle disputes, and implement technical standards, and provisions related to least-developed country (LDC) members, <https://www.wto.org/> (accessed 25 March 2019).

64 RH Bhala 'Mercy for the Third World through GATT Article XVIII' (2002) 6 *Singapore Journal of International and Comparative Law* 498.

65 T Ademola Oyejide 'Special and differential treatment' in B Hoekman, A Mattoo & P English *Development, trade and the WTO: A handbook* (2002) 504.

66 As above (my emphasis).

67 S de Vylder *The least developed countries and world* (2007) 95.

68 Bhala explicates that SDT are viewed as 'inadequate and counterproductive'; Bhala (n 64) 498.

that *global development paradigms* cannot apply uniformly, especially in addressing issues relating to poverty and socio-economic and cultural development, which although perceived as global concerns, are in effect more localised in developing countries.<sup>69</sup>

Saurombe and Nkabinde put these arguments into perspective, as follows:<sup>70</sup>

Special and differential treatment operates on the basis of lumping all emerging and developing countries together into one supposedly homogenous group of 'developing countries' that need the same kind of treatment because they share characteristics, especially in economic development.

It is the submission that the creation of the SDT is a further acknowledgment of the fact that states are not equal.<sup>71</sup> A perusal of African countries suggests that such countries cannot harness the benefits of the multilateral trading system, even with the aid of the SDT. Even though the SDT allows for differentiation between developed and less-developed countries, it fails to go a step further by recognising that the latter countries also differ from each other. These measures in their current form cannot be applied uniformly as states are politically, economically and socially different. Hence, the 'one-size-fits-all' approach in the form of the SDT is not suitable for addressing and actualising the development needs of these states. Heeding the call for reform to SDT provisions, the Bali Ministerial Conference in 2013 'established a mechanism' which allowed for the review and analysis of such measures.<sup>72</sup> Despite these developments, an issue that emerges in these discussions is how SDT provisions and other measures can be used to actualise the development of African countries.

### 3.1.3 Agriculture

Another matter that is contributing to the inability to realise the development of and bringing African countries into the fold of the multilateral trading system is the continued ostensible discrepancy in agricultural trade.<sup>73</sup>

Although there are ample SDT measures in the various WTO agreements, one fundamental area where developing countries have been unable to make a direct and noticeable effect and where the continued differential approach is observed is agriculture. As such, much more flexibility and certainty is needed on issues such as domestic support and market access in agriculture, which is the

69 C Ngang 'Differentiated responsibilities under international law and the right to development paradigm for developing countries' (2017) 11 *Human Rights and International Legal Discourse* 287 (my emphasis).

70 Saurombe & Nkabinde (n 49) 441.

71 Ngang (n 69) 287.

72 <https://www.wto.org/> (accessed 25 March 2019).

73 Saurombe & Nkabinde (n 49) 442.

cornerstone of African trade and prospective development. Agricultural production in Africa is key because of the arable land available for food production and other economic and social benefits. According to the African Development Bank, agriculture in Africa is key to unlocking export growth. It estimates that more than 65 per cent of the world's arable land is located in Africa.<sup>74</sup>

Furthermore, Viljoen puts African reliance of agriculture into perspective by explaining:<sup>75</sup>

Since 2001, Africa's agricultural imports account for around 60 per cent of Africa's total trade in agricultural products. Over the last 15 years, Africa's agricultural imports increased from US \$17 billion in 2001 to US \$61 billion at the end of 2016. On average, agricultural product imports account for 13,4 per cent of the total products imported by African countries over the last 15 years, while agricultural exports account for 9,16 per cent of total African exports over the same time.

Saurombe and Nkabinde aptly point out that 'agriculture is a key area for developing countries, since most of them are becoming increasingly competitive in the agricultural and value added processed food products sectors'.<sup>76</sup> Despite its importance and the controversy surrounding trade in agriculture, the GATT from the outset, according to Ostry, 'for all practical purposes excluded agriculture' from its disciplines.<sup>77</sup> The protectionism proffered by developed countries in the form of subsidies has always been a cause of disagreement between various countries, to the extent that it has derailed many talks and progress within the WTO.

If the AU intends to succeed with Agenda 2063 it needs to set forth a firm plan to challenge those issues relating to agriculture that impede the realisation of the right to development of African countries. In this case the AU should focus not only on the problems at the multilateral level but should also include bilateral and regional agreements on agricultural issues, as these agreements sometimes are used as a back door to complete negotiations that failed at the multilateral stage. Especially within the bilateral negotiations involving developed and less-developed countries, issues directly or indirectly linked to agriculture have been concluded that do not enable development. Reiterating Oppong's views that the aggressive liberalising of agricultural trade policies should be set aside, the WTO

74 W Johwa 'Agriculture marked as Africa's path to prosperity, and Dube Port is an example of what is achievable' *Business Day* 24 May 2018, <https://www.businesslive.co.za/bd/world/africa/2018-05-24-agriculture-marked-as-africas-path-to-prosperity--and-dube-port-will-play-a-key-role/> (accessed 14 September 2018).

75 W Viljoen 'The face of African agriculture trade' 17 May 2017 <https://www.tralac.org/> (accessed 14 June 2018).

76 Saurombe & Nkabinde (n 49) 432.

77 S Ostry 'Trade, development, and the Doha Development Agenda' in D Lee & R Wilkinson (eds) *The WTO after Hong Kong: Progress in, and prospects for, the Doha Development Agenda* (2007) 26.

instead should concern itself with enabling trade rules that are 'just, fair and equitable for developing countries'.<sup>78</sup> Importantly, agricultural and related commitments that have the potential to recognise the needs of less-developed states, the region, the community and, last but not least, the individual, should be the focus of further negotiations.

### 3.1.4 Doha Development Agenda

After the Uruguay negotiations and before Doha, developing countries had done some self-reflection which enabled them to bring to the fore their collective concerns. The advent of the Doha Development Round in 2001 for the first time underlined development as being a key focus for addressing the needs of developing countries.<sup>79</sup> The plan by the WTO to make trade more development-focused initially showed potential.

Along with the Millennium Development Goals (MDGs) (in particular Goal 8), Doha represented a new dawn for the WTO in terms of gaining the favour of the developing and least-developed world. Broadly speaking, the objective of the Doha Development Agenda (DDA) was to 'lower trade barriers to facilitate increased global trade'.<sup>80</sup> Essentially, Cho puts into perspective that the focus of the Doha discussions was to provide a platform for discussing the 'development issues' (in light of the events that preceded it, the 11 September terrorist attacks) and the aspirations of developing countries.<sup>81</sup> Consequently, it was clear that the development needs of these countries were a 'distraction' for developed nations from the political and other economic problems they encountered.

Despite the ongoing events, developing countries were eager to come to Doha and to commence discussions on their terms. Cho appropriately notes that '[d]eveloping countries viewed the Doha Development Agenda (DDA) as an avenue for reducing or eliminating old, *unfair* protection by developed countries that the skewed Uruguay Round deal failed to resolve'.<sup>82</sup> The expectations of these countries were presented in the Doha Ministerial Declaration, which emphasised:<sup>83</sup>

Paragraph 1: The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years.

78 Oppong (n 34) 145.

79 Saurombe & Nkabinde (n 49) 432.

80 Doha WTO Ministerial 2001: Ministerial Declaration WT/MIN(01)/DEC/1 20 November 2001, [www.wto.org](http://www.wto.org) (accessed 25 May 2018).

81 S Cho 'The demise of development in the Doha Round negotiations' (2010) 45 *Texas International Law Journal* 574.

82 Cho (n 81) 575.

83 Doha WTO 2001 (n 80) (my emphasis).

Paragraph 2: *International trade can play a major role in the promotion of economic development and the alleviation of poverty.* We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries.

Paragraph 3: We recognize the particular vulnerability of the least developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the *marginalization of least developed countries in international trade and to improving their effective participation in the multilateral trading system.*

Unfortunately, the events that followed the Doha discussions revealed that developed and developing countries were not of the same mind in respect of the purposes of this round. According to Cho the reason was the 'philosophical divergence on the nature of the Doha Round'.<sup>84</sup> In a sense, it appeared as though there was a Utopian sense of false hope that developed countries would make a 360 degree change in their trade practices, and that less-developed countries would become more independent and ultimate plan of SDT provisions.<sup>85</sup>

The scepticism about Doha was not unwarranted. It did not offer a sustainable development plan for Africa's trade problems and, inevitably, once the fate of Doha was realised, such countries merely continued their reliance on the SDT.<sup>86</sup> Arguably, their response was understandable as what was offered (including amendments to the Agreement on Trade-Related Intellectual Property Rights (TRIPS))<sup>87</sup> to African countries was not (at that stage) considered topical for enabling the realisation of their developmental needs. Viewed in this light, falling back to the trusted SDT was regarded as the most apt strategy.

Interestingly, the authors reason that 'African countries have seen SDT, including Aid for Trade (AfT) as their sole positive interest in the agenda'.<sup>88</sup> Moreover, the earlier objectives of the DDA called for 'policy space for developing countries, notably through effective SDT provisions in favour of developing countries'.<sup>89</sup> Even with the increased focus on the SDT, a more flexible approach that included civil, political and socio-economic matters such as capacity building, technical assistance for addressing, for example, non-tariff barriers, health and education, needs to be considered. In fact, a proper

84 Cho (n 81) 575.

85 Cho 575-576.

86 MF Jensen & P Gibbon 'Africa and the WTO Doha Round: An overview' (2007) 25 *Development Policy Review* 6.

87 Jensen & Gibbon (n 86) 6.

88 As above.

89 R Davies 'Outcome of the 11th WTO Ministerial Conference (MC11) held in Buenos Aires, Argentina, 10-13 December 2017' Presentation to Parliamentary Portfolio Committee on Trade and Industry 6 March 2018, [https://www.thedti.gov.za/parliament/2018/WTO\\_MC11\\_outcomes.pdf](https://www.thedti.gov.za/parliament/2018/WTO_MC11_outcomes.pdf) (accessed 14 September 2018).



development-centred approach requires a 'radical restructuring of existing trade and world economic systems',<sup>90</sup> and is needed to give to give (especially) African countries any hope of realising their right to development.

Even in its description Doha expressed mere aspirations, with no clear and realistic targets that took into account the political, economic and social diversity among its intended beneficiaries. Jensen and Gibbon argue that Doha's overall objective was merely to appease developing countries, with no actual guarantee for creating binding commitments.<sup>91</sup> As mentioned before, by not defining or setting rationally-linked objectives and targets as to how development should be achieved from the outset, Doha had no basis from which to operate. It consisted of mere promises made, particularly by developed countries, to reduce the burden and poverty levels in the poorer trading nations of the world.

Any plan to realise development should take into account the political and socio-economic challenges which largely affect African countries and their development prospects. Thus, even if Doha had a clear *modus operandi*, it most likely would not have made an impact, as Saurombe and Nkabinde argue that

[e]ven among developing countries themselves, it remains to be determined how development principles can be applied effectively in the WTO, in line with countries' diverse definitions of development and in a manner that would best satisfy all members' expectation.<sup>92</sup>

Similar to SDT measures, the WTO and its member states saw Doha as an expedient solution to a complicated situation, which needed a comprehensive plan of action to address African countries' elongated history of political, economic and social problems, which are among the many factors that triggered the lack of development. This was contextually put into place by UNCTAD, which explicated that Africa, having shown inspiring growth, as recognised by the institution, unfortunately continues to 'grapple with the challenges of poverty, unemployment, inequality, commodity dependence and environmental degradation'.<sup>93</sup> Furthermore, during the previous rounds of negotiations it was palpable that certain issues were 'a no-go', and that by 'forcing' discussions on these matters it would most definitely lead to another walk-out. To avoid these pitfalls Doha Agenda protagonists should have been strategic by dissecting the problems one by one, rather than adding to the overflowing basket of trade issues.

As a response to some of the concerned sentiments on the inclusion of African countries in the previous WTO discussions, Africa

90 Ozoemena & Hansungule (n 28) 228.

91 Jensen & Gibbon (n 86) 6.

92 Saurombe & Nkabinde (n 49) 433-434.

93 <http://unctad.org/en/Pages/ALDC/Africa/Economic-Development-of-Africa.aspx> (accessed 12 June 2018).

for the first time hosted a Ministerial Conference.<sup>94</sup> Nairobi, Kenya, provided the backdrop to a much anticipated round which, as stated by the WTO, 'delivered commitments that would benefit in particular the organization's poorest members'.<sup>95</sup> Notably, the conference involved landmark discussions on agriculture and development, along with issues relating to cotton and other issues of particular relevance to least-developed African countries. The offering of a special safeguard mechanism for developing countries and preferential treatment for least-developed countries made it apparent that some officials had not entirely pulled the plug from the Doha discussions. At least then, the eagerness to write an obituary for the WTO was put aside, as WTO officials and other relevant stakeholders focused on salvaging some aspects of the DDA.

However, this optimism was in ruins when a general statement that 'still no agreement could be reached on the future of the DDA'<sup>96</sup> emerged from the discussion. It was anticipated that the Eleventh Ministerial Conference in Buenos Aires<sup>97</sup> would revive the discussion on the role of the DDA. Despite the slight hope that emerged at Nairobi, ministerial decisions at the Buenos Aires Conference could be reached only on a limited number of issues, such as Fisheries Subsidies; the Work Programme on Electronic Commerce; TRIPS non-violation and situation complaints; and the Work Programme on Small Economies.

Disappointingly, at this Conference, also, progress was stagnant as members once again failed to reach agreement on important matters which involved programmes on development and agriculture.<sup>98</sup> Instead, developed countries proved to be the main driving force behind calls for members to observe the 'same set of rules, on the same level of standard', with reportedly 'very little or any differentiation' among countries.<sup>99</sup> This argument illustrates the prevailing misconception that existing programmes that permit differential treatment have brought about significant changes to the socio-economic systems of such countries.

Lastly, if the Doha aspirations finally succumb the WTO will be faced with further questions about its commitment to focus on development and the needs of less-developed countries. Noting the concerns about the single undertaking, the SDT, agriculture and the

94 Held 15-19 December 2015, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/naipackage\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/naipackage_e.htm) (accessed 12 June 2018).

95 <http://www.wto.org> (accessed 25 May 2018).

96 R Davies 'Outcome of the 11th WTO Ministerial Conference (MC11) held in Buenos Aires, Argentina from 10 to 13 December 2017' Presentation to Parliamentary Portfolio Committee on Trade and Industry 6 March 2018, [https://www.thedti.gov.za/parliament/2018/WTO\\_MC11\\_outcomes.pdf](https://www.thedti.gov.za/parliament/2018/WTO_MC11_outcomes.pdf) (accessed 14 September 2018).

97 Held 10-13 December 2017.

98 Davies (n 89).

99 As above.

DDA, the WTO needs to undertake an in-depth assessment of the effectiveness of its array of current policies, programmes and practices, to determine whether in fact they are enablers of development. Notably, African countries need to revive their approach to the multilateral, regional and bilateral framework on trade and development and reassess those mechanisms on which they depend.

#### 4 'Tools' or 'mechanisms' to enable the right to development?

Noting the dismay in the multilateral trade system, there are some positive prospects in respect of the role of trade as an essential tool to revive and ultimately realise the right to development. To a great extent the prevailing sentiment is that the focus of the trade system should be to improve the socio-economic well-being of states and their people. For this reason, trade is an essential tool for internal African relations, and with partnerships external to the continent and *vice versa*.<sup>100</sup> Ngang argues that 'Africa's development future is only attainable through collective self-reliant consciousness: The continent's agenda for development must not be thwarted by external influences or shaped by imported paradigms.'<sup>101</sup>

These sentiments are understandable as incompatible trade policies developed for African countries have not always been logical or suitable for the challenges faced. Knowing that inequity exists in multilateral trade, the proliferation of regional trade agreements (noting the newly-formed Tripartite Free Trade Area (TFTA) between the SADC, East African Community (EAC) and Common Market for Eastern and Southern Africa (COMESA) can be linked to a paradigm shift in the policies of a number of especially African (and other Third World) countries toward a more internal liberal trade approach. The UN General Assembly Agenda for Development also emphasised that '[n]otwithstanding the importance of a favourable international economic environment, ultimately each country bears *primary responsibility for its own economic and social policies for development*'.<sup>102</sup>

Even though the above statement reflects the internal responsibility of states, the sentiments echo the importance of 'sound and stable policies' as being a key part to driving Africa's overall trade and development approach. To this end, there are several trade-related external and internal tools or mechanisms that over the years have been utilised interchangeably by developing and least-developed countries.

100 Ngang (n 9) 108; Ozoemena & Hansungule (n 28) 228; Cheru (n 23) 1279.

101 Ngang (n 9) 108.

102 United Nations General Assembly Resolution 'Agenda for Development' 51st session Agenda item 96(b) A/RES/51/240 15 October 1997 (my emphasis).

At the beginning of this article reference was made to African countries' reliance on official development assistance. Essentially, official development assistance is defined as 'government aid that promotes and specifically targets the economic development and welfare of developing countries'.<sup>103</sup> There have been ample changes in the development aid system which have been linked with global agendas such as the MDGs and Sustainable Development Goals (SDGs) and these changes also resulted in the review of the official development assistance and other practices to improve the effectiveness of aid.<sup>104</sup> As the dynamics in international landscape change, according to Alonso even more changes are on the cards.<sup>105</sup> Least-developed countries (prevalent in Africa) face daunting challenges ranging from pervasive poverty and dependence on development assistance.

Programmes such as the Enhanced Integrated Framework (EIF multi-donor programme)<sup>106</sup> and the AFT initiative underpin the objective and purpose of the RTD Declaration. These programmes enable least-developed countries to 'harness trade for poverty reduction, inclusive growth and sustainable development'.<sup>107</sup> Despite the overall relevance of official development assistance and other development aid systems, African countries must be cautious of not becoming too reliant and being subjected to onerous terms and conditions. Indeed, so-called global partnerships focused on coordinating financial and technical mechanisms to address the constraints and build trade capacity of such countries in order to eliminate social challenge are needed, but countries must be allowed a degree of flexibility to enable policies that are aligned with their national, regional and international development goals. These forms of development systems can play a role in addressing the marginalisation and inequality in trade relations between states and ultimately realising the right to development.

Seemingly, one area in particular has been the focus of attention, namely, agriculture. Here Enhanced Integrated Framework programmes have been incorporated into the relevant country's existing programmes to embrace the country's unique characteristics and thus develop a work plan that includes 'human and institutional capacity, government commitment and managing resources'.<sup>108</sup> As such, with the appropriate combination of policies and practices and

103 OECD 'What is ODA?' April 2018, <https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/What-is-ODA.pdf> (accessed 25 March 2019).

104 Alonso (n 62) 2.

105 As above.

106 The EIF consists of 51 countries, 24 donors and eight partner agencies, <https://www.enhancedif.org/> (accessed 31 May 2018).

107 <http://www.wto.org> (accessed 31 May 2018).

108 R Adhikari & J Edwin 'How is the Enhanced Integrated Framework supporting LDCs to unleash their trade potential?' 8 November 2017, <http://www.ictsd.org> (accessed 31 May 2018).

considering other factors, the salient golden thread that runs between development and international trade is visible. The Enhanced Integrated Framework provides a framework to ensure the efficient and optimal use of trade to realise development,<sup>109</sup> but should not be seen as the lone device, as African countries need to focus on establishing internal measures to address their development needs.

Agenda 2063 is a step towards addressing Africa's challenges. As explained by Jensen and Gibbon, 'many of the problems or impediments to African trade, such as poor infrastructure and low and skewed foreign investment, political violence and instability' are not within the ambit of the WTO and, therefore, have to be addressed by internal policies and programmes.<sup>110</sup> Thus far, these internal matters have not been successfully resolved through national processes. Thus, Agenda 2063 drafters were cognisant of these regions' internal conflicts that can be resolved only through the collective effort of African countries. The abundant civil, political and economic problems facing African countries have led to the overwhelming support for the AU to devise a fundamental list of aspirations for Africa. These included an integrated continent, politically united and based on the 'ideals of pan-Africanism and the vision of Africa's renaissance; peace and security; having a strong cultural identity, common heritage, values and ethics; and where development is people-driven, unleashing the potential of its women and youth'.<sup>111</sup> To ensure this plan, the AU needs to revise and strengthen its 'peer and internal reviews' which include, for example, the African Peer Review Mechanism (APRM), to ensure that its members address these barriers to development.

Agenda 2063 still has a long way to go, but it is a rational approach toward reviving the right to development through addressing the internal challenges faced by African countries, to enhance their abilities to deal with external challenges. Thus, unlike the MDGs and the Doha Development Agenda, Agenda 2063 acknowledges the substantial nature of the problems of African countries, as its long-term vision is to provide 'a strategic framework for the socio-economic transformation of the continent'.<sup>112</sup> Global partnerships undeniably are essential, but African countries need to pursue internal means to realise their development and progress on the multilateral trade stage. More so, the responsibility is bestowed on states to facilitate poverty reduction policies or programmes and nurture relations, and cooperation in the multilateral trade and human rights framework.

The surge in the formation of regional trade agreements is viewed largely as a means to ensure that Africa ultimately can fully participate and become a fully-functioning partner in the multilateral trade

---

109 As above.

110 Jensen & Gibbon (n 86) 5.

111 <https://au.int/en/agenda2063> (accessed 25 May 2018).

112 African Union Commission (n 6).

system.<sup>113</sup> Now might be the most appropriate time to use regional trade agreements and customs unions (ambitiously through the much-anticipated TFTA), in light of the long-term goal to establish Africa as a 'strong, united, resilient and influential global player and partner',<sup>114</sup> to realise African citizenry's right to development. Concerns about the viability of the WTO and the institution's lacklustre approach in effectively addressing the needs of developing and least-developed countries have contributed to this proliferation. However, even as the regional trade agreements proliferate, a comprehensive plan is required as these developments have also presented unforeseen difficulties, ranging from socio-economic and political and overlapping memberships, especially for the SADC, COMESA and EAC in the newly-formed TFTA trading regime.<sup>115</sup> As such, these tools and other development policies and collective partnerships at the multilateral, regional and national levels are crucial for ensuring equitable economic relations and cooperation, and enabling the realisation of the right to development.

## 5 Way forward

From the discussion, the normative and legal framework recognises the differences and the link between the right to development, other human rights and fundamental freedoms and trade. Without a doubt, the right to development encompasses a comprehensive framework and sets out particular approaches that can be harnessed at the international, regional and national levels, for states to assert their full sovereignty over their natural resources and improve the welfare of those within their borders. With the right to development being universal, African countries, due to their high unemployment rates, dire poverty and bleak economic development, and more so now with the various plans set out in Agenda 2063, should focus on reviving development through the multilateral trade system.

There is ample room for the inclusion of the right to development in the multilateral trade framework, as trade is a valuable tool for the realisation of the development of African countries. Indeed, trade practices and policies should be intersected and symbiotic with the right to development. Otherwise, what purpose do they serve?

---

113 UNDP Africa Policy Brief Strengthening Strategic Alignment for Africa's Development: Lessons from the UN 2030 Agenda for Sustainable Development, the African Union's Agenda 2063, and the AfDB's High Fives, [http://www.africa.undp.org/content/dam/rba/docs/Working%20Papers/UNDP%20Africa%20Policy%20Brief%20on%20Strengthening%20Strategic%20Alignment%20for%20Africa%20\(24%20January%202017\)%20-%20ENGLISH.pdf](http://www.africa.undp.org/content/dam/rba/docs/Working%20Papers/UNDP%20Africa%20Policy%20Brief%20on%20Strengthening%20Strategic%20Alignment%20for%20Africa%20(24%20January%202017)%20-%20ENGLISH.pdf) (accessed 10 March 2019).

114 <https://au.int/en/aspirations> (accessed 25 May 2018).

115 J Mapuva & L Muyengwa-Mapuva 'The SADC regional bloc: What challenges and prospects for regional integration?' (2014) 18 *Law, Democracy and Development* 25.

Furthermore, the connection between trade and development is mirrored in the Preamble to the WTO, by reference to aims such as 'raising standards of living', 'ensuring full employment' and 'sustainable development'.<sup>116</sup> Other challenges as a result of structural and operational impediments in multilateral trade would also need to be revised, if the WTO intends to regain its standing and ensure the survival of the multilateral trade system. In this respect, blame must also be levelled at the so-called 'one-size-fits-all' policies, which fail to consider the position of developing and least-developed countries.

Despite positive effects of the SDT and the relevant development assistance mechanisms, these cannot be regarded as the sole means to address the development needs of African countries. Allowing for the continuation of reliance on programmes or policies that are not reasonably paralleled with the socio-economic and political aspirations of African countries may result in the early demise of Agenda 2063. In the short term, African countries should address the underlying concerns with these existing programmes and policies through regional and bilateral discussions.

The plans set forth in Agenda 2063 will not provide an immediate answer to the lingering question of how the realisation of the right to development can be ensured by multilateral trade practices and policies. For Africa, which has witnessed the formation of a number of regional communities that not only serve an economic purpose, but also a political and social purpose, the plan is to shift the focus to regionalism. By incorporating this inward focus, African countries could ultimately become more influential and fully-fledged global players on the various international stages. Nonetheless, there is room for optimism for the revival of the right to development within the multilateral trade framework.

---

116 <https://www.wto.org> (accessed 10 March 2019).

To cite: I Shai 'The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections' (2019) 19 *African Human Rights Law Journal* 494-509  
<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a23>

## The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections

*Isaac Shai\**

Postdoctoral Fellow, Thabo Mbeki African Leadership Institute, University of South Africa  
<https://orcid.org/0000-0001-7686-8306>

### Summary

*This article suggests that currently insufficient theorisation exists of what should constitute radical transformation in South Africa and whether the discourse on transformative constitutionalism and the right to development are capable of living up to the expectations of radical transformation. The point of departure should be radical transformation which in turn must inform the content of both transformative constitutionalism and the right to development. The central question that the article explores is whether the notion of transformative constitutionalism, read in conjunction with and as the concretisation of the right to development, has the capacity to bring about radical transformation in South Africa.*

**Key words:** *radical transformation; transformative constitutionalism; post-colonial theory; de-colonial theory; right to development*

---

\* BA LLB (Witwatersrand) LLM (UNISA) LLD (Pretoria). This article is based on a paper titled 'The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections' delivered at the 2nd International Conference on the Right to Development, 15-17 August 2018, University of Pretoria, South Africa.



# 1 Introduction

Borrowing from Deleuze's *The logic of sense*, Mbembe narrates a representation of Africa that is 'constituted by a paradox'.<sup>1</sup> Mbembe narrates this paradox allegorically in the form of an Africa that is a figure with 'the highest power of language' and an Africa that represents 'the impotence of the speaker' who is unable to 'state the sense' of what he or she says, and unable to say at the 'same time something and its meaning'.<sup>2</sup> For Mbembe, Africa paradoxically is the speaker endowed with the power of language but whose impotence as a speaker prevents him or her to 'say something and its meaning'.

The speaker is prostrate and thus impotent due to what Mudimbe calls the 'colonising structure' which essentially is a grotesque colonial act that manifested itself in the domination of African space, the reformation of the native's mind and the integration of African local economic histories into Western perspectives.<sup>3</sup> For Bhabha the impotence of the speaker who at the same time possesses the highest power of language can be traced to 'colonial dislocation, its displacement of time and person, its defilement of culture and territory'.<sup>4</sup> The question that necessarily arises is how Africa can seize this highest power of language that it possesses so as to overcome its prostrate position.

I propose that the notion of radical transformation offers an alternative prism and space for Africa to speak with potency. Although the notion of multiple and variegated colonialisms in Africa is an apposite descriptor, I suggest that South Africa currently serves as an appropriate paradoxical representation of Mbembe's allegorical 'impotent speaker' in that the country possesses the 'best' and 'progressive' Constitution, yet the same Constitution presides over a multitude of maladies. Specifically, the choice of South Africa is based on three main reasons. First, I regard South Africa as both a touchstone and an apogee of that which is at once present and yet absent. In other words, South Africa arguably is a pungent representation of Mbembe's figure that is possessed of the highest power of language and yet represents the impotence of the speaker that is unable to state the sense of what he or she says, and unable at the same time to 'say something and its meaning'. Put differently, the possibilities of a radically better life for all exist, but the same possibilities are continuously foreclosed and this foreclosure is due to the second reason for selecting South Africa. The second reason for the choice of South Africa is influenced by Mudimbe's assertion that South Africa is emblematic of the colonising structure in its most

---

1 A Mbembe *Critique of black reason* trans L Dubois (2017) 52.

2 As above.

3 As above.

4 H Bhabha 'Foreword to the 1986 edition' in F Fanon *Black skin white masks* trans L Markmann (1967) xxii.

extreme manifestation.<sup>5</sup> It is the colonising structure that I suggest is insidiously responsible for this foreclosure. Third, what is forebodingly missing in South Africa is a discourse on radical transformation that eschews historicism, positivism and the notion of a single indivisible truth about the nature of change required to make Africa a better place. The attainment of radical transformation in South Africa is often spoken of as a possibility within the context of Western liberal democracy. Put differently, there is a sense in which it is hoped that Western liberal democracy is capable of bringing about radical transformation because the South African Constitution *a priori* is transformative. The possibility of attaining radical transformation within the context of Western liberal democracy negates the fact that

European liberalism was forged in parallel with imperial expansion. It was in relation to expansion that liberal political thought in Europe confronted such questions as universalism, individual rights, the freedom of exchange, the relationship between means and ends, the national community and political capacity.<sup>6</sup>

In other words, 'the coming of modernity coincided with the appearance of race and the latter's slow transformation into the privileged matrix for techniques of domination, yesterday as today'.<sup>7</sup> Therefore, the idea of radical transformation that I propose can only bring about rupture in that it seeks to avoid re-inscribing the very historicism and positivism that are embedded within the structures of Western liberal democracy. In this sense the question then becomes whether the discourse on transformative constitutionalism and the right to development are capable of living up to the expectations of radical transformation. There is a sense in which the notions of radical transformation, transformative constitutionalism and the right to development tend to be perceived as meaning one and the same thing. My argument is that the point of departure should be radical transformation which in turn must inform the content of both transformative constitutionalism and the right to development.

However, any theorisation of radical transformation should at the very least reckon with the fact that while the impact of colonialism and apartheid ultimately is felt through material dispossession and raw economic exploitation, the more devastating, corrosive and long-lasting impact of colonialism continues to be ontological and epistemic. As Chatterjee states, '[i]t is not just military might or industrial strength, but thought itself, which can dominate and subjugate'.<sup>8</sup> The greatest achievement of colonial modernity has been its mythical pretensions of the impossibility of other 'truths' and its violent suppression of other possible realities. Viewed from this prism,

---

5 VY Mudimbe *The invention of Africa: Gnosis, philosophy and the order of knowledge* (1988) 6.

6 Mbembe (n 1) 55.

7 As above.

8 P Chatterjee *Nationalist thought and the colonial world: A derivative discourse* (1986) 11.

radical transformation cannot be viewed as a particular end state but rather as a state of becoming that begins with the disruption and 'provincialisation' of Western modernity. The central question is whether the notion of transformative constitutionalism, read in conjunction with or as a concretisation of the right to development, has the capacity to bring about radical transformation in South Africa.

In exploring the capacity of transformative constitutionalism and the right to development to bring about radical transformation, I propose to first read the notion of radical transformation from post-colonial and de-colonial theoretical approaches. I contend that radical transformation, viewed from the prism of post-colonial and de-colonial theoretical approaches, fundamentally inheres in the disruption of coloniality. Second, I propose to analyse the two notions of transformative constitutionalism and the right to development from the prism of post-colonial and de-colonial theoretical approaches. Third, I propose to deal with post-colonial and de-colonial approaches to law. A reading of law from the post-colonial and de-colonial approaches casts doubt on the ability of transformative constitutionalism and the right to development to disrupt coloniality and thus bring about radical transformation. However, I do acknowledge that both the notions of transformative constitutionalism and the right to development constitute progressive, albeit insufficient, interventions towards the realisation of radical transformation.

## 2 De-coloniality, post-coloniality and radical transformation

I suggest that a dynamic interaction between de-colonial and post-colonial theory has the potential to clarify and shore up what should, at a minimum, constitute radical transformation, not only in South Africa but on the African continent as a whole. This view is echoed by Mignolo when he states the following:<sup>9</sup>

I do not see de-coloniality and post-coloniality campaigning for election to win the voting competition that decides which is the best, but as complementary trajectories with similar goals of social transformation. Both projects strive to unveil colonial strategies promoting the reproduction of subjects whose aims and goals are control and possess ... In any event, the post-colonial and the de-colonial are two different projects that have in common the concern with colonialism, colonial legacies.

For Bhabra both de-colonial and post-colonial approaches challenge European historical narratives and historiographical traditions and forcefully bring to bear the parochial character of European origins of modernity and, most importantly, the intrinsic connection between

---

9 W Mignolo *The darker side of Western modernity: Global futures, de-colonial options* (2011) xxvi- xxvii.

modernity and colonialism, empire and enslavement.<sup>10</sup> Lowman and Mayblin are of the view that both theoretical approaches ably expose the universalising pretensions that hitherto have characterised European Western philosophy from the Enlightenment period onwards.<sup>11</sup>

As a prelude to post-colonial and de-colonial approaches to radical transformation, it should have recalled that both approaches have also made incisive analytical interventions on the impact of colonialism and apartheid on the African continent. For instance, De Sousa Santos has stated that 'while the political dimension of colonial intervention has been widely criticised, the burden of the colonial epistemic monoculture is still accepted nowadays as a symbol of development and modernity'.<sup>12</sup> Despite these interventions on the impact of colonialism in Africa, an incessant *maelstrom* continues to bedevil discussions on the impact of colonialism. What compounds matters is that even those who continue to battle the effects of colonialism and the continuing impact of neo-colonialism end up inadvertently embracing the subjects of their critique. The dominant discourse on change, embraced by some Africans, continues to pungently reflect teleological approaches that view 'progress' as 'catching up' with Western Europe and the United States of America. Current debates around the notion of decolonisation have only served to muddle the situation. It is in this context that we need to constantly conduct what Spivak calls a 'persistent dredging operation' on the actual impact of colonialism in order to avoid the reproduction of neo-colonial knowledge which has a tendency of treating colonialism/imperialism as evanescent.<sup>13</sup>

## 2.1 Impact of colonialism

The critical point to be made is that colonialism colonised bodies, minds, time and space. In this sense the exclusions generated by colonialism and its 'civilising paradigm' not only were of a political, economic and social nature but also of a cultural and epistemological nature.<sup>14</sup> The aggregate results, succinctly articulated by Nandy in *The intimate enemy: Loss and recovery of self under colonialism*, was that colonialism 'generated the concept of the modern West from a geographical and temporal entity to a psychological category. The West is now everywhere, within the West and outside; in structures

10 G Bhambra 'Post-colonial and de-colonial dialogues' (2014) 17 *Postcolonial Studies* 115.

11 E Lowman & L Mayblin (eds) 'Theorising the post-colonial, de-colonial theory' (2011) 19 *Studies in Social and Political Thought* 3.

12 B de Sousa Santos et al 'Opening up the canon of knowledge and recognition of difference' in B de Sousa Santos (ed) *Another knowledge is possible: Beyond northern epistemologies* (2007) xxxiii.

13 GC Spivak *A critique of post-colonial reason: Towards a history of the vanishing present* (1999)1.

14 De Sousa Santos (n 12) x.

and in mind.<sup>15</sup> The consequences of what Slemon<sup>16</sup> calls 'flag independence', which is a reference to the survival of colonialism after the demise of the empire, is that even today, because of the presence of the West everywhere, neo-colonialism is used to justify colonialism.<sup>17</sup> The sepulchral tones that this 'presence of the West everywhere' generates is that there is no alternative to the West. This sort of epistemic violence insidiously induces and reproduces self-extermination of possible vistas on the side of the oppressed and the excluded and consistently generates and regenerates an ethnographic mythical notion of one truth for humanity. This ethnographic mythical notion of one single indivisible truth for all of humanity, states Fitzpatrick, has its genesis in the formation of occidental being:<sup>18</sup>

Occidental being is impelled in a progression away from aberrant origins. It is formed in the comprehensive denial of the 'other' – in assertions of universal knowledge, imperious judgement and encompassing being. Since it is constructed in negation, in terms of what it is not, this being is unbounded and able mythically to reconcile its particular and contingent existence with its appropriation of the universal.

The occidental defines itself by negation, conceals its particular and contingent existence and then appropriates the universal. In this sense 'the other is not truly other. It does not exist primarily ... from its relation to a West which encompasses it. The other, in its uncivilised or pre-modern state, is a construct of the West.'<sup>19</sup> We recall De Sousa Santos's incisive analysis to the effect that 'the production of the West as hegemonic knowledge required the creation of another, constituted as an intrinsically disqualified being, a collection of characteristics that were markers of inferiority'.<sup>20</sup>

This closure of other possible vistas is effected in this manner. The other that is not occidental, therefore, is forced to exist and find 'truth' within the meaning of 'truth' already constructed. The ability to speak against this 'truth' is truly foreclosed because of the 'West's arrogation to itself of truth as singular yet universal'<sup>21</sup> and transcendental. Other possible forms of knowledge and cosmologies in this sense are effectively silenced. The mythology of Western modernity is imperiously sustained by the ontological, epistemological and physical violence of imperialism. What is true and what is not true, what is possible, what is good and what is bad therefore is determined in terms of Western rationality.

15 A Nandy *The intimate enemy: Loss and recovery of self under colonialism* (1983) xi.

16 S Slemon 'Post-colonial critical theories' in G Castle (ed) *Post-colonial discourses: An anthology* (2001) 102.

17 Nandy (n 15) xi.

18 P Fitzpatrick *The mythology of modern law* (1992) x.

19 Fitzpatrick (n 18) 30.

20 De Sousa Santos (n 12) xxxv.

21 Fitzpatrick (n 18) 30.

The mythology of Western modernity is further sustained by what Davis calls the notion of 'history as already determined'.<sup>22</sup> Davis refers to this notion of 'history as already determined' as 'periodisation'. The idea of periodisation, according to Davis,

derives its explanatory power from economic models of periodisation by aligning a transition from ecclesiastical to secular society with a transition from medieval, rural, agrarian economy to a modern, urban commercial economy, most typically expressed as the transition from feudalism to capitalism.<sup>23</sup>

I suggest that this idea of periodisation generates sub-notions of progress and development. It is recalled, in parenthesis, and drawing from Pellicani,<sup>24</sup> that Karl Marx's notion of 'the dialectic' remains intrinsic to 'Hegelian theodicy' in that thinking dialectically for Marx means 'to see reality as a fragmented totality longing to regain its original unity'.<sup>25</sup> Theodicy is view of history where freedom is progressively achieved and all that is evil gradually fades away.

Because of Eurocentrism's tendency to define itself by negation, the invented 'savage' 'ought' also to undergo a process of continuous negation by negating its previous savage existence. That the West has negated its past and that the 'savage' must also negate its savage past becomes proof enough that existence always is characterised by a movement from simplicity towards complexity which in concrete terms means a movement from the feudal, sacred, agrarian to the modern, urban and commercial (capitalism). In this sense the notion of periodisation inculcates the belief and desire to reach the ultimate and final period which is characterised by a modern, urban, commercial and capitalist society. At the centre of the notion of periodisation is Hegelian theodicy which is sustained by Marx's dialectical method.

Occidental being and its seemingly benign vectors continue to be pivotal in ensuring that the colonised constantly assume that they are on an onward march to the 'end of history' where they can also regard themselves and be regarded by those who colonised them as having finally reached the 'universal' state of development. This, I suggest, is the most profound impact that colonialism has had on the colonised. If, as Mbembe suggests, (South) Africa is possessed of the highest power of speech, one of the available avenues of ensuring the inversion of the impotent speaker is through the reading of radical transformation from the post-colonial and de-colonial approaches.

---

22 K Davis *Periodisation and sovereignty: How ideas of feudalism and secularisation govern the politics of time* (2008) 1.

23 Davis (n 22) 1-2.

24 L Pellicani *The genesis of capitalism and the origins of modernity* (1994).

25 Pellicani (n 24) fn 3.

## 2.2 Post-colonial and de-colonial on radical transformation

While the immediate impact of colonialism and apartheid is felt through material penury, land dispossession and racism or raw economic and political power, the more devastating, corrosive and intransigent impact of colonialism is ontological and epistemic. Due to ontological and epistemic violence, colonialism not only disrupted a particular way of African life but, most importantly, it continues to suppress and marginalise possible new vistas.

It is in this sense that the radicalism of the confluence between post-colonialism and de-colonial theories inheres in their ability to 'unveil colonial strategies promoting the reproduction of subjects whose aims and goals are control and possess'.<sup>26</sup> As Nandy states, 'the crudity and inanity of colonisation are principally expressed in the sphere of psychology and ... in the sphere of political psychology'.<sup>27</sup> According to De Sousa Santos:<sup>28</sup>

Proposals for radical democracy – which point towards post-capitalist horizons – and the proposal for decolonising knowledge and power – which point towards post-colonial horizons – will be feasible only if the dominant epistemology is subject to a critique allowing for the emergence of epistemological options that give credibility to the forms of knowledge that underlie those proposals.

Radical transformation of the African continent therefore inheres or becomes a possibility with the disruption of coloniality. Maldonado-Torres describes coloniality as follows:<sup>29</sup>

Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which sovereignty of a nation or a people rests on the power of another nation, which makes such a nation an empire. Coloniality, instead, refers to long standing patterns of power that emerged as a result of colonialism, but define culture, labour, inter-subjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of peoples, in aspirations of self, and in so many aspects of our modern experience. In a way, as modern subjects we breathe coloniality all the time and every day.

Radical transformation, therefore, starts with challenging European historical narratives and historiographical traditions so as to demonstrate the parochial character of ethnographic European origins of modernity and the deep connection between modernity and colonialism, empire and enslavement.<sup>30</sup> It is about changing the terms of the conversation and challenging 'the hegemonic ideas of what knowledge and understanding are and consequently what

26 Mignolo (n 9).

27 Nandy (n 15) 2.

28 De Sousa Santos (n 12) xxi.

29 N Maldonado-Torres 'On the coloniality of being: Contributions to the development of a concept' (2007) 21 *Cultural Studies* 243.

30 Bhambra (n 10) 115.

economy, ethics and philosophy, technology and organisation of society should be'.<sup>31</sup>

It is precisely this point that takes us to the critique of and challenges facing the notions of transformative constitutionalism and the right to development. Central to my concern is whether transformative constitutionalism and the right to development address the crudity and inanity of colonialism which is located in the psychology of the oppressed, or whether they, in trying to deal with the mutation of colonialism, end up perpetuating the subject of their critique.

### 3 Transformative constitutionalism and the right to development in South Africa

The notions of transformative constitutionalism and the right to development have no limpid textual presence in the South African Constitution. However, their continued cogency may be said to derive from both the brutal colonial and apartheid past and the supposed 'newness' that the Constitution presents. Transformative constitutionalism has its origins in Klare's influential article titled 'Legal culture and transformative constitutionalism'.<sup>32</sup> In this article Klare describes transformative constitutionalism as entailing

a long-term project of constitutional enactment, interpretation and enforcement ... to transforming a country's political social institutions and power relations in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.<sup>33</sup>

Embedded in the logic of transformative constitutionalism is the assumption of the potential for law to resolve the legacies of colonialism and apartheid. On the other hand, the idea of development as a right generally is attributed to Doudou Thiam, the former Minister of Foreign Affairs, in Algiers in 1967, and to Kéba M'baye in 1972.<sup>34</sup> While the former coined development as human right in a diplomatic arena,<sup>35</sup> the latter brought the discourse to the academia through his inaugural lecture.<sup>36</sup>

31 W Mignolo 'Delinking: The rhetoric of modernity, the logic of colonality and the grammar of decoloniality' (2007) 21 *Cultural Studies* 463.

32 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

33 Klare (n 32) 150.

34 K M'baye 'Le droit au development comme un droit de l'homme' (1972) 5 *Revue International des Droits de l'Homme* cited in OB Okafor 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' 347 <http://hdr.und.org/eng/humandev/> (accessed 25 August 2018).

35 Okafor (n 34).

36 As above.



What the right to development means remains, at an international level, a subject of geo-political contestation.<sup>37</sup> For M'baye development has a human dimension that can be 'moral, spiritual and [even] material'<sup>38</sup> and, moreover, it is an inalienable right that all must benefit from.<sup>39</sup> This suggests a legal duty and a reciprocal right to moral, spiritual and material development. The African Charter on Human and Peoples' Rights (African Charter) was the first regional instrument to make the right to development a justiciable right for member states. The other notable regional instrument that makes provision for the right to development as legally binding is the 2004 Arab Charter.<sup>40</sup> Article 22 of the African Charter states that all peoples 'shall have the right to their economic, social and cultural development with due regard to their freedom and identity and equal enjoyment of the common heritage of mankind' and all states 'shall have the duty, individually and collectively, to ensure the exercise of the right to development'.

At the international level the right to development has received several pronouncements, for example, in the 1986 United Nations Declaration on the Right to Development (RTD Declaration); the 1993 Vienna Declaration and Programme of Action; and the 2000 United Nations Millennium Declaration.<sup>41</sup> However, all these international declarations constitute 'soft' law or non-binding law. While the second part highlights the duty bearers of the right, the first part of article 22 underlines its composite nature which comprises socio-economic and cultural as well as freedom or civil and political rights.

I have already indicated that for Klare the idea of transformative constitutionalism inheres in the fact that the Constitution *a priori* is transformative in that it in itself is committed to large-scale changes of political and social institutions and power relations in society. For Gutto the right to development is implicit in the Constitution. Notions such as public participation in the affairs of the state, references to sustainable development and the right to self-determination should be read as implicit incorporation of the right to development in the Constitution.<sup>42</sup> In this sense, according to Gutto, the right to development suffuses the entirety of the Constitution as the Constitution is a developmental document in and of itself.<sup>43</sup> For Gutto

37 K Arts & A Tamo 'The right to development in international law: New momentum thirty years down the line?' (2016) 63 *International Law Review* 224; M'baye (n 34) in S Kamga 'The right to development in the African human rights system: The *Endorois* case' (2011) 49 *De Jure* 383.

38 M'baye (n 34) in Kamga (n 37) 384.

39 Okafor (n 34) 347.

40 Article 2 of the Arab Charter on Human Rights (2004).

41 Arts & Tamo (n 37) 224.

42 S Gutto 'The right to development: An implied right in South Africa's constitutional order' (2006) in 'Reflections on democracy and human rights: A decade of the South African Constitution' 113 <http://www.sahrc.org.za> (accessed 22 July 2018).

43 Gutto (n 42) 109.

'the national development strategies and objectives point to a model of a developmental state regime that sits comfortably with its right to development'.<sup>44</sup> The fact that South Africa has ratified a number of regional and international legal instruments that entrench the right to development, according to Gutto, is further evidence of the implicit presence of the right to development in the Constitution.

I suggest that while there have been attempts to find 'the transformative' and 'the developmental' in the Constitution, there have been negligible attempts to find a possible nexus between transformative constitutionalism and the right to development. It is in this context that I propose a vertical reading of the relationship between transformative constitutionalism and the right to development, with transformative constitutionalism being an attempt to give concrete expression to the right to development. This vertical relationship, wherein transformative constitutionalism is read as a concrete expression of the right to development, inheres in that the right to development has an international dimension whereas transformative constitutionalism largely is circumscribed to how the South African Constitution should be observed.

The vertical confluence between the right to development and transformative constitutionalism inheres in that both discourses envisage large-scale change that is developmental and occurs within the context of legal rights. In this sense the motive is change that is developmental and the method appropriated for this change is law and constitutionalism occasioned by the state in a participatory manner.

The notion of change, development and progress of society that is grounded in law invites the question posed earlier: If transformative constitutionalism and the right to development can be implicated within the structures of legal modernity, and there exists a relationship between modernity and colonialism, how do we maintain faith in their capacity to bring about radical transformation?

In his foreword to Fanon's 2008 edition of *Black skin white mask*, Sardar posits the following thesis:<sup>45</sup>

If Western civilisation and culture are responsible for colonial racism, and Europe itself has a racist structure, then we should not be surprised to find this racism reflected in the discourses of knowledge that emanate from this civilisation and that they work to ensure that structural dominance is maintained.

Nandy also deals with the question of whether it is possible to 'defeat the West on the strength of one's acquired Westernness' and 'if beating the West at its own game is the preferred means of handling the feelings of self-hatred in the modernised non-West'.<sup>46</sup> For our

44 Gutto (n 42) 113.

45 Z Sardar 'Foreword to the 2008 edition' in Fanon (n 4) xv.

46 Nandy (n 15) xiii.

purposes the two interrelated questions that arise out of the theses of Nandy and Sardars are whether it is possible to attain radical transformation using the law in the form of (transformative) constitutionalism and the language of human rights or the right to development. For Nunn,

what has come to be known as 'the law' in Western societies is really a particular social construction that exhibits cultural attributes peculiar to European and European-derived societies. Law is an artifact of a Eurocentric culture, and as such it reflects the cultural logic, epistemology, axiology, ontology, ethos and aesthetic choice of Eurocentric culture. The core attributes of Eurocentricity are readily discernible within the law.<sup>47</sup>

This is so because law is a result of a particular set of historical realities and mindsets.<sup>48</sup> In this sense law, according to Nunn, is a Eurocentric enterprise. The discernible Eurocentric attributes that are found in law, according to Nunn, are dichotomous reasoning, analytical thought, employment of hierarchies, objectification, abstraction and desacrilisation.<sup>49</sup> It is these attributes that have spawned successive Eurocentric jurisprudential approaches, including natural law and positivism, which remain dominant up to today.<sup>50</sup> Most importantly, Western law has allowed for the dominance of Eurocentric culture and, by implication, Eurocentric epistemology.

According to Fitzpatrick, there exists a very pervasive view that 'law, if used alright, can bring about development or modernisation, or it can secure an order in which other transforming agents can operate'.<sup>51</sup> Contrary to the latter view, Fitzpatrick is of the view that Western law actually has been integral to the denial of being of the peoples of the Third World and this denial is the essence of the constitution of Western law itself.<sup>52</sup>

The implication of Nunn's observations is that Eurocentric epistemology, which thrives on dominance, is an intrinsic part of Western law. The question that arises, based on Nunn's observation and raised by Sardar, Nandy and Fitzpatrick, is whether, if law is a Eurocentric enterprise, what are the prospects of it being employed in the service of radical transformation – that is, if we view radical transformation as fundamentally about the disruption of coloniality.

The notion of transformative constitutionalism is centred on constitutionalism's central's tenet which is the rule of law. The discourse around the right to development, with a few exceptions, pivots around the notion of progress and historicism. The rule of law and the notion of development themselves pivot around the notions

47 K Nunn 'Law as a Eurocentric enterprise' (1997) 15 *Law and Inequality* 350.

48 As above.

49 Nunn (n 47) 334-337.

50 Nunn (n 47) 339-343.

51 P Fitzpatrick 'Law's infamy' in P Fitzpatrick *Law as resistance* (2008) 43.

52 Fitzpatrick (n 51) 42.

of periodisation, itself an offshoot of Hegelian theodicy and Marxian dialectics.

I suggest that the dominant enthusiastic appropriation of Klare's notion of transformative constitutionalism has paid scant regard to Klare's overarching theoretical framework which fundamentally is anchored in his constitutive theory of law which in turn is informed by Marxist humanism.<sup>53</sup> The essence of Klare's constitutive theory of law is faith in law in that it is possible to fill the law with humane content,<sup>54</sup> and that legal culture can provide a context and a moral basis for resistance to injustice.<sup>55</sup> This approach arguably is writ large in the notion of transformative constitutionalism as conceived by Klare. In other words, there are palpable parallels between the notion of transformative constitutionalism and the constitutive theory of law wherein the focus is on law making as praxis.

If radical transformation inheres in the identification of Eurocentric culture and values as embedded in the law and constitutionalism, transformative constitutionalism and the notion of development, and if Eurocentric culture is used as a site for the domination of the other, and if in accordance with Fitzpatrick the denial of being of the Third World peoples is 'integral to the constitution of Western law itself',<sup>56</sup> their ability to bring about radical transformation becomes suspect. Sibanda argues that the major pitfall of transformative constitutionalism is that it is embedded within a liberal-democratic paradigm. He points out that

the prevalence of a liberal democratic constitutional discourse – despite the best intentions of transformative constitutionalism – has had the effect of defining the goods of constitutionalism in narrower terms ... it is transformative constitutionalism's ostensible weddedness to liberal democratic constitutionalism that makes it ill-suited for achieving the social, economic and political vision it proclaims.<sup>57</sup>

For Sibanda legal culture and the prevailing liberal-democratic paradigm in South Africa are two major factors implicated in the threat to transformative constitutionalism and implicitly the right to development. In this sense the threat to transformative constitutionalism is to be found within the neo-liberal trajectory that houses transformative constitutionalism.

According to Sibanda, not only is 'the traditionalism and conservatism of South African legal culture a threat to transformative constitutionalism'.<sup>58</sup> The fact that the Constitution structurally and

53 S Levinson 'Escaping liberalism: Easier said than done' (1983) 96 *Harvard Law Review* 1474.

54 K Klare 'Law-making as praxis' (1979) 40 *Telos* 133.

55 As above.

56 Fitzpatrick (n 51) 42.

57 S Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' in S Liebenberg & G Quinot (eds) *Law and poverty* (2012) 44.

58 Sibanda (n 57) 45.

institutionally accords with the basic tenets of liberal democratic constitutionalism (a few innovations notwithstanding) presupposes that transformative constitutionalism essentially is attainable through sustained and purposeful legal and judicial interpretation demanding shared consciousness.<sup>59</sup> Van Marle also suggests the possibility that 'constitutionalism and human rights discourse are post-apartheid South Africa's embrace of the light of the Western world'.<sup>60</sup>

The right to development in the African Charter, as much as it is considered to have 'highly significant African roots',<sup>61</sup> faces obstacles particularly if it is juxtaposed with post-colonial and de-colonial approaches. Because the notion of development is said to be a natural mutation of Enlightenment philosophy<sup>62</sup> and historicism, I suggest that the post-colonial and de-colonial critiques levelled against Eurocentric historical and historiographical narratives equally apply to the notion of development. In this sense, the notion of development would be imbricated in European universalism and, therefore, be provincial and ethnocentric. This view is buttressed by Escobar who argues that the notion of development constitutes a regime of representation wherein Africa and other Third World countries are constructed in European terms.<sup>63</sup> In other words, how Africa makes sense of itself largely is determined in terms of Western structures of thought. In this sense, Africa's sense of self and aspirations become locked in and therefore correspond to the wishes, aspirations and needs of others, thereby becoming enframed in European reality.<sup>64</sup>

However, for De Sousa Santos it is possible to appropriate the language of human rights, and by implication the language of law, and 'place it at the service of a progressive, emancipatory politics'.<sup>65</sup> In this sense De Sousa Santos effectively is suggesting a counter-hegemonic conception of human rights and, by implication, the possibility of using the right to development 'counter-hegemonically'. The debate about the place of human rights in the developing world, according to De Sousa Santos, properly is a question of the universality of human rights. However, for De Sousa Santos,

the question about the universality of human rights is a western cultural question ... hence human rights are universal only when they are viewed from a Western standpoint. The question of the universality of human rights betrays the universality of what it questions by the way it questions

---

59 Sibanda (n 57) 51.

60 K van Marle 'The spectacle of post-apartheid constitutionalism' (2014) 16 *Griffiths Law Review* 414.

61 Okafor (n 34) 373.

62 A Escobar *Encountering development: The making and unmaking of the Third World* (1995).

63 Escobar (n 62) 7.

64 As above.

65 B de Sousa Santos 'Human rights as an emancipatory script? Cultural and political conditions' in De Sousa Santos (n 12) 3.

it. In other words, the question of universality is a particular question, a Western cultural question.<sup>66</sup>

It is possible to read De Sousa Santos as suggesting that the very question of whether law and human rights can be used as emancipatory tools in the service of radical transformation itself is not an original question but a question that itself is perfidiously colonial. The fact that there exists different inter-continental human rights systems already is an indication of the pluriversal conception of human rights, and the right to development is one such pluriversal right that can be conceived of in a differentiated<sup>67</sup> manner. In same manner as Sibanda, De Sousa Santos suggests that 'only if a politics of human rights radically different from the hegemonic liberal one is adopted and only if such a politics is conceived as part of a broader constellation of struggles and discourses of resistance and emancipation rather than as the sole politics of resistance against oppression'<sup>68</sup> can the possibilities that abound in human rights language be attained.

The question is whether De Sousa Santos effectively deals with the notions of what de-colonial theorists call 'the Western code' and coloniality embedded in Eurocentrism. Put differently, and borrowing from Ndlovu-Gatsheni, if coloniality 'is the name of the darker side of modernity that needs to be unmasked because it exists as an embedded logic that enforces control, domination, and exploitation disguised in the language of salvation, progress, modernisation',<sup>69</sup> is it possible to dredge out human rights from Eurocentrism? If human rights are implicated in what Mignolo refers to as the Western code, the Western code which means 'the unity of liberal thought',<sup>70</sup> which only allows for one truth that is guaranteed by violence, is it still possible to 'pluriversalise' the essence of 'universal human rights' without re-inscribing their Eurocentric structures as suggested by De Sousa Santos?

It is in this sense that I suggest that while the right to development and transformative constitutionalism creates conditions conducive to the attainment of radical transformation, they may not in themselves bring about the radical transformation that we envisage.

---

66 De Sousa Santos (n 12) 12.

67 CC Ngang 'Differentiated responsibilities under international law and the right to development paradigm for developing countries' (2017) 2 *Human Rights and International Legal Discourse* 265.

68 De Sousa Santos (n 12) 3.

69 S Ndlovu-Gatsheni 'Why de-coloniality in the 21st century' (2013) 48 *The Thinker* 13.

70 Mignolo (n 9) xvii.

## 4 Conclusion

In this article I have agreed with Mbembe's allegorical representation, using South Africa as an example, that Africa indeed is possessed of the highest power of language, on the one hand, and, on the other, that Africa represents the impotence of the speaker who is unable to state the sense of what he or she says, and unable to at the same time 'say something and its meaning'. In line with this allegorical representation, I argue that the language of radical transformation, devoid of historicist and positivist tendencies, offers elbow room for Africa to use the power of language that it possesses which in turn will create fecund possibilities for Africa to 'say something and its meaning'. I have argued that the disruption of coloniality is fundamental to the project of radical transformation.

I have also contended that considering the deep ontological and epistemic impact that colonialism and apartheid have had on the African continent as a whole, the project of radical transformation can only inhere in the disruption of coloniality. The disruption of coloniality in this sense requires challenging parochial European historical and historiographical narratives. I have further suggested that the core attributes of Eurocentricity are discernible in law, and this because of the fact of law being a result of a particular set of historical realities, cultural traits and mind-sets.<sup>71</sup> I therefore tentatively conclude that the essence of the project of radical transformation should pivot on the disruption of coloniality, and this approach necessarily suggests that radical transformation can only be characterised by rupture.

---

71 Nunn (n 47 above) 350.

## Recent developments

# Reconceptualising the first African Women's Protocol case to work for *all* women

Ciara O'Connell\*

Post-Doctoral Fellow, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa  
<https://orcid.org/0000-0002-5925-0587>

### Summary

*The ECOWAS Court of Justice is the first human rights body to find a violation of the African region's women's rights treaty, the African Women's Protocol. Nearly 15 years after the adoption of this Protocol, the ECOWAS Court determined in Dorothy Njemanze & 3 Others v Nigeria that the Nigerian state violated the rights of women because state agents assumed they were sex workers and, therefore, discriminated against them and treated them violently. Significantly, the Court determined that the state violated the women's rights to dignity, as well as their right not to be arbitrarily detained and arrested. However, a feminist analysis of this case reveals that the ECOWAS Court's judgment protected women who are not sex workers at the expense of sex workers' rights. This article critically examines how the ECOWAS Court developed its jurisdiction in this case, with a particular focus on how the Court's strategic avoidance of the topic of sex work resulted in a judgment that is harmful to sex workers. The article reconceptualises the Court's reasoning to provide alternative approaches for interpreting women's rights, especially sex workers' rights. By providing the ECOWAS Court judgment with an alternative approach,*

---

\* LLM (NUI Galway) PhD (Sussex); [ciara.o'connell@up.ac.za](mailto:ciara.o'connell@up.ac.za). The author wishes to thank MaryFrances Lukera and Ayo Sogunro for their insightful comments.



*which includes an analysis of the right to work and the right to dignity, through the application of the African Women's Protocol and other human rights instruments, the article provides a feminist and inclusive perspective on how women's rights could be approached in future judgments and litigation efforts.*

**Key words:** *women's rights; sex work; Economic Community of West African States; African Women's Protocol*

## 1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) entered into force in November 2005.<sup>1</sup> However, it was not until more than a decade later that the provisions enshrined in the Protocol would be examined by a regional human rights body. In October 2017 the Economic Community of West African States (ECOWAS) Court of Justice<sup>2</sup> issued judgment in *Dorothy & 3 Others v Nigeria*,<sup>3</sup> and in so doing held the Nigerian state responsible for violating rights enshrined in the African Charter on Human and Peoples' Rights (African Charter);<sup>4</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);<sup>5</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>6</sup> the Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>7</sup> the Universal Declaration of Human Rights (Universal Declaration);<sup>8</sup> and, for the first time, the African Women's Protocol.<sup>9</sup>

---

1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) adopted 11 July 2003, entered into force 25 November 2005.

2 Economic Community of West African States (ECOWAS) Court of Justice (2001).

3 *Dorothy Njemanze & 3 Others v Nigeria* ECOWAS Court of Justice (12 October 2017) ECW/CCJ/JUD/08/17. The case was initially filed on 17 September 2014, and was a joint action between the Institute for Human Rights and Development in Africa (IHRDA), Alliances for Africa, the Nigerian Women Trust Fund and the law firm of SPA Ajibade, with support from the Open Society Initiative for West Africa (OSIWA).

4 Arts 1, 2, 3, 5 & 18(3) African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

5 Arts 2, 3, 5(a) & 15(1) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) GA Res 54/180 UN GAOR 34th session Supp 46 UN Doc A/34/46 1980.

6 Arts 2(1) & (3), 4, 7 & 26 International Covenant on Civil and Political Rights (ICCPR) adopted 16 December 1966, GA Res 2200A (XXI), UN Doc A/6316 (1966) 993 UNTS 3, entered into force on 23 March 1976.

7 Arts 10, 11, 12, 13 & 16(1) Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) adopted 10 December 1984, GA Res 39/46, entered into force 26 June 1987.

8 Arts 1, 2, 5, 7 & 8 Universal Declaration of Human Rights (Universal Declaration) adopted 10 December 1948, UNGA 217 A (III).

9 Arts 2, 3, 4(1) & (2), 5, 8 & 25 African Women's Protocol (n 1).

While this case is heralded as an advancement in women's rights in Africa,<sup>10</sup> it raises concerns as to how and to what extent the African Women's Protocol was applied. The article contends that *Njemanze* is both cause for celebration and grounds for reflection. While the case recognises rights violations of one particular group of women, namely, women who are not sex workers, it simultaneously upholds discrimination impacting another group of women, namely, those women working in sex work (sex workers or 'prostitutes').<sup>11</sup> The ECOWAS Court being the first international treaty body to determine a violation of the African Women's Protocol, it is useful to draw lessons from the case of *Njemanze* for future application before regional and sub-regional human rights bodies in Africa.

In the spirit of feminist efforts to reconceptualise how international human rights law applies to women, the article offers alternative strategies and approaches as to how the ECOWAS Court could have developed its judgment in *Njemanze*. Admittedly, the proposed alternative approaches push the boundaries of what is considered feasible in how we currently *do* human rights law. However, the foundational premise supporting the arguments developed in the article is that in order to make human rights law work for women and marginalised groups in general it is imperative that the accepted 'boundaries' of human rights law and advocacy be manipulated, distorted and, in some cases, eradicated.<sup>12</sup> In terms of structure the article first explores the context in which sex work exists and is regulated in Africa generally. Second, the article introduces the *Njemanze* case by setting out the facts of the plaintiffs' and state's cases and the ECOWAS Court's analysis. Third, it introduces

---

10 See B Chakya 'Africa (Nigeria): ECOWAS Court challenges vagrancy laws that target women' ReproHealthLaw Blog 30 November 2017, <https://reprohealthlaw.wordpress.com/2017/11/30/africa-nigeria-ecowas-court-challenges-vagrancy-laws-that-target-women/> (accessed 10 April 2018); Institute for African Women in Law 'A first for the Maputo Protocol' 24 November 2017, [www.africanwomeninlaw.com/single-post-ajg27/2017/11/24/A-First-for-the-Maputo-Protocol](http://www.africanwomeninlaw.com/single-post-ajg27/2017/11/24/A-First-for-the-Maputo-Protocol) (accessed 12 April 2018); B Ajibade, B Gabari & A Adeniyi 'SPA Ajibade & Co wins landmark decision on gender discrimination and infringement on human rights' Chambers and Partners 20 November 2017, [www.chambersandpartners.com/article/2829/spa-ajibade-co-wins-landmark-decision-on-gender-discrimination-and-infringement-of-human-rights](http://www.chambersandpartners.com/article/2829/spa-ajibade-co-wins-landmark-decision-on-gender-discrimination-and-infringement-of-human-rights) (accessed 12 April 2018).

11 The author uses the term 'prostitutes' when directly referencing the ECOWAS Court judgment as that is the terminology used by the Court. However, the author uses the terms 'sex work' and 'sex worker' rather than 'prostitute' because 'the primary meaning of the word [prostitute] has a sexual connotation, historically describing women who offer sexual services on an indiscriminate basis, whether or not for money and, more recently, the offer of sex for money ... Further, the term 'prostitute' conflates work and identity. Women who sell sex for money typically have other identities, that is, daughter, mother, athlete, musician, et cetera.' See SA Law 'Commercial sex: Beyond decriminalisation' (2000) 73 *Southern California Law Review* 525. The terms 'sex work'/'sex worker' and 'prostitution'/'prostitute' refer to the exchange of sexual acts for money, as opposed to the 'sex work industry' which refers to a broad range of sexual services including pornography, phone and internet sex. D Auguston & A George 'Prostitution and sex work' (2015) 16 *Georgetown Journal of Gender and Law* 229.

12 H Charlesworth & C Chinkin *Boundaries of international law* (2000).

alternative approaches the ECOWAS Court could have adopted to allow for an analysis of rights that operate to protect *all* women. Finally, based on arguments made throughout the article to re-frame the ECOWAS Court's decision in *Njemanze*, the article reconceptualises aspects of the case to consider the discriminatory impact of Nigeria's Penal Code and the need to repeal its *de facto* criminalisation of sex work. While the consensus among human rights lawyers may be to go for the 'low-hanging fruit' in litigation, the article critically examines *Njemanze* with the intention of showing how such an approach may be counterproductive as it enforces the rejection of the rights of marginalised groups such as sex workers.

## 2 Contextualising sex work in Africa

The vast majority of African countries maintain laws that criminalise the activities of sex workers.<sup>13</sup> These laws are in large part remnants of a colonial legacy across African nations, where the influence of Abrahamic religions (Christianity and Islam) on traditional African religions altered traditional perceptions about women's bodies and sexualities. While African traditional religions celebrate women's bodies as 'reproductive or sexual icons', Abrahamic religions portray women's bodies as sites of 'sin, moral corruption and a source of distraction from godly thoughts'.<sup>14</sup> In response to this colonial articulation of women's bodies as 'sinful', colonial powers developed laws to control African women's sexuality. For example, the Ugandan Penal Code, largely based on English criminal law, criminalised sex work (prostitution) in 1930, despite the fact that sex work generally was acceptable in the pre-colonial era.<sup>15</sup>

The criminalisation of sex work in colonial-era Africa was very much entrenched in constructions of black women as 'sexually degenerate', a conception that Ngwena argues continues to outlive European imperialism and colonisation.<sup>16</sup> The 1969 legalisation of sex work in Senegal offers support for Ngwena's conclusion – legalisation, which was and is heavily regulated, is not the result of a liberal government agenda but rather an attempt 'to protect French colonial administrators from contracting sexually-transmitted diseases (STDs)

---

13 African Sex Worker Alliance "'I expect to be abused and I have fear": Sex workers' experiences of human rights violations and barriers to accessing healthcare in four African countries' Research Report in S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 164-165. See also Global Network of Sex Work Project 'Sex work is legalised in Senegal', <https://www.nswp.org/timeline/event/sex-work-legalised-senegal> (accessed 12 April 2018).

14 Tamale (n 13) 153.

15 CA Mgbako *To live freely in this world* (2016) 50; S Tamale 'Sex work and sexuality in Uganda' in S Tamale (ed) *African sexualities: A reader* (2011) 155.

16 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 192.

from native women'.<sup>17</sup> The regulation of African women's bodies in the colonial era was both racist and patriarchal by design.

Laws regulating sex work determine when and where women may engage in sexual activity – in the home, when married to a person of the opposite sex, for purposes of procreation – and simultaneously reinforce the subordination of women. Women who reject this formulation of how women should engage in sexual activity were (and are) pushed to the margins of society, where they not only are denied state protection but are actively targeted by the state.<sup>18</sup>

While many African countries outrightly criminalise sex work, others adopt wide-berth laws on vagrancy, loitering and public disorder.<sup>19</sup> The intention of these expansive laws is to allow law enforcers large discretionary powers to determine who is breaking the law.<sup>20</sup> For instance, in the Kenyan case of *Lucy Nyambura & Another v Town Clerk* the petitioners challenged the interpretation and application of a set of by-laws prohibiting 'loitering in a public place for immoral purposes'.<sup>21</sup> The petitioners were arrested under the remit of these by-laws and because of the vague nature of these laws the Court determined that there was no violation of the petitioners' rights to dignity. Laws such as this one allow law enforcement officers indiscriminately to arrest and detain women simply because of what they are wearing or what time of day it is.

No matter the design of laws criminalising sex work or sex work-related activities, the objective remains the same. These laws are designed to 'strengthen and affirm our aversion to and fear of (sex workers) and confirm that we must control women engaged in unsanctioned sexual activity'.<sup>22</sup>

### 3 Case overview: Establishing the facts

The *Njemanze* case is concerned with the treatment of four women who were arrested and subjected to violence by state agents as it was assumed that the women were sex workers. The plaintiffs (the four women) and the state presented two different contexts in which to examine the case. While the plaintiffs focused on the state's obligation

17 K Ngalamulume 'Le péril vénérien: L'État colonial français et la sexualité à Saint-Louis-du-Sénégal, 1850-1920' ('The venereal peril: The French colonial state and sexuality in Saint-Louis, Senegal, 1850-1920') in J-P Bado (ed) *Conquêtes médicales: Histoire de la médecine moderne et des maladies en Afrique (Medical conquests: The history of modern medicine and diseases in Africa)* (2006), quoted in Tamale (n 13) 164.

18 Tamale (n 13) 158.

19 Eg, Botswana, Nigeria, Kenya, Zimbabwe and Namibia.

20 Centre for Reproductive Rights *Legal grounds III: Reproductive and sexual rights in sub-Saharan African courts* (2017) 125-132.

21 *Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others* (2011) Petition 286 of 2009.

22 Mgbako (n 15) 63.

to prevent and investigate the discrimination and violence they experienced, the state argued that because the plaintiffs in fact were sex workers there existed no grounds on which to determine state responsibility for the alleged violations. The overview of the plaintiff and state arguments provided below builds the foundation for the critique of this case which asserts that the ECOWAS Court's decision in *Njemanze* pits women against each other, rather than supports an inclusive approach to protecting the rights of *all* women.

### 3.1 The facts: Plaintiffs

The plaintiffs alleged a set of facts that outlined how they were targeted, assaulted and detained by officers of a state authority, the Abuja Environmental Protection Board (AEPB). AEPB worked in cooperation with members of the Society against Prostitution and Child Labour (SAPCLN), an Abuja-based non-governmental organisation (NGO), to patrol the streets in search of sex workers.<sup>23</sup> The plaintiffs alleged that they were targeted and deemed 'prostitutes'/*ashawo* simply because they were outside at night. The facts specific to each of the four plaintiffs varied to some degree, but the basis for their allegations shared a string of commonalities, including that

- (i) they were walking outside at night and as a result were verbally abused and degraded by state officers who called them 'prostitutes';<sup>24</sup>
- (ii) they were each assaulted and/or sexually assaulted by armed uniformed officers – two of the plaintiffs identified AEPB officers and vehicles;
- (iii) they either were abducted or an attempt was made to abduct them; and
- (iv) three of the plaintiffs reported the incident to a state authority but received no remedy.

The plaintiffs collaboratively alleged that the state of Nigeria had violated their human rights as enshrined in the African Charter;<sup>25</sup> the African Women's Protocol;<sup>26</sup> CEDAW;<sup>27</sup> ICCPR;<sup>28</sup> CAT;<sup>29</sup> and the Universal Declaration.<sup>30</sup> The alleged rights violations were based on the premise that the mistreatment suffered by the plaintiffs at the hand of state authorities constituted gender-based violence; unequal and gender-based discrimination; and a failure on the part of the state

23 *Njemanze* (n 3) 16.

24 *Njemanze* 36 37.

25 Arts 1, 2, 3, 5 & 18(3) African Charter.

26 Arts 2, 3, 4(1) & (2), 5, 8 & 25 African Women's Protocol.

27 Arts 2, 3, 5(a) & 15(1) CEDAW (n 5).

28 Arts 2(1) & (3), 3, 7 & 26 ICCPR (n 6).

29 Arts 10, 11, 12, 13 & 16(1) CAT (n 7).

30 Arts 1, 2, 5, 7 & 8 Universal Declaration (n 8).

to investigate the plaintiffs' allegations and subsequently to provide a remedy.<sup>31</sup>

To redress the alleged rights violations the plaintiffs requested the Court to order the state to implement awareness-raising campaigns aimed at eradicating beliefs, practices and stereotypes that legitimise and exacerbate violence against women, as well as to adopt legislation and employ social and economic resources to punish and eradicate violence against women. The requested remedies included monetary compensation for the plaintiffs. However, the plaintiffs did not request remedies intended to acknowledge stereotyping, discrimination and violence experienced by sex workers.

The plaintiffs' statement of facts drew a definitive line in the sand: There are two types of women, namely, those women who are humiliated by even the perception that they may be an *ashawo* ('prostitute'), and those women who in fact *are* sex workers. Rather than align themselves with the rights of *all* women, including sex workers who are women, the plaintiffs rebuffed the state's allegations that this case concerned sex work. They asserted that 'this case has nothing to do with the legality or illegality of prostitution and is not a campaign for the legalisation of prostitution'.<sup>32</sup> From the outset, the plaintiffs asserted that being called *ashawo* was degrading, seemingly with little regard for the perhaps unintended implication that women who engage in sex work should be degraded (discriminated against, exposed to violence, not worthy of protection, and so forth). While an argument certainly can be made that it was strategically necessary for the plaintiffs intentionally to distance themselves from commercial sex work and sex workers in order to *win* the case, such a stance played to rather than challenged gender-based discrimination and the stereotyping of women.

### 3.2 The facts: Nigerian state

Rather than engage in the particulars of the plaintiffs' alleged facts the state set out to challenge the ECOWAS Court's jurisdiction over the case. At the crux of the state's argument was the assertion that the plaintiffs were 'prostitutes' who 'dress naked or half naked by the road side soliciting for men'.<sup>33</sup> In its efforts to obstruct the Court's jurisdiction the state submitted the following arguments.

First, the Nigerian state contended that because the plaintiffs 'belong to the cadre of prostitutes popularly called 'Big Auntie'<sup>34</sup> they

---

31 *Njemanze* (n 3) 20-22.

32 *Njemanze* 17.

33 *Njemanze* 15. The state also raised an objection with regard to the admissibility of the second plaintiff's claim, alleging that it was statute-barred. The Court upheld this challenge and did not issue judgment with regard to the second plaintiff.

34 *Njemanze* 16.

were in violation of national law that criminalises sex work in public places in Nigeria.<sup>35</sup> The state claimed:<sup>36</sup>

The government of the Federal Republic of Nigeria, the FCT (Federal Capital Territory) administration and indeed the international bodies in Africa are against commercial sex workers popularly called *ashawo* in Nigeria, as same constitutes nuisance and a violation of the moral values of our African society.

The state argued that the arrest of the plaintiffs was not a violation of the African Charter as the practice was warranted in national law.<sup>37</sup> Sex work is criminalised through Nigeria's Criminal Code, which mainly is applicable in the southern regions of Nigeria, and also its Penal Code, which mainly is applicable in the northern region. The grounds on which sex work is criminalised vary across the Criminal Code and the Penal Code.<sup>38</sup> The state referenced section 406(d) of the Penal Code to support its assertion that sex work in public is criminalised in Nigeria because sex workers are included in the definition of an idle person: '(a)ny common prostitute behaving in a disorderly or indecent manner in a particular public place or persistently importuning or soliciting persons for the purpose of prostitution'.<sup>39</sup> The state argued that because the plaintiffs were outside at night there were enough grounds to warrant their arrest.

The Nigerian state claimed that because sex work in public spaces is illegal in Nigeria there were no grounds for the ECOWAS Court to determine jurisdiction based on a violation of article 6 (the right not to be arbitrarily arrested or detained) of the African Charter. To substantiate its claim that the national law criminalising prostitution warranted the arrest and detainment of presumed sex workers the state argued that if the ECOWAS Court were to accept the plaintiffs' claims it would be equivalent to the Court granting the plaintiffs the 'freedom to sell sex in the street'.<sup>40</sup> The state ultimately argued that national law supplants the protections afforded by international human rights law or, put another way, that the arbitrary arrest and detainment of sex workers is not a violation of international law *because* Nigerian law allows such behaviour.

Second, based on the state's presumption that the plaintiffs were in fact sex workers, it argued that '[t]here exists no international convention, domestic law or culture in Nigeria that recognises prostitution as a legitimate business, it is actually a criminal offence to

35 Sec 406(d) Nigerian Penal Code LFN 2004 3.

36 *Njemanze* (n 3) 15.

37 *Njemanze* 22.

38 Ch 21 Nigerian Criminal Code; secs 220-225 Offences Against Morality; ch 24 Idle and Disorderly Persons; Rogues and Vagabonds; Bringing Contempt on Uniform 249.

39 Penal Code (n 35).

40 *Njemanze* (n 3) 23.

indulge in prostitution in public places'.<sup>41</sup> By challenging the legitimacy of sex work, the Nigerian state sought to marginalise sex workers from international human rights protections. However, this claim, that sex work is not protected in international law, is false. As is discussed in more detail below, sex workers' rights are explicitly recognised in CEDAW and are articulated through a myriad of human rights provisions, including the right to work.

Accompanying its dual-pronged approach to challenging the Court's jurisdiction, the state maintained that the AEPB, in collaboration with the Nigerian police, was mandated 'to arrest, detain and prosecute any woman soliciting/offering herself for sexual service at night at any public place'.<sup>42</sup> The state made no attempt to deny that it condones the arbitrary arrest of women by its agents, revealing that in practice its officers are free to make judgments about who is and who is not a prostitute based on profiling, stereotypes, and individual bias.

### 3.3 The Court's approach: Avoid 'prostitution'

In determining its jurisdiction over *Njemanze*, the ECOWAS Court cited article 9(4) of the Supplementary Protocol, which provides that 'the Court has jurisdiction to determine cases of violations of human rights that occur in any member state'.<sup>43</sup> However, to establish its jurisdiction under article 9(4) the Court determined that human rights violations had indeed occurred because the state confirmed the plaintiffs' version of the facts.<sup>44</sup> The Court found that the state had not provided sufficient evidence to substantiate its claim that the plaintiffs were sex workers.<sup>45</sup> Rather than engage in the complicated task of combating the state's jurisdiction claims, especially as they were premised on the legality or illegality of sex work, the ECOWAS Court determined that

(t)he plaintiff alleged a violation of their human rights, [and] the defendant (state) maintain[ed] that the issue borders on legalisation of prostitution. However, it is trite that jurisdiction is inferred from the plaintiff's claim and not the defence (the state).<sup>46</sup>

41 *Njemanze* 17. Of note, the wording of the law criminalises acts in 'public places', implying that more private arrangements, such as soliciting through text messages, are not criminalised. This means that this provision should be considered more as a regulatory offence (such as operating a legitimate business in a residential building) rather than a criminal offence. Consequently, sex work as a criminal or immoral act is a misreading of the intent of the law.

42 *Njemanze* 16.

43 Supplementary Protocol A/SP1/01/05 amending the Preamble and arts 1, 2, 9, 22 & 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and art 4 para 1 of the English version of the said Protocol (Supplementary Protocol) (adopted in 2005 and provisionally entered into force upon signature in 2005).

44 *Njemanze* (n 3) 36.

45 *Njemanze* 38.

46 *Njemanze* 24.



Based on the plaintiffs' established facts the Court examined the relevant rights violations.

First, the Court determined that the use of the word 'prostitute' or *ashawo* by state agents is 'humiliating, derogatory and degrading' and, therefore, is a violation of the plaintiffs' rights under article 5 of the African Charter which protects the right to dignity and freedom from cruel, inhuman or degrading punishment or treatment.<sup>47</sup> While upholding the plaintiffs' right to dignity, the Court simultaneously reinforced negative social attitudes that perceive sex work to be 'humiliating, derogatory and degrading'.

Second, the Court examined the state's discriminatory application of the Penal Code and determined:<sup>48</sup>

The hug of the operation was targeted against women. This systematic sting operation directed against only the female gender furnishes evidence of discrimination ... There is no law that suggests that when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes. If it were so, it ought to apply to all persons irrespective of sex.

In this brief statement, the Court provided its only analysis of the state's Penal Code in relation to sex work. It relied on CEDAW to determine the Nigerian state's responsibility to prevent gender-based discrimination, as well it determined that Nigeria's Penal Code is discriminatory because it assumes that only women out late at night are 'idle persons'. This aspect of the judgment is the ECOWAS Court's greatest effort to confront the criminalisation of sex work in Nigeria, yet the Court makes no mention of the impact of discriminatory law on sex workers.

Third, the Court found the Nigerian state responsible for violating the plaintiffs' rights to protection from arbitrary arrest and detention under article 6 of the African Charter and article 9(1) of ICCPR. The Court reached its conclusion that the plaintiffs were arbitrarily arrested and detained as the state did not provide sufficient evidence to prove the allegation that the women were engaged in sex work and that their arrest was as a result of the women committing a criminal offence. The Court made it clear that the Nigerian state had violated the plaintiffs' rights to be free from arbitrary arrest and detention. However, the way in which the Court framed its reasoning implies that it would be acceptable for Nigerian state agents to patrol the streets and arrest women as long as they could prove the women they arrested were sex workers. This is a dangerous inference that undermines the Court's previous assertion that a discriminatory law violates the human rights protections enshrined in CEDAW.

Finally, whereas the plaintiffs' requested remedies were intended to confront some of the underlying discrimination issues at play in this

---

47 Art 5 African Charter.

48 *Njemanze* (n 3) 38.

case, the ECOWAS Court limited its remedy order to monetary compensation.<sup>49</sup> This decision is disappointing because not only did the Court neglect to address the larger issue of sex work criminalisation in this case, but also it missed an opportunity to require the state to focus on eradicating beliefs, practices and stereotypes that legitimise and exacerbate violence and discrimination against women.

The following sections seek to reconceptualise aspects of *Njemanze* in order to extrapolate lessons for application in future women's rights cases.

## 4 Reconceptualising jurisdiction

Central to the ECOWAS Court's analysis in *Njemanze* is the premise on which it established jurisdiction. While the state offered distinct challenges to the Court's jurisdiction, the Court neglected to acknowledge the state's claims, instead opting to establish its jurisdiction based on the facts provided by the plaintiffs.<sup>50</sup> By forgoing a comprehensive rebuttal to the state's jurisdiction challenges, the Court subverted the complicated issues surrounding Nigeria's treatment of sex workers and the criminalisation of sex work. This approach makes strategic sense in the event that the ECOWAS Court's aim was to provide an individual remedy to the relevant plaintiffs. However, the ECOWAS Court's vision statement includes 'establishing and sustaining an enabling legal environment for the achievement of community aims and objectives'.<sup>51</sup> This activist community-based approach to interpreting the law creates space for the ECOWAS Court to push the boundaries of how law exists. However, the ECOWAS Court has explicitly stated 'that its role is not to examine community member states' laws *in abstracto*, but rather to ensure protection of people's rights when they are victims of violations of those rights and that it must do so by examining concrete cases brought before it'.<sup>52</sup> This principle notwithstanding the Nigerian state raised the issue of the criminalisation of sex work in *Njemanze*, thereby offering the ECOWAS Court an opportunity to fully interpret international human rights law as it applies to *all* women potentially impacted by the domestic law criminalising sex work.

This part provides a reconceptualisation of the ECOWAS Court's jurisdiction in the determination to develop alternative streams of

49 Three of the four plaintiffs were awarded N6 000 000; one of the plaintiffs was dismissed from the case due to time-barred jurisdiction issues.

50 *Njemanze* (n 3) 24.

51 ECOWAS Court of Justice Mission and Vision Statement (2012), [www.court.ecowas.org/site2012/index.php?option=com\\_content&view=article&id=17&Itemid=20](http://www.court.ecowas.org/site2012/index.php?option=com_content&view=article&id=17&Itemid=20) (accessed 12 June 2018) (my emphasis).

52 *Hadijatou Mani Koraou v The Republic of Niger*, ECOWAS Court of Justice 27 October 2008 ECW/CCJ/JUD/06/08.

analysis that address underpinning issues relevant to this case. To effectively confront the Nigerian state's jurisdiction claims the ECOWAS Court needed to develop two coinciding arguments, namely, (i) a national law criminalising sex work cannot be used as grounds to violate international human rights law; and (ii) the rights of sex workers are indeed enshrined in and protected by international human rights law.

Had the ECOWAS Court developed these counter-claims effectively, it would have established grounds to examine how the national law criminalising sex work violates *all* women's rights. The following parts outline approaches the ECOWAS Court could have adopted to counter the state's jurisdiction claims.

#### 4.1 National law and international human rights protections

To counter the state's claim that the ECOWAS Court's acceptance of jurisdiction in this case would be equivalent to it condoning a violation of national law, the ECOWAS Court needed to determine that the state's Penal Code criminalising sex work may not be employed as grounds to violate the plaintiffs' rights under the African Charter. In the *Njemanze* judgment, the Court developed a preliminary argument about the Nigerian Penal Code that is foundational to confronting the state's first jurisdiction challenge. The ECOWAS Court determined that the AEPB's 'sting operation' specifically targeted women, not men, and therefore inherently was discriminatory. It established that the criminalisation of sex work is not, and should not be, interpreted to be a law that 'suggests when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes'.<sup>53</sup> By addressing the discriminatory application of the Penal Code as regards sex work, the Court established grounds to argue not only that the Penal Code explicitly is discriminatory but also that the Penal Code cannot override article 6 of the African Charter, which enshrines the right to personal liberty and protection from arbitrary arrest.<sup>54</sup>

The claw-back clause in article 6, 'except for reasons and conditions previously laid down by law', is mitigated by the international law principle enshrined in the Vienna Convention on the Law of Treaties, which mandates that a 'state party may not invoke the provisions of (an) internal law as justification for its failure to perform a treaty'.<sup>55</sup> By illustrating how the Nigerian Penal Code undermines human rights principles protected in the African Charter, the ECOWAS Court could have effectively confronted the state's first jurisdiction challenge: The Nigerian state cannot use the provisions of a national law (the criminalisation of sex work) to discriminate against and to arbitrarily arrest and detain any woman. Instead, the Court signalled to other

53 *Njemanze* (n 3) 38.

54 Art 6 African Charter.

55 Art 27 Vienna Convention on the Law of Treaties UNTS Vol 1155 23 May 1969.

African countries that a state's ratification of human rights treaties does not necessarily require the protection of rights enshrined in international human rights law.

#### 4.2 Sex work as 'legitimate' work in international human rights law

To challenge the Nigerian state's assertion that sex work is not a 'legitimate business', the ECOWAS Court needed to establish that sex work indeed is considered 'legitimate' under international human rights law and, accordingly, that women who work in sex work are protected by international human rights law. While the state referenced only the African Charter in its jurisdiction challenge, the African Charter itself prescribes a guide for the broad interpretation of its articles, which includes inspiration from international law.<sup>56</sup>

International human rights treaty-monitoring bodies have not yet developed a direct and comprehensive framework specific to the enforcement of sex workers' rights. Despite this lack there are numerous grounds on which to articulate sex workers' rights through the standards set out in international human rights treaties. For instance, Amnesty International draws on the ESCR Committee's General Comment 2 to argue that 'states must specifically ensure that sex workers have access to the full range of sexual and reproductive health care services'.<sup>57</sup> Additionally, Amnesty International referred to CEDAW General Recommendation 33 to note that '[w]here sex workers face the threat of criminalisation, penalisation or loss of livelihood when or if they report crimes against themselves to police, their access to justice and equal protection under the law is significantly compromised'.<sup>58</sup> The South African organisation Sex Workers Education and Task Force (SWEAT) links the right to work to sex work through the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>59</sup> Further, the Kenyan Sex Worker Alliance in its 2017 Shadow Report submission to the CEDAW Committee determined that the criminalisation of sex work in Kenya violated sex workers' rights to equality and non-discrimination; to engagement in political and public life; to fair employment and labour practices; to access healthcare services; and to be free from exploitation.<sup>60</sup>

56 Art 60 African Charter.

57 Amnesty International 'Policy on state obligations to respect, protect and fulfil the human rights of sex workers' POL 30/4062/2016 26 May 2016 10, <https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF> (accessed 12 June 2018).

58 As above.

59 Sex Workers Education and Task Force (SWEAT) 'Sex work and human rights' (2015), <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf> (accessed 12 June 2018).

60 Kenya Sex Worker Alliance "'Aren't we also women?" Kenya sex workers' shadow report submission to the United Nations Committee on the Elimination of

Perhaps the strongest legal grounds to assert the rights of sex workers is through CEDAW,<sup>61</sup> which has been ratified by Nigeria<sup>62</sup> and which is the only international treaty to make explicit mention of the rights of sex workers. CEDAW explicitly acknowledges the rights of sex workers by requiring states to prevent the exploitation of sex work. The most direct articulation of sex workers' rights in CEDAW is through article 6, which calls on states to 'take all appropriate measures ... to suppress all forms of traffic in women and exploitation of prostitution of women'.<sup>63</sup> Importantly, this provision focuses on the suppression of the exploitation of sex work, not on the suppression of sex work itself. This is because, as Mgbako and Smith explain, during the CEDAW drafting process a group of states expressly rejected language to suppress *all* prostitution.<sup>64</sup> CEDAW's specific mention of the need to suppress the '*exploitation of prostitution*' is indicative of a shift from an emphasis on eradicating sex work to 'view[ing] sex workers as individuals who hold fundamental rights'.<sup>65</sup> While CEDAW does not explain the causes and means of exploitation it references, implied in the language of article 6 is the idea that women may elect to engage in voluntary sex work, that is, states have a duty to create an environment in which sex workers are not exploited.<sup>66</sup> Significantly, article 6 does not imply that sex work should be suppressed or criminalised.

Implicit in CEDAW's requirement that state parties 'take all appropriate measures' to protect sex workers from exploitation is the requirement for states to undertake positive action to ensure the fulfilment of article 6. Such action may include measures to eradicate

---

Discrimination against Women 68th session' October 2017, <https://aswaalliance.org/wp-content/uploads/2019/03/AREN%E2%80%99T-WE-ALSO-WOMEN.pdf> (accessed 12 June 2018).

- 61 J Sagade & C Forster 'Recognising the human rights of female sex workers in India: Moving from prohibition to decriminalisation and a pro-work model' (2018) 25 *Indian Journal of Gender Studies* 26.
- 62 CEDAW and African Women's Protocol, ratified by Nigeria on 22 November 2004 and 16 December 2004 respectively.
- 63 Art 6 CEDAW.
- 64 C Mgbako & LA Smith 'Sex work and human rights in Africa' (2011) 33 *Fordham International Law Journal* 1201.
- 65 As above (my emphasis).
- 66 Debates in feminist circles both challenge and accept the voluntary nature of sex work. Anti-prostitution feminists argue that sex work is a form of violence and sexual slavery, which cannot be removed from its exploitative patriarchal roots. Anti-prostitution feminists use human rights as a liberation tool to 'free' sex workers. See K Barry *The prostitution of sexuality* (1995); J Bindel *The pimping of prostitution: Abolishing the sex work myth* (2017). Pro-sex work feminists, on the other hand, argue that sex work is a legitimate occupation, and that sex workers who voluntarily elect to work in sex work must be protected by the same human rights protections afforded to all workers. See P Alexander 'Feminism, sex workers, and human rights' in J Nagel (ed) *Whores and other feminists* 1997) 83; K Kempadoo & J Doezeema *Global sex workers: Rights, resistance, and redefinition* (1998). However, it is important to note that sex workers from marginalised communities, such as transgender individuals, may be 'forced' into sex work because they face disproportionate employment discrimination.

discrimination, harmful gender stereotypes and violence against women;<sup>67</sup> to establish socio-economic programmes to assist women who work in sex work;<sup>68</sup> to ensure access to healthcare services;<sup>69</sup> and to promote safe and healthy working conditions.<sup>70</sup> Alongside article 6 of CEDAW, the CEDAW Committee has issued recommendations that, although non-binding on states, provide great clarity and substance in interpreting the CEDAW provisions. For instance, General Recommendation 19 on Violence Against Women asserts that gender-based violence impairs women's enjoyment of their rights and freedoms, which includes the right to just and favourable work conditions.<sup>71</sup> This Recommendation makes no distinction as to the type of work or worker, formal or informal, thereby providing a standard to protect sex workers' rights under the right to just and favourable work conditions in international human rights law.

The right to work, as enshrined in numerous international human rights treaties, provides a robust framework through which to protect women sex workers from exploitation. Article 23(1) of the Universal Declaration protects the right to work and to free choice of employment, as well as the right to just and favourable conditions of work.<sup>72</sup> ICESCR, which was ratified by Nigeria in 1993, enshrines the right to work in articles 6, 7 and 8, and includes the right to just and favourable work conditions and the 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'.<sup>73</sup> This distinction, that a worker has the right to freely choose the type of work they do, is directly applicable to sex work and is bolstered by the ESCR Committee's further elaboration of the right to work in General Comment 18 and General Comment 23.<sup>74</sup> General Comment 18 establishes that state parties have a responsibility to reduce the number of workers operating in the informal economy as these workers receive no state protection.<sup>75</sup> Sex workers who operate in contexts where sex work is criminalised are included in this classification of informal workers. General Comment 23 elaborates on General Comment 18 to determine that 'the right to

---

67 Arts 5 & 10 CEDAW.

68 Report of the Committee on the Elimination of Discrimination against Women 18th and 19th sessions 1998 GA Official Records 53rd session Supplement 38 (A/53/38/Rev.1) 'Zimbabwe' para 158.

69 Art 12 CEDAW.

70 Art 11 CEDAW.

71 CEDAW Committee General Recommendation 19: Violence against women (1992) para 7(h).

72 Art 23(1) Universal Declaration.

73 International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted 16 December 1966, GA Res 2200A (XXI), entered into force 3 January 1976.

74 Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 18: The Right to Work, art 6 of the Covenant (E/C12/GC/18) 6 February 2006; ESCR Committee General Comment 23: Right to Just and Favourable Conditions of Work (E/C12/GC/23) 27 April 2016.

75 General Comment 18 (n 74) para 10.

just and favourable conditions of work is a right of everyone, without distinction of any kind'.<sup>76</sup> Furthermore, it contends that workers in the informal economy often are excluded from legal protection, support and safeguards, which exacerbates their vulnerability.<sup>77</sup> General Comment 23 does not argue that informal work be criminalised, but rather calls on states to formalise informal work as a means to improve access to legal and social services for informal workers, which includes sex workers.

The African Charter mandates that every individual shall have the right to work under equitable and satisfactory conditions.<sup>78</sup> The African Commission on Human and Peoples' Rights (African Commission) elaborated in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights the African Charter's right to work provision<sup>79</sup> by noting that state parties have an obligation to take 'appropriate steps to realise the right of everyone to gain their living by work which they freely choose and accept' and to 'establish a system of social protection ... for workers in both formal and informal sector, including ... members of vulnerable and disadvantaged groups'.<sup>80</sup> Sex workers' human rights fall within these protections as sex workers operate in the informal sector and are vulnerable workers, particularly in contexts where sex work is criminalised by the state.

Lastly, article 13 of the African Women's Protocol enshrines the right to work, and calls upon state parties to 'create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector'.<sup>81</sup> While the Women's Protocol makes no explicit mention of sex work or 'prostitution', women who work in sex work are protected by the Protocol in its entirety both because they are women and because they work in the informal work sector.

A commonality across each of the provisions outlined above is that there is no mention of the existence of 'illegitimate' work. Rather, the emphasis in international human rights law, as far as work is concerned, is on states' obligations to protect *all* those persons who work in the informal work sector, which includes protection of the rights of sex workers.

The ECOWAS Court should have relied on CEDAW and the expansive international legal framework on the right to work to address the Nigerian state's challenge to the Court's jurisdiction based on the premise that sex work is not legitimate work and that sex

---

76 General Comment 23 (n 80) para II(1).

77 General Comment 23 (n 80) para 47(d).

78 Art 15 African Charter.

79 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2010).

80 Paras 58, 59(d) & 59(o) Principles and Guidelines (n 79).

81 Art 13(e) African Women's Protocol.

workers are not protected under international human rights law. The Nigerian state is required to fulfil its obligations under CEDAW's article 6. However, by claiming that sex work is not 'legitimate', the Nigerian state aggressively denies a section of its population the right to freely choose their form of work and the right to work in just and favourable work conditions. If the ECOWAS Court interpreted CEDAW and developed the legal framework on the right to work as outlined above, it could have substantiated the legitimacy of sex work, as well as determined that the right to just and favourable work conditions cannot be fulfilled for sex workers in a context where the state criminalises sex work. Indeed, this would be a form of unprecedented judicial activism. However, because the state introduced the argument around the legitimacy of sex work as work the ECOWAS Court had a unique opportunity to push the boundaries of human rights interpretation and application as regards sex work.

## 5 Rethinking *Njemanze*

In the event that the ECOWAS Court had taken up the state's jurisdiction challenge, that this case was indeed about the legality of sex work, it would have created an opportunity to examine the causes and effects of criminalising sex work in Nigeria. There are several reasons why the Court may have elected to forgo such an analysis, including a historical disinclination by courts to delve into the private realm of sex and sexuality. However, this alternative approach would have opened new streams of analysis, two of which are outlined here.

First, the ECOWAS Court would have had the opportunity thoroughly to examine and apply the African Women's Protocol. Second, based on its analysis of the Women's Protocol the Court could have examined the criminalisation of sex work as it is an affront to the human rights protections of women who work in sex work. This final part provides an alternative analytical framework for examining *Njemanze*.

### 5.1 Really applying the African Women's Protocol

While *Njemanze* is heralded as the first African Women's Protocol case, the ECOWAS Court made no effort to analyse human rights violations in this case through the framework of the Women's Protocol. The plaintiffs requested the Court to find a violation of each of the following Women's Protocol provisions: the right to dignity (article 3); the rights to life, integrity and security of the person (articles 4(1) and (2)); the right to access justice and equal protection before the law (article 8); the right to a remedy (article 25); and the obligation on the state to eliminate harmful practices (article 5) and discrimination



against women (article 2).<sup>82</sup> Significantly, the ECOWAS Court did find violations of each of the alleged African Women's Protocol rights. However, it provided no thorough analysis of the respective rights provisions as they applied in this case. Such an analysis would have assisted the Court in articulating the impact of gender stereotyping and discrimination as they relate to the right to dignity in this case and perhaps would have assisted the Court in avoiding an articulation of rights violations that forces women into hierarchical groups. This part provides an analysis of the right to dignity as an umbrella analytical framework that the Court could have employed to unpack how gender stereotypes contributed to the mistreatment of the plaintiffs at the hands of state agents, and to illustrate how *all* women, regardless of their profession, are to be protected against discrimination and violence.

The right to dignity, as enshrined in article 3 of the African Women's Protocol, imparts to *every* woman the right to dignity, the right to respect as a person and the right to free development of her personality.<sup>83</sup> To enact these rights the Protocol requires state parties to adopt and implement 'appropriate measures to prohibit any exploitation or degradation of women' and to 'ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence'.<sup>84</sup> The right to dignity provision in the African Women's Protocol provides a deeper reflection of the ways in which women experience violations of this right as compared to the African Charter's article 5 protection. Not only does the Women's Protocol impart to states a positive duty to enact measures to prohibit the exploitation and degradation of women, but also it requires that the state take measures to *prevent* violence against women.

Inherent in the fulfilment of the right to dignity is the state's obligation to prevent violence against women. To this end, the rights to be free from discrimination (article 2) and the rights to life, integrity and security of person (article 4) provide states with the minimum standard with which they must comply. Article 2 requires state parties to 'commit themselves to modify social and cultural patterns of conduct of women and men ... with a view to achieving the elimination of ... practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotypes roles for women and men'.<sup>85</sup>

---

82 Arts 2, 3, 4(1) & (2), 5, 8 & 25 African Women's Protocol; *Njemanze* (n 3) 10-12 41-42.

83 Art 3 African Women's Protocol.

84 As above.

85 Art 2 African Charter.

Along the same lines article 4 calls upon states to eradicate beliefs, practices and stereotypes that legitimise and exacerbate violence against women.<sup>86</sup> Because the right to dignity requires states to protect women from all forms of violence it cannot be read as a right in a vacuum. To fulfil this right states must also realise, at a minimum, the rights enshrined in articles 2 and 4 of the African Women's Protocol.

Recently the African Commission shed further light on the meaning of the right to dignity as enshrined in the African Women's Protocol and relating to sex work. For example, the General Comments on articles 14(1)(d) and (e) of the Women's Protocol, which examine the intersection between women's human rights and HIV, draw particular attention to the rights of sex workers to be informed of their health status.<sup>87</sup> In the same General Comment the African Commission noted an intrinsic link between the right to dignity and the right to self-protection, which includes the rights to access information, education and sexual and reproductive health services.

Also in the context of HIV prevention, the Special Rapporteur on the Rights of Women released an Intersession Activity Report calling for

policy makers to put in place effective strategies to fight against discrimination in health facilities and thus create favourable conditions enabling people affected by HIV including young girls, sex workers and MSMs to come forward and access HIV-related services.<sup>88</sup>

In this General Comment and Session Report the African Commission made distinctive efforts to encompass the rights of sex workers within the purview of the African Women's Protocol.<sup>89</sup>

Had the ECOWAS Court thoroughly examined the Women's Protocol in line with the African Commission's comments and resolutions, whether alongside or in place of its analysis of article 5 of the African Charter, it subsequently would have found it necessary to uncover the 'social and cultural patterns' that cause and perpetuate

---

86 Art 4 African Charter.

87 African Commission on Human and Peoples' Rights, General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2012), [http://www.achpr.org/files/instruments/general-comments-rights-women/achpr\\_instr\\_general\\_comments\\_art\\_14\\_rights\\_women\\_2012\\_eng.pdf](http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comments_art_14_rights_women_2012_eng.pdf) para 15 (accessed 18 June 2018).

88 Inter-session report of the Special Rapporteur on the Rights of Women in Africa, Maître Soyata Maiga, 46th session of the African Commission on Human and Peoples' Rights (2009), [http://www.achpr.org/files/sessions/46th/inter-act-reps/132/achpr46\\_specmec\\_women\\_actrep\\_2009\\_eng.pdf](http://www.achpr.org/files/sessions/46th/inter-act-reps/132/achpr46_specmec_women_actrep_2009_eng.pdf) (accessed 10 May 2019).

89 In addition, Resolution 163 of the African Commission on Human and Peoples' Rights establishes the Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, which has a mandate 'to integrate a gender perspective and give special attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners', <http://www.achpr.org/sessions/47th/resolutions/163/> (accessed 10 May 2019).

gender stereotypes and violence against women. Upon examining gender discrimination and stereotypes that dictate norms for how and when women engage in sexual activity, the Court would have created for itself an avenue to address how these stereotypes discriminate against *all* women, not only those that are wrongly perceived to be *ashawo* or 'prostitutes' because they are out late at night.

## 5.2 Sex workers' human rights and the criminalisation of sex work

In the event that the ECOWAS Court determined its jurisdiction by challenging the state's claim that sex work is not legitimate work and subsequently analysed the *Njemanze* case using the African Women's Protocol as its guide to examine gender stereotypes and discrimination, it would have established the foundation on which to challenge the criminalisation of sex work in Nigeria. The Court had at its disposal a myriad of rights through which it could have elected to confront Nigeria's Penal Code provision on 'idle persons' or 'prostitutes'. However, the right to dignity and the right to work particularly are attractive as they afford the ECOWAS Court the opportunity to respond to the facts alleged by the plaintiffs and the state. This final part provides alternative arguments the ECOWAS Court could have employed as a means to protect the rights of *all* Nigerian women, including Nigerian women who work in sex work.

### 5.2.1 Sex workers have the right to work

When the law criminalises sex work it fashions sex workers as criminals deserving of punishment, not as labourers deserving of rights.<sup>90</sup> The international legal framework on the right to work, provided in part 4.2 above, has as a common thread the notion that workers who are restricted from choosing their type of work and who are denied formal work protections, particularly are vulnerable to violations of their human rights. This vulnerability, as applied to women who work in sex work, is compounded in circumstances where the law and its enforcement bodies actively discriminate against women who work in sex work. The criminalisation of sex work imposes a position of vulnerability on sex workers by forcing them to operate 'underground'. Working on the fringes of society makes it very difficult for sex workers to report sexual assault or rape, to receive medical treatment and to access social services such as housing and education.<sup>91</sup> Sex workers' forced status as existing or operating beyond the protection of legal structures and systems creates an environment where state agents, such as police officers, face little to

90 Mgbako (n 15) 62.

91 Amnesty International 'Sex workers at risk: A research summary on human rights abuses against sex workers' (2016), [www.amnesty.org/download/Documents/POL4040612016ENGLISH.PDF](http://www.amnesty.org/download/Documents/POL4040612016ENGLISH.PDF) (accessed 24 April 2018).

no punishment for arbitrarily arresting, detaining and abusing sex workers.<sup>92</sup>

By criminalising sex work in its Penal Code, Nigeria is in violation of the right to work as enshrined in article 13 of the African Charter and article 13(e) of the African Women's Protocol. The criminalisation of sex work violates the right to work under equitable and satisfactory conditions as it denies sex workers the right to determine the conditions in which they work. Nigeria's Penal Code deems sex work in public places to be a crime, which forces sex workers to operate behind closed doors to escape arrest or police violence. Sex workers who are forced to hide from the state, rather than be protected by the state often have to work for pimps and in brothels in order to be 'protected'.<sup>93</sup> Additionally, the criminalisation of sex work runs counter to the international right to work provisions that require states to take active measures to reduce the number of workers operating in the informal economy as they receive no state protection.<sup>94</sup>

### 5.2.2 *Sex workers have the right to dignity*

The right to dignity is indivisible from human rights in themselves, and is at the root of all human rights conventions, norms and standards. However, when applied to sex workers the right to dignity seemingly loses weight. The South African case of *Jordan*, summarised here, exemplifies the challenge sex workers face when attempting to enjoy their rights to dignity, as well as offers the ECOWAS Court an opportunity to rectify harmful precedent.

In *Jordan & Others v The State*, a case concerned with the legality of the criminalisation of sex work, the South African Constitutional Court determined that 'the commercial exploitation of sex ... involves neither an infringement of dignity nor unfair discrimination'.<sup>95</sup> Further to this, the minority opinion held the view that 'to the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself'.<sup>96</sup> The Court's line of reasoning in relation to the dignity of sex workers was based on the premise (i) that because sex workers invite the public to engage in illegal activity in the private realm they cannot claim protection of the right to privacy;<sup>97</sup> and (ii) that

92 D Evans & R Walker 'The policing of sex work in South Africa: A research report on the human rights challenges across two South African provinces' (Sonke Gender Justice and SWEAT 2017).

93 M Wijers 'Women, labour and migration: The position of trafficked women and strategies for support' in K Kempadoo & J Doezema (eds) *Global sex workers* (1998) 73.

94 General Comment 18 (n 74).

95 *Jordan & Others v The State* 13 BHRC 203; [2002] (11) BCLR 1117 (CC) para 28.

96 *Jordan* (n 95) para 74.

97 *Jordan* para 28.

by making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money.<sup>98</sup>

The minority opinion accepted the petitioners' argument that the right to dignity is not entirely stripped away from women who engage in sex work, but that such activity 'does place her far away from the inner sanctum of protected privacy rights'.<sup>99</sup> Such a determination, that sex workers have a lowered standard of the right to dignity, runs directly contrary to the South African Constitution, which mandates that '[e]very person shall have the right to respect for and protection of his or her dignity'.<sup>100</sup> As interpreted in *Jordan* this constitutional provision appears not to apply to 'every person' after all.

In *Jordan* sex workers were deprived of their human rights because their work blurs the lines between public and private sexuality. Going further than that, women sex workers experienced limitations on their right to dignity because the Court assumed that sex workers' efforts to make money limited their ability to mother, marry and raise a family. Such thinking is based on gender stereotypes and inherently is undignified in itself.

The ECOWAS Court had an opportunity in *Njemanze* to reflect on and rectify the dangerous precedent established by the South African Constitutional Court in the *Jordan* case. Such a reflection could have drawn on research and scholarship that highlight, for instance, how sex workers who work in a criminalised context may fear accessing healthcare treatment because of a risk that they may be discriminated against, or might even be detained.<sup>101</sup> This false choice that sex workers are forced to make – between accessing their right to health or their right to not be discriminated against or to be arbitrarily arrested – is an undeniable affront to the right to dignity. Perhaps the Court could have determined that by stigmatising sex work the state relays a message to society at large that the level of dignity afforded to a woman sex worker is not equal to that of a worker in a different area of employment.<sup>102</sup>

Further, the ECOWAS Court had the opportunity to link the criminalisation of sex work in Nigeria to the right to dignity as enshrined in article 3 of the African Women's Protocol. Not only does criminalisation strip sex workers of their rights to freely develop their

98 *Jordan* para 74.

99 As above.

100 Art 10 South African Constitution.

101 World Health Organization 'Implementing comprehensive HIV/STI programmes with sex workers: Practical approaches from collaborative interventions' October 2013.

102 Commission for Gender Equality South Africa 'Position paper on sex work' 16 January 2013 12, <http://www.nswp.org/sites/nswp.org/files/Policy%20Brief%20Position%20Paper%20on%20Sex.pdf> (accessed 19 June 2018).

personality and to respect as a person, but also it directly contradicts the state obligation to 'adopt and implement appropriate measures to prohibit any exploitation or degradation of women'. The Nigerian state's criminalisation of sex work violates the rights of women who work in sex work and perpetuates the exploitation of sex workers by casting them as less deserving of rights protection.

Alongside the right to dignity and the right to work the ECOWAS Court could have analysed, among others, the right to freedom of association,<sup>103</sup> the right to health,<sup>104</sup> the right to equality before the law<sup>105</sup> and the right to be free from violence.<sup>106</sup> However, in developing an analysis of the right to dignity and the right to work, the Court would have had the opportunity directly to respond to the plaintiffs' allegations that their dignity had been violated by being called *ashawo* or 'prostitutes'. In addition, the Court would have had an opportunity to respond to the state's claim that sex work is not legitimate and, therefore, that sex workers are not protected under international human rights law. By unpacking these rights as they apply to sex workers the Court would have been able to circumvent the juxtaposition it perpetuates in the *Njemanze* judgment, that only certain women – women who operate within the realm of acceptable sexuality – have the right to dignity and the right to work.

## 6 Conclusion

The first African Women's Protocol case provides a necessary reflection point for African human rights treaty-monitoring bodies to think about how to handle women's rights litigation and develop women's rights jurisprudence. While *Njemanze* is to be celebrated for breaking down a long-standing imposition on the application of the African Women's Protocol, the judgment develops a hierarchy of women based on stereotypes about the activities women should and should not do. By avoiding the complex arguments around the criminalisation of sex work and also neglecting to incorporate an analysis of the Women's Protocol in its judgment, the ECOWAS Court, perhaps inadvertently, perpetuated stereotypes that stigmatise and harm sex workers. As a result the *Njemanze* judgment impedes rather than supports efforts to challenge the criminalisation of sex work across Africa.

In reconceptualising the ways in which the Court could have determined jurisdiction, and subsequently providing alternative approaches to examine relevant rights violations, the analysis provided in this article argues for a comprehensive and inclusive

---

103 Art 10 African Charter.

104 Art 16 African Charter; art 14 African Women's Protocol.

105 Art 3 African Charter; art 8 African Women's Protocol.

106 Arts 2 & 4 African Women's Protocol.

interpretation of women's rights protection. Courts and litigators alike have a responsibility to push the limits of what the African Women's Protocol offers in terms of women's rights. This effort requires good faith interpretations of the Protocol that serve to uplift and protect the rights of all women, not only particular types of women. The ECOWAS Court judgment analysed in the article illustrates the ease with which it is possible to develop a 'women's rights case' while simultaneously harming a group of women. As future Women's Protocol cases emerge from the African region's treaty-monitoring bodies it will be essential that actors involved in litigation reflect upon and learn lessons from the first African Women's Protocol case.

To cite: J Prinsloo 'The constitutionality of the Fee Exemption Regulations in South African schools: A critical analysis of *Michelle Saffer v Head of Department, Western Cape Education Department*' (2019) 19 *African Human Rights Law Journal* 534-556  
<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a25>

## Recent developments

# The constitutionality of the Fee Exemption Regulations in South African schools: A critical analysis of *Michelle Saffer v Head of Department, Western Cape Education Department*

Jesse Prinsloo\*

Candidate attorney, Webber Wentzel, Cape Town, South Africa  
<https://orcid.org/0000-0002-0973-3150>

## Summary

*This article examines the Western Cape High Court decision in Michelle Saffer v Head of Department, Western Cape Education Department. This case explores crucial issues prevalent in contemporary society surrounding custodial parents, who primarily are women, and confirms the nature of the burdens associated with their roles with respect to their children post-divorce. The article argues that section 40(1) of the South African Schools Act and Regulation 6(2) of the Fee Exemption Regulations infringe the dignity of custodial parents and indirectly preclude the children of divorced parents from realising their right to education. It further asserts that Le Grange J failed to take sufficient account of the underlying inequitable gender power dynamic that exists between custodial parents and non-custodial parents, and that the Fee Exemption Regulations place an unnecessary and discriminatory burden on custodial mothers who no longer are married. For this reason, section 40(1) of the Schools Act and Regulation 6(2) are shown to be unconstitutional and therefore invalid to the extent of its unconstitutionality.*

---

\* LLB (Cape Town); [Jesse.Prinsloo@webberwentzel.com](mailto:Jesse.Prinsloo@webberwentzel.com)



**Key words:** *custodial mothers; South African Schools Act; discrimination; unconstitutionality*

## 1 Introduction

The right to education is entrenched in the South African Constitution in section 29(1), and is given effect to by the South African Schools Act (Schools Act).<sup>1</sup> Distinct from other socio-economic rights, the realisation of the right to basic education is immediately achievable and is not subject to any internal limitation demanding that the right be 'progressively realised', or subject to 'available resources'.<sup>2</sup> The Constitutional Court has highlighted that education not only is a human right but is an essential agent that contributes to the fulfilment of other human rights by supporting the elevation of individuals out of poverty and permitting them to contribute to their community.<sup>3</sup> This goal is confirmed in the Preamble of the Schools Act, which emphasises the importance of transforming South African schools, redressing past injustices established by the apartheid education system and achieving an environment that promotes the values of the Constitution.

The first part of the article establishes the facts in the Western Cape High Court case of *Michelle Saffer v Head of Department, Western Cape Education Department*.<sup>4</sup> Part 2 considers the position that custodial mothers find themselves in post-divorce relative to their former husbands. Part 2 is imperative to the article as it establishes the context of this analysis. It frames the lenses through which the reader should heed and criticise the prevailing legislation. This context will help the reader to understand the obstacles pertaining to the prevailing enactment. Part 3 then considers section 40(1) of the Schools Act, and Regulation 6(2) of the Fee Exemption Regulations,<sup>5</sup> where I examine whether either takes into consideration the position of custodial mothers post-divorce. Therefore, it is the constitutionality determination section. In part 4 I argue that in terms of section 40(1) of the Schools Act, when it comes to all divorced or separated biological parents sharing joint liability over children who are attending state schools, the court should recognise that this section should be consistent with the rules surrounding the common law duty of support whereby a parent owes a duty of support, *pro rata*,

---

1 Act 84 of 1996.

2 *Governing Body of Juma Musjid Primary School & Others v Essay NO & Others (Centre for Child Law & Another as Amicus Curiae)* 2011 (8) BCLR 761 (CC) [2011] ZACC 13 para 37.

3 *Governing Body of Juma Musjid Primary School* (n 2) para 37.

4 *Michelle Saffer v Head of Department, Western Cape Education Department & Others* (Case 18775/13).

5 Regulations relating to the exemption of parents from the payment of school fees in public schools, promulgated in GN 1052 of Government Gazette 29311 of 18 October 2006 (Regulations).

according to his or her means. This requirement is vital considering the financial disadvantages that women face after their divorce. Part 5 determines whether section 40(1) of the Schools Act and Regulation 6(2) indirectly limit the right to education of the child of divorced parents, by allowing schools to deny him or her a place when the custodial parent does not furnish it with the necessary information. I conclude by suggesting an appropriate remedy that the court could apply on appeal. It should be emphasised that this article is limited to heterosexual relationships.<sup>6</sup>

It should be recognised that since the time of writing the Supreme Court of Appeal in *Head of Department: Western Cape Education Department & Another v S*<sup>7</sup> overturned the Western Cape High Court's decision by providing practical solutions to the issues discussed below by applying legitimate interpretative aids to the impugned legislation, leaving it constitutionally compliant in terms of achieving gender equality. Nevertheless, the article remains relevant despite the Supreme Court of Appeal's judgment as it speaks to important constitutional and jurisprudential issues facing single mothers in society because of the impugned legislation that were not addressed by the Supreme Court in its judgment and were left open for further discussion in the Western Cape High Court decision. Therefore, the article should be read solely within the context of the Western Cape High Court decision, where these issues were addressed in depth and where they were not resolved as they should have been.

## 2 Facts of the case

The applicant, Michelle Saffer, the divorced biological mother and custodial parent of ZG, was a reporter for a local community newspaper. As a source of income, Ms Saffer received an annual salary from her employment and maintenance payments from her ex-husband, MG. In 1999 Ms Saffer and MG drew up a divorce consent paper which dealt with the proprietary rights, including maintenance, and the liability of both parents regarding school fees. MG was liable to pay 50 per cent of ZG's school fees, school uniforms, tuition costs, books, stationary, equipment and extramural costs reasonably incurred. In 2010 an amendment was made to their agreement regarding parental rights and obligations towards ZG, with both parents consenting to the addition of an addendum to the original consent paper. Among other things it was agreed that Ms Saffer would 'furnish MG with copies of ZG's school reports and any

---

6 The resources used in this article addressed important issues concerning heterosexual relationships. Therefore, the article will be limited to heterosexual relationships.

7 *Head of Department: Western Cape Education Department & Another v S (Women's Legal Centre as Amicus Curiae)* (1209/2016) [2017] ZASCA 187 (13 December 2017).

corresponding documentation received by her which relates to ZG's progress at school or any problems that she may be experiencing'.<sup>8</sup>

Ms Saffer could not afford the school fees at her daughter's school and expressed the desire to apply for an exemption. However, difficulties arose at the point where the exemption form required both parents to complete it on the last page. Ms Saffer contested that as a custodial parent receiving maintenance from MG and, given her difficult history with him, it was unreasonable of the school to expect her to acquire that information from him. Ms Saffer requested that her financial position be considered separately from that of MG. The school responded to Ms Saffer's application stating that the gross income of both biological parents must be considered when applying for financial assistance, according to section 40(1) of the Act and Regulation 6(2), read together with the definition of the phrase 'combined annual gross income of parents' in Regulation 1. Section 40(1) of the Act provides that '[a] parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act'. The school reiterated that to process the application the school governing body (SGB) required MG to provide the school with his income information. Only once the information from both parents was received would the school consider her application.

Ms Saffer responded by saying that the school's failure to provide her with conditional exemption was an unsympathetic disregard of her financial position as the sole breadwinner in her family and that the cooperation of MG was beyond her control. The school failed to process her application and stated that from the information they possessed of their income as a family unit Ms Saffer was not entitled to an exemption. Ms Saffer then responded by saying that she was not a 'family unit' with her daughter's biological father; the two lived separate lives and the school could not demand the completion of a joint exemption application. Ms Saffer felt deeply offended and humiliated. The school threatened legal action against Ms Saffer for outstanding school fees, and Ms Saffer later received a letter of demand and then a summons to appear in court. Ms Saffer then applied for an exemption again, which was rejected.

Ms Saffer then appealed to the Head of Department. The matter was considered and her appeal in respect of the 2012 school fees was upheld. In May 2013, however, Ms Saffer received another letter of demand from the school in respect of the 2013 school fees due to her failure to qualify for an exemption. Ms Saffer appealed to the Head of Department against the school's failure to grant her a fee exemption for the 2013 school year. After consideration of Ms Saffer's appeal by the Head of Department the school was requested to consider her fee exemption application and to advise accordingly of its decision. The school again refused to consider and make a decision on her

---

8 *Saffer* (n 4) para 16.

application based on the financial information of only one parent. The Head of Department averred that in the absence of a decision by the school it could not exercise its powers as an appeal body.

In September 2013 Ms Saffer's attorneys demanded that the SGB make a decision on her exemption application within 14 days. That same month Ms Saffer received a letter of demand from the school's attorney for arrears school and related fees for 2013. In that same month the Chairperson of the SGB informed Ms Saffer that her application for an exemption had been declined.

On 13 September Ms Saffer's attorneys addressed a letter to the Head of Department in respect of her appeal. The Head of Department accordingly was requested to decide Ms Saffer's appeal. The Head of Department replied to Ms Saffer's attorneys that her right to appeal in terms of the Act had been forfeited as she had failed to institute the appeal within the prescribed period of 30 days after receipt of the SGB's notices of its decision dated 16 July 2013. The Head of Department also stated that since the governing body had instituted legal proceedings against her the Department could not intervene in the matter.

### **3 Background to the position of custodial mothers in society post-divorce**

The material shows that upon the breakdown of a marriage or similar relationship almost always it is mothers who become the custodial parent and have to care for the children. This situation places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched.<sup>9</sup>

The greatest asset of numerous middle or working class couples is not property but the earning capacity of the spouses.<sup>10</sup> This asset consists of professional qualifications, promotions, pensions and retirement and medical benefits.<sup>11</sup> In circumstances during the marriage where mothers bear the burden of primary care of the children, fathers are able to be both model workers and parents. Mothers normally construct their careers to accommodate the needs of their children and the careers of their husbands by doing part-time or comparatively non-burdensome work. This pattern involves the

---

9 *Bannatyne v Bannatyne* 2003 (2) BCLR 111 (CC).

10 E Bonthuys 'Labours of love: Child custody and the division of matrimonial property at divorce' (2001) 64 *Journal of Contemporary Roman-Dutch Law* 192 at 199.

11 Bonthuys (n 10) 199.

refusal to work overtime or opting for jobs that are well-suited to family life.<sup>12</sup> Inevitably, this situation becomes problematic at the time of the marital breakdown. Families headed by a female custodial parent are driven to radically downgrade their standard of living and many find themselves sinking into poverty.<sup>13</sup>

The courts have recognised this reality and appear to be sympathetic to the predicament of the wife. Evidence in support of this premise is discernible in *Kooverjee v Kooverjee*<sup>14</sup> where, after the divorce, the father of the children maintained a stable income and lavish property, displaying no signs of financial difficulty.<sup>15</sup> The mother, on the other hand, had an income that was insufficient. She became the custodial parent, and in her testimony it was admitted that she was not able to devote sufficient time to her business to make it more profitable while she bore the primary responsibility of her two children. She could work only part-time. The Court granted her the remedy of spousal maintenance. In *Beaumont*<sup>16</sup> the court *a quo* described the wife as having directly and indirectly contributed to the maintenance and increase of her ex-husband's estate by assisting him in almost every part of his life. The Court acknowledged that the disparity between her and her ex-husband's estate was 'in no small measure due to the contribution made by the defendant to the maintenance and increase in the plaintiff's estate'.<sup>17</sup> Again, the Court provided a suitable remedy to address those circumstances. Further recognition of the existing inequality during and after marriage was provided by O'Regan J in *President of the Republic of South Africa and Another v Hugo*.<sup>18</sup>

There is no doubt that the goal of equality entrenched in our Constitution would be better served if the responsibilities for child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact.

The attitude of many non-custodial parents who are liable for the payment of maintenance causes them to evade their obligations to their dependants, particularly in circumstances where children are

12 Bonthuys 195.

13 DG Stewart 'Single custodial females and their families: Housing and coping strategies after divorce' (1991) 5 *International Journal of Law, Policy and the Family* 297.

14 2006 (6) SA 127 (C) (*Kooverjee*).

15 *Kooverjee* (n 14) para 11.1.1.

16 *Beaumont v Beaumont* 1985 (4) SA 171 (W) paras 177D-G.

17 *Beaumont* (n 16) paras 178I-J.

18 (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) para 113.

being raised in single-parent households.<sup>19</sup> A prevalent explanation for this attitude is that they believe that the custodial parent wastes the maintenance money she receives and squanders it on herself instead of their children.<sup>20</sup> However, the malice does not stop there. The burden placed on mothers to approach the court in times when the non-custodial parent defaults on his maintenance payments has a detrimental impact on the dignity of the custodial parent.

In circumstances where the father is in arrears the option of attachment of the property for the purpose of securing payment of maintenance is available. Despite this remedy, the assets are sometimes spitefully disposed of by the defaulter to frustrate the maintenance court proceedings.<sup>21</sup> Furthermore, the difficulty of tracing the defaulter in circumstances where he lives in a rural area or township remains a reality. Even if he is found and confronted by a policeman the defaulter can claim that he is not the person described on the subpoena or inform those who live with him to deny that he lives there.<sup>22</sup> At times defaulters change their jobs to avoid garnishee orders because each order must be presented to his current employer. Once this happens the burden is placed back on the custodial mother to begin again the entire process of approaching the court.<sup>23</sup> This account is an indication of the intractable nature of the relationship that exists between custodial mothers and their ex-husbands.

Custodial mothers not only lack the resources to care for their children after their divorce but they are also confronted with a reluctance on the part of their ex-husbands to engage with them or contribute financially for the benefit of their children. As a result of the demotion of the non-custodial parent to a secondary role in the lives of their children, these parents, mostly fathers, can withdraw from the lives of their children after the divorce to the point where contact is lost completely.<sup>24</sup> This breakdown could be due to a feeling of resentment because of their value being limited to the payment of child support and allocated times for 'visitation'.<sup>25</sup> Inevitably, this inaction by the non-custodial parent then leaves the custodial mother in a disadvantageous position where the care of the children is her primary responsibility with little or no support being offered by her ex-husband.

---

19 M de Jong 'Ten-year anniversary of the Maintenance Act 99 of 1998: A time to reflect on improvements, shortcomings and the way forward' (2009) 126 *South African Law Journal* 14.

20 As above.

21 Bannatyne (n 9) 4.

22 S Burman & S Berger 'When family support fails: The problems of maintenance payments in apartheid South Africa: Part 1' (1988) 4 *South African Journal on Human Rights* 201.

23 Burman & Berger (n 22) 205.

24 DD Meyer 'The constitutional rights of non-custodial parents' (2006) 34 *Hofstra Law Review* 1469.

25 As above.

## 4 Constitutionality of section 40(1) and Regulation 6(2)

The applicant in *Saffer* sought a declaration that section 40(1) of the Schools Act and Regulation 6(2), read together with the definition of the phrase 'combined annual gross income of parents' in Regulation 1 of the Fee Exemption Regulations, are inconsistent with the Constitution and invalid and infringe her right to equal protection and benefit of the law as well as her right to dignity.

Section 172(1)(a) of the Constitution provides that when deciding a constitutional matter within its power a court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency'.<sup>26</sup> Simply stated, given the importance of the rule of law, a court is obliged, once it has determined that a provision of a statute is unconstitutional, to declare that provision to be invalid to the extent of its inconsistency with the Constitution.<sup>27</sup>

Section 40(1) and Regulation 6(2), read together with the definition of the phrase 'combined annual gross income of both parents' in Regulation 1, generate practical difficulties for custodial mothers who no longer are married, and who no longer have an amicable relationship with their former spouses, yet are burdened with the duty to pay school fees for their children. The Fee Exemption Regulations contains an established formula for evaluating whether an applicant is eligible for a partial or total exemption when it comes to the payment of school fees.<sup>28</sup> To be considered for an exemption, the combined annual gross income of both parents must be furnished to the school. There would be no setback when applying for an exemption in circumstances where both parents of the child are still married or living in the same household. However, in circumstances where the parents are divorced or separated and there has been a breakdown in the relationship to the extent that the desire of the non-custodial parent to communicate and co-operate is non-existent, this prerequisite places the custodial mother in a burdensome and prejudicial position where she is still required to access the information pertaining to her former spouse's financial position. Inevitably, this requirement has a degrading and humiliating effect. As shown above, the reality that many custodial mothers are confronted with does not consist of the happy ending envisaged by the Constitution. Many non-custodial fathers are uncooperative, vindictive

26 P de Vos & W Freedman (eds) *South African constitutional law in context* (2014) 393.

27 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) 17.

28 In terms of Regulations 6(4) and 6(6), a partial exemption ranging between 7% and 97% is granted to the parents if the learner's school fees plus any additional monetary contributions to be paid to the school are 3,5% or more, but less than 10% of the combined annual gross income of the learner's parents.

and at times malicious in their attitudes and actions. Despite this reality section 40(1) and Regulation 6(2) compel custodial mothers to depend on their ex-husbands regardless of the degrading and humiliating outcome.

Le Grange J defended Regulation 6(2) by asserting that the phrase 'combined annual gross income of parents' is in the best interests of the child.<sup>29</sup> According to the Court, it encourages both parents to comply with their legal duty to support their children, thus rendering the differentiation established between persons who are single or divorced and those who share a joint household rationally connected to a legitimate government purpose.<sup>30</sup> Le Grange J referred to *Fish Hoek Primary School v GW*,<sup>31</sup> in which it was emphasised that both parents are liable to pay the school fees of their children and that this liability promotes the achievement of gender equality.<sup>32</sup> However, this reasoning is problematic and the manner and relevance in which this precedent was used is incognisant and immaterial to the burdensome reality facing many South African custodial mothers. The Court failed to recognise that despite the existence of liability or a duty of support many non-custodial parents do not fulfil this duty. In circumstances where the non-custodial father withdraws from the life of the child and fails to comply with his common law duty of support Regulation 6(2) attempts to encourage compliance with this duty, but in actuality will fail dismally. Failing to recognise this reality has the potential to harm the custodial parent and child when no exemption is granted. Furthermore, section 305(4) of the Children's Act<sup>33</sup> already provides an incentive for a parent to support their child by postulating the consequence of a parent being guilty of an offence in circumstances where they do not maintain their child. In cases where this provision is contravened section 305(6) of the same Act imposes a fine or imprisonment for a period not exceeding ten years. The fear of receiving a fine or potential imprisonment encourages the non-custodial parent to support his child. Consequently, the impugned legislation cannot be considered to be rationally connected to the legitimate government purpose of having both parents take financial responsibility in the life of the child. In *Fish Hoek* the Court held:<sup>34</sup>

Historically mothers have been the primary care-givers of children in this country. That continues to be so. It is almost always mothers who become custodial parents and have to care for children on the breakdown of marriage or other significant relationships. That places an additional financial burden on them and the sad reality is that they then become overburdened in terms of responsibilities and under-resourced in terms of means.

---

29 *Saffer* (n 4) para 115.

30 As above.

31 2010 (2) SA 141 (SCA).

32 *Fish Hoek Primary School* (n 31) para 14.

33 Act 38 of 2005.

34 *Fish Hoek Primary School* (n 31) para 13.



The Court in *Bestuursligaam van Gene Louw Laerskool v JD Roodtman*<sup>35</sup> confirmed, and unfortunately reinforced, the reality that the burden to pay school fees rests on the custodial mother regardless of the non-custodial father's common law duty of support. Counsel for the non-custodial father proposed, and the Court concurred, that a non-custodial father did not fall within the definition of 'a parent' for the purposes of suing a parent for arrear school fees. Rather, the Court said that the obligation to pay school fees rested on the custodial parent, which in this instance was the mother of the learner.<sup>36</sup> In the end, considering that custodial mothers are more likely to bear the burden of paying schools fees while the father of the child abdicates responsibility, it palpably is unfair to consider the income of both parents as if they were a 'family unit'. In reality this consideration reduces the custodial mother's chance of receiving an exemption when the father of the child is unsupportive.

As far as the dignity-based challenge was concerned Le Grange J rejected the applicant's contention that the burden placed on her to acquire the necessary information from her ex-husband was an infringement of her dignity.<sup>37</sup> The Court's reason for this was that in 2010 the applicant consented that paragraph 1 of the original consent paper be substituted with an extensive recordal of the co-parental responsibilities and rights of both parents regarding ZG. In this addendum both parents agreed to remain involved in all aspects of ZG's life.<sup>38</sup> It was further agreed between the parties that MS would 'furnish MG with copies of ZG's school reports and correspondence or documentation received by her which relates to ZG's progress at school or any problems that she may be experiencing'.<sup>39</sup> Le Grange J asserted that because MS agreed that she was under a legal obligation to forward school correspondence relating to ZG to MG and because she accepted to remain co-holder of the parental responsibilities the contention made by her that her dignity had been infringed and that she felt deeply offended because of the burden placed on her to communicate with her ex-husband and acquire his financial information consequently was unsound.<sup>40</sup> Essentially, the Court questioned the genuineness of her claim on the basis that the applicant was comfortable enough at the time to agree to an amendment which ensured the potential for further communication between herself and her ex-husband.

---

35 [2003] 2 All SA 87 (C).

36 *Bestuursligaam van Gene Louw Laerskool* (n 35) 26.

37 *Saffer* (n 4) para 116.

38 *Saffer* para 118.

39 As above.

40 *Saffer* (n 4) para 120.

The right to dignity ultimately is entrenched in section 10 of the South African Constitution<sup>41</sup> and is believed to be an essential value fortifying our constitutional scheme.<sup>42</sup> In *Dawood* it was established that dignity could be considered not only a 'value' fundamental to our Constitution but is also a justiciable and enforceable right that must be revered and safeguarded.<sup>43</sup> In *Makwanyane* O'Regan J stated that 'recognising a right to life and dignity is an acknowledgment of the intrinsic worth of human beings: Human beings are entitled to be treated as worthy of respect and concern.'<sup>44</sup> The right therefore implies that there is an expectation to be protected from conditions or treatment that offend an individual's sense of his or her worth in society.<sup>45</sup> Specifically, treatment that is abusive, degrading, humiliating or demeaning is a violation of this right.<sup>46</sup> Khampepe J declared certain provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>47</sup> relating to the criminalisation of consensual sexual conduct with children of a certain age invalid due to this criminalisation of consensual sexual conduct being a form of stigmatisation which was degrading and invasive.<sup>48</sup> The human dignity of adolescents targeted by the impugned provisions clearly was infringed. In *S v Williams*<sup>49</sup> Langa J declared section 294 of the Criminal Procedure Act, which dealt with the sentence of juvenile whipping, invalid due to the cruel, inhuman and degrading treatment experienced by the accused. In *Khumalo*<sup>50</sup> it was mentioned that an individual's dignity comprises not only how he or she values or regards him or herself but also includes how others value or regard him or her.

As discussed in part 3 of this article non-custodial fathers can be malicious and vindictive when confronted by the custodial mother post-divorce. One must not look at the circumstances surrounding Ms Saffer in isolation when making a decision on the constitutionality of the provision in question. Instead, it is appropriate to take into consideration the struggles faced by women in society as whole as this provision has the potential to affect many others. In a society where a woman's bargaining power is suppressed or overpowered through violence, intimidation or humiliating treatment by her male counterpart it should be the objective of society to protect those women from such incidences, and not subject them to such treatment. Where domestic violence is the cause of divorce one might

---

41 Constitution of the Republic of South Africa, 1996.

42 *Dawood* (n 27) para 34.

43 *Dawood* para 35.

44 *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.

45 De Vos & Freedman (n 26) 457.

46 As above.

47 Act 32 of 2007 (Sexual Offences Act).

48 *Teddy Bear Clinic for Abused Children & Another v Minister of Justice* 2013 (12) BCLR 1429 (CC) para 55.

49 1995 (7) BCLR 861 (CC) (9 June 1995).

50 *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) para 27.

assume that leaving the abusive male partner will increase a woman's safety. This is not always the case. In many cases, intimate partner violence does not end at divorce.<sup>51</sup> In fact, abuse often worsens post-separation. In some cases, intimate partner violence-perpetrating non-custodial fathers use custody and parenting time arrangements to abuse mothers and/or children.<sup>52</sup> Even in cases where domestic violence is not the cause of the divorce a simple breakdown of the marriage can result in a non-custodial mother being vulnerable to malicious and vindictive attitudes from the non-custodial father. In *Rosen v Hvenge*<sup>53</sup> the relationship between the custodial mother and non-custodial father had broken down to such an extent that the non-custodial father frustrated the joint decision-making process as co-guardian when he refused to be co-operative when it came to an application for a passport for their minor child to travel to Mauritius on holiday. The non-custodial father also wrote letters to the minor child purposefully describing the custodial mother in uncomplimentary terms and belittled her in the eyes of their minor child.<sup>54</sup> This case is relevant as it speaks to the negative consequences of divorce and the risk that women face when they are confronted by their ex-husbands. Ultimately, exposing any mother to this type of humiliating treatment would amount to an infringement of her dignity.

Inevitably, conflict and turmoil are the consequence of many broken-down relationships. Often the conflict generated by the breakdown of the marital relationship spills over into the parenting relationship.<sup>55</sup> Placing a woman in a situation where she is forced to confront somebody who is abusive undermines her need to be treated with respect. There can be no doubt that the existence of a statutory provision which ignores this fact and places a burden on a custodial mother, in this particular case Ms Saffer, to retrieve the financial information from the non-custodial father in circumstances where the relationship has irretrievably broken down and where there is a risk that she might suffer from abusive, degrading, humiliating or demeaning treatment at the hands of the non-custodial father inescapably leaves her vulnerable to having her right to dignity infringed. Furthermore, Ms Saffer is the sole breadwinner in her family. She receives maintenance from MG as both bear a common law and statutory obligation to support their daughter. However, that is the extent of their relationship. MG's willingness to cooperate with her is beyond her control. Despite Ms Saffer's need to be independent of her ex-husband and her desire to move on and forge a new

---

51 AM Zeoli & EA Rivera 'Post-separation abuse of women and their children: Boundary-setting and family court utilisation among victimised mothers' (2013) 28 *Journal of Family Violence* 3.

52 As above.

53 [2006] 4 All SA 199 (CC) (*Rosen*) para 34.

54 *Rosen* (n 53) para 20.3.

55 *TC v SC* (20286/2017) [2018] ZAWCHC 46 para 2.

autonomous path in life, this obligation treats ex-spouses as a 'family unit' binding them together in an unwanted relationship where ex-spouses must be dependent on each other's cooperation. Therefore, it can be degrading for both individuals on each occasion where a person's individuality and personal liberty are limited beyond the duty to support the child.

The difficulty with the Court's reasoning in this instance is that it failed to determine the constitutionality of Regulation 6(2) due to the existence of a prior agreement between the applicant and her ex-husband. The agreement should not have taken precedence over the discussion of the constitutional issue at hand. The Court failed to take into consideration the dissimilarity between the impersonal relationship established between the parents by the agreement, which as its main purpose links each parent to the wellbeing of their child, and the insuperable criterion established by Regulation 6(2), which requires the custodial parent to exit a space where she feels safe and communicate further with the non-custodial parent, opening up the possibility of abuse. The agreement is impersonal in the sense that furnishing your ex-husband with copies of school reports and any correspondence or documentation does not require the mother to see or communicate extensively with her ex-husband. This communication or correspondence can take place through media such as e-mail or any other intermediary device. The Court in this instance should have looked more broadly at the effect of Regulation 6(2) on the South African community and questioned whether the burden placed on a custodial mother in circumstances where there is no amicable relationship between the parents of the child has the potential to infringe her dignity. As argued above, this potential does exist.

To further determine whether a legislative provision which differentiates between people on a listed ground amounts to unfair discrimination, section 9(3) of the Constitution must be examined. According to *Harksen v Lane*,<sup>56</sup> to determine whether a differentiation amounts to unfair discrimination in terms of section 9(3) a two-stage analysis must be observed. First, it must be determined whether the differentiation amounts to discrimination and, second, if it does, it must then be determined whether the discrimination amounts to unfair discrimination.<sup>57</sup> In terms of section 9(5) of the Constitution discrimination on one or more of the grounds listed in subsection (3) is unfair, lest it can be established that the discrimination is fair.<sup>58</sup>

To determine whether a differentiation amounts to discrimination section 9(3) of the Constitution sets out 16 prohibited grounds of discrimination. If a legislative provision differentiates against an individual or group based on one of these grounds, this differentiation

---

56 *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC).

57 *De Vos & Freedman* (n 26) 444.

58 As above.

will amount to discrimination. The determination of whether a differentiation has occurred on a listed ground must be made objectively. In this case indirect discrimination takes place. Indirect discrimination takes place when certain requirements, conditions or practices, while appearing neutral, actually have an effect or result that is unequal or that disproportionately affects a group defined in terms of a listed or analogous ground.<sup>59</sup> As discussed above, section 40(1) of the Schools Act and Regulation 6(2), read together with the definition of the phrase 'combined annual gross income of parents' in Regulation 1 of the Fee Exemption Regulations, do differentiate between individuals on the specified ground of gender due to it indirectly and disproportionately affecting custodial mothers. Therefore, because there is a distinction based on one of the 16 listed grounds there is an assumption that this differentiation amounts to discrimination.<sup>60</sup>

In order to determine whether the discrimination is fair or not, different factors must be considered. According to *Harksen*<sup>61</sup> these factors include (a) the position of the complainants in society: whether they have suffered in the past from patterns of disadvantage; whether the discrimination in the case under consideration is on a specified ground or not; (b) the nature of the provision or the purpose sought to be achieved by it; and (c) any other relevant factors: whether the discrimination has affected the rights of the complainants; whether it has led to an impairment of human dignity, or an impairment of a comparably serious nature.

In terms of criterion (a) the discrimination under consideration is on a listed ground. Mokgoro J recognised in *Bannatyne* that it is almost always mothers who become the custodial parent upon the breakdown of the marriage and that divorced or separated mothers are often faced with the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means.<sup>62</sup> Fathers, rather, remain actively employed and generally become economically enriched. These disparities undermine the achievement of gender equality which is a founding value of the Constitution.<sup>63</sup> In *Volks NO v Robinson*,<sup>64</sup> Skweyiya J acknowledged that structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries. Many women become economically dependent on men and are left destitute and suffer hardships upon the death of their male partners.<sup>65</sup> Traditionally, the consequences of cohabitation relationships are that women are taken advantage of and the essential

---

59 De Vos & Freedman (n 26) 448.

60 De Vos & Freedman 444.

61 *Harksen* (n 56) para 44.

62 *Bannatyne* (n 8) para 29.

63 *Bannatyne* para 30.

64 *Volks NO v Robinson & Others* 2005 5 BCLR 446 (CC)

65 *Volks* (n 64) para 63.

contributions by women to a joint household through labour and emotional support are not compensated for.<sup>66</sup> Ultimately, the courts have recognised that mothers and women in general remain less powerful and vulnerable in their relationships and in society and often become worse off when families break down. In terms of criterion (b) Le Grange J mentions that the purpose of the provision is to encourage both parents, post-divorce, to comply with their legal duty to support their children. However, as discussed above, this reasoning is incognisant of the burdensome reality facing many South African custodial mothers. Despite the existence of a duty of support, many non-custodial parents do not fulfil this duty.

Furthermore, in terms of *Pillay*<sup>67</sup> it was stated that according to the principle of reasonable accommodation, 'failing to take steps to reasonably accommodate the needs' of individuals on the foundation of race, gender or disability will amount to unfair discrimination.<sup>68</sup> At the core of this principle is the understanding that an authoritative body must take positive steps, and perhaps encounter further hardship or expense, in order to permit all individuals to participate and appreciate their rights equally, without being pushed to the margins of society. To accommodate custodial mothers, despite the effort, steps must be taken by the legislature to amend section 40(1) of the Schools Act and Regulation 6(2), to ensure that this provision reflects the values of dignity and equality in our society. Ultimately, it is the duty of the legislature, which has the means to deliberate different possibilities and to make its decision.<sup>69</sup> Finally, in terms of criterion (c), as discussed above, the exemption scheme violates the dignity of women by effectively excluding them from obtaining fee exemptions in the absence of the non-custodial parent's financial information. In conclusion, it is clear that section 40(1) of the Schools Act and Regulation 6(2) amount to unfair discrimination in terms of section 9(3) of the Constitution.

## 5 Liability (joint or joint and several) of all divorced or separated biological parents

The Court faced a critical issue as to whether section 40(1) with respect to divorced or separated biological parents should be interpreted as imposing joint liability rather than joint and several liability for the payment of the school fees where their children are attending state schools.<sup>70</sup> Joint liability, or *pro rata* liability, is the liability of each co-contractor to pay his or her proportionate share of

66 *Volks* para 64.

67 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).

68 *Pillay* (n 67) para 71.

69 *Prince v President of the Law Society, Cape of Good Hope & Others* 2002 (2) SA 794 (CC) para 84.

70 *Saffer* (n 4) para 88.

a debt.<sup>71</sup> Joint and several liability, or liability *in solidum*, is the liability pertaining to each co-contractor to make the complete performance of the obligation himself. The creditor would then need to claim the whole amount of the debt from any of the co-debtors.<sup>72</sup> Once that takes place the creditor's rights of recovery are ceded to the co-debtor who has performed. The latter then has the right to claim his proportionate share of the debt from the other co-debtors.<sup>73</sup> Counsel for the applicant argued that a strong presumption existed for an interpretation in favour of joint liability and that if section 40(1) were to be interpreted as imposing joint and several liability on divorced or separated persons, it would continue to regard them as a 'household unit', thus infringing their rights to dignity and equal protection of the law.<sup>74</sup> Contrary to this, the respondents asserted, among other things, that joint and several liability applied and that if one parent pays or is compelled to pay the full amount of the school fees, then that parent has a common law right of recourse against the other parent.<sup>75</sup>

Among other cases, the Court referred to prominent decisions of both the Constitutional Court (the *Bannatyne* case)<sup>76</sup> and the Supreme Court of Appeal (the *F v F* case)<sup>77</sup> on the duty of the courts to recognise the burden placed on custodial parents to care for their children and that courts should be aware of the possibility that a difference in treatment between custodial parents and their non-custodial counterparts potentially can and does constitute unfair gender discrimination.<sup>78</sup> In his deliberation of the issue surrounding the intention of the legislature Le Grange J referred to *Bhyat v Commissioner for Immigration*,<sup>79</sup> where it was stated that when attempting to determine the intention of the legislature when construing an Act of Parliament 'the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the legislator could have intended'.

Section 39(2) of the Constitution states that when interpreting any legislation, and when developing the common law or customary law every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Single-parent households are more likely to suffer financial difficulties than households that have both parents

---

71 JTR Gibson *South African mercantile and company law* (2003) 80.

72 Gibson (n 71) 81.

73 *Gerber v Wolson* 1955 (1) SA 158 (A).

74 *Saffer* (n 4) para 91.

75 *Saffer* 93.

76 *Bannatyne* (n 8) para 29.

77 *F v F* 2006 (3) SA 42 (SCA) para 12.

78 *Saffer* (n 4) para 101.

79 1932 AD 125 at 129.

present.<sup>80</sup> In terms of the emotional impact this has, single parents are more likely to be under greater stress and have significantly greater anxiety as a result of earning less, but having a greater responsibility than their non-custodial counterparts.<sup>81</sup> Furthermore, single mothers typically earn less than their male counterparts. The law does account for and address these issues by promoting a *pro rata* duty of support. Where a child has two parents, the parents share the duty of support *pro rata* according to their means.<sup>82</sup> *Pro rata* denotes proportional – the parent who earns more (or possesses more means in other things) is obligated to furnish more child support than the other parent.<sup>83</sup> The scope and content of the duty of support is different for all children; it depends on the standard of living of the child's family. The cost surrounding education has been held to be included in the duty of support.<sup>84</sup>

Le Grange J correctly asserts that to interpret section 40(1) as imposing joint and several liability would be detrimental to custodial mothers and it is in the best interests of the child that the liability of a parent to pay school fees must be regarded as joint liability. More specifically, this assertion refers to liability to the school, and not the liability for school fees between parents.<sup>85</sup> To not do this would unnecessarily burden the mother to furnish the school with money she does not possess, and then claim from the non-custodial parent who has an uncooperative attitude. This position has the potential to significantly harm the custodial parent. To address the disparity in earning capacities between custodial and non-custodial parents each parent should be liable to the school according to his or her means. In circumstances where the non-custodial father earns more his duty to furnish the school with fees would be greater, thus placing a greater but separate burden on him. This argument is in line with the transformative notion of substantive equality as determined by section 9(3) of the Constitution.<sup>86</sup> However, this situation did not apply in the judgment due to the agreement established at the time of the divorce between Ms Saffer and MG, equally dividing their responsibility to ZG.

## 6 A child's right to education

Section 28(2) of the Constitution provides that a 'child's best interests are of paramount importance in every matter concerning the child'. Section 9 of the Children's Act provides that '[i]n all matters

---

80 J Barone 'How the law fails single mothers' (2016) Law School Student Scholarship Paper 763 6, [http://scholarship.shu.edu/student\\_scholarship/763](http://scholarship.shu.edu/student_scholarship/763) (accessed 22 April 2019).

81 As above.

82 A Barratt & W Domingo *Law of persons and family* (2012) 191.

83 As above.

84 *Mentz v Simpson* 1990 (4) SA 455 (A).

85 *Saffer* (n 4) 32.

86 *De Vos & Freedman* (n 26) 422.



concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance must be applied'. As determined in *Minister of Welfare and Population Development v Fitzpatrick*,<sup>87</sup> it is essential that this standard should remain flexible as individual circumstances will establish which factors capture the best interests of a particular child.<sup>88</sup>

The South African education system is confronted with numerous obstinate difficulties.<sup>89</sup> An unassailable education system is fundamental to the advancement of the proficiencies of individuals and for the comprehensive advancement of society overall.<sup>90</sup> On the contrary, an inadequate education system limits the development of human personality and the individual's sense of dignity.<sup>91</sup> It debilitates the potential for democratic participation and unbiased social and economic transformation.<sup>92</sup> Contemplating South Africa's former education system, former Deputy Chief Justice Moseneke held:<sup>93</sup>

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequality are still with us.

In the constitutional era the right to basic education imposes both a positive and a negative obligation on the state to provide for education. In terms of this positive obligation the state is expected to take effective measures to guarantee that every child has access to educational facilities and that every child profits from their right to education.<sup>94</sup> Conversely, this negative obligation imposes a duty on the state and its outfits not to obstruct a child's access to education.<sup>95</sup> Yet, the burden derived from section 40(1) of the Schools Act and Regulation 6(2) has the ability indirectly to limit or infringe a child's right to education. In instances where a custodial mother does not qualify for an exemption due to her inability to furnish the school with the combined annual gross income of both parents the child suffers

---

87 2000 (3) SA 422 (CC) (*Fitzpatrick*).

88 *Fitzpatrick* (n 87) para 18.

89 Y van Leeve 'Mobilising the right to a basic education in South Africa: What has the law achieved so far?' (2014) *Equal Education* 1.

90 As above.

91 As above.

92 As above.

93 *Head of Department: Mpumalanga Department of Education & Another v Hoerskool Ermelo & 2 Others* [2009] ZACC 32.

94 C Churr 'Realisation of a child's right to a basic education in the South African school system: Some lessons from Germany' (2015) 18 *Potchefstroom Electronic Law Journal* 2413.

95 As above.

when the mother cannot afford to keep him or her in the school. This circumstance is contrary to the promotion of the best interests of the child and amounts to an infringement of the right to education.

The task of any court is to determine whether this limitation is justifiable. This process entails a weighing-up of the nature and significance of the right that is limited with the degree of the limitation against the importance and purpose of the limiting measure.<sup>96</sup> It is essential not to restrict the right needlessly by embracing an unreasonably narrow interpretation of the right since this has the potential to terminate precipitately the enquiry to the detriment of the litigant.<sup>97</sup> After the content and scope of the right have been established the subsequent enquiry should investigate whether the limiting measure infringes the right as purported.<sup>98</sup> According to *Walters*, this enquiry involves establishing 'the meaning and effect of the impugned enactment' to determine whether it limits the safeguarded right.<sup>99</sup> This element of the threshold enquiry more often than not is a fact-specific undertaking and focuses on the nature and breadth of the relevant limiting measure.<sup>100</sup> The second stage of the enquiry determines whether this limitation is justified. If the court determines that it is not, then the provision will be declared unconstitutional, and consequently invalid.<sup>101</sup> In this enquiry two questions must be asked: Does the limiting measure fulfil a legitimate purpose? Is there a rational connection between the limiting measure and its avowed purpose? These tests are applied because if an established measure fails these two questions, then it can never justifiably limit a right.<sup>102</sup> As seen above, both questions have been answered in the negative. Furthermore, in terms of the purpose of the relevant provision it has been established that less restrictive alternatives exist which act as incentives for both parents to contribute towards their child, namely, sections 305(4) and 305(6) of the Children's Act. It may be argued that these two sections of the Children's Act are less restrictive because neither provision actively infringes any constitutional rights. They are activated only in consequence of the failure to adhere to the duty of support of the child. Therefore, it is submitted that section 40(1) of the Schools Act and Regulation 6(2), read together with the definition of 'combined annual gross income of parents', evidently do not meet the requirements of section 36(1) and should be declared invalid.

---

96 *Ex Parte Minister of Safety and Security & Others: In Re S v Walters & Another* (CCT28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (21 May 2002) paras 26-27.

97 De Vos & Freedman (n 26) 357.

98 De Vos & Freedman 359.

99 As above.

100 As above.

101 De Vos & Freedman (n 26) 360.

102 De Vos & Freedman 364.

## 7 The appropriate remedy

Before establishing the suitable remedy that the Court should apply, a separate but noteworthy issue should be recognised. The refusal to resolve these disputed concerns in the High Court raises questions pertaining to access to courts in South Africa. Section 34 of the Bill of Rights affirms that '[e]veryone 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'.<sup>103</sup> However, socio-economic circumstances reflecting enormous imbalances due to colonial and apartheid era marginalisation have led to many citizens being excluded from a fair determination of their rights.<sup>104</sup> The cost of litigation, the sophistication of its procedure and its time-consuming nature remain factors impeding access to justice.<sup>105</sup> For a single custodial mother who has a job that limits the availability of financial resources to the care of her children and herself, the thought of approaching a court is a luxury she cannot afford. Regarding many custodial mothers, financial income comes with an expiration date. The need for and importance of a declaratory order was confirmed by Ackermann J in *Fose v Minister of Safety and Security*:<sup>106</sup>

I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.

The granting of effective relief requires a highly critical analysis, acknowledging that how a judgment is written is a fundamental part of the judgment itself.<sup>107</sup> Hence, I would argue that the failure of the High Court to identify and resolve the issues in question at the outset results in a devastating and emotionally frustrating consequence for custodial mothers, inevitably contributing to their disempowerment. This result could have been avoided.

Relevant to the determination of the remedy that the Court should apply, the doctrine of separation of powers and the division of power

103 Sec 34 Constitution of South Africa.

104 E Hurter 'Access to justice: To dream the impossible dream?' (2011) 3 *Comparative and International Law Journal of Southern Africa* 408.

105 Hurter (n 104) 409.

106 1997 (3) SA 786 (CC) (*Fose*) para 69.

107 S Moreland 'Talking about rape – and why it matters: Adjudicating rape in the Western Cape High Court' (2014) 47 *SA Crime Quarterly* 7.

between the different branches of government in accordance with this doctrine must be acknowledged by the reader. As the guardian of the Constitution it is the duty of the judiciary to interpret the Constitution and give substance to the notion of separation of powers and its limits.<sup>108</sup> The case of *Doctors for Life* confirms the following:<sup>109</sup>

Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations.

The courts should be cognisant of the restrictions on judicial authority and must stay away from matters that are relevant to the other branches of government. This entails the judiciary not interfering in the practices of other branches of government unless specifically so mandated by the Constitution.<sup>110</sup>

Section 172(1)(b)(ii) of the Constitution allows a court provisionally to suspend the effect of a declaration of invalidity in the interests of justice and equity once it has found the law to be inconsistent with the Constitution.<sup>111</sup> A suspension of an order of invalidity is a tool used by the Constitutional Court to circumvent 'separation of powers' strains that can arise when declaring legislation invalid.<sup>112</sup> If the court takes this route, the invalid provision remains operational on condition that Parliament rectifies the defect within a stipulated period of time.<sup>113</sup> Once the defect is remedied the declaration of invalidity dissolves and the amendment is given validity. If this remedy does not take place the declaration of invalidity will be given effect to at the expiry date of the stipulated period of time and the ordinary implications attached to this pronouncement will arise.<sup>114</sup> The time afforded to Parliament to amend the defect hinges on the intricacy and diversity of the statutory and policy options available to Parliament.<sup>115</sup> It is likely that the Court will apply this remedy on appeal.

However, the potential use of this remedy by the Court is debateable. The Court will not suspend an order of invalidity in circumstances where the impugned provision unmistakably is inconsistent with a fundamental right and indefensible under the

---

108 De Vos & Freedman (n 26) 103.

109 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 38.

110 De Vos & Freedman (n 26) 103.

111 De Vos & Freedman 403.

112 De Vos & Freedman 404.

113 De Vos & Freedman 403.

114 As above.

115 As above.

general limitation clause that there is no reason to retain it, even provisionally.<sup>116</sup> In *Bhe*<sup>117</sup> the Constitutional Court held that individuals subject to the relevant provision should not be required to remain patient to be alleviated from the burden of inequality and unfair discrimination.

Given the difficulty surrounding the application of regulation 6(2) in connection with the responsibilities of divorced or separated parents regarding the payment of school fees, in the interim the burden of attaining the necessary financial information in the case of divorced or separated parents should fall on the financial officer of the school. This should apply only in cases where the custodial parent does not feel comfortable to retrieve the necessary financial information from their former partner in order to reduce the burden placed on the financial officer. A stable legislative amendment would give effect to the achievement of equality as promised by the Constitution and would represent a ground-breaking triumph in the emancipation of custodial mothers in a society that takes their role for granted. In a patriarchal community this amendment will be a stepping stone in the realisation and preservation of the right to dignity and equal respect which many women have been denied for so long. Moreover, it is recommended that the stipulated period in which this amendment should take place should coincide with the start of the ensuing school year.

## 8 Conclusion

Custodial mothers are overburdened with responsibilities that attach to their perceived role in society. The weight on single mothers to raise their children devoid of support from their non-custodial counterparts is intolerable. As a single mother the duty to balance a career and the care of her children equates to an insurmountable task which she has no choice but to conquer. Together with this, the fact that the law contributes to this load by placing women in positions of disadvantage and discomfort is disquieting. It is the duty of the courts and the legislature to strive to counteract perpetual gender-based stereotypes that are prevalent in society and to supplement this duty with empowering structures authorised to eradicate the burdens commonly placed on custodial mothers. Although the law requires fathers to contribute financially to the well-being of their children, many custodial mothers face an uphill battle when it comes to securing the cooperation of the non-custodial parent.

This article illustrates the unconstitutional nature of section 40(1) of the Schools Act and Regulation 6(2) of the Fee Exemption Regulations

---

116 De Vos & Freedman (n 26) 404.

117 *Bhe & Others v Khayelitsha Magistrate & Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR (1) (CC) (15 October 2004) para 108.

pertaining to the burden it places on custodial mothers in circumstances where there has been a breakdown in the relationship between herself and the father of the child. This impugned provision has the potential to infringe her dignity by placing her in an uncomfortable position, requiring her to confront the non-custodial parent regardless of the potential for abuse. Furthermore, it has been shown that this impugned provision has the ability indirectly to limit or infringe a child's right to education. In circumstances where the custodial mother does not qualify for an exemption due to her failure to furnish the school with the combined annual gross income of both parents, it will be the child who suffers.

As established in *Fose v Minister of Safety and Security*,<sup>118</sup> it is the duty of the court to provide effective relief, within the limits of the Constitution, when a constitutional right has been infringed. In light of this duty, it would be fitting for the Court to suspend an order of invalidity to give the legislature an opportunity to amend the provision. In the interim it is recommended that the burden of attaining the necessary financial information should be placed on the financial officer of the school. However, to lighten this burden placed on the financial officer it is recommended that this method should be used only in circumstances where the custodial parent does not feel comfortable to approach the non-custodial parent.

---

118 *Fose* (n 106) para 69.

**THE CENTRE FOR HUMAN RIGHTS  
UNIVERSITY OF PRETORIA**

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see [www.chr.up.ac.za](http://www.chr.up.ac.za) or contact

The Director  
Centre for Human Rights  
Faculty of Law, University of Pretoria  
PRETORIA 0002  
Tel: (012) 420-3810/3034  
[chr@up.ac.za](mailto:chr@up.ac.za)

**Staff**

**Oyeniye Abe**

Programme Co-ordinator: LLM (International Trade and Investment Law in Africa)

**Romola Adeola**

Coordinator: Migration Rights Clinic

**Linda Ajembe**

Research Assistant

**Dennis Antwi**

Project Manager: Advanced Human Rights Courses

**Abiy Ashenafi**

Research Assistant

**Dorcas Basimanyane**

Assistant: Advanced Human Rights Courses

**Yolanda Booyzen**

Communications and Marketing Manager

**Danny Bradlow**

SARChi Professor of International Development Law and African Economic Relations

**Johannes Buabeng-Baidoo**

Programme Coordinator: LLM/MPhil (Human Rights and Democratisation in Africa)

**Ashwanee Budoo**

Programme Manager: LLM/MPhil (Human Rights and Democratisation in Africa)

**Rutendo Chinamona**

Academic Associate

**Isabeau de Meyer**

Publication Manager: *African Human Rights Law Journal*

**Hlengiwe Dube**

Project Coordinator: Democracy, Transparency and Digital Rights Unit

**Henrietta Ekefre**

Doctoral candidate; Researcher: Advocacy and Litigation Unit

**Charles Fombad**

Professor of Law and Head of Constitutional Law Unit at the Institute for International and Comparative Law in Africa (ICLA)

**Janet Gbam**

Research Assistant

**Michelo Hansungule**

Professor of Human Rights Law; Academic Co-ordinator: LLM/MPhil (Multidisciplinary Human Rights)

**Lizette Hermann**

Manager: Pretoria University Law Press (PULP)

**Christof Heyns**

Professor of Human Rights Law; Director: Institute for International and Comparative Law in Africa (ICLA); United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

**David Ikpo**

Doctoral candidate; Assistant: Marketing

**Oluwatomiwa Ilori**

*Alumni* Coordinator; Doctoral candidate

**Adetokunbo Johnson**

Researcher: Gender Unit; Doctoral candidate

**Eduardo Kapapelo**

Project Co-ordinator: Nelson Mandela World Human Rights Moot Court Competition

**Simphiwe Khumalo**

Assistant: Marketing and website development

**Magnus Killander**

Professor and Head of Research

**Guillain Koko**

Project Coordinator: African Coalition for Corporate Accountability

**Emily Laubscher**

Assistant Financial Manager

**Josua Loots**

Researcher; Programme Manager: Business and Human Rights Unit



**Bonolo Makgale**

Project Coordinator: Democracy, Transparency and Digital Rights Unit

**Tapiwa Mamhare**

Doctoral candidate; Researcher: Intersex Project

**Thuto Moratuo Maqutu**

Project Co-ordinator: Disability Rights Unit; Special Projects Co-ordinator; LLM/MPhil (Sexual and Reproductive Rights in Africa)

**Sydney Mdhlophe**

Assistant: Pretoria University Law Press (PULP)

**Harold Meintjes**

Financial Manager

**Innocentia Mgijima**

Project Manager: Disability Rights Unit

**Alina Miamingi**

Co-ordinator: Children's Rights Project

**Patience Mpani**

Manager: Women's Rights Unit

**Dianah Msipa**

Assistant: Disability Rights Unit; Doctoral candidate

**Nkatha Murungi**

Assistant Director

**Susan Mutambusere**

Tutor; Doctoral candidate

**Dominique Mystris**

Podcast Producer

**Satang Nabaneh**

Project Officer: Women's Rights Unit

**Genny Ngende**

Project Coordinator: African Coalition for Corporate Accountability

**Charles Ngwena**

Professor of Sexual and Reproductive Health Rights; Disability Rights

**Jehoshaphat Njau**

Project Co-ordinator: Disability Rights Scholarship Programme

**Michael Nyarko**

Doctoral candidate; Researcher: Advocacy and Litigation Unit; Editor: AfricLaw.com

**Ciara O'Connell**

Project Officer: Women's Rights; Post-Doctoral Fellow

**Geoffrey Ogwaro**

Project Manager: LGBTI Rights; Doctoral candidate

**Adebayo Okeowo**

Advocacy and *Alumni* Co-ordinator; Doctoral candidate

**Chairman Okoloise**

Tutor; Doctoral candidate

**Lourika Pienaar**

Webmaster

**Sarita Pienaar-Erasmus**

Assistant Financial Manager

**Thandeka Rasetsoke**

Administrative Assistant: International Development Law Unit

**Ahmed Sayaad**

Project Co-ordinator: African Human Rights Moot Court Competition

**Marystella Simiyu**

Tutor; Doctoral candidate

**Tomi Sode**

Project Officer: Women's Rights unit

**Carole Viljoen**

Office Manager

**Frans Viljoen**

Director

**Thomas White**

Research Assistant

**Extraordinary/Honorary professors**

**Jean Allain**

Professor of Public International Law, Queen's University of Belfast, Northern Ireland

**Cecile Aptel**

Office of the High Commissioner for Human Rights, Geneva, Switzerland

**Fernand de Varennes**

Université de Moncton, Canada

**John Dugard**

Member, International Law Commission

**Johann Kriegler**

Retired Justice of the Constitutional Court of South Africa

**Dan Kuwali**

Lawyer in private practice, Malawi

**Edward Kwakwa**

Legal Counsel, World Intellectual Property Organisation, Geneva, Switzerland

**Stuart Maslen-Casey**

Geneva Academy of International Humanitarian Law and Human Rights

**Thandabantu Nhlapo**

University of Cape Town

**David Padilla**

Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

**Michael Stein**

Harvard Law School, United States of America

**Extraordinary lecturers**

**Adem Abebe**

Senior Research Fellow, Max Planck Institute, Germany

**Horace Adjolohoun**

Principal Legal Officer, African Court

**Jay Aronson**

Carnegie Mellon University, United States of America

**Japhet Biegon**

Amnesty International, Kenya

**Patrick Eba**

UNAIDS, Geneva

**Solomon Ebobrah**

Professor of Law, Niger Delta University, Nigeria

**Elizabeth Griffin**

University of Essex

**Enga Kameni**

Manager, Legal Services, African Export-Import Bank, Egypt

**Thomas Probert**

University of Cambridge, United Kingdom

**Karen Stefiszyn**

Consultant

**Attiya Waris**

University of Nairobi

**Advisory board**

**André Boraine**

Dean, Faculty of Law, University of Pretoria

**Edouard Jacot Guillarmod**

Consultant

**Johann Kriegler**

Retired Justice of the Constitutional Court of South Africa

**Bess Nkabinde**

Justice of the Constitutional Court of South Africa

**David Padilla**

Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

**Sylvia Tamale**

Makerere University, Kampala, Uganda

**Johann van der Westhuizen**

Retired Justice of the Constitutional Court of South Africa

**Academic Programmes**

- LLM/MPhil (Human Rights & Democratisation in Africa)
- LLM (International Trade & Investment Law in Africa)
- LLM/MPhil (Multidisciplinary Human Rights)
- LLM/MPhil (Sexual & Reproductive Rights in Africa)
- LLM/MPhil (Disability Rights in Africa)
- LLM (Dissertation) Human Rights
- Doctoral Programme (LLD)
- Programmes at the Faculty of Law
- Gill Jacot Guillarmod Scholarship
- Disability Rights Scholarship Programme
- Alumni Association: LLM (HRDA)

**Projects**

- Advanced Human Rights Courses (AHRC)
- African Moot Court
- Nelson Mandela World Human Rights Moot Court
- African Disability Rights Moot Court
- Extractive Industries (African Commission Working Group)
- Human Rights Clinics
- Human Rights Conferences

**Research**

- AIDS & Human Rights Research Unit
- Business and Human Rights Unit
- Disability Rights Unit
- Ending Mass Atrocities in Africa Conference
- FRAME
- Freedom of Expression & Access to Information
- Gender Unit
- Impact of the Charter/Protocol
- Implementation and Compliance Project
- International Development Unit (IDLU)
- International Law in Domestic Courts (ILDC)
- Unlawful Killings Unit

- Children's Rights Unit
- African Coalition for Corporate Accountability (ACCA)

### **Regular publications**

- *AfricLaw.com*
- *African Human Rights Law Journal*
- *African Human Rights Law Reports (English and French)*
- *African Disability Rights Yearbook*
- *African Human Rights Yearbook*

## AFRICAN HUMAN RIGHTS LAW JOURNAL GUIDE FOR CONTRIBUTORS

Contributions should be e-mailed to:

idemeyer1@gmail.com

All communications should be sent to the same address.

Books for review should be sent to:

The Editors

African Human Rights Law Journal

Centre for Human Rights

Faculty of Law

University of Pretoria

Pretoria 0002

South Africa

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission must indicate that it has not already been published or submitted elsewhere.
- Articles that do not conform to the *African Human Rights Law Journal's* style guidelines will be rejected out of hand.
- Manuscripts will not be considered if the English is below standard. In case of doubt about the correct use of the English language, authors are advised to have their text checked by a native English speaker before submission.
- The *African Human Rights Law Journal* utilises plagiarism detection software. Please ensure that submissions do not infringe other persons' intellectual property rights.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- The manuscript should be in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, academic qualifications (with institutions where obtained) and professional or academic status.
- Authors need to provide their ORCID identifier. ORCID provides a persistent digital identifier that distinguishes them from every other researcher and, through integration in key research workflows such as manuscript and grant submission, supports automated linkages between them and their professional activities ensuring that their work is recognised. If authors do not have such an ID, they can register at the website <https://orcid.org/register>.
- Authors should supply a summary of their contributions (setting out the main *findings* of the article) of between 250 and 300 words, and at least four keywords.

- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.
- The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them in conformity with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.
- The following general style pointers should be followed:
- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34) 243.
- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:  
1  
2  
3.1  
3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used ('Constitution').
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* or <http://www.chr.up.ac.za/index.php/ahrli-contributors-guide.html> for additional aspects of house style.

## CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2018

Compiled by: I de Meyer

Source: <http://www.au.int> (accessed 14 June 2019)

	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	12/08/16
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	<b>23/08/18</b>	
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	
<b>TOTAL NUMBER OF STATES</b>	<b>54</b>	<b>46</b>	<b>48</b>	<b>30</b>	<b>40</b>	<b>33</b>

\* Additional declaration under article 34(6)

Ratifications after 31 July 2018 are indicated in bold