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Editorial

Contributions to this edition of the *African Human Rights Law Journal* may be classed into two overarching categories: articles dealing with issues from a continental perspective; and articles that focus on the domestic level.

The first two contributions which are part of the first category interrogate the impact of two relatively new treaties adopted under the ambit of the African Union (AU): the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), adopted in 2003, and the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (IDP or Kampala Convention), adopted in 2009. Sithole and Dziva trace the effect of article 5 of the African Women's Protocol (dealing with the elimination of harmful practices) in Zimbabwe. Adeola's contribution covers important ground concerning the impact of the Kampala Convention – a topic of particular relevance in the year that the AU devoted to the theme 'The year of refugees, returnees and internally displaced persons: Towards durable solutions to forced displacement in Africa'. These contributions complement the burgeoning scholarship on the topic of implementation/compliance/impact by providing detailed analyses in a specific and more general African context.

The next three contributions deal with a variety of thematic concerns of relevance to Africa as a whole: amnesty in the context of the rights of victims in transitional justice (Egbai and Chimakonam); the due diligence standard and state responsibility for domestic violence in international law (Addadzi-Koom); and the right to palliative care for the most vulnerable (Sibomana, Colgan and GunnClark).

Articles addressing issues of particular concern at the domestic level target five countries: Cameroon, Kenya, Lesotho, Nigeria and South Africa. In respect of Cameroon, Chiatoh discusses the burning issue of the denial of minority rights in pluralist societies, and argues that the denial of the rights of Anglophone Cameroonians is at the root of the current unresolved conflict in that country. In respect of Kenya, Ogendi takes a critical look at pharmaceutical trade policies in the context of access to medicines; and Christiansen, Jensen and Kelly introduce a much-neglected topic by linking state violence, human rights organisations and the plight of the poor in Nairobi. In respect of Lesotho, Nyane reflects on the abolition of criminal defamation,

noting among others the influence of the decision of the African Court on Human and Peoples' Rights in *Konate v Burkina Faso*, and laments the retention of *scandalum magnatum*.

Two issues of particular concern to Nigeria are considered. Arimoro tackles the contemporaneous issue of public-private partnerships and accounts for its effect on the right to property. Ibrahim addresses an issue of perennial concern – the overcrowding of that country's prisons. He identifies the holding-charge procedure in relation to pre-trial detainees as a pertinent factor in this regard.

As far as South Africa is concerned, Alimohammadi and Muller confront the topic of the illegal eviction of undocumented foreigners from South Africa, while Lubaale and Mavundla draw attention to the decriminalisation of cannabis for personal use.

In 'Recent developments' this issue provides a forum for an analysis by Esterhuizen of the Botswana High Court's decision in *Letsweletse Motshidiemang v The Attorney-General*, in which the Court struck down colonial-era legislation criminalising consensual same-sex sexual acts.

Our sincere appreciation and thanks go to all who have been involved in making the *AHRLJ* the quality and well-regarded journal it has become since its establishment in 2001. For this particular issue, we extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights: Prudence Acirokop; Samuel Ade; Prince Agada; Joseph Akech; Akinola Akintayo; Atangcho Akonumbo; Evelyne Asaala; Victor Ayeni; Cristiano D'Orsi; Hlengiwe Dube; Jackie Dugard; Charles Fombad; Hajer Gueldich; Shannon Hoctor; Stanley Ibe; Ademola Jegede; Winifred Kamau; Mona Kareithi; Richard Lines; Trésor Makunya; Nkatha Murungi; Tafadzwa Muvingi; Genny Ngende; Ben Nyabira; Judy Oder; Godwin Odo; Benson Olugbuo; Femi Oluyeju; Azubike Onuora-Oguno; Misha Plagis; Thomas Probert; Julia Sloth-Nielsen; Philip Stevens; Lee Stone; Monica Tabengwa; and Ismene Zarifis.

Eliminating harmful practices against women in Zimbabwe: Implementing article 5 of the African Women's Protocol

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Summary

Traditionally, women's rights have always been of low priority in Africa. Women have been subordinated under the auspices of deep-rooted African customs and cultural practices, compromising their fundamental rights. Accordingly, member states of the African Union developed the African Women's Protocol, with article 5 to guide states towards the elimination of harmful practices against women. This article assesses the implementation of article 5 of the Women's Protocol in Zimbabwe, in relation to legal, constitutional and policy reforms instituted after ratification of the Protocol in 2008. Although the assessment noted a positive domestic influence of the Protocol in Zimbabwe, the country still has a long way to go in the process of eliminating harmful practices. For the effective implementation of article 5, the article recommends the rapid alignment of marriage and customary laws to the Constitution and the African Women's Protocol. The article also vouches for effective multi-sectoral approaches which include litigation and widespread awareness raising on the Constitution and other mechanisms against harmful practices.

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Key words: *child marriages; harmful practices; implementation; African Women's Protocol, women's rights*

1 Introduction

The year 2018 marked a decade after Zimbabwe became a state party to the landmark Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The Protocol was adopted on 11 July 2003 in Maputo, the capital of Mozambique, and entered into force on 25 November 2005, after having achieved the required 15 ratifications. Zimbabwe ratified the Protocol on 15 April 2008 and thus committed itself to be bound by its provisions.

Similarly to the African Charter on Human and Peoples' Rights (African Charter)¹ and other human rights instruments² that preceded the Protocol, it was developed to promote and protect human rights. Distinctively, the Protocol was designed to protect women in a more comprehensive manner than pre-existing instruments.³ Paragraph 11 of the Preamble to the Women's Protocol states that the Protocol was adopted to address the concern that 'despite the ratification of the African Charter and other international human rights instruments by the majority of the states ... women in Africa still continue to be victims of discrimination and harmful practices'.⁴ In light of the provision above, Viljoen states that '[t]he Protocol should not be viewed as correcting normative deficiencies in international human rights law dealing with women's rights, but rather as a response to the lack of implementation of these norms'.⁵

The Protocol is hailed as the most inventive and exciting development in women rights protection since the formation of the African Union (AU) as it lays down essential human rights standards for African women.⁶ The Protocol directs state parties to promote, protect and enforce the rights of women, some of which were never ensured by international instruments, including the right to HIV

1 Zimbabwe ratified the African Charter on 30 May 1986.

2 See other human rights instruments, including the Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966) (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women (1979) CEDAW; and the African Charter on Human and Peoples' Rights.

3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, OAU Doc CAB/LEG/66.6, <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed 27 June 2017).

4 Art 11 Preamble to African Women's Protocol.

5 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11.

6 E Durojaye & LN Murungi 'The African Women's Protocol and sexual rights' (2014) 18 *International Journal of Human Rights* 893.

services⁷ and to abortion.⁸ The Protocol further guarantees women's rights to affordable, adequate, and accessible health services,⁹ among other socio-economic rights of women. The civil and political rights of African women are also guaranteed by the Protocol.

Fundamental to this study is the ability of the Protocol to articulate the state's duty to protect women and girls from harmful practices.¹⁰ Article 5 of the African Women's Protocol directs state parties to the Protocol to condemn and prohibit all forms of harmful practices affecting the enjoyment of human rights by women in society through legislative and other measures necessary.¹¹ For these reasons, the Protocol is regarded as the most progressive tool for the realisation of women's rights.¹² As a state party to the Protocol, Zimbabwe is directed to implement the Protocol through taking all necessary legislative measures, creating public awareness, providing support to victims, protecting women and other measures to eliminate harmful practices at all levels of society.¹³

Attempts by scholars to do research on the domestic effect of the African Women's Protocol have tended to focus on the entire Protocol.¹⁴ These studies in passing hail the Protocol's declaration on the elimination of harmful practices in society, without an in-depth analysis of the extent of implementation at national level.¹⁵ In Zimbabwe studies on harmful practices concentrate on the prevalence and effect of such practices on women and girls,¹⁶ but not on the domestic effect of the Women's Protocol in relation to ending harmful practices. This study evaluates the extent to which Zimbabwe implemented the provisions of article 5 of the African Women's Protocol, focusing on legal, constitutional and policy reforms implemented to end harmful practices in Zimbabwe after the ratification of the Protocol in 2008. A study of this nature is important in revealing Zimbabwe's compliance with regional human rights mechanisms.

7 See arts 14(1)(d)-(e) of the African Women's Protocol.

8 Art 14(2)(c) African Women's Protocol.

9 Art 14 African Women's Protocol.

10 See Article 5 of the Maputo Protocol.

11 As above.

12 'Making reproductive health rights a reality' *Pambazuka News* 20 January 2005.

13 Art 5 African Women's Protocol.

14 B Kombo, R Sow & FJ Mohamed (eds) *A journey to equality: 10 years of the Protocol on the Rights of Women in Africa: Equality now* (2013); VO Ayeni *The impact of the African Charter and the Maputo Protocol in selected African states: Zimbabwe* (2016) Pretoria 281-296; F Banda 'Blazing a trail: The African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 72.

15 Kombo et al (n 14).

16 C Chikunda, E Marambire & R Makoni 'The impact of *khomba* – a Shangaan cultural rite of passage – on the formal schooling of girls and on women's space in the Chikomedzi area in Zimbabwe, Indilinga' (2006) 5 *African Journal of Indigenous Knowledge Systems* 2.

As good as the vision of article 5 of the Women's Protocol seems in advancing the rights of African women, its injunctions require actions beyond a mere declaration to include the domestication and effective implementation by state parties. In this article implementation is construed as synonymous to putting into practice commitments made by the Zimbabwean government under the Protocol.¹⁷ To be specific, the article concerns itself with the passage of domestic policies and legislations that resemble article 5 of the Protocol, as well as with the creation and resourcing of national institutions that are mandated to end harmful practices. It is only upon implementation that article 5 of the Protocol can be seen to be effective in the lives of African women, in general, and Zimbabwean women, in particular. As Viljoen stated, the effect of an international treaty has to be 'felt at the national level if it is to meet the basic rationale for its adoption, which is the full realisation of the rights provided for under the Protocol'.¹⁸

The article starts with this introductory part, followed by a discussion of the prevalent harmful practices in Zimbabwe, and their impact on the lives of girls and women. In the parts 3 and 4 the article evaluates the implementation of the African Women's Protocol in terms of legal, policy and institutional reforms for the protection of women against harmful practices in Zimbabwe. The last part of the article contains the conclusion and recommendations. The article is based on literature review of books, articles and legal, policy and institutional reports, and newspaper articles related to issues under investigation.

2 Harmful practices and their impact on women in Zimbabwe

Cultural practices reflect different values and beliefs held by members of a society from generation to generation. Almost every society the world over has specific traditional cultural practices and beliefs, some of which are beneficial to society, while a majority of them are detrimental to the enjoyment of rights by girls and women.¹⁹ According to the African Women's Protocol, harmful practices are defined as 'all behaviour, attitudes, and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.²⁰ The definition of harmful practices is unique to the Women's Protocol in that it not only includes the

17 K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387.

18 Viljoen (n 5).

19 Fact Sheet 23 'Harmful traditional practices affecting the health of women and children'.

20 Art 1 definition section.

acts that negatively affect the fundamental rights of women and girls but also the *attitude* which would include mindsets, opinions and way of thinking, among others, which is not only ambitious, but also brings up the question of how much can actually be affected by law and legal mechanisms. *It is an uphill task to change people's minds through law.*²¹

A cohort of these harmful practices includes child and early marriages; virginity testing; child betrothal; the appeasement of avenging spirits; and dowry price payments. These practices often are inherited from ancestors, and continue to be perpetuated by generations.

Child marriage entails any marriage entered into with and by persons below 18 years of age.²² In 2015 the prevalent rate of child marriages in Zimbabwe's provinces was at 42 per cent in Mashonaland West; 50 per cent in Mashonaland Central; 36 per cent in Mashonaland East; 39 per cent in Masvingo; 31 per cent in Midlands; 27 per cent in Matabeleland North; 18 per cent in Matabeleland South; 10 per cent in Bulawayo; 30 per cent in Manicaland; and 19 per cent in Harare.²³ The practice tends to affect girls more than boys. Since 2008 an estimated 8 000 girls in rural Zimbabwe have been forced into early marriages or were held as sex slaves.²⁴ The practice is believed to be increased by religious groups such as the polygamous Apostolic sects which encourage marrying off young girls.

In mainstream society parents often arrange child marriages for young girls so as to receive *roora* or *lobola*²⁵ (bride price and benefit material wealth) from better-off families. This sometimes is done through the *kuzvarira*²⁶ and *kuripa ngozi*²⁷ cultural practices. While these two practices appear to have almost disappeared from

21 R Karugonjo-Segawa *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (2005).

22 C Dziva & D Mazambani 'The Constitutional Court ruling against child marriages in Zimbabwe: A landmark decision for advancing the rights of the girl child' (2017) 33 *Eastern Africa Social Science Research Review* 73.

23 E Makuzva 'Real men needed to end early child marriages in Zimbabwe' (2016), <http://263chat.com/2016/11/real-men-needed-early-child-marriages-zimbabwe/> (accessed 19 May 2017).

24 'The tragedy of Johane Marange's child brides' *The Herald* 31 January 2011.

25 See CJM Zvobgo *A history of Christian missions in Zimbabwe* (1996). Zvobgo defines *lobola/roora* as a custom in which the husband (or his family on his behalf) delivers or promises to deliver to the father (or guardian) of the wife stock or other property, in consideration of which the legal custody of the children born of the marriage is vested in their father (or his family) to the exclusion of any member of the mother's family.

26 Under the *kuzvarira* practice, a girl child can be married off at a tender age or before they are even born. The custom was widely practised before the colonial era when elders were able to accumulate young wives through pledging in exchange for grain during times of food shortages.

27 The *kuripa ngozi* practice is a noble way of appeasing the spirit of the dead by marrying off a naive young girl. The avenging spirits are always offered a young girl as compensation. If a man kills a person, the spirit of the deceased is believed to return to haunt the family of the murderer and this spirit normally is appeased by payment through a little girl even as young as four years from the family of the murderer. The girl becomes a slave and wife to a member of the deceased family.

Zimbabwean society, anecdotal and empirical evidence²⁸ suggests their secretive existence among the poor, traditional and religious groups in remote areas. An empirical study by Mapuranga found these practices to be prominent among the Mabee-Rukangare villages further south of Chipinge, near Mozambique.²⁹ Zimbabwean societies practise their *kuzvarira* and *kuripa ngozi* ways in secret, without the consent of the child and the knowledge of community members.

Nowadays these practices, especially that of *kuzvarira*, come in various dimensions, with some girls being sent as helpers and later on being taken as wives. In all these arrangements the parents of the girl child get *roora* or *lobola* from the groom. In the majority of cases a young girl who is a virgin often fetches more proceeds for her family in terms of dowry paid by the husband-to-be. As a result, poor families conceive of the bride price paid for underage girls as their saviour in poverty and their pathetic situations. In its purest form, the practice of the *roora/lobola* payment to in-laws is an acceptable cultural way of formalising marriage relationships in Zimbabwe and many other African societies. Notwithstanding this, the practice often is abused by many poor parents or guardians who use young girls as their 'gateway' off their poverty situations. In a way, the need for *roora/lobola* is equivalent to viewing children as an economic resource, with an exchange value disguised as the bride price.³⁰

In most cases child marriages are arranged by the girl's parents or guardians whose desires take precedence over the rights and interests of the girl child.³¹ Child marriage takes away the fundamental rights of the bride, and exposes her to abuse, violence and other forms of human rights violations. The girl child is robbed of her childhood, which is necessary to develop physically, emotionally and psychologically. Child brides fall pregnant at a tender age, and are forced to perform household and adult duties before they are emotionally, mentally and physically fit for these tasks. Early pregnancies result in birth complications. On the same note, child brides often give birth to premature babies, sometimes with a low body weight. Child brides often drop out of school to get married. Without education, a child bride's life is bleak as she lacks the much-needed enlightenment and information to survive in society and even to seek formal employment. Consequently, child marriage plays a central role in increasing vulnerabilities on the married girl's human rights. The long-term effects of child marriage include misery and a

28 N Chivasa 'Kuripa ngozi as a conflict resolution model in Shona communities of Zimbabwe: A conceptual analysis' (2009) 8 *Critical African Studies*, DOI: 10.1080/21681392.2019.1657028; TP Mapuranga 'A phenomenological investigation into the effects of traditional beliefs and practices on women and HIV and AIDS, with special reference to Chipinge District, Zimbabwe' unpublished PhD thesis, University of Zimbabwe, 2010 72.

29 Mapuranga (n 28).

30 Dziva & Mazambani (n 22).

31 E Warner 'Behind the wedding veil: Child marriage as a form of trafficking in girls' (2004) 12 *Journal of Gender, Social Policy and The Law* 247.

failure by the child bride and her children to satisfy their critical human needs in life. Thus, a vicious cycle of poverty and misery is created.

Female genital mutilation is another form of harmful traditional practice valued in many African countries. However, this is not practised in Zimbabwe. Related to this is the *chinamwari* or *khomba* cultural practice in Zimbabwe. The practice is prevalent and widely respected among the Shangani people in parts of Chiredzi and the Lemba people in parts of Mberengwa. The practice requires that young girls of 13 to 16 years, and even newly-married women, be sent for initiation schooling outside the villages with old women.³² There, young women are taught about married life, especially sexual expertise, so as to please their husbands during the marriage. Researchers have mixed feelings about the practice, with some supporting and others blaming it for a violation of the girl child's rights.³³ The bone of contention often stems from the conditions in which they live during the ceremony. The practice often is conducted in winter (when temperatures are severely low) and initiates spend the duration of the initiation process in the bush half dressed.³⁴ The trainees often are beaten, pinched, forced into icy cold water and are not allowed to warm themselves by the fire.³⁵ These are some of the human rights violations that young girls suffer during the *chinamwari* or *khomba* initiation practices.

Related to the *chinamwari* or *khomba* practice is the virginity testing practice, which largely violates the rights of the girl child in modern-day Zimbabwe.³⁶ A study by Human Rights Watch quoted Archbishop Johannes Ndanga, president of the Apostolic Churches Council of Zimbabwe, a coalition of over 1 000 indigenous apostolic churches, who confessed that 'virginity testing' – which includes the insertion of fingers into the vagina – of girls as young as 12 was widely practised in the apostolic churches.³⁷ Bishop Ndanga once banned an apostolic sect headed by Ishmael Chokurongerwa, accusing the sect leader of abusing women and girls' rights through forcing them to undergo virginity testing. As police officers went to the shrine to investigate the accused, Chokurongerwa and his congregates teamed up to the law-

32 Chikunda et al (n 16); AK Siachitema 'Interrogating the role of initiation rites in shaping adolescents' sexual behaviour and gender relations in a changing world', http://www.inter-disciplinary.net/probing-the-boundaries/wp-content/uploads/2013/06/Siachitema_child3_dpaper.pdf (accessed 20 March 2018).

33 Chikunda et al (n 16).

34 As above.

35 As above.

36 N Wadesango 'Violation of women's rights by harmful traditional practices' (2011) 13 *Anthropologist* 124; 'The traumatised virgins of Hurungwe' *Sunday Mail* 21 August 2016, <https://www.sundaymail.co.zw/the-traumatised-virgins-of-hurungwe> (accessed 21 November 2019).

37 Human Rights Watch World Report 2018, <https://www.hrw.org/world-report/2018/country-chapters/zimbabwe#e0c9cf> (accessed 20 November 2019).

enforcing agents, resulting in the sect leader and others being arrested and sentenced in the *Chokurongerwa* case.³⁸

When virginity testing is done in the home, elderly women (the mother, aunt or the neighbour) can check the virginity of a girl child by inserting a finger into the vagina of the girl to see if the hymen still is intact.³⁹ In some communities and cultures elderly women tasked with the job organise a ceremony or session where they conduct the procedure of inserting their fingers into young girls' vaginas.⁴⁰ The practice is prevalent in rural Zimbabwe, in some cases with blessings from traditional and religious leaders.⁴¹ Those in support of the practice are quick to provide its benefits as combating the spread of HIV, identifying children who are sexually abused by family members, preventing unwanted pregnancies amongst others.⁴² Conversely, the practice remains detrimental to women's enjoyment of rights as they are humiliated and undermined of their dignity and bodily integrity.⁴³

All the harmful practices presented under this part infringe on the fundamental rights of women and young girls. Despite their harmful nature, and the efforts put in place to enlighten society about the detrimental effects of such practices, the practices persist as they are not questioned and take on an aura of morality in the eyes of those practising them.⁴⁴ In the majority of cases the practices occur in secret, and in rural Zimbabwe without the knowledge of law-enforcement agents.⁴⁵ Scholars have blamed the persistence of these practices on many factors including the limited implementation and awareness of women's rights and legal instruments that protect the rights of women, and the inadequacy of laws that specifically speak against harmful practices.⁴⁶ Thus, the call by article 5 of the African Women's Protocol for innovative legislative and policy reforms, the widespread creation of awareness, the provision of support to victims, the protection of women and other measures to eliminate such practices at all levels of society is found judicious. While article 5 of the Protocol is a critical standard-setting clause for ending harmful

38 *Ismael Chokurongerwa v The State* HH620-15B491/15.

39 Wadesango (n 36).

40 As above.

41 C Ndhlovu C 'Virginity testing raises many questions' 2005 *Network Family Health International*, <http://www.fhi.org> (accessed 19 November 2019).

42 Wadesango (n 36); 'The traumatised virgins of Hurungwe' (n 36).

43 L le Roux 'Harmful traditional practices, (male circumcision and virginity testing of girls) and the legal rights of children' unpublished LLM dissertation, University of Western Cape, 2006; A Maharaj 'Virginity testing: A matter of abuse or prevention' (1999) 4 *Agenda Journal* 68.

44 Fact Sheet 23 (n 19).

45 B Rwezaura 'Competing images of childhood in the social and legal systems of contemporary sub-Saharan Africa' (1998) 12 *International Journal of Law, Family and Policy* 253.

46 See Dziva & Mazambani (n 26); UNFPA 'In ending child marriage: A guide for global policy action: International Planned Parenthood Federation and the Forum on Marriage and the Rights of Women and Girls' (2006); Research and Advocacy Unit *Let them grow first: Early marriage in Goromonzi, Zimbabwe* (2014).

practices against women, this acknowledgment by researchers and states is insufficient to ensure the progressive realisation of women's rights in society. The actual elimination of harmful practices lies in the extent to which the clause is domesticated and effectively implemented. The next part addresses this goal.

3 Constitutional and legal reforms to end harmful practices

3.1 Constitutional reforms

From 1980 to 2013, when a democratic Constitution was signed into law, Zimbabwe was governed by the Lancaster House Constitution. The Lancaster House Constitution failed to guarantee the rights of women⁴⁷ and other vulnerable groups. At the time of its inception the main concern of the Lancaster House Constitution was ending the devastating war of liberation and establishing the basic political rights such as enfranchising the indigenous population hitherto discriminated against. The Zimbabwe Women Lawyers Association rightly argues:⁴⁸

The Lancaster House Constitution would give a rights with one hand and take it with the other – the so-called claw-back clauses. What that means is that it allowed for gender equality but at the same time allowed for cultural and societal norms to supersede these rights of 'equality'.

The Constitution, unlike the Lancaster House Constitution, saw men and women actively participating in the constitution-making process, raising their needs and aspirations during outreach meetings conducted to canvass people on what they expected to see in the supreme law of the land. As a result, 95 per cent (3 319 842)⁴⁹ of the people voted for the Constitution through a referendum held on 16 and 17 March 2013. Among those who voted for the Constitution, women comprised the majority. To some extent women had confidence in the Constitution, as a foundation upon which their rights could be promoted and protected.

The adopted Constitution enshrines the rights of all people in Zimbabwe and affirms the founding values and principles of human dignity,⁵⁰ gender equality,⁵¹ and the nation's diverse cultural, religious and traditional values.⁵² Section 80(3) of the Constitution also provides that '[a]ll laws, customs, traditions and cultural practices

47 C Dziva 'The 2013 constitutional reform and the protection of women's rights in Zimbabwe' (2018) 13 *Eastern Africa Social Science Research Review* 21.

48 'Rights of women enshrined in the Constitution' *The Herald* 2 November 2016.

49 Zimbabwe Election Support Network 'Zimbabwe Constitution referendum report and implications for the next elections'.

50 Sec 3(e) of the Constitution of Zimbabwe.

51 As above.

52 As above.

that infringe the rights of women conferred by this Constitution are void to the extent of the infringement’.

The Constitution further declares its supremacy by providing that any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.⁵³ This constitutional provision clearly prohibits any other laws that go against the Constitution – and if there is a law that is contrary to the Constitution, it will have no place in Zimbabwe. For the ordinary woman and girl, this implies that they should not be subjected to practices, customs and traditions that are against the Constitution.

The Constitution further provides for the promotion and preservation of cultural values and practices that enhance the dignity, well-being and equality of Zimbabweans,⁵⁴ protect the right to culture⁵⁵ and recognise traditional leadership.⁵⁶ As the custodians of culture, traditional leaders can be an important institution for the realisation of the right to culture and ending harmful practices in society. In addition, the provision protecting the right to culture explicitly includes a qualification stipulating that ‘no one exercising these rights may do so in a way that is inconsistent with any provision of the Declaration of Rights’.

Section 25 of the Constitution directs the state and all its institutions to protect the family and to prevent domestic violence. Therefore, the Constitution brings hope to the women who endured harmful practices in society. The section is also important as women, civil society organisations (CSOs), non-governmental organisations (NGOs) and all relevant stakeholders can use it to deal with deep-rooted family dynamics and human rights violations at all levels of society. The Constitution gives women the power to challenge any act or piece of legislation inconsistent with it. However, it is the authors’ hope that such protection as envisaged in section 25 does not perpetuate the following scenario described by Chirawu:⁵⁷

In many cases, it is the family – as a semi-autonomous social field, making and enforcing its own laws and settling disputes within the family and representing the family’s interests in the community – that deters women from exercising their legal rights.

The Constitution re-defined a child in accordance with the best international practices.⁵⁸ Since the ratification of the Convention on the Rights of the Child (CRC) and other key human rights treaties by Zimbabwe, the law on the definition of a child has been shrouded in controversy as there was no agreed-upon age of a child. For instance,

53 Sec 2(1) Constitution of Zimbabwe.

54 Sec 16 Constitution of Zimbabwe.

55 Sec 63 Constitution of Zimbabwe.

56 Sec 280 Constitution of Zimbabwe.

57 S Chirawu ‘Challenges to outlawing harmful cultural practices for Zimbabwean women’ in Heinrich Böll Stiftung *Women, custom and access to justice* (2013) 15.

58 Research and Advocacy Unit (n 46).

in terms of the marriage laws a child is a person below 16 years for girls and 18 years for boys.⁵⁹ Further, the issue of the age of consent for sexual intercourse is 16 years, while any sexual intercourse with a person under the age of 12 years is illegal.⁶⁰ Currently those aged between 12 and 14 years can consent to sex if capable of doing so.

However, this position was changed in 2013 when that definition was changed to 18 years in the 2013 Constitution. This inconsistency was widely blamed for the perpetuation of child marriages in Zimbabwe.⁶¹ Section 78(1)⁶² of the Constitution, which further elaborates on consent and marriage rights, protects girls less than 18 years against harmful practices, including child marriage. Indeed, consent will go a long way towards ending forced marriages that were practised under the *kuzvarira* and *chiramu* practices.

3.2 Legal reforms

Legislation provides a critical foundation for the protection of citizens' rights. It is an expression of states' accountability and commitment to the realisation and advancement of their rights. For women, legislation provides the state's commitment to protect them from discrimination, exclusion, deprivation and violence, including harmful practices. Notwithstanding this, available pieces of legislation⁶³ are archaic and not in sync with the Constitution, regional and international human rights standards. Most intriguing is the fact that Zimbabwe currently is conducting an aligning process for all the laws that are inconsistent with the 2013 Constitution, including the current Marriages Bill, the enactment of which will repeal the Marriage Act⁶⁴

59 Under the Marriage Act of Zimbabwe, the minimum marriageable age is 16 years for girls and 18 years for boys as against the stipulated 18 years for both girls and boys in sec 81 of the Constitution of Zimbabwe.

60 See sec 61(1) of the Criminal Law (Codification and Reform) Act [Ch 9:23]: "'Young person" means a boy or girl under the age of 16 years.' Sec 64 further provides that '[a] person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person of or under the age of 12 years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person, or sodomy. (2) A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person above the age of 12 years but of or under the age of 14 years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person or sodomy, unless there is evidence that the young person (a) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct; and (b) gave his or her consent thereto.'

61 See Dziva & Mazambani (n 26).

62 Sec 78(1) states that '[e]very person who has attained the age of eighteen years has the right to found a family'.

63 See eg Domestic Violence Act 14 of 2006; the Criminal Law (Codification and Reform) Act 23 of 2004; the Customary Marriages Act 23 of 1950.

64 Act 81 of 1964.

and the Customary Marriages Act.⁶⁵ Also archaic is the Criminal Law (Codification and Reform) Act,⁶⁶ which stipulates in section 70(4):

For the avoidance of doubt –

- (a) the competent charge against a person who –
 - (i) has sexual intercourse with a female person below the age of twelve years, shall be rape; or
 - ...
 - (iv) without the consent of a female person of or above the age of twelve years but below the age of sixteen years, has sexual intercourse with that female person, shall be rape.

This provision sets the age limit for sexual intercourse with a minor at 16 years. What this effectively means is that the age of consent is 16 years for the girl child. Regarding the Marriage Act [Chapter 05:11], its inconsistency with the African Women's Protocol and the Constitution stems from the fact that the Act stipulates the minimum marriageable age as 16 for girls and 18 for boys,⁶⁷ something that is discriminatory against the girl child. The Customary Marriages Act [Chapter 5:07] is worse off in that it does not provide a minimum age for marriage for either boys or girls. This *lacuna* in the current marriage laws as well as the Criminal Law (Codification and Reform) Act will be remedied by the Marriages Bill which provides for the minimum age of marriage as 18 years,⁶⁸ in line with section 78 of the Constitution. This process to promulgate laws that directly prohibit and sanction harmful traditional practices by Zimbabwe is in line with article 5 of the African Women's Protocol which provides:

States parties shall take all necessary legislative and other measures to eliminate such practices, including ... prohibition ... through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.

Although such efforts to align laws are commendable, the snail-pace approach in complying with the dictates of the Protocol and the Constitution is disturbing as women and girls continue to suffer harmful practices without the protection of the law. For instance, the Marriages Bill currently is at committee stage, where a compilation of

65 Act 23 of 1950.

66 Act 23 of 2004.

67 See sec 22 of the Marriage Act which provides: 'Prohibition of marriage of persons under certain ages. (1) No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable.'

68 Sec 3 of the Marriages Bill provides that the minimum age of marriage is 18 years. In order to ensure the protection of minors, the minimum age requirement has been extended to unregistered customary law marriages and to civil partnerships. This guards against attempts to side-step the law by avoiding formal marriages but still entailing children being forced into relationships that, for all intents and purposes, are marriages.

the views from public hearings as well as written submissions from stakeholders is being made in preparation for presentation to the Lower House.⁶⁹ However, Parliament is currently pushing the Finance Bill, the War Veterans Bill and other Bills in a fast track manner, with the result that Zimbabwe may even get to 2020 before the Marriages Bill is passed into law. This is evidence of limited political will for the alignment of marriage laws to the Constitution and international best practices. Therefore, there is a need for Zimbabwe to fully comply⁷⁰ with article 5 of the African Women's Protocol by hastening the legislative reform process and taking legislative measures, backed by sanctions and other necessary measures, to ensure that harmful practices against women are eliminated.

The Domestic Violence Act remains one domestic law that speaks against harmful practices in Zimbabwe in line with the Women's Protocol. This Act was promulgated in 2007, a year before Zimbabwe ratified the African Women's Protocol. Prior to the promulgation of the Domestic Violence Act 'there had not been any law in Zimbabwe that dealt explicitly and specifically with domestic violence in general and violence against women in particular'.⁷¹ The Domestic Violence Act outlaws harmful cultural or even customary practices and norms that violate the rights of women, such as forced or child marriages and the system of child betrothal or the pledging of young women for avenging spirits.⁷² Other singled-out harmful practices include virginity testing, female genital mutilation, forced marriage, child marriage and forced wife inheritance.⁷³ The Act has been hailed as a landmark piece of legislation that would be the panacea for women's domestic violence woes.

The Act further allows for the victims of domestic violence to apply for an interim protection order as well as a final protection order on safety. The protection measures system, however, has some

69 Telephone communication with B Dube, Member of Parliament for Gweru Urban and Acting Chairperson for the Portfolio Committee on Justice, Legal and Parliamentary Affairs during Marriages Bill public hearings and consultations for Masvingo and Midlands provinces on 28 November 2019.

70 Zimbabwe's current compliance with art 5 of the African Women's Protocol is mainly through the constitutional provisions protecting women's rights. There is no piece of legislation that is backed by sanctions, that is specifically dedicated to the prohibition of harmful traditional practices. The situation is exacerbated by the fact that the Constitution does not bind Zimbabwe to ratified international and regional human rights treaties until they have been domesticated. In this regard sec 327(2) states that '[a]n international treaty which has been concluded or executed by the President or under the President's authority (a) does not bind Zimbabwe until it has been approved by Parliament; and (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament'. However, it is important to note that despite the non-existence of laws promulgated after 2008, Zimbabwe is in the process of aligning the current pieces of legislation as well as drafting new laws for the protection of women's rights.

71 P Osirin *Women's rights as human rights* (2003).

72 Sec 3(1)(l) Domestic Violence Act.

73 Secs 3(1)(l)(i)-(vii) Domestic Violence Act.

weaknesses. Oguli⁷⁴ notes that most women withdraw their cases from the courts as they are financially dependent on men. Other reasons why women withdraw cases of domestic violence include pressure from the mediation and influence of family members and the delay by the courts in dealing with cases. Due to the high incidence of withdrawal of cases, the National Prosecuting Authority (NPA), through section 258 of the Constitution of Zimbabwe, no longer withdraws cases of domestic violence.⁷⁵ The section provides that the NPA is responsible for instituting and undertaking criminal prosecutions on behalf of the state. What this effectively means is that when a complainant lodges a complaint of domestic violence, the case becomes a state case and cannot be withdrawn by the complainant. It now becomes the prerogative of the NPA, on behalf of the state, to either prosecute or withdraw, depending on its assessment of available evidence in the matter.

In a similar case, most victims of domestic violence had nowhere to stay while the court case was in progress, except to return to the abuser's hands. This is due to the lack of adequate safe shelters to assist the survivors of domestic violence around the country. Indeed, the lack of safe shelters to accommodate survivors while perpetrators await trial will see victims go back to stay with the perpetrators. Consequently, there continues to be a high rate of withdrawal of cases and a vicious cycle of violence against women in society.

A study conducted by Chuma and Chazovachii on the Domestic Violence Act revealed that '[a]lthough the state has enacted a progressive legislation to combat domestic violence in the name of the Domestic Violence Act, cases of abuse perpetrated against women continue to increase unabated particularly in the rural communities'.⁷⁶ Chuma and Chazovachii further attributed the incessant violence against women largely 'to the failure to adequately implement and enforce the Act due to several constraining factors'.⁷⁷ The Domestic Violence Act is also affected by limited publicity at all levels of society.

3.3 The judiciary and litigation of harmful practices

The domestication of article 5 of the African Women's Protocol in the local Constitution⁷⁸ is proving important in litigation of harmful

74 OM Oguli et al 'Promoting an integrated approach to combat gender-based violence: A training manual' New Gender Mainstreaming Series Commonwealth Secretariat' (2002).

75 The section establishes and mandates the NPA to institute and undertake criminal prosecutions on behalf of the state and to discharge any functions necessary or incidental to such prosecutions.

76 M Chuma & B Chazovachii 'Domestic Violence Act: Opportunities and challenges for women in rural areas: The case of ward 3, Mwenzei District, Zimbabwe' (2012) 3 *International Journal of Politics and Good Governance* 1.

77 Chuma & Chazovachii (n 74).

78 Sec 80(3) Constitution.

practices such as domestic violence and child marriage. In relation to child marriage, a landmark court ruling was delivered by the Constitutional Court in the *Mudzuru* case.⁷⁹ In this case section 78(1) of the Constitution paved the way for the protection of women and girls' rights to marriage by clearly providing 18 years as the marriageable age. In the case the complainants (child marriage survivors) successfully challenged the constitutionality of the Marriage Act and the Customary Marriage Act and sought a declaratory order in the following terms:

- 1 The effect of s 78(1)⁸⁰ of the Constitution of the Republic of Zimbabwe Amendment (No 20) 2013 is to set 18 years as the minimum age of marriage in Zimbabwe.
- 2 No person, male or female in Zimbabwe may enter into any marriage including an unregistered customary law union or any other union including one arising out of religion or a religious rite before attaining the age of eighteen (18).
- 3 Section 22(1)⁸¹ of the Marriage Act [Chapter 5:11] is unconstitutional.
- 4 The Customary Marriages Act [Chapter 5:07] is unconstitutional in that it does not provide for a minimum age limit of eighteen (18) years in respect of any marriage contracted under the same.

The applicants in this case were requesting the Constitutional Court to declare the Marriages Act unconstitutional as a result of its inconsistency with section 78⁸² of the Constitution of Zimbabwe and global human rights frameworks on the marriageable age. The Constitutional Court declared:

Section 22(1) of the Marriage Act [Chapter 5:11] or any law, practice or custom authorising a person under eighteen years of age to marry or to be married is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. The law is hereby struck down; and (3) With effect from 20 January 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years.

79 *Mudzuru and Tsopodzi v Minister of Justice and Legal Parliamentary Affairs NO & 2 Others* CCZ 12/2015.

80 Sec 78 of the Constitution provides as follows: '(1) Every person who has attained the age of eighteen years has the right to found a family. (2) No person may be compelled to enter into marriage against their will. (3) Persons of the same sex are prohibited from marrying each other.'

81 Sec 22 of the Marriages Act provides: '(1) No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable: Provided that (i) such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements of this Act; (ii) such permission shall not be necessary if by reason of any such other requirement the consent of a judge is necessary and has been granted.'

82 Sec 78 of the Constitution of Zimbabwe stipulates that '[e]very person who has attained the age of eighteen years has the right to found a family. (2) No person may be compelled to enter into marriage against their will.'

The judiciary is commended for protecting the human rights and lives of many potential victims of child and forced marriages in accordance with article 5 of the African Women's Protocol, by declaring that only adults above 18 years can enter into relationships of their choice. The judgment proved how the judiciary can be an indispensable actor in the protection and enforcement of women's rights.

In arriving at the judgment the Constitutional Court made reference to article 5 of the African Women's Protocol. It further struck off all marriage laws inconsistent with the Constitution and international best practices. These laws include the Marriage Act (1964) and the Customary Marriages Act (2004). In light of this judgment the Zimbabwean government is in the process of aligning the marriage laws with the Constitution and with international and regional treaties to which Zimbabwe is a party. Indeed, the Marriages Bill is an effective mechanism to ensure that the judgment is effectively implemented for the benefit of young Zimbabwean women. Further, the judgment should be widely disseminated, together with other pieces of legislation that address women's rights *vis-à-vis* harmful traditional practices. These efforts will result in the litigation of many harmful practices against women, even in lower courts.

The *Mudzuru* case had to be discussed in detail as so far it is the only case that has been dealt with by the Zimbabwean judiciary that directly addresses the harmful cultural practice of child marriage. Other cases that have been brought before the courts are cases of sexual abuse and domestic violence due to physical or emotional abuse. However, the study noted a blatant absence of cases of domestic violence related to harmful cultural practices that have been litigated in the Zimbabwean courts of law. This may be because, as Chirawu⁸³ stated, 'such cases are hard to bring before the courts as they touch on customary law and cultural practices'.

This study further noted a dearth of jurisprudence on other harmful practices such as child and early marriages, *chinamwari* or *khomba*, virginity testing and child betrothal in Zimbabwe's legal system. This might be a result of limited awareness on the part of society about harmful practices and the available avenues for redress in cases of abuse. This is especially the case in most rural communities in Zimbabwe, where the majority of people are not aware of their rights and available mechanisms for redress. A study by the Zimbabwe Human Rights Commission (ZHRC) noted how rural societies are not aware of their rights and available mechanisms for redress.⁸⁴ In such

83 S Chirawu-Mugomba 'A reflection on the Domestic Violence Act [Chapter 5:16] and harmful cultural practices in Zimbabwe' (2016) 1 *Zimbabwe Electronic Law Journal* 10.

84 Zimbabwe Human Rights Commission *A baseline survey on perception, attitudes and understanding on human rights in Zimbabwe* (2015).

communities victims of harmful practices often rely on local traditional leaders' courts that in most cases tolerate the practices. This makes it difficult to find cases regarding other harmful practices that go through the courts to act as jurisprudence in relation to other harmful practices prevalent in Zimbabwean societies. Zimbabwe, therefore, has a long way to go to effectively litigate all harmful practices against women in accordance with regional and national human rights standards.

4 Policy frameworks

The Zimbabwean government implements article 5 of the African Women's Protocol through various national policies. Even without clearly mentioning the Women's Protocol in these policies, the contents of such instruments reflect ideals of the Protocol in relation to harmful practices. Zimbabwe commendably launched the National Action Plan on ending Child Marriages in 2018, with five line ministries and their departments pledging to implement policies and programmes to eradicate child marriage.⁸⁵ Similarly, the National Health Strategy for Zimbabwe 2016-2020⁸⁶ has three main objectives, the first objective being the strengthening of priority health programmes. Under this goal reproductive health is priority number three. This is commendable as reproductive health mainly is affected by harmful traditional practices such as early child marriage. The Strategy acknowledges:⁸⁷

Adolescents and young people contribute significantly to maternal deaths. Zimbabwe has a youthful population, with two-thirds of the population below the age of 25 years. The youth is one of the key affected population groups as most of the sexual reproductive health indicators for youth are either deteriorating or remaining high.

85 'National Action Plan on ending child marriages launched' Zimbabwe Broadcasting Corporation *News Online* 19 December 2018, <https://www.zbc.co.zw/national-action-plan-on-ending-child-marriages-launched/> (accessed 20 November 2019).

86 Ministry of Health and Child Care *The national health strategy for Zimbabwe 2016-2020*.

87 See also the Zimbabwe Multiple Indicator Cluster Survey 2014 which stated that the adolescent fertility rate in 2014 was estimated at 120 births per 1 000 women aged 15-19 years. According to 2010/11 Zimbabwe Demographic Health Survey 20,5% of women aged 20-24 years have had at least one live birth before the age of 18 years. The rural-urban differential in teenage fertility is striking, as rural girls were twice as likely as their urban counterparts to become mothers. The decline in the maternal mortality ratio among women of 15-19 years at 21% is much slower than the average decline of 43% for women of 15-49 (MICS 2014).

This Strategy also is in line with the African Women's Decade⁸⁸ theme number three which focuses on 'women's health, maternal mortality and HIV and AIDS'. The establishment of such a policy therefore is significant for the protection of women's rights against harmful practices as it complies with article 5 of the African Women's Protocol, precisely the obligation to take all necessary legislative and other measures to eliminate such practices.

The National Gender-Based Violence Policy⁸⁹ was designed for the reduction of violence against women. The Policy acknowledges the importance of international instruments ratified by Zimbabwe, including the African Women's Protocol. In its key result area number one on prevention, the Policy includes the prevention of harmful traditional practices such as child marriage and wife inheritance. Furthermore, the Policy clearly states as its output number one the

increased capacity of leaders at all levels to address Gender-Based Violence (GBV) including negative cultural and religious practices that fuel violence against women and girls as the major challenge in combating GBV is to change prevailing beliefs, attitudes and norms that contribute to the acceptability and perpetuation of GBV.⁹⁰

This is language similar to that of the African Women's Protocol which laments prevalent cultural norms and values that affect women's enjoyment of rights in society.

The National Adolescent and Youth Sexual and Reproductive Health Strategy⁹¹ addresses sexual reproductive health challenges among adolescents and young persons between the ages of 10 and 24 years in Zimbabwe. The strategy identifies the key challenges facing adolescents and young people as the high rates of unplanned pregnancies, early child bearing, adolescent marriages, gender-based violence and maternal mortality. In the same way as the African Women's Protocol, this policy managed to identify child marriage and early child bearing as the major challenges facing adolescents in Zimbabwe. Suffice to say that the Strategy is a good working document in as far as the elimination of harmful practices is concerned.

88 African Union *The African Women's Decade: Grassroots Approach to Gender Equality and Women's Empowerment (GEWE) 2010-2020*. The aim of the African Women's Decade is to advance gender equality by accelerating the implementation of Dakar, Beijing and AU Assembly Decisions on Gender Equality and Women's Empowerment (GEWE), through dual top-down and bottom-up approach which is inclusive of grassroots participation.

89 Ministry of Women Affairs, Gender and Community Development *The national gender-based violence strategy 2012-2015*.

90 As above.

91 Ministry of Health and Child Care 'National adolescent and youth sexual and reproductive health strategy (ASRH) II: 2016-2020'. The 2016-2020 ASRH Strategy II represents the second generation results-based strategy the aim of which is to address sexual and reproductive health challenges among adolescents and young people between the ages of 10 and 24 years in Zimbabwe. Zimbabwe's first ASRH strategy covered the period 2010 to 2015.

The National Gender Policy⁹² seeks to achieve a gender-just society where men and women enjoy equality and equity and participate as equal partners in national development processes. The goal of the Policy is 'to eradicate gender discrimination and inequalities in all spheres of life and development'.⁹³ The Policy can be applauded for making reference to the African Women's Protocol as its guiding document. Therefore, the Policy seeks to give effect to the obligations contained in the Women's Protocol.⁹⁴ Such reference to the Protocol as the basis of the Gender Policy brings hope that the obligations contained therein will be complied with.

5 Efforts by national institutions and civil society and non-governmental organisations

Government ministries are also important actors in implementing the provisions of article 5 of the Women's Protocol in Zimbabwe. This has been done through research and the submission of state party reports, advocacy, awareness raising through commemorations and the celebration of key African and national calendar events such as the 16 Days of Activism against GBV. In July 2015 Zimbabwe launched the African Union Campaign to end child marriages. This platform allowed for various government ministries and departments to raise awareness through road marches and speeches against child marriages. Platforms such as this re-energise stakeholders and have become routine fora through which stakeholders explore avenues for cooperation, and share notes on efforts to end harmful practices.

However, the positive impact of these efforts by government ministries is limited by resource constraints. Due to limited funding most of these commemorations are planned and executed in urban centres with the exclusion of women in rural areas, where cultural norms and values weigh too heavily against women's enjoyment of rights. In addition, most activities exclude men who comprise an important constituent in fighting harmful practices. Men comprise the majority of economic, political and religious leaders, who wield power over many aspects of women's lives. For this reason men's attitudes and behaviour should not be ignored in efforts meant to end harmful practices.

National independent institutions including the Zimbabwe Gender Commission (ZGC) and the ZHRC are proving to be indispensable institutions in implementing article 5 of the African Women's Protocol. Established in 2009 and becoming operational in 2014, the ZHRC has a mandate to promote research on, awareness of and respect for

92 Ministry of Women Affairs (n 89).

93 As above.

94 T Mutangi 'The impact of the African Charter and the Maputo Protocol in Zimbabwe' in VE Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 284.

human rights and freedoms, including those of women. In 2015 the ZHRC commissioned a Baseline Survey on the human rights situation in Zimbabwe.⁹⁵ The Baseline Survey exposed the challenges, perceptions and attitudes that society has towards cultural practices. Importantly, the ZHRC established a Thematic Working Group on Gender and Women's Rights which is proving to be key in research and awareness raising on harmful practices against women and girls. In 2015 the Commission's Working Group conducted a televised public dialogue with government institutions, NGOs and CSOs and faith-based organisations on the strategies to end child marriage.⁹⁶ The dialogue produced a documentary and position paper that were publicised through various media platforms including the press, the electronic media and social media platforms, thus creating awareness on the impact and strategies to end child marriages in accordance with its constitutional mandate and article 5(a) of the African Women's Protocol.

The ZHRC also works together with other Chapter 12 institutions⁹⁷ including the ZGC as conduits for implementing article 5 of the Women's Protocol in Zimbabwe. However, the potential of grant-aided institutions such as the ZHRC and the ZGC, as in the case of government ministries, is limited by financial constraints in Zimbabwe. Even with the budget vote from Treasury and supplementary donor funding, the resources remain inadequate for most grant-aided institutions. Few donors are able to partner with grant-aided institutions considering the involvement and need for permission of the responsible Minister when commissions engage a certain donor for funding.⁹⁸ As such the ZHRC and the ZGC have had their fair share of financial constraints in advancing human rights. The government has often been criticised for deliberately starving grant-aided institutions of resources and interfering excessively in their work, thus compromising their independence and effectiveness.⁹⁹ For the year 2019 the ZGC was given a budget of only US \$2 million for employment costs, operational costs and maintenance as well as capital expenditure.¹⁰⁰ This amount is inadequate to ensure that the ZGC effectively carries out its constitutional mandate, including the protection and enforcement of women's rights against harmful

95 Zimbabwe Human Rights Commission (n 82).

96 Zimbabwe Human Rights Commission *Annual Report* (2015) 30.

97 Ch 12 of the Constitution of Zimbabwe which establishes five independent commissions of which the objectives include the support and entrenchment of human rights and democracy as well as the promotion of constitutionalism.

98 See sec 17(c) of the Zimbabwe Human Rights Commission Act.

99 M Makanatsa 'Women's rights and gender equality in the new Zimbabwean Constitution: The role of civil society in implementation and compliance' in CM Fombad (ed) *The implementation of Modern African constitutions: Challenges and prospects* (2017) 156.

100 Zimbabwe 2019 Budget Highlights, <http://www.zimtreasury.gov.zw/index.php/resources/2019budget?download=21:2019-national-budget-highlights> (accessed 24 April 2019).

practices. Without adequate resources, national institutions have largely confined their activities to low-cost activities such as human rights promotion through the issuing of press statements denouncing harmful practices against women.

NGOs and CSOs play crucial roles in efforts meant to implement article 5 of the African Women's Protocol through research, education, advocacy and lobbying the government to end harmful practices. In 2008 non-state actors were instrumental in lobbying the government to ratify the Protocol. Thereafter, CSOs continued to call upon the government to implement the provisions of African human rights systems, including recommendations by the African Commission on Human and Peoples' Rights (African Commission). In some instances CSOs with African Union (AU) observer status¹⁰¹ contribute to the protection and promotion of human rights by taking part in AU processes, including doing research and submitting shadow reports to the African Commission to complement state reports. These shadow reports are crucial as they often provide an independent assessment of the human rights situation which might be lacking in government reports.

Some notable examples of CSOs that implement the African Women's Protocol include the Women's Coalition of Zimbabwe, which works tirelessly to end child marriage. In 2017 members of the Women's Coalition of Zimbabwe¹⁰² launched a two-year project titled 'Amplifying community voices against child marriages' in Norton, Chiweshe and Mbare.¹⁰³ The aim of the project is to encourage community action against child marriages by transforming societal attitudes and perceptions to form a strong and coherent voice against harmful traditional, cultural and religious practices that support child marriage in Zimbabwe. Projects of this nature raise awareness at grassroots level, from where the problem of harmful practices, and child marriages in particular, emanates. Therefore, raising awareness and involving citizens at grassroots level can go a long way towards eradicating harmful traditional practices against women.

In most cases NGOs and CSOs forge partnerships with government ministries to sensitise and raise society's level of awareness about harmful practices. Plan Zimbabwe, together with the Ministry of Women's Affairs, Gender and Community Development is implementing the 18+ Ending Child Marriages project in three

101 Catholic Commission for Justice and Peace in Zimbabwe, Southern African Research and Documentation Centre (SARDC); Zimbabwean Human Rights Association (ZimRights); Legal Resources Foundation (LRF); Human Rights Trust of Southern Africa; Zimbabwe Human Rights NGO Forum; Zimbabwe Lawyers for Human Rights (ZLHR); Zimbabwe Association of Doctors for Human Rights (ZADHR); and Zimbabwe Women Lawyers Association.

102 The members include the Zimbabwe Women Lawyers Association; Women and Law in Southern Africa; and Shamwari Yemwanasikana.

103 The project location has been limited to these three areas due to the recorded high prevalence of child marriages as indicated in the UNFPA Paper on Child Marriages.

programme unit areas. The objectives are to increase support from community members and leaders to discourage child marriage; to empower girls to be better equipped to resist socio-economic pressures that lead to child marriage; and to ensure that community members have increased knowledge of the realities of child marriage.¹⁰⁴ This project has also roped in the Zimbabwe National Chiefs' Council, which is playing a pivotal role in protecting the rights of the girl child by preventing child marriages.

Similarly, Development Aid from People to People (DAPP), a Zimbabwean NGO, launched a four-month campaign to end early and forced child marriages in Mashonaland Province. Conducted between November 2015 and February 2016, the programme mobilised traditional leaders and activists to take action to prevent early and forced child marriages, and raising community awareness on the rights of girls in line with human rights and women's rights statutes. As the custodians of culture, the inclusion of traditional leaders is crucial for ending child marriages and other harmful practices in their societies.

6 Conclusion

Despite the constitutional, policy and judicial attempts discussed above, some harmful cultural practices remain prevalent in Zimbabwe. This is partly due to the slow pace of legislative reform that specifically deals with the elimination of harmful practices against women. Such delayed legislative reform is in clear violation of article 5 of the African Women's Protocol. It requires more than legislation and litigation to address this current state of blatant violation of women's rights. There is a need for a more holistic approach that includes the speedy alignment of laws, advocacy, human rights education, awareness raising on legislation, a change in patriarchal mind-sets and political will. In all these efforts, both men and women have an important role to play. Most harmful cultural practices are perpetuated by and for men and the affected parties almost always are women. Nevertheless, not all men are culprits.

For any mechanism to effectively achieve the goal of article 5 of the African Women's Protocol, all stakeholder approaches that involve perceived perpetrators and victims should be implemented. It is key to also address the need for political will from the powers that be to eliminate harmful traditional practices. Put differently, the only durable solution is for everyone to be responsible for the elimination of harmful traditional practices: women, men, civil society, the

104 B Pazvakavambwa 'Preliminary research into the extent, factors and effects of child marriage research in Zambia, Zimbabwe and Malawi' 2015, <https://static1.squarespace.com/static/5519047ce4b0d9aaa8c82e69/t/57457d5f4d088efc9e56969b/1464171875757/Child+Marriage+Report+-+FINAL+2015.pdf> (accessed 13 June 2017).

judiciary and, of course, the state. It is a shared responsibility and until and unless it is seen in that light, women will continue to suffer the prejudices caused by harmful traditional practices.

The impact of the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa

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Summary

In 2009 the African Union Assembly adopted the Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). The adoption of the Kampala Convention was in response to the protection and assistance of persons displaced within the borders of the state. While there was a regional instrument that dealt with the protection of persons displaced outside state borders, the gap in the protection of persons displaced internally within state borders prompted the adoption of the framework. Hailed as a binding regional response to a global challenge, the Kampala Convention has emerged as an important framework since adoption. However, there is scant information and discussion about its impact on the protection and assistance of internally-displaced persons. This article seeks to fill this gap by considering the impact of the Kampala Convention on the regional landscape on the protection and assistance of internally displaced persons in Africa.

Key words: *internally displaced persons; impact; Africa; Kampala Convention, African Union; IDP Convention*

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1 Introduction

With a third of the world's 40 million internally displaced persons (IDPs) on the African continent, the need for an adequate response to the protection and assistance of IDPs has resonated significantly.¹ In response to the normative protection gap, African leaders adopted the Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention) in Kampala, Uganda, in 2009 to cater for 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence' for reasons such as 'armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters'.² However, to qualify as an 'internally displaced' person, one must not have crossed an internationally-recognised state border.³ As the first binding international instrument of its kind, the Kampala Convention has become a reference point for the protection and assistance of IDPs. As at November 2019, 30 African Union (AU) member states have ratified the Kampala Convention.⁴ While much has been stated about the potential value of the Convention, especially in the early years of its adoption, there is scant information and discussion about its impact on the internal displacement landscape.⁵ In advancing the discussion, the article is divided into two main parts. The first part provides a context in which protection and assistance of IDPs has emerged. This is useful to understand the gap that the Kampala Convention – as with its antecedent, the UN Guiding Principles – fills in relation to IDPs. The second part examines the impact through the optics of four parameters, namely, direct substantive, indirect substantive, direct symbolic and indirect symbolic impacts.

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- 1 C Beyani 'Recent developments: The elaboration of a legal framework for the protection of internally-displaced persons in Africa' (2006) 50 *Journal of African Law* 187; J Crisp 'Forced displacement in Africa: Dimensions, difficulties and policy directions' (2010) 29 *Refugee Survey Quarterly* 1; MT Maru *The Kampala Convention and its contribution to international law* (2014); AM Abebe *The emerging law on forced displacement in Africa: Development and implementation of the Kampala Convention on internal displacement* (2017); KM DeJesus 'Forced migration and displacement in Africa: Contexts, causes and consequences' (2018) 37 *African Geographical Review* 79-82; N Bhalla 'Africa welcomes refugees but freedoms, jobs needed, aid groups' *Reuters* 12 February 2019; UN Economic Commission for Africa Issue Paper on the Theme: United Nations Support to the African Union Year of Refugees, Returnees and Internally Displaced Persons: Towards durable solutions to forced displacement in Africa UN Doc E/ECA/RCM/20/INF2 23 February 2019 para 4; African Union 'Member states expert meeting on the operationalisation of the African humanitarian agency opens' African Union (Press releases) 15 April 2019.
 - 2 Art 1(k) African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009) (Kampala Convention).
 - 3 As above.
 - 4 United Nations High Commissioner for Refugees 'UNHCR welcomes Somalia's ratification of the Kampala Convention' *UNHCR* 27 November 2019.
 - 5 Examining the impact of the Kampala Convention provides an optic through which to understand in concrete terms its importance in shaping the landscape on internal displacement in Africa.

2 Context

In response to the global issue of internal displacement, a set of UN Guiding Principles on Internal Displacement (UN Guiding Principles) was adopted in 1998 with the aim of providing normative guidance to states on the protection and assistance of IDPs.⁶ These Guidelines sought to build on existing international practice to identify specific normative protection in response to the gap between the protection of persons displaced within state borders. This gap prompted early discussions during the formation of the 1951 Refugee Convention,⁷ when the notion of assistance to populations displaced within state borders was mooted. However, there was a prevalent consensus at the time that issues of internal displacement were primarily internal state affairs and were not for discussion in the international legal community in view of the principle of non-interference.

As such, to raise the question about international legal solidarity towards IDPs in this period was to raise an objection to the doctrine of non-interference which guided state relations and which, in fact, was at its peak during the Cold War. However, things slowly started changing at the end of the Cold War when it became clear that the internal affairs of states could not be left solely to the states to decide. There were countries of the former Soviet Union in which identities were constructed along ethnic lines that significantly affected other populations within the states. In Africa, the situation in the Sudan was a reflection of the essence of international legal protection.⁸ During the phases of civil wars between the northern and the southern part (now South Sudan), protection largely was constructed along ethnic lines and given that the north and south were divided in a heavily-charged socio-ethnic conflict, the posture of the national government towards displaced populations unveiled patterns of these divides. The pertinent question that thus emerged from these concerns was what then was to become the plight of populations left at the mercy of national governments that were less emphatic to their protection needs. A mere reflection on this question raises the pertinent role of the international community towards the protection, not merely of persons seeking asylum, but of those who are internally displaced within state borders. The development of the norm on IDPs was to create a standard to which states may hold themselves to account in

6 UN Commission on Human Rights, Addendum, 'Guiding Principles on Internal Displacement' Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission on Human Rights Resolution 1997/39, UN Doc E/CN.4/1998/53/Add.2 11 February 1998 (UN Guiding Principles); see also R Cohen & FM Deng *Masses in flight: The global crisis of internal displacement* (1998).

7 UN Convention Relating to the Status of Refugees, 189 UNTS 150 (1951 Refugee Convention).

8 F Deng *War of visions: Conflict of identities in the Sudan* (1995) 484; HA Ruiz 'The Sudan: The cradle of displacement' in R Cohen & FM Deng (eds) *The forsaken people: Case studies of the internally displaced* (1998) 142.

relation to IDPs and to which the international community may assess the level of states in the furtherance of protection for IDPs, be it as a consequence of conflict, development projects or natural disasters. With the development of the Guiding Principles, there have been a plethora of normative awakenings to enhancing the protection of displaced populations and, within this rhetoric,⁹ the Kampala Convention has sprung up as a normative force.

However, the development of the Kampala Convention never really was the objective of the first Organisation of African Unity (OAU) Ministerial Conference on forced displacement held in Khartoum, Sudan, in 1994.¹⁰ In fact, while the issue of internal displacement was largely brought to the fore through the notable contribution of the OAU leading up to the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED Conference),¹¹ the development of a regional framework on the protection and assistance of IDPs began in the early 2000s in the period of the development of a normative framework in the Great Lakes for the protection and assistance of IDPs.¹² Seeing that the issue of internal displacement was a continental issue that affected countries beyond the Great Lakes region, developing a norm for the protection and assistance of IDPs became an imperative at the level of the AU and the formation of the Kampala Convention notably began with the decision of the AU Executive Council to address the issue of internal displacement in Africa through a binding instrument.¹³ Earlier, in 1969, the OAU, now the AU, had developed a framework for the protection of persons displaced outside state borders.¹⁴ This

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- 9 See E Ferris 'Assessing the impact of the Principles: An unfinished task' (2008) *Forced Migration Review: Ten Years of the Guiding Principles on Internal Displacement* 10-11; D Cantor *Returns of internally displaced persons during armed conflict: International law and its application in Columbia* (2018); N Majidi & D Tyler 'Domesticating the Guiding Principles in Afghanistan' (2018) *Forced Migration Review: Twenty Years of the Guiding Principles on Internal Displacement* 31-34.
- 10 See Khartoum Declaration of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa, adopted at the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa in Khartoum, Sudan, 13-14 December 1998.
- 11 UN General Assembly International Conference on the Plight of Refugees, Returnees and Displaced Persons, Report of the Secretary-General, UN Doc A/43/717 19 October 1988.
- 12 Protocol on the Protection and Assistance of Internally Displaced Persons, adopted by the International Conference on the Great Lakes Region (2006).
- 13 See AU Executive Council Decision on the situation of refugees, returnees and displaced persons AU Doc EX/CL/127 (V) (2004).
- 14 The 1969 Refugee Convention incorporates the 1951 UN Refugee Convention refugee definition of persons who 'owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. Notably, however, the definition of the 1969 Refugee Convention expands the category of refugees, recognising that refugees are 'every person who, owing to external aggression, occupation, foreign domination

protection, captured through the 1969 OAU Convention, was in response to the dynamics of displacement on the continent in the period following decolonisation. However, there was no regional standard on the plight of persons displaced within state borders. Given the need to articulate guidance, the AU Commission was requested to commence the development of a context-suited framework in response to the issues faced by IDPs in Africa. This process resulted in the development and eventual codification of the Kampala Convention which seeks to respond to the protection gaps, leveraging on the provisions of the United Nations (UN) Guiding Principles.

The Kampala Convention has 23 provisions.¹⁵ Notably, it requires states to protect the rights of all persons against being arbitrarily displaced and, in so doing, to respect provisions of international law that are relevant for the protection of IDPs. Moreover, the Kampala Convention further accentuates the general obligation of states to prevent conditions that result in displacement such as 'political, social, cultural and economic exclusion and marginalisation'.¹⁶ The Kampala Convention further emphasises obligations relating to protection and assistance, including cooperation among states in the protection of these persons and the facilitation of access to humanitarian assistance.

or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'. See OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) (1969 Refugee Convention) arts 1(1) & (2); 1951 Refugee Convention (n 6) art 1; see generally SA Aiboni *Protection of refugees in Africa* (1978); MR Rwelamira 'Two decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa' (1989) 1 *International Journal of Refugee Law* 557; E Arboleda 'Refugee definition in Africa and Latin America: The lessons of pragmatism' (1991) 3 *International Journal of Refugee Law* 185; J Oloka-Onyango 'Human rights, the OAU Convention and the Refugee crisis in Africa: Forty years after Geneva' (1991) 3 *International Journal of Refugee Law* 453; G Okoth-Obbo 'Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 79; JOM Okello 'The 1969 OAU Convention and the continuing challenge for the African Union' (2014) 48 *Forced Migration Review* 70.

15 Art 2 of the Kampala Convention provides an indication of its objectives as follows: (1) Promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions; (2) Establish a legal framework for preventing internal displacement, and protecting and assisting internally displaced persons in Africa; (3) Establish a legal framework for solidarity, cooperation, promotion of durable solutions and mutual support between the States Parties in order to combat displacement and address its consequences; (4) Provide for the obligations and responsibilities of States Parties, with respect to the prevention of internal displacement and protection of, and assistance, to internally displaced persons; (5) Provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons'. Kampala Convention (n 2) art 2.

16 Art 1(b) Kampala Convention.

Moreover, the Convention underscores the duty of international organisations and humanitarian agencies and emphasises protection for IDPs in the context of armed conflict as with the obligation of armed groups, notably, to refrain from arbitrary displacement. The obligations of the AU, notably within the context of the responsibility of states to protect and support, are emphasised. Further, the obligation of states during internal displacement, including positive steps that must be undertaken by states with the assistance of international organisations and agencies, is underscored. The Kampala Convention provides for protection in the context of development projects. Moreover, it advances durable solutions and underscores the relevance of compensation, the registration of IDPs and institutional protection through the machinery of a Conference of State Parties (COSP) to the Kampala Convention, the African Peer Review Mechanism (APRM) and the African Commission on Human and Peoples' Rights (African Commission).¹⁷

While drawing heavily on this framework, the Kampala Convention sets its own tone. It recognises issues of harmful practices as root causes of internal displacement and also places specific obligations on international organisations and humanitarian agencies. Moreover, the Kampala Convention incorporates salient obligations such as the AU's cardinal doctrine on responsibility to protect in situations of grave breaches of human rights, including genocide, war crimes and crimes against humanity.¹⁸ It is useful to draw on certain correlations between the Kampala Convention and the Guiding Principles in reflecting both on the normative influence of the latter and the contribution of the former. Further, both instruments underscore the pertinence of the right not to be arbitrarily displaced, also reflecting core root causes such as conflict, natural disasters and development projects. Moreover, both instruments underscore the importance of international humanitarian and human rights law in contextualising protection for IDPs. As in the case of the Guiding Principles, the Kampala Convention is emphatic on the primary obligation of the state given that the nature of internal displacement reflects a picture of persons within state territories over which states, by virtue of settled custom in international law, have control.

Beyond this, however, both instruments reflect the need for international cooperation in providing humanitarian assistance to

17 Specifically, art 14 provides: '(1) States Parties agree to establish a Conference of States Parties to this Convention to monitor and review the implementation of the objectives of this Convention. (2) States Parties shall enhance their capacity for cooperation and mutual support under the auspices of the Conference of the States Parties. (3) States Parties agree that the Conference of the States Parties shall be convened regularly and facilitated by the African Union. (4) States Parties shall, when presenting their reports under Article 62 of the African Charter on Human and Peoples' Rights as well as, where applicable, under the African Peer Review Mechanism indicate the legislative and other measures that have been taken to give effect to this Convention.' Art 14 Kampala Convention (n 2).

18 Art 8(1).

IDPs, recognising that the issue of internal displacement is not merely a matter that states should be made to encounter alone. In addition, both instruments emphasise the nexus with refugee law, noting that IDPs may also become refugees and as such have the right to seek asylum. On the issue of gender, both instruments stress the protection of women, also recognising intersectionality, for instance, with pregnant and elderly women. While both instruments are fairly elaborate, there are obvious misses that are worth reflecting on. In both instruments, for instance, there hardly is any reference to awareness raising, notably due to the fact that the issue of awareness has been recognised as integral to compliance. Moreover, neither instrument also defines what arbitrary displacement is, despite the fact that it is integral to protection of the group it seeks to serve. However, the fact that these gaps may raise interpretative questions is not an argument that affects the value of the instruments. For instance, the concern about awareness can be resolved if one reflects on the obligation of states to take measures that are strategic and policy-oriented towards protecting IDPs at the domestic level. Distinctively, however, the Kampala Convention is hard law and, as such, binding on states for which accountability may be sought from states.

3 Impact

Given that the ultimate test of international human rights law is at the domestic level, establishing its impact offers a basis for understanding the 'influence that ... treaties may have had in ensuring the realisation of the norms they espouse in the individual countries'.¹⁹ The impact of treaties has been a subject of interest among various international legal scholars.²⁰ The consensus in the literature is that there is a need for evidence-based treaty assessments. However, a systemic approach for this examination has been isolated. In the field of human rights law there are useful indicators that have emerged from discussions on this subject, notably, in relation to judicial decisions.²¹ The question of impact or effect of treaties resonates from the notion that the aim of treaties is to effect changes within the scope of a subject matter. Whether through norm setting or institution creation, human rights

19 C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic law' (2001) 23 *Human Rights Quarterly* 483 485.

20 See M Scheinin 'Impact of the law of treaties' in MT Kamminga & M Scheinin (eds) *The impact of human rights law on general international law* (2009) 23; F Viljoen 'Impact in the African and Inter-American systems: A perspective on the possibilities and challenges of cross-regional comparison' in P Engstrom (ed) *The Inter-American human rights system: Impact beyond compliance* (2019) 303; ST Ebovrah 'The uneven impact of international human rights law in Africa's sub-regional courts' in M Scheinin *Human rights norms in 'other' international courts* (2019) 287.

21 See C Rodríguez-Garavito 'Beyond enforcement: Assessing and enhancing judicial impact' in M Langford et al (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 75.

treaties seek to orientate changes in the behavioural pattern of actors towards a particular issue. It often is for this reason that a study on the impact of treaties is of essence as a way of measuring the pertinence of the treaty and, in effect, determining its utility. Leveraging on notable scholarly discussions, this part defines four parameters for contextualising impact: direct-substantive, direct-symbolic, indirect-substantive and indirect-symbolic. Before engaging these parameters in the context of the Kampala Convention, it is useful to briefly reflect on the parameters.

Generally, the primary aim of treaty formation is to influence the subject matter of focus. Where such influence specifically relates to treaty obligations, the treaty may be regarded as having a direct influence. The notion of 'direct' influence derives from duties that are explicit in the treaty. Generally, treaties provide for such direct influences either in the form of concrete law and institutional formation (substantive) or actions geared at building momentum on the subject (symbolic). As such, a treaty's direct influence can further be sub-divided into substantive and symbolic. A direct influence is substantive where it relates to concrete steps that alter the normative and institutional landscape on the subject of focus. However, a direct influence may also be symbolic and, in this context, relate to actions that build momentum on the need for viable solutions and which frames the treaty subject matter as an urgent concern. However, when these influences do not relate to treaty obligations, they are regarded as indirect and can also be either substantive or symbolic. It is not always the case that a treaty impact may have these four dimensions of impact. However, in the context of the Kampala Convention these four dimensions can be clearly discerned.

Leveraging on this typology, this part reflects on the impact of the Kampala Convention in the formation of laws and the development of institutions that are directly related to treaty obligations (direct substantive impact) and that are not directly related to treaty obligations (indirect substantive impact). This part further reflects on the impact of the Kampala Convention in framing displacement as an urgent concern (symbolic impact). Such symbolic impact may be directly related to the treaty (direct symbolic impact) or not directly related to the treaty (indirect symbolic impact). Such impacts include treaty use for advocacy; conferences; media reportage; symposiums; academic writing; and by reporting mechanisms through concluding observations or recommendations.

3.1 Direct substantive impact

Since the adoption of the Kampala Convention in 2009, norms have emerged at the national level as a direct substantive effect of the

treaty.²² At least seven countries have developed laws and policies (including draft laws and policies) leveraging on the Kampala Convention: Liberia, Malawi, Niger, Nigeria, South Sudan, Somalia and Zambia.²³

While reflecting the Kampala Convention as an important source, these frameworks also draw on key provisions of the Kampala Convention. For instance, the Liberia IDP law and the Malawi IDP Framework draw its definition of IDPs from the Kampala Convention.²⁴ In addition to the definition of IDPs in the Kampala Convention, the Niger IDP law draws on the provisions of the Kampala Convention with regard to IDP registration and the responsibility of humanitarian actors. Moreover, an emphasis on coordination notably is emphasised in the treaty. The Niger IDP Law establishes a national coordination committee required to facilitate the coordination of government decision making along with national human rights institutions, civil society and international organisations as with national and international humanitarian agencies. Another pertinent emphasis is on the need for durable solutions: The notions of local integration, resettlement and return are duly emphasised.²⁵ The Nigerian IDP policy mirrors the Kampala Convention. One of the policy objectives is to ‘accentuate the commitment of the government of Nigeria to the obligations of state parties under various international treaties’, with respect to ‘international humanitarian law and human rights protection in situations of emergencies and internal displacement, with special attention to the Kampala Convention’.²⁶ The South Sudan IDP Law also draws heavily on the Kampala Convention. The South Sudan framework leverages on the Kampala Convention in recognising climate change as a root cause of internal displacement, requiring that measures be established to address its effects.²⁷

22 The Kampala Convention requires states to ‘incorporate their obligations under this Convention into domestic law by enacting or amending relevant legislation on the protection of, and assistance to, internally displaced persons in conformity with their obligations under international law’. Art 3(2)(a) Kampala Convention.

23 Federal Republic of Nigeria National Policy on Internally Displaced Persons in Nigeria (2012) (Draft) (Nigeria IDP Policy); Guidelines for the Compensation and Resettlement of Internally Displaced Persons (2013) (Zambian Policy); Policy Framework on Displacement within Somalia (2014) (Somalia IDP Policy); Puntland Policy Guidelines on Displacement (2014) (Puntland IDP Policy); Malawi Durable Solutions Framework for Internally Displaced Persons and Flood affected Populations (2015) (Malawi IDP Framework); Niger Law Relating to the Protection and Assistance of Internally Displaced Persons (2018) (Niger IDP Law); Liberia: Act for the implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2018) (Draft) (Liberia IDP Law); South Sudan: Protection and Assistance of Internally Displaced Persons Act, 2019 (Draft) (South Sudan IDP Law).

24 Liberia IDP Law (n 23); Malawi IDP Framework (n 23).

25 Niger IDP Law (n 23).

26 Nigeria IDP Policy (n 23).

27 South Sudan IDP Law (n 23).

As with the South Sudan framework, the Somalia IDP Policy recognises climate change as a root cause of internal displacement.²⁸ Notable influences of the Kampala Convention are also reflected in the provision of the Puntland IDP Policy starting with the first four paragraphs of the Preamble which underscore the consciousness to 'the gravity of the situation of internally-displaced persons as a source of continuing instability and tension for African states'; 'the specific vulnerability of internally-displaced persons'; and reaffirm 'the inherent Somali tradition of hospitality by local host communities for persons in distress and support for such communities'.²⁹ In the Zambian Policy the impact of the Kampala Convention is most visible in the design of operational principles with respect to development projects.³⁰ Notably, the Zambian Policy emphasises the need to explore viable alternatives to projects and conduct assessments.

Institutionally, the direct substantive impact of the Kampala Convention is the formation of the COSP to monitor and review implementation as required under article 14(1) of the Kampala Convention.³¹ The first COSP was held in April 2017 in Harare, Zimbabwe, with the objective of exploring avenues to foster compliance among member states of the AU.³² Pertinent concerns were raised with respect to data, notably in relation to making data more acceptable and reflective of the situations of internal displacement. The impact of business activities in many parts of Africa, the links between humanitarian protection and development support, and the importance of stakeholder engagement as with continental solidarity in addressing key issues were emphasised. Countries also aired notable actions towards the implementation of the Kampala Convention. For instance, Malawi noted that in March 2015 it adopted a Durable Solution framework which draws on the Kampala Convention and seeks to enable the state, humanitarian and development partners to evaluate opportunities towards providing durable solutions for flood-affected populations. On an institutional front Zimbabwe highlighted the existence of a civil protection unit. Overall, the meeting emphasised the pertinence of training of officials involved in protecting and assisting IDPs. An action plan for the

28 Somalia IDP Policy (n 23).

29 Puntland IDP Policy (n 23).

30 Zambian Policy (n 23).

31 Art 14(1) of the Kampala Convention recognises the Conference of State Parties as the principal organ to 'monitor and review the implementation of the objectives' of the Kampala Convention. Art 14(1) Kampala Convention (n 2).

32 '1st meeting of the conference of states parties to the Kampala Convention' African Union (Press Releases) 3 April 2017; 'Kampala Convention: UN expert welcomes the establishment of the Conference of State Parties' *Global Protection Cluster* 5 April 2017.

implementation of the Kampala Convention was adopted at the COSP³³ with an emphasis on enhanced national strategies.

Apart from these impacts, there are also indirect substantive impacts that have emerged on the premise of the Kampala Convention. The next part examines these indirect impacts that, while not explicit treaty obligations, reinforce the influence of the Kampala Convention.

3.2 Indirect substantive impact

While not explicitly provided for in the treaty, laws and policies have emerged that were influenced by the Kampala Convention. A notable indirect substantive impact of the Kampala Convention is the development of an AU Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa.³⁴ The Kampala Convention is the 'primary basis for the Model Law'³⁵ which seeks to 'assist in the implementation of the Convention as a framework for regional and international cooperation with respect to which the African Union is expected to play a more proactive role'.³⁶ The Model Law was developed by the African Union Commission on International Law (AUCIL) and adopted by the AU Assembly in 2018.³⁷ The Model Law incorporates 63 articles in providing an exposition on the Kampala Convention and reinforces the interpretation of national legislation in line with the Kampala Convention.³⁸

Moreover, another notable impact is the development of the General Comment on Free Movement of Persons in Africa.³⁹ While the General Comment articulates guidance on free movement within state borders in line with article 12 of the African Charter on Human and Peoples' Rights (African Charter), its provisions were shaped by the Kampala Convention, particularly with regard to the movement of IDPs due to armed conflict, disasters and development projects. The

33 'Plan of Action for the implementation of the Kampala Convention adopted by conference by conference of state parties' African Union (Press releases) 6 April 2017.

34 AU Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa (2018) (AU Model Law); see R Adeola 'The African Union Model Law on Internally Displaced Persons: A critique' in O Shyllon (ed) *Model law on access to information for Africa and other regional Instruments: Soft law and human rights in Africa* (2018) 224.

35 AU Model Law (n 34) para 10.

36 Report of the Draft AU Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa, AU Doc AUCIL/Legal/Doc 6 (IX) (2014) para 8.

37 The development process of the Model Law commenced in 2011 with the AUCIL as the focal institution. A Special Rapporteur within the AUCIL was tasked with the mandate of developing the framework which was presented and adopted by AU policy organs, most notably the AU Assembly. See AU Model Law (n 34).

38 AU Model Law (n 34).

39 General Comment on art 12(1) of the African Charter on Human and Peoples' Rights (2019).

Kampala Convention has also shaped the incorporation of provisions on forced displacement in other regional instruments, notably, the African Disability Protocol.⁴⁰

3.3 Direct symbolic impact

Since its adoption the Kampala Convention has been used to give visibility to the need for the enhanced protection of IDPs, framing perceptions on internal displacement as an urgent concern. In this regard the AU has been visible in strengthening 'the institutional framework and capacity of the African Union with respect to protection and assistance to internally displaced persons'⁴¹ and also collaborating with 'international organisations and humanitarian agencies, civil society organisations and other relevant actors in accordance with their mandates, to support measures by state parties to protect and assist internally displaced persons'.⁴² Over the last decade the Kampala Convention has formed the premise for the discussion on internal displacement at the AU Annual Humanitarian Symposiums and at the AU/UNHCR Humanitarian Law and Policy Trainings which seek to build the capacity of the AU and its member states on issues of forced displacement in Africa.

Over the last decade another important way in which the Kampala Convention has shaped perceptions on internal displacement as an urgent concern is through yearly anniversaries. The anniversaries notably 'serve as a reminder of how, as a legally binding tool, it frames displacement as a problem that requires comprehensive, structural and long-term responses at all levels'.⁴³ At its tenth anniversary a regional focus on forced migrants, including IDPs, was adopted through the designation by the AU Assembly of the year 2019 as the Year of Refugees, Returnees and Internally Displaced Persons in Africa.⁴⁴ The designation of 2019 as the year of forcibly-displaced populations has in many ways raised the profile of issues relating to displaced populations in Africa. Through this designation, there have been a renewed interest in the protection and assistance of IDPs which has led to strategic engagement based on the Kampala Convention at national and regional levels. This has been reflected in a plethora of regional meetings, studies and trainings that have emerged in the furtherance of IDP protection.

40 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018).

41 Art 8(3)(a) Kampala Convention (n 2).

42 Art 8(3)(c) Kampala Convention.

43 Norwegian Refugee Council and Internal Displacement Monitoring Centre Briefing Paper: The Kampala Convention two years on: time to turn theory into practice 8 December 2014.

44 See African Union Theme: Year of Refugees, Returnees and Internally Displaced Persons in Africa: Towards durable solutions for forcibly displaced persons in Africa (2019).

3.4 Indirect symbolic impact

Although not explicitly contained in the Kampala Convention, there are ways in which the Kampala Convention has been used to build momentum in addressing the issue of internal displacement. These are observable from a plethora of sources, including advocacy by civil society, Concluding Observations adopted after state reporting processes, media reports, conferences and studies.

With respect to civil society advocacy, a notable impact is the delivery of training and the development of studies on the protection and assistance of IDPs based on the Kampala Convention. The Norwegian Refugee Council (NRC), the Internal Displacement Monitoring Centre (IDMC) and the International Committee of the Red Cross (ICRC) have carried out notable initiatives in this regard. Over the last decade there have been a plethora of trainings and studies due to the Kampala Convention.

Since 2012 the IDMC has conducted trainings and reviews on the Kampala Convention in various parts of Africa, including Zimbabwe, Uganda and Ethiopia.⁴⁵ In 2012 the IDMC held its first pilot workshop pooling together over 30 national actors mostly from Uganda. The aim of this exercise was to develop key action plans for the protection and assistance of IDPs through the optics of the Kampala Convention. During the workshop the need for participatory approaches to the protection and assistance of IDPs was emphasised. It was observed that while Uganda had a national policy developed prior to the Kampala Convention, this policy was not as comprehensive and there was a need to amend the policy to reflect the Kampala Convention.

In 2014 and 2015 joint workshops were held by the NRC and the IDMC to build national strategies for the protection of IDPs based on the Kampala Convention. Both workshops brought together actors from government and civil society from various parts of the continent including Mali, Uganda, Nigeria, Côte d'Ivoire, South Sudan, Zambia and the Central African Republic. This process was not used merely to introduce the Kampala Convention as a regional imperative around which national level actions should be congregated, but also to build internal capacities to address challenges experienced by actors in the protection and assistance of IDPs.

45 'Domesticating and implementing the Kampala Convention: A dialogue for action' Pilot Workshop Uganda 12-13 November 2012; Norwegian Refugee Council and Internal Displacement Monitoring Centre 'Workshop report: The national responsibility to protect internally displaced people: The Kampala Convention' Addis Ababa, Ethiopia 8-10 December 2014; Norwegian Refugee Council and Internal Displacement Monitoring Centre 'A review of the legal framework in Zimbabwe relating to the protection of IDPs: In the context of the Kampala Convention and other supranational normative frameworks' December 2014.

In 2016 the ICRC undertook a regional study on the practical dimensions of the Kampala Convention.⁴⁶ The study emerged from the recognition of the value of the Kampala Convention as an imperative norm in shaping the landscape on IDP protection and assistance and the necessity of leveraging on its substantive provisions in advancing interventions. The study provides notable recommendations for national and regional actors in addressing internal displacement. Through this study the ICRC engages in bilateral engagement with states and regional institutions on the protection and assistance of IDPs.⁴⁷

Moreover, in its Concluding Observations the African Commission has also leveraged on the Kampala Convention in underscoring the need for law and policy formation. In its Concluding Recommendation on Uganda's fifth periodic state report, the African Commission observed that Uganda had 'not fully aligned its laws and regulations with its commitments under regional and international human rights treaties', including the Kampala Convention.⁴⁸ Following Malawi's state report covering the period 1995 to 2013, the African Commission urged Malawi to adopt 'a comprehensive strategy for the domestication and effective implementation' of the Kampala Convention which it ratified in 2013.⁴⁹ Moreover, in its Concluding Observation on Liberia the African Commission requested Liberia to 'provide information on the domestication of the Kampala Convention within the domestic legal system, and the measures put in place to ensure its full implementation'.⁵⁰ Special IDP mechanisms at the global and regional levels have also leveraged on the Kampala Convention in articulating the need for enhanced legal protection of IDPs. Notably, the African Commission Special Mechanism on Internally Displaced Persons has repeatedly urged states to formulate laws on IDPs in line with the Kampala Convention. At the global level the UN Special Rapporteur on the Human Rights of IDPs urged Libya to sign and ratify the Kampala Convention given that it could 'be

46 International Committee of the Red Cross *Translating the Kampala Convention into practice: A stocktaking exercise* (2016).

47 ICRC 'Translating the Convention into practice: A stocktaking exercise' (2017) 99 *International Review of the Red Cross* 365-366.

48 Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010-2012), adopted at the 57th ordinary session, Banjul, The Gambia 4-18 November 2015.

49 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995-2013) adopted at the 57th ordinary session, Banjul, The Gambia 4-18 November 2015.

50 Consideration of Reports Submitted by State Parties under Article 62 of the African Charter on Human and Peoples' Rights: Concluding Observations and Recommendations on the initial and Combined Periodic Report of the Republic of Sierra Leone on the Implementation of the African Charter on Human and Peoples' Rights, adopted at the 19th extraordinary session, Banjul, The Gambia 16-25 February 2016.

helpful to the government of Libya as a guidance tool to regulate the government's actions at the national and regional levels'.⁵¹

At the global level countries have referred to the need for law and policy measures based on the Kampala Convention during the Universal Peer Review of African states, including Côte d'Ivoire and Ethiopia.⁵² During Ethiopia's second periodic review, Uganda and Sierra Leone highlighted the need for the ratification of the Kampala Convention. Sierra Leone recommended to Ethiopia to '[c]onsider ratifying the Kampala Convention and drawing up a plan of action for internally displaced persons'.⁵³ During the third cycle Norway made a similar recommendation, requesting Ethiopia to ratify the instrument and to 'create a policy framework for all internally displaced persons'.⁵⁴

The Kampala Convention has also had the indirect symbolic effect of shaping media coverage on internal displacement. Over the last decade local and international media notably have spotlighted the issue of internal displacement with reference to the Kampala Convention. Outside Africa this has been reflected in news articles by prominent press news agencies such as Reuters, and *The Guardian* (UK). In Africa media coverage on internal displacement has been shaped by the Kampala Convention in prominent national press, including *Daily Maverick* (South Africa), *The New Times* (Rwanda) and *New Vision* (Uganda).⁵⁵

For instance, *Daily Maverick* published a significant piece in which it spotlighted the importance of the Kampala Convention in shaping the regional focus on IDPs. Noting that the Kampala Convention comes as an African solution to an African problem, the piece reflects the fact that it provides a viable roadmap in addressing the challenges facing IDPs. It further underscores the need for the treaty's proposed solutions to be 'made available to those affected by displacement'.⁵⁶ Also, *The New Times* published a piece in which the issue of internal displacement is shaped by the existence of the Kampala Convention.⁵⁷ In reflecting on the issue of internal displacement in Africa, *The New Times* accentuate the importance of the Kampala

51 See UN Human Rights Council Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to Libya UN A/HRC/38/39/Add.2 10 May 2018.

52 See UN Human Rights Council Report of the Working Group on the Universal Periodic Review: Côte d'Ivoire UN Doc A/HRC/42/6 3 July 2019 para 140.22.

53 UN Human Rights Council Report of the Working Group on the Universal Periodic Review: Ethiopia UN Doc A/HRC/27/14 7 July 2014 para 155.9.

54 UN Human Rights Council Report of the Working Group on the Universal Periodic Review: Ethiopia UN Doc A/HRC/42/14 5 July 2019 para 163.5.

55 See 'AU Summit to discuss 17 million IDPs in Africa' *New Vision (Uganda)* 15 October 2009; 'Africa's displaced people: Forgotten no more' *The New Times* 14 May 2010; K Patel 'Internally displaced people: An African solution to a huge African problem' *Daily Maverick* 6 December 2012.

56 *The New Times* (n 55).

57 As above.

Convention as a regional solution, emphasising that while IDPs have for far too long been forgotten, the Kampala Convention closes the protection gap and opens up new possibilities in enhancing the protection of these persons in Africa. According to the news agency, states that sign the Kampala Convention 'agree to shoulder primary responsibility for preventing forced displacement, among other things by threatening prosecution of those responsible'.⁵⁸

There have also been conferences and studies on the issue of internal displacement influenced by the Kampala Convention.⁵⁹ Notably, in September 2019 an international conference on the protection of forced migrants in Africa was held in South Africa.⁶⁰ An outcome statement was adopted noting, among others, that the 'Kampala Convention provides an important framework for the protection and assistance of IDPs'.⁶¹ This is in view of 'its prevalent impact in facilitating engagement with states, supporting the work of international organisations and enhancing the development of national legislations of African states'.⁶² To its credit, the Kampala Convention reflects a regional consensus that the optics of engagement on issues of internal displacement in Africa have to be more critical and robust fostering lasting solutions that build on the objective of ending internal displacement in Africa.

4 Conclusion

This article reflects on the impact of the Kampala Convention over the last decade. On the basis of the preceding part of this article, I contend that the Kampala Convention has contributed significantly to shaping the regional narrative on internal displacement. Over the last decade the Kampala Convention has defined national, regional and global narratives on internal displacement. Based on this treaty framework, states have sought to harmonise standards, and one of the ways in which this has been reflected is through national laws and policies on internal displacement in Africa.

While it is evident that much of the development in the regional and national landscape on internal displacement is shaped by the

58 As above.

59 See S Ojeda 'The Kampala Convention on internally displaced persons: Some international humanitarian law aspects' (2010) 29 *Refugee Survey Quarterly* 58; L Groth 'Engendering protection: An analysis of the 2009 Kampala Convention and its provision for internally displaced women' (2011) 23 *International Journal of Refugee Law* 221; Maru (n 1); UN Human Rights Council Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani, UN Doc A/HRC/26/33 4 April 2014; Abebe (n 1).

60 International conference on forced migration in Africa, hosted by the Centre for Human Rights, 'Calls for decisive action' *Centre for Human Rights (News)* 10 September 2019.

61 Future Africa Statement on Forced Migration in Africa 7 September 2019 2.

62 As above.

Kampala Convention, there is a need for progress, particularly in the area of good practices. It is imperative that for further action, there needs to be sustained advocacy from the region, constant dialoguing with states at sub-regional level and internal mechanisms at the domestic level that foster responsibility and ensure accountability. An important forum where this can be done at the regional level is at the annual AU humanitarian symposiums that serve as an avenue through which various institutions, civil society, member states of the AU and sub-regional communities reflect on ways in which the humanitarian landscape can be enhanced.

Moreover, beyond anniversaries there needs to be a sustained introspection among states, increased insights on relevant issues relating to the protection and assistance of IDPs within the context of the Kampala Convention, the invigoration of commitments at all levels and impact evaluation which is integral to the furtherance of protection and assistance to IDPs. To sustain the future of the Kampala Convention, there should be the continental adoption of a sustained multi-stakeholder public awareness raising on the protection and assistance of IDPs; the emergence of regulatory frameworks on IDP protection at the national level; enhanced institutional capacity of institutions; and improved efficacy of AU organs in the response to issues of internal displacement.

Protecting the rights of victims in transitional justice: An interrogation of amnesty

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Summary

The authors argue in this article that some categories of amnesty programmes, such as 'blanket' and 'self-granted amnesties' that bar the prosecution of perpetrators, have not been very helpful in the protection of the rights of victims in transitional justice. They contend, before embarking on widespread abuses of human rights since the post-ICJ era, that most perpetrators, especially dictators, often are aware of the legal odds but feel confident that if their regimes collapse, they would press for amnesty at least in return for a transitional process involving cooperation, surrender, confession, reparation and reconciliation. The Chilean, Peruvian and Sri Lankan cases have become citeable precedents. This reliance presents these categories of amnesty as unjust instruments of transitional justice. The article proposes a rule of law-based transitional justice that will involve an adjustment in the international law as a viable alternative to some amnesty programmes that appear to shield perpetrators from justice.

Key words: *transitional justice; amnesty; rule of law; truth commissions; international law*

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1 Introduction

Justice may be conceived elementarily as allowing the law to take its full course within its jurisdiction in matters regarding rewards, punishment and the distribution of goods and opportunities. The notions of blanket and self-granted amnesties, which are some of the strategies of transitional justice, simply state that the law should take a much-reduced course, if at all. Where then is the justice component in the programme called transitional justice? This question might be regarded as 'thinking out loud' and, indeed, may seem of little practical importance in our fast-advancing ideas about justice, but our justice programmes can hardly be complete without a retributive component. Transitional justice that admits of a type of amnesty which shields perpetrators from punishment may simply be robbing Peter to pay Paul, and this goes against the fundamental idea of justice as a programme that rewards legally correct actions and punishes illegal ones.

In this article we intend to work with the elementary conception of justice proffered above, and as such the article does not consider the well-known historical controversies associated with the definition of the term, beginning from Plato to Rawls and Nozick.¹ Despite the many differing views about justice, one gleans from all these that justice has legal and ethical components. Maduabuchi aptly observes: 'The term "justice" is as old as man. The minds of the masses, the oppressed, the down-trodden and the slaves are yearning for justice. Justice is a legal, ethical and ontological term. It is a common and living concept. The question of justice is a perennial one.'² Here, we do not intend to stretch the question of justice further, but strictly wish to study some of its practical dimensions in the forms of instituting, maintaining and applying the rule of law. The legality of justice is in the application of the rule of law and its ethical dimension lies in doing this without bias and compromise.

In a transitional justice programme, which is a strategy for moving a society from a period of chaos to that of peace, cases of abuse and human rights violations are handled in ways that should soothe wounds, calm nerves, expose secrets, repair damages, redress injustices, reconcile opponents and bring stability to a volatile context. The challenge in the transitional justice programme is that the rule of law is easily set aside. The rights of victims to justice might be grossly violated by the state when certain types of amnesty programmes that shield criminals from prosecution are deployed. The international

1 See Plato *The republic of Plato* trans A Bloom (1991); R Nozick *Anarchy, state and utopia* (1974); J Rawls 'Justice as fairness: Political not metaphysical' (1985) 14 *Philosophy and Public Affairs* 223; J Rawls *A theory of justice* (1999).

2 M Dukor 'Conceptions of justice' (1997) 24 *Indian Philosophical Quarterly* 497.

criminal and human rights laws require states to investigate and prosecute all cases of abuse and human rights violations.³

However, the immediate question is whether strategies of transitional justice should shield perpetrators or protect the rights of victims to justice. In this article we argue for the latter. Our inquiry focuses on showing that broad-based amnesties, such as blanket and self-granted amnesties, vitiate the rule of law and obstruct the course of justice. Our position is to criticise these categories of amnesty programmes that offer broad-based coverage (and to elevate criminal prosecution) after providing some of its strongest arguments. Our proposal is a rule of law-based alternative that involves limited amnesties, if at all. We begin with an elementary clarification of our concepts.

2 What is transitional justice?

Two words make up this concept, namely, 'transition', meaning to move from one point to another or, for our purpose, from one governmental regime to another; and 'justice', meaning, for our purpose, to abide by the rule of law with regard to reward, punishment and distribution of resources. Transitional justice, therefore, describes the type of justice that is sought in order to help bring about a peaceful transition from one regime (usually a repressive regime) to another (usually a democratic regime). Indeed, many scholars have offered different but related definitions of transitional justice. According to the International Centre for Transitional Justice,⁴

[t]ransitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse.

The foregoing is also similar to the definition offered by the United Nations (UN) which conceives it as 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.⁵ What may be gleaned from the definitions above is that an overemphasis on peace and reconciliation may form the necessary grounds for states to introduce broad-based amnesty programmes for perpetrators of large-scale human right abuses and crimes against humanity. When this

3 M Freeman & P Hayner 'Truth-telling' in D Bloomfield et al (eds) *Reconciliation after violent conflict: A handbook* (2003) 137.

4 International Centre for Transitional Justice 'What is transitional justice?' <http://www.ictj.org> (accessed 5 November 2015).

5 K Annan *The rule of law in conflict and post-conflict societies* (2004).

occurs, the ideas of accountability and justice are vitiated. Laplante,⁶ for example, relates how this emphasis led the corrupt and compromised government in Peru to legalise impunity through amnesty. She also discusses how the widespread impunity in Peru, which almost sidelined criminal justice in the application of transitional justice, soon led to international intervention. This intervention came in the form of the strengthening of human rights laws, the development of international criminal law, and a reduction of a state's authority at legislating immunity measures such as amnesty. We will revisit the issue of amnesty leading to large-scale human rights abuses later in the article.

3 How broad-based amnesty programmes scuttle transitional justice

According to Shalev,⁷ there are approximately five known categories of amnesty programmes:

- blanket amnesty which covers a broad range of crimes (a good example is Sri Lanka's Indemnity Act of 1982);
- conditional amnesty, which provides conditions or criteria under which certain individuals could be absolved from prosecution (a typical example being the South African case);
- *de facto* amnesty as in the case of Argentina's *Ley de Punto Final* (1986)⁸ which does not prohibit amnesty but limits it;
- disguised amnesty which depends on other laws for their interpretation and implementation, such as the Ouagadougou Political Agreement (2007) which could be interpreted for implementation based on different provisions in Ordinance 2007-475; and
- the notorious self-amnesty which is pardon granted to itself by a ruling government for its crimes (for example, the Peruvian case).

Amnesty has been a part of humanity's long political history that dates back to approximately 403 BC.⁹ It has been invoked in different contexts for different purposes. In ancient Greece Thrasybulus invoked it to end a lingering conflict.¹⁰ In Peru it was invoked to legalise impunity.¹¹ In Liberia it was invoked to attain transition from a

6 JL Laplante 'Outlawing amnesty: The return of criminal justice in transitional justice schemes' (2009) 49 *Virginia Journal of International Law* 915.

7 I Shalev 'EIP explainer: Amnesties' (2015) *European Institute of Peace* <http://www.eip.org/en/news-events/eip-explainer-amnesties> (accessed 20 September 2019).

8 As above.

9 GR Teitel *Transitional justice* (2000) 53.

10 RJ Buck *Thrasybulus and the Athenian democracy: The life of an Athenian statesman* (1998) 120.

11 Laplante (n 6).

totalitarian to a democratic regime.¹² However, the most powerful arguments in support of amnesty are that amnesty encourages a perpetrator to 'confess' his crimes and show 'remorse' for them. These gestures help the victim to 'heal' and thus to show 'forgiveness'. Together they provide adequate grounds for 'reconciliation' which then brings about 'peace'. However, what should be pointed out here is that the problem with programmes that emphasise and prioritise confessions, forgiveness and reconciliation over criminal prosecution is that they deny victims justice by shielding perpetrators in a transitional justice process.

Granted that transitional justice processes are based on the thinking that victims of atrocities and their societies need to know the truth about what had transpired, it falls to Truth Commissions to bring this about. Sooka supports the imperative of truth commissions in providing the framework for true reconciliation and transitional justice in post-conflict zones.¹³ However, Cassel argues also that the right to know the truth is not autonomous but is 'subsumed in the right of victims and families to obtain clarification of the facts through judicial investigation and adjudication'.¹⁴ This right to know is also enshrined in international law, as Villalba acknowledges.¹⁵

What can be established from the above is that truth commissions that offer broad-based amnesty may not be the only way to unearth the truth about what happened in repressive times. A thorough judicial process of criminal justice can also achieve this. Laplante cites the case of the Nuremburg trials as a credible example in which the criminal justice procedure makes amnesty less captivating.¹⁶ On the strength of this, we will interrogate amnesty as an immunity measure in the next part.

4 An interrogation of amnesty as an instrument of transitional justice

Some people think, perhaps correctly, that amnesties are very effective in revealing the hidden truths.¹⁷ Perhaps it is helpful to be optimistic, especially when the programme is applied in a transition from a troubled to a peaceful time. Undoubtedly, a documented perpetrator who would inevitably face criminal prosecution most likely

12 Laplante 66-68.

13 Y Sooka 'Dealing with the past and transitional justice: Building peace through accountability' (2006) 88 *International Review of the Red Cross* 311.

14 D Cassel *Victims unsilenced: The Inter-American human rights system and transitional justice in Latin America* (2007) 160.

15 SC Villalba 'Transitional justice: Key concepts, processes and challenges' Briefing paper (IDCR-BP-07/11) Institute for Democracy and Conflict Resolution (IDCR) (2011) 7.

16 Laplante (n 6) 918.

17 Villalba (n 15) 4.

will embrace the promise of amnesty and confess his crimes. The instinct of self-preservation explains this choice. Indeed, examples abound across history where this measure has led to the unmasking of many truths that probably would not have been known. Hayner¹⁸ relates a particularly strong case in the South African Truth and Reconciliation Commission (TRC) about three men who disappeared in the 1980s. An official police investigation revealed no clues, but at the TRC a former police officer, who had applied for and received amnesty, confessed the truth about their disappearance. The police officer along with colleagues had kidnapped and killed the men, then roasted their bodies for six hours until they turned into ash before throwing their ash into the Fish River. As horrendous as that was, the report helped some of the victims' families to obtain closure in their loss and further made the programme of reconciliation significant to national healing.

However, despite these clear advantages that amnesty as an instrument of transitional justice affords, there are strong arguments vitiating it as a morally and politically correct principle. For example, arguments have been raised about amnesty granting a freedom ticket to criminals;¹⁹ about perpetrators under amnesty not showing remorse or telling their hideous story in a triumphant tone; about amnesty violating international criminal and human rights laws;²⁰ about it denying victims their rights to justice; about it providing protection to perpetrators and denying same to victims,²¹ and so forth. Indeed, sensitive observations such as these bring amnesty seriously into question. It is largely for this reason that Freeman and Hayner²² observe that amnesty is 'inconsistent with a state's obligation under international law to punish perpetrators of serious human rights crimes'. Following on this, Dugard declares that 'amnesty is no longer accepted as the natural price to be paid for transition from repression to democracy'.²³ This raises the question of what amnesty is.

Amnesty is not an acquittal, in that one no longer is guilty. Despite being granted amnesty, a perpetrator is not cleared of the crimes of which he has been accused. Amnesty is not a verdict of innocence or of guilt. It is not proof that one is guilty or that one is innocent. It is turning a blind eye to the law in pursuit of the immediate goal of

18 P Hayner *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2011) 22.

19 International Centre for Transitional Justice 'Amnesty must not equal impunity, 2009 DRC amnesty law', <http://www.ictj.org> (accessed 5 November 2015).

20 Y Naqvi 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85 *International Review of the Red Cross* 583.

21 AR Wilson *The politics of truth and reconciliation in South Africa: Legitimising the post-apartheid state* (2001) 167-172.

22 Freeman & Hayner (n 3) 137.

23 J Dugard 'Dealing with crimes of a past regime: Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001.

peace and stability. The conditions of amnesty are not the same as the conditions of ransom. A perpetrator does not confess his crimes before receiving amnesty. Amnesty is not even a law-keeping practice in light of national and international criminal and human rights laws, but rather a law-breaking practice. It means setting aside the rule of law to do that which is considered immediately profitable as against that which is legally and strategically correct or even morally right.

Gardner defines amnesty as 'a pardon extended by the government to a group or class of persons, usually for a political offense; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted'.²⁴ The foremost exercise of amnesty in the history of human civilisation, as indicated earlier, can be traced back to around 404 BC when the Greek general Thrasylbulus offered amnesty to some remnants of the Athenian oligarchy.²⁵ Ever since, amnesty has appeared to be a common and acceptable practice at the end of warfare and conflict. However, in the post-World War II era, following the example of the Nuremburg trials and the post-Cold War era, following a sophistication in international criminal and human rights laws, the wisdom of amnesty is widely being questioned. The case of South Africa, where the devious offenders walked away without prosecution, created ripples that led many to rethink amnesty.

Much as the defenders of amnesty in South Africa argue that a peaceful transition at that time was more valuable, it created a history of scandal that within a space of approximately four decades some 8 000 amnesty applicants and even a greater number that had not applied walked free of the grievous crimes they had committed. Also, the case of Peru where the political class legalised impunity in the name of amnesties, has led scholars such as Laplante to advocate the outlawing of amnesty as an immunity measure in transitional justice.²⁶ With the tenet of amnesty conflicting with escalating international criminal and human rights laws, Dugard²⁷ asks whether amnesty remains an option in today's transitional justice programme, and answers that with the development of international human rights and criminal laws it no longer is the proper price to be paid for truth. We also think it is not, especially the two categories of blanket and self-granted amnesties that award large-scale, if not complete, coverage to crimes. These categories of amnesty are unjust. There are compelling reasons to believe that the processes of truth commissions can be compromised at different points, and amnesty programmes provide suitable cover for it. An example is where the negotiations between Nelson Mandela and FW de Klerk were said to have produced the terms of agreement on which basis the Truth

24 BA Garner (ed) *Blacks law dictionary* (2009) 99.

25 Buck (n 10) 79-83.

26 Laplante (n 6) 983.

27 Dugard (n 23) 1001-1015.

Commission proceeded. Here, it is possible that an individual's interest may supersede those of the group. Such a possibility demonstrates that broad-based amnesty is not such a good idea after all. Such amnesties seem to be the worst modern tools of diplomacy that re-victimise the victim and make the protection of human rights (in our context, the rights of victims) difficult.

5 Why compromising the justice component may scuttle the transitional justice process

According to Dugard,

[t]he present state of international law on the issue of amnesty is, to put it mildly, unsettled. While amnesty is prohibited in the case of genocide and war crimes committed in international armed conflicts, there are no clear rules prohibiting amnesty in the case of other international crimes.²⁸

Does this lack then mean that national governments are at liberty to award amnesty in all other areas, such as government repression, forced disappearances, widespread torture and imprisonment, systemic violations of rights of citizens, children and women, assassinations, executions, gang brutality, killings and violence, that are not committed during war time? A typical example may be the ongoing killings and destruction of property by Fulani headmen in the middle belt and other parts of Nigeria.

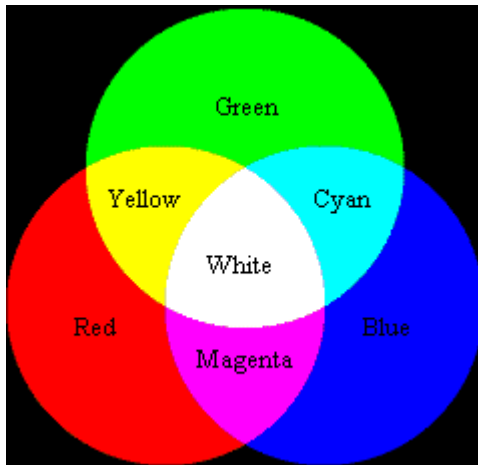
It should be observed that one of the weaknesses of certain categories of amnesty in a modern society is trivialising accountability by neglecting the rule of law. Another is that it tramples on the rights of victims to justice. We observe here that any justice programme that does not punish the offender punishes the victim. What is meant here is that victims are entitled to reparation and, above all, to justice. They become twice victimised or punished by the justice system when perpetrators are not brought to account. The punishment they suffer is the psychological pain of the knowledge that their attackers have walked away free. It should be a cardinal requirement in transitional justice that criminals be brought to account. This may be called the principle of 'justice as inevitable reaction'. By this principle we conceive justice (retributive) as a reaction to offences. The laid-down laws of a society determine when an offence has been committed. Justice then becomes the maintenance of the rule of law. Justice reacts to restore any law that has been breached. In any modern society where laws have been enacted, whether those laws are obeyed or not, justice inevitably reacts when they are breached. However, what happens is that where the rule of law is maintained, justice reacts to punish the offender and where the rule of law is not maintained it reacts to punish the victim. The victim, therefore, becomes twice victimised. This situation leaves us to ponder whether in the long run

28 Dugard 1015.

amnesty contributes to building democracy, democratic institutions and a culture that respects human rights and the rule of law.

However, the ultimate factor that vitiates those truth commissions that offer amnesty during transitional justice is the possibility of compromising the rule of law. There are four possible stages of transitional justice, namely, the period of conflict where the abuses are committed; the period of negotiations on how to end the conflict and introduce peace; the period of fragile peace where justice was not served; and the period of enduring peace where justice is served. We may choose to colour these four stages which may be imperative to enable us to capture clearly the essence and the flaws which a transitional justice programme might suffer and the long-term consequence. Find below the labelling and interpretation of the various stages of transitional justice. We wish to clarify that our interpretation of colours in this theory is not based on racial definition.

Figure 1. Colour representation of the moods of transitional justice

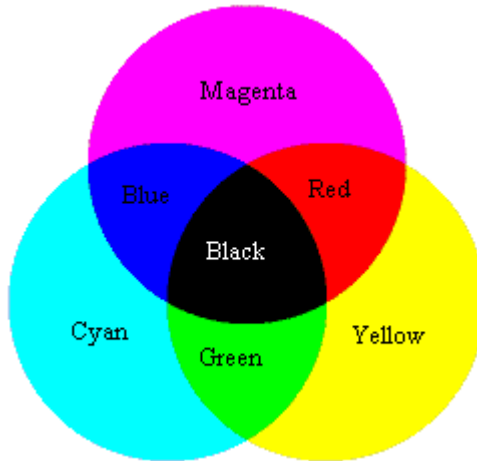


Source: Wolfstone Group 'Colour Mixing', http://209.150.104.225/Lighting/colmix_ColorMixing.html

In the above figure, three primary colours, red, blue and green when mixed, form different shades of colours: Red + blue = magenta; blue + green = cyan; green + red = yellow; red + blue + green form white. In the four stages of a transitional justice process identified above there are moods, and we will identify some such possible moods and label them with the colours in the above figure. The first is the mood of crimes and abuses (red); fragile peace (blue); long-term peace (green); negotiation with little or no compromise (yellow); negotiation with serious compromise (magenta); damage control (cyan). Let us consider white as a neutral mood in which the interests and mind sets of the negotiators are upright. In this condition, the

negotiating corridor is transparent and compromises are averted. As a product of red + blue + green, which depicts the moods of the acknowledgment of the conditions of crime (red), the possible outcome of fragile peace (blue) if there are compromises and the possible outcome of long-term peace (green) if compromises are averted.

Figure 2. Colour interpretation of the moods of transitional justice



Source: Wolfstone Group, 'Colour Mixing'. http://209.150.104.225/Lighting/colmix_ColorMixing.html

Let us interpret the above figure with the labelling in figure 1. Negotiation with little or no compromise (yellow) + negotiation with serious compromise (magenta) will ultimately regress to the mood of crimes and abuses (red). The mood of damage control (cyan) + negotiation with serious compromise (magenta) will lead to fragile peace (blue). The mood of negotiation with little or no compromise (yellow) + the mood of damage control (cyan) will lead to long-term peace (green). However, when the mindsets and interests of negotiators vary proportionately in the structure of damage control (cyan) + negotiation with serious compromise (magenta) + negotiation with little or no compromise (yellow), the negotiating corridor will be clouded in dark secrecy within which compromise becomes possible.

The success or failure of transitional justice to a large extent depends on whether negotiations for a way forward were compromised. During negotiations a number of actors are involved, notably perpetrators; accomplices; interest groups; beneficiaries; loyalists; affiliates; speculators; opposition; power blocs; foreign bodies; governments; and so forth. One truth is that these actors all have interests. The interests of these actors may vary considerably, but

in some ways it may be possible to reconcile some of these interests. This is where compromise sets in. We briefly outline five possible points of compromise below:

- (1) Beneficiary factor: There are people who benefit in conflict situations and during the transition process.²⁹ These include arms suppliers, business men who trade on illegally-obtained national resources such as blood diamonds in Sierra Leon, blood crude oil in the Middle East, Libya and the Niger Delta of Nigeria, and so forth. These people will do everything to compromise a transitional justice process to see that the eventual outcome will be more conflict or at least a fragile peace.
- (2) Legal disability factor: When the rule of law is not first established, negotiators will operate in an atmosphere of unmonitored freedom. Anything therefore is possible during this process of negotiations. Different groups and individuals with selfish interests might enter deals that compromise the process.
- (3) Commitment factor: Perpetrators of heinous crimes during repressive times usually have loyalists, affiliates, associates and accomplices who owe them favours. The perpetrators try to get these unknown accomplices to the negotiating room where they seek to approve policies and measures that protect the interests of the perpetrators. This is another way in which the process could be compromised.
- (4) Speculator factor: People with selfish motives will seek to conclude dirty deals. In a corrupt and repressive regime, for example, actors acquire great wealth and property. There might be members of the negotiation team who might want to do back deals with the perpetrators to receive a chunk of the stolen wealth and property in order for them to support or propose amnesty. These people do not care about peace and stability; they are property speculators who want to have their own share. Once their demands have been met by the perpetrators, they become complicit and as such seek to compromise the process.
- (5) Spaceship factor: This is also called the parachute effect.³⁰ It explains the way foreigners participate in transitional justice initiatives. They simply come in, sometimes not fully enlightened about the nature of the conflict and motives of local agents they are to work with, and as soon as they have completed their mission they leave without any follow-up programme. This paves the way for the implementation programme to be compromised at certain points, which may eventually retard the growth recorded earlier in the programme.

We thus infer that sometimes, when any of these factors compromises the negotiations or any other phase of a transitional justice

²⁹ Sooka (n 13) 313.

³⁰ Sooka 314.

programme, immunity measures such as amnesty become an important part of a truth commission and concepts such as confession, remorse, forgiveness, reparation, peace and reconciliation are emphasised. The South African case is a good example. Schabas tells us how the private agreements between Nelson Mandela and FW de Klerk shaped the transitional justice process in South Africa.³¹ Another example is that of the Democratic Republic of the Congo (DRC) where Sooka reports that a truth commission was established while the conflict was still ongoing and under pressure from peace brokers: 'The commission itself has members who are associated with warring parties and, as such, do not qualify as impartial.' Sooka then asks: 'Under these circumstances, can such a commission function with credibility?'³² Yet another example is when truth commissions begin by announcing amnesties. Sooka suggests that this may weaken their resolve to eventually prosecute some severe cases and the outcome is an embittered victim, especially 'the victims who feel the commission benefited perpetrators'. Thus, Sooka cautions that '[i]n establishing a truth commission, although healing and reconciliation are important, justice for victims should be given priority by ensuring that it is part of its core mandate'.³³ Also, Laplante gives two examples about outgoing dictators such as the Chilean Augusto Pinochet and Peruvian President Alberto Fujimori who used amnesty to provide cover for the crimes committed by their regimes.³⁴ Also, Hayner cites a number of cases such as in Liberia where the members of the truth commission were arbitrarily chosen by the government in power without due process, thereby casting doubt on the commission's credibility.³⁵

Wilson suggests that these forms of compromise are easily recognised when the language of reconciliation becomes hegemonic as in the South African case.³⁶ Klaaren and Varney further suggest that in such a compromised transitional justice process, talk of reconciliation displaces that of criminal prosecution and is placed on the front burner in the process.³⁷ On the other hand, when the negotiation is not compromised or not seriously compromised, criminal prosecution tends to feature in a truth commission and concepts such as justice, human rights, punishment and the rule of law are emphasised. We must admit that the latter is difficult to

31 W Schabas 'Transitional justice and the norms of international law' Presented at the annual meeting of the Japanese society of international law, Kwansai Gakuin University (2011) 11-12.

32 Sooka (n 13) 312.

33 Sooka 316-317.

34 Laplante (n 6) 919 924 944.

35 Hayner (n 18).

36 Wilson (n 21) 171.

37 J Klaaren & H Varney 'A second bite at the amnesty cherry? Constitutional and policy issues around legislation for a second amnesty' (2000) 117 *South African Law Journal* 572 581-592.

achieve without a transparent negotiation phase that establishes the rule of law.

6 Towards a rule of law-based alternative

It is clear from our discussion that what is lacking in some transitional justice programmes that accommodate certain categories of amnesty is the element of retribution. What our rule of law-based alternative compels the state and peace brokers to do is to establish an inviolable benchmark for the transitional justice programme in which accountability by way of criminal prosecution becomes not only a feature but a strong and prominent component. This rule of law-based proposal is the moral twine binding our ideas together, as becomes apparent when the question is asked whether one would rather leave the victim dissatisfied irrespective of the argument or have the offender deservedly punished. Punishing the offender not only is the legally correct thing to do, but is the morally right course of action. However, this practice entails the establishment of the rule of law as the foremost step in a transitional justice programme. In a way, we envision that this will affect the structure of truth commissions that have become the central nervous system of transitional justice programme, because amnesty, which is an essential part of truth commissions, would be limited to crimes a reasonable human considers not serious or outlawed. In this connection, Laplante argues that

[m]any scholars now acknowledge that to be legitimate, amnesties must conform to legal norms. This has created a standard of 'qualified amnesties' with customary and treaty law prohibiting bars to prosecution for war crimes, enumerated treaty crimes, and crimes against humanity³⁸

as truth commissions seek to do through amnesties.

Even though Hayner contends that 'it is not correct to say that most truth commissions provide political cover for amnesties, as some analysts have suggested, or that most truth commissions are established along with an amnesty',³⁹ records from most truth commissions bear witness to a preference for amnesty to criminal prosecution. The point need not be stressed again that in volatile times peace is regarded as more important than the rule of law, as truth is more important than justice. At least, that has always been the defence mounted by advocates of truth commissions and amnesty, which crystallises in what is called the 'truth versus justice debate'. This debate seeks to establish which is better, truth that could lead to peace and stability or justice that could lead to further escalation of conflict. Our take on this debate is that the suggested moral dilemma was mischievously created or simply does not exist. One can reach the

38 Laplante (n 6) 918.

39 Hayner (n 18) 105.

truth without awarding broad-based amnesties as the Nuremberg trials prove. In difficult cases, for example, a conditional amnesty that covers witnesses and accessories is adequate to reach the truth and prosecute perpetrators.

Modern society claims to rest on the rule of law. As the social contractarians point out, a state is a product of a pact. People come together to submit their individual freedoms and enact for themselves a body of laws to regulate their actions. Thus created, the state owes a range of debts and duties to its citizens which it is under obligation to honour. What this view implies is that any state that fails to honour these debts and duties (which are within its capacity to pay) automatically loses its moral authority to regulate the actions of its citizens.

A study of modern political theory reveals that the fundamental index of a functional society is the rule of law. Kelly⁴⁰ explains that streamlining a political process that led to the emergence of the nation state in the nineteenth century was a test of the rule of law in which the idea of the modern state as a political entity is that which owes no allegiance to any other power above itself. It is on the basis of the rule of law as the first principle of any modern state that political philosophers such as Hobbes, Locke, Rousseau, Hegel and Mill formulate theories on how best to maintain, promote and apply the rule of law.

Transitional justice cannot yield long-term stability if the component of the rule of law is compromised. Therefore, it is our proposal that transitional justice be redesigned to have the rule of law as its backbone and to outlaw certain categories of amnesty that shield perpetrators of serious crimes from prosecution. This rule of law-based alternative stipulates that the United Nations General Assembly be empowered to temporarily set aside a state's sovereignty and establish the rule of law in any troubled context using international forces prior to any negotiations that will lead to a transitional justice programme. This piece of legislation may be called the 'frozen sovereignty proviso'. This legal provision in international law would especially be required to discourage would-be dictators and tyrants from orchestrating human right abuses. Granted that this concept creates room for the intimidation of some states by others at the international level, it remains our best option for curtailing the impunity taking place in some states in modern times. It is easier for a tyrannical element in a state to initiate a programme of massive human rights abuses than for the majority of states in the UN General Assembly to conspire against a state. What is called for, however, is a careful articulation of the 'frozen sovereignty proviso' fitted with relevant clauses that will drastically reduce the room for abuse. Despite the great strides that in recent decades have been made in

40 P Kelly *Introduction to modern political thought* Undergraduate study guide, international programmes, University of London (2011) 6.

international law, legislation such as the 'frozen sovereignty proviso' remains conspicuously absent.

On the one hand, stable states might not broach the idea of such a proviso because of the fear of being accused of imperialism and neo-colonialism. On the other hand, non-stable states relish the cover which the provision of inviolable state sovereignty provides to immunise them against external interference in their dirty business. Rawls in his *The law of peoples* intuits that stability and security at the national level will determine stability and security at the international level.⁴¹ While not denying this possibility, we are of the view that a more practical alternative will be a situation where stability and security at the national level are guaranteed at the international level through laws such as the 'frozen sovereignty proviso'.

The modern world has made significant progress in terms of the quality of national laws. It has also made advances in the area of international law, but has not replicated at the international level the type of progress made at the national level. There is an apparent use of kid gloves in regulating nation states, made possible by the notion of state sovereignty deemed to be inviolable. It is understood that the events of World Wars I and II make this provision necessary, and some minor adjustments could still be made for the good of all. Sanctions of all kinds may be effective, but experience has shown that it is usually the innocent citizens that suffer, as in the cases of North Korea, Iran, Venezuela and Zimbabwe, to mention but a few. A provision that empowers the world body to temporarily set aside a state's sovereignty in the event of massive human right abuses would help avert horrendous incidents such as the Biafran genocide of 1967-1970 and the 1994 Rwandan genocide, to mention but a few examples. We are convinced that the 'frozen sovereignty proviso' or anything like it will constitute an important chapter in international law.

The successful enactment of the 'frozen sovereignty proviso' will strengthen criminal prosecution rather than broad-based amnesty and make it an important aspect of transitional justice. According to Naqvi, '[c]riminal prosecution of those accused of committing war crimes is a fundamental aspect of a victim's right to justice'.⁴² The author, however, proceeded to state that the incorporation of what the author calls 'limited amnesties' might be tolerated in a transitional justice process, and we are not opposed to this idea. In the tightening of international human rights and criminal laws, Laplante is correct in arguing that 'we can glimpse the impending demise of amnesty'.⁴³

41 J Rawls *The law of peoples: With the idea of public reason revisited* (1999).

42 Naqvi (n 20) 583.

43 Laplante (n 6) 932.

7 Conclusion

In this article we have articulated some concepts and principles to advance a rule of law-based alternative to broad-based amnesty in a transitional justice process. We submit that the best possible programme of transitional justice would be one in which the rule of law is pre-established through an international law provision to protect the rights of victims and have the state honour its debts and duties to its citizens during the process. The claim that justice will trigger violence and lawlessness, as widely speculated in the case of South Africa, is unfounded and mischievous if the rule of law was first established in a transitional justice process covering four possible stages and six moods, as colour-charted in the figures above. Our proposals are for truth commissions and, by extension, transitional justice programmes, to be fitted with criminal prosecutions as their central component and to limit amnesty to crimes which a reasonable human being would describe as not severe. The essence of prosecuting and punishing offenders in a modern state where the rule of law reigns is to protect the rights of victims, to honour the debts and duties of the state to its citizens, and, most importantly, to maintain the statehood of a state by preventing it from becoming a rogue state or, worse still, a failed state.

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'He beat me, and the state did nothing about it': An African perspective on the due diligence standard and state responsibility for domestic violence in international law

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Summary

State responsibility for human rights violations by private individuals as well as the cataloguing of domestic violence as a human rights violation in international law are emerging concepts being filtered through regional and international courts, quasi-judicial and treaty-monitoring bodies. These judicial and quasi-judicial bodies delineate a framework for determining state obligations with regard to domestic violence under international human rights law through the due diligence standard. The Economic Community of West African States Community Court of Justice in 2018 had its first opportunity to offer insights into its jurisprudence regarding state responsibility for domestic violence in international law. This article contributes to the dialogue on the standard for state responsibility together with the forms of domestic violence acts that are appropriate to warrant intervention from an African perspective. It focuses on how the ECOWAS Community Court of Justice has incorporated the due diligence standard and examines its potential as a legal tool to ascertain the nature of state obligations pertaining to those manifestations of domestic violence against women that are worthy of international intervention in the West African sub-region and Africa as a whole.

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1 Introduction

State responsibility for violations of human rights by private or non-state actors and the acknowledgment of domestic violence as an infringement of human rights are developing concepts in international law.¹ International and regional courts, quasi-judicial and treaty-monitoring bodies through their decisions, therefore, develop a due diligence jurisprudence aimed at clearly setting out what the due diligence standard entails and delineate a framework to determine state obligations with regard to domestic violence against women in compliance with the standard.²

In May 2018 the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) gave a landmark decision in favour of the complainants in *IHRDA & WARDC (on behalf of Mary Sunday) v The Federal Republic of Nigeria*³ – the first ever domestic violence case to be brought before the Court. The case is celebrated for setting the tone for state responsibility to victims of domestic violence regarding their right to a fair trial. Yet, the ECCJ did not find the defendant state to be in violation of the complainant's right to freedom from discrimination and gender-based violence. This decision engenders legal discourse on the standard for state responsibility as well as the forms of domestic violence acts that are appropriate to warrant intervention at international law.

Against this backdrop, the article reviews the *Mary Sunday* case which offers preliminary insights into the jurisprudence of the ECCJ that is developing regarding domestic violence. The case is also seminal to our understanding of the expansive notion of state responsibility for violations by private actors based on the due diligence principle. The ECCJ for the first time made reference to the due diligence standard in relation to domestic violence. Focusing on the due diligence standard, the article analyses how the standard is used in the *Mary Sunday* case by the ECCJ. The article further explores its potential as a tool to define and assess the obligations of states pertaining to those manifestations of domestic violence against women that are worthy of international intervention in the West African sub-region and Africa as a whole.

The article proceeds in five parts: Part 1 looks at state responsibility and the due diligence standard as applicable to domestic violence in

1 L Hasselbacher 'State obligations regarding domestic violence: The European Court of Human Rights, due diligence, and the international legal minimums of protection' (2010) 8 *Northwestern Journal of International Human Rights* 190.

2 As above; J Goldscheid & D J Liebowitz 'Due diligence and gender violence: Parsing its power and its perils' (2015) 48 *Cornell International Law Journal* 301.

3 ECW/CCJ/APP/26/15.

international law; part 2 gives a brief overview of the ECOWAS Court, particularly its jurisdiction and procedures regarding human rights; part 3 focuses on the *Mary Sunday* case, including the facts and issues raised and the judgment; part 4 reviews and analyses the *Mary Sunday* case through the lens of state responsibility and the due diligence standard in order to ascertain the ECCJ's jurisprudence on the subject as well as the potential impact of the due diligence standard in the African human rights regime in relation to domestic violence. Part 5 concludes the article.

2 State responsibility, due diligence standard and domestic violence in international law

2.1 State responsibility

State responsibility is a topic that has been subjected to many layers of classification: imputability, direct and indirect responsibility, and responsibility for particular groups such as state organs, insurrectional groups and private individuals.⁴ A state incurs responsibility when its actions or omissions constitute an internationally wrongful act.⁵ To put it differently, a breach or violation of international law by a state entails its international responsibility.⁶

State responsibility arises under two conditions: First, when the conduct of a state is 'attributable to the state under international law',⁷ that is when an act or omission is imputable to the state or deemed to have been carried out by the state and, second, when the conduct of a state 'constitutes a breach of international obligation of the state',⁸ that is a breach of a duty imposed by an international juridical standard.⁹

The attribution of conduct to a state for international responsibility as seen in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) is strict in nature. That is, a state is held responsible for acts imputable to it regardless of its intention – whether the act or omission was in good faith, bad faith or negligent – as long as the act or omission is internationally wrongful.¹⁰ This is

4 I Brownlie *Principles of public international law* (1990) 446.

5 Art 1 Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA).

6 'A violation of international law is a definitive act which would, by itself, directly involve responsibility.' *Italy v France* (Preliminary objections) (1923) PCIJ Ser A/B/, No 74 (*Phosphate in Morocco* case). 'Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.' *Great Britain v Spain* (1925) 2 RIAA 615 641 (Spanish zone of Morocco claims).

7 Art 2 ARSIWA (n 5).

8 As above.

9 A Abass *International law: Text, cases and materials* (2014). *United States v Mexico* (1931) RIAA 1 (*Dickson Car Wheel Company* case).

what is known as the objective responsibility of a state. Most courts, tribunals and other quasi-judicial bodies in the international sphere are biased towards objective responsibility.¹¹

However, at customary international law subjective responsibility is considered (also known as the fault theory) in addition to objective responsibility. Subjective responsibility, unlike objective responsibility, takes cognisance of the intention of a state for an action or omission before assigning responsibility. Subjective responsibility will therefore ask whether the state intentionally acted unlawfully (*dolus*) or whether it was negligent (*culpa*).¹² This notwithstanding, subjective responsibility should not be mistaken for the failure of a state to exercise due diligence as is prudent in a particular situation. This is because the failure by a state to employ due diligence in its actions will give rise to a strict liability even if it acted or omitted to act in good faith.

The state in itself is not a living person capable of acting on its own. That is why state responsibility is imputed to the state through the actions and inactions of certain groups of persons. ARSIWA lists the entities the actions or inactions of which are attributable to states and further gives the circumstances under which those acts or omissions merit attribution.¹³ State organs, insurrectional groups¹⁴ and private individuals are the special groups whose actions or omissions may be attributable to the state. This article's main focus is on private individuals as they are the direct perpetrators of domestic violence. The article also looks at state organs in part, because of the growing theory and debate surrounding state responsibility for domestic violence acts carried out by private individuals. Thus, these two categories of actors are considered.

The conduct of private persons usually is not attributable to the state except in two circumstances, namely, where private individuals act on the instruction of the state or are directed or controlled by the state,¹⁵ and where there is an absence or default of official authorities such that private persons or groups of persons exercise governmental authority in the circumstances.¹⁶ All the same, the conduct of private persons acting strictly in their private capacity may incur state responsibility where the state failed to prevent such conduct. The responsibility of the state in such cases arises not as a direct result of the private person's conduct but indirectly as a result of the failure of

10 As above.

11 As above.

12 As above. Some international law scholars are of the view that the distinction between objective and subjective responsibility is neither here nor there. Rather than working towards a cross-cutting theory of state responsibility, each case should be decided on its own merits for it is 'both difficult and illusory to seek a single acceptable dominant theory of responsibility'. Abass (n 9).

13 Arts 4-11 ARSIWA (n 5).

14 Art 10 ARSIWA. Art 11 of ARSIWA mentions imputability by the acknowledgment of actions by the state.

15 Art 8 ARSIWA (n 5).

16 Art 9 ARSIWA.

the state to prevent such conduct.¹⁷ For example, the domestic violence acts of a private person may incur state responsibility not because a state is directly responsible for the acts of domestic violence carried out privately by that individual, but because the state failed to exercise due diligence to prevent or prosecute that private individual that perpetuated the domestic violence acts.

On the other hand, the conduct of state organs, whether legislative, executive, judicial or other conduct, is attributable to the state regardless of the position the person or entity holds in the organisation of the state.¹⁸ Actions of persons who are not organs of state but are empowered by the law of the state to exercise elements of governmental authority are also imputable to the state.¹⁹ The actions of organs of the state, or person or entity empowered to exercise elements of government authority, are attributable to the state even if the actions are *ultra vires*, so long as the entity was acting in its official capacity.²⁰ It is important to distinguish acts of state officials acting in their private capacity from *ultra vires* acts of state officials acting in their official capacity. The former ordinarily is not attributable to the state while the latter is.

The international jurisprudence on state responsibility further acknowledges positive obligations of states arising from the negative rights of individuals. By this, the impact of negative rights, such as the right to life of persons, which traditionally was viewed as only limiting a state's interference in a person's right to life, has now been expanded to impose a positive obligation on states to put in place appropriate measures to protect and ensure that individuals enjoy their right to life. The failure of a state to do so is likely to incur international responsibility.²¹ Similarly, the right to be free from torture, inhuman and degrading treatment and abuse, though negative in nature, imposes a positive obligation on the state to ensure that individuals are protected from violence and abuse even within the private setting. Where a state fails to prevent acts of violence in the private sphere, such as acts of domestic violence, its failure is interpreted as complicity, and what would otherwise have been a purely private act independent of the state, turns into 'a constructive act of the state' for which the state will be held accountable.²²

The due diligence standard discussed in the next part builds on the above-stated concord between the positive obligation of states and the enjoyment of negative rights by its citizens with respect to

17 J Crawford & S Olleson 'The character and forms of international responsibility' in MD Evans (ed) *International law* (2014) 443 456.

18 Art 4 ARSIWA (n 5).

19 Art 5 ARSIWA.

20 Art 7 ARSIWA.

21 Hasselbacher (n 1) 192.

22 As above; BC Meyersfeld 'Reconceptualising domestic violence in international law' (2003) 67 *Albany Law Review* 371.

domestic violence, by expanding state responsibility to cover private acts of private individuals.

2.2 Due diligence standard

The due diligence standard is premised on the question of what measure of diligence, responsibility or prudence exercised by a state is deemed reasonable enough for it to have executed its obligations.²³ The Inter-American Court case of *Velasquez Rodriguez v Honduras* (*Velasquez case*)²⁴ was the global first to detail the due diligence standard. In this case, Angel Manfredo Velasquez Rodriguez, a graduate student, was kidnapped from a parking lot by armed men in civilian clothes. His kidnapping and disappearance were one of a series of disappearances in Honduras between 1981 and 1984. It was common knowledge that the abductions had been carried out by military personnel and other agents of the state acting on state orders. The targets of the abductions were persons suspected of being a threat to national security. In this landmark case, the central issue before the Inter-American Court was whether Honduras's obligation under the American Convention was merely to 'respect' the rights of individuals by refraining from violating them, or whether Honduras had an obligation to take positive steps to protect individuals from human rights violations by non-state actors.²⁵

The Inter-American Court found evidence supporting the fact that the kidnappers were undercover agents of the state.²⁶ The Court further indicated that even if it had not found such evidence, 'the failure of the [s]tate apparatus to act ... is a failure on the part of Honduras to fulfil the duties it assumed under [a]rticle 1(1) of the [American] Convention'.²⁷ The Court found the obligation of Honduras to be dual in nature based on the language of article 1(1) of the American Convention: 'The [s]tate [p]arties to this Convention undertake to *respect* the rights and freedoms recognised herein and to *ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.'²⁸

First, the obligation that state parties must 'respect' individual rights and freedoms means that states are to refrain from directly violating individual rights. Second, the obligation of state parties to 'ensure' means that states are to mobilise all government apparatus to prevent, investigate and punish any violation of individual rights and

23 Meyersfeld (n 22).

24 Inter-American Court of Human Rights (29 July 1988) Ser C No 4.

25 HJ Steiner, P Alston & R Goodman *International human rights in context: Law, politics, morals* (2007) 214.

26 *Velasquez case* (n 24) para 182.

27 As above.

28 My emphasis.

freedoms and, where feasible, restore those rights or provide adequate compensation for any harm suffered.²⁹

The Inter-American Court explained that the second obligation of state parties to 'ensure' under article 1(1) of the Convention was not limited to state actors but may extend to non-state actors:³⁰

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, *but because of the lack of due diligence to prevent the violation or respond to it as required by the Convention*³¹ ... The violation can be established even if the identity of the individual perpetrator is unknown. *What is decisive is whether a violation of the rights recognised by the Convention has occurred with the support or the acquiescence of the government, or whether the state has allowed the act to take place without taking measures to prevent it or to punish those responsible.*

The Court further explained the basic duties that constitute the standard of due diligence. The basic duties are often referred to as the '5Ps': prevent, protect against, prosecute, punish and provide reparation.³² That is, the

legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.³³

The duty to prevent human rights violations means that states are to take all reasonable measures – legal, political, administrative and cultural – to protect individual rights.³⁴ States discharge this duty by drafting and adopting specific national legislation against violations of human rights; developing policies and action plans; and undertaking awareness-raising campaigns, training for professional groups such as prosecutors, the police and members of the judiciary.³⁵ The existence of violations, however, does not necessarily mean that the state has failed in its duty to prevent abuses.³⁶

29 *Velasquez case* (n 24) (my emphasis).

30 Para 173 *Velasquez case*.

31 Para 172 *Velasquez case* (n 24) (my emphasis).

32 Goldscheid & Liebowitz (n 2).

33 Para 174 *Velasquez case* (n 24 above). Similar language is found in Human Rights Council 'Accelerating efforts to eliminate all forms of violence against women: Ensuring due diligence in prevention' (2010) A/HRC/RES/14/12 para 1. Also, UN General Assembly 'Intensification of efforts to eliminate all forms of violence against women' (2013) A/RES/67/144 para 11.

34 L Henkin et al *Human rights* (2009) 851, citing R Coomaraswamy 'Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences' UN Doc E/CN.4/1996/53 (1996) para 54. Human Rights Council (n 33).

35 Y Ertrük 'Integration of the human rights of women and the gender perspective: Violence against women: The due diligence standard as a tool for the elimination of violence against women' (2006) E/CN.4/2006/61 Report para 61.

36 Coomaraswamy (n 34).

The duty to protect includes providing legal assistance, health care, counselling centres, shelters, restraining orders and financial aid to victims of violence.³⁷ The proper implementation of these protective measures prevents the continuous victimisation of victims of violence.

The duty to punish requires states to conduct thorough, objective and serious investigations such that violations are punished. Anything short of this is a failure on the part of the state. However, as in the case of the duty to prevent, the fact that an investigation did not yield sufficient results does not mean the state has failed in its duty to investigate.³⁸ This is because the due diligence obligation is one of means and not results, although states are required to undertake all diligent measures that have the potential to actually prevent or eliminate abuse.³⁹

The duty to provide sufficient reparations requires states to ensure that victims of violence are adequately compensated.

Ultimately, the due diligence standard holds states accountable for their actions and inactions, especially with regard to human rights issues, even in instances where violations were carried out by private individuals.⁴⁰ It changes the traditional notion that states can only be responsible for human rights violations of their agents.

Although the *Velasquez* case used the due diligence standard to extend state responsibility for violations by private persons, the violations in issue occurred in the public domain, hence leaving the whole realm of private violations against women by private persons uncharted.⁴¹ Driven by the need to widen state responsibility in the private sphere, especially in relation to violence against women, feminists used the due diligence standard as applied in the *Velasquez* case as a launch pad to disintegrate the public/private divide that for so long shrouded international intervention in matters of violence against women. Through advocating and politicising the supposed private violence, the feminist understanding of the due diligence standard permeated legal texts and scholarship and the jurisprudence of other international and regional human rights systems.⁴²

Yakin Ertürk, former UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, endorsed the feminist understanding of the due diligence standard in her report on the due

37 Ertrük (n 35).

38 Coomaraswamy (n 34); Ertrük (n 35).

39 R Manjoo 'Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences' (2013) A/HRC/23/49 para 72, citing *Opuz v Turkey* App No 33401/02, Eur CtHR (2009) para 136; Goldscheid & Liebowitz (n 2).

40 PG Moral & MA Dersnah 'A feminist challenge to the gendered politics of the public/ private divide: On due diligence, domestic violence, and citizenship' (2014) 18 *Citizenship Studies* 661.

41 As above.

42 As above.

diligence standard as a tool for the elimination of violence against women.⁴³

The due diligence standard has helped to challenge the liberal doctrine of state responsibility with regard to violation in the 'private sphere'. This meant that the state, by failing to respond to intimate/domestic violence, can be held responsible for not fulfilling its obligation to protect and punish in a non-discriminatory way and can be charged as an accomplice to private violations. On the other hand, using due diligence to filter private acts through state responsibility has left the individual perpetrator of an act of private violence not directly responsible under international law, thus maintaining a separate regime of responsibility for private as opposed to public acts.

Ertürk further identified some underlying principles of the due diligence standard of which states must be mindful and should apply, namely, the fact that the obligation of states to exercise due diligence is a non-delegable duty; non-discrimination in the application of the due diligence standard;⁴⁴ that due diligence must be exercised in good faith; and that measures to prevent and protect women from violence must be founded on accurate empirical data.⁴⁵

In sum, the due diligence standard imposes on states a positive obligation to use all reasonable measures appropriate to eliminate violations of human rights and impunity. It also serves as a liaison between the conventional relationship in international law between the state and its agents, on the one hand, and the relationship between the state and the dealings of private persons, on the other.⁴⁶ The next part of the article investigates domestic violence in international law, highlighting its shift from the historical public/private divide to its current status.

2.3 Domestic violence in international law

The majority of instances of gender-based violence that women experience at various stages of their lives are domestic in nature – 'occurring in the home, perpetrated by those to whom the woman is closest'.⁴⁷ Despite the domesticity of the violence, it is a universal tool of oppression that transcends borders and cultures.⁴⁸ Thus, there is an emerging jurisprudence for the recognition of domestic violence as a human rights violation at the international level.⁴⁹ This move has resulted in a continuing discourse aimed at re-conceptualising domestic violence, that is, to ascertain an identifiable genus of

43 Ertrük (n 35).

44 The same level of commitment to due diligence should be applied in cases of violence against women as in other forms of violence.

45 Ertrük (n 35).

46 E Abi-Mershed 'Due diligence and the fight against gender-based violence in the Inter-American system' in C Benninger-Budel (ed) *Due diligence and its application to protect women from violence* (2009) 127 128.

47 Coomaraswamy (n 34) para 54.

48 Henkin et al (n 34); Meyersfeld (n 22).

49 Hasselbacher (n 1); Meyersfeld (n 22).

domestic violence acts that can be classified as international human rights violations under international law.

Traditionally, domestic violence has been recognised as a private matter to be addressed within the confines of the home. The long-standing private nature of domestic violence acts was premised on the traditional roles that women played in society – limited to the home – which makes violations against women a matter that is concealed within the private sphere, void of state or international intrusion.⁵⁰

For the longest time, a major flaw with the public/private dichotomy was the lack of regulation of the private sphere. Non-regulation of matters within the private sphere and a lack of institutional protection often led to the family being a 'cradle of violence', women often being at the receiving end.⁵¹ Theoretically, the public/private dichotomy (where public referred to the realm of government politics, economics and the workplace and private referred to the family) frowns upon the perpetration of domestic violence in the private sphere. This assertion is premised on the work of John Stuart Mill, the philosopher who partly shaped the concept of public/private duality. Mill was of the view that state intervention in private freedoms should be at its barest minimum except where it is necessary to prevent harm to others.⁵² This is why using the private leg of the dichotomy to perpetuate domestic violence with impunity is a non-starter. By politicising and internationalising domestic violence, the erstwhile 'private violence' is plunged into the public sphere by reconceptualising domestic violence with reference to states, which is in line with the foundational concepts of the dichotomy. International and regional human rights courts, feminist theorists and organisations have contributed towards the process of shifting the recognition of domestic violence from the private domain into the public sphere of international human rights law.

In the early 1990s the United Nations (UN) Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) issued General Recommendation 19 which construed CEDAW⁵³ as applicable to violence against women occurring both in public and in private.⁵⁴ Thus, although 'domestic violence' was not specifically mentioned in CEDAW, it was deemed applicable to it.⁵⁵

50 Hasselbacher (n 1); C Moore 'Women and domestic violence: The public/private dichotomy in international law' (2003) 7 *International Journal of Human Rights* 93; C Chinkin 'A critique of the public/private dimension' (1999) 10 *European Journal of International Law* 387.

51 Moore (n 50).

52 As above.

53 1979, 1249 UNTS 13.

54 CEDAW Committee General Recommendation 19 UN Doc A/47/38 (1992) para 9.

55 General Recommendation 19 indicates that the Convention does not apply only to actions by state actors but includes those by private persons where the state fails 'to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation'. CEDAW Committee (n 54).

A year after General Recommendation 19 was released, in 1993, the Declaration on the Elimination of Violence against Women (DEVAW) was also published by the UN General Assembly (UNGA). The DEVAW imposed an obligation on states to exercise due diligence to prevent gender-based violence perpetrated by the state itself or by non-state actors.⁵⁶

In 1995 the Beijing Platform for Action was introduced.⁵⁷ The Platform for Action contained action plans for governments, regional and international organisations and non-governmental organisations (NGOs) to research and come up with statistics on violence perpetrated against women, including domestic violence.⁵⁸

In 1999 the UNGA adopted the Optional Protocol to CEDAW.⁵⁹ The Protocol, which entered into force in December 2000, allows women to submit complaints of violations of their rights to the CEDAW Committee upon the exhaustion of all available domestic remedies.⁶⁰ Two of the early decisions of the CEDAW Committee on domestic violence are *AT v Hungary*⁶¹ and *Goekce (Deceased) v Austria (Goekce case)*.⁶²

In *AT v Hungary*, AT filed a communication with the CEDAW Committee claiming to have been a victim of a continuum of domestic violence acts for the previous four years. AT's case was that her common law husband had threatened to kill her and to rape their two children. The husband, LF, had also for three years failed to pay child support. There were ten medical certificates to prove different incidents of physical abuse to which AT had been subjected by LF. AT also stated that under Hungarian law there were no protection orders or restraining orders.⁶³

The Committee found that the remedies afforded to victims of domestic violence under Hungarian laws were insufficient and the existing procedures were also ineffective. Hungary was found to have fallen short of its obligation under articles 2(a), (b) and (e) of

56 Declaration on the Elimination of Violence against Women, GA Res 48/104, 20 December 1993, art 4(c) (DEVAW).

57 The action plan was adopted at the United Nations Fourth World Conference on Women held in Beijing, China from 4 to 15 September 1995. Thirty thousand women attended the conference. B Roberts 'The Beijing Fourth World Conference on Women' (1996) 21 *The Canadian Journal of Sociology* 237.

58 'Report of the Fourth World Conference on Women' Beijing, 4-15 September 1995 A/CONF 177/20/Rev 1.

59 UN General Assembly 'Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women' 1996, 2131 UNTS 83, <https://www.refworld.org/docid/3ae6b3a7c.html> (accessed 18 September 2018).

60 Optional Protocol to CEDAW (n 22) arts 2 & 4(1).

61 CEDAW Communication 2/2003, UN Doc CEDAW/C/32/D/2/2003.

62 CEDAW Communication 5/2005, UN Doc CEDAW C/39/D/5/2005.

63 *AT v Hungary* (n 61).

CEDAW,⁶⁴ although Hungary had taken steps towards instituting a comprehensive action programme against domestic violence. The reason for the decision was that the comprehensive action programme against domestic violence was yet to address the violations having been experienced by AT. AT's rights under articles 5(a) and 16 of CEDAW were also found to have been violated.⁶⁵ The Committee made recommendations to Hungary to ensure that AT's physical and mental integrity as well as the safety of AT and her children were guaranteed. The Committee, among others, stated:⁶⁶

Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy ... [T]he Committee concludes that the obligations of the state party ... remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

In *Goekce*,⁶⁷ ?ahide Goekce, an Austrian citizen, suffered various forms of domestic violence and threats of violence by Mustafa Goekce, her husband, over a period of three years (1999 to 2002). The police, the public prosecutor and other state institutions in charge of protection against violence were aware of the violence that Mustafa perpetrated against his wife. Although a number of orders were issued against Mustafa and actions were taken to prevent the violence and to protect ?ahide from her husband, it was on record that at one time ?ahide refused to testify against her husband and specifically asked the Court not to punish him. On 7 December 2002 Mustafa shot and killed ?ahide with a handgun in the presence of their two daughters. A few hours before her untimely death, ?ahide made an emergency call, but the police did not send a patrol car to the scene of the crime. Mustafa surrendered to the police two and half hours after the shooting and currently is serving a sentence of life imprisonment at an institution for offenders with mental disorders.⁶⁸

Austria's contentions *inter alia* were that by the deceased's failure to cooperate with state authorities to prosecute her husband, she did not exhaust domestic remedies; the deceased also insisted on keeping her family life private and refused to request an interim injunction against her husband. Furthermore, arresting, detaining, prejudging and punishing a person without reasonable suspicion of an imminent

64 Art 2(a) obligates states to embody the principle of gender equality in their national constitutions, laws or any means possible. Under art 2(b) states are to use all means – legislative, sanctions or otherwise – to prohibit discrimination against women. States have the responsibility to use all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.

65 Art 5(a) requires states to use all means to modify any social or cultural patterns with the view of eliminating customary stereotypes and prejudices about gender roles. Under article 16 states are charged with the duty to ensure that discrimination against women in marriage and family matters is eliminated.

66 *AT v Hungary* (n 61) para 9.3.

67 *Goekce* case (n 62).

68 As above.

threat or act of domestic violence would violate the fundamental rights of the person, such as the right to a fair trial, and will be contrary to the presumption of innocence as well as the rule of law.⁶⁹

In response, the complainants argued that the alleged uncooperative attitude of Sahide was a once-off event at a time when she truly thought she risked losing her children should she proceed to testify against her husband. Sahide, who most likely suffered from the Stockholm syndrome,⁷⁰ should not be blamed as at that material time she was unable to draw the line between psychological, economic and social factors.⁷¹

The CEDAW Committee acknowledged the comprehensive domestic violence protection framework of Austria in terms of its legislation, criminal and civil law remedies, awareness, education and training programmes, shelters, counselling sessions for victims and work with perpetrators. However, the Committee pointed out that a comprehensive system alone would not do, and that the system had to be supportive as well, in order for the victims of domestic violence to fully enjoy their fundamental rights and freedoms. To make the system supportive, the CEDAW Committee mentioned that state actors must adhere to the due diligence obligations of the state.

The CEDAW Committee further illustrated how Austria had failed to exercise its due diligence to protect Sahide, by not responding to Sahide's emergency call despite the history of conjugal violence that had occurred between the two. Austria, therefore, was advised to prevent and respond to violence against women by strengthening the implementation and monitoring of its laws against violence through the exercise of due diligence. As part of its recommendations, the CEDAW Committee expressly stated that 'in all actions taken to protect women from violence, due consideration is given to the safety of women, emphasising that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity'.⁷²

Austria was found to be in violation of articles 2(a), (c)-(f) and 3 of CEDAW read with article 1 of CEDAW and General Recommendation 19 of the CEDAW Committee, together with the rights of the deceased to life and physical and mental integrity.

69 As above.

70 According to *Merriam-Webster*, Stockholm syndrome is the psychological tendency of a hostage to bond with, identify with, or sympathise with his or her captor: *Merriam-Webster* <https://www.merriam-webster.com/dictionary/Stockholm%20syndrome> (accessed 29 October 2018). The *Cambridge English dictionary* also defines Stockholm syndrome as the situation when a person who has been taken prisoner starts to like or trust the person or people who have taken them: *Cambridge advanced learner's dictionary and Thesaurus* <https://dictionary.cambridge.org/dictionary/english/stockholm-syndrome> (accessed 29 October 2018).

71 *Goekce* case (n 62) para 5.4.

72 *Goekce* case para 12.3.

At the regional level, the Inter-American Commission on Human Rights (Inter-American Commission), which has a well-developed jurisprudence on domestic violence cases, found Brazil to have failed to prevent, prosecute and convict for acts of domestic violence in the case of *Maria de Penha Maia Fernandes v Brazil*⁷³ (*Fernandes case*). The complainant had suffered acts of violence, including attempted murder, perpetrated by her then husband, Marco Antonio Heredia Viveiros, in the period between May and June 1983. As a result the complainant had become a paraplegic. The complainant's case was that the Brazilian justice system had failed in its duty to ensure equal protection⁷⁴ and judicial protection⁷⁵ since it unduly delayed the final ruling against the perpetrator for more than 15 years. The complainant further added that her complaint was not an exception, but rather that it formed part of the systematic impunity associated with domestic violence acts against women in Brazil.⁷⁶

The Inter-American Commission held that Brazil had violated its duty to ensure judicial protection and equal protection under the American Convention on Human Rights (American Convention) by failing to properly prosecute cases of domestic violence against women. The Commission recommended that Brazil complete the prosecution of Antonio by conducting an effective investigation. It also recommended that the state should provide adequate compensation for the victim. Also, measures should be instituted to eliminate the condonation of domestic violence against women by the state.⁷⁷

Similarly, the European Court of Human Rights (European Court) in *Opuz v Turkey*⁷⁸ found Turkey liable for domestic violence for failing to exercise due diligence in protecting victims and prosecuting the perpetrator. In this case the complainant, Nahide Opuz, and her mother had been subjected to years of domestic violence by Nahide's husband. As a result her husband eventually killed her mother. The two victims had earlier made several reports to the Turkish law enforcement personnel, which yielded very little response. Nahide contended that the incompetence of the Turkish law enforcement was a violation of her right to be free from torture, cruel, inhuman and degrading treatment and gender discrimination as well as her mother's right to life.

73 Inter-American Commission on Human Rights 2000, Case 12.051, IAm Comm of HR, Report 54/01, OEA/Ser L/V/II.111 Doc.20 Rev 704.

74 Organisation of American States (OAS) 'American Convention on Human Rights' Pact of San José', Costa Rica 1969 (American Convention) art 24.

75 Art 25 American Convention.

76 The IACHR found that in Brazil, 70% of domestic violence complaints that give rise to criminal liabilities are put on hold and hardly any conclusion is reached on them. Of the 30% that are concluded, only 2% result in the conviction of the perpetrators: *Goekce case* (n 62) para 49.

77 *Fernandes case* (n 73).

78 App No 33401/02, Eur CtHR (2009).

The European Court held that Turkey indeed had failed to exercise due diligence in protecting the victims, and held in favour of Nahide. The decision served as a gateway for providing a remedy for domestic violence victims in international law in Europe.⁷⁹

In the African system, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) was adopted in 2003 and entered into force in 2005. As at early 2018, 41 out of 54 African countries had ratified the Protocol. The African Commission on Human and Peoples' Rights (African Commission) is the body in charge of the implementation of the African Women's Protocol. The Protocol, like CEDAW, does not make express mention of 'domestic violence' but its application to domestic violence is inferred from the definition of 'violence against women'. Violence against women, according to the Protocol, means 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts'.⁸⁰ In addition, the Protocol places a duty on states to 'take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women ... whether the violence takes place in private or public'.⁸¹

After more than 15 years since its adoption and 11 years of being in force, the ECCJ only made its first pronouncement on the African Women's Protocol in the last quarter of 2017,⁸² and its first domestic violence decision⁸³ on the Protocol in the second quarter of 2018. The latter is the subject matter of this article.

In feminists' and scholars' circles, some have labelled domestic violence in a manner that fits the scope of public international law.⁸⁴ Meyersfeld proposed a category of extreme forms of domestic violence that need international attention which she called 'private torture'.⁸⁵ Meyersfeld also proposes the label 'systemic intimate

79 S Choudhary 'Legal recourse to domestic violence: European perspective through ECHR decision (*Opuz v Turkey*)' <https://ssrn.com/abstract=2177522> (accessed 29 October 2018).

80 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) (2003) art 1(j).

81 Art 4(2)(a) African Women's Protocol.

82 *Dorothy Njemanze & 3 Others v Federal Republic of Nigeria* ECW/CCJ/JUD/08/17.

83 *Mary Sunday* case (n 3).

84 B Meyersfeld 'A theory of domestic violence in international law' JSD thesis, Yale Law School, 2016 <http://digitalcommons.law.yale.edu/yjsd/3> (accessed 18 July 2018).

85 Meyersfeld (n 22). Other labels for domestic violence aimed at placing this form of violence within the public sphere include 'terrorism', explaining domestic violence as involving calculated acts that harm victims psychologically and physically: Meyersfeld (n 84), citing J Fedler 'Lawyering domestic violence through the Prevention of Family Violence Act 1993: An evaluation after a year in operation' (1995) 112 *South African Law Journal* 231; and 'patriarchal terrorism' which is interpreted as an extreme form of domestic violence: Meyersfeld (n 84) 99, citing MP Johnson 'Patriarchal terrorism and common couple violence: Two forms of violence against women' (1995) 57 *Journal of Marriage and the Family* 283.

violence' as those manifestations of domestic violence that constitute human rights violations in international law. According to her, 'systemic intimate violence' has elements that merit international intervention. Acts of domestic/intimate violence can be classified as 'systemic' when they are severe to a standard that 'shocks human conscience'; the harm is continuous and hybrid in nature as opposed to once-off acts; and the state condones such systematic abuses by its inaction, which often is demonstrated by the lack of supportive welfare systems, inadequate healthcare services, and a lack of access to justice in the form of either police services or the courts.⁸⁶

The constitutional right to privacy was also interpreted by theorists in a way that affirms the safety of women in the domestic setting rather than to oppose or interfere with the privacy of their home.⁸⁷ Thus, the right to privacy has been construed to mean not only the right to be free from intrusion, but 'linked affirmatively to liberty, the right to autonomy and self-determination'.⁸⁸

The UN Commission on Human Rights (UNCHR) in 1994 appointed a Special Rapporteur on Violence Against Women. The Special Rapporteur, Ms Radhika Coomaraswamy, delivered her first report in 1996 in which she advocated the recognition of domestic violence as a 'human rights concern rather than as a mere domestic criminal justice concern'.⁸⁹ She argued for conceptualising domestic violence as 'torture', and that domestic violence could constitute torture or cruel, inhuman and degrading treatment depending on the severity and prevailing circumstances that create state responsibility.⁹⁰ The argument of the Special Rapporteur was based primarily on the gendered nature of domestic violence in concert with the inaction of states which condones the perpetuation of the violence.⁹¹ The Special Rapporteur, therefore, came up with a framework for a model legislation on domestic violence.⁹² The purpose of the model framework is to ensure state compliance with international standards (including due diligence) by sanctioning domestic violence. Thus, by the obligations contained in the model framework, the building blocks for determining the minimum threshold for compliance with the due diligence standard were laid.

86 Meyersfeld (n 84) 125.

87 Meyersfeld (n 84) 100.

88 Meyersfeld (n 84).

89 Coomaraswamy (n 34) para 29.

90 Coomaraswamy (n 34) para 42.

91 As above.

92 Framework for Model Legislation on Domestic Violence, Doc E/CN.4/1996/53/Add.2 2 February 1996.

2.4 State responsibility and the due diligence standard as applicable to domestic violence

The role of the due diligence standard in assigning state responsibility for gender-based violence, particularly those acts that occur in the private sphere, such as domestic violence, is an instrumental and appealing development. This is because states can be held responsible for violations to which states hitherto were not responsive⁹³ due to the public/private dichotomy that limited state responsibility to matters considered to be worthy of state intrusion to the exclusion of those matters that were considered private. These often were matters related to the home and family.

The due diligence standard expands the scope of state responsibility for violations occurring in the private sphere in various ways.⁹⁴ First, the due diligence framework challenges the public-private dichotomy which for so long had excluded states from incurring responsibility for violations perpetrated by private individuals in the private sphere. The due diligence standard recognises all violations, whether occurring within the private and public sphere, as human rights violations that deserve equal attention by the state. In this regard, state responsibility for private violations such as domestic violence arises not because the private perpetrator's actions are directly imputable to the state, but because the state has failed to exercise due diligence to prevent, protect from, prosecute, punish and/or provide remedies for the victims.⁹⁵

The inaction of the state has been regarded as complicity in and/or *de facto* permission for the private violation.⁹⁶ The nature of this obligation has been referred to as a 'diagonal obligation', where states have a duty to protect the rights of individuals and groups from violations by non-state actors.⁹⁷ The finding by the CEDAW Committee in *AT v Hungary*, that Hungary had failed in its duty to exercise due diligence, is consistent with state responsibility arising out of state inertia with respect to putting measures in place to prevent and protect victims of domestic violence.

In conceptualising due diligence in the domestic violence context, Coomaraswamy echoed the idea of state complicity by arguing that the due diligence principle can hold states complicit in systematic failures in protecting persons from private violence, and requires states to provide and enforce adequate remedies to victims of private

93 Goldscheid & Liebowitz (n 2); Ertrük (n 35).

94 Goldscheid & Liebowitz (n 2).

95 *Velasquez case* (n 24) para 173.

96 Goldscheid & Liebowitz (n 2); Crawford & Olleson (n 17); Manjoo (n 39), citing R McCorquodale & P Simons 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70 *Modern Law Review* 598 618.

97 Goldscheid & Liebowitz (n 2), citing JA Hessbruegge 'Human rights violations arising from conduct of non-state actors' (2005) 11 *Buffalo Human Rights Law Review* 25.

violence.⁹⁸ In her view, the complicity of a state in domestic violence is made manifest where a state fails to take the minimum steps necessary to protect the victims of a human rights violation.⁹⁹ The state by its pervasive inaction creates a conspiracy of silence with perpetrators who continue to abuse their victims.¹⁰⁰ The mere existence of legal systems and sanctions against domestic violence were not sufficient under the due diligence standard. Rather, the state had the obligation to “effectively ensure” that incidents of [domestic] violence are actually investigated and punished.¹⁰¹ This is why in the *Goekce* case Austria was found to have breached the due diligence standard although, far from being a ‘systematic failure’ or ‘pervasive non-action’,¹⁰² it had a comprehensive system to protect victims of domestic violence. The decision by the CEDAW Committee in this case resonates with the assertion that it takes more than the mere existence of a legal system for a state to discharge its due diligence obligation to prevent, protect from and punish. There is an obligation to ‘effectively ensure’ that domestic violence is actually investigated and punished.¹⁰³

Second, the due diligence standard expands state responsibility by its insistence on prevention in addition to the traditional efforts to protect and prosecute, which often are the core of international responsibility. The obligation on a state to prevent is helpful particularly in cases of domestic violence as it shifts the obligations of states from becoming entirely reactionary in nature to being prevenient as well. Thus, due diligence ensures that states protect individuals (individual due diligence) and prevent the continuous occurrence of human rights violations (systemic due diligence).¹⁰⁴

98 Coomaraswamy (n 34).

99 As above.

100 Henkin et al (n 34). Some scholars have taken issue with Coomaraswamy’s view on state complicity in domestic violence at international law. It is their view that state inaction to prevent, investigate and punish domestic violence does not make them complicit in the violence, although state inaction in such matters constitutes independent wrongful actions in international law. To these scholars, there is a need to distinguish between the domestic violence act of the private actor and the inaction of the state: Meyersfeld (n 22) 260, citing A Freeman *The international responsibility of states for denial of justice* (1938) 20.

101 Coomaraswamy (n 34) para 37.

102 Coomaraswamy (n 34).

103 Coomaraswamy para 37.

104 Manjoo (n 39). Manjoo in her report emphasised the need to carve out a framework for the responsibility of states to exercise due diligence. She advocates distinguishing between the types of state responsibility to act with due diligence rather than merging them. Manjoo, therefore, introduces ‘individual due diligence’ and ‘systemic due diligence’. She explains individual due diligence as the ‘obligations states owe to particular individuals, or groups of individuals to prevent, protect, punish and provide effective remedies on a specific basis’. According to her individual due diligence is flexible because the state’s due diligence obligation is ultimately to meet the needs and desires of the affected individual. Systemic due diligence, on the other hand, is the obligation of states to ‘ensure a holistic and sustained model of prevention, protection, punishment and reparations for acts of violence against women’.

This is why in the *Fernandes* case the Inter-American Commission stated that a violative act may lead to state responsibility 'not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as the Convention requires'.¹⁰⁵

Another way in which the due diligence standard expands state responsibility is by requiring states to dig deeper to tackle the root causes of domestic violence, which are the social or cultural patterns that create stereotypes and prejudices about gender roles. This forms part of the duty to prevent by educating and creating awareness on gender equality. Violence against women and domestic violence, for that matter, are directly linked to gender discrimination. To this end, taking steps to eliminate gender discrimination will lead to eliminating domestic violence against women.¹⁰⁶

On building legal minimums for the due diligence standard, Meyersfeld proposes three factors to consider in determining the minimum threshold below which a state will be deemed to have failed to comply with the due diligence standard, namely, the nature of the right;¹⁰⁷ the practical resources and capabilities of the country;¹⁰⁸ and the repetition of aggregate omissions.¹⁰⁹ Coomaraswamy in her 1999 report also attempted to develop some factors for assessing state compliance with the due diligence standard, namely, the ratification of all human rights instruments including CEDAW; the existence of constitutional authority that guarantees equality for women and prohibits violence against women; the existence of national legislation and/or administrative sanctions that adequately

105 *Fernandes* case (n 37) (my emphasis). The IACHR in the *Fernandes* case was guided by the due diligence principle as explained and discussed in the *Velasquez* case. Also, in *Claudia Isabel Velasquez Paiz et al v Guatemala* Case 12.777 No 53/13 (2015), the IACHR stated that '[s]tates should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework of protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to complaints.'

106 Goldscheid & Liebowitz (n 2).

107 According to Meyersfeld, the right at stake when it comes to domestic violence in international law is the right to be free from 'systemic [domestic] violence'. She defines 'systemic [domestic] violence' as involving the following elements: (a) severe emotional or physical harm or threat; (b) a continuum of violence rather than a one-off incident; (c) committed predominantly by men against women within an intimate relationship; (d) victim unable to access legal assistance due to her isolation, incapacitation or general vulnerability; and; (e) the violence is systemic in nature – occurring in a society where the state has failed to provide the minimum facilities necessary to compensate the violence. Meyersfeld (n 84) 111.

108 Meyersfeld argues that the due diligence standard fluctuates depending on the resource capital (social, political and economic) of each state. This notwithstanding, women's rights and interests must remain a priority for states so long as it is 'reasonable and progressive to do so'. Meyersfeld (n 84).

109 This relates to how actionable omission will be determined based on the nature of the right and the resources of the state in question. State liability will not be well founded if its justice system is not able to protect individuals from all forms of violence. Those cases of gender-based violence that are extreme and systemic in nature are those that states should pay attention to.

remedy women victims of violence; the existence of policies or plans of action that deal with violence against women; the sensitivity of the criminal justice system to issues regarding violence against women;¹¹⁰ the existence of support systems for women victims of violence; education and awareness programmes on violence against women as a human rights violation; and the collection of data and statistics on violence against women.¹¹¹

Clearly, the efforts to consider domestic violence as an international human rights concern rather than as a domestic criminal justice issue have successfully changed the dynamics of state responsibility by the creation of international norms that impose an obligation on states to prevent and to protect individuals from violence perpetrated by private persons and to punish such private actors. The due diligence obligation is one of means rather than results. That is, the perpetration of domestic violence will not be interpreted as a failure by the state, but rather, the inadequacy of appropriate measures to prevent, protect from or punish will be construed as a state failure for which the state will incur liability.¹¹²

The purpose of this part of the article has been to set out the underlying concepts and principles on which the *Mary Sunday* case is examined. This part began with an overview of the traditional notion of state responsibility, which was limited to state actors, highlighting the way in which the due diligence standard was used by the courts and the efforts by feminists to expand the traditional view of state responsibility. The effect is that, by institutionalising the due diligence standard, states now are accountable in international law for the actions and inactions of private individuals as well. This expansive notion of state responsibility through due diligence has been especially helpful in addressing violence against women that often occurs in private, such as domestic violence. This part, therefore, concluded with the way in which domestic violence, through the operation of due diligence in expanding state responsibility incorporated into international documents, international and regional court decisions and feminist scholars, has been raised to the level of a violation in international human rights law for which states can be held responsible. Against this background, the remainder of this article will focus on how these have been weaved into the African human rights system, using the ECCJ and the *Mary Sunday* case as a case study. The next part of the article gives a brief overview of the ECCJ.

110 On this factor, Coomaraswamy asks further questions: What is police practice? How many cases are investigated by the police? How are victims dealt with by the police? How many cases are prosecuted? What type of judgments are given in such cases? Are the health professionals who assist the prosecution sensitive to issues of violence against women?

111 E.CN.4/1999/68.

112 Goldscheid & Liebowitz (n 2).

3 The ECOWAS Court

Established in 1991,¹¹³ the Economic Community of West African States Community Court of Justice (ECCJ) has the mandate to interpret and determine the legality of and member states' compliance with all instruments of the Community.¹¹⁴

In 2005 the Court's mandate was expanded to determine human rights violations through the adoption of the Supplementary Protocol,¹¹⁵ which since has remained a substantial part of its operations. There neither is a fixed law particularising the scope and nature of the Court's human rights mandate, nor is there a specific index of rights assigned to the Court. Consequently, operating on the basis of the commitment of member states to recognise, promote and protect human rights,¹¹⁶ the Court has through case law delimited its human rights mandate. For example, the Court exercises its human rights mandate in accordance with all international instruments to which ECOWAS member states are parties.¹¹⁷ Also, applications to the Court that do not clearly specify an alleged human rights violation are not admissible.¹¹⁸ Again, since the Supplementary Protocol did not specify the types of human rights violations over which the Court has competent jurisdiction, the Court has delimited its jurisdiction to human rights violations of an international character.¹¹⁹

The Supplementary Protocol has allowed individuals to bring actions for human rights violations provided their applications are not anonymous and have not been brought before any other international court.¹²⁰ Typical of the ECCJ is the fact that, unlike other comparable regional courts where the exhaustion of domestic remedies is a prerequisite for obtaining audience in the court, there is no such barrier in the case of the ECCJ. Individuals can walk straight to the ECCJ and bypass all local remedies available.¹²¹ This distinctive feature of the Court increases accessibility, especially of individuals to justice where it eludes them in their home countries. For this reason, the

113 Revised Treaty of the Economic Community of West African States 1993 art 15.

114 Protocol A/P1/7/91 on the Community Court of Justice art 9.

115 Supplementary Protocol A/SP.1/01/05 art 3(4). D Abebe 'Does international human rights law in African courts make a difference?' (2017) 56 *Virginia Journal of International Law* 527. ST Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1.

116 Supplementary Protocol (n 115) art 4(g).

117 *SERAP v Federal Republic of Nigeria* ECW/CCJ/ JUD/18/13 para 28.

118 *Musa Leo Keita v The Republic of Mali* ECW/CCJ/JUD/03/07.

119 *Peter David v Ambassador Rolph Uwechue* ECW/CCJ/RUL/03/10.

120 Supplementary Protocol (n 115) art 4(d).

121 *Prof Moses Essien v The Gambia* ECW/CCJ/APP/12/11 (2012) para 31. In this case the defendant state argued that exhaustion of local remedies as stated in art 50 of the African Charter was applicable to the ECCJ. The ECCJ rejected this argument and explained that art 50 did not apply to the ECCJ. The Court stated that 'access to this Court is not subject to exhaustion of local remedies as envisaged by the customary international law on the point'.

ECCJ is a promising platform for administering the rights of women in West Africa.

4 The *Mary Sunday* case

The case of *IHRDA & WARDC (on behalf of Mary Sunday) v The Federal Republic of Nigeria (Mary Sunday case)*¹²² is the first ever domestic violence case decided by the ECCJ. It was decided on 17 May 2018. The petition was filed on 24 August 2015 by the Women Advocates Research and Documentation Centre (WARDC) and the Institute for Human Rights and Development in Africa (IHRDA) on behalf of Ms Mary Sunday against the Federal Republic of Nigeria.

4.1 The facts

On 24 August 2012 the victim, Ms Mary Sunday and her fiancé, Corporal Gbanwuan, had an altercation that resulted in the victim suffering some physical injuries.

It was Ms Sunday's case that during the wrangle the corporal had beaten her with his fists the entire time. She also indicated that she sought refuge in their neighbour's kitchen, where the corporal poured hot oil over her and scalded her.

By contrast, the police's version of the facts revealed that according to their investigations, it was rather Ms Sunday who attempted to pour the hot oil on her fiancé, but she ended up scalding herself in the process. She was found by the police to have provoked the unfortunate events.

The plaintiff claimed the following violations against the Federal Republic of Nigeria: (a) a violation of her right to an effective remedy; (b) a violation of her right to health; (c) a violation of her right to work; and (d) discrimination with respect to her being a woman. She claimed a sum of ₦ 20 million against the Republic of Nigeria as compensation for damages suffered.

The Federal Republic of Nigeria filed a preliminary objection challenging the jurisdiction of the ECCJ to hear the case. However, this objection was rejected by the Court, which on 7 December 2016 ruled that it had the competence to hear the case.¹²³

The defendant state argued that it could not be held liable for the violation alleged by the plaintiff since the said violent act was strictly of a private nature and did not involve a public official or agent acting in the course of his official duties or as a consequence of such duties.

122 The original judgment in the case was delivered in French. References and quotations from the case used in this article are from the English translation retrieved from International Human Rights and Development in Africa (IHRDA), one of the two organisations that filed the action on behalf of Mary Sunday.

123 Ruling ECW/CCJ/APP/26/15.

4.2 The Court's judgment

The three-member panel Court dismissed the plaintiff's pleas for a violation of her right to health and discrimination on the grounds of gender. The ECCJ, however, found in favour of the plaintiff in respect of her plea based on the right to an effective remedy, and awarded the sum of ₦ 15 million as compensation.

5 Analysis of the ECOWAS Court's due diligence jurisprudence in *Mary Sunday*

The *Mary Sunday* case is profound for synthesising the application of the due diligence principle in determining state responsibility for domestic violence in the African human rights framework. Although there is no express mention of 'due diligence' in the case – a variant 'appropriate diligence' is used once in relation to the right to health – inferences of its application can be drawn from the reasoning of the Court, which inferences are consistent with the derivatives of the due diligence principle as discussed above. The case is particularly important to ascertain the jurisprudence of the ECCJ concerning the forms of domestic violence that merit international intervention and those that do not, and the distinctions that the ECCJ draws between the human rights violations for which states can incur responsibility and those for which they cannot, as well as the circumstances under which states can incur responsibility.

The remainder of this part of the article focuses on ascertaining how the due diligence principle came into play to hold Nigeria liable or otherwise regarding the human rights issues that were raised in the *Mary Sunday* case, and how these inform the burgeoning due diligence jurisprudence of the ECCJ for state responsibility in domestic violence cases.

5.1 State obligation to exercise due diligence to prevent discrimination based on gender

The ECCJ first addressed Ms Sunday's claim that Nigeria's refusal to pursue proceedings against Corporal Gbanwuan despite the violence to which she had been subjected makes the state responsible for discrimination on the grounds of gender under articles 2 and 18(3) of the African Charter on Human and Peoples' Rights (African

Charter);¹²⁴ article 2 of the African Women's Protocol;¹²⁵ article 2 of CEDAW;¹²⁶ articles 2(1) and 6 of the International Covenant on Civil and Political Rights (ICCPR);¹²⁷ and article 2 of the Universal Declaration of Human Rights (Universal Declaration).¹²⁸ Nigeria argued that no human rights violation could be attributed to it since the alleged violent act was committed by the state official acting in his private capacity. Nigeria also contended that the acts constituted domestic violence that could only be challenged in the context of being the individual responsibility of Corporal Gbanwuan.

Here, we clearly see the state using in its defence the age-old trump card of public/private duality with which the Court agreed. The Court explained that the nature of the acts complained of was not systematic such as to allow their 'deliberately discriminatory character to be confirmed'.¹²⁹ In other words, the actions leading to the case were confined within the private sphere – conjugal violence – which had nothing 'general' or 'systematic' about it. The events related to an individual and not to a 'gender', which the Court indicated encompassed plurality. The Court added that the fact that the perpetrator in the instant case was a state official had no bearing on state responsibility as he was acting purely in his private capacity. The ECCJ added that even if the acts were to have been committed in his official capacity, they should have been dealt with as assaults, or as being unrelated to the duties of an agent of the police force. For these reasons the ECCJ found Nigeria not liable for violating the right to be free from gender discrimination but directed that this aspect of the matter should be dealt with at the national level where the perpetrator will be held personally accountable.

Mary Sunday's claim invoked the due diligence duty of Nigeria to prosecute and convict for violations. She used Nigeria's failure to execute this duty effectively as grounds for discrimination based on gender, but this was where she was at fault. The insistence of the

124 Art 2 provides: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.' Art 18(3) provides: 'The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.'

125 This provision relates to the elimination of discrimination against women through legislative, institutional and other measures necessary. Art 2(1)(d) provides: 'States shall take corrective and positive action in those areas *where discrimination against women in law and in fact continues to exist*' (my emphasis).

126 The article places an obligation on state parties to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and undertake such steps as are necessary.

127 Art 2(1) provides that state parties will recognise the rights of all persons within its territory and jurisdiction without any kind of distinction whatsoever. Art 6 protects the right to life and guarantees the protection of this right under the law.

128 Art 2 guarantees the rights and freedoms listed in the Universal Declaration to all persons without distinction.

129 ECW/CCJ/APP/26/15.

ECCJ on the non-systematic or non-general nature of the events and, hence, the absence of discrimination based on gender by Nigeria can be reconciled with the literature and case law that require domestic violence acts to be systemic in nature in order to warrant international intervention and incur state responsibility. For example, in the *Fernandes* case there was evidence in the form of statistical reports to show that the unresponsiveness of the Brazilian justice system towards domestic violence against women was systematic. In the *Geokce* case and *AT v Hungary* the domestic violence acts complained of constituted a continuum of harm rather than a once-off event.¹³⁰ Based on the evidence presented, the states and the justice systems of the states in these cases had systematically failed to prevent, protect from, prosecute and punish the violations that the women involved had faced. That was not the case in *Mary Sunday*.

First, the aggressive act leading to Mary Sunday's injury was a once-off event which was not sufficient to create a continuum of harm for which the resulting pervasive non-action by Nigeria could give rise to international responsibility. Second, there was no evidence or empirical data presented to the ECCJ to show that Nigeria or the justice system in Nigeria had systematically failed to respond to similar cases of violence against women. This plays up one of the underlying principles of the due diligence standard which requires preventive and protective measures by states to be based on accurate empirical data.¹³¹ The actions of Corporal Gbanwuan in his private capacity could be classified as a violation of Mary Sunday's right to be free from violence against women for which the corporal could be personally liable at the national level. However, his action cannot lead to a direct responsibility of Nigeria as discriminating against women although it gives rise to an indirect responsibility for the failure of Nigeria to provide an effective remedy for Mary Sunday, which the ECCJ found.

The ECCJ's opinion on the public-private dichotomy in domestic violence cases in international law and how it relates to state responsibility departs from the mainstream literature and case law on the subject. The ECCJ was of the view that Nigeria did not incur responsibility because Corporal Gbanwuan, although a state official, was acting in his private capacity. The Court made reference to a hypothetical situation where even if Corporal Gbanwuan was acting in his official capacity, Nigeria still would not have incurred responsibility as he had acted *ultra vires*. Unless this hypothetical situation and the conclusion therefrom was strictly based on the particular facts of the case where the violent act was not of an international character, the Court's opinion would be inaccurate. This is because the actions of a state official acting in his official capacity, even if he acts *ultra vires*, are

130 Henkin et al (n 24); Meyersfeld (n 22).

131 Ertrük (n 35).

imputable to the state.¹³² This should be distinguished from actions of a state official acting in his private capacity, which are not attributable to a state. The advent of the due diligence standard in domestic violence cases makes states responsible for paying attention to violence against women both in the private and public spheres. A failure to prevent, protect from and punish violations within the private sphere may give rise to state responsibility.

5.2 State obligation to exercise due diligence to protect the right to health care and to appropriate medical care interventions

It was Mary Sunday's claim that Nigeria had violated her right to health as guaranteed in international law¹³³ by refusing to make the necessary health care interventions available to her and failing to provide accessible and available health services.

The ECCJ dismissed this claim on two grounds: First, there was no evidence to show a refusal or delay in providing health care¹³⁴ and, second, there were no reasonable grounds for upholding the claim as to the quality of technical facilities at public hospitals. On the second basis, the Court stated that the quality of technical facilities was heavily dependent on the level of resources available to the state which, in turn, is dependent on the economic development level of the state. There is no uniformity regarding state resources. The ECCJ found the hospital services to have shown evidence of 'appropriate diligence and the state [had] not fallen below the standard of what could reasonably be expected of it'.¹³⁵

Here, the ECCJ demonstrates its application of the due diligence standard to state responsibility. Its finding is consistent with one of the factors in determining the minimum threshold for due diligence which requires the resources of the state to be taken into account.¹³⁶ However, caution should be taken where the issue of resources is involved as there is a risk of states using the lack of resources to escape responsibility. The due diligence standard requires states to do the reasonable minimum to protect against violations of rights.

132 Art 7 ARSIWA (n 5).

133 This ground was based on art 16 of the African Charter; art 14 of the African Women's Protocol; art 25(1) of the Universal Declaration; and art 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

134 On the contrary, Mary Sunday was admitted to the hospital immediately after the incident before she was transferred to another hospital to receive further treatment. Issues of burden of proof which the Court raised is beyond the scope of this article, which focuses primarily on the due diligence aspect of the Court's decision. The burden of proof in gender-based violence generally is the subject matter of another article.

135 *Mary Sunday* case (n 3).

136 *Meyersfeld* (n 22).

5.3 State obligation to exercise due diligence in providing an effective remedy

The plea for Nigeria to be held liable for violating Mary Sunday's right to an effective remedy¹³⁷ was the only successful plea. The grounds for the plea was that Nigeria had refrained from an independent and thorough investigation into the matter. In its defence, Nigeria once again raised the private nature of the events as a barrier to incurring liability. The defendant state also added that according to their investigations Mary Sunday had injured herself and, therefore, there was no room for state liability.¹³⁸

The ECCJ rejected the defence of Nigeria by pointing out that the private nature of the incident is not a sustainable reason when it comes to a victim accessing justice and a legal remedy. The Court stated:¹³⁹

It would clearly be futile, as the state of Nigeria has at time indicated in its defence, if the public authority were never required to involve itself in events that are characterised by their private nature. Such a point of view would not only result in leaving certain violent acts committed in a domestic context unpunished ... but this view is further refuted in terms of the progress made within civilised society in order to deal consistently with social violence and to improve the peaceful quality of communal life. The law also remains valid within private dwellings, it does not cancel itself out on approaching the doors to marital homes.

The Court's assertion that the law remains valid in private settings is in sync with Mill's theory on which the public/private divide was partly premised. That is, although state interference in private matters should be minimalist, it is to the exclusion of instances where harm is caused, as in this case. States, therefore, can no longer hide behind the public/private divide to escape responsibility for violations within the private setting.

With regard to the results of the investigation by the police, the ECCJ found it perfunctory. There was no evidence on the dossier indicating a proper questioning of Corporal Gbanwuan. At a glance, the Court found the injuries sustained by Mary Sunday to be indicative of the level of harm to which she had been subjected. The victim had also been informed that upon the death of Corporal Njoku, the officer originally handling the investigation, the dossier for the case had been lost. The Court was of the view that taking into consideration the discrepancies surrounding the incident, the police should not have hastily concluded its investigations so as to dismiss the matter, but rather should have deferred to a national court of competent jurisdiction to resolve the matter in accordance with the

137 This plea was based on art 8 of the Universal Declaration; arts 2(1) & 2(3) of ICPPR; arts 8 & 25 of the African Women's Protocol; arts 2 & 3 of CEDAW; and arts 12, 13 & 14 of the Convention Against Torture (CAT).

138 *Mary Sunday* case (n 3).

139 ECW/CCJ/APP/26/15.

law.¹⁴⁰ For these reasons, the ECCJ found Nigeria to have been in violation of Mary Sunday's right to access justice.

The finding of the Court is a clear demonstration of the due diligence duty of states to prosecute, punish and provide reparations for victims of violence. A failure to investigate includes a failure to properly investigate. The Court echoed the need for a state to exercise due diligence to investigate seriously and thoroughly. Thus, although Nigeria did not directly incur liability for the violence perpetrated against Mary Sunday, it indirectly incurred responsibility for its failure to provide her with the appropriate legal remedy by conducting serious investigations.

Manjoo's proposal for distinguishing between the types of due diligence is significant here. Nigeria's liability was not found based on its failure to exercise systemic due diligence *per se*, but rather was premised on its failure to exercise individual due diligence which it personally owed to Mary Sunday to meet her needs of accessing justice. From this perspective, credence is given to Manjoo's proposal that the due diligence principle expands the scope of state responsibility. The distinction also allows for individual victims of domestic violence to be entitled to compensation on the international plane even in cases where the violent acts are not systemic properly so called.

Much as this two-part distinction of due diligence is promising for protecting individual victims of domestic violence, it potentially can cause challenges to the ECCJ in particular. As indicated earlier, there is no prior requirement to exhaust local remedies before appearing at the ECCJ. The downside to this, coupled with an advanced individual due diligence jurisprudence, is that over time the ECCJ will be heavily inundated with cases that otherwise could have been resolved at the national level. On the flip side, the open gates to the ECCJ allow victims who find themselves frustrated by state inertia in providing access to justice, as in the *Mary Sunday* case, to easily access justice. It therefore is recommended that a framework be put in place at the regional level to balance the competing concerns into a complementary model that will serve the interests of justice.

6 Conclusion

This article has reviewed the *Mary Sunday* case with respect to state responsibility for domestic violence in international law through the lens of the due diligence standard. The article also examined the ECCJ's jurisprudence on the due diligence standard as it applies to state responsibility. Although there was no express mention of 'due diligence' in the *Mary Sunday* case, there is evidence of its application by the ECCJ in holding Nigeria accountable.

140 *Mary Sunday* case (n 3).

The *Mary Sunday* case is significant for holding states accountable to prosecute the perpetrators of acts of domestic violence which often occur in the private sphere. It serves as a precedent that informs states on the minimum measures required to ensure their compliance with the due diligence standard, particularly as far as the obligation to properly investigate, prosecute and punish perpetrators is concerned. It emphasises the fact that this obligation of states transcends the public/private divide especially where human rights violations are involved. Indeed, the ECCJ is to be applauded for its attempt to explicate the due diligence standard in the African context, which involves that (a) state liability for human rights violations does not arise only in state actions but also in private actions such as domestic violence; and (b) a state's failure to exercise due diligence to prosecute, punish and provide reparation for victims of domestic violence will incur international responsibility.

However, it is observed that for a landmark decision such as *Mary Sunday*, the ratio on which the decision was made was quite terse. The ECCJ seemed to have rushed through its decision, leaving many issues barely addressed that could have been detailed to cement its jurisprudence. The decision basically reiterated legal provisions in international and regional instruments that were used by the parties without reference to case law either in the region or beyond. Its characteristically pithy comments on the issues arising in the case make it challenging to conduct an in-depth theoretical analysis on the reasoning and jurisprudence of the Court. It is believed that the nature of the Court's judgment is partly attributable to the prevailing judicial system at the regional level which combines the civil and common law systems. It is recommended, therefore, especially in cases of a monumental nature such as *Mary Sunday*, that the Court goes the extra mile to comprehensively address all issues raised. This is so because if the Court were to substantially contribute to creating ground-breaking changes in society, then far-reaching decisions are essential.

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The right of palliative care for the most vulnerable in Africa is everyone's responsibility

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Summary

In sub-Saharan Africa over 80 per cent of needy children are unable to access palliative care services. Since the introduction of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of Children, the three countries selected for this study, South Africa, Uganda and Kenya, have committed themselves to protect and promote the rights of children. Within the broader framework of international human rights, countries are obligated to realise a child's right to health and provide adequate health care. Yet, children living in these countries with life-threatening and life-limiting illnesses suffer from physical, psychological and emotional pain. The objective of the article is to focus on the plight of seriously ill children in sub-Saharan Africa. This includes highlighting their basic human right to paediatric palliative care and the challenges they encounter in receiving the necessary help. In examining a right to health it is understood that encapsulated within that right is the

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availability and access to palliative care for all who require such care. It is important for states to understand that realising universal health coverage is not possible unless existing legislative and social barriers, inadequate healthcare services and training of healthcare providers are addressed. In order to improve the monitoring and evaluation of needs and services, and remove the social, political and economic barriers, state involvement is necessary. The primary argument is that it is possible to successfully implement palliative care even in circumstances where resources are limited. The approach adopted calls for an increased understanding and the buy-in of representatives of government, civil society (international and national) and affected communities all working toward a common agenda and effectively utilising existing community resources.

Key words: *paediatric palliative care; life-threatening conditions; children's rights; pain relief; opioid analgesics; universal health care*

1 Introduction

In 2013 the United Nations Children's Fund (UNICEF) and the International Children's Palliative Care Network (ICPCN) published a report revealing that, globally, at least 21 million children require palliative care.¹ Of this number 98 per cent are situated in low to middle-income countries such as South Africa, Kenya and Uganda.² The report further indicated that only 1 per cent of needy children in sub-Saharan Africa were accessing palliative care services.³ These figures are a concern in a world that since the late 1980s has advocated child-centred approaches and the prioritisation of children's rights as set down in the United Nations Convention on the Rights of Child (CRC).⁴ Of importance in this context is the fact that the primary aim of the Convention is to protect and promote the rights of all children. This same child-centred focus is reflected in the UN Committee on the Rights of the Child (CRC Committee) where

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- 1 S Connor & C Sisimayi 'Assessment of the need for palliative care for children: Three country report: South Africa, Kenya and Zimbabwe' (2013) UNICEF & ICPCN, http://www.unicef.org/aids/files/Palliative_Care_Three_Country_Report_Nov13.pdf (accessed 13 November 2019). The WHO defines palliative care for children as active, total care of the child's body, mind and spirit and involves giving support to the family. 'Paediatric palliative care (PPC) begins when an illness is diagnosed, and continues beyond the death of the child during the bereavement period'; 'palliative care seeks to improve the quality of life of patients diagnosed with life-threatening illnesses through prevention and relief of suffering', <http://www.who.int/cancer/palliative/definition/en/> (accessed 12 November 2019).
 - 2 World Bank 'Country and lending groups for current 2020 fiscal year', <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519> (accessed 12 November 2019).
 - 3 Connor & Sisimayi (n 1).
 - 4 UN General Assembly Convention on the Rights of the Child (CRC) 20 November 1989 United Nations Treaty Series 1577 3, <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 9 November 2019).

the child's right to health, as defined in article 24, is interpreted as an inclusive right. Inclusivity refers to effective, affordable and appropriate health care which extends beyond curative, rehabilitative and palliative services, adopting a holistic health care approach. It places the realisation of a child's right to health within the broader framework of international human rights obligations.⁵

Since the adoption of CRC and the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁶ numerous plans and programmes have been developed by government and civil society alike. Three countries in the African region, South Africa, Kenya and Uganda, were specifically selected for this study because, in addition to the provision of legislative and institutional protection for children, these countries have been identified as exemplars of palliative care development in Africa.⁷ In addition to introducing courses on palliative care education at tertiary level, these countries are the home of regional and country-level bodies that guide and oversee the implementation of palliative care.⁸

Yet, in spite of these planned interventions and specific protective measures children facing life-threatening, life-limiting illnesses or chronic conditions (life-threatening conditions) continue to bear the brunt of their own vulnerability resulting in physical, psychological and emotional pain. The disturbing fact is that the capacity to address this suffering exists with adequate political buy-in and innovative planning and support from countries at an international and national level. This was recognised by the World Health Organisation (WHO) which in 2010 proposed that improved efficiency in the collection of

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- 5 UN Committee on the Rights of the Child General Comment 15: The right of the child to the enjoyment of the highest attainable standard of health (art 24) 17 April 2013 CRC/C/GC/15 para 2, <http://www.refworld.org/docid/51ef9e134.html> (accessed 15 November 2019). The right to health is clearly defined in art 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); General Comment 14: The right to the highest attainable standard of health (art 12 of the Covenant) 11 August 2000 E/C.12/2000/4, <http://www.refworld.org/docid/4538838d0.html> (accessed 9 November 2019).
 - 6 All African states have signed the African Children's Charter; seven states have not ratified the Charter: Democratic Republic of the Congo; São Tomé and Príncipe; South Sudan, Tunisia, Morocco, Sahrawi Arab Democratic Republic and Somalia, <https://www.acerwc.africa/about-the-charter/> (accessed 8 November 2019).
 - 7 BA Fraser et al 'Palliative care development in Africa: Lessons from Uganda and Kenya' (2018) 4 *Journal of Global Oncology* 1; JY Rhee et al 'An analysis of palliative care development in Africa: A ranking based on region-specific macro-indicators' (2018) 56 *Journal of Pain and Symptom Management* 230.
 - 8 Associations such as the African Palliative Care Association (APCA) and the Palliative Care Association of Uganda (PCAU) in Uganda, the International Children's Palliative Care Network (ICPCN) in South Africa, and the Kenya Hospice and Palliative Care Association (KEHPCA) in Kenya.

local revenue and the re-prioritising of budget allocations would allow countries more funds for domestic health.⁹

The article highlights the harsh reality confronting many children living with life-threatening conditions. It argues that despite the promise of rights, universal health coverage and the recognition of equality and the inherent dignity of everyone,¹⁰ holistic health coverage continues to elude the most vulnerable members in a country. The article proposes that the right to palliative care at national, regional and international level is an integral part of the right to health; an argument supported in terms of the definition of palliative care provided by WHO. According to the definition palliation is an important part of the overall continuum of care for seriously-ill children, and palliative care begins when the illness is diagnosed, continuing regardless of whether or not a child receives treatment directed at the disease.¹¹ The article provides a detailed outline of the barriers and challenges faced when palliative care is sought. It calls for realistic political commitment from government, without which both children and adults living with a life-threatening condition will continue to struggle to access adequate health care. Pivotal to the debate is the realisation that the provision of comprehensive paediatric palliative care (PPC) is possible, even in markedly impoverished settings. All that is required is a shift in thinking and the adoption of implementation strategies where existing resources are utilised economically and unnecessary barriers are removed.¹² Ultimately it is argued that a failure to provide adequate and appropriate PPC, at a time when children's rights are a priority, is a denial of the most basic of human rights, namely, the right of a child to survival and development and, at the end of life, a right to a dignified pain-free death or, as stated by Merriman, 'the right to a good death'.¹³

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- 9 WHO 'Health system financing: The path to universal coverage' (2010) 10-11, http://www.who.int/whr/2010/10_summary_en.pdf (accessed 15 November 2019); Connor & Sisimayi (n 1) state that with political will 'all countries can do more to raise funds for health' and countries should rethink the way monies are raised and diversify their sources of funding.
- 10 UN General Assembly Universal Declaration of Human Rights 10 December 1948, 217 A III Preamble, <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 10 November 2019).
- 11 WHO (n 1).
- 12 AE Caruso Brown et al 'Reported availability and gaps of paediatric palliative care in low and middle-income countries: A systematic review of published data' (2014) 17 *Journal of Palliative Medicine* 1369; see also J Downing et al 'Paediatric palliative care in resource-poor countries' (2018) 5 *Children PubMed*, file:///C:/Users/09200241/Downloads/children-05-00027%20(1).pdf (accessed 15 November 2019).
- 13 'Anne Merriman Hospice Africa launched in Kampala' *The Independent* 18 August 2016, <https://www.independent.co.ug/anne-merriman-hospice-africa-foundation-launched-kampala/> (accessed 10 November 2019); see also General Comment 14 of the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) which states that it is critical to provide 'attention and care for chronically and

2 Child suffering: Life-threatening conditions and HIV

2.1 Children's needs unmet

In Africa children are more likely than anywhere else in the world to be confronted with illness and death before the age of five years.¹⁴ An often overlooked reality is that children, like adults, suffer from a range of life-threatening illnesses and conditions such as cancer, cardiovascular diseases, kidney and liver diseases, congenital anomalies (excluding heart abnormalities), HIV and AIDS, blood and immune disorders, meningitis, neurological disorders and neonatal conditions.¹⁵ Of these, as indicated in the ICPCN study on the need for palliative care for children, HIV continues to impact negatively on children's lives. The study, carried out in the three sub-Saharan African countries, revealed that 'HIV-related illnesses and neonatal conditions are the greatest contributors to children's mortality. Other non-malignant but chronic conditions contribute significantly to childhood morbidity and mortality in these countries.'¹⁶

Thus, while global figures depict significant progress in the fight against HIV, the number of children becoming newly infected with HIV remains unacceptably high, especially in sub-Saharan Africa.¹⁷ Reports indicate that in the period 2010 to 2018 progress made with respect to reducing the rate of new infections in children is lower than previously expected – from 280 000 to 160 000 – with 25 per cent of new infections occurring in Eastern and Southern Africa.¹⁸ Ninety-one percent of the 1,8 million children living with HIV today are aged between 0 to 14 years and are situated in sub-Saharan Africa. In 2017, 110 000 (63 000 to 160 000) children aged 0 to 14 years died from AIDS-related causes; 32 000 (18 000 to 48 000) of this number were children aged 5 to 14 years.¹⁹ It is a sad reality that the mortality rate among children, including adolescents, remains high because of their

terminally ill persons, sparing them avoidable pain and enabling them to die with dignity', <https://www.escri-net.org/resources/general-comment-14> (accessed 17 November 2019).

- 14 SN Naicker et al 'Development and pilot evaluation of a home-based palliative care training and support package for young children in Southern Africa' (2016)
- 15 *Bio Medical Central (BMC) Palliative Care* 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4826506/pdf/12904_2016_Article_114.pdf (accessed 16 November 2019).
- 15 S Connor & MCS Bermedo (eds) 'Global atlas of palliative care at the end of life' (2014) 10 WPCA & WHO, http://www.who.int/nmh/Global_Atlas_of_Palliative_Care.pdf (accessed 10 November 2019).
- 16 Connor & Sisimayi (n 1) 6.
- 17 United Nations Children's Fund (UNICEF) *Women: At the heart of the HIV response for children* (2018) 7.
- 18 UNAIDS Fact Sheet – Global AIDS Update 2019, https://www.unaids.org/sites/default/files/media_asset/UNAIDS_FactSheet_en.pdf (accessed 16 November 2019).
- 19 UNICEF (n 17).

being uniquely vulnerable to the rapid progression of HIV, particularly when diagnosis and treatment are neither timely nor sustained.²⁰

Within this environment children suffering with life-threatening conditions or severe disabilities should, as in the case of their adult counterparts, have the right to palliative care. As Saunders said, 'You matter because you are you, and you matter until the last moment of your life. We will do all we can, not only to help you die peacefully, but also to live until you die.'²¹

2.2 Why are children not accessing palliative care?

Studies similar to those carried out by ICPCN draw attention to the fact that children in sub-Saharan Africa live in extremely difficult circumstances.²² Many children with chronic conditions are also living in households where the primary caregiver is economically vulnerable, ill or both. Unfortunately, PPC coverage remains almost non-existent or extremely low, particularly in certain parts of the region, with children unable to access much needed care.²³

The ICPCN report indicated that in 2012, 545 children in Kenya received specialised palliative care (<1 per cent of the need); of approximately 264 102 patients in South Africa only 14 501 received specialised care (~5 per cent), while in Zimbabwe only 5 438 children received specialised care (~5 per cent).²⁴ Coupled with the low coverage of PPC is the fact that there is a paucity of data regarding the supply of paediatric services, the number of sites providing these services, the number of children in need of palliative care and those who are receiving care.²⁵ This lack of clarity and research, with respect to the number of children in need and limited data on accessible sites and resources, results in the inability of governments and civil society organisations (CSOs) to track the existing challenges and identify the needs of communities and health sites. This in turn results in poor coverage, planning and budgeting for children's palliative care.²⁶

An integral part of accessing palliative care, for both adults and children, is the provision of relief from pain. Although effective and inexpensive pain medication exists there are many challenges and

20 UNICEF (n 17) 36.

21 C Saunders 'Care of the dying – 1: The problem of euthanasia' (1976) 72 *Nursing Times* 1003-1005.

22 LE Bain et al 'Malnutrition in sub-Saharan Africa: Burden, causes and prospects' (2013) 15 *Pan African Medical Journal (PMC)* 120.

23 Connor & Sisimayi (n 1).

24 Connor & Sisimayi 7.

25 R Harding et al 'Paediatric palliative care in sub-Saharan Africa: A systematic review of the evidence for care models, interventions, and outcomes' (2014) 47 *Journal of Pain and Symptom Management* 648-649.

26 As above.

barriers obscuring access to certain medicines.²⁷ These barriers range from social, economic, structural, legal and political in nature. In Africa barriers are complex and multi-layered impacting on individuals in such a way as to limit their ability to utilise existing resources. A more inclusive approach is needed involving a broad representation of national and international stake holders – including government – therefore moving away from the traditional ‘silo approach’ to problem solving.²⁸

3 International frameworks supporting palliative care as a human right

3.1 Human rights framework

Over the last 30 years palliative care has revealed itself as an important component of a healthcare system and of international human rights. Although palliative care is not directly referred to in international instruments, such as the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR) with its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), it is part of a continuum of health care for everyone. Brennan, Gwyther and Harding state that ‘health includes the health of people with life-threatening illnesses’. It can therefore be argued that ‘a right to palliative care can be implied from the overall international human right to health’.²⁹

This relatively recent focus on palliative care has resulted in the global and regional adoption of various policy instruments. The most important of these is the 2014 World Health Assembly Resolution (WHA67) on strengthening palliative care as a component of comprehensive care throughout the life course.³⁰ The WHA67 Resolution is the first global resolution on palliative care calling on the WHO and member states to ensure that palliative care is a core

27 WHO ‘Palliative care: Fact sheet’ (2018), <http://www.who.int/mediacentre/factsheets/fs402/en/> (accessed 11 November 2019); Single Convention on Narcotic Drugs 1961 Preamble 1 para 3, https://www.unodc.org/pdf/convention_1961_en.pdf (accessed 10 November 2019).

28 As above; see also JE Méndez ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development’ Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment A/HRC/22/53 1 February 2013 paras 51-56 and recommendations, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (accessed 15 November 2019).

29 F Brennan et al ‘Palliative care as a human right’ in *Report for Open Society Institute Law and Health Initiative on Palliative Care and Human Rights* (2008) 25.

30 WHO 76th World Health Assembly (WHA67) ‘Strengthening of palliative care as a component of comprehensive care throughout the life course’ Resolution 67.19 (2014), http://www.oeci.eu/Attachments%5CA67_R19-en.pdf (accessed 11 November 2019).

component of health systems, improving both access to and awareness of palliative care. Other important instruments include the United Nations (UN) Political Declaration on Non-Communicable Diseases and Universal Health Coverage, where palliative care is incorporated as part of essential services.³¹

The overall aim of such instruments is to advocate the integration of palliative care into a country's health system and to encourage greater awareness of palliative care by both government and community. In the African region, the African Charter on Human and Peoples' Rights (African Charter) recognises the right of people to access palliative care in article 2 where it states that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health'. States are also obligated to take the necessary steps to protect the health of their people and to ensure that they receive medical attention when they are sick.³² In 2012 the African Union (AU) adopted the Common Position on Controlled Substances and Access to Pain Management, the aim of which is to ensure a functioning system for managing controlled drugs and substances.³³ This indicates the intention to ensure delivery of the best affordable drugs to patients in need while, at the same time, preventing the diversion of drugs for the purpose of abuse.³⁴

It is through these various frameworks that important advocacy opportunities, aimed at achieving access to palliative care and ensuring adequate pain management, can be advanced. The unavoidable reality is that when health services are inadequate individuals living with severe pain face a future without access to urgently-required pain relief medication. This fact coupled with a government's lack of commitment to address the gaps in a healthcare system negates the intention to deliver the 'best affordable drugs' to those in need, constituting, in terms of the Universal Declaration, 'cruel, inhuman or degrading treatment or punishment'.³⁵

When extending the argument to include children the call for palliation carries with it additional concerns. An exacerbating factor for children is that, when talking about the right to health, reference is generally made to adults in the health system. This disturbing oversight results in misunderstanding or conflating children's health issues with those of adults. Paediatricians often point out that 'children are not small adults' and it is important to understand that in

31 UN 'Political declaration on non-communicable diseases' 16 September 2011, http://www.un.org/ga/search/view_doc.asp?symbol=A/66/L.1 (accessed 13 November 2019).

32 Art 16 African Charter on Human and Peoples' Rights, <https://www.achpr.org/legalinstruments/detail?id=49> (accessed 15 November 2019).

33 African Union (AU) 'African common position on controlled substances and access to pain management drugs' 5th session of AU Conference of Ministers of Drug Control (October 2012), https://www.un.org/en/africa/osaa/pdf/au/cap_controlledsubstances_2012.pdf (accessed 14 November 2019).

34 AU (n 33) 2.

35 Méndez (n 28) para 39; see also art 5 of the African Charter.

the trajectory of a child's illness, his or her resilience and response to treatment will differ from that of an adult.³⁶

4 International frameworks protecting the rights of children

4.1 Children's rights

Numerous international instruments provide specific rights and protections for every child. Because of their status as children, children are accorded special treatment having access to the same rights as adults and to rights that apply to them specifically.³⁷ Of the many instruments and laws directed at children the two relevant instruments that refer to the protection, support and rights of children are CRC³⁸ and the African Charter on the Rights and Welfare of the Child (African Children's Charter). These instruments, founded on earlier declarations on children at an international level, introduced the idea that children are not beneficiaries but subjects of international law and are provided with 'special protections' implemented in the form of the best interests of the child.³⁹

4.2. Child palliative care as a human right

Of the two instruments discussed, CRC is said to be the most comprehensive document setting out children's rights, yet neither CRC nor the African Children's Charter makes specific reference to the care or protection of children suffering from life-threatening conditions.⁴⁰ CRC identifies four broad principles, often termed 'the four 'P's'. These four 'P's' are viewed as fundamental to the overall protection and welfare of children and are cited as participation by children in decisions affecting them; the protection of children against abuse, discrimination and all forms of neglect and exploitation; the

36 R Harding, L Sherr & L Gwyther 'Pediatric palliative care in sub-Saharan Africa: A systemic review of the evidence for care models, intervention and outcomes' (2014) 47 *Journal of Pain and Symptom Management* 649; see also UNICEF (n 17).

37 D Colgan 'Policy networks in action: A comparative case study of two projects aimed at addressing childhood vulnerability' unpublished PhD thesis, University of Witwatersrand, 2015 123; see also J Sloth-Nielsen 'A developing dialogue: Children's rights, children's law and economics: Surveying experiences from Southern and Eastern African law reform processes' (2008) 12 *Electronic Journal of Comparative Law*, <http://www.ejcl.org/123/art123-5.pdf> (accessed 10 November 2019).

38 It has been said that CRC is the most comprehensive document on the rights of children.

39 For the purposes of CRC, a child is defined as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier' (art 1); see also T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 14.

40 Although neither instrument makes specific reference to paediatric palliative care, the UN Committee on the Rights of the Child refers to it in General Comment 15; see UN Committee on the Rights of the Child (n 5).

prevention of harm to children through the systems in place; and the provision of assistance to children for their basic needs enabling a child's growth and development.⁴¹ The principles contained in CRC, therefore, provide the foundation on which the argument for child palliative care as a right is based.

When applying rights in terms of CRC and the African Children's Charter, both highlight the importance of the best interests of the child. In article 3 of CRC the best interests of the child are seen as 'a primary consideration', and in article 4 of the African Children's Charter the best interests of the child are seen as 'the primary consideration'.⁴² Article 4 of CRC also requires that state parties undertake all appropriate legislative, administrative and other measures to implement the rights recognised in the Convention. These positive obligations contained in article 4 of CRC are not similarly reflected in article 4 of the African Children's Charter as general obligations of states are found in article 1 of the Charter. In terms of article 1 other human rights instruments are seen to complement the protections offered by the African Children's Charter.⁴³

Nonetheless, the protection offered by both instruments provides the means to support an argument that state parties have a duty to ensure the survival and development of every child. This is supported by the child's inherent right to life (article 6 of CRC and article 5 of the African Children's Charter) and the child's right to enjoy the highest (article 23 of CRC) or 'best' attainable standard of health (article 14 of the African Children's Charter). Taken further, this means that even though palliative care is not highlighted as a specific right in CRC, it is fundamental to the well-being of a child that is living with a life-threatening condition. Thus, state parties have a responsibility to ensure that no child living with such an illness or condition is deprived of his or her right to access the necessary healthcare services and, as such, a child should not be subjected to further suffering. This call for access to palliative care was recognised by the UN Committee on the Rights of the Child (CRC Committee) which welcomed the commitment of Belarus to palliative care for children and the country's adoption of an Order on Child Palliative Care.⁴⁴

The UN Special Rapporteur on the Right to the Highest Attainable Standard of Health similarly raises the argument that there is an

41 J Korbin & D Krugman *Handbook of child maltreatment: Volume 2 of child maltreatment* (2013) 543.

42 UN Committee on the Rights of the Child (n 5) paras 12-15; see also M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 26.

43 Gose (n 42) 29-31.

44 The Committee recommended that state parties establish a funding mechanism to provide palliative care for children and support palliative care services provided by NGOs; see Committee on the Rights of the Child '56th session Consideration of Reports Submitted by States Parties Under Article 44 of the Convention Belarus' (2011), www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.BLR.CO.3-4.doc (accessed 15 November 2019).

important relationship between the right to health and a young child's right to survival and development.⁴⁵ In reports by Special Rapporteurs on health and torture, specific comments were made about the importance of palliative care as a child's right, pointing out that it should be 'an obligatory part of healthcare services' and regarded as one of the interventions made available across the continuum of care.⁴⁶ It was also stated in General Comment 15 of 2013 that state parties have an obligation to ensure the survival, growth and development of the child and to systematically identify the risks and protective factors that underlie the child's life, survival, growth and development so that evidence-based interventions may be designed and implemented to address a wide range of determinants during the child's lifetime.⁴⁷

This recognition of the right to PPC is an important step towards acknowledging specific vulnerabilities and the needs of a child living with a serious illness. However, the reality is that such recognition does not automatically translate into addressing the child's needs and the real proof of commitment lies in the adequate allocation of resources and the provision of relief from pain and suffering. This allocation of resources is a multi-level consideration that calls on all stakeholders to work together for a common aim. In this context of collaboration states need to consider a variety of issues ranging from removing barriers and improving access to controlled medication, providing adequate services with skilled staff and facilities, developing an increased understanding and knowledge of palliative care and consistently monitoring and evaluating existing needs and available resources.⁴⁸

5 Right to paediatric palliative care for children in Africa

5.1 Sub-Saharan Africa

State parties have an obligation to protect and care for children and to ensure the adequate provision of palliative care for a child living with a life-threatening condition. The question that arises in the case

45 Dainius Puras (OHCHR) Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Statement made at the 70th session of the General Assembly 22 October 2015.

46 ICPCN 'UN report highlights palliative care for children as a right' 25 September 2015, <http://www.icpcn.org/un-report-highlights-palliative-care-for-children-as-a-right/> (accessed 15 November 2019); Open Society 'Public health fact sheet: Children's palliative care and human rights' (2018), <https://www.opensocietyfoundations.org/uploads/2d02a07d-c1a0-4474-8c63-17ec62b00056/child-rens-palliative-care-human-rights-20151008.pdf> (accessed 17 November 2019).

47 Committee on the Rights of the Child (n 5) paras 16 & 32.

48 AF Brooke et al 'Palliative care development in Africa: Lessons from Uganda and Kenya' (2018) 4 *Journal of Global Oncology* 1; see also ICPCN report (n 1) and UNICEF (n 17).

of countries in the sub-Saharan region is whether measures have been put in place to protect children's rights in a feasible and effective manner.

In many sub-Saharan countries the need to access palliative care remains acute, but for children living with a life-threatening condition the options are limited.⁴⁹ In these circumstances Amery states that 'palliation and symptom relief are the only realistic option for most African children with advanced cancers and AIDS'.⁵⁰ Despite global and regional commitments to improve children's access to palliative care and pain relief, states are confronted with competing priorities which are further exacerbated by a lack of adequate resources and specialised skills. These issues bring about implementation failures with governments not following through on intended policy plans or programmes, often needing to rely on other sectors in society to fill existing gaps.⁵¹

The CRC Committee drew attention to the fact that many state parties often leave the provision of palliative care services to non-governmental organisations (NGOs) that struggle to survive without adequate funding or support from their respective government institutions.⁵² In South Africa, Kenya and Uganda NGOs provide the majority of palliative care services while the governments offer minimal or piecemeal assistance.⁵³ Countries such as South Africa and Uganda have expressed an intention to address these limitations in the future.⁵⁴ In 2017 the Human Rights Commission (HRC) in Uganda called for the input of both government (the Ministry of Health) and civil society (palliative care organisations) in compiling its twentieth annual report for the Ugandan Parliament, as mandated by the Constitution, ensuring that the voices of all responsible stakeholders were represented in their report.⁵⁵

49 The availability of paediatric palliative care indicates that only an estimated 20% of children in these countries will be cured of cancer, compared with 80% of children in high-income countries; see Caruso Brown et al (n 12) 1369.

50 J Amery (ed) *Children's palliative care in Africa* (2009) 26.

51 There are several competing challenges placing a strain on the capacity of health care professions in sub-Saharan Africa, such as the additional burden of treating HIV/AIDS; see Amery (n 50).

52 UN Committee on the Rights of the Child (Belarus) (n 44) para 56; see also UN Committee on the Rights of the Child (n 5) paras 100 & 101.

53 L Gwyther et al 'The development of hospital-based palliative care services in public hospitals in the Western Cape, South Africa' (2018) 108 *South African Medical Journal* 86-89; UN Committee on the Rights of the Child (n 5).

54 The South African government finalised a national policy on palliative care which was approved in April 2017 by the National Health Council, a body that includes representation from government and civil society, <https://hpca.co.za/download/national-policy-framework-and-strategy-on-palliative-care-2017-2022/> (accessed 16 November 2019).

55 Uganda Human Rights Commission 'Progress, challenges and recommendations on palliative care in Uganda' Invitation to 20th UHRC annual report consultation meeting 5 December 2017 (signed 14 November 2017).

Such implementation challenges that are faced by advocates for palliative care, call on countries to ensure state involvement in the form of practical, innovative and effective responses. This means not only addressing the problem through improved resource allocation and the removal of barriers to increase access, but also understanding the extent of the problem through, for example, evidence-based or evidence-informed interventions. Unfortunately, the necessary state buy-in is not apparent. It is of concern that limited attention was given to PPC during the 28th through to the 33rd ordinary sessions of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) despite the huge burden of chronic non-communicable diseases and HIV among children on the continent, and following the adoption in 2014 of the first ever global resolution on palliative care, WHA67.19.⁵⁶

6 Barriers

6.1 Socio-economic, regulatory and knowledge barriers

In sub-Saharan Africa the barriers confronting both states and individuals in accessing and utilising palliative care resources are nuanced and complex. These barriers range from social, economic, structural, political and legal in nature. In the social context, families themselves may be conflicted about different treatment options, unsure of the choice between hospital-based treatment or home-based palliative care. Individuals and minority groups may face barriers such as discrimination and disempowerment from institutions or other community members. At an economic level, individuals may struggle to access healthcare facilities because of high transport costs and, in certain areas, the cost of healthcare services. At a structural level, institutions may not have adequate skills or knowledge or may lack institutional standards for the provision of children's palliative care.⁵⁷ From a legal or regulatory perspective, many drug control laws and practices in place, to protect against substance abuse, have resulted in limited availability and accessibility of opioid analgesics for children. This final barrier, the lack of availability of controlled medicines, represents a major global health problem and is viewed by

56 It is important to note here that the specific need to advance children's palliative care in Africa is a relatively new development in the region. The last sessions of the African Children's Committee were an opportunity to evaluate progress in terms of the 2014 WHA67 Resolution, particularly regarding the implementation of recommendations, the challenges met and advances made. Unfortunately, there was no reference to palliative care, <https://www.acerwc.africa/sessions/> (accessed 16 November 2019).

57 United Nations Office on Drugs and Crime (UNODC) 'Ensuring availability of controlled medications for relief of pain and preventing diversion and abuse: Striking the right balance to achieve optimal public health outcome' (2011) Discussion Paper 8-10, https://www.unodc.org/docs/treatment/Pain/Ensuring_availability_of_controlled_medications_FINAL_15_March_CND_version.pdf (accessed 15 November 2019).

the authors as an area where fundamental change can have widespread benefits.⁵⁸

In Africa the lack of access to pain relief medication is exacerbated by the exodus of medical doctors from rural areas – more than 80 per cent of doctors on the continent locate themselves in major towns. This means that many rural children are unable to access pain medication. Countries where the laws strictly limit access to controlled substances can cause unnecessary pain and suffering for young children with serious illnesses. With few doctors and overly-restrictive laws, it is increasingly challenging to supply pain medication to patients in distant, inaccessible rural areas. African countries have one of the lowest doctor to patient ratios in the world with many doctors remaining far removed from rural communities.⁵⁹

An additional concern for children located in sub-Saharan Africa is the socio-economic status of their family or caregivers. In communities already battling issues relating to poverty and inequality, the ability to access specialised health facilities for children in need is even more of a challenge. A weak healthcare system with limited resources negatively impacts on these vulnerable members of a community. Where the health infrastructure and supply of medicine are inadequate the resulting shortages of resources, both human and medical, lead to the unnecessary suffering of children requiring specialised care. In this environment affected children are cared for in their own homes or within the community.⁶⁰ In addition to the financial and emotional burden this situation places on the extended family and community, caregivers also require further support through improved access to relevant information. To be able to provide informed and sensitive care and assist in the reduction of a child's suffering calls for specialised education and specific skills which include an understanding the developmental needs of a child.⁶¹

58 UNODC (n 57) 4; see also Connor & Sisimayi (n 1) 49.

59 WHO reported that over 44% of WHO member states have fewer than one physician per 1 000 of the population and that the African region has access to only 3% of health workers, yet more than 24% of the global burden of disease. WHO *Density of physicians*, https://www.who.int/gho/health_workforce/physicians_density/en/ (accessed 17 November 2019). See also World Bank Data, https://data.worldbank.org/indicator/SH.MED.PHYS.ZS?name_desc=true (accessed 15 November 2019).

60 Children depend on adults to represent their interests. Thus, children may be said to be doubly vulnerable, as discussed by D Ewing 'Children's experiences of the link between poverty and unemployment in the context of HIV/AIDS' in P Graham (ed) *Inheriting poverty? An economic research agenda for realising the rights of children* (2006) 89.

61 The approach adopted in PPC is holistic in nature encompassing the child's spiritual, emotional, physical and educational development, accounting for the impact of stress and the child's need to play; Naicker et al (n 14). In such an environment care should come to the patient at home via a care team led by a palliative care nurse; when needed a wider team will be referred to which includes doctors, social workers and spiritual counsellors.

Barriers related to accessing care for life-threatening conditions affect children at multiple levels. This may be illustrated through the example of paediatric care for children diagnosed with cancer in Uganda. There is only one specialised paediatric oncology ward, located at the Uganda Cancer Institute in Kampala, where all children diagnosed with cancer are referred to for treatment. Cancer treatment consumes both resources and time, taking approximately two weeks to prepare for treatment and averaging three weeks for the treatment cycle. This process, coupled with the cost of clinical investigations, medicine, food, accommodation and transport to and from the hospital, drains the resources of most families, resulting in their defaulting on treatment. This negatively impacts on the survival of affected children, even in the case of curable childhood cancers.⁶²

The aim is to neither intentionally inflict suffering or harm on a child with a serious illness, nor to deprive the child of the right to access existing resources (human, material, technological or scientific) to alleviate such suffering. Therefore, it is essential to identify these key barriers which, once removed, would aid those in need of access to palliative care resources.

6.2 Legal barriers

6.2.1 Effect and impact

One notable barrier standing in the way of effective pain treatment is the introduction of unnecessarily restrictive drug control mechanisms through legislation. For many countries in Africa access to pain relief is strictly regulated in order to prevent the misuse of controlled substances, such as morphine and other opioids. Unfortunately, such stringent control measures interfere with a person's ability to access the necessary treatment. In these countries laws and policies appear to focus more on the prevention of drug abuse than on pain relief.⁶³

In South Africa, Kenya and Uganda a distinction is made between two forms of legislation, one aimed at the licit medicines market and the other at the illicit drug market.⁶⁴ Legislation aimed at the licit medicine market determines the 'who and what' of prescribing, whereas that for the illicit drug market focuses on preventing the abuse of certain controlled substances. In Kenya the Pharmacy and Poisons Act,⁶⁵ and in South Africa the Medicines and Related

62 Kawempe Home Care in Uganda, through New Hope children's hostel, caters for 30 children and their caregivers, waiting to access cancer treatment at UCI-Kampala. Children and caregivers spend between two to six months at Kawempe Home Care; <http://kawempehomecare.org/children/> (accessed 10 November 2019).

63 DG McNeil 'Drugs banned, many of the world's poor suffer in pain' *New York Times* 10 September 2007, <http://www.nytimes.com/2007/09/10/health/10pain.html> (accessed 15 November 2019).

64 Personal communication Andy Gray, University of KwaZulu-Natal, March 2018.

65 Ch 244 of the Laws of Kenya (updated 2012).

Substances Act,⁶⁶ set the basis for the control of medicines for licit use. Other legislation that impacts on the control of the licit market relates to the registration of health care practitioners such as medical practitioners, dentists, nurses and pharmacists.⁶⁷ In Kenya legislation that refers to the illicit use of controlled drugs and substances is the Narcotic Drugs and Psychotropic Substances Control Act of 1994. In South Africa the Drugs and Drug Trafficking Act of 1992 together with the Prevention and Treatment for Substance Abuse Act of 2008 covers the illicit drug market.

Currently in Uganda the vacillation between strictly regulating or allowing greater access to certain controlled substances is being played out through legislative reform. The introduction of the Narcotic Drugs and Psychotropic Substances (Control) Act in 2015 is a retrogressive step after the progressive application of the National Drug Authority (Prescription and Supply of Certain Narcotic Analgesic Drugs) Regulations 24 introduced in 2004 (Regulation 24). This shift in law indicates the ongoing uncertainty that exists in the application of both types of legislation. It is an uncertainty that constantly plagues advocacy efforts towards improving access to palliative care and pain relief. According to WHO the manner in which legislation is weighted, for both licit and illicit medicine control, should not be a mutually-exclusive exercise. The WHO believes that the most effective 'drug control regime' would be the one that is able to strike a balance between the primary considerations raised in both by allowing pain relief to relieve suffering while ensuring that these medicines are not diverted to the illicit drug market.⁶⁸

6.2.2 Legal control over nurse prescribing

In African countries such as Kenya and South Africa the laws and practices that control the prescription of pain relief medication ensure that, through application of law, only trained medical practitioners or dentists can prescribe specific forms of medication.⁶⁹ In South Africa the South African Nursing Act 2005 allows nurses to prescribe and administer, in certain circumstances, schedule 0-4 drugs. The regulations do not allow nurses to prescribe stronger medication, such as morphine and other opioids (schedule 5-6), which are necessary for the pain relief of people with life-threatening conditions. In Kenya the Narcotic Drugs and Psychotropic Substances (Control) Act) 1994 sets

66 Medicines and Related Substances Act 101 of 1965.

67 In South Africa, the Health Professions Act 56 of 1976; the Nursing Act 35 of 2005; and the Pharmacy Act 53 of 1974.

68 WHO 'Ensuring balance in national policies on controlled substances: Guidance for availability and accessibility of controlled medicines' (2011) 1, http://apps.who.int/iris/bitstream/10665/44519/1/9789241564175_eng.pdf (accessed 11 November 2019).

69 D Line (ed) 'The 2015 quality of death index: Ranking palliative care across the world' (2015) *The Economist* 42, <https://www.eiuperspectives.economist.com/healthcare/2015-quality-death-index> (accessed 14 March 2018); see also Brooke et al (n 48) 1-10.

out a framework for the control of specific drugs. In terms of this Act only certain registered healthcare practitioners are authorised to prescribe, administer or supply narcotic drugs or psychotropic substances. This means that a trained palliative care nurse or clinical officer cannot legally prescribe morphine.⁷⁰

For most high and some middle-income countries, universal health coverage⁷¹ is close to being achieved. Other countries, including low-income countries such as Rwanda and Ethiopia, are making rapid progress towards this goal. In every case, the countries achieving universal health coverage increased the supply and quality of health services through reducing barriers preventing people from accessing necessary health care.⁷² Rwanda's legislation governing narcotic drugs and psychotropic substances, in terms of article 17(4), allows a qualified (registered) midwife or nurse to prescribe narcotics such as morphine.⁷³

In the last decade Ugandan legislation has changed with respect to nurses prescribing narcotic and psychotropic drugs. In 2004 Regulation 24⁷⁴ authorised clinical officers and nurses, as palliative care specialists, to prescribe narcotic analgesic drugs. This was reversed in 2015 when the Narcotic Drugs and Psychotropic Substances (Control) Act was passed which once again limited nurses' prescribing of certain controlled substances.⁷⁵

To counter the impact of such a retrogressive law the Ugandan government made a commitment to collaborate with CSOs in working towards improved access of pain relief medication and to remove legislative barriers for those needing palliative care. This resonates with the recommendations of the 2016 United Nations General Assembly Special Session (UNGASS) outcomes on the World Drug Problem which called for greater collaboration between different

70 Sec 3 Narcotic Drugs and Psychotropic Substances (Control) Act 4 of 1994.

71 According to WHO, UHC means that all people and communities can use the promotive, preventive, curative, rehabilitative and palliative health services they need, of sufficient quality to be effective, while also ensuring that the use of these services does not expose the user to financial hardship; http://www.who.int/health_financing/universal_coverage_definition/en/ (accessed 15 November 2019).

72 The Elders 'Universal health coverage: Position paper' May 2016, <http://theelders.org/sites/default/files/final-uhc-position-paper-for-web.pdf> (accessed 15 November 2019).

73 Law N 03/2012 of 15 February 2012 governing narcotics, drugs, psychotropic substances and precursors in Rwanda; <https://www.mindbank.info/item/2415> (accessed 16 November 2019).

74 The National Drug Authority (Prescription and Supply of Certain Narcotic Analgesic Drugs) Regulations 24 of 2004.

75 The Narcotic Drugs and Psychotropic Substances (Control) Act 2015, <https://www.parliament.go.ug/documents/1264/acts-2015> (accessed 16 November 2019).

sectors in government (health, education, justice and law enforcement) and CSOs.⁷⁶

Other countries, such as Kenya and South Africa, continue to debate the possibility of broadening nurse prescribing regulations to address access issues. The time is ripe for policy makers to reconsider existing restrictive regulatory practices and to take definitive steps in addressing the multiple anomalies introduced through legislation. Any legislative change must account for the concerns voiced by multiple sectors, ranging from health professionals, patients and law enforcers to policy makers. This calls for effective dialogue between all stakeholders where misconceptions and assumptions are broken down and understanding takes place.

6.3 The call to address children's suffering

6.3.1 *Obligations and commitments*

The oversights experienced with respect to promoting and ensuring access to children's palliative care can also be noted within frameworks developed that aim at guiding governments in the formulation of national child protection policies and child rights programmes. The instruments developed are generally inadequate, with limited provision for palliative care services and little opportunity for the implementation of evidence-based research and the monitoring of outcomes. The Uganda Children (Amendment) Act 2016 identifies the need to prepare and maintain a national data base on children, yet does not specifically identify or address the needs of seriously-ill children.⁷⁷ The Act acknowledges rights set out in CRC and the African Children's Charter. Section 4(1)(l) states that every child shall have the rights contained in these instruments 'with appropriate modifications to suit circumstances of Uganda that are not specifically mentioned in this Act'.⁷⁸ This provides the opportunity to argue in favour of recognising PPC as a human right in Uganda, particularly in light of the burden of life-threatening conditions confronting children in the country.

In the Kenya Children Act the right of every child to health and medical care is recognised, stating that responsibility for providing such care rests with parents and the government.⁷⁹ The Act also mentions the need to 'design programmes for the alleviation of the

76 United Nations Office on Drugs and Crime (UNODC) Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem, New York, 19-21 April 2016.

77 The Uganda Child Act 2003, subsequently amended by the Uganda Children (Amendment) Act 2016, <https://ulii.org/ug/legislation/act/2016/59> (accessed 16 November 2019).

78 Sec 4(1)(l) Uganda Children (Amendment) Act 2016.

79 Sec 9 Children Act [Kenya] 8 of 2001, <https://www.refworld.org/docid/47975f332.html> (accessed 16 November 2019).

plight of children with special needs or requiring special attention'.⁸⁰ In South Africa the Children's Act adopts a holistic view of children living with disabilities or chronic illnesses. It calls for the recognition of a child's right to develop and survive in society, accounting for the child's emotional, psychological, spiritual and physical needs.⁸¹ No direct reference is made to palliative care or pain relief, although the Act does generally mention providing special care 'as and when appropriate' and the need to provide 'necessary support services'.⁸² In most of the frameworks developed there is little indication of specific programmes or activities aimed at advancing palliative care for seriously-ill children and limited indication of a commitment to utilise evidence-based research in order to establish data on existing demands and services in this area of need.

6.3.2 Drawing attention to hidden suffering: The unheard voices

It is unfortunate that many child protection policies and programmes address the public side of a child's vulnerability, focusing on specific issues or specific groups of vulnerable children.⁸³ This approach, sometimes referred to as the vertical approach, includes violence against children, the protection of displaced children, migrant children, child justice, child trafficking, sexual exploitation, teenage pregnancy, child labour, immunisation and nutrition, all of which are important and notably visible.⁸⁴ The hidden side of child suffering often is neglected or goes unnoticed. The call for a more systematic and evidence-based approach to interventions may best address these hidden vulnerabilities of children whose needs are often overlooked because of limited visibility.

This 'hidden suffering' underlies many implementation failures despite the broad policy frameworks, programmes and plans developed at national and international levels. Suggested intervention plans and strategies – such as the recommendations by the WHO – call for improved monitoring and evaluation of needs and services in relation to palliative care and allocation of resources, including improved access to medication.⁸⁵ In terms of Resolution WHA67.19, passed at the 67th session of the World Health Assembly in Geneva, Switzerland, member states are urged to 'assess domestic palliative care needs, including pain management medication requirements, and promote collaborative action to ensure adequate supply of essential medicines in palliative care, avoiding shortages'.⁸⁶ The

80 Sec 32(2)(o) Children Act (n 79).

81 Sec 11 Children's Act 38 of 2005.

82 Secs 11(2)(b) & (c) Children's Act.

83 JD Fluke & F Wulczyn 'A concept note on child protection systems monitoring and evaluation' (2010) UNICEF Working Paper 2-3.

84 As above.

85 WHA67.19 (n 30).

86 As above; Resolutions and Decisions 1(5).

current lack of research and limited data collection⁸⁷ relating to palliative care, specifically PPC, indicate that various government institutions and commissions or child care programmes are failing to adequately implement the required monitoring or evaluation programmes called for in terms of WHA67.⁸⁸

An important part of the approach, recommended by WHO and in terms of WHA67, calls for partnership development and increased collaboration between international agencies and with stakeholders involved in advocating children's palliative care.⁸⁹ This means that policy or programme implementation lies not only with the relevant government department or ministry, but also requires the involvement of specialised national and international bodies that have the protection and promotion of children's rights as a core mandate, of which UNICEF is one example.⁹⁰ These international and national CSOs have a duty to respond to a country's palliative care needs, working in collaboration with the state while also holding the state to account. To this end, UNICEF is mandated to advocate the protection of the rights of all children, developing and supporting opportunities that ensure the growth and survival of children. Through advocacy efforts of such organisations attention can, and must, be drawn to the suffering of children in sub-Saharan Africa.

At regional and country levels, institutions such as human rights commissions and organisations similar to the African Children's Committee need to also play a role in bringing such issues to the fore. Offices such as the National Child Council (NCC) in Uganda and the Human Rights Commission in both South Africa and Kenya should partner with government and civil society in determining palliative care needs and in monitoring the implementation of policies introduced by governments in terms of the international policy framework.⁹¹

The WHO further recommends that state parties introduce a public health strategy that will assist governments in integrating palliative care into a country's healthcare system. The strategy that is developed needs to address a broad variety of issues including (i) the development of appropriate policies; (ii) the availability of effective medicine; (iii) building awareness and educating stakeholders such as policy makers, health care workers and individuals in communities,

87 Caruso Brown et al (n 12).

88 WHA67.19 (n 30); Resolutions and Decisions 1(1) & (5) and 2(2) (3), (7),(9) & (10). Kofi Annan points out, when commenting on malnutrition in Africa, that '[t]his shows how crucial it is to invest in data. Data gaps undermine our ability to target resources, develop policies and track accountability. Without good data, we're flying blind. If you can't see it, you can't solve it'; <https://www.nature.com/articles/d41586-018-02386-3> (accessed 17 November 2019).

89 WHA67.19 (n 30); Resolutions and Decisions 2(8).

90 As above; see also UNICEF [https://www.unicef.org/publicpartnerships/files/UNICEF_Mission\(1\).pdf](https://www.unicef.org/publicpartnerships/files/UNICEF_Mission(1).pdf) (accessed 16 November 2019).

91 R Pfund & S Fowler-Kerry *Perspective on palliative care for children and young people: A global discourse* (2010) 19-20.

about palliative care; and (iv) implementing palliative care at primary, secondary and tertiary care levels.⁹²

7 Conclusion

'At the moment pain is only a problem for those who suffer, for everyone else it is someone else's problem' (Dr Rajagopal).⁹³

No child living with a life-threatening condition should be deprived of his or her right to access healthcare services. Yet, of the 21 million children needing palliative care worldwide, only 210 000 in sub-Saharan Africa access care. The challenges are wide-ranging with legislative and social barriers, inadequacies in healthcare services and a lack of evaluative evidence. With limited evidence of palliative care needs, resources and the provision of care services, many sub-Saharan countries will struggle to appropriately determine the extent of the problem and to address the challenges. A primary purpose of this article is to show that, with the appropriate buy-in by government, civil society and business, palliative care can successfully be implemented even in an environment where resources are limited. The answer lies in implementing a broad multidisciplinary approach and making innovative, effective use of available community resources within an evaluative framework.

Addressing the palliative care needs of children in sub-Saharan Africa lies beyond the capacity of a single institution or organisation. In environments of complexity a collaborative, multi-layered approach is called for. The strategy is to involve a diverse range of stakeholders – from health professionals and patients to law enforcers and policy makers – using dialogue to break down misconceptions and develop a greater understanding in order to work toward a common goal.

Strong advocacy through stakeholder networks and partnerships can act as the voice for those unable to speak for themselves, utilising a variety of methodologies – from lobbying to litigating – to mobilise for change. Through advocacy states are reminded of their obligations and challenged to re-evaluate existing policies and restrictive laws. Advocacy efforts call on decision makers to recognise and hear the

92 WHO 'Strengthening of palliative care as a component of integrated treatment within the continuum of care' in 134th session of the World Health Assembly (2014) para 19, http://apps.who.int/gb/ebwha/pdf_files/WHA67/A67_31-en.pdf (accessed 17 November 2019). Primary level care refers to care closest to where the person lives such as care by clinics, community health centres and home care teams that bring palliative care to patients at home. Secondary, tertiary and quaternary level care is progressively more technical care for complex health problems. Treatment and care are provided at district hospitals, regional or secondary hospitals and at tertiary hospitals and often include research and teaching.

93 'Why are so many people denied the painkillers they need?' *BBC News* 21 May 2018, <http://www.bbc.com/news/world-asia-india-44152429> (accessed 17 November 2019).

voice of the voiceless, to take account of the suffering and to respond appropriately. Failing to do so is a fundamental denial of a child's right to survival and development and, in the case of a child living with pain, may sentence the child to further unnecessary suffering. The fact that the voices of children are not heard does not mean that their suffering is not significant.

Recognition of minority groups as a prerequisite for the protection of human rights: The case of Anglophone Cameroon

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Summary

Human rights are inextricably linked. No instrument demonstrates this nexus between the various categories of rights better than the African Charter on Human and Peoples' Rights. In the African Charter collective rights and individual rights are interdependent and indivisible. In some circumstances it would be difficult if not impossible to protect individual rights if collective/group rights were not guaranteed and protected. The collective right of self-determination is recognised in the United Nations Charter. The right to self-determination is of particular relevance to the Republic of Cameroon where the Anglophone minority since independence continuously has complained of marginalisation and neo-colonialism. These complaints have been to the effect that severe violations of the rights of some Anglophone Cameroonians have occurred. The article contends that these violations are a direct consequence of the attempted erasure of the status of a 'people' that Anglophone Cameroonians as a group continued to enjoy after their free association with the Republic of Cameroon. The article demonstrates that the attempted erasure has enabled not only the violation of individual rights but has led to an armed conflict in Cameroon where there is now a struggle for the creation of an Anglophone state.

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Key words: *Anglophone Cameroon; minority groups; group rights; individual rights; self-determination*

1 Introduction

Individual rights are linked inextricably to minority or group rights. It is difficult to protect the rights of individuals if the group to which the individual belongs is not recognised and the collective rights of the group are not guaranteed. Nowhere is this more evident than in Cameroon where a crisis that has been termed a civil war¹ is unfolding. The crisis in Cameroon started in October 2016 because of the ever-present feeling by the people of the former Trust Territory of Southern Cameroons under British administration, now called Anglophones, of being victims of marginalisation, discrimination and neo-colonialism. This feeling gave birth to what is generally called the Anglophone problem.² This problem partly stemmed from the attempted erasure of the status of a 'people' that the people of the former Southern Cameroons continued to exercise even after independence when the former Southern Cameroons associated with the Republic of Cameroon to become the federated state of West Cameroon with equal status to the federated state of East Cameroon in 1961. This erasure formed the basis of the submission of the African Commission on Human and Peoples' Rights (African Commission) in the *Southern Cameroons* case.³ The petitioners partly argued that the former Southern Cameroons was annexed forcefully by 'La République du Cameroun' in 1961 and that a September 1961 Federal Constitution designed to respect the separateness and distinctness of the people of Southern Cameroons⁴ had been agreed upon but was changed in 1972 after the declaration of a unitary state. According to the petitioners 'the imposition of the Unitary State on Anglophone Cameroon in 1972 was unconstitutional, illegal and a breach of

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- 1 The International Crisis Group has stated that '[t]he crisis ... that began in October 2016 with protests by teachers and lawyers escalated into an armed insurrection at the end of 2017 and has since degenerated into a civil war'; International Crisis Group 'Cameroon's Anglophone crisis: How to get to talks?' Crisis Group Africa Report No 272, 2 May 2019, <https://www.crisisgroup.org/africa/central-africa/cameroon/272-crise-anglophone-au-cameroun-comment-arriver-aux-pourparlers> (accessed 13 May 2019).
 - 2 For more on the Anglophone problem, see P Konings & FB Nyamnjoh 'The Anglophone problem in Cameroon' (1997) 35 *Journal of Modern African Studies* 207; E Anyefru 'Paradoxes of internationalisation of the Anglophone problem in Cameroon' (2010) 28 *Journal of Contemporary African Studies* 85; D Eyoh 'Conflicting narratives of Anglophone protest and the politics of identity in Cameroon' (1998) 16 *Journal of Contemporary African Studies* 249; EH Nfobin & NV Nchang 'The Cameroon "Anglophone question" in international law' (2014) 22 *African Journal of International and Comparative Law* 234; SE Ebai 'The right to self-determination and the Anglophone Cameroon situation' (2009) 13 *International Journal of Human Rights* 631.
 - 3 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (*Southern Cameroons* case).
 - 4 *Southern Cameroons* case (n 3) para 7.

faith'.⁵ They therefore argued that the right to self-determination of the people of Southern Cameroon under article 20 of the African Charter on Human and Peoples' Rights (African Charter) had been violated.⁶ Although the African Commission found that article 20 had not been violated,⁷ unlike other articles, it recommended that the government of Cameroon enter 'into constructive dialogue with the complainants, and in particular, SCNC and SCAPO to resolve the constitutional issues, as well as grievances which could threaten national unity'.⁸ This constructive dialogue has never materialised except for the Major National Dialogue that was called as a result of the conflict that started in October 2016, which separatist groups rejected as a non-event and did not participate in.

As the first part of the article demonstrates, international law for a long time has recognised that in some, if not all, cases the recognition of a 'people' or a group with accompanying rights is a prerequisite for the protection and exercise of individual rights. The second part shows that this is even more the case with the Anglophone people in Cameroon, considering that their status as a 'people' is a status that evolved as a direct consequence of the exercise of their right to independence. Part 3 demonstrates that authorities in Cameroon decided in 1972 to erase the protections guaranteed by the Constitution to the former Southern Cameroonians as a group, that is, erasing the federated State of West Cameroon. However, this erasure could not do away with the nature of 'peoplehood' as they remain a group with an inalienable right to self-determination. Part 4 shows that the direct consequence of this erasure has been the severe violation not only of the rights of Anglophones as a group, but especially the individual rights of any individual that refuses to accept the erasure and considers this erasure as having the effect of colonialism. Although groups enjoy many collective rights, the right to self-determination is paramount as far as the Anglophone problem in Cameroon is concerned as the problem stems from the violation of that right in particular.

2 Protection of group rights as a prerequisite for the protection of individual rights

The concept of group or collective rights is well-embedded as a legal concept in international human rights law. Jovanovic explains what it means methodologically for a theory of 'collective rights' to be legal.⁹ She argues that collective rights are an emerging operative legal concept of a general kind as the notion is found in various

5 *Southern Cameroons* case para 14.

6 *Southern Cameroons* case para 163.

7 *Southern Cameroons* case paras 197-198.

8 *Southern Cameroons* case para 215.

9 MA Jovanovic *Collective rights: A legal theory* (2012) 2.

international and municipal legal instruments, and also because references to it are made in judicial decisions or expert legal opinions as well as in numerous academic articles and books.¹⁰ Two important examples suffice, the 1966 UN human rights covenants guarantee the collective right to self-determination¹¹ and, especially, the African Charter contains wide-ranging provisions on the protection of collective rights. For groups, this protection guarantees the inalienable right to self-determination, to development, to natural resources, a healthy environment, non-discrimination and equality, and international and national peace and security.¹² Group rights (third generation rights) are linked intimately to individual rights on the premise that groups are made up of individuals, and it is accepted now that all three generations of rights are interdependent. This interdependence is embodied in the African Charter. Although it was partly inspired by other international and regional instruments, the African Charter is unique by departing from these instruments¹³ due to its technique of human rights protection. It treats all rights as indivisible, that is, civil, political, economic, social and cultural rights and peoples' rights.¹⁴ For this reason, Dersso describes the Charter as 'unique in its definition of rights guaranteed' because it 'is the only international instrument that has entrenched all three categories of rights (first, second, and third generation rights)' and, more importantly, because 'all three categories of rights have the same legal

10 Jovanovic (n 9) 4.

11 Common art 1 of UN General Assembly International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series Vol 999 171, <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 8 October 2018) (ICCPR), and UN General Assembly International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series Vol 993 3, <http://www.refworld.org/docid/3ae6b36c0.html> (accessed 8 October 2018) (ICESCR).

12 Arts 19-24 African Charter.

13 FM Ndahinda *Indigeness in Africa, A contested legal framework for empowerment of 'marginalised' communities* (2011) 187.

14 The Preamble to the African Charter stipulates: 'Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.' They are indivisible in the sense that there is no clear-cut difference between so-called first generation and second generation rights, with different modes of protection. Eg, first generation rights generally are considered to be beyond the reach of states, that is, states should not intervene in their enjoyment (negative duties of the state), while second generation rights require positive action by states for their enjoyment, eg, by the provision of economic facilities for economic and social rights. It is for this reason that the international community in 1966 came up with two international covenants for first generation and second generation human rights. See F Viljoen *International human rights law in Africa* (2012) 214. Also see MW Mutua 'The Banjul Charter and African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339 at 340; E Ankumah *The African Commission on Human and Peoples' Rights. Practices and procedures* (1996) 159.

validity and are, legally speaking, equally enforceable'.¹⁵ Even before the African Charter, and as early as 1968, the Teheran International Conference on Human Rights stated in its Declaration that

since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible. The achievement of lasting progress in the implementation of human rights is dependent on sound and effective national and international policies of economic development.¹⁶

Further, in 1977 the United Nations (UN) General Assembly took a resolution¹⁷ in which it noted that

all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights ... consequently, human rights questions should be examined globally, taking into account both the overall context of the various societies in which they present themselves, as well as the need for the promotion of the full dignity of the human person and the development and well-being of the society.¹⁸

Not only are rights interdependent and indivisible but it is difficult to exercise individual rights if group rights are not guaranteed. In this regard the following citation by Sohn is instructive:¹⁹

One of the main characteristics of humanity is that human beings are social creatures. Consequently, most individuals belong to various units, groups, and communities ... It is not surprising, therefore, that international law not only recognizes inalienable rights of individuals, but also recognises certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; *the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights.*

According to Kiwanuka, who suggests that collective rights should be regarded as *sui generis*, 'when the group secures the rights in question, then the benefits redound to its individual constituents and are distributed as individual human rights'.²⁰ Addressing African experts preparing the draft African Charter in Dakar, Senegal, then Senegalese President Senghor said that in Africa 'the individual and his rights are wrapped in the protection of the family and other

15 S Derso 'The African human rights system and the issue of minorities in Africa' (2012) 20 *African Journal of International and Comparative Law* 43.

16 UN Doc A/Conf.32/41 Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran (1968) para 13.

17 GA Res 32/130; Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms UN Doc A/32/45, 16 December 1977.

18 GA Res 32/130 (n 17) paras (a) and (b).

19 LB Sohn 'The new international law: Protection of the rights of individuals rather than states' (1982) 32 *American University Law Review* 1 48 (my emphasis).

20 RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *The American Journal of International Law* 85.

communities'.²¹ To further explain this situation in the African system it has been advanced that the nature of the African state, which is its inability to take care of all within the state due to its limited strength, calls for the recognition of peoples. Odinkalu states that 'in most African countries where the state is nowhere near as strong as it is in Europe and North America, the community often insures the individual against the excesses of unaccountable state power'.²²

The importance of group rights for the protection of individual rights is even more invaluable as far as the group right of self-determination is concerned. It is this importance that motivated the inclusion of the right to self-determination in the 1966 Covenants. In their common article 1 they provide for the right both to equality and self-determination.²³ In its General Comment 12, the UN Human Rights Committee gave the *raison d'être* of this inclusion in these terms: 'The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.'²⁴

The importance of this right for the purposes of individual rights had been recognised by the UN as early as 1952 when it

decided to include in the international covenant or covenants on human rights an article on the right of peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations. This article shall be drafted in the following terms: 'All peoples shall have the right of self-determination' and shall stipulate that all states including those having responsibility for the administration of Non-Self-Governing Territories (NSGT) should promote the realisation of that right in conformity with the purposes and principles of the UN and that states

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- 21 Address delivered by Leopold Sedar Senghor, former President of the Republic of Senegal, at the opening of the meeting of African Experts preparing the draft African Charter in Dakar, Senegal, 28 November to 8 December 1979 (Senghor's speech) in CH Heyns (ed) *Human rights law in Africa* (1998) 78-80.
- 22 AC Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 344.
- 23 Common art 1 of the ICCPR and ICESCR: '1 All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development ... 3 The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'
- 24 CPR Committee General Comment 12: Art 1 (Right to self-determination) The Right to Self-determination of Peoples Adopted at the 21st Session of the Human Rights Committee on 13 March 1984; also see GA Res 637 A (VII) 12 December 1952; and K Doehring 'Self-determination' in B Simma (ed) *The Charter of the United Nations: A commentary* (2002) 50.

having responsibility for the administration of NSGT should promote the realisation of that right in relation to the peoples of such territories.²⁵

A further justification for this inclusion was that the violation of the right in the past resulted in bloodshed and it is considered a continuous threat to peace.²⁶ This is exactly what has occurred in Cameroon as there has been an attempted erasure of the group status of the Anglophone people in Cameroon with the right to self-determination and leading to the conflict that started in October 2016. This attempted erasure resulted in severe massive violation of the individual rights of Southern Cameroonians.

3 Evolution of Anglophone Cameroonians as a 'people' with accompanying rights, especially the right to self-determination

The territory today known as the Republic of Cameroon was part of the German protectorate of Kamerun from 12 July 1884 when the Germans signed protectorate treaties with Coastal Douala chiefs²⁷ to the advent of World War I. The boundary of German Kamerun was defined by treaties between Germany and Britain, on the one hand, and between Germany and France, on the other.²⁸ With the defeat of Germany in World War I, Britain and France took over German Kamerun. They administered the whole territory together as a condominium from 1914 to 1916, but this arrangement failed due to disagreements between them on how jointly to administer the territory.²⁹ This failure led to the partition of the territory by a Franco-British Agreement signed by the British Secretary for Colonies and the French Minister for Colonies. The agreement, signed on 10 July 1919, was further clarified on 29 December 1929 and 31 January 1931 by the signing of another agreement between the Governor of the Colony and Protectorate of Nigeria and the *Commissaire de la République Française au Cameroun*.³⁰ By a 2 August 1946 Order-in-Council providing for the administration of the Nigerian Protectorate and Cameroons the British divided its territory into two, thus giving birth to the Northern and Southern Cameroons. Northern Cameroons was administered as part of the northern region of Nigeria, while

25 Resolution 545 (VI), Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination, 375th Plenary Meeting 5 February 1952.

26 Resolution 545 (VI) (n 25).

27 VJ Ngoh 'The political evolution of Cameroon, 1884-1961' Dissertations and Theses, Portland State University, 1979 (Paper 2929) 8.

28 See the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria: Equatorial Guinea intervening*) [2002] ICJ Rep 303 (*Bakassi case*) para 33.

29 W Dze-Ngwa 'The First World War and its aftermath in Cameroon: A historical evaluation of a centenary, 1914-2014' (2015) 3 *International Journal of Liberal Arts and Social Sciences* 82.

30 *Bakassi case* (n 28) para 34.

Southern Cameroons was administered as part of the eastern region of Nigeria. This administrative union of the Cameroons and the Nigerian protectorate was based on UNGA Res 224 (111) on Administrative Unions Affecting Trust Territories of the 160th plenary session of 18 November 1948. The respective British and French territories had become internationally-recognised separate legal entities under the League of Nations as League of Nations-Mandated Territories in 1922 and later by the UN as they became UN Trust Territories. The UN entered into Trust Agreements with Britain and France on the Cameroons.³¹ In other words, the international law of decolonisation at the time was to apply to both colonial territories separately as under that law they were internationally-recognised colonial territories with the right to independence and full rights of territorial integrity. Referring to the independence of colonial countries, the Independence Declaration, Resolution 1514,³² said to be the Magna Carta of decolonisation,³³ stated in paragraph 6 that 'any attempt aimed at the total or partial disruption of the national unity and territorial integrity of a country is incompatible with the purposes of the Charter of the United Nations'. According to Resolution 1541,³⁴ colonial countries had three ways of exercising their right to self-determination: emergence as a sovereign independent state; free association with an independent state; or integration with an independent state.

In the exercise of its right to self-determination the Trust Territory of Cameroon under French administration gained independence on 1 January 1960 to become the Republic of Cameroon and was admitted to the UN in September 1960.³⁵ For the exercise of their right to self-determination the UN decided that the Trust Territory of Southern Cameroons by a plebiscite should decide to join either the already-independent Federal Republic of Nigeria or the already-independent Republic of Cameroon.³⁶

31 UN and Britain signed Trusteeship Agreement Document A/152/REV2 and with France, Trusteeship Agreement Document A/155/REV2 on 13 December 1946.

32 UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples 14 December 1960, A/RES/1514(XV), <https://www.refworld.org/docid/3b00f06e2f.html> (accessed 4 October 2019).

33 H Gros Espiell 'The right to self-determination, implementation of United Nations Resolutions' UN Doc E/CH.4/Sub.2/405/Rev.1 1980.

34 UN General Assembly Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73(e) of the Charter, 15 December 1960, A/RES/1541, <https://www.refworld.org/docid/3b00f0654c.html> (accessed 4 October 2019).

35 See GA Res 1476 (XV), Admission of the Republic of Cameroon to Membership of the United Nations 20 September 1960, A/Res/1476/(XV). This shows that the former French-administered territory was admitted as 'The Republic of Cameroon'.

36 Res 1350- XIII on the Future of the Trust Territory of the Cameroons under United Kingdom Administration, 13th session, 794th plenary meeting 13 March 1959, and Res 1352-XIV on the Future of the Trust Territory of the Cameroons under United Kingdom Administration: Organisation of a Plebiscite in the southern part of the territory, 14th session, 829th Plenary Meeting, 16 October 1959.

In the subsequent plebiscite of 11 February 1961 the people of Southern Cameroons voted to join the Republic of Cameroon. Following pre- and post-plebiscite negotiations between the leaders of Southern Cameroons and the leaders of the Republic of Cameroon to the effect that Southern Cameroons would join the Republic of Cameroon as a federated territory with equal status to the Republic of Cameroon³⁷ and in respect of paragraph 5 of GA Resolution 1608³⁸ that certified the results of the plebiscite the people of Southern Cameroons achieved self-government through free association with the Republic of Cameroon in 1961. The former Southern Cameroons became the Federated State of West Cameroon, with a Prime Minister and a legislature, while the former Republic of Cameroon became the Federated State of East Cameroon, both with equal status forming the Federal Republic of Cameroon regulated by an agreed September 1961 Federal Constitution. According to plaintiffs in the *Southern Cameroons* case this arrangement was so that the cultures and way of life of the former Southern Cameroonians would be protected.³⁹

The main effect of the division of German Kamerun between Britain and France was that both introduced their respective systems of administration. The British introduced indirect rule giving a prominent place to local rulers, whereas the French introduced direct rule that basically was a system of assimilation. The English language was used in Southern Cameroons and French was used in the French Cameroun with different legal systems and systems of education. In Southern Cameroons 'native authorities were established with courts and councils where chiefs meted out punishment more or less according to ... native customs'⁴⁰ to simplify the system of indirect rule that left

37 Official records of the General Assembly 15th session, Annexes, Vol 1, Agenda items 13 and 47, 20 September-20 December 1960 and 7 March-21 April 1961, New York, Document A/4 727 Report of the United Nations Plebiscite Commissioner for the Cameroons under United Kingdom Administration; Letter dated 30 March 1961 from The United Nations Plebiscite Commissioner to the Secretary-General by Djalal Abdoh. See especially 17 of the official records wherein, in a reply to a request made by the administering authority regarding the Republic of Cameroon's stand on the basis on which of the people of Southern Cameroons would join the Republic of Cameroon, the Ministry of Foreign Affairs of the Republic of Cameroon, in a *note verbale* dated 24 December 1960, stated that Southern Cameroon would join as a federated state.

38 GA Res 1608 (XV), The future of the Trust Territory of the Cameroons under United Kingdom administration, 21 April 1961 UN Doc A/RES/1608(UN Doc A/RES). Para 4(b) provided that the trusteeship over the Southern Cameroons will come to an end 'upon its joining the Republic of Cameroon'. It continued in para 5, inviting the governments of Southern Cameroon and Republic of Cameroon to enter into discussions and determine the arrangements 'by which the declared policies of the parties concerned will be implemented'. The wording of these articles clearly indicates that Southern Cameroons was to achieve self-government by association with the Republic of Cameroon, and not integration, in line with Principle VI(b) and Principle VII GA Res 1541 (XV) *on principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under article 73(e) of the Charter*, 15 December 1960 (UN Doc A/RES/1541(XV)).

39 *Southern Cameroons* case (n 3) para 7.

40 Ngoh (n 27) 80.

the administration of local affairs in the hands of local authorities such as chiefs.

It may be concluded that because they associated with the Republic of Cameroon the people of former Southern Cameroons, whose territory became West Cameroon, maintained their distinct peoplehood with the right to self-determination. In this sense, Principle VII of Resolution 1541 is instructive:

- (a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent state the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.
- (b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

This principle established a continuous right of self-determination to the distinct people of the former Southern Cameroon, a right that has been violated as a result of the attempted erasure of their peoplehood status.

4 The attempted erasure of the status of Anglophones as a 'people' and the continuous violation of their right to self-determination

Ten years after coming together the terms of the agreement between the two entities were violated and the federated territory of West Cameroon was erased in a manner reminiscent of the actions taken by Emperor Haile Selassie regarding the status of Eritrea in 1952 that led to a 30-year civil war.⁴¹ As described by Ndahinda, 'the political leadership of the French-speaking Republic of Cameroon manoeuvred

41 Eritrea was an Italian colony up until 1947 when, after a peace treaty, Italy renounced the colony. The UNGA, instead of bringing Eritrea under the trusteeship system, placed it under temporary administration. The UNGA later in 1952 decided that Eritrea would join Ethiopia to form a federal state, with considerable autonomy. UNGA A/Res/390(V)A-B 2 December 1950 and UNGA A/Res/617 (VII), 17 December 1952. According to Resolution 390 (V)A of 2 December 1950 para1, the former Italian colony of Eritrea was to be established as 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'. It also provided that the Eritrean government shall possess legislative, executive and judicial powers in the field of domestic affairs', para 2. After a few years the Ethiopian Emperor, Haile Selassie, integrated Eritrea into Ethiopia, and a civil war of independence ensued that lasted 30 years. See O Yohannes 'The Eritrean question: A colonial case?' (1987) 25 *Journal of Modern African Studies* 644 (fn omitted).

to abolish the federal structure and achieved this through a controversial national referendum held on 20 May 1972.⁴² This controversial referendum which led to the declaration of a unitary state in 1972, is an illegal integration of the former Southern Cameroon into the former Republic of Cameroon as it is a violation of unification agreements, especially article 47 of the September 1961 Federal Constitution.⁴³ The name was changed from the Federal Republic of Cameroon to the United Republic of Cameroon. Later, claiming to consolidate national unity, a Restoration Law 84/01 in 1984 amended the 1972 Constitution further changing the name of the country to the name that East Cameroon had before Southern Cameroon associated with it: 'the Republic of Cameroon'. The explanatory note for the amendment stated:⁴⁴

This Bill was prompted by the government's desire to consolidate national unity and democratise political life in Cameroon. The amendments give *de jure* and *de facto* recognition to Cameroon's fundamental option of national unity. The objective is to get rid of the ambiguity in the appellation: United Republic of Cameroon, by adopting the prestigious name 'Republic of Cameroon'. This stresses the one and indivisible nature of the nation. As a consequence of this amendment the Seal of Cameroon had also to be amended to be consonant with this appellation.

These all are attempts effectively to do away with the identity of the former Southern Cameroon. The attempted erasure of the status of Anglophones as a people that caused their territory to be named the North West and South West regions of Cameroon, directly violate their right to self-determination as democratically conceived, that is, it disregards the will of Southern Cameroonians who in 1961 voted in favour of a federated territory within the Federal Republic of Cameroon. Moreover, it also violated their right to internal self-determination as, unlike before, the people of the former Southern Cameroon no longer can decide their political, economic and social well-being by themselves as a people. As a federated territory the people of the former Southern Cameroon, which became West

42 FM Ndahinda 'Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 30.

43 It is considered illegal because of the violation of the Federal Constitution that certified agreements between the two entities in respect of GA Resolution 1608 (n 38). The Federal Constitution in art 47(1) held that 'any proposal for the revision of the present constitution which impairs the unity and integrity of the federation shall be inadmissible'. Constitution of the Federal Republic of Cameroon 1961. See PF Nkot 'Le référendum du 20 mai 1972 au Cameroun: Analyse de quelques tendances de la doctrine' (1999) 403 *Les Cahiers de Droit* 665. See especially AD Olinga 'La "Question Anglophone" dans le Cameroun d'aujourd'hui' (1994) 48 *Revue juridique et politique, indépendance et coopération* 292. He held that 'en méconnaissant ce bouclier, les auteurs du projet de Constitution créant un État unitaire ont violé la constitution de 1961', 304.

44 The Restorations Law 84/01 of 4 February 1984, originally published by the Association of Secretaries-General of Parliaments 1985: Explanatory note on the February 1984 Amendment of The Constitution of Cameroon, by Mr El Hadj Hayatou (on file with author).

Cameroon, had an elected legislature and a Prime Minister. As explained by the petitioners in the *Southern Cameroons* case, the people of Southern Cameroon remain a separate and distinct people with English as their official working language, whereas the people of East Cameroon are Francophones. The legal, cultural and educational traditions of the two parts remained different and also the character of local administration. The petitioners argued that the September 1961 Federal Constitution was designed to respect those differences.⁴⁵ This agreement was an effective exercise of internal self-determination or self-government, also guaranteed by the 1966 Covenants. According to Sohn:⁴⁶

The Covenants clearly endorse not only the right of external self-determination, but also the right of internal self-determination: the right of a people to establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution. A people that cannot freely determine its political status can hardly determine its economic, social, and cultural status. A people should be free both from interference by other peoples or states and from deprivation of its right to self-determination by a tyrant or dictator.

The question now is whether the people of the former Southern Cameroon, a territory that now is the North West and South West regions of Cameroon, still constitute a distinct group/people with the right to self-determination within Cameroon irrespective of the actions taken in 1972 and 1984. Does the right to self-determination exist after decolonisation?

The African Commission decided that the Anglophone people of Cameroon constituted a people with the right to self-determination. The Commission made use of its Report of the Working Group of Experts on Indigenous Populations/Communities,⁴⁷ the definition given by the United Nations Educational, Scientific and Cultural Organisation (UNESCO)⁴⁸ and especially the perception that the population of the former Southern Cameroon have of themselves, to decide that they can legitimately claim to be a 'people' as they have a distinctive identity.⁴⁹ While accepting that a people may manifest ethno-anthropological attributes, the African Commission implied that

45 *Southern Cameroons* case (n 3) para 7.

46 Sohn (n 19) 50.

47 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, published jointly by the ACHPR/IWGIA 2005.

48 *Southern Cameroons* case (n 3) para 170. The UNESCO meeting of experts that reflected on the concept of 'people' concluded that where a group of people manifest some of the following characteristics, a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life, it may be considered a 'people'. Such a group may also identify itself as a people, by virtue of their consciousness that they are a people. Final Report and Recommendations of the Meeting of Experts on extending of the debate on the concept of 'peoples' rights held in Paris, France, from 27 to 30 November 1989 (SHS-89/CONF.602/COL.1) para 22.

49 *Southern Cameroons* case (n 3) para 178.

these are not the only criteria to acknowledge a people, for it said that such attributes may be added to the characteristics of a people.⁵⁰ For the Commission 'the people of Southern Cameroon' qualify to be referred to as a 'people' because they

manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct identity. Identity is an innate characteristic within a people. It is up to other external people to recognise such existence, but not to deny it.⁵¹

The ethno-anthropological attributes would be necessary as a precondition only in other circumstances such as in the case of indigenous people⁵² and cannot be used to deny a people their right to self-determination because, as the African Commission observed, the African Charter guarantees equal protection to people on the continent, including other racial groups whose ethno-anthropological roots are not African.⁵³ This reasoning established a clear difference between the people of former Southern Cameroon, the Anglophones, and other ethnic groups in Cameroon who do not have the right to external self-determination.

It is now settled that self-determination survived decolonisation. Common article 1 of the 1966 Human Rights Covenants⁵⁴ made equality and self-determination the rights of 'all peoples'.⁵⁵ It means that there are rights not only of colonial peoples but of all peoples, including those in independent states. This factor is evidenced by the fact that the third paragraph⁵⁶ of the article is dedicated to non-self-governing and trust territories. Thus, article 1(1) provides a universal right.⁵⁷ Moreover, the universal nature of this right in the common

50 *Southern Cameroons case* (n 3).

51 *Southern Cameroons case* para 179.

52 *Southern Cameroons case* para 178.

53 As above.

54 ICCPR and ICESCR (n 11).

55 Common art 1(1): 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development ...'

56 Common art 1(3): 'The States Parties to the present Covenant, including those having responsibility for the administration of non-self-governing and trust territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

57 According to Crawford, 'as a matter of ordinary treaty interpretation, one cannot interpret article 1 as limited to the colonial case. Article 1, paragraph 1 does not say that some peoples have the right to self-determination. Nor can the term "peoples" be limited to colonial peoples. Article 3 deals expressly, and non-exclusively, with colonial territories. When a text says that "all peoples" have a right – the term "peoples" having a general connotation – and then in another paragraph of the same article, it says that the term "peoples" includes the peoples of colonial territories, it is perfectly clear that the term is being used in its general sense ... any remaining doubt is removed by article 2, which deals with permanent sovereignty over natural resources.' J Crawford 'Right of self-determination in international law: Its development and future' in P Alston (ed) *Peoples' rights: Collected courses of the Academy of European Law* (2001) 27.

article 1 was made clear by a number of states reacting to India's reservation to article 1. In ratifying the International Covenant on Civil and Political Rights (ICCPR), India stated that 'the words "the right of self-determination" ... applied only to the peoples under foreign domination and ... these words do not apply to sovereign independent states or to a section of a people or nation – which is the essence of national integrity.⁵⁸ In its reaction to this reservation, The Netherlands observed:⁵⁹

The right of self-determination as embodied in the Covenants is conferred upon all peoples. This follows not only from the very language of article 1 common to the two Covenants but as well from the most authoritative statements of the law concerned ie the Declarations of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of the right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.

Significantly, the African Charter made the right an inalienable right for all African peoples.⁶⁰ Moreover, the African Commission itself, after determining that the people of the former Southern Cameroon constituted a people, stated that they could not exercise their right to self-determination guaranteed by article 20 of the African Charter as other conditions for its exercise had not been established.⁶¹

58 Crawford (n 57) 28.

59 CCPR/C/2/Add.5 (1982) 3, cited in Crawford (n 57) 28. Germany also 'strongly' (emphasis by Crawford) objected to the reservation in the following terms: 'The right to self-determination as enshrined in the Charter of the UN and as embodied in the covenants applies to all peoples and not only to those under foreign dominations. All peoples therefore have the inalienable right to freely determine their political status and freely pursue their economic, social and cultural development. The federal government cannot consider as valid any interpretation of the right of self-determination which is contrary to the clear language of the provision in question. It moreover considers that any limitation of their applicability to all nations is incompatible with the object and purpose of the covenants.' CCPR/C/2/Add4 (1980) 4. Crawford (n 57) 28.

60 Art 20: '(1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. (2) Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community. (3) All peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.'

61 A reading of the African Commission's decision makes it clear that if the rights of the people are grossly violated, they would have the right to exercise self-determination in the external sense. See *Southern Cameroons case* (n 3) para 194. It stated: 'Concrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by article 13.1.' The only logical conclusion to make here is that the Commission would allow secession if it is convinced that the rights of Southern

The fact that the people of former Southern Cameroon still have the right to self-determination is further supported by the fact that they joined the Republic of Cameroon by way of free association in line with GA Resolution 1541. That Resolution has been interpreted in a way that if the conditions for incorporation with a state at independence are not respected, then international law authorises secession.⁶² Quane reaches the same conclusion when she says that 'it seems that peoples who decide on association retain the right to alter their status in the future'.⁶³

Therefore, it is up to the Anglophones as a people to decide their way of life without outside interference. According to Quane:⁶⁴

Once an entity is recognised as a people, the traditional position in international law is that they enjoy the full range of options in respect of both internal and external self-determination ... state practice reveals that controversies may surround the recognition of an entity as a people ... once the entity is explicitly recognised as a people it is difficult to find many examples of a limitation being imposed on the range of self-determination options available to them. Further, there are no explicit references to any limitations on the right in the relevant international instruments.

The non-recognition of the status of Anglophones as a distinct group with rights in line with unification agreements has led to gross violations of the individual rights of Anglophones in Cameroon.

5 Violation of human rights of Anglophone Cameroonians as a direct result of the attempted erasure of their status as a group with the right to self-determination

Following the erasure of the status of West Cameroon, and before the drafting of a new constitution for Cameroon in 1996, Anglophone Cameroonians made proposals for the new constitution. Very obvious among the proposals is the demand to return to the pre-1972

Cameroonians had been massively violated and that they were oppressed, that is, if they did not participate in the affairs of the country, according to art 13 of the African Charter. Art 13(1) states that '[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'.

- 62 MG Kohen 'Introduction' in MG Kohen (ed) *Secession: International law perspectives* (2006) 19. According to Kohen, if the conditions under which a territory was incorporated into a state by a decision of the UN General Assembly are not respected, the secession of the territory must be authorised under international law.
- 63 H Quane 'The United Nations and the evolving right to self-determination' (1998) 47 *International and Comparative Law Quarterly* 554.
- 64 H Quane 'The UN Declaration on the Rights of Indigenous Peoples: New directions for self-determination and participatory rights?' in S Allen & A Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2001) 259-260.

arrangements, failing which the people of former Southern Cameroon would have no other option but to declare independence. In 1993 and 1994, respectively, representatives of Anglophone Cameroon adopted the Buea Declaration and the Bamenda Proclamations under the framework of the All-Anglophone Conference. In the former they alleged violations suffered by Anglophone Cameroonians since the erasure of their status within Cameroon. These violations, which we consider violations of collective rights, included the violation of the 1961 Constitution; the exploitation and rape of their economy; the lack of road infrastructure; the restriction of free movement of people and goods as a result of numerous road checkpoints; the marginalisation of Anglophones, especially with regard to official functions, where they alleged that Anglophone Cameroonians have only played second fiddle to their Francophone compatriots; discrimination in education and training; Francophone exploitation and domination; international isolation of Anglophone Cameroon; and other human rights abuses, especially torture, unlawful imprisonments, arrests, and so forth.⁶⁵ Because of these violations, the Buea Declaration stated:⁶⁶

The imposition of the Unitary State on Anglophone Cameroon in 1972 was unconstitutional, illegal and a breach of faith; the only redress adequate to right the wrongs done to Anglophone Cameroon and its people since the imposition of the unitary state is a return to the original form of government of the Reunified Cameroon; to this end, all Cameroonians of Anglophone heritage are committed to working for the restoration of a federal Constitution and a federal form of government, which takes cognisance of the bi-cultural nature of Cameroon and under which citizens shall be protected against such violations as have been enumerated; that the survival of Cameroon in peace and harmony depends upon the attainment of this objective towards which all patriotic Cameroonians, Francophones as well as Anglophones, should relentlessly work.

In the Bamenda Proclamation they averred that

one year since the Anglophone constitutional proposals were officially submitted, the government had not reacted to them; that all efforts to generate the interest and understanding of the Francophone officials and Francophone public generally in the Anglophone constitutional proposals had been greeted with responses ranging from indifference through apathy to hostility.⁶⁷

While reiterating the resolutions taken in the Buea Proclamation, the Bamenda Declaration further stated:⁶⁸

Should the government either persist in its refusal to engage in meaningful constitutional talks or fail to engage in such talks within a reasonable time, the Anglophone Council shall inform the Anglophone people by all suitable means. It shall, thereupon, proclaim the revival of the independence and

65 The Buea Declaration Issued by the All-Anglophone Conference held in Buea, Cameroon, on 2 and 3 April 1993 (on file with author).

66 *Southern Cameroons* case (n 3) para 14.

67 *Southern Cameroons* case para 15.

68 As above.

sovereignty of the Anglophone territory of Southern Cameroons and take all measures necessary to secure, defend and preserve the independence, sovereignty and integrity of the said territory

Even before the All-Anglophone Conference, some Anglophone Cameroonians had seen their rights violated because of their stance against the violation of the unification agreement. For example, a prominent Anglophone lawyer and former president of the Cameroon Bar Association, Fongum Gorji-Dinka, brought a case to the United Nations Human Rights Committee against the Republic of Cameroon. According to his submission, considering that Anglophones were subjugated and their human rights severely violated by members of the Franco-Cameroonian armed forces as well as militia groups, riots broke out in 1983 prompting Parliament to enact Restoration Law 84/01 dissolving the union of Southern Cameroons and the Republic of Cameroon. Consequently, he became head of the 'Ambazonian Restoration Council', published several articles calling on President Paul Biya of the Republic of Cameroon to withdraw from Anglophone Cameroon (which he called Ambazonia) in compliance with the Restoration Law.⁶⁹ As a result he was arrested, detained in inhumane conditions and he experienced both physical and mental torture, which caused a stroke that paralysed the left side of his body.⁷⁰ He also alleged that his and his people's right to self-determination under article 1 of ICCPR had been violated when the 1961 unifications agreements were violated in 1972, which amounted to an illegal annexation.⁷¹ He continued that his rights under article 9 (on arbitrary arrests and detention), article 10 (on respect for the inherent dignity of the human person), article 12 (on liberty of movement), and article 5 of ICCPR (on the right to vote), all had been violated. Although the Human Rights Committee found that the complaint under article 1 was inadmissible, it decided that 'the facts before it reveal violations of articles 9, paragraph 1; 10, paragraphs 1 and 2 (a); 12, paragraph 1; and 25 (b) of the Covenant'.⁷² The complaint under article 1 was inadmissible because, according to the Human Rights Committee, it 'does not have competence under the Optional Protocol to consider claims alleging a violation of the right to self-determination protected in article 1 of the Covenant'.⁷³ This means that it is competent to consider only allegations of the violations of individual rights in respect of the Optional Protocol. To this effect it stated that 'the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated.

69 Communication 1134/2002 *Fongum Gorji-Dinka v Cameroon* UN Doc CCPR/C/83/D/1134/2002 (2005) para 2.5.

70 *Fongum Gorji-Dinka* (n 69) paras 2.6, 2.7.

71 *Fongum Gorji-Dinka* para 3.1.

72 *Fongum Gorji-Dinka* para 6.

73 *Fongum Gorji-Dinka* para 4.4. It had earlier arrived at the same conclusion in Communication 932/2000, *Gillot v France*, views adopted on 15 July 2002, para 13.4.

These rights are set out in part III (articles 6 to 27) of the Covenant.⁷⁴ This is according to article 1 of the Optional Protocol.⁷⁵

Akwanga's situation is another example of the violation of human rights as a result of the non-recognition of Anglophones as a group. As an activist and leader of the Southern Cameroons Youth League, he was arrested and charged with aggravated theft, assassination, hostilities against the nation, attempted secession, non-denunciation of criminal activities, insurrection, revolution and complicity.⁷⁶ With allegations of inhuman and degrading treatment and of torture suffered as a result of his activities for the Southern Cameroons, he took his case to the Human Rights Committee, which found in his favour. The Committee found that 'the rights of Mr Akwanga under article 7; article 10, paragraphs 1 and 2; article 9, paragraphs 2, 3 and 4; and article 14' had been violated.⁷⁷ Whatever the importance of all of these rights, his right to a fair trial is of particular importance because of the regular use of military tribunals to try civilians in Cameroon. The Human Rights Committee found that 'the trial and sentencing of the author by a military court discloses a violation of article 14 of the Covenant',⁷⁸ and further stated that this is so because the state did 'not demonstrate the need to rely on a military court'. This reasoning was based on its

General Comment No 32, in which it considers that the state party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate for the task and that recourse to military courts is unavoidable.⁷⁹

This reliance was criticised by a member of the Human Rights Committee itself. According to Fabian Omar Salvioli in his individual opinion in the case, although ICCPR does not prohibit the use of military courts,

the jurisdiction of the military criminal justice system should, however, be contained within suitable limits if it is to be fully compatible with the

74 *Fongum Gorji-Dinka*.

75 Optional Protocol to the 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. Art 1 states that '[a] State Party to the Covenant that becomes a party to the present Protocol recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.'

76 Communication 1813/2008 *Ebenezer Derek Mbongo Akwanga v Cameroon* UN Doc CCPR/C/101/D/1813/2008 (2011) para 6.2.

77 *Ebenezer Derek Mbongo Akwanga* (n 76) para 8. Art 7 of ICCPR prohibits torture and inhumane treatment; art 9 prohibits arbitrary arrests; art 10 protects human dignity and humanity; and art 14 protects the right to a fair trial.

78 *Ebenezer Derek Mbongo Akwanga* para 7.

79 *Ebenezer Derek Mbongo Akwanga*. See General Comment 32, art 14, CCPR/C/GC/32 para 22.

Covenant: *Ratione personae*, military justice should apply to serving military personnel, never to civilians or retired military personnel; *ratione materiae*, military courts should be competent to try disciplinary offences, never ordinary offences and certainly not human rights violations. Only under these conditions can military jurisdiction be compatible with the Covenant.⁸⁰

He continued by stating that

General Comment No 32 is an important legal document with respect to the human right to due process, but its treatment of the issue under discussion here is highly regrettable ... and the Committee should take steps to correct the notion that military courts may try civilians; its current position is completely out of step with modern standards of international human rights protection and with the most enlightened doctrine on the subject.⁸¹

In the *Southern Cameroons* case, where the petitioners alleged the violation of rights to a fair trial under article 7(1) of the African Charter of individuals tried in military tribunals,⁸² the African Commission stated that

trial by military courts does not *per se* constitute a violation of the right to be tried by a competent organ. What poses [a] problem is the fact that, very often, the military tribunals are an extension of the executive, rather than the judiciary. Military tribunals are not intended to try civilians. They are established to try military personnel under laws and regulations which govern the military.⁸³

Because 'the accused persons were not military personnel', and because 'the offences alleged to have been committed were quite capable of being tried by normal courts', the African Commission found that 'trying civilians by the Yaoundé and the Bafoussam Military Tribunals was a violation of article 7(1)(b) of the Charter'.⁸⁴ Added to this finding, the Commission found that the state was in violation of other individual rights of Southern Cameroonians.⁸⁵

In the same case the African Commission also found that the respondent state, the Republic of Cameroon, had violated the group right to equality of the people of Southern Cameroon protected by

80 *Ebenezer Derek Mbongo Akwanga*, individual opinion of Committee member Mr Fabián Omar Salvioli para 8.

81 *Ebenezer Derek Mbongo Akwanga* individual opinion (n 80) para 9.

82 *Southern Cameroons* case (n 3) para 121.

83 *Southern Cameroons* case para 127.

84 *Southern Cameroons* case para 128. Art 7(1) African Charter: 'Every individual shall have the right to have his cause heard. This comprises ... (b) the right to be presumed innocent until proved guilty by a competent court or tribunal.'

85 The African Commission found that the state had violated art 1 on the implementation of the African Charter; art 2 on non-discrimination; art 4 on the right to life; art 5 on human dignity; art 6 on liberty and security of the human person; art 7(1) on fair trial; art 10 on freedom of association; art 11 on the right to assembly; and arts 19 and 26 on group rights.

article 19.⁸⁶ It found that the 'relocation of business enterprises and location of economic projects to Francophone Cameroon, which generated negative effects on the economic life of Southern Cameroon, constituted violation of article 19 of the Charter'.⁸⁷

Although the African Commission was 'not convinced that Cameroon had violated article 20 of the Charter'⁸⁸ because the complainants did not 'satisfy the Commission that the two conditions under article 20(2) namely oppression and domination have been met',⁸⁹ it declared that '[i]t is evident that the 1995 Constitution did not address the Southern Cameroonians' demands, particularly since it did not accommodate the concerns expressed through the 1993 Buea Declaration and 1994 Bamenda Proclamation'.⁹⁰

Not only has the state not considered the demands of the people of former Southern Cameroon, as the African Commission said, the violation of human rights continues without abatement. In the armed conflict that started as a crisis in October 2016 the state is accused of committing crimes against humanity as a result of its systematic attacks against civilian populations.⁹¹ Amnesty International revealed that along with other serious human rights violations (some having been committed by armed separatist groups) the government engaged in the burning of entire villages, resulting in hundreds of thousands of internally-displaced persons and thousands of refugees.⁹² Furthermore, accusing armed separatists also of human rights violations, Human Rights Watch documented cases where not only had the government engaged in the burning of entire villages

86 Art 19 African Charter: 'All 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.'

87 *Southern Cameroons* case (n 3) para 162.

88 Art 20 of the African Charter guarantees the right to self-determination, and guarantees the right of colonised people to free themselves from domination.

89 *Southern Cameroons* case (n 3) para 197.

90 *Southern Cameroons* case para 202.

91 See art 7 of the Rome Statute which defines crimes against humanity as acts such as murder, torture, rape, and enforced disappearance, committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. See Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9; 37 ILM 1002 (1998); 2187 UNTS 90. The Centre for Human Rights at the University of Pretoria, South Africa, released a statement to the effect that 'available evidence strongly suggests that crimes against humanity have been and are being committed in the English-speaking regions of Cameroon'. See Centre for Human Rights, Press Statement: 'Centre for Human Rights calls for independent investigation of sustained allegations of crimes against humanity in Cameroon' 11 June 2018 (on file with author). Also see Amnesty International report in which it documented human rights violations, including unlawful killings, destruction of private property, arbitrary arrests and torture committed by the Cameroonian security forces during military operations conducted in the Anglophone regions. See Amnesty International, Cameroon 'A turn for the worse: Violence and human rights violations in Anglophone Cameroon' 12 June 2018, www.amnesty.org/download/Documents/AFR1784812018ENGLISH.PDF (accessed 27 June 2018).

92 Amnesty International (n 91).

but it had especially committed torture and extra-judicial killings, and incommunicado detentions.⁹³ The Raoul Wallenberg Centre for Human Rights and the Centre for Human Rights and Democracy in Africa published a comprehensive report in June 2019 in which they document evidence of crimes against humanity in the framework of the conflict that started in October 2016. The report documents cases of murder, deportation or forcible transfer of the population, torture, rape and sexual violence.⁹⁴ A year before this report, in April 2018, the African Commission adopted a resolution in which it recalled the recommendations it gave in the *Southern Cameroons* case, 'including the abolition of all discriminatory practices against people of the North-West and South-West of Cameroon, and the engagement in constructive dialogue in order to resolve the constitutional issues, as well as grievances that could threaten national unity'. It went further to condemn 'the various human rights violations committed in the country since October 2016' and 'the continuous repression against human rights defenders'.⁹⁵ Instead of entering 'into constructive dialogue with the complainants, and in particular, SCNC and SCAPO to resolve the constitutional issues, as well as grievances which could threaten national unity'⁹⁶ as recommended by the African Commission,⁹⁷ the Cameroon government called a Major National

93 Human Rights Watch 'Cameroon: Routine torture, incommunicado detention' 6 May 2019, <https://www.hrw.org/news/2019/05/06/cameroon-routine-torture-incommunicado-detention> (accessed 14 May 2019); Human Rights Watch "'These killings can be stopped": Abuses by government and separatist groups in Cameroon's Anglophone regions' July 2018 32-50. Human Rights Watch also accused armed separatists of violating the rights to education, that is, attacks on students and teachers, the kidnapping of principals, arson attacks on schools, and threats to students, parents and teachers; <https://www.hrw.org/report/2018/07/19/these-killings-can-be-stopped/abuses-government-and-separatist-groups-cameroons> (accessed 26 July 2018).

94 Centre for Human Rights and Democracy in Africa & Raoul Wallenberg Centre for Human Rights 'Cameroon's unfolding catastrophe: Evidence of human rights violations and crimes against humanity' June 2019 27-23 54-56, www.chrda.org/news/reports2019/cameroons-unfolding-catastrophe-2019/ (accessed 30 October 2019).

95 See Resolution on the Human Rights Situation in the Republic of Cameroon ACHPR/Res 395 (LXII) 2018, adopted by the African Commission meeting at its 62nd ordinary session held in Nouakchott, Mauritania, from 25 April to 9 May 2018.

96 *Southern Cameroons* case (n 3) para 215.

97 It should be noted that the Southern Cameroon National Council (SCNC), one of the complainants in the *Southern Cameroons* case, was banned by the government in January 2017. See Amnesty International 'Cameroon: Arrests and civil society bans risk inflaming tensions in English-speaking regions' 20 January 2017, <https://www.amnesty.org/en/press-releases/2017/01/cameroon-arrests-and-civil-society-bans-risk-inflaming-tensions-in-english-speaking-regions/> (accessed 30 October 2019). The All Anglophone Conference that came up with the Buea Declaration and Bamenda Proclamation in 1993 and 1994, respectively, was renamed from Southern Cameroons People's Conference (SCPC) to Southern Cameroons People's Organisation (SCAPO), with the Southern Cameroons National Council (SCNC) as its executive governing body. See Centre for Human Rights and Democracy in Africa & Raoul Wallenberg Centre for Human Rights (n 94) 20; and

Dialogue held from 30 September to 4 October 2019.⁹⁸ However, the Major National Dialogue did not address the root causes of the Anglophone problem and the demands of Anglophone groups such as separation, secession and a return to federalism.⁹⁹ It was thus shunned by Anglophone separatist groups.¹⁰⁰ One of the major recommendations of the dialogue is the endowment of the North-West and South-West regions with a special status.¹⁰¹ This proposal was dismissed by prominent Anglophone figures and separatist leaders. For example, Aya Paul Abine, a former justice of the Cameroon Supreme Court and prominent Anglophone activist, said that the conflict could not be resolved by 'a combination of fuzzy words' and that 'only negotiations between the two sides can end it'.¹⁰² Ebenezer Akwanga who, as seen above, took Cameroon to the UN Human Rights Committee, stated that Ambazonia (the name coined by Gorji-Dinka, as seen above) does not 'need a special status' and continued: 'We don't want to be a part of Cameroon ... Ambazonia is marching to freedom and nothing can stop us.'¹⁰³

6 Conclusion

Human rights are interdependent and indivisible and their effectiveness in the protection of one form or type of right (individual rights) is dependent on the guarantee and respect of the other (group

Chatham House 'The Cameroon Anglophone crisis: Examining escalation and seeking solutions' Africa Programme Meeting Summary 2 November 2017, <https://www.chathamhouse.org/sites/default/files/events/Meeting%20Summary%20-%20The%20Cameroon%20Anglophone%20Crisis.pdf> (accessed 30 October 2019).

98 See www.nationaldialogue.cm (accessed 29 October 2019).

99 Eg, Akere Muna, a political leader and former Cameroonian representative of Transparency International, while noting that the debate in the Anglophones regions of Cameroon involved secession and separation, questioned why there was no commission to examine those alternatives. See NK Chimtom 'Cameroon's conflict: Will the national dialogue make any difference?' *BBC News*, www.bbc.com/news/world-africa-49931662 (accessed 29 October 2019). The commissions created were Commission 1: Bilingualism, Cultural Diversity and Social Cohesion; Commission 2: Educational System; Commission 3: Judicial System; Commission 4: Decentralisation and Local Development; Commission 5: Reconstruction and Development of Crisis-Affected Regions; Commission 6: Return of Refugees and Internally Displaced Persons; Commission 7: Disarmament, Demobilisation and Reintegration of Ex-combatants; Commission 8: Role of Diaspora in the Crisis and its Contribution to the Country's Development. See Report of the Rapporteur General of the Major National Dialogue, 4 October 2019, www.nationaldialogue.cm (accessed 29 October 2019).

100 ME Kindzeka 'Separatist leaders shun Cameroon's "National Dialogue"' *VOA*, www.voanews.com/africa/separatist-leaders-shun-camerouns-national-dialogue (accessed 29 October 2019).

101 Report of the Rapporteur General (n 99).

102 Journal du Cameroun 'Separatists derisive over "special status" move in Cameroon crisis' 4 October 2019, <https://www.journalducameroun.com/en/separatists-derisive-over-special-status-move-in-cameroon-crisis/> (accessed 30 October 2019).

103 As above.

rights). In some circumstances the cause of the violation of individual rights is the refusal to guarantee and protect the collective rights of the group to which individuals belong. It is after the erasure of the status of West Cameroon in 1972 and after the restoration law of 1984 that violations of other collective rights and individual rights of Anglophone Cameroonians intensified. Anglophone Cameroonians' rights to freedom from arbitrary detention, to life and other civil and political rights are directly linked to the collective right of Anglophones as a 'people' to self-determination, to decide their political future and to use their specific legal and educational systems. The right to a fair trial of an Anglophone arrested in an Anglophone region is indivisible from the rights of Anglophones as a group to their legal system. The right to education of an Anglophone child would be protected if the Anglophone system of education is protected and the appropriate language used in schools. Further, it is contended that the main cause of the conflict in Cameroon that started in October 2016 is the violation of the group right to internal self-determination, a direct consequence of the declaration of a unitary state in 1972 and the 1984 Restoration Law.

It has been argued that even the amalgamation of the former Southern Cameroon and the Republic of Cameroon did not provide for the equal partnership of both parties, let alone for the preservation of the cultural heritage and identity of each, but turned out merely to be a transitory phase in the total integration of the Anglophone region in a strongly-centralised and unitary state.¹⁰⁴ It is these factors that create an Anglophone consciousness which includes the feeling of being 'marginalised', 'exploited' and 'assimilated' by the Francophone-dominated state and even by the 'Francophone population as a whole'.¹⁰⁵

According to Sohn, 'international law has long been concerned with one of the most basic of collective rights: the right of self-determination', and 'many wars were fought in the name of the principle of self-determination, and the international community has often come to the assistance of those who have invoked that principle'.¹⁰⁶ A recognition of the status that the people of the former Southern Cameroon received when they associated with the Republic of Cameroon would align with UN values and purposes, namely, equality and the right to self-determination¹⁰⁷ and would go a long way towards bringing peace to an otherwise fragile region with fragile countries and where the scourge of terrorism is causing destruction.

104 Konings & Nyamnjoh (n 2) 207.

105 As above.

106 Sohn (n 19) 48.

107 Art 1(2) UN Charter.

Pharmaceutical trade policies and access to medicines in Kenya

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Summary

The right to health requires the full integration of TRIPs Agreement flexibilities in pharmaceutical trade policies and the avoidance of TRIPs-plus standards to safeguard access to medicines nationally. The article argues that a human rights impact assessment, and specifically a right to health impact assessment, may resolve beforehand the adverse impacts of pharmaceutical trade policies on access to medicines in Kenya. However, Kenya, as in many other developing countries, has not yet embraced the HRIA tool in its trade policy processes even though the theory and methodology of HRIA or RHIA exist. The key finding of the article is that many trade policy makers in Kenya are not adequately prepared in terms of their knowledge and attitude to implement the HRIA or RHIA as a routine process in trade.

Key words: *access to medicines; free trade agreements; human rights impact assessment; pharmaceutical trade policy; Kenya*

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1 Introduction

Access to medicines is a fundamental element of the right to health. The right to health norms on access to medicines emphasise the full utilisation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) flexibilities in line with the Doha Declaration on TRIPs Agreement and Public Health, 2001,¹ as well as the non-adoption of higher standards (TRIPs-plus standards) than is required by the TRIPs Agreement. A failure to adhere to the above, therefore, may adversely impact on the right to health and access to medicines, which is an obligation of the government under international, regional and national legal instruments. Incorporating the full utilisation of TRIPs Agreement flexibilities and avoiding TRIPs-plus standards in pharmaceutical trade policy, therefore, are crucial in order to safeguard the right to health and access to medicines in the local context.

How to resolve the adverse impact of pharmaceutical trade policies on access to medicines at the national level, therefore, is critical to safeguard access to medicines. One way to address this concern is to integrate the mechanism of a human rights impact assessment (HRIA) in pharmaceutical trade policy processes.² Through HRIA, 'the human rights implications of a policy are considered when that policy is being developed (*ex ante*); or of assessing the impact of policy or practice on the rights of those affected once the policy is implemented (*ex post*)'.³ HRIA, therefore, ensures that the implementation of international trade rules do not prioritise trade imperatives at the expense of human rights.⁴ The main aim of HRIA is to build attention to human rights into trade policies.⁵ In this regard, the HRIA has the power to change policies and practices in favour of improving the lives of people.⁶

Developing countries are cautioned against negotiating or implementing trade-related intellectual property rights without first assessing their impact on human rights using HRIA as a tool.⁷ This is particularly crucial in relation to bilateral and multilateral free trade agreements (FTAs) that may be used to pressurise governments to accept more stringent standards of intellectual property protection

1 WT/MIN(01)/DEC/W/2, 14 November 2001.

2 R Mungoven 'Walking the talk: Exploring methodologies and applications for HRIA by the United Nations' (February 2016) 7.

3 J Harrison & M Stephenson 'Scottish Human Rights Commission 'Human rights impact assessment: Review of practice and guidance for future assessments' (1 June 2010) 14, <http://eqhria.scottishhumanrights.com/eqhriapolicyprocess.html> (accessed 27 February 2018).

4 G MacNaughton 'Human rights impact assessment: A method for healthy policymaking' (2015) 17 *Health and Human Rights Journal* 64.

5 As above.

6 MacNaughton (n 4) 16.

7 MacNaughton 117-118.

beyond what is required by the TRIPs Agreement.⁸ The HRIA should, therefore, be promoted as a routine process in trade worldwide.⁹

The article focuses on how the HRIA could be implemented in Kenya in relation to its motivational theory, methodology and trade policy makers' preparedness in terms of their knowledge and attitude in this area. The article is structured as follows: the government obligations under the right to health; the human rights and market theories underpinning the use of the HRIA mechanism; the emerging methodology of HRIA; and the preparedness of trade policy makers in Kenya to implement HRIA as a routine process in trade.

2 Methodology

This is a mixed method research study integrating data from diverse disciplines, including human rights, international trade law, intellectual property rights law, and impact assessment methodology. Both primary and secondary data has been used in this study.

The primary data has been sourced mainly from legislation, resolutions, court decisions and treaties. In addition, primary data has also been sourced from semi-structured interviews with trade policy makers, experts and civil society organisations working in the area of access to medicines in relation to the issue of the preparedness of trade policy makers in terms of their knowledge and attitudes in relation to HRIA. Clearance was obtained from the research ethics committee of the Faculty of Law, University of Pretoria. The responses received from each interviewee were transcribed and the file is with the author. There was no compelling need to obtain authorisation from the relevant review board in Kenya as the interviewees who participated in this study were consenting expert participants and were not vulnerable or at risk. Requests for anonymity by interviewees are accommodated in the study. Lastly, no private health information was requested from the interviewees.

The secondary data used in this study emanates from various sources, including journal articles, reports, books, and electronic sources from various databases.

8 L Forman & G MacNaughton 'Lessons learned: A framework methodology for human rights impact assessment of intellectual property protection in trade agreements' (2016) *Impact assessment and Project Appraisal* 1, <http://www.dlsph.utoronto.ca/wp-content/uploads/2012/02/Forman-MacNaughton-IAPA-final-.pdf> (accessed 30 July 2017).

9 MacNaughton (n 4) 64.

3 Right to health obligations of the government in relation to access to medicines

3.1 International instruments on the right to health

There are at least five human rights provisions that apply in the context of the TRIPs Agreement and access to medicines. The main provisions include the rights to health, life and human dignity. In addition to these, the right to information and the right to public participation have become increasingly important in fostering transparency and accountability in relation to trade negotiations.¹⁰ This part, however, focuses only on the right to health instruments as elaborated on below.

3.1.1 Global human rights instruments

At the global level, the right to health has been protected in many key human rights instruments. The most influential instrument besides article 25 of the Universal Declaration of Human Rights (Universal Declaration) at the global level is article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹¹ which provides: 'The state parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

Article 12(2) of ICESCR further reiterates that the right to health extends to the underlying determinants of health, including 'food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment'.¹² Article 12(2) of ICESCR has been interpreted as follows. First, article 12(2)(a) dealing with maternal, child and reproductive health services requires the right to access anti-retrovirals (ARVs) in order to prevent mother-to-child transmission of HIV.¹³ Second, article 12(2)(c) on the right to prevention, treatment and control of diseases may be interpreted to mean 'the right of access to certain medicines, namely medicines necessary for immunisation and

10 D Ovetv 'Making trade policies more accountable and human rights-consistent: A NGO perspective of using human rights instruments in the case of access to medicines' in W Benedek, K de Feter & F Marrella (eds) *Economic globalisation and human rights* (2007) 183.

11 UN General Assembly International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations Treaty Series Vol 993 3, <http://www.refworld.org/docid/3ae6b36c0.html> (accessed 3 March 2016); adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; entered into force 3 January 1976, in accordance with art 27.

12 General Comment 14: The right to the highest attainable standard of health (art 12), adopted at the 22nd session of the ESCR Committee on 11 August 2000 E/C 12/2000/4) para 4.

13 Z Strauss & D Horsten 'A human rights-based approach to poverty reduction: The role of the right of access to medicines as an element of the right of access to health care' (2013) 16 *Potchefstroom Electronic Law Journal* 304.

medicines specifically required to combat particular epidemics (such as ARVs which, although they do not combat the epidemic, are essential in the management and control thereof).¹⁴

Third, article 12(2)(d) relating to the right to health facilities, goods and services also include the provision of essential drugs.¹⁵

ICESCR is supplemented by many thematic global human rights instruments, including article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹⁶ article 24 of the Convention on the Rights of the Child (CRC);¹⁷ article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD);¹⁸ and article 25 of the Convention on the Right of Persons with Disabilities (CRPD).¹⁹ The purpose of these thematic instruments is to reinforce the importance of the right to health in different thematic sectors.

3.1.2 African human rights instruments

At the continental level, the African Charter on Human and Peoples' Rights (African Charter) is the starting point. The African Charter enshrines the right to health in article 16(1) as follows: 'Every individual shall have the right to enjoy the best attainable state of physical and mental health.' Unlike ICESCR, article 16(2) of the African Charter is brief and only requires state parties to 'take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'. Accordingly, this provision is the basis on which the state is under an obligation to

14 Strauss & Horsten (n 13) 305.

15 General Comment 14 (n 12) para 17.

16 UN General Assembly Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, Vol 1249 13, <http://www.refworld.org/docid/3ae6b3970.html> (accessed 7 March 2016). Art 12(1) provides: 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.'

17 UN General Assembly Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol 1577 3, <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 7 March 2016). Art 24(1) provides: 'States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.'

18 UN General Assembly International Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965, United Nations, Treaty Series, Vol 660 195, <http://www.refworld.org/docid/3ae6b3940.html> (accessed 7 March 2016).

19 UN General Assembly Convention on the Rights of Persons with Disabilities Resolution/adopted by the General Assembly, 24 January 2007 A/RES/61/106, <http://www.refworld.org/docid/45f973632.html> (accessed 7 March 2016). Art 25 of CRPD provides: 'States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.'

provide health and medical services for their populations despite implementation challenges.²⁰ From the text, the link between access to medicines and the right to health under the African Charter may be found in the context of providing medical attention when people are sick.

The African Charter is also supplemented by other regional human rights instruments, including article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol);²¹ and article 14 of the African Charter on the Rights and Welfare of the Child (African Children's Charter).²²

Since Kenya has ratified both the African Women's Protocol and the African Children's Charter, it has additional obligations to provide access to medicines for these categories of people.

3.1.3 *Sub-regional instruments on the right to health*

There are documents at the sub-regional level that recognise the right to health. In relation to Kenya, article 33 of the East African Community Human and Peoples' Rights Bill²³ provides for the recognition of the right to health. However, it should be noted that this document is still pending before the East African Community Legislative Assembly (EALA). There also is thematic legislation enacted by the sub-regional body that provides for the right to health, which is the East African Community HIV and AIDS Prevention and Management Act, 2012.²⁴ In this regard, the right to health is particularly crucial in relation to the prevention and management of HIV and AIDS in the EAC.

20 J Rehman *International human rights law* (2010) 320.

21 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, <http://www.refworld.org/docid/3f4b139d4.html> (accessed 7 March 2016). Art 14(1) provides: 'States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.'

22 Organisation of African Unity (OAU) African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), <http://www.refworld.org/docid/3ae6b38c18.html> (accessed 7 March 2016). Art 14(1) provides: 'Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.'

23 East African Community on Human and Peoples' Rights Bill, 2011, http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/EALA_Legislation/BILLSUPPLEMENT12thAugust20121.pdf (accessed 7 March 2016). This Bill is yet to be enacted into law.

24 East African Community HIV and AIDS Prevention and Management Act, 2012, adopted during the 5th session of the East Africa Legislative Assembly, held in Nairobi, Kenya, on 23 April 2012 and entered into force on 14 December 2014.

3.2 Interpretation of the right to health in relation to access to medicines

At the international level, to determine the nature and scope of the right to health in relation to access to medicines, reliance is often placed on 'soft' law. A 'soft' law is a non-binding but persuasive instrument, which usually is relied upon to clarify the normative standards applicable in relation to the rights defined under an instrument, such as the right to health discussed above. Moreover, unlike the 'hard' laws discussed above, the link between the right to health and access to medicines, including in the context of intellectual property rights, is clearly explained in detail in many examples of 'soft' law as discussed below. There are three main positions that are discernible in the soft laws. The first approach is that only access to essential medicines is part of the right to health. The second is that the right to health encompasses only life-saving medicines. The last approach is that access to all medicines is part of the right to health.

In 2009 the Special Rapporteur on the Right to Health published a report on access to medicines and the right to health from an intellectual property point of view. According to him, as a result of product patents, intellectual property law has an impact on the right to health by allowing a patentee to set higher prices.²⁵ Thus, in order to promote competition by lowering the number of patents granted, countries should adopt higher as opposed to lower patentability criteria.²⁶ Noting the importance of generic medicines in lowering prices of HIV medications from as high as US\$ 10 000 per patient per year to US\$ 350 per patient per year, the Special Rapporteur noted that the post-2005 TRIPs Agreement period will pose challenges in terms of the manufacture and the importation of generic medicines owing to the new obligations of states under TRIPs.²⁷ In the interests of public health, the Special Rapporteur argued that countries should be allowed to use the following TRIPs flexibilities: (a) making full utilisation of the transition periods; (b) defining the criteria of patentability; (c) issuing compulsory licences and provide for government use; (d) adopting the international exhaustion principle to facilitate parallel importation; (e) creating limited exceptions to patent rights; and (f) allowing for opposition and revocation procedures.²⁸

The Special Rapporteur also noted the pressure imposed on developing countries by developed countries and multinational corporations in the context of utilising TRIPs Agreement flexibilities.²⁹

25 Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health, Anand Grover, 31 March 2009 [A/HRC/11/12] paras 17-18.

26 Report (n 25) para 18.

27 Report paras 20-21.

28 Report para 27.

29 Report para 56.

Apart from the utilisation of TRIPs flexibilities, the Special Rapporteur on the Right to Health addresses the issue of Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs), which he observed lack 'transparency or participation from the public, and often establish TRIPs plus provisions, which undermine the safeguards and flexibilities that developing countries sought to preserve under TRIPs'.³⁰ He urged countries to analyse such multilateral or bilateral agreements for potential health violations and to insist on transparency and openness at all stages of negotiations.³¹ In his view, the TRIPs-plus provisions in FTAs can serve one or more of the following purposes: 'extend the patent term; introduce data exclusivity; introduce patent linkage with drug registration and approval; and create new enforcement mechanisms for intellectual property rights'.³²

In October 2009 HRC Resolution 12/24 incorporated some of the proposals made by the UN Special Rapporteur on Health and encouraged 'all states to apply measures and procedures for enforcing intellectual property rights in such a manner as to avoid creating barriers to the legitimate trade of medicines, and to provide for safeguards against the abuse of such measures and procedures'.³³ The focus here was that the enforcement of intellectual property rights should not be a barrier to trade in medicines and that safeguards should be put in place to guarantee that such measures and procedures for enforcing intellectual property rights will not be abused. Illustratively, a key safeguard for access to medicines in the context of anti-counterfeiting is to delink patents from anti-counterfeiting legislation.

In March 2011 HRC Resolution 16/28 was adopted focusing on enforcement. The Resolution 'encourages all states to apply measures and procedures to enforce intellectual property rights in a manner that avoids the creation of barriers to the legitimate trade of medicines, and to provide for safeguards against the abuse of such measures and procedures, taking into account, inter alia, the [Doha Declaration]'.³⁴ The key addition here is the fact that the Doha Declaration should at all times be taken into account while enforcing intellectual property rights domestically. At around the same time the Special Rapporteur on the Right to Health had identified as one of the emerging challenges in the area of access to medicines the issue of 'ensuring access to medicines for non-communicable or chronic diseases'.³⁵ It would be important in the future that the Doha Declaration is expanded to include also non-communicable diseases in addition to HIV and AIDs, tuberculosis and malaria.

30 Report para 69.

31 Report para 70.

32 Report para 75.

33 HRC Resolution 12/24, 2009, UN Doc A/HRC/RES/12/24 para 6.

34 HRC Resolution 16/28, March 2011, UN DOC A/HRC/Res/16/28 para 19.

In July 2011 the HRC adopted Resolution 17/14, which called on states '[t]o promote access to medicines for all, including through the use, to the full, of the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which provide flexibility for that purpose, recognising that the protection of intellectual property is important for the development of new medicines as well as the concerns about its effects on prices'.³⁶ It should be noted that this Resolution focused on the development of medicines and not only access to medications and, thus, the moderate language which calls for intellectual property protection as well as the utilisation of TRIPs flexibilities.

In 2013 the Special Rapporteur on the Right to Health undertook another extensive study focusing on the existing challenges and good practice with regard to access to medicines in the context of the right to health as mandated by the United Nations (UN) HRC Resolution 17/14.³⁷ According to the Special Rapporteur, the right to health framework is composed of the following key elements that ensure access to medicines as derived from paragraph 12 of General Comment 14 of the Committee on Economic, Social and Cultural Rights (ESCR Committee): availability, accessibility, acceptability and quality as key elements of the right to health.³⁸ This report is especially relevant to this study and will be referred to throughout the subsequent parts of this study. Thus, the substantive contents of this report will not be set out here in order to avoid unnecessary duplication.

Perhaps the clearest indication that the HRC intended to broaden the scope of the right to health beyond access to ARVs to all medications is the June 2013 Resolution 23/14 of the HRC. This Resolution focused on access to medicines for everyone as opposed to ARVs only that had been stressed hitherto. Most importantly, it 'recognises that access to medicines is one of the fundamental elements in achieving progressively the full realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.³⁹ In this regard, therefore, unlike sub-Commission on Human Rights Resolution 2001/33, access to medicines as a right to health is not limited to pandemics such as HIV and AIDS.

Among other things, HRC Resolution 23/14 urged states to 'use, to the full of the provisions of the [TRIPs] Agreement which provide

35 Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health: Expert consultation on access to medicines as a fundamental component of the right to health, Anand Grover, 16 March 2011 [A/HRC/17/43] para 48.

36 HRC Resolution 17/14, July 2011, UN Doc A/HRC/Res/17/14 para 7(g).

37 Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health, Anand Grover, 1 May 2013 [A/HRC/23/42] para 1.

38 Report (n 39) para 8.

39 HRC Resolution 23/14, June 2013 A/HRC/Res/23/14 para 2.

flexibility for that purpose, recognising that the protection of intellectual property is important for the development of new medicines, as well as the concerns about its effects on prices'.⁴⁰ This paragraph contains contradictions because on the one hand it notes that pharmaceutical patents are important for the development of new medicines, but on the other hand it also recognises that pharmaceutical patents have an impact on medicine prices. In this regard, it adopts a middle ground with regard to pharmaceutical patents.

HRC Resolution 23/14 also urged states to 'apply measures and procedures for enforcing intellectual property rights in such a manner as to avoid creating barriers to the legitimate trade of affordable, safe, efficacious and quality medicines, and to provide for safeguards against the abuse of such measures and procedures'.⁴¹ This paragraph focuses on intellectual property enforcement by noting that it should be implemented in a manner that does not create a barrier to legitimate trade and also through providing safeguards against the potential abuse of such measures and procedures. Consequently, if pharmaceutical patents are to stay, then its enforcement should not undermine legitimate trade, for instance in generics.

The Resolution further urged states '[t]o ensure that investment, industrial or other policies promote development and access to medicines, in particular their affordability'.⁴² This paragraph notes the critical role played by investment and industrial policies in the development and affordability of medicines.

At the regional front, in 2013 the African Union (AU) in a progress report recognised that, among other things, 'a critical enabler to a sustainable AIDS and tuberculosis response remains an intellectual property framework that is sensitive to public health objectives'.⁴³ In that report, the following was recommended: '[S]trengthen review of laws and measures to fully incorporate and utilise all public health related [TRIPs Agreement] flexibilities and to avoid limits on the use of public health related TRIPs flexibilities'.⁴⁴

4 Theories underpinning the utilisation of the human rights impact assessment mechanism

The applicable theories in relation to HRIAs in relation to trade may be divided into two main categories, namely, traditional human rights theories and market or trade theories. The human rights theories are

40 HRC Resolution 23/14 (n 39) para (h).

41 HRC Resolution 23/14 para (j).

42 HRC Resolution 23/14 para (m).

43 Implementation of the Abuja Call for Accelerated Action Towards Universal Access to HIV and AIDS, Tuberculosis and Malaria Services, 2013, Progress Report 2010-2012 [Sp/Assembly/ATM/II(IV) para 44.

44 As above.

human rights as a source of substantive policy guidance in trade; human rights as a source of political, moral and legal pressure; human rights and fragmentation, coherence and constitutionalisation of international law; and human rights as a trigger for social learning in trade.⁴⁵ This review will only focus on human rights as a trigger for social learning in trade due to its popularity. The market theories discussed in this part of the article include semiotic methods and rational theory for morality.

4.1 Human rights theories underpinning human rights impact assessment

In relation to human rights as a trigger for social learning in trade, Harrison notes that the HRIA as a tool is currently more popular in other fields and is outwardly focused and, as such, it is possible that human rights can affect policy debates in new areas including trade.⁴⁶ The idea here is that HRIA facilitates the process by which human rights-based arguments can be introduced and supported in other sectors where it was previously not possible to do so. This view is shared by Forman who further argues that 'the tool's methodology and approach are best understood through theories of rights as drivers of social change, particularly constructivist theories of socially-driven normative diffusion'.⁴⁷ In Forman's view, the way the tool works is through playing 'a more subterranean normative role by diffusing and internalising new human rights norms around medicines, so that policy makers are forced to consider their right to health duties when dealing with intellectual property rights'.⁴⁸ Lang argues that unlike the other traditional human rights theories, the social learning theory is transformative in relation to the trading system because of its role of imposing a 'new thinking'.⁴⁹ In this manner, human rights rules and principles become the basis of producing new policy ideas to fundamentally question the present assumptions that have hindered progress in trade.⁵⁰

The social learning theory, as briefly articulated above, is persuasive in relation to HRIA but suffers from one major weakness, which is that it lacks legitimacy among trade policy makers and, therefore, it is not

45 ATF Lang 'The role of the human rights movement in trade policy-making: Human rights as a trigger for policy learning' (2007) 5 *New Zealand Journal of Public International Law* 77.

46 J Harrison 'Human rights measurement: Reflections on the current practice and future potential of HRIA' (2011) 3 *Journal of Human Rights Practice* 170.

47 L Forman 'From TRIPS-plus to rights-plus? Exploring right to health impact assessment of trade-related intellectual property rights through the Thai experience' (2012) 7 *Asian Journal for WTO and International Health Law* 355.

48 As above.

49 Lang (n 45) 101. According to Lang 'new thinking' means 'new ideas about the kind of trade policies which are desirable and legitimate, and about the kind of governance structures through which political power is constituted and exercised in the trading order'.

50 Lang (n 45) 101.

sufficient to motivate trade policy makers to view human rights as a routine process in trade. This constraint may be addressed using market theories, as discussed below.

4.2 Market theories underpinning human rights impact assessment

This part attempts to explain why trade and human rights should not be viewed as being inconsistent with each other but compatible using market theories.

4.2.1 *Semiotic methods*

One theorist is Malloy who introduces a concept known as the semiotic method, which he contends can 'help us to reflect on the social and cultural consequences of invoking and validating economic assumptions in law and social institutions'.⁵¹ In the semiotic method, Malloy contends that the focus is not only on 'what might be efficient, but on what the social significance might be of declaring an efficiency criterion to be of primary significance in determining social policy'.⁵² The semiotic method is significant in so far as it allows for the challenging of the dominant efficiency criterion in trade and economics.

4.2.2 *The rational theory of morality*

The rational theory of morality is advanced by Coleman who notes that there seems to be an inherent conflict between rationality and morality, which may be defined as utility maximisation and constrained utility maximisation respectively.⁵³ However, it is possible for one to derive morality from rationality if one considers that 'the theory of rationality must generate both the substantive and motivational components of moral theory'.⁵⁴ The substantive part has been tackled in relation to the right to health norms discussed above and, as such, this part focuses on the motivational aspect. Consequently, Coleman uses contractarian terms to explain that 'under conditions of perfect competition, the individually rational, self-interested behaviour of all agents induces a Pareto-efficient outcome ... in optimal equilibria, therefore, each actor does as well as he can – that is, his utility is maximised subject to the utility maximisation of others'.⁵⁵ It will be irrational to impose restrictions if all individuals are performing at an optimum level.⁵⁶ Consequently, it

51 RP Malloy *Law and market economy* (2000) 26.

52 As above.

53 J Coleman *Markets, morals and the law* (1998) 311. According to Coleman, the rational actor seeks to maximise his net (expected) utility and the moral actor sometimes acts so as to constrain the utility-maximising behaviour.

54 As above.

55 Coleman (n 53) 312.

56 As above.

follows that '[u]nder conditions of perfect competition ... the rational actor has no incentive to adopt constraints, moral or otherwise, on his utility-maximising behaviour. Compliance with moral principles would be irrational.'⁵⁷ However, in situations of market failures where conditions of perfect competition are non-existent, the reverse is true.⁵⁸ In this situation, 'the self-interested, utility-maximising behaviour for each individual leads to a Pareto-*inefficient* outcome – that is, one in which at least some individuals could be made better off without worsening the conditions of others'.⁵⁹ Constraining the utility-maximising behaviour may lead to better results for the individual than if she continues pursuing the unrestrained path.⁶⁰ Therefore, '[b]y introducing constraints on the utility-maximising behaviour of individuals, it may be possible to secure Pareto-*efficient* outcomes in which an individual fares better than she would were she to act as an unconstrained utility maximiser'. Moreover, '[t]here would then be a rational motivation for compliance with normative, possibly even moral, principles which requires constraint'.⁶¹

5 Methodology of human rights impact assessment

Limited scholarship exists in the area of methodology of HRIA and taking into account the practice and experience of implementing HRIA.⁶² However, a few critical scholars will be reviewed in this part. Harrison, for instance, notes that HRIA has developed in at least six main areas, including development; health and human rights; children's rights; multinational companies; international trade; public authorities; and others including anti-trafficking laws and policies and domestic violence.⁶³ It appears therefore that HRIA has multiple uses and has been used in many contexts, including international trade. The immediate problem, however, is that some actors will abuse the term HRIA to refer to a process that does not resemble any ideal-type instrument as known by human rights actors and commentators.⁶⁴ It therefore is crucial to understand the methodology of HRIA in order to distinguish it from other instruments employed by human rights or trade actors. According to Harrison, the ideal-type instrument developed from the practice of HRIA all over the world over a long period of time should have eight main elements as follows:⁶⁵

57 As above.

58 As above.

59 As above.

60 As above.

61 As above.

62 Harrison (n 46) 163.

63 Harrison 168-170.

64 Harrison 171.

65 Harrison 172-179.

screening;⁶⁶ scoping;⁶⁷ evidence gathering;⁶⁸ consultations;⁶⁹ analysis;⁷⁰ conclusions and recommendations;⁷¹ publication;⁷² and monitoring and review.⁷³ Suffice to note that the steps under HRIA actually are similar to most of the other types of impact assessments and as such the methodology of impact assessment is similar across the board.⁷⁴ Harrison notes that in order to enhance future practice, several things must be addressed, including⁷⁵ improving collective understanding of the process;⁷⁶ better guidance and support for those undertaking HRIAs;⁷⁷ and monitoring performance.⁷⁸ In the context of access to medicines, the health impact assessment (HIA), international trade agreements HRIA and right to health impact assessment (RHIA) are instructive. For a detailed discussion about HRIAs in the context of health policy-making, the work of MacNaughton is key.⁷⁹ However, since this study involves

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- 66 Harrison 172-173. 'Screening is the process of deciding whether a particular policy, practice, or project is suitable for a full impact assessment, and screening out those where an HRIA is not considered appropriate or necessary. It therefore performs a critical step in justifying a decision to undertake an assessment.'
- 67 Harrison 173-174. 'Scoping refers to the information that is gathered and questions that are asked once the decision to undertake an HRIA has been made (although in some forms of HRIA considerable scoping may be required before a screening decision is taken). Scoping essentially provides a road map for the rest of the assessment (what is being assessed, and how it is to be assessed).'
- 68 Harrison 174-175. 'This is the collection of information to inform analysis of the policy in question. This is at the heart of an impact assessment methodology. Without gathering evidence about the (potential) impacts of a policy, the conclusions of the decision-maker are likely to reflect simply their own knowledge, experience and prejudices.'
- 69 Harrison 175-176. 'There need to be procedures for ensuring that the voices of those who are, or are likely to be affected by the policy are heard and taken into account in the HRIA process. This requires effective consultations.'
- 70 Harrison 176-178. '[U]sing human rights obligations as the basis of impact assessment is not as obvious or as simple as it seem. In some extreme cases, there are assessments in which no real attempt is made to use human rights obligations as the basis for assessment at all ... HRIAs must be fundamentally rooted in human rights norms and standards if they are really to be considered HRIAs.'
- 71 Harrison 178-179. 'If he aim is to have an effect on actual policy and practice, then clearly this step is central – without clear conclusions and recommendations, action in response to the HRIA is highly unlikely.'
- 72 Harrison 179. 'Publishing HRIA is a vital part of the impact assessment process. It ensures that the body undertaking the assessment can be held to account by rights-holders and other interested actors.'
- 73 As above. 'Some form of monitoring process is vital in order to scrutinise whether recommendations in the original HRIA are properly implemented.'
- 74 MacNaughton (n 4) 66.
- 75 Harrison (n 46) 180-183.
- 76 Harrison 180-181. Some of the areas he identifies as in need of better understanding include 'evidence-gathering techniques that are appropriate to different forms of assessment, and the development of techniques that are appropriate to different forms of assessment, and the development and application of context-specific indicators that actually drive assessment processes'.
- 77 Harrison 181-182. This involves using toolkits and other aides, including principles.
- 78 Harrison 182-183.
- 79 MacNaughton (n 4) 69.

international trade agreements, the focus of the study mainly is on HRIAs and specifically RHIA but not HIA. The difference between HRIA and RHIA is in the norms that have been used with the latter emphasising only right to health norms as is the case in this study. HIA has a different methodology which does not put human rights at the core and, therefore, differs from HRIA. This author has no technical competence to articulate HIA in such a study since he is only conversant with human rights methodologies.

Accordingly, Harrison and Goller observe that HRIA of international trade agreements will depend largely on how best the interlinkages between trade and human rights norms are treated in the methodology.⁸⁰ In this regard, they proceed to develop an appropriate methodology to cover the gap, noting that 'there is minimum guidance in relation to the appropriate methodologies from key institutional actors despite the numerous calls to conduct HRIA on trade agreements'.⁸¹ Most importantly, the authors note that

an HRIA of a trade agreement requires developing a methodological framework for exploring the impact of international legal obligations and how they are implemented at the national level, rather than the impact of a particular actors or set of actors and the impact of their actions on specified third parties as in the case of the activities of a multinational company or NGO.⁸²

The above quote is important because the focus of HRIA is on the impact of international trade rules at the national level.

The authors note that the main value of HRIA is the fact that human rights are at the core of its methodology.⁸³ The authors also warn that HRIAs commissioned by governments can be retrogressive if they are not appropriately conceived and implemented, because it may be 'utilised in future to short-circuit important decision-making by other actors'.⁸⁴ Finally, the authors note that

HRIAs should also facilitate identification of situations where government are not in fact constrained by international trade rules to act in a way that conflict with human rights norms. Governments may be making domestic policy choices and regulatory decisions in ignorance of the real ambit of international trade rules or for entirely different reasons at the behest of domestic lobbying groups.⁸⁵

Arguably, the development of FTAs and pharmaceutical trade policies that go beyond the TRIPS Agreement is often motivated by lobbying from the private sector and other interest groups as opposed to a clear obligation under international trade rules. In Kenya, the Kenya

80 J Harrison & A Goller 'Trade and human rights: What does "impact assessment" have to offer' (2008) 8 *Human Rights Law Review* 592.

81 Harrison & Goller (n 80) 592-593.

82 Harrison & Goller 594.

83 Harrison & Goller 605.

84 Harrison & Goller 613.

85 Harrison & Goller 615.

Association of Manufacturers (KAM) was responsible for championing the TRIPs-plus Anti-Counterfeit Act legislation in Kenya and the East African region.⁸⁶

Apart from HRIA on international trade agreements, there are special types of HRIA based on individual rights as opposed to the whole gamut of human rights norms and principles such as RHIA. The work of Forman and MacNaughton on RHIA in the context of international trade agreements is particularly important in this study.⁸⁷ The two authors note that in order to respond to the challenge of access to medicines in relation to the TRIPs Agreement in developing countries, the HIA and RHIA have been utilised.⁸⁸ Even so, the government has not been active in utilising these tools.⁸⁹

The two authors also develop some guidance borrowing from various articles as follows: They note that the methodology can be 'flexible, robust and user-friendly and draw on a multidisciplinary team that is independent from executive negotiating the agreement'.⁹⁰ The requirement for independence from the government is particularly controversial because, as argued in this study, HRIA should actually be conducted by states and not external stakeholders. States should therefore view the tool as being useful as opposed to something that can be manipulated and, as such, market theories of HRIA discussed above may play a role. Also, there is a proposal to use six steps as follows:⁹¹ (a) screening or preliminary analysis of the extent of the HRIA necessary; (b) scoping including team selection, development of the methodology, selection of an explicit human rights framework based upon applicable human rights obligations and identification of data sources and indicators; (c) data collection; (d) analysis, requiring the evidence gathered to be compared against the human rights obligations; (e) reporting the conclusion and recommendations of the analysis at the basis for weighing the options, decision making and holding decision makers accountable; and (f) monitoring and evaluating outcomes as they are implemented.

However, it should be noted that Harrison (discussed above) had eight steps in his methodology that should constitute an ideal-type HRIA as opposed to the six proposed by Forman and MacNaughton. However, the methodology proposed by Harrison is not sufficiently different from what Forman and MacNaughton have set out since what appears to be data collection and reporting the conclusions and recommendations for Forman and MacNaughton have been split in the case of the methodology for Harrison. With regard to the former,

86 See <http://kam.co.ke/policy-advocacy/counterfeit-goods-illicit-trade/> (accessed 27 June 2018).

87 Forman & MacNaughton (n 8) 109-138.

88 Forman & MacNaughton 122.

89 As above.

90 Forman & MacNaughton 129.

91 Forman & MacNaughton 129-130.

Harrison instead has evidence gathering and consultation as two separate steps. Similarly, with regard to the latter, Harrison has conclusion and recommendations and publication as two separate steps. Ultimately, therefore, the two methodologies are substantially the same. Further, HRIA should combine quantitative and qualitative analysis using economic modelling, causal chain analysis, expert opinions and civil society involvement.⁹² In this study, it is submitted that economic modelling and causal chain analysis is a best practice and, therefore, its absence is not fatal to any methodology that may be adopted. However, an explicit human rights framework should be integrated into HRIA without fail.⁹³ Also, broad participation is important since it is required by human rights principles and the imperatives of guaranteeing accountability.⁹⁴ Further, HRIAs should not be used in isolation but together with 'existing human rights strategies such as mobilisation, campaigning, advocacy and research and policy analysis, for achieving human rights-friendly trade and investment regimes.'⁹⁵ It is submitted that HRIA is not a replacement to other strategies but it is just one of the many strategies available in the human rights and trade context. Lastly, HRIA should be institutionalised within domestic laws and within the international system to enhance its effectiveness in promoting and protecting human rights in trade.⁹⁶

6 Trade policy process in Kenya and access to medicines

This part discusses the process of trade policy development at the Ministry of Trade and other government departments in Kenya.

6.1 Process of trade policy development within the Ministry of Trade

Apart from the actors, the process of trade policy development is also important. It is in the process where the methodology of HRIA belongs and should be implemented. As demonstrated below, the process of trade policy making in Kenya still assumes the situation of the perfect market and is blind to market failures. It is for this reason that the HRIA as a tool has been seen as being unnecessary in trade negotiations. In order to change this, the trade process should be able to identify and deal with situations of market failures, which entails the availability of more adverse impacts than actual benefits for a country in relation to a particular trade measure.

92 Forman & MacNaughton 130.

93 As above.

94 As above.

95 As above.

96 Forman & MacNaughton 131.

It is important to note that the administration of intellectual property rights in Kenya faces severe institutional problems.⁹⁷ The problem is further exacerbated by the fact that many government institutions are unable to attract and retain a multidisciplinary work force, and in many instances they lose their best work force to transnational organisations.⁹⁸

Before embarking on trade policy making, it is important to clarify that pharmaceutical trade policies usually are trade policies and not health policies. However, as noted by Dr Wangai, a representative of the Ministry of Health, without medicines health providers may not be able to do much in healthcare facilities.⁹⁹ Despite the importance of medicines in health, the Ministry of Health has no mandate over the trade aspects of medicines, including issues of intellectual property rights protection. However, as noted by Dr Wangai, the Ministry of Health has some role to play when it comes to the regulation of medicines, and currently the Pharmacy and Poisons Board is responsible for guaranteeing the quality of medicines in the country.¹⁰⁰ According to Dr Wangai, Kenya aims at establishing the Kenya Food and Drug Agency, which will be responsible for regulating medicine and other non-pharmaceutical products used in the health sector.¹⁰¹ It therefore appears that the Ministry of Health focuses on quality assurance as opposed to trade. This may explain the lack of clear collaboration between the Ministry of Health and the Ministry of Trade including in the area of medicines.¹⁰² It is submitted, therefore, that the Ministry of Health has a very limited role to play in terms of making medicines affordable in the country, especially in relation to the adverse impact of pharmaceutical trade policies despite the fact that they stand to be most affected when medicines are inaccessible. The ministry that is directly responsible for policies is the Ministry of Trade through its trade policy development process, as shown below.

In Kenya the trade policy development process, including in the area of intellectual property rights, largely is a participatory process coordinated at the Ministry of Trade supported by other government departments.¹⁰³ As such, trade policy in Kenya is not an exclusive function for the Ministry of Trade. It should be noted, however, that

97 B Sihanya *Intellectual property and investment law in Kenya and Africa: Translating technology for sustainable development* (2016) 619.

98 As above.

99 Interview with Dr Mary Wangai on 23 May 2018 (Ministry of Health, Department of Regulation and Standards).

100 As above.

101 As above.

102 As above.

103 Interview with Bramah L Kaleve on 17 April 2018 (Principal Trade Development Officer, Ministry of Trade).

international trade has since 2017 been coordinated by the Ministry of Foreign Affairs and International Trade.¹⁰⁴

According to Kaleve, the process of trade policy development begins with a preparatory meeting organised by the Ministry of Trade in the country involving various stakeholders, usually government ministries and other departments to be affected in a particular trade process.¹⁰⁵ The various stakeholders usually are required to develop position papers in relation to the trade proposals that are on the table in a manner that will safeguard the interests of the government in the trade negotiation process.¹⁰⁶ The position paper is then compiled by trade experts or officials from the Ministry of Trade, and the position paper then forms the basis for negotiations.¹⁰⁷ At the multilateral level, the process is somewhat different since there usually is a peer review process or trade policy review process that is done in order to ensure that the proposals made do not negatively impact international trade.¹⁰⁸ The government then has to reach out to government departments that are affected to provide information that may be required to address any queries raised.¹⁰⁹ It is submitted that the peer review process is a good practice in as far as the implementation of trade obligations is concerned, and a similar practice in relation to human rights may be useful. Alternatively, Munyi notes that there needs to be a checklist akin to that used by the Dutch negotiators to check whether all elements have been complied with by an agreement before it is signed or enacted into law.¹¹⁰

However, since this article focuses on trade policy at the national level, it is crucial to understand whether there are safeguards in the trade policy development process in relation to human rights. Kaleve notes that human rights usually are introduced through specific trade instruments. For instance, the African Growth and Opportunity Act (AGOA) and the Cotonou Agreement have specific clauses addressing human rights in trade policy.¹¹¹ However, the Ministry of Trade has no internal mechanism to address human rights concerns in trade should it be necessary.¹¹² Trade experts mainly are individuals qualified in law, economics, trade development and business.¹¹³ However, staff of the Ministry of Trade attend seminars organised by

104 Interview with Leah Aywa Baraza on 15 May 2018 (Deputy Chief State Counsel, International Law Division).

105 Interview with Bramah L Kaleve (n 103).

106 As above.

107 As above.

108 As above.

109 As above.

110 Interview with Peter Munyi on 15 March 2018 (International Trade Lecturer, University of Nairobi).

111 Interview with Bramah L Kaleve (n 103).

112 As above.

113 As above.

civil society on trade and human rights.¹¹⁴ It is submitted that more seminars and training targeting trade policy makers may help narrow the capacity gap in terms of trade and human rights. This is especially so because, as noted by Kaleve, human rights do not form part of the work plan of the Ministry of Trade and it is unlikely that the Ministry will streamline it because the variable value on productivity is minimal.¹¹⁵ It is submitted that the above position generally is understood using market theories aimed at increasing the Pareto-efficiency. However, there are circumstances, including market failure, that actually may require inefficient response from the government, especially when it relates to the implementation of international intellectual property rights rules.

The role played by the Ministry of Trade in terms of the integration of the TRIPs Agreement flexibilities serves as a good lesson in relation to the access to medicines agenda. In 2001 the role of trade policy makers, including that of Minister Biwott, was instrumental in the incorporation of TRIPs Agreement flexibilities under the Industrial Property Act, 2001.¹¹⁶ It should be noted that during this time, the momentum was also in favour of developing countries since the Doha Declaration had also been adopted. In the period after the Doha Declaration, many developing countries have become less assertive, especially at the national level. The agency of the Doha Declaration serves to show that trade policy makers are actually desirous of tools that they can use to act in the best interests of the government.

At present the influence of the Doha Declaration is waning at the national level. Trade policy makers, therefore, have become very unpredictable since trade policy makers are usually assertive in Geneva but they do not follow up on their 'talk' in Geneva with appropriate actions in terms of implementation back home.¹¹⁷ It therefore appears that a national tool that is able to remind trade policy makers of their obligations, including under human rights such as the HRIA, may be an appropriate solution. It therefore is important to show that the HRIA methodology actually is a tool that serves rather than frustrates the interests of the government since trade policy development usually involves maximising the interests of the state.

In the absence of a clear integration of human rights norms and methodologies in the context of mainstream trade policy-development processes, it is useful to also look at the role of the Office of the Attorney-General (AG) as well as the Kenya National Commission on Human Rights (KNCHR) in relation to trade and human rights.

114 As above.

115 As above.

116 Interview with Peter Munyi (n 110).

117 As above.

6.2 Other relevant government departments

Ideally, the implementation of HRIA should be undertaken by legal offices in government. These offices actually have access to information regarding the nature of human rights obligations of the government. Suffice to note that the trade department may not be knowledgeable about or be able to competently interpret the full obligations of the government under human rights provisions in international, regional and national instruments. Therefore, where the Ministry of Trade fails, the other government departments supporting the trade policy development process should be able to act and provide appropriate guidance.

According to Ouma, when the government negotiates a trade agreement with other countries, the relevant line ministries often provide position papers in trade, health and agriculture.¹¹⁸ She notes that the legal issues relating to trade negotiations mainly are handled by the treaty department in the office of the Attorney-General of Kenya.¹¹⁹ It therefore appears that the AG has the final say on the legality of legislation or a trade agreement.

Accordingly, the AG usually is involved to ensure that the legal limits are observed in relation to the obligations of the government both at the international and national levels.¹²⁰ The AG office relies on the requests, proposals or documents presented to it by the Ministry of Trade. Thus far the office of the AG has yet to receive any request from the Ministry of Trade to evaluate a particular trade agreement from a human rights perspective, even though it is true that the capacity may be low in the department in relation to human rights.¹²¹ In this regard, the AG's office usually is focused on complying with the Constitution of Kenya and the World Trade Organisation (WTO) obligations and not human rights, including the constitutional human rights provisions.¹²² It is submitted that many government departments, including legal departments, are oblivious of their obligations in relation to trade and human rights. Indeed, Aywa notes that the stakeholders that usually participate in trade are not human rights specialists and, therefore, it usually is difficult for these people to understand human rights issues in trade. Thus far trade and human rights have been viewed separately.¹²³

Indeed, the sentiments expressed above in relation to the general perception in government about the separateness of trade and human rights is also reflected in the work of the Department of Justice under the AG's office. The Department is responsible for reporting on

118 Interview with Judy Ouma, 6 March 2018 (Former Trade Negotiator, Economist and USIU-Africa Lecturer).

119 As above.

120 Interview with Leah Aywa Baraza (n 104).

121 As above.

122 As above.

123 As above.

human rights violations in collaboration with other government departments including the KNCHR. Korir notes that there has been no complaint in relation to human rights and trade.¹²⁴ Korir further notes that the main problem is that the policy makers in many government departments are still operating under the old constitutional framework, which contained limited human rights, excluding socio-economic rights.¹²⁵ It therefore emerges that the quality of policy makers in government today has not adjusted to the new constitutional dispensation which also protects the right to health, including in a trade context.¹²⁶ The link between human rights and trade remains unclear for many officials in the Department of Justice.¹²⁷

However, taking into account the above process of trade negotiations, which involves various line ministries including the office of the AG, it is perplexing that the KNCHR, which is mandated to advise the government on human rights issues, plays no active role to support the office of the AG.¹²⁸ At the moment, even the relevant economic, social and cultural rights department under the KNCHR is yet to roll out a specific programme on trade and human rights, and it admits that it has not in the past collaborated in the area of pharmaceutical trade policies with government departments.¹²⁹ The KNCHR, however, currently focuses on business and human rights, especially focusing on extractive industries. Some of the activities being implemented include the putting in place of a national action plan and policies in this area.¹³⁰ The area of access to medicines has therefore been neglected by the KNCHR and, as such, the KNCHR has failed to push for and monitor compliance in terms of the implementation of the constitutional right to health, including the decision of the *PAO* case in anti-counterfeit legislation in Kenya.¹³¹

From the above it appears that the lack of input of the office of the AG, both the International Law Department and the Department of Justice as well as the KNCHR may have contributed to the low profile of human rights in the process of trade development and negotiations. The KNCHR, working closely with the office of the AG, may thus help advance the human rights agenda in trade, including the implementation of HRIA. However, the use of the HRIA tool still is best optimised if the Ministry of Trade and its agencies, including the

124 Interview with Stephen Kibet Korir on 3 May 2018 (State Counsel, Department of Justice, Human Rights Division).

125 As above.

126 As above.

127 As above.

128 Interview with Maina Mutua, 30 March 2017 (Head of ECOSOC Department, KNCHR).

129 As above.

130 Interview with George Morara, 14 March 2018 (Vice Chairperson, KNCHR).

131 As above.

ACA and KIPI,¹³² were capacitated to integrate the tool as a routine process in their work especially because pharmaceutical trade policies are in fact trade as opposed to health or human rights policies. This is the true spirit of the current constitutional framework, which binds all state and non-state officials and recognises that every state organ has a fundamental duty to observe, respect, protect, promote and fulfil the human rights protected under the Constitution.¹³³ This will also be in line with the current government priorities and interests, which include universal health coverage.

7 Conclusion

Developing countries are expected to implement their right to health obligations, including in the context of trade and specifically TRIPs Agreement implementation locally. The TRIPs Agreement affects many laws and policies at the national level, including pharmaceutical trade policies. In this regard, pharmaceutical trade policies enacted at the national level should therefore ensure that the TRIPs Agreement flexibilities are not compromised in line with the right to health norms and that adopting standards beyond what is required under the TRIPs Agreement is avoided. A failure to do so will have an adverse impact on access to medicines in the country and consequently violate the right to health. The best way to safeguard access to medicines locally, therefore, is to integrate the mechanism of HRIA in trade policy processes and implement them as a routine processes in trade in order to identify and resolve *beforehand* the adverse impact of pharmaceutical trade policies on access to medicines. The utilisation of the HRIA will ensure that trade imperatives do not supersede human rights obligations of the government, including with regard to access to medicines. The methodology adopted by each country should reflect the rights protected and countries where the right to health is protected should be encouraged to conduct RHIA, which is more specific on issues of access to medicines than HRIA, generally speaking. Lastly, trade policy makers should have adequate knowledge and the right attitude in relation to human rights and human rights methodologies to facilitate the implementation of HRIA. One way in which to adequately prepare trade policy makers both at the Ministry of Trade and beyond is to explain HRIA using market theories including rational theory of morality, which is a motivational theory, in order to achieve more acceptability of human rights tools and norms in the trade sector.

132 Telephone interviews with anonymous individuals at KIPI and ACA on 5 July 2018. In this interview it also emerged that these agencies do engage in trade policy development processes, especially in relation to the work they do, but still there is no clear appreciation of the link between human rights and trade.

133 Art 21(1) of the Constitution, 2010.

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A predisposed view: State violence, human rights organisations and the invisibility of the poor in Nairobi

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Summary

The article examines the challenges faced by human rights organisations in documenting cases of torture, focusing on the particular example of Kenya. The analysis is situated in the context of both widespread human rights violations and a vibrant human rights community in Kenya. There is considerable evidence that the urban poor are particularly vulnerable to torture and ill-treatment. However, the article suggests that human rights organisations often fail systematically to document the experiences of survivors living in conditions of poverty. The empirical material for this article was produced during three stages of data collection between May 2014 and September 2016, including a household survey examining

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exposure to torture and ill-treatment in an informal settlement and in-depth interviews with human rights practitioners, survivors and members of the community. The authors focus on the particular case of torture and ill-treatment rather than wider forms of state violence, such as extra-judicial killings, although the two often overlap. The aim is not to provide a legal analysis of mechanisms around the prevention of torture and ill-treatment. Rather, it is to provide a sociological and anthropological analysis of the obstacles to the effective human rights documentation of violations experienced by the urban poor. The article argues that three structural predispositions create considerable challenges in the documentation of torture and ill-treatment. These are limits to socio-spatial and institutional reach; the privileging of legal accountability; and a focus on the 'good victim'. In the conclusion the article sets out some implications of the research findings, including the strengthening of alliances with non-human rights groups, the privileging of protection over legal accountability, and the importance of a 'victim-centred' approach.

Key words: *torture; poverty; Kenya; protection; survivors*

1 Introduction

The body of Willie Kimani, a human rights lawyer representing a person who had laid a complaint against the police, was found in a river one week after he had disappeared along with his taxi driver and his client. Kimani and his client were on their way back from a court appointment. Kimani, his client and their driver were tortured before being killed. Many human rights organisations put all else aside and organised a demonstration demanding that the authorities stop extra-judicial killings. The demonstration featured the dramatic use of red-stained white T-shirts and three white coffins. This occurred in July 2016, and arguably was the first time that human rights organisations had gone to the streets on such a scale since the promulgation of the progressive Constitution in 2010. According to some activists, it was time for Kenyans to 'take back our streets'. The Law Society of Kenya told *BBC News* that Kimani's death was a 'dark day for the rule of law in Kenya'.

Three years previously Dennis was the victim of a vicious attack by the police. In 2013, around the time of the national elections, he was arrested with three of his friends. At the time of the arrest, Dennis was 29 years old and lived in South Eastleigh, working as a casual labourer. The young men were taken to different police stations. Dennis was tortured 'to say what he didn't know', as he put it. He was also injected with some substance. Dennis surmised that the purpose of the arrest and the ill-treatment was to intimidate the young men into not participating in any public demonstration. After a few days, Dennis was taken to hospital, treated for his injuries at no cost (a social worker helped him waive the bill) and sent home in his bloody clothes and with KSH 200. At the time he was interviewed as part of

this research project in September 2015, he still was not able to walk. Dennis's case did not become a nationally-recognised human rights case, even though his case was later picked up by local paralegals who made contact with a prominent human rights organisation. However, Dennis was fortunate. The three friends with whom he had been picked up, who also were young and underemployed members of the urban poor, all died in police custody.

There are many differences between the two cases above. However, what interests us in this article are the differences in terms of how human rights organisations dealt – and did not deal – with them, and what that might tell us about the potential and limits of human rights work in conditions of entrenched poverty and violence. We want to explore why human rights organisations 'missed' Dennis's case. We suggest that this was not simply a case of 'bad luck', but that it occurred in the context of a wider predisposition which means that human rights organisations systematically fail to document the forms of torture and ill-treatment experienced by the poor. By predispositions we mean the existence of a number of structural and conceptual factors working against cases such as that of Dennis being followed up by human rights organisations. This is an issue that goes well beyond Kenya. As the UN Special Rapporteur on Extreme Poverty and Human Rights has stated: 'When the situation of people living in poverty is addressed in development or human rights frameworks, their civil and political rights are often completely ignored' and, as a result, human rights work can fail to 'address the distinctive ways in which people living in poverty are affected by police brutality'.¹ While human rights organisations are aware that their documentation of state violence only represents the 'tip of the iceberg' and, more particularly, leaves out the experiences of many people living in poverty, they can find it hard to address the gap.² This article attempts to identify some possible reasons as to why that is the case. We ask what the obstacles are that prevent the poor from being 'seen' by human rights organisations, and how the inability to see them impacts on human rights work in urban Nairobi.

This analysis is situated in a context of both widespread human rights violations and a vibrant human rights community in Kenya.³ The violations by successive governments, since colonial times, through the Kenyatta and Moi regimes and to the present, as well as the history of the Kenyan human rights community, have been

1 P Alston 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (2017), <http://undocs.org/A/72/502> (accessed 30 October 2019).

2 See also N van Stapele "'We are not Kenyans": Extra-judicial killings, manhood and citizenship in Mathare, a Nairobi ghetto' (2016) 16 *Conflict, Security and Development* 303.

3 GR Murunga & SW Nasong'o 'Bent on self-destruction: The Kibaki regime in Kenya' (2006) 24 *Journal of Contemporary African Studies* 1.

explored and critiqued by several scholars.⁴ A prominent example of the critique is Mutua and the other contributors to the important volume on human rights non-governmental organisations (NGOs) in East Africa.⁵ This body of scholars criticises human rights organisations for having a ‘saviour’ complex and for being culturally irrelevant. While this analysis often is insightful, it is also important to acknowledge the role that civil society organisations – often with large elements of local ownership – play in the process of strengthening democracy, the rule of law and social justice.⁶ This broader discussion of Kenyan human rights NGOs informs our analysis, but we want to adjust the terms of engagement to focus explicitly on the forms of violence, the types of perpetrators and the types of victims that human rights documentation brings into the picture. Hence, we want to explore and understand human rights through their practices of ‘seeing’ and counting human rights violations.

Our goal here is not to serve as an indictment of human rights organisations in Kenya. All the human rights organisations interviewed for the purposes of this article achieved a great deal with limited resources and under great pressure – and most often were brilliantly committed. What we suggest instead is that the social and spatial position of human rights organisations, their focus on particular forms of accountability, and their understanding of appropriate forms of victimhood, at a practical level, stood in the way of them being able to ‘see’ the poor.⁷ This might be put differently: It was not simply the fact that an act of violence had occurred that helped it to become a human rights issue. Instead, for that to happen, a range of different features had to be in place. In particular, the victim had to be relatively easy to reach for human rights groups, and be seen as a viable case for criminal prosecution or other forms of legal accountability. Willie Kimani lived up to these criteria; Dennis did not.⁸

At this point an important conceptual issue needs to be addressed and unpacked, namely, the issue of ‘seeing’. Analytically, and in human rights terms, what does it mean to ‘see’ something? As

4 D Anderson *Histories of the hanged: The dirty war in Kenya and the end of empire* (2005); KG Adar ‘Assessing democratisation trends in Kenya: A post-mortem of the Moi regime’ (2000) 38 *Journal of Commonwealth and Comparative Politics* 103; Van Stapele (n 2).

5 M Mutua *Human rights NGOs in East Africa: Political and normative tensions* (2009).

6 Murunga & Nasong'o (n 3); W Mutunga *Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997* (1999); Van Stapele (n 2); J Rasmussen & D Omanga ‘People’s parliaments in Kenya: Public oral debate and political participation from the streets of Eldoret and Nairobi’ (2012) 2 *Politique Africaine* 71.

7 We present a parallel, more global argument based on research conducted in Kathmandu, Dhaka and Nairobi (S Jensen et al ‘Torture and ill-treatment under-perceived: Human rights documentation and the poor’ (2017) 39 *Human Rights Quarterly* 393).

8 Conceptually, this analysis draws on S Jensen & H Ronsbo *Histories of victimhood* (2014).

indicated above, whether a particular case is seen as a human rights violation is not merely a matter of it being made known. Dennis's case was known to paralegals and they had informed a national human rights organisation. However, it still failed to become a case that human rights organisations were able to act upon. One way to approach this is through Cohen's seminal work on what he calls 'states of denial'.⁹ Cohen's notion of denial involves what he calls a moral paradox of knowing and not knowing at the same time. For Cohen, denial is both an individual and a social practice of not wanting to see, or not being able to see and turning a blind eye. For Cohen, these forms of denying presume knowledge about the violation at some level. The human rights organisations that were interviewed for this research study know in some specific way, but cannot or will not (often for perfectly good reasons) respond in any great measure to the violations. In her insightful review, Moon suggests that human rights documentation and advocacy are closely interlinked because knowledge must always be tied to advocacy within human rights organisations.¹⁰ One therefore needs to ask what 'seeing' implies and why certain violations can be seen and acknowledged while others are not substantially recognised by human rights actors.

We focus on the particular case of torture and ill-treatment, rather than wider forms of state violence, such as extra-judicial killings, although the two can often overlap, and indeed they did in the research. Our analysis, however, not only concerns torture and ill-treatment as defined in international legal frameworks. In real life, on the ground for victims and for local human rights organisations, it often is difficult to distinguish between acts of torture and killing, as the case of Dennis indicates. In this way, we use the case of torture and ill-treatment as a privileged access point for understanding larger issues around documenting and intervening in relation to human rights violations against the poor. What follows is not a legal analysis of mechanisms around the prevention of torture and ill-treatment. Rather, it provides a sociological and anthropological analysis of the obstacles to the effective human rights documentation of violations experienced by the urban poor, with a particular focus on the human rights categories of torture and ill-treatment.

The remarks above all assume that the poor are particularly vulnerable to torture and ill-treatment. We often associate torture and ill-treatment with particular forms of violence, involving state officials dragging political activists into dark dungeons and torturing them. While these forms of violence certainly occur, as Kimani's case illustrates, there are also many incidents that count as torture and ill-

9 S Cohen *States of denial: Knowing about atrocities and suffering* (2001); S Cohen 'States of denial' (2008) 154 *RSA Journal* 48.

10 C Moon 'What one sees and how one files seeing: Human rights reporting, representation and action' (2012) 45 *Sociology* 876.

treatment under the UN Convention Against Torture (CAT) that are more 'everyday' and 'mundane' occurrences, linked, for example, to extortion and harassment of poor and marginal groups by police officers or other public officials.¹¹ According to a recent report by our research partner in Nairobi, the human rights organisation Independent Medical and Legal Unit (IMLU), close to one in every third Kenyan (30 per cent) has been subjected to ill-treatment during the past four years.¹² This is an increase of almost 30 per cent since the similar national survey conducted in 2011.¹³ The police committed 78 per cent of these violations. Importantly, only 28 per cent of the incidents were reported to a public authority. The low levels of reporting state violence to human rights organisations were also established in a survey conducted in three informal settlements in Eastern Nairobi.¹⁴ We return to the survey below.

The empirical material for this article was produced during three stages of data collection between May 2014 and September 2016. The research study began with a mapping of the organisations engaged in documentation of torture and ill-treatment in Nairobi. On the basis of the mapping, we interviewed staff from nine Kenyan NGOs, three international non-governmental organisations (INGOs), one civilian-based organisation (CBO), one state organisation and one media organisation about the aims, results and difficulties in their documentation practices. The second stage involved a quantitative survey in one low-income area in Eastern Nairobi. This particular area was selected as IMLU, the partner in the research, had connections to a paralegal organisation. This connection proved essential to ensure access to the informal settlement areas. Designed as a household-based victimisation survey, it covered socio-economic issues, social capital, exposure to torture and ill-treatment, perceptions of risk of torture and ill-treatment, and justice-seeking behaviour. A team of five enumerators assisted by five paralegals carried out 500 structured

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- 11 While the Convention Against Torture distinguishes between torture and cruel, inhuman and degrading treatment, all violations meeting certain criteria fall within the Convention. In this article we refer to cruel, inhuman and degrading treatment under one as ill-treatment. Hence, in our analysis ill-treatment is also a legal category under CAT. In practice, this will always involve the participation, consent or acquiescence of a public official. For a discussion of these categories, see ZU Arefin Choudhury, S Jensen & T Kelly 'Counting torture: Towards the translation of robust, useful and inclusive human rights indicators' (2018) 36 *Nordic Journal of Human Rights* 132.
 - 12 The Independent Medical and Legal Unit (IMLU) is a partner to the research project on which this article is based and has been involved in the conception of the project along with its implementation and its Nairobi after-life of advocacy. IMLU 'National Torture Prevalence Survey Report' 2016.
 - 13 IMLU 'National Torture Prevalence Survey Report 2011'.
 - 14 This research is funded by DfID, ESRC and DIGNITY-Danish Institute against Torture. It explores human rights documentation of torture and ill-treatment in low-income countries. It explores human rights documentation among the poor in Dhaka, Kathmandu and Nairobi. For more detail, see <https://torturedocumentationproject.wordpress.com/> (accessed 30 October 2019).

interviews during March and April 2015.¹⁵ The third stage consisted of interviews with identified victims among respondents such as Dennis. In this way, the qualitative interviews were embedded within the survey and not accidentally identified. The combination of these research techniques allows us to produce different perspectives on experiences of torture and ill-treatment, and triangulate against the information produced through human rights documentation.

We organise our argument in this article in five parts. After this introductory part, we describe in more detail the context in which the research has been carried out with regard to violence and the human rights framework, in order to map out what we consider to be the under-perception by human rights actors of state violence against the poor. In parts 3 to 5 we explore in turn each of the three predispositions we have identified, namely, socio-spatial and institutional predispositions; a predisposition defined by privileging legal accountability; and a predisposition based on notions of who constitutes the good victim. In the final part we conclude our analysis by suggesting a need to consider in more detail how to overcome the predispositions and thereby deepen and consolidate human rights work in Kenya among the poor.

2 Human rights and violence in Kenya

The post-election violence of 2007 and 2008 constituted a watershed moment in Kenya. One of the effects of the violence was work on a new Constitution that was adopted in 2010 and arguably became one of the most progressive constitutions worldwide with a wide range of legal and institutional protective mechanisms. To a large extent, the Constitution also provided the perfect rallying point for many human rights organisations. Torture and ill-treatment were central issues dealt with during the discussions around the Constitution. Articles 25, 26 and 29 guarantee the right to life and the absolute prohibition of torture. Following the promulgation of the new Constitution, torture has been prohibited by the National Police Service Act 2011 (revised in 2014); the Kenya Defence Forces Act 2011; the National Intelligence Service Act 2012 (revised in 2014); the Chiefs Act 1998 (revised in 2012); and the Children's Act 2010 (revised in 2010).

However, despite the criminalisation of torture in these Acts, the ratification of the UN Convention Against Torture, and the well-coordinated advocacy by human rights actors of an anti-torture Bill, the Prevention of Torture Act – which defines and criminalises torture and establishes a legal and institutional framework to support victims of torture – were only passed into law in April 2017. Furthermore, the government in 2013 passed a counter-terrorism Bill that gave the

15 For the full report, see P Kiama et al 'Violence against the urban poor in Nairobi' (2016), <https://torturedocumentationproject.wordpress.com/> (accessed 30 October 2019).

police wide-ranging powers to extract information. As the perceived and real threats from Al-Shabaab became more pronounced, more counter-terrorism legislation and state practices have been legitimised in the name of the war on terror. For instance, the police have made use of the counter-terrorism legislation in the security operation Usalama Watch where they arrested thousands of people in a Somali-dominated suburb, and held more than 400 'suspects' in custody and charged approximately 70 persons with various offences.¹⁶

The 2010 Constitution also led to the establishment of the Independent Policing Oversight Authority (IPOA) – a rare case of a civil oversight authority for the police in Africa. It was introduced with the new Constitution, with the mandate to carry out oversight of the entire police system. IPOA started operations in June 2012. It has the power to investigate; recommend prosecution upon investigation; monitor policing operations; review or audit investigations carried out by the Internal Affairs Unit of the NPS; conduct inspections of police premises, detention facilities; and also review patterns of police misconduct with a view to making policy and institutional changes. IPOA works closely with the National Police Service Commission (NPSC), another new institution with civilian influence on the recruitment, training, disciplining and promotion of police officers in Kenya. The Independent Policing Oversight Act (2011) stipulates that IPOA has the responsibility of investigating any death or serious injury suspected to have been caused by a member of the police. Following this mandate, it has published critiques of the police work and it can open closed police files to investigate the quality of evidence used in court cases.¹⁷ In many ways, IPOA has been a success in terms of establishing oversight of the police. Despite the justified acclaim, IPOA is also vulnerable. It receives low government funding and relies heavily on donor support (bilateral aid agencies and the United Nations Office on Drugs and Crime (UNODC)) and employs a mere 25 investigators.¹⁸

Police misconduct remains prevalent. In 2012 IPOA conducted a baseline survey with 5 082 households and 515 police officers across the country, which revealed that 33 per cent of the respondents had experienced police misconduct, including assault, falsification of evidence, bribery and the threat of imprisonment in a 12-month period.¹⁹ A high level of police misconduct was also established in our 2015 survey in Nairobi's Eastlands where 41 per cent of the 500 respondents reported experiences of violence in the household with

16 IPOA 'Monitoring Report on Operation Sanitization Eastleigh Publicly known as "Usalama Watch"' (2014).

17 IPOA 'Baseline Survey on Policing Standards and Gaps in Kenya' (2013).

18 KR Hope 'Civilian oversight of the police: The case of Kenya' (2009) 1 *The Police Journal: Theory, Practice and Principles*; DL Kivoi & CG Mbae 'The Achilles heel of police reforms in Kenya' (2013) 2 *Social Sciences* 189.

19 IPOA 2013 (n 17).

police officers committing 26 per cent of the incidents.²⁰ Furthermore, and according to Kenyan human rights institutions and NGOs, in the past six years the number of extra-judicial killings involving Kenyan police and security forces is in the high hundreds. IMLU has recorded that the police killed 97 people in 2015. According to a social scientist working in Mathare, a large slum area in Nairobi, a conservative estimate is that at least one young man was killed every week between January 2013 and December 2015 in the area, and activists in Korogocho, another Nairobi slum notorious for crime, have estimated that police officers killed 25 young men in 2015 in that particular area.²¹

These seemingly contradictory trends – intractable state violence and the development of a strong human rights culture – may be indicative of a Gramscian ‘war of position’ between conflicting senses of emergency; one that focuses on the need to curb state violence and one that focuses on the threats from crime and terrorism. Hence, while people in the cited surveys and reports are well aware of police violence and Kenyans generally view torture as ‘bad’, 57 per cent of the population approve of the use of torture in relation to national security.²² Likewise, while many Kenyans would express horror at the extra-judicial killings of young men in the slums, the fear of crime often legitimises such slayings. These seemingly contradictory points of view were captured in interviews from our survey sites where women, mothers of endangered young men, expressed gratitude towards one particular police officer because of his rough style, including the execution of criminals, *and* because he issued warnings before shooting.²³

There is a vibrant human rights community in Kenya – particularly in Nairobi – and this community is well aware of the widespread human rights abuses perpetrated against the general Kenyan population, including the many living in urban slums. The question then arises as to why these same human rights organisations still have difficulty in ‘seeing’ violations against the poor such as Dennis. This is the subject of the following three parts.

3 Spatial, social and institutional predispositions

One way in which to start unpacking the predispositions against documenting torture against the poor is simply to map human rights organisations in relation to the location of the urban poor. Most national NGOs have head offices in Nairobi and operate through

20 Kiama et al (n 15).

21 Van Stapele (n 2).

22 Amnesty International ‘Stop torture global survey: Attitudes to torture’ (2014).

23 L Gudmundsen, LV Hansen & S Jensen ‘Gendered violence in informal settlements in Kenya’ in S Jensen & M Andersen (eds) *Corruption and torture: Everyday policing of the urban poor* (2017) 95.

offices in the main towns (for instance, Mombasa, Nakuru and Kisumu) where they work with community-based organisations and local NGOs. Some organisations such as IMLU have a network of monitors to provide a link between victims and themselves. IMLU then refers victims to the nearest *pro bono* lawyer, doctor or psychologist. Within the human rights community, this network structure has the advantage that the monitors can operate in an informal manner so as not to attract too much attention. However, there are doubts as to the reach of this network. As a senior human rights activist puts it, 'it is not entirely clear when we say we have a network, what we mean by that. Who is in it and how strong are those relationships?' This uncertainty arguably is also a question of spatial make-up. The NGO offices are often located in middle-class areas, especially in the areas around Westlands and Kilimani. This is a considerable distance away from potential victims among the poor living in informal settlements. Many human rights organisations also rely on people coming to their offices to report violations. However, the cost of travel from Eastlands to Westlands and the time spent often constitute prohibitive barriers to reporting. As our survey indicated, very few people living in the slums would even know about human rights organisations, let alone where they are located.²⁴ For instance, when we carried out the survey people interviewed would not know of the existence of the paralegal organisation with which we worked but they would know the names of individual members, suggesting that people's relationships with structures often are personalised relations.

Apart from the spatial outlay of Nairobi, space plays another role in that many human rights organisations literally are turned towards the UN in Geneva, the African Commission on Human and Peoples' Rights (African Commission) in Banjul and the 'international community', more broadly. As is the case with the geographical structure, this is hardly surprising. Most human rights organisations – and even state institutions such as IPOA – rely heavily on foreign funding. As part of the realisation of rights-based development, most foreign donors focus on the consistency between interventions and international conventions such as the UN Torture Convention, the Convention on the Rights of the Child (CRC), or the African Charter on Human and Peoples' Rights (African Charter).²⁵ Many national human rights organisations mirror the structure of international and regional human rights practices, and are highly specialised in specific areas of human

24 Kiama et al (n 15).

25 The African Commission on Human and Peoples' Rights adopted General Comment 4 on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5), 21st extra-ordinary session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia. The General Comment addresses the obligations to provide effective redress; to ensure rehabilitation; to protect against reprisals; offers guidance on the right to redress within the context of sexual and gender-based violence, and violence carried out by non-state actors.

rights documentation. The Kenya Human Rights Commission (KHRC) focuses mostly on political violence; IMLU leads on torture and the rehabilitation of Kenyans; the Refugee Consortium of Kenya leads on torture and the rehabilitation of refugees; the Legal Resource Foundation leads paralegal work and civil society documentation in detention facilities; Kituo Cha Sheria leads on labour and housing rights; The Cradle on children's rights; and the Federation of Women Lawyers (FIDA) and the Coalition on Violence Against Women (COVAW) on women's rights. There is a similar specialisation among INGOs. The Centre for Victims of Torture focuses on the rehabilitation of refugees; the International Justice Mission focuses on sexual violence against children; and Amnesty International Kenya on evictions. The high level of specialisation and division of labour encourages cross-collaboration on documentation, advocacy and legislation as well as the referral of clients for services. For example, KHRC has since 2009 led an advocacy group around the anti-torture legislation and IMLU hosts the Police Reform Working Group consisting of 15 NGOs that have come together to speak with one voice, as they put it, on matters such as the recruitment and vetting of police officers and extra-judicial killings. NGOs also share documentation for advocacy at the international level and INGOs share documentation on sensitive issues such as extra-judicial killings with IMLU, Amnesty International Kenya and various social justice centres for advocacy in Kenya.

Importantly, most human rights work does not take place with direct textual reference to international and regional human rights mechanisms. A major part of the documentation on torture and ill-treatment on the ground is carried out by paralegals that are often, but not always, recruited from the communities within which abuses are taking place. However, some NGO staff stated that they faced a number of difficulties in relation to the paralegals. Although many human rights organisations might prefer to recruit from within affected communities, there are important challenges in doing so. For one, there may be few people with the desired skills living in the very poorest communities, and once they obtain the skills, they often move out. Furthermore, when paralegals live in the community they often face the risk of reprisal if they report abuse. A further key dilemma is the gap between the skills required to be a paralegal and the allowances available for paralegal work. NGOs that were interviewed preferred paralegals and other documenters with secondary education and a fluency in English reading and writing. Yet, the organisations can offer only low allowances. Besides the financial constraints, which are difficult to overcome as donors are reluctant to pay allowances at community level, some organisations admitted that there was little meaningful feed-back from the head offices to the 'people on the ground'. Both issues were confirmed by one of the paralegal units that we interviewed that referred cases to civil society organisations and received no feed-back or assistance on the cases, not even when it had been promised.

The issue of language points to one last structural issue relating to the inability to 'see', namely, class. In Nairobi language maps on to class in intricate ways with Kiswahili and English being the dominant languages of the elite. To say that class matters probably is not problematic, but what does it mean for the engagement of human rights organisations with the urban poor? We may use our own research process to illustrate some points. We decided to work in South Eastleigh as it was one of the places in Nairobi where IMLU had stronger relations through a paralegal organisation. We contracted an independent consultancy company to carry out the survey and agreed that the paralegal organisation would assign one member to each enumerator (of which there were five) to ensure the safety of the enumerators as well as to help establish contacts with residents who are justifiably wary of people with paper and pen. After conducting the survey, their experiences were collected in a survey process report.²⁶ The report describes language problems where English and Kiswahili were not sufficient and where enumerators needed translation from Kikuyu, Luo or Shen. It also describes the 'hostile residents'. For instance, one male enumerator reported:²⁷

Some respondents I approached in the field for interviews were unreceptive in that they did not give me a chance to explain to them what the research was all about but rather responded with sentiments that they are used to 'people who carry files around' [meaning researchers] and that they don't get any help after the surveys are conducted.

He, along with other enumerators, also discussed the harsh weather conditions, or probably the lack of air-conditioning, along with bad sanitation. However, the report states that '[t]he enumerators handled it [the sanitation] with grace'.²⁸

The enumerators carried out their work with relative competence and their account shows that they were conscious of their foreignness ('we stood out') and verbalised it in several instances as if they were in a foreign land, which of course they were in many ways. One of their most important reflections about this 'other' land has a direct bearing on our analysis. It is not only human rights organisations that fail to see violence against the poor. Often residents also fail to see that what they experience warrants attention or even the label of violence. It simply is what is to be expected. A female enumerator reflected as follows on this dilemma:²⁹

The respondents reflected a lack of knowledge about their rights as human beings, the laws, regulations and procedures related to the various acts of violence. Furthermore, they seemed to lack knowledge on what can be regarded as violence and the extent to which the various acts can be

26 Intermediaries in Development (IDC) 'Study on comparative analysis of the documentation of violence and ill-treatment in low-income countries – Nairobi-Kenya. Survey Analytical Report' (2015).

27 IDC (n 26) 12.

28 IDC 8.

29 IDC 19-20.

considered as violent. For example, most respondents considered being 'roughed up', slapped or punched around by police as 'normal' – these are things that the police do ... Their lack of knowledge on what violence is, and the mandate of the police seemed to make them highly vulnerable to the acts of violence.

In the quote, she reflects on when and how residents in the survey area perceive something as violence and concludes that they see only events that lead to serious impairment as violent events. Apart from the obvious sense of talking about the social and spatialised 'other', her remarks also reveal what we may call a predisposition on the part of victims, namely, the normality of violence. Hence, we may conclude that it is not only the human rights organisations that fail to 'see' violations against the poor, but it is also the poor that 'fail' to see what happened as a human rights violation. As in the case of language, the ability to see events through a human rights lens maps onto what we could term spatialised class distinctions.

In summary, spatial, social and institutional predispositions exist against human rights organisations 'seeing' violations against the urban poor. They are geographically and socially far removed from the slum areas and institutionally their attention often is turned towards inter-organisational collaboration and relations to the international world of human rights, leaving access to poor areas to struggling paralegals or to chance. Similarly, poor urbanites do not understand their afflictions as human rights violations. This is not a moral condemnation or assigning guilt to either human rights organisations or to the urban poor, but a reflection of the structural dilemmas of human rights work. Nonetheless, these dilemmas have consequences.

4 A predisposition for legal accountability

Just before dawn, three young women from Eastleigh were on their way to work when they were shot by the police. The police were chasing two alleged robbers who disappeared into the slum. Having lost their initial target, the police fired their guns and called for everyone in the area to lie down. While lying down, two of the young women were wounded. The police called for a local mini-bus driver to take the young women to hospital. After having been treated in hospital the women were discharged after one day. The police officers accused the girls of hiding the suspects, but did not press any charges.³⁰ A neighbour reported the incident to a member of a local paralegal organisation who lived in the vicinity. One woman was suffering from particularly serious wounds on her leg. After carrying out the initial documentation, the paralegal arranged for the women to be taken to IMLU for treatment and legal counselling. IMLU assisted the women to access medical services (over a two-month

30 This case was identified during the survey research.

period), carried out forensic documentation, psychological reports and rehabilitation plans.

As in the case of other human rights NGOs, IMLU requested the women to report the case to the police. The women had previously been too afraid to do so, but agreed to go to the police. When they entered the police station they saw the very police officer who had been implicated in the shooting and they became afraid. IMLU persuaded a lawyer to accompany them. The police were unwilling to register the case in the occurrence book and it took the *pro bono* lawyer another six months to get the officer in charge at the police station to accept the case for registration. After the women had obtained a police report and a P3 form (for the documentation of physical injuries), the police officers involved began threatening the girls that they would be charged with armed robbery if they pursued the case. The police officers also threatened the paralegals to a point where the latter had to move from the area for some months.

By the time the incident was reported to the police six months later, one of the young women had lost her job, her ability to rent a place, and she wanted 'treatment, justice, and compensation'. She had heard of people who had been compensated by the police and, in addition to the medical records at IMLU and the hospitals, two witnesses would support the case in court. In other words, the victim was initially confident that the evidence could lead to compensation for the injuries and lost income. However, police threats put an end to her hopes of compensation. Throughout the two-hour interview with members of the research team, she talked about the difficulty to secure a living and her fear of police officers, but little about justice in the form of holding individual officers responsible. The inability of human rights organisations to protect the victims (and the paralegals) from the police threats of reprisal removed her urge for legal accountability. Although the proof was available and the victim had hopes of compensation, the lack of protection was of greater concern to her than the prosecution of the perpetrators.³¹

This case is indicative of a wider pattern of police practice, oscillating between assisting women who have been hurt in their pursuit of criminals and their own violent practices, threats and intimidation in protecting themselves against prosecution. However, the case also illustrates how legal accountability is a central priority in the actions of human rights organisations. Again, this is not a criticism of human rights practice. In an interview, one and half years after the incident, one of the women was grateful to the paralegals and IMLU for the treatment and legal assistance that they helped her to access. Nonetheless, legal accountability – or enabling work around legal accountability – was central to the way in which the organisation acted. We will elaborate in some detail on the logic of legal

31 Jensen (n 7).

accountability before exploring the extent to which and how this might be part of a disposition against the urban poor.

The goals of criminal prosecution and reparations often dominate human rights documentation globally.³² General Comment 4 of the African Commission, for example, sets out in some detail that '[s]tate parties are required to establish judicial, quasi-judicial, administrative, traditional and other processes to enable victims to access and obtain redress'.³³ The implicit assumption is not only that such processes are crucial in terms of individual cases, but they can also serve to reduce future acts of torture and other crimes through ending cultures of impunity. The UN Convention Against Torture similarly requires that 'all acts of torture are offences under ... criminal law' and that states 'make these offences punishable by appropriate penalties' (article 4). Article 14 also requires states to ensure that a 'victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation'. This has been widely interpreted as implying legal forms of redress.³⁴ In this context, much time and effort are invested in training, networks and lobbying in order to further the aim of holding perpetrators to account and providing compensation for survivors. Hence, it is fair to say that legal accountability constitutes a central element in the way in which human rights organisations work.

There is nothing inherently wrong with focusing on legal accountability. In fact, it is part of the success of the anti-torture movement worldwide, and for good reasons. The model inherent in the fight for legal accountability and compensation may be summarised as follows: By ensuring that public officials are held to account we prevent impunity. This future public good is matched by an individual benefit for the victim in that proving legal accountability ensures the right to compensation.

However, the question arises as to how and to what extent this model predisposes against the needs of the poor. First, the model of legal accountability requires an investment of time and money, to the extent that local human rights organisations have limited resources to manage more than a few cases at any given time. Furthermore, it potentially comes with the price of not aligning with the wishes of the victims and residents in poor, urban neighbourhoods. To take the case of the three women set out above: While this case illustrates the power of the model, it is also fraught with uncertainties and possible misunderstandings. The three women were willing to engage in the process but as the case dragged on, the issues of protection (due to

32 Moon (n 10).

33 Para 21.

34 Eg, the 2016 ICTI Guidelines on the Documentation of Serious Human Rights Violations for Human Rights Defenders In Kenya recommends on page 4 that '[d]ocuments collected by NGOs can constitute an essential component of prosecutions, reparations, truth-seeking efforts or institutional reforms', <https://ssrn.com/abstract=2956514> (accessed 30 October 2019).

police threats) and survival (a lack of livelihood and shelter) took on a more acute form. Their needs in some ways aligned with the narrative of human rights accountability up to a point, after which the discrepancy became ever greater.

The situation has to be understood against a wider background of impunity and the widespread lack of trust that the Kenyan legal system can provide a measure of justice. Levels of intimidation against people reporting police abuse can be very high, and witness protection programmes are virtually non-existent.³⁵ Survivors and family members can, therefore, prioritise simply arriving home alive over legal forms of accountability. In our survey, only 30 per cent of respondents said that they would report incidents of torture and ill-treatment to the police.³⁶ Of those that actually had experienced incidents of violence, only 13 per cent had reported the incidents to NGOs or paralegals. Only 25 per cent of the respondents reporting incidents of violence to the police felt that 'justice was served'. Perhaps most importantly in terms of the arguments presented here, only 4,6 per cent of respondents to the survey said that they would report incidents of torture and ill-treatment to NGOs.

This does not mean that there are no local strategies to engage with police violence well beyond the model of legal accountability. Paralegals, human rights monitors and other 'people on the ground' that we have talked to provide legal first aid, that is, the initial documentation of a case, informing the victim about the legal process, and taking actions such as accompanying the survivor to report to a police station. This clearly is in line with or at least not opposed to human rights strategies of legal accountability. At community level, however, there is no legal competence to carry out litigation. Instead, there is a deliberate attempt to solve the issue 'before it becomes a case'. As one paralegal said, 'most NGOs prefer to take cases to court, but we don't believe in the court process for family law because women do not go to the dock to give witness against their husbands'. Instead, the paralegals use mediation such as alternative dispute resolution (ADR), where they interact with each party, inform them about the options on how to resolve the issue at hand – court or mediation – whereafter most people agree to go for mediation. These are disputes between relatives, landlord and tenants, and neighbours (between citizens), not between citizens and the state. The many cases resolved through mediation remain undocumented and, therefore, do not figure in statistics on human rights violations.

Paralegals and human rights monitors rarely employ mediation in allegations of torture and ill-treatment. However, mediation may constitute a different and complementary approach to human rights violations or police violence that is more in line with the immediate

35 Interview with human rights practitioner in Nairobi (6 May 2015).

36 Kiama et al (n 15).

needs of the poor in terms of their ability to live safely. If mediation were an option, perhaps more victims in poor neighbourhoods would come forward. This is not to suggest that the perpetrators of torture and ill-treatment should 'walk free', so to speak, but rather that the current focus on legal accountability only leads to few court cases. Such cases often involve well-known human rights defenders and not young men from poor neighbourhoods who have been severely beaten up by police officers. The fear of reprisal by police officers is an important obstacle to legal accountability, as we saw in the case of the three women. As an illustration, we took part in a one-day legal aid clinic in South Eastleigh in a community hall. Immediately prior to the meeting 'a killer police' was 'spotted around the area'. This 'sighting', according to those that did not dare face the danger, meant that only six people turned up.

In summary, while legal accountability is and has been central to address torture and ill-treatment globally it also privileges violations that can be legally documented with relative ease. This entails that a number of elements must be present, such as a victim who is willing to come forward and engage in a legal process, an organisation that has the capacity to engage with the matter (and no organisation can take on the number of cases that our research revealed in the three slum neighbourhoods in South Eastleigh alone) and much time and courage on the part of all parties, especially victims living in poor areas and local organisations such as the paralegals. These elements are seldom present. Even in cases such as this one where an organisation helps the victim to come forward, it is almost impossible to carry it through with legal accountability. Moreover, the victim's main concern may not be legal accountability but the ability to get on with his or her life.

5 The good victim

The third predisposition concerns the fact that the human rights movements tend to valorise torture victims as particularly heroic, often with good reason. Within this moral system, the political activist in a dictatorial regime assumes a privileged position. The claimed attributes of a 'good victim' are not only a reflection of suffering, but also the product of specific political contestations over moral deservedness.³⁷ A good example is the '56 ex-Kenya air force soldiers who were subjected to brutal torture following a botched *coup* attempt in 1982 in Kenya'. These soldiers approached IMLU 32 years after the event, and IMLU enrolled the survivors into its rehabilitation programme and wrote an article about the torture *sequelae* and the achievements of the IMLU group therapy. In this case, which resulted in compensation – the only compensation for torture ever to be paid

37 Jensen & Ronsbo (n 8).

out in Kenya – the victims were portrayed by many as true heroes, defending the nation and revolting against a past autocratic ruler. Yet, ‘good’ victimhood is more than a set of moral criteria. It also requires holding attributes that can be recognised by appropriate structures, above all by human rights organisations and legal institutions. Some types of torture survivors are easier, both morally and practically, to recognise as such.

The case of Willie Kimani, quoted at the beginning of this article, is an excellent case in point. It involved people who were widely respected for their work on human rights in Kenya. For example, the daily newspaper, *Standard Digital*, wrote the following obituary:³⁸

Kimani was an investigator at International Justice Mission (IJM) for one and a half years before joining IPOA where he majored in investigations on police brutality and sexual violence against children ... His passion for fighting for the protection of victims of torture and extra-judicial killings drew him to the Independent Medico-Legal Unit before he joined IPOA.

He was only 32 years old but his passion for the protection of those who had suffered state violence had enabled him to achieve admirable results. The KNCHR uploaded a signed statement – as part of a human rights coalition – that ‘Willie Kimani has dedicated his career to secure basic human rights and freedom for his fellow citizens’ and that he was ‘pouring his incredible passion into the fight for securing justice for the poor and transforming the criminal justice system’.³⁹

Another case, involving the slaying of Hassan Guyo, featured similar elements.⁴⁰ As in the case of Willie Kimani, the Kenyan National Commission for Human Rights uploaded a joint press release on the killing of Hassan Guyo that praised him for being ‘a prominent human rights defender’ and that ‘Mr Guyo was a human rights defender and a pillar in the realisation of human rights at the vast marginalised Northern Kenya region’.⁴¹ In 2013 Guyo was shot in the back by members of a military unit at a checkpoint. He had been arrested several times prior to this fatal encounter and had kept records of his torture and ill-treatment by the Kenyan security forces. The Kenyan state or Kenyan human rights organisations had not made any significant effort to provide him with protection. At first, the military

38 Standard Digital 2 July 2016, <http://www.standardmedia.co.ke/article/2000207312/slain-lawyer-willie-kimani-investigated-police-brutality> (accessed 30 October 2019).

39 ‘Enforced disappearance of Willie Kimani, a human rights defender together with Josephat Mwenda and Joseph Muiruri’ HNCHR 29 June 2016, <https://www.knchr.org/Portals/0/Statements/Joint%20Press%20Release%20-Disappearance%20of%20Willie%20Kimani%20et%20al.pdf?ver=2016-07-15-112136-167> (accessed 30 October 2019).

40 Jensen (n 7).

41 Joint Press Release on the Killing of Hassan Guyo, a Human Rights Defender, by Security Agents in Moyale, Kenya, 16 August 2013, <http://www.knchr.org/Portals/0/PressStatements/Hassan%20Guyo%20statement%2016%20August%202013.pdf?ver=2013-08-16-172326-527> (accessed 30 October 2019).

and the police denied all knowledge of the incident. After intense media coverage, the military was forced to conduct an inquest. The inquest revealed that Guyo had been hit by a militarily-issued bullet. The Kenyan National Commission of Human Rights and a group of human rights NGOs provided evidence to the coroner.

In some ways, Hassan Guyo was a 'perfect victim'. He had previously been tortured several times without his case being given a high profile by the human rights organisations. The police in Kenya shoot people every day. Yet, Guyo's death elicited a particular media, human rights and state response. Why might this be? First, on a sombre note, our material indicates that – in Kenya and beyond – human rights cases can be easier to pursue once the victim is dead. Furthermore, survivors of torture can be easier to document once they are also murder victims. Living survivors are often too scared to seek redress. In contrast, the dead cannot run away and their bodies are (sometimes) available for documentation. There is no need to balance legal justice with a fear of reprisals. Institutionally, the recognition of Guyo (and Kimani) as victims was also made possible by the existence of legal and political procedures for recognition – forensic reports, a magistrate's court, a human rights community, interested journalists – which, as we have argued above, are not equally distributed. Guyo's recognition was further enabled by his status as a human rights defender. This was what mobilised human rights interest and the press.

The two young women who were accidentally shot by a police officer on their way to work were 'good victims' in the sense that they were innocent, young women making a living through hard work which included going to work at sunrise. The institutional recognition was enabled through especially the medico-legal reports and the victim and witness statements. Although the proof was available and the victim had hopes of compensation, the lack of protection was of greater concern to her than the prosecution of the perpetrator. In a meeting with the involved paralegals, one said that 'in most cases, people die from police shooting – the problem for the girls was that they survived'.⁴² However, due to the duration of the case, the fear of the women due to the threats of the police and the hard work needed to be performed by cash-strapped NGOs, the women's case ended nowhere, neither in court nor with the satisfaction of redress and security for the girls.

The most common victims of torture and ill-treatment are young, indigent males such as Dennis whom we encountered in the opening pages of the article. Among the friends with which he was detained, he was the only one to return home and grateful to be alive, although he returned as a disabled person, being unable to walk, paralysed on one side of the upper body and suffering from lumps on his neck and back. It is illustrative that this case, involving one young man crippled

42 Interview with paralegals, 31 July 2014.

by torture and three others dead, has not been picked up by any human rights group or become the subject of international alerts and media campaigns. These four young men – and numerous others killed by the police – in the public eye are ‘bad’ victims. They are stereotypically linked to violence and crime, often perpetrating violence, which is also borne out in our survey where they were the most likely perpetrators. Some are involved in criminal activities and sometimes they terrorise neighbours and kin. For instance, in the area where we conducted the survey, one woman had on several occasions been terrorised on her way to work.⁴³ In what became the final straw, she was held up early one morning. When she had no money and the young men did not want her old cellular phone, she had to promise to find them another phone. Since then, she dared not use the same road and, consequently, her livelihood was compromised.

Despite the violence that young men sometimes visit on their fellow community members, there is also the realisation, at least among some community members, that the police specifically and unfairly target young men. In the same slum area where the woman terrorised by young men lived, another woman explained how she had to provide sexual services to the police as well as pay money to get her children released from jail and the very real dangers of death or torture. This kind of sentiment found expression in informal settlements. Here we found a mural with the heading ‘Our fallen soldiers’, with at least 20 names written below. All these young men had been beaten and killed by the security forces. While only some of them allegedly had been involved in criminal groups, none of the cases have been taken up by human rights groups and none of the cases appeared to have become the subject of international alerts and media campaigns. As another study on police violence in a neighbouring slum in Mathare has revealed, grassroots activists in informal settlements perceived a ‘gap’ between their aspirations and working practices and those of larger NGOs.⁴⁴ While the allegations levelled against young men often are substantial, this clearly should not deprive them of protection. However, they do present human rights organisations with complicated dilemmas. As poverty can push people into moral compromises, the distinction between victim and perpetrator seldom is clear-cut, especially among poor young males. Their poverty alone exposes them to accusations of criminality and deviancy, which is further aggravated by their age and gender. In other words, the often compromised lives of poor young men are more complex than the documentation of the accidental shooting of young women on their way to work or the lives and deaths of largely middle-class human rights activists such as Hassan Guyo and Willie Kimani.

43 Gudmundsen et al (n 23) 95.

44 PS Jones, W Kimari & K Ramakrishnan ‘Only the people can defend this struggle’: The politics of the everyday, extrajudicial executions and civil society in Mathare, Kenya’ (2017) 44 *Review of African Political Economy* 559 568.

6 Concluding remarks

This article explored the way in which human rights organisations in Kenya are predisposed against documenting and engaging with the violence against the (urban) poor in Nairobi. Based on a victimisation survey on the prevalence and nature of violence in three Nairobi slum neighbourhoods, interviews with human rights organisations and documenters as well as in-depth interviews with several victims of torture and ill-treatment, we concluded that there are at least three predispositions working against the poor. First, human rights organisations and the urban poor do not share the same social or spatial world, even if they stay in the same city. The two are often separated by insurmountable distances, and the poor often see no point in directly accessing human rights remedies should these be available to them. Second, human rights organisations are concerned with legal accountability whereas the poor – while no enemies of accountability – can also think of justice in different ways incorporating security, livelihood and shelter. Finally, human rights organisations often find it easier to work with what we may term ‘good victims’. This moral category often is off-limits to the poor who live complicated and morally-ambiguous lives.

Human rights organisations may find it difficult to reach survivors of torture and ill-treatment who live in poor communities. This is not an indictment of human rights organisations in Kenya or elsewhere. We understand these predispositions as rooted in structures beyond their control. However, while this clearly is the case, there are also avenues for addressing the poor in different ways that do not render them invisible or difficult to assist. Access to justice, for example, not always implies access to the courts. Legal accountability, in the shape of criminal prosecutions and redress, certainly is important, but this might not be the immediate priority for many survivors of torture. This realisation is making its way into, for instance, regional normative frameworks well ahead of global normative frameworks. Hence, the African Commission states the following in its General Comment 4 with regard to the victim-centred approach to redress after torture and ill-treatment:⁴⁵

A victim-centred approach to redress requires an analysis and full understanding of the harm suffered and of the victims' wishes. It needs to reflect their experiences and realities, so that the provided redress is responsive to their needs. States should ensure that victims have ownership of the redress process, and relevant actors providing redress are expected to work with the victims, and not on the victims.

Working more directly with the poor, and understanding the harm suffered and the victims' wishes, are of crucial importance. The predispositions outlined above affect the ability of human rights

45 African Commission General Comment 4 (n 25) para 18.

organisations to reach survivors of torture and ill-treatment in poor communities and suggests a need to rethink some approaches.

Through our analysis we see at least two possible implications for human rights work that must be taken into account by local, national and international human rights organisations and donors if they wish to design victim-centred interventions. First, legal accountability is not necessarily the place to start with human rights work. If one of the main reasons why survivors do not report their experiences is their fear of reprisals, it is necessary to consider protection even before the point of instituting a legal case. For people living in poor communities, protection, in the sense of feeling safe and secure, might also involve the ability to put a roof over their families' heads and to put food on their table. Now, for instance, protection usually is considered by human rights organisations a function of a legal process, but human rights organisations might also consider protection in relation to torture more broadly, also when there is no legal process. This is difficult work, and might involve thinking beyond the usual remit of human rights organisations, also in relation to funding that classically privileges legal accountability. However, a victim-centred approach is essential if human rights groups are to be enabled to bring about a measure of justice.

Second, and linked to the above, in order to respond to the forms of torture and ill-treatment experienced by people living in poverty, human rights groups could develop connections with the diverse grass-roots organisations that already work with poor populations, such as women's groups, savings groups, youth clubs, religious institutions and health organisations. Again, this may require redesigning funding schemes for human rights work. These organisations often do not think of themselves within narrow and legal 'human rights' terms but they may be interested in extending human rights protection given the right circumstances and incentives. They complement the work of paralegals as they not only often have a strong understanding of day-to-day life, but people living in poverty are more likely to trust them. Such organisations are well placed to identify victims and survivors and to provide the necessary support in the form of medical assistance, shelter and local knowledge.

Abolition of criminal defamation and retention of *scandalum magnatum* in Lesotho

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Summary

The Constitutional Court of Lesotho in the case of Peta v Minister of Law, Constitutional Affairs and Human Rights struck down the provisions of the Penal Code relating to criminal defamation on the basis that they violate the right to freedom of expression as envisaged in section 14 of the Constitution. The purpose of this article is to analyse the ramifications of the abolition. The article contends that while the boldness of the Constitutional Court is lauded, the commitment of Lesotho to join the global abolitionist movement is doubtful as the vestige of scandalum magnatum remains on the statute books. As such, the country may have to undergo a comprehensive review of the laws hampering the full realisation of freedom of expression, including the Constitution itself. After analysing the key cases on criminal defamation and other 'insult crimes', the article recommends that all 'insult criminal laws' be repealed. The cases studied show that these crimes invariably have been used selectively to protect the 'good image' of people with political status, not ordinary citizens. The article analyses the development of criminal defamation in Lesotho and its 'partial' abolition through the Peta case, and discusses how Lesotho's judicial abolition of criminal defamation features in the broader global wave of abolition.

Key words: Lesotho; abolition; criminal defamation; scandalum magnatum; freedom of expression; Constitution of Lesotho

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1 Introduction

The crime of defamation has formed part of Lesotho's common law since 1884 when the country was removed from the administration of the Colony of the Cape of Good Hope.¹ At the time, the law that was to be applicable in Lesotho was to be the law that 'as nearly as the circumstances of the country will permit, [would] be the same as the law for the time being in force in the Colony of the Cape of Good Hope'.² The common law that was applicable in the Cape was the Roman-Dutch common law,³ and was to be applicable in Lesotho, despite the resumption of direct rule over Lesotho (then Basutoland) by Britain.⁴ When the country gained independence in 1966 the common law of the country remained the same, and remains so under the current Constitution.⁵ The crime of criminal defamation thus has been part of Lesotho's criminal law ever since Roman-Dutch Law was received as the common law of Lesotho in 1884. However, it was not commonly used until recently. The crime of insult against the authorities that was common in Lesotho since independence was the crime of sedition,⁶ which often was used by politicians in government against other politicians in opposition or any perceived detractor of government,⁷ and was so despite the fact that the Independence Constitution envisaged the right to freedom of expression.⁸ The crime of sedition became popular in Lesotho even under the new Constitution of 1993. During all this time the entire criminal law in Lesotho was uncodified. It was not until 2010 that the country enacted the Penal Code, which codified the entire criminal common law of the country, including criminal defamation and other 'insult offences', namely, sedition, *crimen injuria* and offences against the royal family (*scandalum magnatum*).⁹ Similarly, this codification and

1 JE Beardsley 'The common law in Lesotho' (1970) 14 *Journal of African Law* 198; SM Poulter 'The judicial system of Lesotho' (1970) 3 *Comparative and International Law Journal of Southern Africa* 63; WCM Maqutu & AJGM Sanders 'The internal conflict of laws in Lesotho' (1987) 20 *Comparative and International Law Journal of Southern Africa* 377; AJGM Sanders *Internal conflict of laws in South Africa* (1990) 21.

2 Sec 2 General Law Proclamation 2B of 1884; see also S Poulter 'The common law in Lesotho' (1969) 13 *Journal of African Law* 127.

3 JH Pain 'The reception of English and Roman Dutch law in Africa with reference to Botswana, Lesotho and Swaziland' (1978) 11 *Comparative and International Law Journal of Southern Africa* 137.

4 LBBJ Machobane 'Perceptions on the constitutional future for the Kingdom of Lesotho' (1988) 26 *Journal of Commonwealth and Comparative Politics* 185.

5 See the Constitution of Lesotho, 1993.

6 Sedition Proclamation 44 of 1938; see also *R v Monyau C of A (CRI)* 11/04, <https://lesotholii.org/ls/judgment/high-court/2005/88> <https://lesotholii.org/node/2015> (accessed 1 November 2018); *Molapo v R* (1999-2000) LLR-LLB 316.

7 *R v Sekhonyana (CRI)\T\36\94* (unreported), <https://lesotholii.org/node/2015> (accessed 1 November 2018).

8 Lesotho Constitution, 1966.

9 See sec 2 of Penal Code Act 6 of 2010.

retention of 'insult offences', as they were under common law, took place despite section 14(1) of the new Constitution, which provides:

Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

After 1993 the crime of defamation has been used sparingly.¹⁰ It was not until 2018 that the Constitutional Court division of the High Court of Lesotho in the case of *Peta v Minister of Law, Constitutional Affairs and Human Rights*¹¹ struck down the criminal defamation provisions in the Penal Code¹² on the basis that they violated section 14(1) of the Constitution. This decision has been widely received internationally as a positive step for the country towards the implementation of the global call for states to abolish the crime of defamation.¹³ The government had an opportunity to appeal the decision to the Court of Appeal but elected not to do so, thereby yielding to the pressure to join the emerging abolitionist movement.

However, this judicial abolition of the crime of defamation in Lesotho is not complete while *scandalum magnatum* – the crime of defaming the King – and other insult crimes remain on the statute books. In fact, historically and philosophically, *scandalum magnatum* is the doctrinal foster-mother of criminal defamation.¹⁴ From its conception, the crime was intended to protect the reputation of kings and the nobility.¹⁵ Thus, rather than being a remedy for reputational damage – which is an aspect of human dignity – it was intended to protect the good image of the nobility. Under the Lesotho Penal Code,¹⁶ the crime of defamation and the *scandalum magnatum* (offences against the royal family) are created separately.¹⁷ The Court in the case of *Peta* abolished only the former; the latter remains on the

10 It was used mainly in those isolated cases at magistrate's court level where the government was persecuting its perceived detractors.

11 CC11/2016 (unreported, decided on 18 May 2018), <https://lesotholii.org/lj/judgment/high-court-constitutional-division/2018/3-0> (accessed 11 November 2018).

12 Act 6 of 2010.

13 Committee to Protect Journalists (CPJ) 'Lesotho Constitutional Court declares criminal defamation unconstitutional' 22 May 2018, <https://cpj.org/2018/05/lesotho-constitutional-court-declares-criminal-def.php>; Southern African Litigation Centre (SALC) 'Lesotho: Challenging the offence of criminal defamation' 21 May 2018, <http://www.southernafricalitigationcentre.org/2018/05/21/lesotho-challenging-the-offence-of-criminal-defamation/> (accessed 20 April 2019).

14 VV Veeder 'The history and theory of the law of defamation' (1903) 3 *Columbia Law Review* 546.

15 DM Loades 'The theory and practice of censorship in sixteenth century England' (1974) 24 *Transactions of the Royal Historical Society* 141.

16 Act 6 of 2010.

17 Sec 79 of the Penal Code, 2010.

statute books and the government has started using it against its detractors. This article contends that while the boldness of the Constitutional Court in striking down criminal defamation is lauded, the commitment of Lesotho as a country to join the global abolitionist movement is doubtful if the vestige of *scandalum magnatum* is retained on the statute books. The purpose of the article, therefore, is to analyse the development of the crime of defamation in Lesotho and its 'partial' abolition and how the abolition features in the broader global wave of abolition. The argument is anchored mainly in three parts, namely, the investigation into the origins and philosophy of criminal defamation, its application and abolition in Lesotho and the global patterns regarding the crime. Ultimately, the article contends that if Lesotho really intends to join the soaring abolitionist movement at global level, it must follow the total abolition route of crimes aimed at selectively protecting the 'good image' of certain people, such as the royal family.

2 Changing theoretical and philosophical approaches to criminal defamation

2.1 Classical approach

Defamation, in general, and criminal defamation, in particular, always have been a controversial subject that acquired varying theoretical and philosophical justifications dating from one historical epoch to another.¹⁸ The approaches to criminal defamation may be classified in three categories: the classical approach; the contemporary (retentionist) human rights-based approach; and the abolitionist approach. The crime of defamation classically developed within a societal structure that is entirely different from the modern egalitarian society.¹⁹ Under both the Roman and English societies of the sixteenth and seventeenth centuries, social stratification defined relations between and amongst the members of society.²⁰ As law was generally, defamation was used to enhance this stratification. Therefore, there was a strong correlation between the defamatory words and the status of the person against whom the words were uttered.²¹ Since society philosophically believed in a divinely-ordained hierarchy, the defamation of an eminent person was regarded as a very serious offence.²² Perhaps due to the influence of the Greek philosopher Plato,²³ it was believed that eminence in society was

18 CR Post 'The social foundations of defamation law: Reputation and the Constitution' (1986) 74 *California Law Review* 691.

19 Loades (n 15) 141.

20 Veeder (n 14) 546.

21 JC Lassiter 'Defamation of peers: The rise and decline of the action for *scandalum magnatum*' (1978) 22 *American Journal of Legal History* 216.

22 Lassiter (n 21) 216.

23 P Westen 'The empty idea of equality' (1982) 95 *Harvard Law Review* 537.

attained by quality and those in the lower ranks of society did not have quality. Consequently, when a defamation allegation was made, the enquiry was double-pronged, namely, it was about the words uttered and the quality and the status of the person against whom the words were uttered. This concept is captured aptly by Lassiter as follows:²⁴

The offence of defaming eminent persons – specifically peers of the realm – had come to be known by the sixteenth century as *scandalum magnatum*, a medieval Latin expression meaning literally ‘the scandal of magnates’. By the seventeenth century, protection from *scandalum magnatum* had come to be counted regularly among that small body of legal privileges which set the peerage apart from the rest of English society.

Thus, words that ordinarily would be not actionable when uttered against an ‘ordinary’ person, ‘when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury’.²⁵ The offence *scandalum magnatum* has its roots in the statutes of the thirteenth and fourteenth centuries in England.²⁶ The flagship statute of this offence was enacted in 1275, and provided:²⁷

Whereasmuch as there have been aforetimes found in the country devisers of tales ... whereby discord or occasion of discord hath arisen between the king and his people or great men of this realm ... it is commanded that none be so hardy as to tell or publish any false or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm; he doth so shall be taken and kept in prison until he hath brought him the court which was first author.

This classical approach to defamation emerged during the time of unrest when peace and stability, more than equality and freedom, were the fundamental values of society.²⁸ Under those circumstances criminal defamation law was used to prevent the circulation of ‘bad rumours’ and slander against the ‘great men of the realm’.²⁹ The caste of ‘great men of the realm’ included, but was not limited to, ‘Prelates, Dukes, Earls, Barons, and great men of the realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King’s House, Justices of the one bench or the other, and of other great officers of the realm’.³⁰

24 Lassiter (n 21) 215. The civil leg of defamation grew from the criminal leg but still was for the peers. As Lassiter comments: ‘The peer who was victim of verbal abuse might bring against his abuser an action for *scandalum magnatum*, stating it to be on behalf of the King as well as himself (*tam pro domino rege quam pro se ipso*), and alleging damages in a sum sufficient to compensate for the harm done to his reputation as a noble peer of the realm and one of the King’s “hereditary” councillors.’

25 W Blackstone *Commentaries on the laws of England. Book the Third* (1768) 123 (quoted in Lassiter (n 21)).

26 F Carr ‘English law of defamation: With especial reference to the distinction between libel and slander’ (1902) 18 *Law Quarterly Review* 255.

27 3 Edward I, c, quoted in Veeder (n 14) 551.

28 Lassiter (n 21) 217; A Harding *A social history of English law* (1966).

29 Lassiter (n 21) 217.

30 Veeder (n 14) 553.

Modern criminal defamation has not been able to outgrow these classical trappings, both theoretically and practically. While the crime of defamation took a slight drift in line with the egalitarian changes in society since the eighteenth century, the vestige of its use in classical times still obtains. The majority of countries now have created the crime of defamation as a crime like any other crime that may be committed against a person regardless of status in society. The purpose of the crime has been couched differently as a protection to reputation, which is an artefact of human dignity.³¹ Nevertheless, there are countries such as Lesotho that still retain the classical crime *de scandalum magnatum*. Section 79(2) of the Penal Code provides that '[a] person who knowingly commits any act calculated to violate the dignity or injure the reputation of the Royal Family commits an offence'. Even in countries where the *scandalum magnatum* is not expressly provided for in the statutes, the practice of the prosecution of criminal defamation startlingly resonates with its classic beginnings. The pattern is captured by Leflar as follows:³²

Modern criminal defamation prosecutions appear on analysis to serve pretty much the same function as the early prosecutions for libel of 'great men'. The usual pattern in the political cases, which are more numerous than any other type of case from 1920 on, is one of the 'ins' prosecuting the 'outs', of the winner prosecuting the loser.

Therefore, in practice, although most countries would feel embarrassed to record it statutorily, the crime of defamation still largely protects 'great men' from 'detractors'. These 'common men' mostly use the media as a conduit for their detractions. Consequently, the media and these 'common men' often become the targets of selective prosecutions.³³

2.2 Contemporary (retentionist) human rights-based approach

There are countries that still retain criminal defamation but have given it a new justification. The new justification is human rights-based. According to this approach, reputation is the bedrock of human dignity and, therefore, must be protected by the defamation laws. The philosophical justification for this 'new approach' is explained by Dworkin who contends that 'the most basic premise of Western democracy – that government should be republican rather than despotic – embodies a commitment to [the] conception of dignity'.³⁴ In that sense, defamation laws changed their classical slant where they were inclined towards the protection of the divinely-ordained hierarchy in society and took on the new egalitarian incarnation. They

31 S Hoxor 'Dignity, criminal law, and the Bill of Rights' (2004) 121 *South African Law Journal* 304.

32 RA Leflar 'Social utility of the criminal law of defamation' (1956) 34 *Texas Law Review* 984 1032.

33 A Stone 'Defamation of public figures: North American contrasts' (2005) 50 *New York Law School Law Review* 9.

34 R Dworkin *Life's dominion* (1993) 166-167.

now take on a new purpose of protecting one of the foundational values of human rights discourse – the right to dignity.³⁵ This new justification for defamation laws is best represented by the *dictum* of the Canadian Supreme Court in the case of *Hill v Church of Scientology of Toronto*,³⁶ where the Court held that good reputation represents an ‘innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.’³⁷

Thus, this new justification locates the reputation of an individual within the ambit of dignity. This formulation has found a comfortable reception in South Africa.³⁸ To that end, the South African Supreme Court of Appeal in the case of *National Media v Bogoshi*³⁹ confirmed that human reputation is also an integral value of the South African constitutional project. However, the Court reaffirmed that freedom of expression is an equally important pillar of the South African Bill of Rights. The Court affirmed freedom of expression as ‘one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man’.⁴⁰ These affirmations therefore call for the balance of two equally important values in an open democratic society. As Tocherty observes, ‘[t]he pendulum between reputation and expression has swung back and

35 The United States Supreme Court confirmed the inextricability of reputation from dignity in the case of *Rosenblatt v Baer* 383 US 75 (1966) 97 as follows: ‘The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.’

36 (1986) 26 DLR (4th) 129.

37 *Hill* case (n 36) 163; see also D Lepofsky ‘Making sense of the libel chill debate: Do libel laws “chill” the exercise of freedom of expression?’ (1994) 4 *National Journal of Constitutional Law* 197 contends that reputation is the ‘fundamental foundation on which people are able to interact with each other in social environments’; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

38 In *Argus Printing and Publishing v Esselen’s Estate* 1994 (2) SA 1 (A) 23H-J, the Court quoted with approval the following passage in M de Villiers *The Roman and Roman-Dutch law of injuries* (1899) 24-25: ‘The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation.’ See also *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC).

39 1998 (4) SA 1196 (SCA).

40 *National Media v Bogoshi* (n 39) 20. See also *Wholesale & Department Store Union v Dolphinn Delivery* (1987) 33 DLR (4th) 183 where the Court stated that ‘[f]reedom of expression ... is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of Western society’.

forth throughout history'.⁴¹ In the case of *Khumalo v Holomisa*⁴² the Court held:⁴³

The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.

Informed by this strong human rights justification for the existence of defamation law, the South African Supreme Court of Appeal in *Hoho v S*⁴⁴ specifically refused to invalidate the crime of defamation and reasoned that the crime still serves a legitimate purpose under the new South African constitutional dispensation.⁴⁵ The Court was persuaded by the same retentionist approach adopted by the Privy Council in *Worme v Commissioner of Police of Grenada*,⁴⁶ where it was seized of the question of whether the hindrance to freedom of speech under section 10(1) of the Grenada Constitution constituted by the statutory crime of intentional libel was reasonably justifiable in a democratic society. The Privy Council confirmed that '[i]n fact criminal libel, in one form or another, is to be found in the law of many democratic societies, such as England, Canada and Australia. It can accordingly be regarded as a justifiable part of the law of the democratic society in Grenada.'⁴⁷

However, despite this retentionist posture, countries such as South Africa are under immense pressure to abolish criminal defamation.⁴⁸

41 B Docherty 'Defamation law: Positive jurisprudence' (2000) 13 *Harvard Human Rights Journal* 263 267; see also E Brouillet 'Free speech, reputation, and the Canadian balance' (2005) 50 *New York Law School Law Review* 33.

42 2002 (5) SA 401.

43 *Khumalo v Holomisa* (n 42) para 28.

44 2009 (1) SACR 276 (SCA). In *Motsepe v S* 2015 (2) SACR 125 (GP) para 40, the North Gauteng High Court went as far as saying: 'Freedom of expression does not have a superior status to other rights under the Constitution. The Constitutional Court has found that freedom of expression must sometimes take a back seat and may be legitimately "chilled" when it intersects with the "foundational" Constitution value of dignity' (emphasis in original).

45 *Hoho* (n 44) para 36.

46 [2004] UKPC 8.

47 *Worme* (n 46) para 43.

48 J van der Berg 'Should there be a crime of defamation' (1989) 106 *South African Law Journal* 276 290; JR Spencer 'Criminal libel: A skeleton in the cupboard' (1977) *Criminal Law Review* 383; D Milo 'The timely demise of criminal defamation law' 4 October 2015, <http://blogs.webberwentzel.com/2015/10/the-timely-demise-of-criminal-defamation-law/> (accessed 1 November 2018); JRL Milton *South African criminal law and procedure Vol II: Common law crimes* (1996) 520-535; CR Snyman *Criminal law* (2008) 475-477; J Burchell *Principles of criminal law* (2006) 741.

2.3 Abolitionist wave

Despite the new-found justification for criminal defamation, countries⁴⁹ and international bodies at large are moving *en masse* in favour of abolitionism.⁵⁰ The abolitionist movement is based on two main theoretical grounds. The first is that philosophically modern society differs sharply from classical society; the values that undergirded society in classical times have changed. While defamation laws, by and large, originally were intended to protect peace and stability in society, the new philosophical approach embellishes the values of freedom, equality and dignity. The abolitionist movement contends that 'criminal defamation represents the clearest threat'⁵¹ to the values of the modern egalitarian society. Thus, this epochal difference between classical times of criminal defamation and contemporary times provides the strongest reason for jettisoning criminal defamation.

The second reason, which is much more direct, is that freedom of expression has acquired so much prominence in contemporary human rights discourse that the slightest threat to it is visited with the harshest of criticism.⁵² The centrality of freedom of expression to a modern society was flagged in the case of *Argus Printing and Publishing v Esselen's Estate*⁵³ where the Court stressed that 'freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society'.⁵⁴ At a more practical level, several aspects of criminal defamation have propelled the abolitionist movement. Van der Berg identifies approximately five reasons why the crime of defamation must be abolished.⁵⁵ The first is the change in the rationale for the offence. The original rationale for the offence was 'the social insecurity of the aristocracy, which increasingly became threatened by the mounting confidence and power of the plebeians'.⁵⁶ This argument is located within the broader philosophical drift from classical society to modern society. The second reason is infrequency of prosecutions.

49 Such as Ghana, Kenya and Zimbabwe.

50 International PEN 'Stifling dissent, impeding accountability' 22 November 2017, pensouthafrica.co.za/pen-report-on-criminal-defamation-laws-in-africa/ (accessed 13 November 2018); S Tierney 'Press freedom and public interest: The developing jurisprudence of the European Court of Human Rights' (1998) 3 *European Human Rights Law Review* 419; EA Berton 'The Inter-American Court of Human Rights and the European Court of Human Rights: A dialogue on freedom of expression standards' (2009) *European Human Rights Law Review* 332. *Herrera Ulloa v Costa Rica* (2 July 2004) (Series C No 107); *Ricardo Canese v Paraguay* (31 August 2004).

51 F Cowell 'The human rights case for libel law reforms in the Commonwealth' (2011) 37 *Commonwealth Legal Bulletin* 329.

52 E Yanchukova 'Criminal defamation and insult laws: An infringement on the freedom of expression in European and post-Communist jurisdictions' (2003) 41 *Columbia Journal of Transnational Law* 861.

53 1994 (2) SA 1 (AD).

54 *Argus Printing and Publishing* (n 53) para 28.

55 Van der Berg (n 48) 276.

56 Van der Berg 281.

The incidence of criminal prosecutions is very low across jurisdictions. Hence, in the case of *Hoho*⁵⁷ the appellant sought to invoke this reason as a ground for striking down the crime. However, the South African Supreme Court of Appeal was unpersuaded and sought support from the Privy Council decision in the case of *Worme v Commissioner of Police of Grenada*,⁵⁸ where the Court held that '[t]he fact that the law of criminal libel has not been invoked in recent years does not show that it is not needed. After all, prosecutions are in one sense a sign not of the success of a criminal law, but of its failure to prevent the conduct in question.'⁵⁹

The third reason is the availability of adequate civil remedies. The civil leg of defamation provides a sufficient or even better remedy than the criminal leg; perhaps this is the reason why there is a paucity of prosecutions for criminal defamation. The flipside of criminal defamation is that often it is amenable to abuse reminiscent of its beginnings as the law protecting the 'great men'.⁶⁰ The fourth reason is its questionable effectiveness as a deterrent.⁶¹ This criticism is located within the perennial debate around the deterrence theory of criminal law.⁶² Hoctor adds two more reasons, the first being the unconstitutionality of the offence.⁶³ In most cases, crime struggles to pass constitutional muster. Even where it has barely passed, as in South Africa, the balancing exercise between reputation and freedom of expression still poses a problem. Another reason is the pattern of selective prosecutions. The prosecutions of this crime invariably target political opponents of the establishment.

Although these reasons have propelled the global movement in favour of abolition, the movement is stronger within intergovernmental and international non-governmental formations than within domestic jurisdictions. Many national governments have not yet been persuaded to join the movement. In fact, in Africa, where the crime has been abolished in countries such as in Ghana,⁶⁴

57 *Hoho* (n 44).

58 As above.

59 *Hoho* (n 44) para 42.

60 Spencer (n 48) 471 states that '[t]here should be one law for the rich, who can afford to pay damages, and another for the poor, who cannot afford to do so and therefore should be sent to prison'.

61 C Walker 'Reforming the crime of libel' (2005) 50 *New York Law School Law Review* 169; also see C Walker 'Scandalising in the "eighties"' (1985) 3 *Law Quarterly Review* 359.

62 Snyman (n 48).

63 S Hoctor 'The crime of defamation: Still defensible in a modern constitutional democracy?' (2013) 34 *Obiter* 125.

64 O Anku-Tsede 'The media and the offence of criminal libel in Ghana' (2013) 9 *Journal of Law, Policy and Globalisation* 26.

Kenya,⁶⁵ Zimbabwe⁶⁶ and Lesotho,⁶⁷ it has not been done through an express policy of government or a legislative repeal of criminal defamation in the statutes. The abolition has been judicial, often after vehement opposition from government. However, the movement has sailed through smoothly at international level. The UN Human Rights Committee already has called upon state parties to the International Covenant on Civil and Political rights (ICCPR) to 'consider the decriminalisation of defamation'.⁶⁸ Regional human bodies are also active in the movement. The African Commission on Human and Peoples' Rights (African Commission) in 2010 passed a resolution expressly repealing criminal defamation.⁶⁹ In *Konaté v Burkina Faso*⁷⁰ the African Court on Human and Peoples' Rights (African Court) declared criminal defamation generally in contravention of the African Charter on Human and Peoples' Rights (African Charter).⁷¹ The pattern is almost the same with respect to other regional courts.⁷² The trend is towards abolition.

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- 65 On 6 February 2017 the High Court of Kenya declared the criminal defamation provision in sec 194 of the Kenyan Penal Code incompatible with Kenya's 2010 Constitution and thus unconstitutional; *Jacqueline Okuta & Another v Attorney-General* [2017] eKLR, <http://kenyalaw.org/caselaw/cases/view/130781/index.php?id=3479> (accessed 11 November 2018).
- 66 On 3 February 2016 a full bench of the Zimbabwean Constitutional Court ruled unanimously that criminal defamation was unconstitutional, invalidating sec 96 of the country's Criminal Law (Codification and Reform) Act in the case of *Madanhire & Another v Attorney-General* CCZ 2/14.
- 67 *Peta* case (n 11).
- 68 UN Human Rights Committee General Comment 34 of 12 September 2011, CCPR/C/GC/34 para 47, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed 13 November 2018).
- 69 African Commission on Human and Peoples' Rights 'Resolution on Repealing Criminal Defamation Laws in Africa', <http://www.achpr.org/sessions/48th/resolutions/169/> (accessed 29 March 2019).
- 70 *Konaté v Burkina Faso* App 4/2013, en.african-court.org/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details (accessed 5 November 2018).
- 71 African Charter on Human and Peoples' Rights adopted in Nairobi, Kenya, 27 June 1981, <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> (accessed 13 November 2018). Art 9 of the Charter provides: '1) Every individual shall have the right to receive information. 2) Every individual shall have the right to express and disseminate his opinions within the law.' For commentary, see D Shelton '*Konaté v Burkina Faso*' (2015) 109 *American Journal of International Law* 630.
- 72 M Pasqualucci 'Criminal defamation and the evolution of the doctrine of freedom of expression in international law: Comparative jurisprudence of the Inter-American Court of Human Rights' (2006) 39 *Vanderbilt Journal of Transnational Law* 379.

3 Crimes of defamation and *scandalum magnatum* in Lesotho

3.1 Common law and statutory position

In terms of the common law, the crime of criminal defamation is immensely underdeveloped in Lesotho as there are hardly any reported cases or writings on it. However, it may safely be contended that the South African position is the position in Lesotho, for two reasons. First, the two countries share the common law, which is the Roman-Dutch law.⁷³ Second, the South African case law is hugely influential in Lesotho. In South Africa, the question of whether criminal defamation is still part of the South African common law was settled in the case of *Hoho*.⁷⁴ In this case the appellant sought to attack the crime of defamation on two fronts, namely, that it has been abrogated by disuse and that it was in conflict with freedom of expression as enshrined in the South African Constitution.⁷⁵ The Court categorically refused the claim and endorsed the crime as part of South African common law.

The crime of defamation under common law involves 'the unlawful and intentional publication of matter that impairs another person's reputation'.⁷⁶ The requirements of this crime are fairly settled. These are (a) the unlawfulness, (b) the intention, (c) publication (d) of matter defamatory of (or that impairs) another.⁷⁷ In its classical nature truth was not a defence for the offence, particularly when the 'defamatory and injurious statements were made in a public manner (*convicium contra bonos mores*)'.⁷⁸ However, under modern case law truth as a defence vitiates unlawfulness.⁷⁹ What has been a subject of controversy, though, is whether seriousness (gravity) is a requirement for the crime. In the case of *Hoho* the Court noted the division in

73 Pain (n 3) 137.

74 *Hoho* (n 44). The Court observed that one of the significant safeguards against the abuse of the crime is that that 'it is ... substantially more difficult to secure a conviction on a charge of defamation than it is to succeed in a civil claim for defamation' (para 33).

75 See sec 16 of the Constitution of the Republic of South Africa, 1996.

76 J Burchell *Principles of criminal law* (2005) 741; Milton (n 48) 520-535.

77 *Hoho* (n 44).

78 Veeder (n 14) 564. The essence of the offence in this case lay in the unwarrantable public proclamation, in the contumely that was directed at a man before his fellow citizens. In such cases, the truth of the statements was no justification for the unnecessarily public and insulting manner in which they had been made.

79 *The Citizen v McBride* 2011 (4) SA 191 (CC). In the case of *Khumalo* (n 42) para 37, the Court held that '[t]he common law delict of defamation does not disregard truth entirely. It remains relevant to the establishment of one of the defences going to unlawfulness, that is, truth in the public benefit. The common law requires a defendant to establish, once a plaintiff has proved the publication of a defamatory statement affecting the plaintiff, that the publication was lawful because the contents of the statement were true and in the public benefit.'

judicial and scholarly opinion on the question of gravity.⁸⁰ In the end the Court stated that '[i]n the light of these authorities I am not persuaded that the authoritative analysis of the law by Van den Heever JA in *Fuleza* is wrong and that a degree of seriousness was an element of the crime of defamation in Roman-Dutch law or that it is an element of criminal defamation in our law'.⁸¹

Despite remaining controversial, it would seem that this *dictum* in the *Hoho* case is the most recent statement of the common law position as it obtains in South Africa and, arguably, in Lesotho. In Lesotho the statement derives support from one of the most isolated prosecutions on criminal defamation in the country. In 2007 the Crown launched a prosecution for criminal defamation against one Qamaka Nts'ene, a trade unionist, and one Maketso Motjope, a civil servant in the Ministry of Finance.⁸² The particulars of their charge were that they distributed pamphlets accusing the then Prime Minister, Pakalitha Mosisili, and several other cabinet ministers and their spouses of extramarital affairs. The pamphlets also claimed that appointments had been made because of these affairs. The matter was tried in the magistrate's court where the accused were found guilty of criminal defamation. They were sentenced to two years' imprisonment with the option of a two-hundred maloti fine, half of which was suspended for three years. This offence clearly lacked seriousness, but the magistrate's court convicted the accused and imposed a very light sentence.

When the crime was codified under the Penal Code in 2010 seriousness was not included as a requirement. Section 101 of the Penal Code provides that a defamatory matter

means matter likely to injure the reputation of any person by exposing him or her to hatred, contempt or ridicule, or likely to damage the person in his or her profession or trade by an injury to his or her reputation, and it is immaterial whether at the time of the publication of the defamatory matter the person concerning whom the matter is published is living or dead.⁸³

80 J van der Berg 'Is gravity really an element of *crimen injuria* and criminal defamation in our law?' (1988) 54 *Journal of Contemporary Roman-Dutch Law* 72; FFW van Oosten 'Seriousness, defamation and criminal liability' (1978) 95 *South African Law Journal* 505; Burchell (n 48) 332-333; Van der Berg (n 48) 276.

81 *Hoho* (n 44) para 21.

82 M Sithetho 'Lesotho PM sues paper' 2 November 2007, journalism.co.za/lesotho-pm-sues-paper/ (accessed 10 November 2018). Both persons were opponents of the Prime Ministry from within his own political party, the Lesotho Congress for Democracy, which in the same year experienced a split that resulted in the formation of the All Basotho Convention (ABC), to which the accused ultimately belonged.

83 Sec 101 of the Penal Code Act 6 of 2010.

It would seem that the state not only has codified criminal defamation as it existed under common law, but also has expanded it into other aspects that would otherwise not be actionable under common law.⁸⁴ Therefore, the statute has created a completely new offence.

As for *scandalum magnatum* (offence against the royal family), it is unclear whether it ever really became a crime under Roman-Dutch common law; or whether it ever became part of the common law of Lesotho. The crime has its roots in the English law. Ever since the promulgation of the statutes *scandalum magnatum* in the thirteenth century⁸⁵ the crime has been part of the English common law.⁸⁶ The crime overtly draws a distinction between 'great men' and 'common men'. As Starkie and Huntington contend, 'words spoken in derogation of a peer or a judge or other great officer of the realm are usually called *scandalum magnatum*; and though they be such as would not be actionable when spoken of a private person, yet when applied to persons of high rank and dignity, they constitute a more heinous injury'.⁸⁷

The rationale for the crime is that 'there have been oftentimes found in the country devisors of tales whereby discord, or occasion of discord hath many times arisen between the King and his people or great men of the realm'.⁸⁸ During codification in Lesotho this crime found its way into the Penal Code. The Code provides that '[a] person who knowingly commits any act calculated to violate the dignity or injure the reputation of the Royal Family commits an offence'.⁸⁹ Despite it being so broad in the country, the Code limits the 'Royal Family' to 'the King, the King's nuclear family and the Regent'.⁹⁰

84 The requirements of the offence of criminal defamation was narrowly restated in the *Hoho* case (n 440) para 16 as 'the unlawful and intentional publication of matter concerning another which tends to injure his reputation'. In the case of *Peta* (n 11) para 18, the Court noted the broad manner in which the section was couched. The Court noted: 'This section is over-broad for the following reasons. In terms of section 102(1) and (2) of the Act criminal defamation prosecution can be initiated even when no person other than the complainant became aware of the supposedly defamatory statement. In terms of this section 102(1) the Act on top of a time-honoured test in defamation matters which is, whether ... the words tend to lower the plaintiff in the estimation of right-thinking members of society – has now added a new dimension in terms of which the statement which is heard only by the aggrieved person is considered defamatory. Secondly, in terms of section 102 (2) there is no need for a statement to be completely defamatory to be labelled as such. In my view quite clearly, the means chosen to protect the individuals' reputational interests are broader than necessary to accomplish the said objective.'

85 JC Courtney 'Absurdities of the law of slander and libel' (1902) 36 *American Law Review* 36 552; RC Donnelly 'The right of reply: An alternative to an action for libel' (1948) 34 *Virginia Law Review* 867.

86 WL Prosser 'Libel per quod' (1960) 46 *Virginia Law Review* 839.

87 T Starkie & T Huntington *A treatise on the law of slander, libel, scandalum magnatum and false rumours* (1832) 103.

88 As above.

89 Sec 79(2).

90 Sec 79(1).

Under common law, there is no reported case on this crime in Lesotho. However, after the codification in 2010 quite a number of 'political detractors' have been prosecuted for the crime. In 2014 the then Minister of Communications, Selibe Mochoboroane, was charged with the crime after a fallout in the coalition government. The Minister belonged to a coalition partner, Lesotho Congress for Democracy (LCD), which was opposed to the prorogation of parliament by the King on the advice of the Prime Minister, Thomas Thabane.⁹¹ In violation of the principle of collective ministerial responsibility the Minister went on radio on 8 September 2014 and criticised the prorogation. In particular, he said the Prime Minister 'has advised the King to break the law', and was charged with a violation of section 79(2) of the Code.⁹² The charge ultimately was withdrawn by the Director of Public Prosecutions.⁹³ In 2017, the same Thomas Thabane was the leader of the opposition in a government led by Prime Minister Pakalitha Mosisili. Ironically, more or less the same set of facts that led Mochoboroane to be charged also led to Thabane being charged with the same offence. As a leader of opposition Thabane was opposed to the dissolution of parliament which the King was going to effect on the advice of the Prime Minister (Mosisili) in 2017. Thabane said that the King was younger than him and that he hoped that he would do the right thing and refuse the advice for dissolution and early elections. He also indicated that the King was not irremovable, and that he, too, may be removed from his position. Thabane was charged with the same section 79(2).⁹⁴ The case was again withdrawn when Thabane became the Prime Minister after the 2017 election.

In a similar manner, another opposition activist, Bokang Ramats'ella, has been a victim of the same section. He was charged in 2017 after his coalition had lost the election.⁹⁵ Ramats'ella allegedly went on radio and said that the All Basotho Convection party (the ruling party) had dragged the King into politics. He said that the King

91 H Nyane 'The advent of coalition politics and the crisis of constitutionalism in Lesotho' in M Thabane (ed) *Towards anatomy of political instability in Lesotho, 1966-2016* (2017) 77.

92 K Mohloboli 'Mochoboroane faces sedition charge' *Lesotho Times* 13 November 2014, <http://www.lestimes.com/mochoboroane-faces-sedition-charge/> (accessed 15 November 2018).

93 T Tefo 'Mochoboroane defiant after court victory' *Lesotho Times* 20 November 2014, <http://www.lestimes.com/mochoboroane-defiant-after-court-victory/> (accessed 15 November 2018).

94 T Tefo 'Thabane faces sedition charge' *Lesotho Times* 7 April 2017, www.lestimes.com/thabane-faces-sedition-charge/ (accessed 15 November 2018); T Tefo 'Drama in court during Thabane case' *Lesotho Times* 7 April 2017, <http://www.lestimes.com/drama-in-court-during-thabane-case/> (accessed 15 November 2018).

95 'Ramatsella's case still under consideration' *TMGLive* 11 July 2017, <https://tmglive.tv/2017/07/ramatsellas-case-still-consideration/> (accessed 15 November 2018).

should 'refrain from engaging in politics regardless of whether he supports the opposition or government'.⁹⁶

These post-Code *scandalum magnatum* cases clearly demonstrate that the crime is used to silence dissent and criticism. In most of these cases the criticism was not even directly against the King, but was against the Prime Minister who happened to be his adviser constitutionally.

3.2 Partial abolition: *Peta v Minister of Law, Constitutional Affairs and Human Rights*

An occasion arose in 2018 in the case of *Peta*⁹⁷ for the constitutionality of criminal defamation to be tested. As in most criminal defamation cases, the case arose out of political circumstances. It arose out of the highly-charged political atmosphere prevailing in June 2016 when the international community was exerting substantial pressure on the government of Lesotho to relieve the then commander of the Lesotho defence force, Tlali Kamoli, of his duties as commander. This followed recommendations by the Southern African Development Community (SADC) commission of inquiry.⁹⁸ The government of Lesotho resisted the pressure⁹⁹ and the newspaper *Lesotho Times* satirised the entire scenario.¹⁰⁰ The accused was the editor of the *Lesotho Times* that had published the satire article. The article satirised the then all-powerful commander as having put the cabinet under siege. It portrayed Kamoli as having entered a cabinet meeting unannounced and ordering the chairperson of the meeting, the Prime Minister, to stop the proceedings, and the Prime Minister dutifully obliged. The satire stated: 'The reason for ... Kamoli doing all this ... was because he wanted to show who indeed was the mighty King of this country. He wanted to prove where real power resided.'¹⁰¹ The reality of the matter is that the satire was depicting the general feeling in society

96 T Tefo 'Ramatsella faces charges for remarks' *Lesotho Times* 17 February 2017, www.lestimes.com/ramatsella-faces-charges-for-remarks/ (accessed 15 November 2018).

97 *Peta* case (n 11).

98 Communiqué, Double Troika Summit of SADC Heads of State and Government, Gaborone, Botswana, 18 January 2016 (issued 19 January 2016), http://www.sadc.int/files/7014/5322/7325/Communique_19_January_2016_-_0950hrs.pdf (accessed 13 November 2018).

99 See M Mohloboli 'Mosisili defiant over SADC report' *Lesotho Times* 22 January 2016, <http://lestimes.com/mosisili-defiant-over-sadc-report/> (accessed 15 October 2018); M Mohloboli 'Kamoli here to stay: LCD' *Lesotho Times* 14 May 2016, www.lestimes.com/kamoli-here-to-stay-lcd/ (accessed 15 October 2018).

100 *Lesotho Times* 23-29 June 2016.

101 Scrutator 'Flicker of hope for my beloved kingdom' *Lesotho Times* 23-29 June 2016.

and that at the time General Kamoli appeared very powerful in the country.¹⁰² On the basis of strict liability,¹⁰³ the accused was charged with criminal defamation in terms of section 104 of the Penal Code. The accused challenged the constitutionality of the criminal defamation sections of the Code, namely, section 104 read with sections 101 and 102.¹⁰⁴ The mainstay of his case was that the sections contravened section 14 of the Constitution of Lesotho which embodies freedom of expression. The section contains unusually extensive special limitation clauses. The internal limitation clauses in section 14 of the Constitution stipulated almost everything as a permissible limitation of the right to freedom of expression. Any law that makes provision for the following is regarded as permissible:¹⁰⁵

the interests of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the reputations, rights and freedoms of other persons or private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or (c) for the purpose of imposing restrictions upon public officers.

Clearly, these limitations constitute claw-back clauses rather than real limitation clauses.¹⁰⁶ However, the Court found a way of invalidating criminal defamation notwithstanding such a laborious web of limitations on the right to freedom of expression. The Court used the abolitionist theory as flagged in the decision of the African Court in

102 'Too risky to arrest Lesotho *coup* leader' – Report' *News24* 14 September 2014, <https://www.news24.com/Africa/News/Too-risky-to-arrest-Lesotho-coup-leader-report-20140914> (accessed 15 March 2019); 'Lesotho army chief accused of 2014 *coup* attempt resigns' 11 September 2016, <https://www.news24.com/Africa/News/lesotho-army-chief-accused-of-2014-coup-attempt-resigns-20161108> (accessed 15 March 2019).

103 Strict liability of newspaper editors is part of Lesotho's common law of defamation. See the case of *Mosisili v Editor, Mirror Newspaper & Others* CIV/T/275/2001, <https://lesotholii.org/ls/judgment/high-court/2008/62> (accessed 25 April 2019). The decision followed older South African cases such as *Pakendorf v De Flamingh* 1982 (3) SA 146 (A); *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394, whereas in *National Media v Bogoshi* 1998 (4) SA 1196 (SCA), the South African Constitutional Court ruled strict liability unconstitutional.

104 Sec 102 provides: '(1) A person publishes a defamatory matter if he or she causes the print, writing, painting, effigy or other means by which the defamatory matters is conveyed to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, so that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person. (2) It is not necessary for defamation that a defamatory meaning should be directly or completely expressed, and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged defamation itself or from any extrinsic circumstances, or partly by the one and other means.'

105 Sec 40(2).

106 For an analysis of claw-back clauses in the African Charter on Human and Peoples' Rights, see R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667; C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155.

*Konaté v Burkina Faso*¹⁰⁷ which it called ‘a landmark judgment’.¹⁰⁸ The Court also relied heavily on international decisions and resolutions,¹⁰⁹ and decisions of other foreign jurisdictions that are on the abolitionist bandwagon.¹¹⁰ In the end, the Court used the proportionality test which now is fairly established in human rights litigation in Lesotho.¹¹¹ The Court found that ‘[t]he means used to achieve the purpose of protecting reputation interests, in some instances, are overbroad and vague in relation to the freedom of expression guarantee in section 14 of the Constitution’.¹¹² The decision has been widely welcomed as a step in the right direction, not only for affirmation of freedom of expression in the country but even for human rights generally in Lesotho. The human rights provisions in the Lesotho Constitution are overwhelmed by claw-back clauses under the guise of special limitation clauses.¹¹³ However, while the abolition of criminal defamation is lauded, it is only partial because other ‘insult offences’ remain on the Penal Code.¹¹⁴

It is important to note that while the decision in *Peta* has established Lesotho on the list of countries where criminal defamation has been abolished, care must be taken when invoking the case as persuasive authority in other jurisdictions such as South Africa. The Court in *Peta* specifically invalidated the statutory provisions of a specific jurisdiction, Lesotho.¹¹⁵ The case may not be a safe authority for countries that still use the common law position such as South Africa. In any event, the South African Supreme Court of Appeal in the *Hoho* case already has pronounced that *crimen injuria* is not unconstitutional.¹¹⁶ Perhaps a route that may remain for countries such as South Africa is to pass an Act of parliament categorically abolishing the crime of defamation.

107 *Konaté* (n 70); Shelton (n 71) 630.

108 *Konaté* (n 70) para 21.

109 African Commission Resolution 169 (n 69).

110 *Konaté* (n 70); *Okuta* (n 65); *Madanhire* (n 66).

111 *Attorney-General v 'Mopa* (2002) AHRLR 91 (LeCA 2002); *Commander of Lesotho Defence Force v Rantuba* LAC (1995-99) 687. The cases that use the proportionality test in Lesotho follow the three-pronged test devised by Dickson CJ in *R v Oakes* [1986] 1 SCR 103 as follows: ‘(i) Firstly, the measure limiting the right or freedom must be rationally connected to achieve that purpose. (ii) Secondly, the measure, even if rationally connected to the objective should impair “as little as possible” the right or freedom under the spotlight. (iii) Thirdly, there must be proportionality between the effects of the measure limiting the right or freedom and the purpose which has been classified as of sufficient importance.’

112 *Peta* (n 11) para 24.

113 H Nyane ‘Limitation of human rights under the Constitution of Lesotho and the jurisprudence of superior courts’ (2015) 23 *Lesotho Law Journal* 1.

114 See secs 78 & 79 of the Penal Code Act 6 of 2010.

115 Lesotho’s entire criminal law has been codified. Sec 2(2) of the Penal Code Act 6 of 2010 provides that ‘[n]o person shall be tried, convicted or punished for an offence other than an offence specified in this Code or in any other written law or statute in force in Lesotho’.

116 *Hoho* (n 44).

4 Conclusion

The article set out to investigate the ramifications of the abolition of criminal defamation in Lesotho. It is apparent from the foregoing that the crime of defamation dates back to the late nineteenth century when the country was removed from the administration of the Colony of the Cape of Good Hope.¹¹⁷ However, the crime has not been used in Lesotho as there are no reported cases of criminal defamation in the country. The most prominent occasion when the crime was prosecuted was in 2007 when the magistrate's court for the District of Maseru found two people guilty of this crime for having 'defamed the then Prime Minister, Mosisili'.¹¹⁸ The disuse notwithstanding,¹¹⁹ the crime formerly was part of Lesotho's criminal law until 2010 when the Penal Code was enacted. The Code provides that '[n]o person shall be tried, convicted or punished for an offence other than an offence specified in this Code or in any other written law or statute in force in Lesotho'.¹²⁰ Even in the aftermath of codification the crime continued to be used to prosecute detractors of government until 2018 when the crime was judicially abolished. The contention raised throughout the article has been that as long as *scandalum magnatum* and other 'insult crimes' remain on the statute books the abolition of criminal defamation is only the tip of an iceberg.¹²¹ In fact, the possibility is that in future prosecutions based on other insult crimes, such as *crimen injuria*,¹²² sedition¹²³ and *scandalum magnatum*¹²⁴ will rise in order to make up for the abolition of criminal defamation. This

117 Proclamation 2B of 1884.

118 Sithetho (n 82).

119 In *Hoho* (n 44) para 14 the Court observed: 'I have not been able to find and we have not been referred to any suggestion by an academic or anybody else, before this case, that criminal defamation has been abrogated by disuse.'

120 Sec 2(2).

121 See BT Balule 'Insult laws: A challenge to media freedom in the SADC's fledgling democracies?' (2008) 41 *Comparative and International Law Journal of Southern Africa* 404.

122 Sec 104.

123 See sec 76. In 2014 when Mochoboroane was charged with criminal defamation, the alternative charge was sedition. He was charged with a contravention of sec 76(2)(b) read with sub-secs (1) and (5)(a), (b), (c), (d), and (e) of the Penal Code Act 6 of 2010. The particulars of the alternative charge were the following: '[T]he said accused unlawfully and with the intention of defying or subverting the authority of the Government of Lesotho, but without the intention to overthrow or coerce the Government of Lesotho, did utter seditious words to wit ... *leha se re tlohela ho e sheba mahlong a molao ke bona mona Tona-Khola a elelitse Motlotlehi ho tlola molao are o sebelisa molao* to bring into hatred or contempt or to excite disaffection against the person of His Majesty or the Government of Lesotho ... or to incite the people and residents of Lesotho ... and/or to bring into hatred or contempt or to excite disaffection against the administration of justice in Lesotho ... or to cause discontent or disaffection against the administration of justice in Lesotho ... and/or to promote feelings of ill-will and hostility between different classes of the population of Lesotho.' This alternative charge only evinces the argument made in this article that now that criminal defamation has been abolished, governments in Lesotho will easily use sec 76 against detractors.

124 Sec 79.

possibility is also strengthened by the fact that the country has a very weak Bill of Rights. The Bill of Rights under the Constitution of Lesotho is virtually engulfed in the web of claw-back clauses disguised as special limitation clauses.¹²⁵

As such, the country may have to undergo a comprehensive review of the laws hampering the full realisation of freedom of expression, including the Constitution. It is recommended that all 'insult criminal laws' be repealed and the structure of limitation clauses in the Constitution be reviewed. The model of one general limitation clause for all the human rights provisions is recommended.¹²⁶ Special limitation clauses may be used sparingly depending on the nature of the right involved.

The article also notes that by abolishing criminal defamation Lesotho has joined an emerging global movement in favour of decriminalisation. This may encourage other countries to follow suit. However, a caution has been raised here that while Lesotho has codified its criminal law, other countries have not. Common law, which is the springboard for criminal defamation, continues to be part of the criminal law in countries such as South Africa.¹²⁷

125 Nyane (n 113) 1.

126 See sec 36 of the South African Constitution. It must be noted, however, that contrary to the widely-held view that the Constitution of Lesotho does not have a general limitation clause, sec 4(1) has vaguely couched 'general limitation clause' as follows: 'The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.'

127 Milton (n 48) 519.

Public-private partnership and the right to property in Nigeria

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Summary

Governments across the globe are challenged by endemic budget deficits and find it impossible to reduce significantly their infrastructure deficit without the option of calling upon private sector funding. In addition, the public sector is better served to make policy decisions and provide opportunities for the private sector to design, fund, manage, maintain and operate public facilities using a public-private partnership model. To achieve this aim, it is the responsibility of the public authority to make land available for new projects and for the expansion or rehabilitation of existing public facilities. The objective of this article is to examine the process of land expropriation for public-private partnership projects in Nigeria in relation to the right of the citizen to property but who might be affected when such a decision is taken. The article reviews legislation, court decisions and literature on the subject and proffers recommendations.

Key words: *infrastructure; land expropriation; Nigeria; property; public-private partnership; right to property*

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1 Introduction

There is no universal definition of the term ‘public-private partnership’ (PPP). It is, however, a model of public infrastructure procurement distinct from the traditional method by which governments fund infrastructure solely from public budgets or from borrowed funds.¹ A PPP is a collaboration between the public authority and the private sector. In a PPP the private sector is responsible for the design, funding, management and operation of a public facility for the duration of the contract, after which the facility is transferred to the public authority.² A PPP usually is long-term and may last for 30 years. Unlike in a privatisation where government divests its interest in an enterprise, in a PPP the facility is transferred to the private consortium for the duration of the contract. A PPP also is not a service or management contract as it involves the design and the building or rehabilitation of a public facility. The justification for the adoption of the PPP model of procurement is that in the modern era the costs involved in infrastructure procurement as well as budget deficits make it impracticable for the public authority alone to cater for all the infrastructure needs of the population. Furthermore, a PPP provides an opportunity for the public authority to tap into private sector expertise so that the government can concentrate on policy making.³ The obvious advantage of adopting a PPP is that it reduces the burden on the government to provide for the infrastructure needs of the population and at the same time aids in closing the infrastructure gaps in the country.

Given the need to facilitate PPP arrangements the public authority has a responsibility to provide the land for the projects. As a result the government may exercise a compulsory acquisition of private rights in land for the purpose of the public. The problem this article seeks to address is how the government can acquire land for PPPs in Nigeria without violating the right of the citizen to property. The aim of the article, therefore, is to highlight the need to preserve the citizen’s right to property and for parties in a PPP transaction to ensure that the proper procedure is followed in the compulsory acquisition of land for PPP projects.

Furthermore, the article examines how the PPP impacts on the right to property in Nigeria. The purpose of this enquiry is that with the adoption of PPP, the public authority in the country may consider engaging the private sector in the delivery of several infrastructure projects. Where the projects are ‘greenfield’⁴ projects, that is, where

1 D Grimsey & MK Lewis *Public-private partnerships: The worldwide revolution in infrastructure provision and project finance* (2004) 1.

2 A Arimoro ‘An appraisal of the framework for public private partnership in South Africa’ (2018) 13 *European Procurement and Public Private Partnership Law Review* 214.

3 As above.

4 ER Yescombe *Public-private partnerships: Principles of policy and finance* (2007) 249.

the project is an entirely new project, they require the government to expropriate land for the purposes of the project. In some cases, even for 'brownfield'⁵ projects, that is, where the project involves the rehabilitation of an existing facility, there may be a need to expand the project site which may require the expropriation of surrounding property. Where this is the case, how is the right to property in Nigeria affected? The discussion in the article centres on the introduction of the PPP in Nigeria, the procedure for engaging the private sector in PPP arrangements and the attitude of the courts towards land expropriation for public purposes. In the next section, the article discusses PPPs in Nigeria.

2 Public-private partnership in Nigeria

The PPP was introduced to the Nigerian environment shortly after the return to democratic rule in 1999.⁶ The then administration of President Olusegun Obasanjo embarked on a privatisation regime that witnessed the divestment of government's interests in assets in several public-owned enterprises. The rationale for this divestment was based on the fact that private sector involvement in infrastructure is key to the vision to ensure that Nigeria becomes one of the top 20 economies in the world by the year 2020 as expressed in the country's Vision 20:2020 Objective.⁷ The Obasanjo administration passed the Public Enterprises (Privatisation and Commercialisation) Act in 1999. The Act created the National Council on Privatisation (NCoP) and the Bureau of Public Enterprises (BPE) as the supervisory and implementing agencies respectively for privatisation and commercialisation transactions at the national level in the country.⁸ Indeed, some PPP transactions were consummated under that Act which involved divesting government's interests in an already-existing public asset.⁹ The entire privatisation and commercialisation exercise that was superintended by the BPE has been the subject of criticism. Several of the acquired assets have not performed better than when they were under public sector management.¹⁰ There was a lack of understanding between the private sector entities that bought the

5 As above.

6 O Soyaju 'Legal framework for public private partnership in Nigeria' (2013) 34 *De Jure* 816. Some PPP transactions were administered under the privatisation regime.

7 Soyaju (n 6) 817.

8 A Olor, G Etomi & V Oyedeji 'Public private partnerships' (2017), <https://gettingthedealthrough.com/area/71/jurisdiction/18/public-private-partnerships-nigeria/> (accessed 24 October 2018).

9 As above.

10 DE Arowolo & CS Ologunowa 'Privatisation in Nigeria: A critical analysis of the virtues and vices' (2012) 1 *International Journal of Development and Sustainability* 794.

assets and the public authority as to the goals of the exercise¹¹ and the fact that the federal government of Nigeria privatised assets when the conditions were not right to do so.¹²

The shift towards the PPP after the perceived failure of the privatisation exercise necessitated the passing into law of the Infrastructure Concession Regulatory Commission (Establishment Etc) Act 2005 (ICRC Act). This Act created the Infrastructure Concession Regulatory Commission (ICRC) which came into existence in 2008.¹³ The agency is charged with the responsibility of giving institutional leadership to the successful implementation of a PPP model that would enable private sector participation in infrastructure delivery in the country at the national level. The ICRC Act 2005 is divided into two parts. The first part assigns government ministries, departments and other agencies with the power to enter into a contract with or grant concessions to the private sector for the financing, construction, operation and maintenance of any viable infrastructure. The second part established the ICRC and describes its functions as the regulatory agency. Unfortunately, the Act leaves several gaps including a failure to provide rules on how the procurement of a PPP contract is to be undertaken¹⁴ and the funding of PPP projects.¹⁵ The Act also does not define the term PPP. However, the explanatory memorandum to the Act states:¹⁶

This Act provides for the participation of the private sector in financing the construction, development, operation, or maintenance of infrastructure or development of projects of the Federal Government through concession or contractual arrangements; and the establishment of the Infrastructure Concession Regulatory Commission to regulate, monitor and supervise the contracts on infrastructure or development projects.

According to the National Policy on Public Private Partnership (NPPPP), the basic scope of the federal government of Nigeria's programme for PPPs is the creation of a new infrastructure, and the expansion and refurbishment of existing assets such as power generation plants and transmission/distribution networks; roads and bridges; ports; airports; railways; inland container depots and logistic hubs; gas and petroleum infrastructure, such as storage depots and distribution pipelines; water supply treatment and distribution

11 E Ujah 'Privatisation blues, the sour tastes of the exercise in Nigeria' *Vanguard* 12 September 2011, www.vanguardngr.com/2011/09/privatisation-blues-the-sour-taste-of-the-exercise-in-nigerian/ (accessed 24 October 2018).

12 E Etieyibo 'The ethics of government privatisation in Nigeria' (2011) 3 *Thought and Practice* 87.

13 Ollor et al (n 8).

14 G Nwangwu 'The legal framework for public-private partnerships (PPPs) in Nigeria: Untangling the complex web' (2012) 7 *European Procurement and Public Private Partnership Law Review* 270.

15 A Arimoro 'Funding of public-private partnership projects under the Nigerian ICRC Act of 2005: Why is the Act silent?' (2015) 40 *Journal of Law, Policy and Globalisation* 69.

16 My emphasis.

systems; solid waste management; educational facilities (for instance, schools, universities); urban transport systems; housing; and healthcare facilities.¹⁷

In addition to the ICRC Act other relevant legislation that regulates PPP transactions in the country at the national level include the Public Procurement Act 2007;¹⁸ the Fiscal Responsibility Act 2007;¹⁹ the Debt Management Office Act 2003;²⁰ and the Utilities Charges Commission Amendment Act 2016.

At the sub-national level, given the fact that Nigeria is a federation of 36 states, a Federal Capital Territory and 774 local governments, state governments that desire to establish a PPP regime within their jurisdictions may enact their own PPP law.²¹ Following from this, some states, including Lagos,²² Rivers,²³ Cross River,²⁴ Ekiti²⁵ and Niger, have enacted their own PPP laws and set up PPP units to administer PPP transactions in their local environments. Of interest to a prospective PPP investor or promoter in Nigeria is the fact that there can be as many legal frameworks for PPP as there are various governments at different tiers, because the various states in the country are allowed to enact local PPP laws. Furthermore, the Second Schedule of the 1999 Constitution of the Federal Republic of Nigeria contains a list of items in the Exclusive Legislative List over which state governments have no jurisdiction. As such, care must be taken to note the constitutional restrictions on state governments on matters such as aviation, federal roads and inland waterways.²⁶ The implication of arranging a PPP in such areas may result in an illegality as the states have no power to embark on projects relating to items in the Exclusive Legislative List.

17 Infrastructure Concession Regulatory Commission 'National Policy on Public Private Partnership' (2009) 4.

18 This Act deals with the procurement of goods, works and services.

19 This Act ensures accountability, transparency and prudence of government in preparation of budgets and expenditure frameworks.

20 This law governs all government loans.

21 Each tier of government in Nigeria is allocated responsibilities as prescribed in the Second and Fourth Schedules to the 1999 Constitution of the Federal Republic of Nigeria (as amended). See also secs 4,5 and 8 of the Constitution.

22 The Lagos State government enacted the Lagos State Public Partnership Law 2011 to regulate PPP in the state.

23 The Rivers State Public-Private Participation in Infrastructure Development Law 2009 regulates PPP transactions in Rivers State.

24 The Public Private Partnership Law 2010 applies in Cross River State.

25 In Ekiti State, the Ekiti State Public Private Partnership Law 2011 applies.

26 Refer to n 20.

2.1 Types of public-private partnership in Nigeria

A variety of PPP alternatives are available under the existing legal frameworks in Nigeria.²⁷ The laws make provision for the traditional forms and to some extent allow for innovation where needed.²⁸ Apart from Rivers State where the law is couched to allow for private finance initiative (PFI), which is a model in which the public authority pays the project company for the use of the facility by citizens,²⁹ it is not clear whether a PFI-styled PPP can be arranged under the ICRC Act which specifically mentions only concessions.³⁰ This author is of the view that the concession-type of PPP is envisaged under the ICRC Act because the ICRC Act does not provide for a PFI arrangement and uses only the word 'concession' in the title of the Act and in its provisions.

Under the concession model, there are several types of PPP that may be adopted.³¹ These include the following:

- (i) *Build-Operate-Transfer (BOT)*. In a BOT, the concessionaire³² builds the facility, operates it under the terms of the PPP contract and transfers the facility to the public authority at the end of the tenure of the agreement. This applies specifically to 'greenfield' projects.³³
- (ii) *Rehabilitate-Operate-Transfer (ROT)*. Under the ROT form of PPP arrangement the project company rehabilitates an existing facility, operates it under the terms of the agreement and returns the facility at the end of the contract to the public authority. This kind of arrangement suits 'brownfield' projects.³⁴
- (iii) *Build-Own-Operate-Transfer (BOOT)*. In a BOOT the private sector project company finances, builds, owns and operates a facility and charges user fees for a specified period after which the ownership is transferred to the public authority.³⁵

In the next subsection the article briefly discusses the advantages inherent in PPP arrangements.

27 F Onuobia & OJ Okoro 'Nigeria' in B Werneck & M Saadi (eds) *The Public-private partnership law review* (2018) 178.

28 Onuobia & Okoro (n 27) 179.

29 Yescombe (n 4) 9.

30 In a concession, the members of the public that are the end users of the public facility pay for their use as distinct from PFI-styled PPP.

31 This author is of the firm view that privatisation, service or management contracts are not PPPs and should not be confused with PPP.

32 In this article this term is used interchangeably with 'project company'.

33 Refer to n 4.

34 Refer to n 5.

35 A Arimoro 'An evaluation of the legal framework for public private partnerships in Nigeria' unpublished LLM dissertation, University of Derby, 2014 29, www.researchgate.net/publication/274951436_An_Evaluation_of_the_Legal_Framework_for_Public_Private_Partnerships_in_Nigeria (accessed 24 October 2018).

2.2 Advantages of public-private partnership

Generally, while development issues have become too complex and intertwined, the financial resources to provide for or maintain available infrastructure assets have become scarce for the government alone, hence the need to partner with the private sector.³⁶ The private sector partner may be domestic or foreign.³⁷ There are at least five advantages to adopting PPPs by the federal government of Nigeria. First, a PPP provides an opportunity to improve service delivery by allowing both the private and public sectors to do what they can do best. The government's core business is policy making, while the private sector is a better manager of business activities. Second, by taking advantage of private sector innovation, experience and flexibility, the PPP often can deliver services more cost-effectively than traditional approaches. Third, public sector risk is reduced as it is transferred to a party that can better manage the risk. Fourth, the private sector can generate business, create jobs and impact on the economy; and, fifth, the government can tap into the expertise of the private sector.

2.3 How do public-private partnerships work?

In the event that the public authority identifies the need to develop a new or to update an existing facility the government may leverage the cooperation of the private sector. Here, the government may select a consortium of private sector enterprises, which includes a developer, a general contractor and a facility manager. While the public sector maintains ownership of the facility, the responsibility for the design, construction, financing and ongoing operations is transferred to and managed by the consortium. During the duration of the contract the government or users of the facility pay for the use of the facility.³⁸

Typically, the public authority selects PPP partners through a fair competitive bidding process. The agency sponsoring the project will invite the private sector to submit proposals³⁹ detailing plans for meeting service delivery needs. The proposals are then subjected to evaluation to ensure that they deliver value for money for taxpayers and protect the interests of the public.⁴⁰ The public authority then grants the right to a private company that wins the bid to develop

36 Arimoro (n 35) 26.

37 As above.

38 As above.

39 Eg, Asset & Resource Management Co Ltd (ARM) emerged winner of the competitive bid for the Lekki-Epe Toll Road Concession Project and incorporated the LCC as a special purpose vehicle to execute the project with the preferred concession method for the project being a BOT which is a globally established model. See J Ehonwa 'Important facts about the Lekki-Epe expressway' *Connect Nigeria* 16 April 2013, <https://connectnigeria.com/articles/2013/04/important-facts-about-the-lekki-epe-expressway/> (accessed 24 October 2018).

40 Partnerships British Columbia 'An introduction to public private partnerships' (2003), <http://www.partnershipsbcc.ca/pdf/An%20Introduction%20to%20P3%20-June03.pdf> (accessed 24 October 2018).

and operate the project. It is the responsibility of the private company to obtain financing for the project as well as procure the design and going ahead with construction. In addition it maintains and operates the facility during the duration of the concession. It therefore behoves the project company to secure sufficient resources to meet these obligations.⁴¹

2.4 The duty of the state to ensure development versus the right to property

In this part of the article the duty of the state to ensure the economic well-being of citizens in relation to the right of citizens to own property is examined. Section 16 of the 1999 Constitution of the Federal Republic of Nigeria deals with socio-economic rights. It is given that in order for the state to deliver services for the public good, the government is required to make policies and to embark on actions geared towards achieving this objective.⁴² It is argued that Nigeria's Land Use Act 1978 was passed in order to give the government sufficient powers over the acquisition, transfer or assignment of interest in land.⁴³ The Act aims to enable economic development by allowing the government to have control over land by abrogating absolute ownership or freehold interest by the community, families or an individual.⁴⁴ This position of the law in Nigeria was restated in *Savannah Bank v Ajilo*.⁴⁵

The above notwithstanding, there is a need for a balance. While the compulsory acquisition of land by the public authority for public purposes is to benefit the citizens of that state, it is pertinent that the state protects the right to own property. To do this the state must ensure adequate compensation where land is acquired compulsorily.⁴⁶ Thus, while the state has a responsibility to improve the well-being of citizens, it must not be at the cost of depriving other citizens of their rights.

41 For the Lekki-Epe Project, the LCC in 2008 received the full commitment for the cost of the construction phase of the project, securing an N50 billion long-term financing package with several blue-chip local and international financial institutions on terms regarded as ground-breaking in the Nigerian financial environment. The financiers include Stanbic IBTC, First Bank of Nigeria (FBN) and Africa Infrastructure Investment Managers.

42 I Ogunniran 'Enforceability of socio-economic rights: Seeing Nigeria through the eyes of other jurisdictions' (2010) 1 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 63.

43 ME Nwocha 'Impact of the Nigerian Land Use Act on economic development in the country' (2016) 8 *Acta Universitatis Danubius. Administratio*, <http://journals.univ-danubius.ro/index.php/administratio/article/view/3976/3876> (accessed 27 October 2019).

44 As above.

45 (1987) 1 NWLR (Pt 413).

46 *The Administrators of the Estate of General Sani Abacha v Eke-spiff & 3 Others* (2009) 37 NSCQR 364.

2.5 Expropriation of land for public-private partnership projects

The term 'expropriation' has been defined as 'the power of government to acquire legally-recognised tenure rights without the willing consent of the tenure holder, in order to serve a public purpose or otherwise benefit society'.⁴⁷ It may occur that private land is compulsorily acquired by the government for the purposes of a PPP project. When the government exercises the power to acquire private land without the willing consent of the owner the process is called by a variety of names, including expropriation, takings and compulsory purchase.⁴⁸ It is noted that despite being a core and necessary power within the scope of government, land expropriation always is mired in controversy both in theory and in practice.⁴⁹

Generally, the government may compulsorily acquire a property for a 'public purpose'. The term 'public purpose' is subject to different definitions. For the purpose of this article, 'public purpose' refers to the acquisition of land by the government for one or more of the following reasons:⁵⁰

- (i) transportation use including roads, canals, highways, railways, bridges, wharves and airports;
- (ii) public buildings including schools, libraries, hospitals, factories and public housing;
- (iii) public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs;
- (iv) public parks, playgrounds, gardens, sports facilities and cemeteries; and
- (v) defence purposes.

The principal legislation that governs land in Nigeria is the Land Use Act 1978.⁵¹ The Act vests all the land in the governor of a state in the following words:

- 1 Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation is vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

2(1) As from the commencement of this Act –

47 NK Tagliarino et al 'Compensation for expropriated community farmland in Nigeria: An in-depth analysis of the laws and practices related to land expropriation for the Lekki Free Trade Zone in Lagos' (2018) *Land* 5 DOI.10.3390/land7010023.

48 JM Lindsay 'Compulsory acquisition of land and compensation in infrastructure projects' (2012) 1 *PPP Insights* 1.

49 Nwocha (n 43).

50 As above.

51 Cap 202 Laws of the Federation of Nigeria 1990.

- (a) all land in urban areas shall be under the control and management of the Governor of each state; and
- (b) all other lands shall, subject to this Act, be under the control and management of the Local Government, within the area of jurisdiction of which the land is situated.

Furthermore, the Act gives the governor the power to revoke a right of occupancy for an overriding public interest.⁵² The term 'overriding public interest' is defined by the Act as follows:

- (a) the requirement of the land by the Government of the State or by a Local Government in either case for the public purpose within the State, or the requirement of the land by the government of the Federation for the purposes of the Federation;
- (b) the requirement of the land for mining purpose or oil pipelines or for any purpose connected therewith;
- (c) the requirement of the land for the extraction of building materials;
- (d) the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval.

Where the government compulsorily acquires land for the overriding public interest, the Act provides that the holder and the occupier of the land shall be entitled to compensation for the value at the date of the revocation of their unexhausted improvements.⁵³ However, where the right of occupancy is revoked for mining purposes, the holder and occupier shall be entitled to compensation under the appropriate provisions of the Minerals Act or the Minerals Oil Act or any legislation replacing the same.⁵⁴ Furthermore, if there is a dispute regarding the amount of compensation calculated under section 29 of the Act, the dispute is to be referred to the appropriate Land Use and Allocation Committee.⁵⁵ In order to examine the provisions of the Land Use Act mentioned above it will help to consider background to the Act itself. First, the Land Use Act has been analysed as being based on Islamic principles where land is held by the state in sacred trust for the people.⁵⁶ Under Islamic law the emir (or governor) personifies the state and has unfettered power over all the land in the emirate.⁵⁷ In Nigeria the state governors are placed in the position of these emirs with all powers in a secular environment. Hence, a study revealed that the Act was more prone to abuse in the Christian south than in the Muslim north of Nigeria.⁵⁸ It has been averred that governors in Nigeria have abused the powers conferred on them under section 1 of

52 Sec 28 Land Use Act 1978.

53 Sec 29(1) Land Use Act 1978.

54 Sec 29(2) Land Use Act 1978.

55 Sec 30 Land Use Act 1978.

56 P Onukwuli 'The broad powers of state governors under the Land Use Act 1978 and land governance in Nigeria' (2018) Paper delivered at the Annual World Bank Conference on Land and Poverty, Washington DC, 19-23 March 2018. See also Qur'an 6:165.

57 Cap 202 Laws of the Federation of Nigeria 1990 (n 51).

58 As above.

the Land Use Act. For example, in Enugu State the procedure for land acquisition by the state has been abused where land compulsorily acquired for burial grounds, zoological gardens, polo fields and cricket grounds has been converted to residential use by the state governor.⁵⁹

It is a given that the public authority may compulsorily acquire land in the public interest, but at what point does it vitiate the right to property? In *Olatunji v Military Governor of Oyo State*⁶⁰ the Court of Appeal, per Salami JCA (as he then was) stated:⁶¹

The appellant can legitimately protest the acquisition if the purpose for which the land was being acquired was not within the confines of the definition of public purpose as defined in section 50 of the Act. The acquiring authority failed to state the public purpose for which the property was acquired. He kept it up his sleeve. In this connection Waddington J said in the case of *Chief Commissioner, Easter Province v Ononye* 17 NLR 142 at 143 thus: 'The notice merely states "for public purposes" and I find it difficult to understand why the particular public purpose is not stated. When the matter comes into court it has to be admitted that there is no public purpose involved at all; and the impression is liable to be conveyed, no doubt erroneously, that there was something ulterior in the failure to make the purpose public.'

In addition, the Court held that the holder of land compulsorily acquired by the public authority is entitled to know the ground(s) for the government's acquisition of a citizen's interest in the land. The learned Justice of the Court of Appeal stated further:⁶²

The appellant is not entitled to speculate or fish for the ground or grounds for acquiring his interest in the property in dispute. The best he would do in the circumstance is to lie patiently in waiting until the acquiring authority manifest[s] its true intention. Before manifestation of the acquiring authority's intention he is helpless not only himself would be helpless the court to which he has constitutional access to would equally be left in complete helplessness.

From the decisions of the Nigerian courts, it is settled that the limitation of the right to property *vis-à-vis* compulsory acquisition of property by the public authority applies to where the land is required for a known public interest and for the payment of reasonable compensation.⁶³ Thus, in *National Universities Commission v Oluwo*⁶⁴ the Court of Appeal held that where land has been expropriated by the public authority, the person whose land has been so acquired is entitled to reasonable compensation. In the same vein, the Nigerian

59 As above.

60 (1994) LPELR 14116.

61 Land Use Act 1978 (n 55).

62 Paras B-G Land Use Act 1978 (n 55).

63 O Odima 'Nigeria: Legal and regulatory requirements for the compulsory acquisition of land in Nigeria' *Mondaq* 13 May 2016, www.mondaq.com/Nigeria/x/490868/real+estate/Legal+And+Regulatory+Requirements+For+The+Compulsory+Acquisition+Of+Land+In+Nigeria (accessed 25 October 2018).

64 [2001] 3 NWLR (Pt 699) 90.

Supreme Court restated the importance of the proper procedure for land expropriation. It held in *Goldmark (Nigeria) Ltd v Ibafo Co Ltd*:⁶⁵

The court has always emphasised that government has the right to compulsorily acquire property on payment of compensation. There is no argument about such constitutional power. There are statutes that provide for the procedure of acquiring property by the government. Government is expected to comply with those statutes which it has enacted. Where government disobeys its own statute by not complying with the laid down procedure for acquisition of property, it is the duty of the courts to intervene between the government and the private citizen.⁶⁶

From the foregoing it is safe to say that where the public authority in Nigeria seeks to obtain land for the purposes of a PPP project, the project itself must conform to the 'overriding public interest' criterion. In addition, the proper method for compulsory land acquisition for the project as laid out in the *Goldmark* case above must be adhered to.

In the next part of the article the right to property is examined.

3 Right to property

The right to property may refer to the legal and political environment, intellectual property or physical property rights. In this article reference is made to physical property rights. The right to property is enshrined in international law. Article 17 of the Universal Declaration of Human Rights 1948 (Universal Declaration) provides that '[e]veryone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.'

According to *Webster's new encyclopaedic dictionary* a right is defined as

something to which one has a just claim: as (a) the power or privilege to which one is justly entitled; (b) the interest that one has in a piece of property; the property interest possessed under law or custom and agreement in an intangible thing; something that one may claim as due.⁶⁷

'Property' is defined as '(a) something owned or possessed; specifically a piece or real estate; (b) the exclusive right to possess, enjoy, and dispose of a thing; ownership: (c) something to which a person or business has a legal title'.⁶⁸

The right to property refers to the power or a legitimate right vested in the owner of a means of production, called the property, to use, enjoy and live by them, and legal procedures are taken against

65 [2012] 10 NWLR (Pt 1308) 291.

66 *Olatunji* (n 60).

67 *Webster's new encyclopaedic dictionary* (2002) 1582.

68 *Webster's new encyclopaedic dictionary* (n 67) 1467.

those that forcefully claim or destroy such property.⁶⁹ In this part this article discusses the right to property.

A property right is considered the definite and inalienable right to control and use property. This right may be exercised by an individual (natural or artificial), a community or by a group of individuals. The right to property also includes the right for the owner to delegate the right to use the resources, the right to sell, rent or otherwise alienate his interest in the property.⁷⁰

Property rights refer to the rules that determine who gets what and who must compensate whom if damages occur. The 1999 Constitution of the Federal Republic of Nigeria (as amended) enshrines the right to property as can be gleaned from section 44(1) which provides that no movable property or interest in an immovable property is to be taken possession of compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things, (a) requires the prompt payment of compensation therefor; and (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

While conceding that the right to property is limited in Nigeria to the extent that the public authority may expropriate land for overriding public interest, it is important to note that the remedy here is reasonable compensation. However, it is submitted that the intention of the law is not to acquire land compulsorily from one person and give it to another private person. In this case, it must be understood that even though in a PPP the ownership of the facility is transferred to the private sector partner for the duration of the contract, ownership ultimately reverts to the public authority and, as such, a PPP should not be considered as a case where private land is acquired compulsorily and handed over to a private entity.

3.1 Evolution of property ownership in the Nigerian context

Economists believe that the evolution of property ownership is based on the foundation of natural rights.⁷¹ The natural owner is the entity 'who has produced an article, or who, by a constructively equivalent expenditure of productive force, has found and appropriated an object'.⁷²

Arguably, the right to property is the oldest 'real' right. This was before the definition of other concepts such as 'right' or 'real' (as

69 CM Sibani & E Asis 'The right to property in Nigeria: A reflection on the legal and Biblical laws' (2016) 28 *Idea* 234.

70 O Adebimpe 'Property rights in Nigeria: An untapped tool for economic growth' (2017), www.studentsforliberty.org/2017/09/15/property-rights-nigeria-untapped-tool-economic-growth/ (accessed 25 October 2018).

71 *Goldmark* (n 65).

72 *Goldmark* 235.

distinct to 'personal').⁷³ It is noted that controversies regarding property are as old as humanity itself.⁷⁴

From time immemorial, through the era of agriculture to the modern era of industrial development, real property (or land) has remained the most valuable asset in the life of man and in his development. The land is regarded as a source of wealth to those who have it.⁷⁵ As such, the rationale behind the enactment of the Land Use Act is to make land available to all citizens and to ensure that land is acquired and put to proper use for the development of the country.

Before the passing of the Land Use Act there were three main sources of land law in Nigeria, namely, customary law, received English law,⁷⁶ Islamic law and local legislation. Before 1978 there was a duality of land use systems in the country. The southern part operated mostly in terms of the customary law while principles of Islamic law applied in the north.

Given the fact that Nigeria's Land Use Act has its origin in Islamic law, it is not out of place to consider how Islamic jurisprudence treats the concept of land. According to Sayin et al from an Islamic point of view the land is God's creation and, as such, land ownership originally resides in God.⁷⁷ Therefore, since everything belongs to the Creator and private ownership is permitted and encouraged, the property must be protected as it is recognised as a means for fulfilling the needs of the faithful.⁷⁸ In Islamic jurisprudence limits on property rights can apply where there is a need to satisfy basic communal needs. However, according to Islam the right to property is not a natural right. It is a right that derives from the individual accepting to perform certain obligations based on divine commandments.⁷⁹

The Land Use Act can be traced to the Land Tenure Law passed by the Parliament of Northern Nigeria in 1962. Under the Land Tenure Law the land was vested in the governor who was to hold the land in trust for the citizens. The governor granted only rights of occupancy as against outright ownership.⁸⁰ The Land Use Act 1978 was promulgated initially as a decree by the General Olusegun Obasanjo administration before the advent of civil rule in 1979. The Act entered into force on 29 March 1978 as the country's land policy document.

73 In the modern era, there is a distinction between 'real' and 'personal' property.

74 Y Sayin et al 'Land law and limits on the right to property: Historical, comparative and international analysis' (2017) *European Property Law Journal* DOI 10.1515/eplj-2017-0002.

75 B Oseni 'Summary of the Land Use Decree No 6 of 1978 in Nigeria' (2012), <http://nigeriaenvironment.blogspot.com/2012/11/summary-of-land-use-act-decree-no-6-of.html> (accessed 25 October 2018).

76 Comprising the common law, equity and statutes of general application.

77 Suratul Ali Imran 3:15; Suratul al-Isra 17:100; Suratul al-Fajr 89:20; Suratul al-'Aadiyat 100:8.

78 Sayin (n 68).

79 As above.

80 Oseni (n 69).

The effect of the Act is that land ownership in the country has been nationalised. However, this effect does not negate the right to property as stipulated in the 1999 Constitution (as amended). It is worth noting that no individual in Nigeria can hold a freehold interest in land.⁸¹ Individuals are granted only a right of occupancy for a maximum holding period of 99 years, subject to the payment of ground rent. In reality what landowners sell in Nigeria is a leasehold and not a freehold.⁸² Simply put, under the law in Nigeria the real owner of all land is the state. For all urban land one's statutory right to the land is for the period of the lease (for example, 49 or 99 years). The state can decide to terminate the lease in the public interest.

3.2 Land availability for public-private partnerships

In this part land availability for PPP is discussed. As already noted, the government may exercise its power to acquire land compulsorily in the overriding public interest. In many cases the land where the project is to be sited for a PPP project may already be available, for example stations in a rail project or depots in a light rail one. However, where the project requires the compulsory acquisition of land, for example for the dualisation of a public road, the public authority bears the risk of acquiring the land.⁸³ This factor is referred to as land acquisition risk.⁸⁴

For the prospective PPP investor in Nigeria it is important to note that the law requires that where land is acquired compulsorily for public purposes, the purpose must be defined and made clear. In addition, reasonable compensation has to be paid to the landowner. While it is the responsibility of the public authority to ensure that this is done, the private sector entity in a PPP arrangement needs to ensure that the public authority has performed its obligations so as not to embark on a project that suffers under disputes with landowners, whether as a community or in their individual capacities. Thus, land acquisition constitutes a critical area that PPP investors must consider before entering into PPP transaction deals in the country. This is more the case because land matters arguably form the bulk of adjudicated cases in Nigerian courts.⁸⁵

The next part of the article presents the conclusion and recommendations.

81 Sec 1 Land Use Act 1978.

82 NB Udoekanem, DO Adoga & VO Onwumere 'Land ownership in Nigeria: Historical development, current issues and future expectations' (2014) 4 *Journal of Environmental and Earth Science* 186.

83 APMG International 'Land availability and acquisition' (2018), <https://ppp-certification.com/ppp-certification-guide/111-land-availability-and-acquisition> (accessed 25 October 2018).

84 As above.

85 K Agary 'Land ownership in Nigeria (1)' *Punch* 17 July 2016, <https://punchng.com/land-ownership-nigeria-1/> (accessed 25 October 2018).

4 Conclusion

Due to the huge deficit in infrastructure in Nigeria and the need to bridge this gap, government at the national and subnational level continues to explore collaborating with the private sector to meet the infrastructure needs of the population. More successful PPP relationships would transform into more projects around the country. In the same vein, the public authority requires land for such projects. In turn, it would lead to the government compulsorily acquiring land from the population in the public interest. Given the attachment of Africans to their landed property, this article examines the effect of such acquisitions *vis-à-vis* the right to property, especially as land is regarded as everything a family in the African setting stands for. It is considered that when one is deprived of his or her land, it amounts to 'robbing them of their personhood, being and identity, in other words their full humanity'.⁸⁶

It is noted in the article that the right to property is a fundamental right enshrined in chapter IV of the 1999 Constitution of the Federal Republic of Nigeria (as amended). It is the duty of the state to ensure that this right is protected. However, it is imperative to note that the right is limited to the extent that land may be taken compulsorily from its owner in Nigeria for the overriding public interest.

It has been established in the country's jurisprudence that the overriding public interest for which a land is taken by the government must be known and defined. Furthermore, land must not be acquired from one individual and be given to another private person, as it amounts to an abuse of the law vesting land in the person of the governor of a state. In this article the PPP is distinguished from a taking by the government for a handover to a private party. Although the ownership of a PPP facility is a private entity during the duration of a PPP contract, ultimate ownership resides in the government that initiated the project.

Following from the findings in this article, the author makes the following recommendations. It is recommended that a prospective investor in a PPP in Nigeria critically considers the land ownership risk. Furthermore, even though this risk is borne by the public authority, before closing a PPP deal the parties must ensure that the proper procedure is followed. A failure to follow due procedure may lead to protracted land disputes and community resentment of a project, no matter how well-intentioned it is. Second, the state must ensure that the right of the citizen to property is respected and where it has to be curtailed reasonable compensation is paid. In the opinion of this author reasonable compensation must be the fair market value at the time of acquisition.

86 K Tafira 'Why land evokes such deep emotions in Africa' *The Conversation* 27 May 2015, <https://theconversation.com/why-land-evokes-such-deep-emotions-in-africa-42125> (accessed 27 October 2019).

Decongestion of Nigerian prisons: An examination of the role of the Nigerian police in the application of the holding-charge procedure in relation to pre-trial detainees

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Summary

The Nigerian Correctional Service is known to be grappling with a congestion of inmates in its facilities around the country. However, its major challenge is that more than two-thirds of these inmates are awaiting-trial detainees that ultimately stay in correctional centres for long periods of time without their status being determined. There is a growing body of research into ways to reduce the high incidence of prolonged detention of pre-trial inmates in the country. This article analyses the effect of the holding-charge procedure, whereby the Nigerian police arraign individuals before lower courts that do not have jurisdiction to try the alleged crimes, for the purpose of remanding individuals in prison custody pending the time of completion of an investigation into their matters by the police, which could take years. In the course of the study, the relevant literature on international and national human rights legal jurisprudence, including the Administration of Criminal Justice Act (2015), which has as one of its objectives the reduction in the prolonged periods of detention of pre-trial detainees, was analysed with a view to highlighting the implications of the holding-charge procedure for the criminal justice system of Nigeria. Consequently, it was observed that the practice of holding charge contributes largely to the high number of pre-trial-detainees. There is a need for urgent reforms in the criminal justice system of Nigeria to reduce the arbitrary detention of individuals.

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1 Introduction

Prison congestion is a challenge faced by many countries globally. The Nigerian Correctional Service (NCS) also is not insulated from this problem, as it has a capacity of housing only 50 153 inmates.¹ However, as at 7 October 2019 it accommodated 73 818 inmates.² In addition, the majority of persons in custody are held without bail or having been convicted by a court of law. These categories of inmates are referred to as pre-trial detainees (PTDs).³ They constitute 69 per cent of the total prison population, as 50 968 out of the total prison inmates of 73 818 are PTDs, while 22 850 have been convicted and are serving prison terms.⁴ This situation has been described as a 'national scandal'.⁵ Various suggestions for solving the problem of prison congestion have been proffered. Olokooba and Adebayo are of the opinion that the adoption of plea-bargain, where an accused person pleads guilty to the commission of a lesser offence in exchange for a lighter sentence, will accelerate the administration of justice, hence reducing the pressure on the correctional facilities.⁶ Simon-Peter suggests the establishment of privately-owned and managed prisons, although he is of the view that 'caution' should be exercised by the government as they are profit-oriented.⁷ Also, it was observed that the introduction of non-custodial sentencing for convicts and ordering them to engage in community service instead of imprisonment decreases the number of inmates in prisons.⁸

This article seeks to examine the role of the Nigerian Police Force (NPF), which has the task of investigating of the commission of criminal offences, as it pertains to its contribution to the congestion in Nigerian prisons. The NPF at the initial stage takes individuals into its detention facilities, and what it does thereafter largely determines whether the cases will be disposed of speedily.⁹ 'Poor or shoddy

1 'World Prison Brief Data', www.prisonstudies.org/country/nigeria (accessed 28 August 2018).

2 'Summary of inmate population by convict and awaiting trial persons as at 7 October 2019', www.prisons.gov.ng/statistics (accessed 10 October 2019).

3 AB Garner et al (eds) *Black's law dictionary* (2009) 514.

4 Summary of inmate population (n 2).

5 W Isiaka 'Buhari: Prison congestion a national scandal' 7 October 2017 <https://dailytrust.com.ng/buhari-prison-congestion-a-national-scandal.html> (accessed 12 February 2018).

6 SM Olokooba & MK Adebayo 'Plea bargaining: A panacea towards prison congestion in Nigeria' (2014) 4 *International Journal of Juridical Sciences* 146.

7 S Ayooluwa 'Service work as an antidote to prison problems in Nigeria' (2016) 1 *International Journal of Juridical Science* 34.

8 Ayooluwa (n 7) 37.

9 A Babalola 'Power of police to prosecute criminal cases: Nigeria and international perspectives' (2014) 2 *European Journal of Business and Social Sciences* 131.

investigation' methods tend to prolong the incarceration of individuals.¹⁰ Also, there are allegations of their failure to submit case files timeously to the authorities concerned for legal advice (the office of the Director of Public Prosecution) to decide whether to prosecute or dismiss the charges against the suspects, which further contributes significantly to the growing number of PTDs.¹¹ Consequently, the article discusses the legislation that protects the right to liberty of individuals in Nigeria, the functions of the NPF and an analysis of the application of the holding charge in Nigeria.

2 Safeguards against pre-trial detention

The right to liberty of individuals is guaranteed and protected at the international level by article 9 of the International Covenant on Civil and Political Rights (ICCPR) of 1966. This Covenant prohibits the arbitrary arrest and detention of individuals.¹² The Human Rights Committee (HRC), which has the responsibility of overseeing the implementation of the provisions of ICCPR¹³ to which Nigeria is a party, describes arbitrary detention as 'an arrest or detention which may be authorised by domestic law and nonetheless be arbitrary' as it may be as a result of 'inappropriateness, injustice, lack of predictability and due process of law'.¹⁴ Although the HRC recognises the right of an individual to liberty as provided in article 9(1), it acknowledges that it is not absolute, as anyone may be justifiably detained, but the detention must be within the ambit of the law.¹⁵ The most common forms of detention as identified by the HRC are police custody and pre-trial detention.¹⁶

The Nigerian Constitution, as does ICCPR, also guarantees each individual's right to liberty. However, the Constitution acknowledges that the right is not absolute and can be curtailed in accordance with the law.¹⁷ ICCPR for its part provides that anyone arrested or detained on a criminal charge shall be arraigned 'promptly' before a competent court of law.¹⁸ The treaty does not explain the time frame that would satisfy the prompt requirement in arraigning a detainee before a court. However, the HRC has explained that a detainee should be

10 'Police cause of congestion in Nigerian prisons: Dambazau', thenewsnigeria.com/2016/03/police-cause-of-congestion-in-nigerian-prisons-dambazau/ (accessed 1 July 2018).

11 'Controller of Prisons lament prisons congestion in Delta' *Leadership* 10 July 2018 12.

12 General Assembly Resolution 2200A (XXI).

13 General Assembly Resolution (n 12) art 28.

14 General Comment 35: Article 9 (Right to liberty and security of persons) adopted by the HRC at its 112th session 16 December, 2014 UN DOC NO CCPR/C/GC/ 35 para 12.

15 General Comment 35 (n 14) para 10.

16 General Comment 35 para 5.

17 Constitution of the Federal Republic of Nigeria 1999 (as amended) sec 35(1).

18 ICCPR (n 12) art 9(3).

brought before a judge within 48 hours of his detention and in the case of juveniles within 24 hours. These timelines are given to minimise the chances of the detainees being ill-treated while they are in the custody of the police.¹⁹ The HRC's interpretation of 'promptness' to be 48 hours is commended as it is seen to have 'taken global realities into account'.²⁰ Equally, it has been pointed out that 'prompt custody hearing' gives a detainee the opportunity to put his case before a judge, so that the legality of his detention can be determined.²¹ Nigerian legislation contains more onerous provisions regarding detention periods in police custodial centres, as it provides that an individual shall not exceed the period of (i) 24 hours (a day) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometres and, (ii) in any other case, 48 hours (two days) or any longer period which, given the circumstances of the case, the court may consider reasonable.²²

However, under (ii), the Court of Appeal asserted that where there is a court of competent jurisdiction within a radius of 40 kilometres, the failure to arraign a person alleged to have committed a criminal offence in a period of one day as provided by section 35(5)(a) is an infringement of the constitutionally-guaranteed right to liberty of every citizen of Nigeria.²³ Pre-trial detention that results in prolonged incarceration is also discouraged by the HRC as it enjoins states to resort to it only out of necessity, as it is prone to abuse by state authorities, which has resulted in the PTDs outnumbering prison convicts.²⁴ As indicated earlier, Nigeria falls under the category of those states that have a high number of PTDs in its correctional centres. The Constitution has set a time limit of 48 hours for keeping persons in the custody of the NPF.²⁵ The Nigerian Constitution further provides that any individual that has been detained and has not been tried within two months shall be released unconditionally or on bail.²⁶ The Nigerian Supreme Court further elaborated on the constitutional right to bail of individuals as follows:²⁷

19 General Comment 35 (n 14) para 33.

20 LG Neuman 'Arbitrary detention and the Human Rights Committee's General Comment No 35' 17 September 2016, <http://ssrn.com/abstract=2840254> (accessed 21 April 2017).

21 L Medina 'Indefinite detention, deadly conditions: How Brazil's notorious criminal justice system violates the International Covenant on Civil and Political Rights' (2016) 31 *American University International Law Review* 613.

22 Nigerian Constitution (n 18) sec 35(5).

23 *Danfulani v EFCC* (2016) 1 Nigerian Weekly Law Reports (Pt 1493) 223 247 paras F-H.

24 S Nagy 'Use and abuse of pre-trial detention in Council of Europe: A path to reform' (2016) 13 *Loyola University Chicago International Law Review* 160.

25 Sec 35(5) Nigerian Constitution.

26 Sec 35(4) Nigerian Constitution.

27 *Suleman v Commissioner of Police* (2008) 162 Law Reports of Courts of Nigeria 179-180 paras JJ-A.

The right of bail, a constitutional right, is contractual in nature. The effect of granting bail is not to set the accused free for all times in the criminal process but to release him from the custody of the law and to entrust him to appear at his trial at a specific time and place ... the freedom is temporary in the sense that it lasts only for the period of the trial.

In addition the Court of Appeal in *Ahmed v Commissioner of Police Bauchi State*²⁸ held:²⁹

Section 35(4) of the Nigerian Constitution provides that a person arrested or detained upon reasonable suspicion of his having committed a criminal offence, should be brought before a competent court of law within a reasonable time, and if such a person is not tried within a period of two months from the date of his arrest and detention, and in the case of a person who is in custody or is not entitled to bail, such an accused person shall/is entitled to be released either unconditionally or upon conditions that are reasonably necessary to ensure his appearance for trial at a later date.

The Court further asserted that 'it does not lie in the mouth of the prosecution' to object to the release of detainees when it failed timeously to arraign them before a court of competent jurisdiction for trial.³⁰ Also, section 35 of the Nigerian Constitution is aimed at protecting Nigerian citizens against arbitrary arrest and detention by the state and its agencies.³¹ Furthermore, section 36 of the Constitution guarantees every individual's right to a fair hearing, that is, the presumption of innocence is in favour of a person charged with a criminal offence,³² who should also be given adequate time and facilities to enable the person prepare his own defence.³³ In addition, the Nigerian Constitution is the supreme law of the land. Hence, it is the responsibility of the state, including the courts, to ensure that the right to liberty of individuals is protected in accordance with the law.³⁴

However, despite the legal protection outlined above there continues to be a high incidence of arbitrary arrest leading to pre-trial detention, which ultimately culminates in the overcrowding of the correctional centres. As a result, there is a high incidence of attempted jailbreaks and riots in the correctional centres which, in the authorities' efforts to suppress these, resulted in loss of life among inmates due to the alleged use of excessive force by security agencies.³⁵ As mentioned earlier, various factors contribute to the

28 (2012) 9 Nigerian Weekly Law Reports (Pt 1304) 909.

29 *Ahmed* (n 28) 125-126 paras G-A.

30 *Ahmed* 129-130 paras H-B.

31 *Danfulani v Economic and Financial Crimes Commission* (2016) 1 Nigerian Weekly Law Reports (Pt 1556) 247 para H.

32 Sec 36(5) Nigerian Constitution.

33 Sec 36(5)(b) Nigerian Constitution.

34 *Okafor v Lagos State Government* (2017) 4 Nigerian Weekly Law Reports (Pt 1556) 433 paras C-D.

35 'Chaos in Nigerian prisons: Two weeks, two riots' *Daily Trust Saturday* 3 September 2016 48.

overcrowding of Nigerian prisons. This article examines the role of the NPF in the high incidence of pre-trial detention in Nigeria.

3 Functions of the Nigerian police force

The NPF is established by the Nigerian Constitution,³⁶ and its powers and duties are outlined in the Police Act.³⁷ The Act provides that the police have the responsibilities of the prevention and detection of crime; the apprehension of offenders; the preservation of law and order; the protection of life and property and the enforcement of all laws and regulations as it may be assigned.³⁸ Furthermore, the Act equally empowers the personnel of the NPF to prosecute cases before any court in Nigeria.³⁹ The NPF's efforts to carry out its functions and discharge its constitutional mandate have not escaped criticism. They are described as 'the most troublesome in sub-Saharan Africa'.⁴⁰ Reports of their engagement in extra-judicial killings, arbitrary arrests and detention are abundant in the media.⁴¹ Also, it is observed that in the majority of NPF investigations the period extends up to six months irrespective of the offence a person is alleged to have committed, which contributes to individuals languishing in detention for months or even years.⁴² Furthermore, the failure to complete investigations within a reasonable time results in the case file being misplaced and,⁴³ as a result, the file is not forwarded to the Director of Public Prosecutions (DPP) who is saddled with the responsibility of issuing legal advice and where necessary arraigning and prosecuting individuals before competent courts.⁴⁴ It has been observed that family members of individuals suspected of having committed a crime sometimes are arrested and detained by the NPF if they are unable to arrest the alleged suspect.⁴⁵ However, this practice is now prohibited by the Administration of Criminal Justice Act (ACJA) of 2015.⁴⁶ The procedure to which the NPF resorts is to have individuals remanded in prison custody pending the time they complete their 'investigations'. Consequently, what contributes to prison overcrowding is the 'holding charge', which is the focus of this article.

36 Sec 214 para U Nigerian Constitution.

37 Ch P19, Laws of the Federation of Nigeria 2004.

38 Sec 4 Police Act.

39 Sec 23 Police Act.

40 AM Oluwagbenga 'Do the police really protect and serve the public? Police deviance and public cynicism towards the law in Nigeria' (2017) 17 *Criminology and Criminal Justice* 159.

41 Oluwagbenga (n 40) 162.

42 F Agbedo *Rights of suspects and accused persons under the Nigerian criminal law* (2009) 215.

43 As above.

44 Agbedo (n 42) 217.

45 Ayooluwa (n 7) 34.

46 Sec 7 Administration of Criminal Justice Act 2015.

4 Position of the holding charge under the Nigerian administration of criminal justice system

Nigeria is a federation consisting of 36 states.⁴⁷ Nigeria has two laws that regulate its criminal proceedings, namely, the Criminal Procedure Act (CPA)⁴⁸ and the Criminal Procedure Code (CPC).⁴⁹ These laws regulate the criminal proceedings in Nigeria, the CPA being applicable in the territories of the 17 southern states of Nigeria, while the CPC is applied by the 19 northern states of the federation.⁵⁰

Under the CPA, the NPF is mandated to submit a report to the nearest magistrate's court of persons in its custody who were arrested without a warrant. The report must indicate whether they are on court bail or not.⁵¹ The law also provides that the NPF arraigns persons in its custody within 24 hours of their arrest before a magistrate's court that has jurisdiction to determine the charges against the accused persons and, where their arraignment is not possible within a short period, admit them to bail if the allegations do not relate to offences that upon conviction are punishable with death.⁵² The CPC, for its part, emphasises that the NPF shall not detain a person in its custody for more than 24 hours. However, on the application of the NPF a court may authorise the detention of a person for a period that is not to exceed 15 days.⁵³ The CPC makes provision for the NPF where there are reasonable grounds to believe that an offence has been committed to record the grounds of these suspicions on a form known as the First Information Report (FIR).⁵⁴ The FIR and those individuals suspected of having committed the alleged offences are arraigned before a magistrate's court, where the NPF prosecutor is given the opportunity to present *prima facie* evidence that the allegations contained in the FIR are true.⁵⁵ If the magistrate, after having conducted the initial inquiry, is satisfied that the allegations in the FIR have not been substantiated, the suspects must be discharged.⁵⁶ However, where the prosecution provides evidence that leads the court to believe that the accused persons have a case to answer, charges are framed by the magistrate and the accused person will take a plea and if they plead guilty, they will be given an opportunity to enter a defence against the charges against them.⁵⁷

47 First schedule Nigerian Constitution.

48 CAP C41 Laws of the Federation of Nigeria 2004.

49 Criminal Procedure Code 27 of 1963.

50 AO Onadeko *The Nigerian criminal trial procedure* (1998) xxii.

51 Sec 20 CPA (n 48).

52 Sec 17 CPA.

53 Sec 129 CPC.

54 Sec 117(2) CPC.

55 Sec 126 CPC.

56 Sec 159 CPC.

57 Sec 160 CPC.

Despite the provision of these laws regulating criminal proceedings, the NPF resorts to a procedure known as the holding charge whereby the NPF arraigns a person suspected of having committed an offence before a magistrate's court under a 'phony or miniature charge' in order for the court to remand the accused person in prison pending the conclusion of their investigation into the matter. After the conclusion of the investigation the individual is formally arraigned under a proper charge before a court of competent jurisdiction and with the fake charge is withdrawn.⁵⁸ The holding charge is used by the NPF also in cases where individuals are suspected of having committed capital offences, where they arraign the individuals on a FIR, which is described by the Supreme Court of Nigeria as 'just a report that an offence has been committed'.⁵⁹ However, the NPF arraign suspects on FIRs before magistrate's courts that do not have the jurisdiction to determine the alleged offences, with the sole aim of securing a remand order, a practice unknown to any law or practice.⁶⁰ An example of the injustice occasioned by the holding-charge procedure is the case of *COP v Usman Abashe & 4 Others*, where the NPF arraigned five individuals before a magistrate's court on FIR,⁶¹ in which they are alleged to have committed criminal conspiracy; armed robbery; the abetment of armed robbery and belonging to a gang of thieves.⁶² As the magistrate's court had no jurisdiction to try the offences, it remanded all the accused persons in prison until such time as the NPF had concluded their investigation. However, the facts contained in the FIR disclosed that two of the individuals were suspected by the NPF only of having stolen sheep and goats, but nevertheless they were remanded in prison and were released only after six months in custody.⁶³ This practice has led to some PTDs remaining in prison for more than seven years without trial.⁶⁴

Also, in some cases the failure of PTDs to provide gratification to the police in order for them to hasten with the completion of their investigations and recommend the termination of the FIR or properly arraign the accused persons before a court of competent jurisdiction has contributed to the congestion in Nigerian prisons.⁶⁵ The NPF engage in the practice of the holding charge to shield themselves from being held accountable if they exceed the time limit provided in the Nigerian Constitution of holding individuals in custody.⁶⁶ The

58 YDU Hambali *Practice and procedure of criminal litigation in Nigeria* (2013) 540.

59 *Suleman* (n 27) 179-180 paras JJ-A.

60 Hambali (n 58) 540.

61 Court Trial KT/CMC1/641x/12.

62 As above.

63 As above.

64 *Olokooba & Adebayo* (n 6) 143.

65 AM Araromi & A Oke 'Breach of human rights by Nigerian police in the performance of its functions: Need for reform' (2013) 10 *US-China Law Review* 483.

66 Hambali (n 58) 540.

holding charge is alien to the Nigerian jurisprudence and it is alleged that it emanates from the NPF.⁶⁷

Nigerian courts have handed down conflicting judgments with regard to the legality of the holding charge. The Nigerian Supreme Court in the case of *Onagoruwa v The State*⁶⁸ held:⁶⁹

In a good number of cases the police in this country rush to court on what they generally refer to as *holding charge* even before they conduct investigation. Where the investigation does not succeed in assembling the relevant evidence to prosecute the accused to secure conviction, the best discretion is to abandon the matter and throw in the towel. On no account should the prosecution go out of its way to search for evidence to prosecute when it is not there.

In another case the Supreme Court criticised the application of the holding-charge procedure as it held that before an accused is brought before any court it should be assumed that the case is ripe for hearing and not for further investigation. The individual must not be there on mere suspicion, which cannot be regarded as reasonable suspicion under the Constitution of the Federal Republic of Nigeria. Where there is no sensible *prima facie* inference that may be drawn that an offence has been committed, the accused cannot be deprived of his liberty, even for a second.⁷⁰ There cannot be a 'holding charge' hanging like a sword of Damocles over an accused in court pending the completion of the investigation into the case against him.⁷¹

However, the Supreme Court has changed its position on the holding charge. In the case of *Lupadeju v Johnson*⁷² it ruled that a magistrate's court has the power to remand a person suspected of having committed an offence on the presentation of a charge signed by a police officer, notwithstanding the fact that the magistrate's court lacks the jurisdiction to try the allegations contained in the charge.⁷³ The uncertainty regarding the application of the holding charge has given the NPF the opportunity to continue using it as an excuse to keep individuals in detention for more than five years on the premise that they have not completed their investigations into the alleged crimes committed by the PTDs.⁷⁴ Hence, the practice contributes to the delays in the determination of criminal cases, which leads to those in custody being unable to enjoy the protection provided by the Nigerian laws.⁷⁵ This factor ultimately may lead to the wrongful conviction of PTDs because of their inability to secure

67 S Akinbiyi *Criminal law and procedure in Nigeria* (2009) 431.

68 (1993)7 Nigerian Weekly Law Reports (Pt 303) 49.

69 *Onagoruwa* (n 68) 107 paras E-F.

70 *Ogor v Kolawale* (1985) 6 Nigerian Constitutional Law Reports 539 paras 3-4.

71 *Ogor v Kolawale* (n 70) 539 paras 2-3.

72 (2007) 29 Nigerian Supreme Court Quarterly Law Reports (part II) 1511.

73 *Lupadeju v Johnson* (n 72) 1549 paras F-H.

74 A John & A Musa 'Delay in the administration of criminal justice in Nigeria: Issues from a Nigerian view point' (2014) 26 *Journal of Law and Globalisation* 136.

75 John & Musa (n 74) 131.

the assistance of a lawyer to defend them during their trial or apply for bail on their behalf.⁷⁶

5 Reforming the holding charge: Administration of Criminal Justice Act to the rescue?

As pointed out earlier, one of the reasons advanced for the congestion of Nigerian prisons is the delay in the administration of the Nigerian criminal justice system. For instance, the failure by the NPF to complete investigations on time, the fact that legal advice is not issued timeously and the delay in the trial of defendants/suspects due to congestion in the courts ultimately result in the congestion of the correctional services. Adebayo is of the opinion that both the CPA and the CPC are relics of colonial legislation, do not conform to present realities and need to be reviewed.⁷⁷ Akinseye-George also observes that the provisions of both laws focus more on the protection of the accused person than on the objective of 'restorative justice and the protection of the larger society'.⁷⁸

Due to these shortcomings in the criminal justice system, the Administration of Criminal Justice Act (ACJA) was established,⁷⁹ to replace both the CPA and the CPC, with the objectives to ensure –

- the speedy dispensation of justice;
- the efficient management of criminal justice institutions;
- the protection of the society from crime; and
- the protection of the rights and interests of defendants, suspects and victims.⁸⁰

The ACJA introduces some innovations into the Nigerian criminal justice system. For instance, it outlaws the arrest of any person in place of a suspect,⁸¹ provides that any individual deprived of his liberty must be treated humanely⁸² and provides that magistrates are mandated to visit police stations or other places of detention at least once a month for the purpose of inspecting records of arrests and, where necessary, give orders regarding the arraignment of suspects.⁸³ Equally, detention time limits have been set by the Act,⁸⁴ and the concept of plea bargain was introduced into the Nigerian criminal justice system by the Act in order to promote the speedy dispensation

76 K Rohrer 'Why has the Bail Reform Act not been adopted by the state systems' (2017) 95 *Oregon Law Review* 522.

77 AM Adebayo *Administration of Justice Act 2015: Annotated with cases and comprehensive notes* (2016) 2.

78 Y Akinseye-George *Administration of Criminal Justice Act (ACJA) 2015 with explanatory notes and cases* (2017) *Centre for Socio-Legal Studies* 3.

79 ACJA (n 46).

80 Sec 1(1) ACJA.

81 Sec 7 ACJA.

82 Sec 8 ACJA.

83 Sec 34 ACJA.

84 Secs 293-299 ACJA.

of justice.⁸⁵ The establishment of the ACJA is widely viewed as timely by the stakeholders in the administration of justice and if applied by all states of Nigeria, it will reform the administration of criminal justice, especially reducing the period of prolonged pre-trial detention.⁸⁶

However, it must be observed that the ACJA is applicable in federal courts, which are established by the federal government. The law will be applicable in state courts only once the Act has been enacted into state laws by the various state legislatures.⁸⁷ So far 24 states and Abuja (the capital city of Nigeria) out of a total of 36 states have adopted the ACJA as part of their local laws, which resulted in the deletion of the CPA and CPC from the laws of the respective states.⁸⁸ The remaining states that are yet to enact the ACJA as part of their laws continue to apply those legislations as the case may be. The holding charge was included in the provisions of the ACJA as it empowers magistrate's courts to remand individuals alleged to have committed criminal offences over which they have no jurisdiction.⁸⁹ However, it introduced time limits in the law, as persons on remand are not to be detained for a period exceeding 14 days at the first instance, after which they will be returned before the court.⁹⁰ After the expiration of the 14 days the court may extend the remand order for another period of 14 days and the police are required to show justifiable cause for the extension of the remand order.⁹¹ After the expiration of 28 days without the individual being arraigned for trial, hearing notices will be issued to the Inspector-General of Police or Commissioner of Police of a state, as the case may be, on whose application the individual was remanded in custody. The hearing of the case may be fixed for a period not exceeding 14 days, where the representative of the NPF will show cause why the detainees may not be released unconditionally.⁹² After the said hearing, if the court is satisfied with the reasons advanced by the NPF, the individual may be remanded for a final period not exceeding 14 days after which he will be arraigned before the appropriate court.⁹³ The ACJA has precluded courts from granting further remand orders after the expiration of this period, and further provides that the court will order the release of the

85 Secs 270-277 ACJA.

86 'Stakeholders call for swift implementation of ACJ Law in Akwa Ibom State' 16 January, 2017, www.nba-acj.org.ng/index.php?option=com_content&View=article&id=462&catid=68&itemid=176 (accessed 12 February 2018).

87 AR Emma 'An appraisal of the ACJA, 2015', <http://ssrn.com/abstract=2665611> (accessed 21 July 2018).

88 Anambra, Lagos, Ekiti, Ondo, Rivers, Oyo, Enugu, Akwa Ibom, Cross River, Kaduna, Delta, Kogi, Edo, Ogun, Plateau, Osun, Kwara, Adamawa, Bayelsa, Kano, Nassarawa, Benue, Jigawa, Katsina and Abuja, <https://www.partnersnigeria.org/acjl-tracker/> (accessed 9 October 2019).

89 Sec 293 ACJA.

90 Sec 296(1) ACJA.

91 Sec 296(2) ACJA.

92 Sec 296(4) ACJA.

93 Sec 296(5)(a) ACJA.

individual from custody and that it will entertain no further application for remand.⁹⁴

Despite the introduction of time limits in the ACJA to prevent the excessive detention of individuals on the holding charge, Emma is of the opinion that the introduction of the holding charge in the ACJA has taken the legislation 'backward' as it confers jurisdiction on magistrate's courts which ordinarily they lack. Therefore, legitimising the holding charge has defeated the entire objective of the reform of the ACJA relating to arbitrary detention which it was established to remedy.⁹⁵ Okolo also is of the view that giving legal teeth to the holding charge 'is a setback to the criminal justice system and an antithesis to equity and the rule of law'.⁹⁶ In countering these arguments, Akinseye-George argues that ACJA seeks to cure the pre-ACJA remand proceedings where magistrates had no control over the detention orders issued by them. He further asserts that the a magistrate can issue remand orders only on the condition that the court is satisfied that there is a probable cause to detain the individual brought before it.⁹⁷ Also, the failure by of a magistrate to ensure that the time lines for the detention of individuals as provided by ACJA are not complied with is a serious violation of his obligation under the ACJA.⁹⁸

Four years after the establishment of the ACJA it appears that the number of PTDs in the cells of NCS continues to escalate. As pointed out earlier, 69 per cent of its inmates belong to this category⁹⁹ which a year ago stood at 68 per cent.¹⁰⁰ It is submitted that the ACJA has failed to stem the inflow of PTDs. For instance, Lagos State, which is the first state in Nigeria to enact ACJA as part of its laws,¹⁰¹ has the largest population of prison inmates in the country: The Ikoyi prison, which in 2018 had a total capacity of 800, had 3 138 inmates, 2 664 of inmates in the institution being PTDs.¹⁰² Consequently, the introduction of time limits for the holding charge in the ACJA appears not to have succeeded, as the number of PTDs has not decreased.

94 Secs 296(6) & (7) ACJA.

95 Emma (n 87).

96 E Okolo 'Issues in the Administration of Criminal Justice Act 2015 – Opinion' 21 October 2016, <https://investadvocate.com.ng/2016/10/21/issues-administration-criminal-justice-act-2015-opinion/> (accessed 21 February 2018).

97 Akinseye-George (n 78) 360.

98 Akinseye-George 362.

99 'Summary of inmate population by convict and awaiting trial persons as at 16 July 2018', www.prisons.gov.ng/statistics (accessed 28 August 2019).

100 As above.

101 T Soniyi 'Onnoghen asks states to adopt ACJ Act' 16 February 2017, <https://www.thisdaylive.com/index.php/2017/02/16/onnoghen-asks-states-to-adopt-acj-act/> (accessed 5 March 2018).

102 'Lagos CJ frees seven inmates from Ikoyi prison' 7 December 2018, pmnewsnigeria.com/2018/12/07/lagos-cj-frees-7-inmates-from-ikoyi-prison/ (accessed 11 October 2019).

6 Conclusion

The overwhelming number of PTDs in Nigerian prisons continues to defy solution despite legal safeguards by which with the NPF is mandated to arraign a person before a court within 24 hours and the Nigerian Constitution limits the maximum period of pre-trial detention to two months. Also, the application of the holding-charge procedure by the NPF, where individuals are remanded in prison custody without a valid charge by magistrates who in most cases do not have jurisdiction to determine the alleged offences or admit the alleged offender to bail, has contributed to the increase of PTDs in prison custody. It is observed that conflicting judgments delivered by the Supreme Court on the legality of the holding-charge procedure increases the confusion on the legality of the procedure in the Nigerian legal system.

The ACJA was established with the sole aim of reforming the criminal justice system of Nigeria; 24 states so far have enacted the Act as part of their local laws. Also, in the ACJA the holding-charge procedure was given 'legal teeth' as it empowers magistrates to remand individuals in prison custody if they are satisfied that there is probable cause to do so, provided that the period of detention does not exceed 58 days. Despite this provision, the number of PTDs in prison custody continues to escalate in states that have adopted the ACJA. Consequently, it is recommended that there is a need for magistrates to be trained in relation to their obligation to enforce the detention limits set by the ACJA. The chief justices of Nigerian states also should ensure that the monthly inspection of detention centres by magistrates is done, with a mandatory report of what transpires during the inspections being prepared and submitted to the chief justice concerned immediately after the inspection has been completed. In addition, the members of the NPF are poorly motivated and ill-trained. The Nigerian government needs to provide more funds for their training and also provide them with more attractive welfare packages that will discourage them from engaging in practices that further increase the delay in the administration of criminal justice in Nigeria. The implementation of the Nigerian Correctional Service Act, 2019 by the Nigerian government will significantly reduce the number of PTDs as it contains provisions that seek to address the problem. For instance, where a custodial centre is congested, it is mandated to notify the heads of the judiciary, law enforcement and prosecuting bodies and other relevant bodies and institutions so that measures are taken to reduce the number of those in custody, more specifically PTDs.¹⁰³ Should these concerns fail to address the congestion, the state controller of NCS is mandated to give instructions to those in charge of custodial centres to refuse to accept PTDs into

103 Sec 18(1).

the facilities they control.¹⁰⁴ The implementation of these measures will stem the flow of PTDs held in custody.

104 Sec 18(2).

The illegal eviction of undocumented foreigners from South Africa

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Summary

In Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew & Another and Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality the courts failed to provide guidance regarding the relationship between the Prevention of Illegal Eviction from and Unlawful Occupation of Land, the Refugees Act and the Immigration Act. This article sets out to provide such guidance by contextualising South Africa as a constitutional democracy with a supreme Constitution (the principle of a single system of law) that delineates a point of departure for establishing which source of law should regulate litigation about the illegal eviction from one's home (the subsidiarity principles). The authors then overlay the principle of a single system of law and the subsidiarity principles with the systemic characteristics of a property system that promotes section 39(2) of the Constitution. Taken together, these principles and characteristics are used to evaluate PIE, the Refugees Act and the Immigration Act with a view to establishing which is the most appropriate source of law to evict undocumented foreigners from South Africa and to determine the appropriate relationship between the statutes. The article further aims to evaluate the failure to consider the procedural protection and substantive safeguards outlined in PIE, which ultimately perpetuates, or even exacerbates, the vulnerable position of undocumented foreigners who are forced from their homes.

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Key words: *subsidiarity; eviction; undocumented foreigners; immigration; refugees*

1 Introduction

Since the fall of apartheid there has been an increase in immigrants seeking entry into South Africa from all over the African continent.¹ With the influx of immigrants seeking entry into South Africa the government has had to enact legislation and formulate policies that regulate, enforce and control the admission of foreigners into the country as well their departure from the country. Limitations that these statutes and policies place on the individual rights of people, particularly undocumented foreigners, are justified by the public interest. In the immigration context the public interest includes living in an environment where immigration control is performed within the highest applicable standards of human rights protection in compliance with international law²; preventing xenophobic attacks;³ grappling with security considerations;⁴ and retaining control of the immigration of foreigners. The government's use of its police powers to ensure the health, safety and well-being of all the people of South

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- 1 A Hiropoulos 'Migration and detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals' November 2017, <http://apcof.org/wp-content/uploads/018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf> (accessed 12 May 2018). Realistic estimates of immigration indicate that between two and three million foreign nationals currently reside in South Africa. This number includes both documented and undocumented foreigners, refugees and asylum seekers that are predominantly from Zimbabwe, Mozambique, the Democratic Republic of the Congo, Angola, Somalia, Rwanda and Malawi.
 - 2 Due regard must be had to South Africa's compliance with international law, which is applicable to the human rights protection of refugees, asylum seekers and undocumented foreigners. The Convention Relating to the Status of Refugees was concluded on 28 July 1951 and entered into force on 22 April 1954. As of 1 May 2018 the Convention had 145 ratifications. South Africa ratified the Convention on 12 January 1996. The International Convention on the Elimination of All Forms of Racial Discrimination was concluded on 7 March 1966 and entered into force on 12 March 1969. As of 1 May 2018 the Convention had 179 ratifications. South Africa ratified the Convention on 10 December 1998. The Protocol Relating to the Status of Refugees was concluded on 31 January 1967 and entered into force on 4 October 1967. As of 1 May 2018, the Protocol had 146 ratifications. South Africa ratified the Protocol on 12 January 1996. See https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en (accessed 1 May 2018). However, an extensive analysis of international law is beyond the scope of this article.
 - 3 AE Okem & LE Asuelime 'An insight into South Africa's xenophobia: Impacting on Africa's integration' (2015) 45 *Journal of African Union Studies* 48. In South Africa xenophobia is perpetuated by violence against both documented and undocumented foreigners and the looting of foreign-owned businesses, which creates hostility, fear and distrust among foreigners in South Africa.
 - 4 The South African government may exercise police power to ensure the health, safety and welfare of South African citizens. In ensuring the health of South African citizens the government may impose restrictions on non-citizens from entering the Republic if there has been an outbreak of an infectious disease in their country of origin. See *News24* 'SA issues Ebola travel ban' 21 August 2014,

Africa include the detection and deployment of undocumented foreigners, the monitoring of immigrants and the enforcement of immigration policies. However, in South Africa the use of police powers has an unwholesome history.⁵

Prior to 2002⁶ the applicable legislation that regulated the status of immigrants was the Aliens Control Act 96 of 1991 (Aliens Control Act). The Aliens Control Act was used by state bureaucrats under apartheid as a tool to dictate and control the rights of movement and residence. This aided in establishing and maintaining an unjust and unequal land use system based on racial and status segregation.⁷ Therefore, during apartheid the *rei vindicatio* was legislatively enhanced by the police powers of the state to evict people for the purposes of immigration control.⁸ Local authorities were provided with a platform to evict undocumented foreigners, which allowed them to dictate the scope of immigrant rights in terms of wide and, seemingly unfettered,⁹ powers to those enforcing immigration control and detection.

<https://www.news24.com/SouthAfrica/News/SA-issues-Ebola-travel-ban-20140821> (accessed 18 May 2017). In ensuring the safety of South African citizens, the government may implement measures restricting the number of persons entering the Republic or may remove foreigners from the Republic. This may prevent public disorder, over-crowding or threats to national security (sec 28(1) of the Refugees Act 130 of 1998). To ensure the welfare of South African citizens, the government may prohibit any person from employing an illegal foreigner. This may ensure that employment opportunities are available to citizens only (sec 38(1) of the Immigration Act 13 of 2002).

- 5 AJ van der Walt *Constitutional property law* (2005) 410-411.
- 6 TF Hicks 'The Constitution, Aliens Control Act, and xenophobia: The struggle to protect South Africa's pariah: The undocumented immigrant' (1999) 7 *Indiana Journal of Global Legal Studies* 339.
- 7 G Muller 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* 369.
- 8 During apartheid, the South African government attempted to divide South Africa into a number of separate states, called 'independent homelands'. Under the homeland system, each state was supposed to develop into a separate nation-state for a different ethnic group. This was regulated by the Black States Citizenship Act 26 of 1970 and the National States Citizenship Act of 1970. These Acts declared black people as foreigners in urban areas and changed their status so that they no longer were citizens of South Africa, but rather citizens of one of the ten autonomous territories. A Boddy-Evans 'Apartheid era laws: Bantu Homelands Citizenship Act No 26 of 1970', <https://www.sahistory.org.za/article/black-homeland-citizenship-act-1970> (accessed 4 September 2019). It is important to qualify that immigrants referred to in the context of this article were South Africans, although they had been consigned to independent homelands. Therefore, a distinction must be made between persons deemed foreigners by the apartheid state and foreigners that were born in countries outside of South African territory. See also C Plasket 'Homeland incorporation: The new forced removals' in C Murray & C O'Regan (eds) *No place to rest: Forced removals and the law in South Africa* (1990).
- 9 Sec 54(1) of the Aliens Control Act 96 of 1991 states that '[a]ny immigration officer may for the purpose of this Act (a) enter upon any premises; and (b) interrogate any person found in or on such premise'. The interpretation of 'any' provided immigration officers with broad power.

South Africa's current constitutional framework affords 'everyone'¹⁰ – including documented and undocumented foreigners – a variety of fundamental rights, benefits and protections. The Aliens Control Act was repealed by the Immigration Act 13 of 2002 (Immigration Act) and the Refugees Act 130 of 1998 (Refugees Act). However, the rights afforded to persons in terms of this new regulatory framework remain a matter of bureaucratic practice as opposed to a matter of judicial interpretation and are largely a remnant of apartheid practices.

The Department of Home Affairs (Home Affairs), law enforcement officials and others involved in immigration enforcement have abused and promoted an environment where xenophobic attacks thrive.¹¹ Human rights violations are perpetuated and the deprivation of constitutional protections and entitlements, including the right of access to adequate housing, has increased.¹² The influx of immigrants and the continuous surge of people into urban areas have increased the pressure on the South African government to utilise its resources for its citizens and, recently, non-citizens including undocumented foreigners.¹³ This pressure, coupled with the risk of indigent citizens being unable to secure temporary emergency housing, has led to a culture of xenophobia that has 'consumed South Africa's consciousness'.¹⁴

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- 10 Although section 26 of the Constitution of the Republic of South Africa, 1996 is of particular importance for this research essay, the Constitution provides a variety of other fundamental rights affording protection to 'everyone'. Sec 24(1)(a) states that '[e]veryone has the right to an environment that is not harmful to their health or wellbeing'. Sec 27(1) states that '[e]veryone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Sec 29(1) states that '[e]veryone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible' and so forth.
- 11 T Masuku 'Targeting foreigners: Xenophobia among Johannesburg's police' (2006) *SA Crime Quarterly* 19. Members of the South African People Service (SAPS) frequently target black legal and illegal immigrants. Through various studies, Masuku states that xenophobia not only is embedded in the attitude of the SAPS, but that it manifests itself in violence, abuse and the ill-treatment of foreigners.
- 12 Hiropoulos (n 1) 1. Since 1994, the South African government's primary response to the increase in immigration has been to arrest and deport undocumented foreigners. R Suttona & D Vigneswaran 'A Kafkaesque state: Deportation and detention in South Africa' (2011) 15 *Citizenship Studies* 627. The arrests and deportations are regularly made outside the legal framework, and involve human rights abuses and procedural irregularities.
- 13 *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew & Another* 2010 (1) SA 403 (GJ). In this case the central legal question was whether undocumented foreigners were entitled to temporary emergency accommodation. We expand on this in part 3 below.
- 14 Bloomberg 'Johannesburg mayor insists on 'shock and awe' plan for City' 15 August 2017 <https://www.bloomberg.com/news/articles/2017-08-14/johannesburg-mayor-insists-on-shock-and-awe-plan-for-city> (accessed 20 March 2018). Johannesburg Mayor, Herman Mashaba, discussed his plans to evict undocumented foreigners from the inner city buildings in a bid to attract private investment to rebuild South Africa's economic hub. Mashaba stated that he was going to use 'shock and awe tactics', 'overwhelming power' and a 'spectacular

In the past decade the courts have handed down judgments in cases where local authorities have used police power legislation, in the form of the Immigration Act and the Refugees Act, to evict undocumented foreigners. This has led to the circumvention of the procedural protections and substantive safeguards of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality (Tswelopele)*¹⁵ officials from three governmental agencies in a joint operation evicted 100 people,¹⁶ respectively, from the rudimentary shelters that they had erected on a vacant piece of land.¹⁷ A total of 16 immigrants without South African documentation were arrested and subsequently deported. The eviction was found to have been unlawful despite the plea of Home Affairs stating that their participation was focused solely on identifying 'non-documented illegal immigrants'.¹⁸

In *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew and Another (Chapelgate)*¹⁹ the City of Johannesburg sought the eviction of approximately 300 occupiers. When the matter was placed before the High Court, the number of occupiers totalled 161 of whom the majority were not South African citizens.²⁰ Although it was conceded that occupation was unlawful and an eviction order was granted, the issue turned on whether the City was obliged to provide temporary emergency accommodation for undocumented foreigners under PIE.²¹

The question that arises is how the rights of a foreigner, or any category of foreigner, to be in the country may be affected by their status and, if they have no such right, whether the Constitution or other laws requires them to be assisted with emergency temporary shelter if indigent or allows them to participate in housing projects.

display of force to paralyze the enemy's perception of the battlefield and destroy its will to fight', the 'enemy' and 'it' referring to undocumented foreigners.

15 2007 (6) SA 511 (SCA).

16 *Tswelopele* (n 15) para 2. The officials who carried out the operation were from the nature conservation division of the Tshwane Metropolitan Municipality, the Immigration Control Office of the Department of Home Affairs, SAPS and members of the Garsfontein community policing forum.

17 *Tswelopele* (n 15) para 1. See *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) para 3 and *Rikhotso v Northcliff Ceramics (Pty) Ltd & Others* [1996] 4 All SA 524 (W) paras 6 and 7 for a similar history.

18 *Tswelopele* (n 15) para 5.

19 2010 (1) SA 403 (GJ).

20 *Chapelgate* (n 19) paras 10-13. There were only 64 South African citizens out of the total of 161 occupiers (39,75%). In addition, there were two Mozambicans and 22 Zimbabweans who claimed to have rights to remain in South Africa. Therefore, 73 foreign occupiers (amounting to 45%) were unable to produce documentation proving that their stay had been regularised. Out of the total foreigners, only one or two were able to produce documents indicating that they were lawfully entitled to reside in the Republic. Out of 161 occupiers, over half of the 21 occupiers were minors who were born in South Africa to non-citizen occupiers. In addition, one non-citizen occupier was disabled and was being cared for by a relative who is a Zimbabwean national.

21 *Chapelgate* (n 19) para 5.

In both *Tswelopele* and *Chapelgate* the courts failed to provide guidance as to the precise nature of the relationship between police power legislation authorising the eviction of undocumented foreigners in terms of PIE, the Immigration Act and the Refugees Act.

Consequently, the evictions of undocumented foreigners under the guise of 'solely to identify non-documented immigrants' in terms of the Immigration Act and the Refugees Act are frequently executed.²² Evictions are carried out by government officials and local authorities without complying with the procedural protection and substantive safeguards of PIE. They claim that their intention is not to evict undocumented foreigners,²³ but to fulfil the objectives of the Immigration Act and the Refugees Act. The unscrupulous use of police power during these constructive evictions in evading the procedural protections and substantive safeguards outlined in PIE unfavourably resembles the harsh turmoil of immigration control and racial segregation during apartheid.²⁴ Evictions during apartheid were conducted without prior notice, usually involved the demolition of buildings or structures, and occurred without a court order considering the personal circumstances of the unlawful occupiers.²⁵

22 *Tswelopele* (n 15) para 5.

23 *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (*Pheko*). A similar argument was contended by the Ekurhuleni Metropolitan Municipality where the Municipality instituted eviction proceedings in terms of sec 55(2)(d) of the Disaster Management Act 57 of 2002 (DMA). The case turned on whether 'evacuations' amounted to an 'eviction' and whether the unlawful occupiers faced imminent danger due to unstable dolomite formations. Nkabinde J concluded that the local authority had acted outside the authority conferred by the DMA and contrary to sec 26(3) of the Constitution. Nkabinde J found that the local authorities acted unconstitutionally when evicting the unlawful occupiers in terms of the DMA. However, the Constitutional Court failed to provide the local authorities with guidance as to the precise nature of the relationship between the DMA and PIE.

24 Muller (n 7) 382-384. In 1951 Parliament enacted the Prevention of Illegal Squatting Act 52 of 1951 (PISA). The purpose of PISA was to prevent and control illegal squatting on public or private land. PISA provided courts with the authority to order the eviction of squatters and authorise the demolition of any buildings or structures erected on the land without the permission of the owner or lawful occupier. The peremptory nature of PISA obliged owners to evict unlawful occupiers. Therefore 'the scope of evictions based on the stronger right to possession' under apartheid land law was significantly extended. In 1952 parliament supplemented PISA with a package of laws aimed at implementing its influx control policy. The package included the Black Laws Amendment Act 54 of 1952 which amended sec 10 of the Black (Urban Areas) Consolidation Act, the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 and the Black Service Levy Act 64 of 1952. In 1976 an amendment to PISA followed on the judgment in *S v Peter* 1976 (2) SA 513 (C). The amendment inserted sec 3B into the Act which enabled landowners and local authorities to demolish squatter shacks after the lapse of a seven-day notice period. The provision further deterred landowners from allowing squatters to live on their land by making this a punishable criminal offence.

25 G Muller 'Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa' (2015) 132 *South African Law Journal* 617. The judgment in *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) resulted in the 1977 amendment of PISA.

The transition to democracy and the entry into force of the Constitution of the Republic of South Africa, 1996 (Constitution) changed the legal landscape of evictions.²⁶ Section 26(1) of the Constitution provides that everyone has the right to have access to adequate housing. Section 26(2) places an obligation on the state to adopt reasonable legislative and other measures to achieve the progressive realisation of this right within its available resources.²⁷ Furthermore, section 26(3) of the Constitution provides that no one may be evicted from their home or have their home demolished without a court order which was made after considering all the relevant circumstances. Section 26(3) furthermore states that no legislation may permit arbitrary evictions. PIE was enacted to give effect to section 26(3) of the Constitution.²⁸ It provides specific procedural protections and substantive safeguards to unlawful occupiers who use buildings/structures or land for residential purposes. The jurisprudence developed in terms of PIE has indicated that the courts have adopted an increasingly sensitised approach to the squalid conditions in informal settlements and inner city buildings, highlighting the struggle²⁹ of unlawful occupiers.³⁰ A detailed history of their occupation is also considered.³¹ These conditions are viewed as serious by judges when determining whether it would be just and equitable to grant an eviction order and when, or under what conditions, it would be just and equitable to execute such an order.

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- 26 Muller (n 25) 618. The socio-economic landscape of evictions, however, has not undergone a similarly profound change. The government has a considerable housing backlog, and overcrowded, impoverished black neighbourhoods still exist next to spacious, well-established, affluent, white neighbourhoods in certain parts of South Africa. Informal settlements and abandoned inner city buildings within the large metropolitan municipalities of South Africa are not always suitable for the habitation of unlawful occupiers because of a lack of water, sanitation and electricity.
- 27 *Eagle Valley Properties 250 CC v Unidentified Occupants of Erf 952, Johannesburg* [2011] ZAGPJAC 3 (17 February 2011) para 40. In determining the government's ability to provide temporary emergency accommodation, the Court required the City of Johannesburg to submit information, including statistical projections of the expected number of indigent households requiring shelter and the allocation of the City's budget. *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Others* 2009 (1) SA 470 (W) paras 27, 56 & 57. Sec 153(a) of the Constitution provides that a municipality must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community'.
- 28 Muller (n 25) 619.
- 29 See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 7; *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 (6) SA 404 (SCA) para 10.
- 30 In terms of sec 1 of PIE, an 'unlawful occupier' is defined as a 'person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land'. It is clear that South African citizens, undocumented immigrants and immigrants whose stay has been regularised can be unlawful occupiers.
- 31 Muller (n 25) 619.

The aim of this article is twofold: first, to identify which statute is the most appropriate source of law to evict undocumented foreigners in post-apartheid South Africa; and, second, to determine the appropriate relationship between the suite of statutes.³² We set out to do this by contextualising South Africa as a constitutional democracy with a supreme Constitution (the principle of a single system of law) that delineates a point of departure for establishing which source of law should regulate litigation about the alleged infringement of a right in the Bill of Rights (the subsidiarity principles). We then overlay the principle of a single system of law and the subsidiarity principles with characteristics of a property system that promote the spirit, purport and objects of the Bill of Rights.³³ Taken together, these principles and characteristics are used to evaluate PIE, the Immigration Act and the Refugees Act to establish the appropriate relationship between these three statutes in regulating the effective eviction of foreigners from land and buildings or structures that they occupy unlawfully.

2 Single system of law

2.1 Introduction³⁴

Currently, three parallel sources of law – PIE, the Immigration Act and the Refugees Act – are applied when evicting undocumented foreigners from unlawfully-occupied property. This position is problematic because these statutes not only require different procedural requirements and substantive considerations, but also have different results. Van der Walt states that the existence of a choice between different sources of law might lead to a power struggle between forces that entrench the *status quo* and forces that promote transformation.³⁵

The enquiry into which statute is the most appropriate source of law for evicting undocumented foreigners must begin with the fact that South Africa is a democracy founded on the values of the supremacy of the Constitution and the rule of law.³⁶ The effect of this is that no source of law – which in this case includes a choice between

32 A.J. van der Walt *Property and Constitution* (2012) 24 states that ‘the job of academic lawyers is to help figure out how legislation could be ... interpreted ... so as to promote the spirit, purport and objects of the Bill of Rights’.

33 Sec 39(2) of the Constitution states: ‘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.’

34 This part resembles Muller (n 25) 6-8.

35 Van der Walt (n 32) 4 19. Van der Walt refers to the forces that entrench the *status quo* as courts are intent on protecting the common law, for example the landlord’s right to select tenants. Van der Walt refers to the forces that promote transformation as legislatures are intent on introducing statutory reforms required by the Constitution, for example to prevent racial discrimination.

36 Sec 1(c) of the Constitution.

PIE, the Immigration Act and the Refugees Act – exists independently in the South African legal system.³⁷ The Constitutional Court in *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa*³⁸ (*Pharmaceutical Manufacturers*) states that '[t]here is only one system of law ... shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'.³⁹

The principle of a single system of law was used by the Constitutional Court to develop the 'subsidiarity principles'. In determining which source should regulate litigation regarding an alleged rights infringement, the subsidiarity principles should be applied as a starting point for the eviction of undocumented foreigners. This prevents the submergence of parallel sources of law, particularly in a property dispute, and ensures maximum coherence with the principle of a single system of law⁴⁰. These principles are not meant to restrict the power of the courts to interpret legislation, engage in constitutional review and develop the common law.

The first principle states that a litigant who alleges that a right in the Bill of Rights has been infringed must rely on the legislation that was specifically enacted to protect that right and may not rely directly on the provision in the Bill of Rights when bringing an action to protect the right.⁴¹ However, the proviso allows a litigant to rely directly on the provision in the Bill of Rights if he or she attacks the legislation for being unconstitutional or because it inadequately protects the right.⁴²

The principle results in a shift away from 'binary notions of autonomy, rivalry and conflict' between the relationship of the Constitution and other sources of law.⁴³ This ensures a shift of emphasis between the effect of the Constitution in relation to its transformative goals on vested property rights.⁴⁴ The shift transcends traditional notions of vested property rights away from regulating the conflict between individual property interests and rather manages tensions between reform measures promoting the spirit, purport and object of the Bill of Rights, while simultaneously and optimally protecting vested individual property interests.⁴⁵ It is inevitable that the simultaneous and optimal balancing of implementation of reform goals and the protection of rights may result in conflict. Insofar as this conflict is concerned, the principle of a single legal system requires an

37 Van der Walt (n 32) 20.

38 2000 (2) SA 674 (CC).

39 *Pharmaceutical Manufacturers* (n 38) para 44.

40 Muller (n 25) 622.

41 Van der Walt (n 32) 36.

42 Muller (n 25) 622; Van der Walt (n 32) 35.

43 Van der Walt (n 32) 67-68.

44 Van der Walt 37.

45 Muller (n 25) 622; Van der Walt (n 32) 20.

equalising that 'optimises' both, rather than ranking one higher than the other.⁴⁶ In *Port Elizabeth Municipality v Various Occupiers (PE Municipality)*⁴⁷ the Constitutional Court elucidated this principle. The intricate balancing of property rights and constitutionally-protected housing rights necessary for the purpose of PIE are described below:

The Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

This dictum provides a constitutionally-inspired process of optimal, simultaneous and equal protection of vested rights (section 25 of the Constitution) while promoting the interests of justice by encouraging access to secure land tenure and housing (section 26 of the Constitution).⁴⁸ The impact of this shift away from sources competing for supremacy ensures that an equitable balancing of two interlinked processes forming part of one single legal and constitutional goal simultaneously promotes section 39(2) of the Constitution.⁴⁹ Identifying the most appropriate source of property law – in this case either PIE, the Immigration Act or the Refugees Act – for evicting undocumented foreigners in a single system of law, therefore, must proceed from section 39(2) of the Constitution.

2.2 Characteristics of a property system promoting section 39(2) of the Constitution⁵⁰

Whether the Immigration Act, the Refugees Act or PIE is the most appropriate source of law for evicting undocumented foreigners depends on the ability and likelihood of each of these Acts to promote the spirit, purport and object of the Constitution. In determining this ability and likelihood, attention should be drawn to the 'general, systemic features and characteristics' that underpin the property system holistically.⁵¹

46 Muller (n 25) 623.

47 2005 (1) SA 217 (CC).

48 Muller (n 25) 623.

49 Van der Walt (n 32) 22.

50 This part resembles Muller (n 25) 9-10.

51 As above. Van der Walt states that the focus should not be on upholding individual rights, reforming specific property institutions or introducing particular reforms, but rather on the general, systemic features and characteristics of the property system.

Van der Walt argues that all sources of law should display the following characteristics: They should be formally valid and of general application in that they must be adopted and promulgated publicly;⁵² be expressed in understandable terms; be prospective in effect; not require conduct beyond the powers of the people; not be changed so frequently that people cannot arrange their own actions and affairs; be consistent with one another; and must be administered consistently with their wording.⁵³ All sources of law should also promote the following general characteristics:⁵⁴ equality;⁵⁵ the inherent human dignity of every person;⁵⁶ access to courts;⁵⁷ and access to administrative justice.⁵⁸ In addition to these general characteristics, a property system should further recognise the following specific characteristics: state regulation of property that is 'legitimate, natural and inevitable' if the regulation serves a legitimate public purpose,⁵⁹ and state interference with property must establish an equitable balance between the private interests that will be affected by the regulation and public interest that is served by the regulation.⁶⁰ In addition to the aforementioned positively-framed characteristics,⁶¹ a property system should not authorise the arbitrary eviction from one's home⁶² or arbitrary deprivation of property.⁶³ Lastly, a property system should ensure that new legislation is enacted to give effect to the following reformative goals in the Constitution:⁶⁴ providing access to secure tenure;⁶⁵ access to land on an equitable basis;⁶⁶ the progressive realisation of the right of access to adequate housing;⁶⁷ and protection against eviction without a court order and only after all relevant circumstances have been considered.⁶⁸

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- 52 F Michelman 'The rule of law, legality and the supremacy of the Constitution' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional law of South Africa* (Original Service, June 2008) ch 11.
- 53 Van der Walt (n 32) 27-28.
- 54 Van der Walt 28.
- 55 C Albertyn & B Goldblatt 'Equality' in Woolman, Bishop & Brickhill (n 52) ch 35.
- 56 S Woolman 'Dignity' in Woolman, Bishop & Brickhill (n 52) ch 36.
- 57 J Brickhill & A Friedman 'Access to courts' in Woolman, Bishop & Brickhill (n 52) ch 59.
- 58 J Klaaren & G Penfold 'Just administrative action' in Woolman, Bishop & Brickhill (n 52) ch 63; C Hoexter *Administrative law in South Africa* (2012) ch 63.
- 59 Van der Walt (n 32) 29.
- 60 AJ van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77.
- 61 As above.
- 62 Sec 26(3) Constitution.
- 63 Sec 25(1) Constitution.
- 64 Van der Walt (n 32) 31-40-43 on the notion of legislation that gives effect to a right.
- 65 Sec 25(6) Constitution.
- 66 Sec 25(5) Constitution. See also J Pienaar & J Brickhill 'Land' in Woolman, Bishop & Brickhill (n 52) ch 48; AJ van der Walt *Constitutional property law* (2005) 354-368.
- 67 Sec 26(2) Constitution. See S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 187-191.
- 68 Sec 26(3) Constitution.

Therefore, these characteristics indicate that a property system should not have the unwanted outcomes of causing or exacerbating homelessness or landlessness.⁶⁹

Van der Walt argues that these characteristics and the unwanted outcomes can be linked to the general constitutional aims and transformative goals stated in the various provisions of the Bill of Rights.⁷⁰ Therefore, in promoting the spirit, purport and objects of the Bill of Rights a property system must display these characteristics and avoid unwanted outcomes. When determining which is the most appropriate source of law – PIE, the Immigration Act or the Refugees Act – to regulate the eviction of undocumented foreigners in post-apartheid South Africa, it must be established whether and to what extent PIE, the Immigration Act or Refugees Act promotes the principle of a single legal system of law which demonstrates these characteristics while avoiding unwanted outcomes.

2.3 Evicting undocumented foreigners from South Africa

2.3.1 *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*

The purpose of PIE is to prohibit illegal evictions and to establish a framework for evicting unlawful occupiers. PIE provides three distinct application procedures for the eviction of unlawful occupiers, namely, where a private owner or the person in charge of the land institutes normal eviction proceedings;⁷¹ where a private owner or person in charge of the land institutes urgent eviction proceedings;⁷² and where an organ of state institutes eviction proceedings.⁷³ Section 6(1) of PIE states that an organ of state may institute eviction proceedings against unlawful occupiers from the land and that the court may grant an order of eviction if it is 'just and equitable' to do so and if 'it is in the public interest'. For the purposes of section 6(2) of PIE 'public interest' includes 'the interest of health and safety of those occupying the land and the public in general'.

PIE was enacted after 1994 and reliance on it recognises its enactment by the democratically-elected legislature so that it demonstrates the desired features and attempts to steer clear of unwanted outcomes. Furthermore, PIE is partial legislation,⁷⁴ but does

69 Van der Walt (n 32) 32.

70 As above.

71 Sec 4 PIE.

72 Sec 5 PIE.

73 Sec 6 PIE.

74 Muller (n 25) 633. PIE applies to all instances of unlawful occupation (squatting, land invasions, former mortgagors and holding over), in both urban and rural areas, where the property is used for residential purposes. However, PIE is not applicable if the property is used for business or for commercial purposes. See *Manguang Local Municipality v Mashale & Another* 2006 (1) SA 269 (O) paras 6 and 7; *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) para 14.

give direct effect to a right in the Constitution that directly impacts evictions in general.⁷⁵ PIE requires circumspect application of the subsidiarity principles because it neither exhausts the constitutional obligation in terms of section 26(3), nor does it wholly replace the common law eviction of unlawful occupiers wholly. Relying on the subsidiarity principles in the context of partial legislation such as PIE still serves the general purpose of ensuring that the identification of the applicable source of law promotes constitutional goals despite the reduction in their directive force.⁷⁶

PIE seems to satisfy all the characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights. PIE is formally valid and of general application to all unlawful occupiers who use land or buildings/structures for residential purposes in both urban and rural areas. PIE also promotes the inherent human dignity of people; applies to everyone equally and does not discriminate against people based on any of the listed grounds in section 9(3) of the Constitution read with section 29(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and Item 4(a) of the Schedule to PEPUDA;⁷⁷ promotes access to administrative justice;⁷⁸ and promotes access to courts.⁷⁹ PIE limits the right of owners to the use and enjoyment of their property for a legitimate purpose, but also ensures that an appropriate balance is struck between the property interests of landowners and the housing interests of the unlawful occupiers in that PIE explicitly states that a court should make an order that is just and equitable to landowners and the unlawful occupiers.

PIE fits with one of the land reform programmes provided for in the Constitution.⁸⁰ Land tenure reform has been described as the reform

75 Van der Walt (n 32) 61-63. Although it is clear from the Preamble of PIE that it intends to give effect to sec 26(3) of the Constitution, this section does not specifically provide that legislation should be enacted to give effect to it.

76 Van der Walt (n 32) 50.

77 G Muller 'On considering alternative accommodation and the rights and needs of vulnerable people' (2014) 30 *South African Journal on Human Rights* 47. Muller argues that PIE gives effect to substantive equality. PIE requires a context-specific consideration of the rights and needs of the elderly, children, persons with disabilities and female-headed households.

78 Sec 4(2) PIE. The unlawful occupiers and local authority within whose jurisdiction the land falls must be given written and effective notice of eviction proceedings at least 14 days before the hearing of the application. The purpose of the notice is to provide the occupiers with protection by notifying them of the threat to their occupation, informing them of the provisions of PIE, and informing them of their rights. The unlawful occupiers must receive information regarding the nature of the proceedings; the date and time of the hearing; the grounds for the proposed eviction; their right to appear and defend the case; their right to request legal aid; and the fact that they will have an opportunity to place their personal circumstances before the court.

79 Secs 4(6), 4(7), 5(1) & 6(1) of PIE expressly state that evictions may occur only in terms of a court order that was issued after consideration of all the relevant circumstances.

80 Muller (n 25) 635.

of the legal basis of land holding that is usually directed towards the implementation of social change.⁸¹ In the context of eviction of undocumented foreigners, calls are made for social change through a land use system that is not segregated along the lines of ethnic or social origin. The abolition of discriminatory apartheid land law legislation was insufficient and merely symbolised the start of a process that required the enactment of further legislation to strengthen and stabilise weak rights and interests in land.⁸² Lastly, the availability of alternative accommodation is regarded as the most important factor that a court should consider in determining whether it is just and equitable to grant an eviction order.⁸³ The reality of an eviction is that the evictees are unable to take the physical site and its intangible elements as a home⁸⁴ with them to the alternative accommodation. Therefore, an eviction order often breaks the strong emotional ties and support structures within a community.⁸⁵ An eviction destroys and disrupts the livelihoods of individuals and their families as relocation entails various uncertainties.⁸⁶ An additional layer of uncertainty is attached when undocumented foreigners are evicted, including further marginalisation and the imminent threat of

81 D Carey Miller *Land title in South Africa* (2000) 456.

82 Muller (n 25) 635.

83 *Tswelopele* (n 15) para 18. The evictees had constructed their shelters using scraps of building and waste material. Although the actual structure had a minimal market value, the pain and humiliation of being left homeless could not be quantified. Regardless of the minimal market value of the shelter, it provided them with a home which they would have otherwise not have had. Therefore, the availability of alternative accommodation is imperative in regaining an evictee's sense of dignity and safety.

84 See L Fox 'The meaning of home: A chimerical concept or a legal challenge?' (2002) 9 *Journal of Law and Society* 580; L Fox 'The idea of home in law' (2005) 2 *Home Cultures* 1; L Fox *Conceptualising home: Theories, laws and policies* (2007). Fox developed the concept of 'home' in the context of the United Kingdom to show how courts could weigh the tangible, monetary interests of creditors against the intangible, affective interests of occupiers that face eviction claims from the creditors. These intangible, affective interests of occupiers include the home as (a) a physical structure because it provides occupiers with the requisite shelter from the elements and the facilities that sustain and support them; (b) a territory because it affords the occupiers of the home the opportunity to exercise control over the space in the home and the activities within it; (c) identity because it embraces the adage 'home is where the heart is' and reveals the fact that occupiers forge strong emotional connotations with their homes through the experience of living in a particular place over a period of time; and (d) as a social and cultural unit because it creates an intimate link between the family and their place of residence that is sustained through a complex process of social interaction between members of the household. See also the submissions of the *amici curiae* in *Residents of Joe Slovo Community Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 27-49. These submissions are available online at <http://www.constitutionalcourt.org.za/Archimages/12720.PDF> (accessed 1 August 2011).

85 Muller (n 25) 636.

86 As above. These uncertainties range from the ability of individuals to earn an income as informal traders or usurping other unskilled employment; the prevalence of gang-related violence and the safety of the new area; the closeness of recreational facilities, health care facilities, religious institutions and schools; and service delivery and infrastructure.

xenophobic attacks. The failure to consider whether it is just and equitable to grant an eviction order may perpetuate or even exacerbate the vulnerable position of undocumented foreigners who are forced from their homes.

Therefore, PIE satisfies the characteristics of a property system that optimally promotes the spirit, purport and objects of the Bill of Rights.

2.3.2 *Immigration Act*

The Immigration Act was enacted to provide a uniform framework containing guidelines for the regulation of admission⁸⁷ of foreigners to,⁸⁸ their residence in, and their departure from the Republic.⁸⁹ All other relevant matters connected thereto are outlined in the Immigration Act, including the enforcement and detection policy relating to the monitoring of foreigners. It further aims to create a new system of immigration control in which immigration laws are efficiently and effectively enforced by deploying the administrative capacity of Home Affairs.

As is the case with PIE, the Immigration Act was enacted after 1994, and reliance on it must be approached similarly to that of PIE. However, the Immigration Act is partial legislation,⁹⁰ is of a technical nature⁹¹ and does not give direct effect to a right in the Constitution but may give indirect effect to section 21 of Constitution. The extent of the protection afforded in terms of the Bill of Rights may be

87 Sec 1(1)(a) of the Immigration Act defines 'admission' as 'entering the Republic at a port of entry on the basis of the authority to do so validly granted by this Act or by an immigration officer in terms of this Act'.

88 Sec 1(1)(xvii) of the Immigration Act defines 'foreigner' as 'an individual who is neither a citizen nor a resident but is not an illegal foreigner', while in terms of sec 1(1)(xviii) an 'illegal foreigner' is defined as 'a foreigner who is in the Republic in contravention of this Act and includes a prohibited person'.

89 Sec 1(1)(xi) of the Immigration Act defines 'departure' as 'exiting the Republic from a port of entry'.

90 Van der Walt (n 32) 20. The Immigration Act regulates and identifies persons who are lawfully entitled to enter the Republic. However, the Immigration Act does not regulate admission into and departure from the Republic of persons who are specifically regulated by the Refugees Act. Sec 2(b) of the Citizenship Act 88 of 1995 states that a person who is exempted from visa requirements in terms of sec 10A or sec 31(1) of the Immigration Act, who entered the Republic or is in the Republic for purposes of permanent residence, shall be deemed to be or have been lawfully admitted to the Republic for permanent residence therein, or permanently and lawfully residing in the Republic. The above is indicative that large portions of migration, citizenship and status regularisation are regulated by the Immigration Act, Refugees Act and Citizenship Act.

91 The *Oxford advanced learner's dictionary* (2005) defines 'technical' as 'connected with a particular subject and therefore difficult to understand if you do not know that subject'. The Immigration Act contains a web of procedural processes and substantive aspects. This includes internal monitoring and control, which requires a certain level of understanding, knowledge and skill to manoeuvre. Eg, the Immigration Act outlines 12 categories of visas in sec 10(2) all of which have their own specific requirements.

affected by the legal status of persons residing within South Africa.⁹² Section 21(1) provides that everyone has the right to freedom of movement, and section 21(2) states that ‘everyone’ – including non-citizens⁹³ – has the right to leave the Republic. The Immigration Act regulates the admission of foreigners to, their residence in, and their departure from the Republic and, therefore, may give indirect effect to sections 21(1) and 21(2) of the Constitution.

The scope and application of section 21 determine the extent of the protection of the right, which is linked to the interpretation of the right to freedom of movement and residence. This protection is of importance for persons who are neither South African citizens nor have regularised their stay. The position of section 21 in light of the Lawyers for Human Rights judgment is confirmed by Klaaren who states that it would seem that sections 21(1) and 21(2) of the Constitution similarly would be applicable to all persons within the South African territory,⁹⁴ including persons who are illegally in the Republic.

Although the Immigration Act may give effect indirectly to sections 21(1) and 21(2) of the Constitution, it is contextually problematic to construct a direct and clear line between the objectives of the Immigration Act and a right or rights in the Constitution. An extension of the subsidiarity principles may be justified in the context of post-1994 technical legislation because the Immigration Act was enacted in an era characterised by the efforts of a democratic legislator. Therefore, the normal subsidiarity principles should be consulted as a point of departure to prevent the development of parallel systems of law that regulate the eviction of undocumented foreigners under the guise of the Immigration Act. This will ensure maximum coherence with the principle of a single system of law. Although the subsidiarity principles should be used as a point of departure, they should be applied less strictly while allowing the provisos to feature more prominently.

In pursuance of the Immigration Act, section 32 regulates the deportation and monitoring of illegal foreigners and provides as follows:

92 J Klaaren ‘The right to freedom of movement and residence’ in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (Original Service, January 2013) ch 66-65.

93 Sec 21(3) of the Constitution provides that ‘[e]very citizen has the right to enter, to remain in and to reside anywhere in, the Republic’. Sec 21(4) provides that ‘[e]very citizen has the right to a passport’. Therefore, protection in terms of sec 21 in some instances is afforded to ‘everyone’ and in other cases only to ‘citizens’. However, the restriction of the protection is only to the extent that persons enter into and remain in the Republic and reside anywhere in the Republic.

94 Klaaren (n 92) 66-63. ‘Everyone’ should be given its ordinary meaning. The term, therefore, provides coverage to all natural persons, whether or not they are of South African nationality. Sec 26(1) of the Constitution states that everyone has the right to access adequate housing. It is suggested that the meaning of ‘everyone’ in terms of sec 26(1) be given the same interpretation as ‘everyone’ in terms of sec 21.

- (1) Any illegal foreigner shall depart, unless authorised by the Department to remain in the Republic pending his or her application for a status.
- (2) Any illegal foreigner shall be deported.

Furthermore, section 34(1) provides for the deportation and detention of illegal foreigners and states:⁹⁵

Without a need for a warrant,⁹⁶ an immigration officer may arrest an illegal foreigner, or cause him or her to be arrested, and shall irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department determined by the Director-General.

Both sections 32 and 34 require mandatory departure from the Republic in the form of the permanent deportation of illegal foreigners.⁹⁷ Where illegal foreigners are unlawfully occupying property and are deported they are required to permanently vacate the property in which they were residing with limited possibility to return once they have regularised their status due to having a criminal record.⁹⁸

95 Sec 34(1)(a) provides that the foreigner concerned shall be given written notice of the decision to deport him or her and that he or she has the right to appeal such decision in terms of this Act. The foreigner may at any time request any officer attending to him or her that his or her detention be confirmed by a court warrant and will be immediately released if the warrant is not issued within 48 hours of said request (sec 34(1)(b)). Additionally, the foreigner shall be notified of his or her rights in a language that he or she understands if practical, possible and available (sec 34(1)(c)). Sec 34(1)(d) provides that the foreigner concerned may not be held in detention for longer than 30 calendar days without a warrant of a court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days. Lastly, sec 34(1)(e) provides that the foreigner concerned shall be held in detention complying with the minimum prescribed standards affording protection to his or her dignity and human rights.

96 In terms of sec 33(5)(b) of the Immigration Act, an immigration officer may also obtain a warrant to apprehend an illegal foreigner.

97 Sec 34(5) of the Immigration Act. Failure to depart will result in the foreigner being guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

98 In *Occupiers of 51 Olivia Road, Berea and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) the constitutionality of sec 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 was challenged. The Constitutional Court held that sec 26(3) of the Constitution deserved 'a generous construction' and that sec 12(6) of the Act would render sec 26(3) of the Constitution 'virtually nugatory and [that it] would amount to little protection if people who were in occupation of their homes could be constitutionally compelled to leave by the exertion of the pressure of a criminal sanction without a court order' (para 49). In *Pheko* (n 23) the Constitutional Court interpreted sec 55(2)(d) of the DMA to refer to a 'temporary removal from a disaster-stricken area to a temporary shelter' which suggests that, if possible, people would be able to return to their homes once the disaster has abated. In the context of evicting unlawful occupiers from informal settlements or dilapidated inner city buildings, it would be contrary to the purpose of the Act if

The characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights, as applied above in respect of PIE, should be applied in the same manner to the Immigration Act. The Immigration Act is formally valid; is of general application to foreigners regarding their admission to, residence in and departure from the Republic; applies to all foreigners equally and does not discriminate against foreigners based on any of the listed grounds in section 9(3) of the Constitution read with section 29(1) and Item 4(a) of the Schedule to PEPUDA; promotes administrative justice,⁹⁹ and promotes access to courts.¹⁰⁰ The Immigration Act serves a public purpose of ensuring that immigration control is maintained. However, it may be argued that the Immigration Act falls short in terms of promoting the inherent dignity of human beings. Removing illegal foreigners in order to deport them deprives them of a home under the auspices of immigration control. This deprivation or loss has been referred to as a 'painful and often degrading experience' which perpetuates the marginalisation of illegal foreigners and their standing in society.¹⁰¹ The Immigration Act does not attempt to strike a balance between the public interests of local authorities to monitor and control immigration and the individual interests of illegal foreigners who are deeply affected in vacating their homes following arrest and deportation.

The Immigration Act does not contain a specific provision that requires immigration officials to consider the rights, needs and relevant circumstances of illegal foreigners before deportation is effected – let alone eviction. The purpose of the Immigration Act is not to regulate evictions but to ensure the efficient and effective administration of immigration control. The Immigration Act minimally promotes the adjudication and review of decisions that adversely affect an illegal immigrant.¹⁰² Therefore, the Immigration Act falls

unlawful occupiers could return to the settlement or building had measures not been taken to ensure the recurrence of the living conditions that necessitated the evacuation in the first place. In *Pheko* the Constitutional Court stated: 'An evacuation does not entail the demolition of people's homes or an indefinite removal. The DMA does not seek to achieve this. If the purpose of the DMA were to authorise demolition and eviction without an order of court, it would have said so. It does not. The forcible removal of the applicants amounts to an eviction, an indefinite removal from Bapsfontein. The deprivation is, in the circumstances, inimical to the right in s 26(3)' (para 40).

- 99 Sec 5(d) of the Immigration Act empowers the Immigration Advisory Board to review any decision of the Department of Home Affairs taken in terms of sec 8(1) of the Immigration Act when requested to do so by the Minister of Home Affairs.
- 100 Sec 8(2) of the Immigration Act affords a person who is aggrieved by the decision of the Department of Home Affairs generous avenues of appeal to the Director-General, the Minister and the courts. See further sec 37(1) of the Immigration Act.
- 101 *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others* 2012 (6) SA 294 (SCA) para 33.
- 102 Sec 8(1) of the Immigration Act states that prior to making a decision that adversely affects a person, Home Affairs must notify the affected persons and give them at least 10 calendar days to make representations. Thereafter, Home Affairs

short with regard to promoting access to the courts and administrative action.

The Immigration Act does not promote the spirit, purport and objects of the Bill of Rights to the extent that deportation is used to disguise a constructive eviction. It falls short on the characteristics of promoting the inherent human dignity of illegal foreigners, promoting access to administrative justice and promoting access to courts.

2.3.3 *Refugees Act*

The Refugees Act was enacted to give effect to the relevant international legal instruments, principles and standards relating to refugees in South Africa,¹⁰³ to provide for the reception of asylum seekers into South Africa,¹⁰⁴ to regulate applications for and recognition of refugee status; and to provide for rights and obligations flowing from such status.¹⁰⁵

The Refugees Act was also enacted after 1994 and reliance on it must be approached similarly to that of PIE and the Immigration Act. The Refugees Act is partial legislation and is of a technical nature.¹⁰⁶ The Refugees Act does not give direct effect to a right in the Constitution but may give indirect effect to section 21 of the Constitution, as in the case of the Immigration Act. It remains contextually problematic to construct a direct line between the Refugees Act and a right in the Constitution. Therefore, the subsidiarity principles demand that the focus must be on a purposive interpretation of the Refugees Act.

The characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights, as applied above in respect of PIE, should be applied in the same manner to the Refugees Act. The Act is formally valid; is of general application and applies equally to all

must give notice to the affected persons if the decision has been withdrawn, modified, or if it will become effective. Sec 8(4) further provides that any person who is adversely affected by a decision of Home Affairs shall be notified in writing of his or her rights and may not be deported before the relevant decision is final. However, when an illegal immigrant is evicted under the veil of immigration control in terms of the Immigration Act, he or she is neither notified of the impending eviction in terms of the Immigration Act nor in terms of PIE. It would appear that local authorities use the provisions of the Immigration Act to circumvent the procedural requirements in PIE. Therefore, deportation may often lead to an unlawful eviction.

103 Sec 1(xv) defines 'refugee' as 'any person who has been granted asylum in terms of [the Refugees] Act'.

104 Sec 1(v) defines 'asylum seeker' as 'a person who is seeking recognition as a refugee in the Republic'.

105 Preamble of the Refugees Act.

106 In interpreting, applying and administering the Refugees Act, a certain level of skill, knowledge and understanding is required. Sec 2(b) provides that each Refugee Status Determination Officer and Refugee Reception Officer must have such qualifications, experience and knowledge of refugee matters to ensure that they are capable of performing their functions.

asylum seekers regarding their application for refugee status; does not discriminate against asylum seekers based on any of the listed grounds in section 9(3) of the Constitution read with section 29(1) and Item 4(a) of the Schedule to PEPUDA; promotes access to administrative justice;¹⁰⁷ and promotes access to courts.¹⁰⁸

The Refugees Act pursues a public purpose of ensuring that relevant international legal instruments, principles and standards relating to refugees are adhered to. Therefore, the Refugees Act upholds both public interest and individual interest by extending protection to those who are unable or unwilling to return to their country of nationality out of fear.¹⁰⁹ The Refugees Act contains specific provisions for when the rights, needs and circumstances of refugees and asylum seekers are considered.¹¹⁰

Section 23 of the Refugees Act provides for the detention of an asylum seeker whose status has been withdrawn:

If the Director General has withdrawn an asylum seeker visa in terms of section 22(5), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.

Removal and detention in this instance entails that the asylum seeker referred to above must permanently vacate the building or structure in which he or she is residing. The asylum seeker therefore is evicted from their home.

The Refugees Act appears to meet many of the characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights. However, it provides no protection in circumstances where its provisions, particularly section 23 above, are used to execute an eviction.

107 Secs 11(e) and 25(1) of the Refugees Act empowers the Standing Committee for Refugee Affairs to review the decision of a Refugee Status Determination Officer.

108 Secs 14(1)(b) and 26 of the Refugees Act empower the Refugee Appeal Board to hear and determine any appeal lodged in terms of this Act.

109 Sec 3 of the Refugees Act provides that 'a person qualifies for refugee status for the purposes of this Act if that person (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere'.

110 See secs 2 and 3 of the Refugees Act read with sec 32 which makes special provision for unaccompanied children and mentally-disabled persons who must be assisted in applying for asylum.

3 Eviction of undocumented foreigners

In evicting undocumented foreigners, the procedural protections and substantive safeguards contained in PIE should be applied as a point of departure. Therefore, it is necessary to first consider the protection generally afforded to unlawful occupiers in terms of PIE before ascertaining whether these protective measures are limited in respect of unlawful occupiers who are undocumented foreigners. When an owner or person in charge of land institutes proceedings for the eviction of an unlawful occupier,¹¹¹ the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. This must be done at least 14 days prior to the hearing of the proceedings.¹¹² If the court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided by the rules of the court, then service must be effected in the manner directed by the court provided that the court considers the rights of the unlawful occupier to receive adequate notice and to defend the matter.¹¹³ In determining whether it would be just and equitable to evict the undocumented foreigners, the court must consider the rights and needs of vulnerable people,¹¹⁴ the availability of alternative accommodation,¹¹⁵ imposing reasonable conditions on the eviction and/or demolition order.¹¹⁶

In *Chapelgate* the Court examined the extent of benefits, protections and rights afforded to undocumented foreigners. An undocumented foreigner who resides in South Africa and to whom the Refugees Act does not apply has diminished status. He or she may not be lawfully employed¹¹⁷ and no learning institution may knowingly provide him or her with training.¹¹⁸ Additionally, it is an offence to let or make available to an illegal foreigner accommodation unless for the purposes of humanitarian assistance.¹¹⁹ The Court referred to *Khosa v Minister of Social Development*.¹²⁰ In this judgment Mokgoro J stated that the case of an illegal foreigner was 'quite different' to that of a person who has regularised his or her stay. However, the failure of a foreigner to enter the country legally at a designated port of entry or one who did not seek asylum but gained entry using another category of visa which has since expired does not

111 Sec 4(1) PIE. The procedure for the serving of notices and filing of papers is prescribed by the rules of the court.

112 As above.

113 Secs 4(4) & 5 PIE.

114 Sec 4(6) PIE.

115 Sec 4(7) PIE.

116 Sec 4(12) PIE.

117 Sec 38(1)(a) of the Immigration Act provides that no person shall employ an illegal foreigner.

118 Sec 39(1)(a) of the Immigration Act further provides that no learning institution shall knowingly provide instruction or training to an illegal foreigner.

119 Secs 42(1)(b)(viii)-(ix) read with sec 49 of the Immigration Act.

120 2004 (6) SA 505 (CC) paras 59 & 69.

render that person subject to the consequences of the Immigration Act provided that an intention to seek asylum exists.¹²¹ South African precedent has proved hesitant in affording an undocumented foreigner the same rights as asylum seekers and refugees. However, the courts have confirmed that the right to dignity is determinative of the issue if it is conflicted by any other law, including another provision in the Constitution.¹²² In *Chapelgate* Spilg J concluded that undocumented foreigners are equally entitled to the socio-economic rights contained in the Bill of Rights as a citizen would ordinarily be entitled to insofar as the provision does not specifically provide enjoyment and protection for citizens only.¹²³

In *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others (Changing Tides)*¹²⁴ the interior of a building had been divided into apartments that were let to citizens and undocumented foreigners. The Supreme Court of Appeal considered whether the City was obliged to provide temporary emergency accommodation for undocumented foreigners. The judgment turned on whether the determination of status should precede the provision of emergency shelter. Without the luxury of time, the Court identified that the matter required prompt alleviation of the plight of individuals who had been trapped in an emergency situation.¹²⁵ The living conditions in the building posed a risk to life and health.¹²⁶ Therefore, the Court did not concern itself with the niceties of any qualifier other than the desperate need to accommodate the individuals concerned.¹²⁷ In establishing when the appropriate time was to determine the status of the undocumented foreigner, the Court held:¹²⁸

The relevant question, in cases of eviction creating an emergency, is whether the appropriate time to [determine the status of the occupier] is before that person obtains such accommodation or afterwards. Where the facts point to the desirability of the eviction being effected as rapidly as

121 *Chapelgate* (n 19 above) para 40.

122 *Chapelgate* (n 19 above) para 51. See further *Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority and others* 2007 (4) SA 395 (CC) para 99–110 (*Union of Refugee Women*); *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) para 26–31.

123 *Chapelgate* (n 19) para 67–70. Only a few sections in the Bill of Rights apply expressly to citizens only. The laws of general application may also be applicable to reasonably and justifiably limit the enjoyment of other constitutionally-protected rights to citizens only. However, where questions of life, bodily integrity and dignity are involved, it becomes more problematic to justify the limitation of the right.

124 2012 (6) SA 294 (SCA).

125 *Changing Tides* (n 124) paras 53–54.

126 *Changing Tides* para 2. The building was in a state of disrepair with no toilets or ablution facilities, illegal electricity connections, no sewerage or water supply, inadequate ventilation and refuse, including human waste, strewn in open spaces. The building was a health and fire hazard and it was claimed by the local police that the building provided a hub for illegal activities.

127 *Chapelgate* (n 19) para 58.

128 *Changing Tides* (n 124) paras 53 & 56. The Court ordered that accommodation be made available to all occupiers.

possible, because the circumstances in which the occupiers are living pose a risk to life and health, the only answer must be that the review process should defer to the need for eviction and accordingly take place after the City has provided the evictees with temporary emergency accommodation.

The Court in both *Chapelgate* and *Changing Tides* held that while evictees that are undocumented foreigners are entitled to temporary emergency accommodation,¹²⁹ their entitlement may be subject to reasonable and conditions set by the courts, such as regularising their stay within a certain period.¹³⁰

Our argument is that in instances such as *Chapelgate* and *Tswelopele*, where undocumented foreigners stand to be unlawfully evicted under the guise of immigration control, PIE is the most appropriate source of law to regulate the effective eviction of any foreigner. The Immigration Act and the Refugees Act do not contain the same, or even similar, procedural protections and substantive safeguards against illegal eviction. However, the provisions of the Refugees Act and the Immigration Act ought to be used to supplement PIE in the unique context of regulating the entry into and egress from South Africa of foreigners. Specifically, this includes the precondition that before an undocumented foreigner is entitled to temporary emergency accommodation their stay must be regularised. In this regard, the relevant sections of Refugees Act and the Immigration Act pertaining to detention, deportation and withdrawal of refugee or asylum seeker status are to be applied.¹³¹

Until such time that the status of a foreigner is determined or their lawful detention or deportation commences, he or she must be entitled to the same benefits that are afforded to any citizen. Pertinently, this includes the procedural protections and substantive safeguards in PIE and access to temporary emergency shelter. This is especially so when the living situation of the undocumented foreigner is one of dire need.¹³² This approach will prevent local authorities from circumventing the procedural protections and substantive safeguards of PIE under the guise of immigration control and 'weeding out' the few unlawful occupiers who may not be entitled to certain benefits, such as temporary emergency accommodation.¹³³

By identifying PIE as the most appropriate source of law – and thus the best starting point – in all eviction matters relating to undocumented foreigners, and supplementing its provisions with the relevant sections of the Immigration Act and Refugees Act, we are able to determine the relationship and coherence of all three Acts within a single system of law that is shaped by the Constitution.

129 Sec 4(7) PIE.

130 Sec 4(12) PIE.

131 Sec 34 of the Immigration Act and secs 23 and 28(1) read with sec 28(4) of the Refugees Act.

132 *Changing Tides* (n 124) para 52.

133 As above.

4 Conclusion

It is likely that the increase in immigrants seeking entry into South Africa will continue to surge.¹³⁴ Therefore, it is necessary to provide local authorities with guidance as to how they should – and, by implication, are not permitted to – evict unlawful occupiers who are undocumented foreigners under the guise of immigration control. The subsidiarity principles demand that the Immigration Act should be interpreted with a generous measure of distrust as it does not optimally demonstrate all the characteristics or avoid the unwanted outcomes. In addition, the Immigration Act should be treated with a fair amount of circumspection given that it is partial legislation and due to its technical nature. The application of the subsidiarity principles demands a purposive interpretation of the Immigration Act. The Immigration Act does not optimally promote the spirit, purport and objects of the Bill of Rights because it does not satisfy all the general, systemic features and characteristics of a property system in post-apartheid South Africa.

The Refugees Act appears to meet many of the characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights and appears to avoid unwanted outcomes. However, the Refugees Act should also be treated with a fair amount of circumspection given that it is partial legislation and due to its technical nature. The subsidiarity principles demand that the focus must be on a purposive interpretation of the Refugees Act. Although the Refugees Act satisfies many of the general, systemic features and characteristics of a property system in post-apartheid South Africa, it does not provide adequate protection in circumstances where its provisions, particularly section 23 of the Refugees Act, are used to execute an eviction.

PIE, in contrast, deserves a greater degree of respect. It satisfies all the characteristics and avoids the unwanted outcomes of a property system that optimally promotes the spirit, purport and objects of the Bill of Rights.¹³⁵ It is argued that PIE should be the starting point for evicting unlawful occupiers who are undocumented foreigners. The rights and needs of the evictees should be central to the question of whether it is just and equitable to grant an eviction order.¹³⁶ Put differently, the marginalisation of undocumented foreigners will be perpetuated if local authorities are allowed to execute evictions for immigration control in terms of police power legislation. Local authorities are required to fundamentally reconsider their response to eviction under the guise of immigration control. This reconsideration must be animated by a genuine concern for the precarious position in which undocumented foreigners find themselves; the duty to respect

134 Hiropolous (n 1) 1.

135 Muller (n 25) 637.

136 As above.

their right of access to adequate housing;¹³⁷ the political will to find case-specific solutions that will allow progressive realisation of the right of access to adequate housing;¹³⁸ and a profound understanding of the significance of a home.¹³⁹

The Immigration Act and the Refugees Act should be used in conjunction with PIE where the unlawful occupiers are undocumented foreigners. This conjunction would infuse any decision on evicting undocumented foreigners with the procedural protections and substantive safeguards, including the right to be provided with temporary alternative accommodation, of PIE.

This conclusion should be understood against the background of various paradigm shifts in the law of evictions: first, from abstract to context-specific adjudication and, second, from a hierarchical arrangement of rights to a constitutional matrix of relationships.¹⁴⁰ The last paradigm is a move from government establishing a land use system that is based on racial and status segregation to a government that must promote equitable access to land and housing.¹⁴¹

It is arguable that local authorities and the government at various levels feel frustrated that they are unable to satisfy all the context-specific requirements of PIE.¹⁴² In these instances, local authorities have instead decided to invoke their police powers to evict undocumented foreigners for the purposes of immigration control. In some respects it appears that by doing so, local authorities have decided to further marginalise undocumented foreigners and to ignore the precarious conditions in which undocumented foreigners find themselves.

The right to dignity features prominently in the right to have access to adequate housing in terms of sections 26(1) and (2) of the Constitution and underscores the protective rights accorded to an evictee under section 26(3) of the Constitution, which is given substantive context through PIE. In *Maphango & Others v Aengus Lifestyle Properties (Pty) Ltd*¹⁴³ Froneman J stated that '[i]t would be a denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation. This would be so no matter how the case was pleaded.'¹⁴⁴

It is clear that the courts have a constitutional responsibility to consider all legislation that promotes equitable access to land and

137 Muller (n 25) 638.

138 As above.

139 *Residents of Joe Slovo* (n 84) paras 231 & 232. Ngcobo J stated that sec 26(3) 'underscores the importance of a house, no matter how humble ... it acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security.'

140 Muller (n 25) 638.

141 As above.

142 As above.

143 2012 (3) SA531 (CC).

144 *Maphango* (n 143) para 152.

housing and prevents further marginalisation of vulnerable groups, particularly undocumented foreigners, and that all evictions, irrespective of the status of the evictees, are carried out in a manner that respects human dignity, equality and freedom.¹⁴⁵ The time is ripe to declare that PIE should be the starting point in any inquiry regarding the eviction of unlawful occupiers who are undocumented foreigners in post-apartheid South Africa.

145 *Chapelgate* (n 19) para 73. Spilg J shared this sentiment with Ngcobo J in *Joe Slovo* (n 84) paras 231 & 232.

Decriminalisation of cannabis for personal use in South Africa

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Summary

In 2002 the South African Constitutional Court was faced with a case challenging the constitutionality of the legislation criminalising cannabis use. The appellant argued that the criminalisation infringed the right to religion. The Court, however, ruled that the legislation did not constitute a constitutional infringement. It is worth noting that the African Commission and the Human Rights Committee previously have dealt with this issue, in particular, the implications of South African legislation on cannabis for international human rights law. Just as the Constitutional Court, the Commission and Committee did not find a violation. In 2017 the Western Cape Division of the High Court of South Africa was faced with another application, this time challenging the constitutionality of the legislation criminalising the personal use of cannabis by adults in the privacy of their home. The Court in this instance declared the prohibition of the use of cannabis by adults in the confines of their private dwellings to be inconsistent with the Constitution of South Africa and declared the provisions to be invalid to that extent. The decision of the High Court was confirmed by the Constitutional Court in 2018, with the latter Court ruling, amongst others, that 'the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption'. This decision raises two questions, namely, what inspired the Court in the 2018 case to arrive at a decision different from that of 2002? In light of the fact that South Africa is a party to the three binding

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international drug treaties which, among others, create a presumption upon states to criminalise possession and cultivation for personal use, the second question is what the implications of the 2018 decision are for South Africa's international law obligations. Answering these two questions forms the crux of this article.

Key words: *cannabis; decriminalisation; international law; personal use; Prince; South Africa*

1 Introduction

South Africa, like many states in the world, has made the personal use and possession of cannabis a criminal offence. Cannabis is commonly known as 'dagga' in South Africa,¹ whereas in other countries it is referred to as 'marijuana'. The criminalisation of cannabis use in South Africa was effected through provisions in two Acts of Parliament. These are the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) in section 4(b) and the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) in section 22A(10).² In accordance with these provisions, cannabis is one of the substances prohibited for personal use. Under the international drug treaties instruments (which will be analysed in subsequent parts of the article) there is a general presumption upon states to criminalise possession and cultivation for personal use.

The criminalisation of cannabis has awakened debates on whether or not the use of this substance should constitute a criminal offence. These debates have transcended the academic realm and many have challenged its criminalisation in courts of law. In the context of South Africa, the indiscriminate criminalisation of cannabis use and possession has been challenged not only in the South African courts but also beyond. The argument has time and again been that the criminalisation infringes the right to practise religious beliefs, among others. The decision of 2017, as later confirmed in 2018 by the South African Constitutional Court, however, brought a new perspective to South African jurisprudence. Notably, the laws criminalising cannabis

1 See the National Prosecution Authority of South Africa Annual Report 2014/2015, which refers to issues of cannabis.

2 The prohibition against cannabis is found in Part III where it is listed in Schedule 2 of the Drugs Act as a harmful, unwanted dependence-producing substance. The prohibition on the use or possession of cannabis is effected by sec 4(b). The major aim of the Drugs Act is to proscribe the use and/or possession of dependence-producing substances as well as dealing in such substances. The possession of cannabis for medicinal purposes is allowed as an exemption under sec 4(b). However, this exemption is subject to the stipulated provisions of the Medicines Act. Also, sec 22A(10) of the Medicines Act, read together with sch 8 of the same Act, strictly prohibits the use or possession of cannabis unless it is for research or analytical purposes. The major stated aim of the Medicines Act is to regulate the registration of medicines and substances. As a result, substances listed in sch 8 of the Medicines Act resembles those listed in Part III of sch 2 of the Drugs Act.

were challenged not on the basis of religion, but based on the right to privacy. For the first time, after three prior decisions, the High Court of the Western Cape found a constitutional violation. The Court, declaring, *inter alia*, that the prohibition on the use of cannabis by adults in the confines of their private dwellings is inconsistent with the South African Constitution and that the provisions of the legislation in question were invalid to that extent. The South African Constitutional Court confirmed this ruling, going a step further by expanding the protection of individuals that use cannabis for personal consumption. In this regard the Court categorically ruled that 'the right to privacy entitles an adult person to use, cultivate or possess cannabis in private for his or her personal consumption'.³ In terms of the ruling such protection is not limited to a home or private dwelling.

With this decision, South Africa is the first and, currently, the only African country to make provision for the personal consumption of cannabis in private (also generally referred to as recreational cannabis). The use of cannabis for medicinal and recreational purposes remains illegal in most African countries, including Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, the Central African Republic, Chad, the Democratic Republic of the Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Egypt, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Sudan, South Sudan, Tanzania, Togo, the Kingdom of Eswatini, Uganda and Tunisia.⁴ In 2017 Lesotho legalised the cultivation of cannabis for medicinal purposes, while in April 2018 Zimbabwe legalised the cultivation of cannabis for medicinal and research purposes.⁵ However, in both these countries the law does not make provision for cannabis for personal consumption. An African country that comes close to the current legal position in South Africa is Morocco. In Morocco the personal consumption of cannabis is tolerated as part of that country's local culture.⁶ However, unlike the position in South Africa, cannabis for personal consumption remains illegal in Morocco and arrests still persist. Morocco currently is having discussions to have the laws on cannabis revised.⁷ However, these discussions are centred on the regulation of cannabis for industrial and medicinal purposes as opposed to personal consumption (recreational cannabis). Generally, therefore, the state of affairs in most African

3 *Minister of Justice and Constitutional Development & Others v Prince; National Director of Public Prosecutions & Others v Rubin; National Director of Public Prosecutions & Others v Acton & Others* [2018] ZACC 30 (*Prince 2* Constitutional Court decision) para 58.

4 Prohibition Partners *The African cannabis report* (2019) 1.

5 As above.

6 As above.

7 As above.

countries makes the legal position established in the South African decision one of its kind in the context of Africa.

A cursory reading of the South African decision may suggest that the judgment is merely another decision on the subject of cannabis use. However, on closer scrutiny deeper issues and questions are revealed. For example, what made the argument in the 2018 case stand out, with the Court arriving at a decision different from that of previous courts? Also, South Africa ratified three international treaties which, among others, create an obligation upon states to criminalise the possession and cultivation for personal use. This again leaves a number of questions unanswered. In particular, if the 2018 decision is implemented, will South Africa still be in adherence with its international law obligations? To answer these questions this article is divided into two parts. The first part critically analyses the various decisions in which the legislation criminalising cannabis in South Africa has been challenged. It focuses on the 2002 decision of the Constitutional Court, the decision of the African Commission on Human and Peoples' Rights (African Commission), the Human Rights Committee decision, the 2017 decision of the High Court and the 2018 decision of the Constitutional Court. The purpose of this part of the article is to demonstrate how the right to privacy played out in the 2017 and 2018 decisions, leading the courts to find a constitutional infringement, a finding at which the three previous decisions had not arrived. The part concludes that anchoring the argument of infringement in the right to privacy eliminated the barriers that seemed insurmountable in previous decisions. The second part measures the 2018 decision against South Africa's international law obligations. It is concluded that the 2018 decision, although changing the legal regime in South Africa, does not infringe the international drug treaties to which South Africa prescribes.

2 The *Prince* case: From South African courts to the African Commission; to the Human Rights Committee and back to South African courts

2.1 *Prince v President of the Law Society, Cape of Good Hope*⁸

The facts of this case are that Prince was using dagga, otherwise known as cannabis sativa, for spiritual, medicinal, culinary and ceremonial purposes as a way of manifesting and/or practising his religion as a Rastafarian.⁹ He had successfully completed his legal studies, which enabled him to qualify to be registered as a candidate attorney. However, because he had in the past been convicted of the offence of possessing dagga, his fitness and propriety to be registered as candidate attorney was questioned, particularly in light of the fact

8 *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC).

9 See para 1.

that he indicated that he was not eager to stop his use of dagga for religious purposes. On this account the Cape of Good Hope Law Society rejected his request for registration. In the Law Society's view, registration would bring disrepute upon the attorneys' profession.¹⁰ Mr Prince was not satisfied with this decision. He challenged the constitutionality of the prohibition on the use and possession of cannabis for religious purposes both in the Cape of Good Hope High Court (High Court) and later in the Supreme Court of Appeal (SCA). In both instances he was unsuccessful. His appeal in the SCA was dismissed and he consequently lodged an appeal with the Constitutional Court.

Before the Constitutional Court, Prince still failed to get the Court to find a constitutional infringement on the prohibition on the use and possession of cannabis for religious purposes. Ngcobo J, handing down the majority judgment, ruled as follows:¹¹

The appellant belongs to a minority group. Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.

In arriving at this decision, the Court noted that it would be impossible for state agencies mandated to enforce the overall statutory prohibition on the use and possession of dagga to make an exception for the use of small quantities for religious purposes without undermining the overall aims of the prohibition.¹²

It is important to note that Prince challenged the prohibition on the use of marijuana within the ambit of the rights to freedom of religion, to dignity, to pursue the profession of one's choice, and not to be subjected to unfair discrimination. Notably, the right to privacy feature nowhere in his argument. He chose the right to freedom of religion and sought an exemption only for followers of the Rastafari religion. In light of this narrow argument, the Court did not venture into addressing the issue whether the use or possession of small quantities of dagga in the privacy of the home was constitutional.¹³ Thus, the Constitutional Court steered clear of the argument for use or personal consumption of cannabis in small quantities. As Prince had chosen to anchor his argument on the infringement of the right to practise religion, the Court's decision was confined to this argument.

10 See para 2.

11 See 87, cited in para 146 of the case.

12 Para 130. The Court observed that 'where there was no carefully controlled chain of legalised supply, it was going to be difficult to see how the island of genuine acquisition and use of cannabis by Rastafarians for the purpose of practising their religion could be distinguished from the surrounding ocean of illegal trafficking and use'.

13 Para 165.

Anchoring the argument within the ambit of religion came with challenges. Notably, it did not pass the limitation clause in section 36 of the South African Constitution. Having exhausted all the judicial avenues in South Africa, Prince sought to look beyond South Africa's judicial borders. He approached the African Commission.

2.2 *Prince v South Africa*¹⁴

Prince brought a complaint before the African Commission alleging a violation of articles 5,¹⁵ 8,¹⁶ 15¹⁷ and 17(2)¹⁸ of the African Charter on Human and Peoples' Rights (African Charter). Prince requested the African Commission to find South Africa in violation of the African Charter for failure to allow him an exemption.¹⁹ In Prince's view, the failure to make such exemption placed him in conflict with the law in so far as the offence of use or possession of cannabis was concerned.²⁰ Although Prince acknowledged that the prohibition served a legitimate purpose, he took the view that it was prejudicial because no exception was made for the sacramental use of cannabis by Rastafari. Prince drew the attention of the Commission to the fact that the Drugs Act and the Medicines Act provided for an exemption for the possession or use of cannabis under exceptional circumstances. Notably, cannabis could be used or possessed for medicinal purposes, in line with the provisions of the Medicines Act, which regulated the registration of medicines and related substances.²¹ Prince, therefore, requested the African Commission to grant him a similar exemption for the sacramental use of cannabis.²² He submitted that a religiously-pluralistic society would be ensured through such reasonable accommodation.²³ The African Commission made several interesting rulings, some of which are worth noting.

In arriving at its decision, the African Commission ruled that although one's freedom to manifest his or her religion or belief can never be attained if there are legal limitations preventing an individual from carrying out actions sanctioned by his or her convictions or beliefs, such freedom did not in itself consist of a general right to act

14 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004).

15 See the African Charter on Human and Peoples' Rights of 1981. Art 5 deals with the right to the respect of the dignity inherent in a human being and to the recognition of his or her legal status.

16 As above. Art 8 provides for 'the right to freedom of conscience, the profession and free practice of religion and that no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms'.

17 As above. Art 15 provides for 'the right to work under equitable and satisfactory conditions, and to receive equal pay for equal work.'

18 As above. Art 17(2) provides for 'the right of every individual to freely take part in the cultural life of his community'.

19 See *Prince v South Africa* (n 14) para 29.

20 Para 40.

21 As above.

22 Para 31.

23 As above.

in line with one's convictions.²⁴ The Commission pointed out that whereas the right to embrace religious convictions should be unqualified, the right to act on those beliefs should not be absolute.²⁵ This is because a persons' right to practise his or her religion in some instances must yield to the interests of society.²⁶ In finding that the limitation was legitimate, the Commission had recourse to article 27(2) which underscores the need to accord due regard to the rights of others in the exercise of the rights guaranteed under the African Charter.²⁷ The Commission was also of the view that the restriction was general in nature.²⁸ The prohibition was not directed at the claimant and Rastafari in general. Rather, it applied to everyone, and this necessarily ruled out the argument that the prohibition was discriminatory.²⁹ Considered together, Prince's request for an exemption for the sacramental use and possession of cannabis on the grounds stipulated in the African Charter was rejected. Dissatisfied with the decision of the Commission, Prince escalated the matter to the United Nations (UN) level, as discussed below.

2.3 *Prince v South Africa*³⁰

Before the Human Rights Committee, Prince alleged that South Africa was in violation of his rights under article 18(1),³¹ article 26³² and article 27³³ of the International Covenant on Civil and Political Rights of 1966 (ICCPR). The facts of the matter are similar to those canvassed by Prince in the earlier forums. He alleged a violation of article 18(1) of ICCPR, and referred to General Comment 22 which underscores the notion that worship 'extends to ritual and ceremonial acts giving direct expression to belief'.³⁴

24 Para 41.

25 As above.

26 As above.

27 Para 43.

28 The African Commission cited the UN Human Rights Committee recommendation in the case *K Singh Bhinder v Canada* (Communication 208/1986). The Committee had upheld limitations against the manner of manifestation of one's religious practice.

29 Para 44.

30 *Prince v South Africa* (2007) AHRLR 40 (HRC 2007).

31 Art 18(1) provides that '[e]veryone shall have the right to freedom of thought, conscience and religion; and that this right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

32 Art 26 provides that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

33 Art 27 provides that '[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

Prince was of the view that by prohibiting the possession or use of cannabis for religious purposes by Rastafari, South Africa was in violation of article 26. This, he said, was as a result of the failure by the respondent to distinguish the Rastafari religion from other religions.³⁵ He further alleged that the failure by the respondent to explore other avenues with a view to finding an effective exception for Rastafari constituted a violation of article 27.³⁶ In considering the matter on its merits, the Human Rights Committee arrived at a decision similar to that of the African Commission. In this regard the Committee stressed that 'freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations'.³⁷ The Committee further observed that the proscription of the use and possession of cannabis, which resulted in the restriction of Prince's freedom to manifest his religion, was prescribed by law, namely, by the Drugs Act and the Medicines Act. In the Committee's view, therefore, the failure to make an exemption for the use of cannabis for religious purposes was a justifiable limitation in terms of article 18(3).³⁸ Against this backdrop, the Committee found no violation of article 18(1).³⁹ The Committee also failed to find a violation of article 27.⁴⁰ With regard to article 26, the Committee took the view that South Africa's failure to make an exemption for Rastafarians could not be said to constitute differential treatment.⁴¹ The Committee ultimately found that South Africa did not breach any articles of ICCPR as alleged by the petitioners.⁴²

With the Human Rights Committee failing to find a violation of ICCPR, the legal issues surrounding the *Prince* case seemed sealed. However, this position lasted only until 31 March 2017 when the South African High Court handed down a decision which, drawing on the previous decisions, could not have been expected. This decision was, in many respects, confirmed by the Constitutional Court in 2018. The overarching question, therefore, arises as to what changed between 2002 and 2018 in terms of the *ratio decidendi* of the courts. The 2017 decision, as confirmed by the Constitutional Court in 2018, therefore, is examined briefly to assess the line of argument that won the day and, more generally, to see how this decision contributes to South African jurisprudence on this subject.⁴³

34 Para 3.1 of the Communication.

35 Para 3.3.

36 Para 3.4.

37 Para 7.2.

38 Art 18(3) provides that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

39 Para 7.3.

40 Para 7.4.

41 Para 7.5.

42 Para 8.

2.4 *Prince v Minister of Justice and Constitutional Development & Others; Rubin v National Director of Prosecutions & Others; Acton & Others (Prince 2)*⁴⁴

Different actors brought applications before the Western Cape High Court. One of the applicants was Prince who approached the Court seeking a declaration to the effect that the legislative provision prohibiting the possession and use of cannabis, as well as the cultivation, purchase and transportation of cannabis for personal or communal consumption be declared invalid. Since his request was similar to two other applications, they were decided together. We are concerned here with Prince's challenge. He challenged provisions of the Drugs Act together with those of the Medicines Act in so far as they related to cannabis consumption and the legislative provisions prohibiting the use and possession of cannabis by adults in the privacy of their homes.⁴⁵ He argued before the High Court that the criminalisation of the possession and use of cannabis in the privacy of adults' own homes as well as incorrectly-designated places (such as Rastafarian churches) was unconstitutional. He alleged that the challenged legislation breached fundamental rights, including freedom of religion and equal dignity.⁴⁶ However, Prince's main challenge against the legislation was that it breached his right to privacy.⁴⁷

What makes the *Prince 2* decision stand out is the manner in which the Court dealt with the issue of the right to privacy. As to whether the Drugs Act and Medicines Act placed undue limitations on the right to privacy, the Court held the following view:⁴⁸

If privacy, as a continuum of rights which starts with an inviolable inner core moving from the private to the public realm where privacy is only remotely implicated by interference, it must follow that those who wish to partake of a small quantity of cannabis in the intimacy of their home do exercise a right to autonomy which, without clear justification, does not merit interference from the outside community or the state.

The Court took a similar view with regard to the cultivation of cannabis in homes for the exclusive purpose of personal consumption.⁴⁹ Turning to the question of the limitation of rights, the Court ruled that rights may be limited in terms of Chapter 2 of the Constitution.⁵⁰ The Court also had recourse to developments in other

43 *Prince v Minister of Justice and Constitutional Development & Others; Rubin v National Director of Prosecutions & Others; Acton & Others* (4153/2012) [2017] ZAWCHC 30; [2017] 2 All SA 864 (WCC); 2017 (4) SA 299 (WCC) (31 March 2017) (*Prince 2* High Court decision).

44 As above.

45 *Prince 2* High Court decision (n 43) para 4(a).

46 *Prince 2* High Court decision para 11.

47 As above.

48 *Prince 2* High Court decision (n 43) para 25.

49 *Prince 2* High Court decision para 26.

50 *Prince 2* High Court decision para 28.

states, which revealed that states are warming up to the idea of decriminalisation and, most importantly, that criminalisation *per se* hardly addresses the harm caused by prescribed drugs such as cannabis.⁵¹ Against this backdrop, the Court ruled that the provisions of the Drugs Act and Medicines Act needed to be narrowly tailored to ensure that they were not overly broad as to undermine guaranteed rights such as the right to privacy.⁵² Ultimately, the Court ruled that the respondents did not discharge the burden of proving that the limitation of the right to privacy was justifiable.⁵³ The Court, however, cautiously noted that the decision did not imply that the Court understated the importance of curbing drug trafficking.⁵⁴ Rather, that the decision was 'only concerned with the conduct of individuals performed in the confines of their own homes'.⁵⁵

The final nail in the coffin in the fight against the criminalisation of dagga for personal use by adults was put by the Constitutional Court in the 2018 confirmatory decision.⁵⁶ The Constitutional Court had the task of either confirming or not confirming the High Court order of constitutional invalidity on the provisions of the impugned legislation as it related to the prohibition of the use of cannabis by adults within the confines of their homes or private dwellings. The Court interpreted the right to privacy as being the right to be left alone.⁵⁷ The Court pointed out that the right to privacy entitled an adult person to use or cultivate or possess cannabis in private for personal consumption.⁵⁸ Thus, the Court confirmed the High Court's decision to the extent that the impugned provisions criminalising the use, cultivation or possession of cannabis limited the right to privacy.⁵⁹ The Constitutional Court further addressed the issue of whether the infringed right to privacy caused by the impugned legislation could be said to be reasonable and justifiable in terms of section 36 of the South African Constitution. In this regard, the Court found the provisions of the impugned legislation to be part of a law of general application. However, on the issue of dealing in cannabis, the Court cautiously noted that such a limitation served a legitimate purpose in light of the chronic challenge of dealing in cannabis in South Africa.⁶⁰ Therefore, the prohibition on dealing in cannabis was found to be a justifiable limitation of the right to privacy.⁶¹ As a result, the Constitutional Court did not confirm the finding of the High Court in this regard.

51 *Prince 2* High Court decision para 90.

52 *Prince 2* High Court decision para 104.

53 *Prince 2* High Court decision para 107.

54 As above.

55 As above.

56 *Prince 2* Constitutional Court decision (n 3).

57 *Prince 2* Constitutional Court decision para 45.

58 *Prince 2* Constitutional Court decision para 58.

59 As above.

60 *Prince 2* Constitutional Court decision (n 3) para 88.

61 As above.

Furthermore, the Constitutional Court did not confirm the High Court's order of invalidity relating to section 22(A)(10) which prohibited the sale and administration of cannabis for any purpose other than medicinal purposes.⁶² However, the Court declared section 40(1)(h) of the Criminal Procedure Act to be constitutionally invalid in that it no longer was a criminal offence for an adult to use or be in possession of cannabis for his or her own personal consumption in private.⁶³ The Court found that the state had failed to show that the limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In addition, the Constitutional Court found it fit to extend the use of cannabis from the confines of a home or private dwelling to any private place provided that this is not regarded as a public place.⁶⁴ The Court found that such use or possession of cannabis would be protected if it is for personal consumption by an adult person.⁶⁵

One can gather that human rights could only win the day upon invoking the right to privacy, an approach that did not feature in decisions prior to the *Prince 2* decision. By anchoring the decision in the right to privacy, the Court did not have to labour with creating exemptions for certain categories of individuals. Rather, the exemption for the use of cannabis in the privacy of the home applied to everyone. This, by omission, encompassed Rastafarians such as Prince who, as argued in previous jurisprudence, need to use cannabis for sacramental purposes. The decision is praiseworthy in so far as human rights are concerned. It was contended that the decision underscores the boldness of the Court and its willingness to take 'emotions and moral convictions' out of the human rights debate.⁶⁶

However, no matter how bold the decision was, a number of practical uncertainties arise. If not effectively addressed, these uncertainties have the potential to undermine the contribution to jurisprudence made in the *Prince 2* case. As consistently noted, the Constitutional Court has emphasised that 'the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption'.⁶⁷ As far as implementation is concerned, the Constitutional Court ruled as follows:⁶⁸

If a police officer finds a person in possession of cannabis, he or she may only arrest the person if, having regard to all the relevant circumstances,

62 *Prince 2* Constitutional Court decision (n 3) para 90.

63 *Prince 2* Constitutional Court decision para 93.

64 *Prince 2* Constitutional Court decision para 58.

65 *Prince 2* Constitutional Court decision para 100.

66 P de Vos 'Dagga judgment: There are less drastic ways to deal with its harmful effects' *Daily Maverick* 4 May 2017, <https://www.dailymaverick.co.za/opinionista/2017-05-04-dagga-judgment-there-are-less-dramatic-ways-to-deal-with-its-harmful-effects/> (accessed 4 November 2019).

67 *Prince 2* Constitutional Court decision (n 3) para 58.

68 *Prince 2* Constitutional Court decision para 111.

including the quantity of cannabis found in that person's possession, it can be said that there is a reasonable suspicion that a person has committed an offence under section 40(1)(b) or (h) of the Criminal Procedure Act. I think that the references to possession of cannabis, 'for personal use', or 'for personal consumption' help to ensure that we do not have to specify the amount or quantity of cannabis that may be possessed. We only need to say that the amount that may be possessed is an amount for personal consumption.

The implication of the above ruling is that there is no prescription on the amount of cannabis deemed adequate for personal use. A question, therefore, arises as to what quantity is acceptable. On the one hand, by steering clear of prescribing the acceptable amount, each case is dealt with uniquely and decisions of police officers are arrived at on a case-by-case basis. On the other hand, however, such open-endedness, if not addressed, could be abused as it leaves police officers with unfettered discretion. Critical to note at this juncture is the fact that from a criminal justice perspective, individuals must be furnished with sufficient information to enable them to know what is prohibited and what is acceptable. With the current state of affairs, neither police officers nor users are certain of circumstances when the amount of cannabis possessed exceeds the threshold for personal consumption or use. With such uncertainty, issues of legality come into play and these directly impact on the right to a fair trial for those accused.

As already noted, the Court extended the decision of the High Court to the extent that the use or possession of cannabis cannot be restricted to a home or private dwelling. The Court used an example of 'an adult who has cannabis in his or her pocket for his or her personal consumption within the boundaries of a private dwelling or home'.⁶⁹ Such a person is not only protected while in a home or private dwelling, but also upon stepping out of the boundary of a home or private dwelling provided that the cannabis remains in his or her pocket.⁷⁰ Challenges of implementation, however, would arise in differentiating between private and public for purposes of enforcement. Again, since penal laws have to be precise to conform to the principle of legality, this remains an issue that would require further delineation by way of legislation, short of which the fair trial rights of those accused are threatened.

It is also worth noting that the High Court in its decision had declared provisions that prohibited the purchase of cannabis for personal use invalid.⁷¹ Generally, the Court's reasoning in this regard would make sense in that for one to be allowed to use cannabis, access to it has to be envisaged. However, the Constitutional Court did not confirm this part of the High Court ruling. In the Court's view, to confirm such an order would be tantamount to 'sanctioning

69 *Prince 2* Constitutional Court decision para 98.

70 *As above.*

71 *Prince 2* Constitutional Court decision (n 3) paras 87 & 88.

dealing in cannabis'.⁷² This ruling is rather bizarre, especially in light of the fact that not all adult users of cannabis cultivate or plan to cultivate their own plant. This, therefore, implies that this category of users will have to acquire or purchase it somehow. One commentator vividly paints the dilemma by posing the question: How is an adult user of cannabis supposed to acquire the marijuana they're allowed to use in private if they don't buy it from a dealer of some sort (which the Constitutional Court explicitly says is illegal)?⁷³ Even assuming users of cannabis were to cultivate their own plants, chances are high that they would still need to acquire the seed. This seed might have to be purchased. Thus, the seller of the seed would, by definition, fall within the ambit of dealer and as such would be engaged in an illegal act. Moreover, a user who decides to purchase from a seller could also risk being an accomplice in the illegal act of dealing in cannabis and related products such as seeds. Precisely put, to make use of cannabis for personal consumption in private, some users would have to act illegally. This is a real possibility that the Constitutional Court did not explicitly address.

Considered together, despite the above-mentioned practical challenges, there is no denying that the decision in the *Prince 2* case makes a useful contribution to the jurisprudence on this subject, not only in South Africa but in Africa at large. A question left unresolved, however, is whether the *Prince 2* decision would pass international law muster. The answer to this question forms the crux of the next part of the article.

3 The international drug-treaty regime and *Prince 2*

The overall purpose of the third part of the article is to assess the *Prince 2* decision in light of international law, in particular the treaties on illicit drugs. However, such a task cannot be effectively executed without first understanding the position of international law on cannabis or, more generally, illicit drugs. Understanding the position of international law relating to drugs is pivotal as it sets the stage for understanding the standard against which to measure whether or not South Africa would be operating within the contours of international law if the *Prince 2* decision is confirmed by the Constitutional Court and/or translated into legislation.

The sources of international law are multiple, ranging from international customs and international treaties to general principles of law recognised by civilised nations.⁷⁴ Anyone seeking to establish

72 As above.

73 M Nel 'The dagga ruling: While a step forward isn't very practical', <https://citizen.co.za/talking-point/2011497/the-dagga-ruling-while-a-step-forward-isnt-very-practical/> (accessed 3 November 2019).

74 Art 38 of the Statute of the International Court of Justice. See also M Dixon *A textbook on international law* (2007) 23.

the position of international law on a particular issue would have to refer to one or more of these sources.

On the subject of illicit drugs, the main source of international law are international treaties. Customary international law and other sources of international law generally do not feature here. Therefore it is fair to conclude that the international legal norms on drugs are mainly found in treaties. Presently there are three international treaties devoted to this cause. These are the UN Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol); the UN Convention on Psychotropic Substances 1971; and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. South Africa is party to all three the foregoing treaties.⁷⁵ Suffice it to note that the three treaties are not self-executing.⁷⁶ Therefore, state parties to these treaties have to take additional steps to ensure their execution, including the enactment of laws at the domestic level. The South African Drugs Act, a national statute comprehensively addressing the subject of illicit drugs, is a clear indication of South Africa's preparedness to breathe life into the international treaties it willingly signed up to.⁷⁷

In discussing the treaty regime on narcotic and psychotropic substances, it may also be necessary to take into account the position of international law on treaties and ratification or accession thereof. Under the Vienna Convention on the Law of Treaties (Vienna Convention), '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.⁷⁸ Therefore, South Africa, as a party to the three drug treaties is bound to perform them in good faith. Furthermore, under the law of treaties '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁷⁹ Therefore, South Africa, as a party to the three drug treaties cannot be seen to enact national laws and thereupon rely on them to justify its failure to perform the obligations enshrined in these three international treaties. Moreover, the Vienna Convention mandates South Africa to interpret the above-mentioned drug treaties 'in good faith'.⁸⁰ Therefore, South Africa cannot adopt a biased interpretation of the treaties with a view to circumventing its international obligations under the said treaties.

75 The 1971 Treaty, 27 January 1972; 1988 Treaty, 14 December 1988; Single Convention, 16 November 1971.

76 In this regard, action is required on the part of state parties to take measures at the domestic level to execute the provisions of the conventions. Notable provisions imploring states to take measures at the domestic level include art 36 of the Single Convention; art 21 of the 1971 Convention; and art 3 of the 1988 Convention; all of which mandate parties to adopt measures that make drug use a criminal offence.

77 See generally the South African Drugs and Drug Trafficking Act 140 of 1992.

78 Art 26 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).

79 Art 27 Vienna Convention.

80 Art 31 Vienna Convention.

3.1 United Nations Single Convention on Narcotic Drugs 1961

The Single Convention on Narcotic Drugs (Single Convention) derives its name from the history surrounding the previous regimes on drugs treaties. Prior to the adoption of the Single Convention, several other treaties dealt sparsely with the subject of illicit drugs.⁸¹ The Single Convention, though often quoted in discussions pertaining to the genealogy of drug treaties, was not the first of its kind on the subject of illicit drugs. For instance, history demonstrates that treaties devoted to this cause date as far back as 1912.⁸² Between 1912 and 1961 there were up to 123 international instruments addressing the subject of illicit drugs, including the Opium Geneva Convention;⁸³ the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotics;⁸⁴ the Protocol signed at Lake Success, New York;⁸⁵ and the Opium Protocol.⁸⁶ The multiplicity of treaties on this subject was not without challenges. It caused a non-coherent international regime on the subject. This set the pace for a reconsideration of the international framework on illicit drugs. Accordingly, the Single Convention was adopted with a view to consolidating several international instruments, none of which, as it were, dealt comprehensively with the subject of illicit drugs.⁸⁷ The Single Convention was also anchored in the need to streamline control mechanisms pertaining to various drugs.⁸⁸ In the words of some commentators, therefore, 'the old system of treaties was

81 Report on the expert seminar 'International Law and Drug Policy Reform', organised by the Global Drug Policy Observatory (GDPO), Washington DC, 17-18 October 2014 2-3, <https://www.swansea.ac.uk/media/Expert%20Seminar%20Report%20-%20International%20Law%20&%20Drug%20Policy%20Reform.pdf> (accessed 4 November 2019).

82 For a history surrounding the development of drug treaties, see generally DR Bewley-Taylor *The United States and international drug control, 1909-1997* (2001); WB McAllister *Drug diplomacy in the twentieth century: An international history* (2000).

83 United Nations International Opium Convention, signed at Geneva, Switzerland, on 19 February 1925, as amended by the Protocol signed at Lake Success, New York, on 11 December 1946.

84 United Nations Convention for Limiting the Manufacture and Regulating the Distribution of Drugs, signed at Geneva, Switzerland, on 13 July 1931, as amended by the Protocol signed at Lake Success, New York, on 11 December 1946.

85 United Nations Protocol, signed at Lake Success, New York, on 11 December 1946, amending the Agreements: Conventions and Protocols on Narcotic Drugs concluded at The Hague, The Netherlands, on 23 January 1912, at Geneva, Switzerland; on 11 and 19 February 1925 and 13 July 1931 at Bangkok, Thailand, on 27 November 1937; and at Geneva, Switzerland, on 26 June 1936.

86 United Nations Opium Conference: Protocol and Final Act of 23 June 1953.

87 See Introduction to the United Nations Single Convention on Narcotic Drugs 1961 as amended by the 1972 Protocol (Single Convention).

88 As above.

superseded in 1961 when the member countries saw the need to start afresh by enacting the Single Convention'.⁸⁹

The Single Convention is a relatively bulky treaty comprising 51 articles and four schedules. The Convention affirms the need to compress the previous treaties on drugs into a single regime, with the introduction of this Convention making this aim explicit.⁹⁰ As this article specifically addresses cannabis, in discussing the parameters of the Single Convention much (but not exclusive) emphasis is placed on the Convention's provisions on cannabis. Under this Convention, the term 'cannabis' is described as a flowering plant.⁹¹ 'Cannabis plant' in terms of the Single Convention 'means any plant of the genus cannabis', while 'cannabis resin' means 'the separated resin, whether crude or purified, obtained from the cannabis plant'.⁹² The Single Convention makes use of the term 'cultivation' in various articles. Cultivation for purposes of the Single Convention means the cultivation of several drugs, including the cannabis plant.⁹³

The Single Convention contemplates a number of controls to regulate illicit drugs. These include limiting 'exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs', prohibiting the exportation of drugs to any country or territory and licensing the manufacture of drugs.⁹⁴ This Convention's control regime is schedule-based. There are four schedules appended to the Single Convention, each containing a list of drugs. Various drugs are subject to different control mechanisms depending on the schedule under which they are categorised or listed. Cannabis is listed in both schedule I and schedule IV of the Single Convention. In terms of article 2 of the Single Convention, drugs listed under schedule I are subject to all the control measures listed in the Convention which, as already alluded to, include limiting cannabis use 'exclusively to medical and scientific purposes'. The drugs falling within the ambit of schedule IV are subject to controls similar to those in schedule I.⁹⁵ However, the difference between drugs under schedule I and IV is that the drugs falling under the latter schedule are subject to additional regulation such as a requirement of adoption of special measures, cognisant of the dangerous properties of these drugs.⁹⁶ In addition to the schedule-based regulatory system, the Convention makes specific provision for the regulation of cannabis. Under article 28, the Single

89 New York City Bar 'The international drug control treaties: How important are they to US drug reform?' (2012), https://www2.nycbar.org/pdf/report/uploads/3_20072283-InternationalDrugControlTreaties.pdf (accessed 4 November 2019).

90 Introduction Single Convention (n 87).

91 Art 1(1)(b) Single Convention (n 87).

92 Art 1(1)(c) and art 1(1)(d) Single Convention respectively.

93 Art 1(1)(i) Single Convention.

94 Arts 4(c), 29 and 31 Single Convention.

95 Art 2(5) Single Convention.

96 As above.

Convention does not apply to 'the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes'.

The Convention could not be more emphatic. State parties are to enact legislation necessary 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs [including cannabis]'.⁹⁷ The Convention also has in place a provision instructing state parties to penalise any conduct that is contrary to the Single Convention.⁹⁸ To underscore the seriousness of crimes relating to illicit drugs, the Convention adds, albeit with some equivocation,⁹⁹ that 'serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty'.¹⁰⁰ A textual reading of article 2 in light of the schedules applicable suggests that the purpose of the Single Convention is to limit the use of cannabis to 'medical and scientific purposes'. Although in terms of article 28 of the Convention the cultivation of cannabis for industrial purposes is not subject to the Convention's controls, parties are still under an obligation to adopt measures necessary to control the misuse of cannabis. Article 33 of the Single Convention goes a step further by underscoring that 'the parties shall not permit possession of [cannabis] except under legal authority'.

3.2 United Nations Convention on Psychotropic Substances (1971)

The Psychotropic Substances Convention was adopted ten years after the Single Convention. This Convention expands the catalogue of drugs subject to regulation under international law to include synthetic and psychotropic substances. This Convention was born out of concerns that 'the public and social problems resulting from the abuse of certain psychotropic substances' were not covered by the Single Convention.¹⁰¹ The UN, therefore, deemed it fit to have in place 'rigorous measures necessary to restrict the use of such substances to legitimate purposes'.¹⁰² In doing this, however, the UN was alive to the fact that 'the use of psychotropic substances for medical and scientific purposes is indispensable and that their availability for such purposes should not be unduly restricted'.¹⁰³ For

97 Art 4(c) Single Convention.

98 Art 36(1)(a) Single Convention.

99 Art 36(1)(b) provides that '[n]otwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38'.

100 Art 36(1)(a) Single Convention.

101 See Preamble to 1971 Convention.

102 As above.

103 As above.

these and several other reasons beyond the scope of the present discussion, the UN deemed it appropriate to have in place an international convention fully devoted to the regulation of synthetic and psychotropic substances. It is against this backdrop that the 1971 Convention was adopted. As the schedules to the Single Convention mainly encompassed plant-based drugs such as cannabis, coca, cocaine, and so forth, the 1971 Convention expanded the catalogue by encompassing within its four schedules synthetic and psychotropic drugs.¹⁰⁴ Under article 1 of the 1971 Convention, psychotropic substances mean 'any substance, natural or synthetic, or any natural material in schedules [I to IV]'. A perusal of the four schedules to the 1971 Convention indicates that these substances include bromamfetamine, tenamfetamine, pyrovalerone, methylphenobarbital, butalbital, pentobarbital, amphetamine and methylphenidate.

The 1971 Convention has 33 articles and, as is the case for the Single Convention, the 1971 Convention organises its control regime through schedules. There are four schedules to this Convention and the drugs falling within the ambit of the various schedules are subject to varying regulation regimes in terms of article 2 of the 1971 Convention. This Convention is very similar to the Single Convention in terms of its control regime and, specifically, in regard to its object and purpose. Besides the fact that it is fully devoted to the regulation of synthetic and psychotropic substances, it also demands of state parties to limit the use of scheduled drugs to medical and scientific purposes.¹⁰⁵ Just as the Single Convention, state parties are mandated not to permit the possession of scheduled drugs except under legal authority.¹⁰⁶ The Convention encompasses aspects of criminalisation, directing state parties to 'treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention'.¹⁰⁷ Offences pertaining to the contravention are to be taken seriously, as evidenced by the wording of the Convention, namely, that state parties are to 'ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty'.¹⁰⁸

In underscoring the seriousness of offences arising from the contravention of the Convention, the 1971 Convention does not lose sight of other measures relevant in preventing the commission of crimes relating to scheduled drugs. In this regard, the Convention underscores that measures such as treatment, education, after-care, rehabilitation and social reintegration can be availed to drug abusers.¹⁰⁹ The implication of the foregoing allowance is that

104 See the four schedules to the 1971 Convention.

105 See art 5(2) of the 1971 Convention.

106 Art 5(3) 1971 Convention.

107 Art 22(1) 1971 Convention.

108 As above.

109 Art 22(2) 1971 Convention.

although a state may criminalise the manner in which the crime is dealt with by the criminal justice system it does not always have to result in incarceration. This exemplifies the strategy that several states are adopting.¹¹⁰ They still criminalise conduct that contravenes the Convention, but steer clear of invoking imprisonment. Rather, they focus on the other measures permitted by the 1971 Convention which, among others, include rehabilitation and treatment. However, as will be discussed briefly in one of the subsequent parts, the foregoing measures are to be taken with a pinch of salt because of the risk they pose to internationally-guaranteed human rights and freedoms.

Be that as it may, South Africa, having signed up to the drugs treaties, including the 1971 Convention, remains bound by these treaties despite the criticism levelled against them. As the 1971 Convention currently stands, there is a presumption for South Africa to limit the use of the drugs scheduled under this Convention exclusively to medicinal or scientific purposes. It is pertinent to note, however, that although South Africa is a party to the 1971 Convention, this Convention does not specifically address cannabis, the drug with which the *Prince 2* case deals. Therefore, if South Africa is to assess whether or not it will have lived up to international obligations by effecting the *Prince 2* case, the 1971 Convention should be the least of its worries, let alone have it feature in such assessment. Having drawn this conclusion, therefore, for purposes of this article, a further examination of this Convention is unnecessary since it does not speak to the cannabis issue as encapsulated in the *Prince 2* case.

3.3 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

Even after the adoption of the Single Convention and the 1971 Convention, there still was a 'rising trend in the illicit production of demand for and traffic in narcotic and psychotropic substances'.¹¹¹ There also was a concern that children were gradually becoming victims in the various activities of the drug market.¹¹² The illicit trafficking of drugs also brought with it several other criminal activities that needed to be addressed, such as drug-related money

110 Eg, Portugal passed Law 30/2000, which decriminalised the personal use and, as an entry point, made it explicit that that offenders are diverted to treatment sessions, asked to pay a fine or required to attend education classes. In Brazil the possession of illicit drugs for personal consumption remains a criminal offence in terms of art 28 of Law 11.343 of 2006. However, it is not penalised with imprisonment. Rather, offenders are required to take part in programmes such as education on drugs, rehabilitation, community service, and so forth. See also commentary of G Greenwald 'Drug decriminalisation in Portugal – Lessons for creating fair and successful drug policies' (CATO Institute, Washington DC 2009) 2.

111 Preamble to 1988 Convention.

112 As above.

laundering.¹¹³ Illicit drug trafficking was steadily turning into an international criminal activity.¹¹⁴ By 1988 the UN had determined that illicit drug trafficking demanded 'urgent attention and the highest priority'.¹¹⁵ For these and several other reasons beyond the scope of this discussion, the adoption of an international convention devoted to the challenges identified became inevitable.

The 1988 Convention consists of 34 articles. It also comprises two tables. The term 'table' as used in the 1988 Convention is analogous to the term 'schedule' as used in the Single Convention and the 1971 Convention.¹¹⁶ The two tables appended to the 1988 Convention consist of 'amendments made by the Commission on Narcotic Drugs in Force as of 23 November 1992'.¹¹⁷ Some of the substances listed in these two tables are ephedrine, acetone, safrole, piperidine and potassium permanganate.¹¹⁸ Salient in the 1988 Convention is the emphasis placed on criminalisation.¹¹⁹ There is a presumption for states to 'adopt such measures as may be necessary to establish as criminal offences under [their] its domestic law[s]'.¹²⁰ The conduct envisaged by the Convention includes

the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.¹²¹

Of particular relevance for the present discussion are provisions relating to cannabis. In terms of article 3(2) of the 1988 Convention,

subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

It is important to note that cannabis is one of the substances that fall within the ambit of drugs listed under the 1961 (Single) Convention. Therefore, there is a general presumption that the possession, purchase or cultivation of cannabis for personal consumption are not acceptable. States desirous of circumventing the article 3(2) obligations could be tempted to adopt a flexible interpretation, one

113 As above.

114 As above.

115 As above.

116 See the section on tables under the 1988 Convention.

117 See Annex of tables to the 1988 Convention.

118 As above.

119 See eg Preamble and art 3 of the 1988 Convention.

120 Art 3(1) 1988 Convention.

121 As above.

that legalises the use of cannabis generally. Such an approach may, however, not withstand logical muster. Note should be taken of the wording of article 3(2), in particular, the use of the word 'shall', which connotes the mandatory nature of the obligation. Moreover, a UN commentary on article 3(2) suggests that an interpretation that has the effect of legalising the possession, purchase or cultivation of cannabis for personal consumption would crumble. According to this commentary, the penalisation envisaged in article 3(2) of the 1988 Convention 'amounts in fact also to penalisation of personal consumption'.¹²² It can, therefore, be garnered that article 3(2), in unambiguous terms, creates a presumption upon states to criminalise possession and cultivation for personal use. However, sight should not be lost of the opening statement to article 3(2) which subjects the subsequent part of the article to a state's 'constitutional principles and the basic concepts of its legal system'. The implication of this opening statement is discussed in detail in the next part of the article.

3.4 *Prince 2* in light of the international drug treaties

It would be an arduous task to assess *Prince 2* in light of international law without making reference to some of the salient issues noted in the first part. At the risk of falling into the trap of repetition, therefore, some rulings salient in this case are re-echoed to aid logical construal. In this case, Zondo ACJ ruled, *inter alia*, that the provisions of the Drugs Act and the Medicine Act in question are invalid because 'the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption'.¹²³ In handing down the *Prince 2* decision, the Constitutional Court emphasised that the ruling is subject to, among others, legislative amendment and confirmation by the highest court of the land, the Constitutional Court.¹²⁴ Thus, it would be necessary to assess whether legislative changes, if effected, would be in alignment with the international legal regime comprehensively set out.

In terms of the Single Convention there is a general presumption for parties to make the production, trade, and possession of illicit substances for non-scientific and non-medicinal purposes a punishable offence. In accordance with the 1988 Convention, there is also a presumption that the possession, purchase or cultivation of cannabis for personal consumption are to constitute a criminal offence under domestic law. What then would be the implications of these

122 United Nations (1998) Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, done at Vienna, Austria, on 20 December 1988; New York: United Nations Publications E/CN.7/590/80. For a contrary view, however, see generally N Boister *Penal aspects of the UN drug conventions* (2001). Boister is of the opinion that no such obligation under the international conventions rests upon states parties to criminalise drug possession for personal consumption.

123 See *Prince 2* Constitutional Court decision (n 3) para 58.

124 *Prince 2* Constitutional Court decision para 129(12).

obligations for the 2018 Constitutional Court's ruling? The answer to this question will depend on the scope and meaning of the *Prince 2* judgment. A few salient points may be deduced from the ruling quoted above. First, the High Court's ruling (as confirmed by the Constitutional Court) addresses a specific category of individuals, in this case adults. It follows rationally that children are not envisaged in so far as this decision is concerned. Second, the domain in which cannabis is used is another salient issue that stands to be taken note of. The ruling in very clear terms makes reference to private use, suggesting that the use of cannabis in the 'public domain' still constitutes an offence. Third, the conduct proscribed is not without limitation. Such conduct includes possession, use or cultivation. It would reasonably follow that conduct falling outside the scope of the foregoing list remains criminalised. Activities other than those enumerated, such as the production, purchase, manufacture, extraction or preparation, remain criminal. Another element that can be garnered from the ruling of the Court is that the purpose for which cannabis is cultivated, possessed or used is specific. It is strictly limited to 'personal consumption'. The implication of this position is that other purposes, such as sale and distribution, remain criminal. The question then is whether South Africa can allow the private use of cannabis while at the same time adhering to its international obligations.

It is important to engage with some commentaries on this decision. After the *Prince 2* decision had been handed down there was jubilation, particularly among dagga users. To some, the assumption was that by virtue of the *Prince 2* decision the use of cannabis had been legalised.¹²⁵ Some commentators tried to place the *Prince 2* decision in proper perspective, but not many have addressed the gist of the decision. Acton, the leader of the Dagga Party, made it explicit that the decision was about the home and not about public possession and consumption.¹²⁶ Prince, one of the applicants in the *Prince 2* decision, interpreted the decision as follows: 'What this means is that South Africans can use cannabis in their homes.'¹²⁷ Despite such clarity, some questions remain. For example, what are the parameters of possession for personal consumption in private? According to the High Court judgment, as confirmed by the Constitutional Court, the right to possess or cultivate cannabis in private can be used as a defence to a charge. As consistently noted in

125 See eg 'Personal cannabis use legalised in South Africa', <https://fieldsofgreenforall.org.za/personal-cannabis-use-legalised-in-south-africa/> (accessed 4 November 2019); S Scissor 'Cannabis was just legalised in South Africa for personal use' 31 March 2017, <https://btl.co.za/cannabis-just-legalised-south-africa-personal-use/> (accessed 4 November 2019).

126 J Evans 'How the Western Cape High Court dagga judgment applies to you' *Daily Maverick* 31 March 2017, <https://www.dailymaverick.co.za/article/2017-03-31-how-the-western-cape-high-court-dagga-judgment-applies-to-you/#.WapwYVO L4g> (accessed 4 November 2019).

127 As above.

the first part of this article, this suggests that the possession, cultivation or use of cannabis remains prohibited. The only difference now is that a person charged can raise a defence to the effect that such possession, use or cultivation is for personal consumption in private.¹²⁸ Therefore, a person may still be arrested or even charged. Contrary to the views of commentaries, the possession, cultivation, use or consumption of cannabis in private has not been legalised.

What then are the implications of this position for international law? It is reiterated that the Single Convention creates a presumption that the use of cannabis is to be limited to medicinal and scientific purposes. Measuring the *Prince 2* decision against this mandate, it would appear that the decision transgresses the Single Convention because of the presumption that the use of cannabis is to be limited to medicinal and scientific purposes. However, the Single Convention has to be read together with the 1988 Convention and, arguably, the 2018 decision is not in violation with the 1988 Convention. Notably, the *Prince 2* decision, if meticulously interpreted, does not have the effect of legalising the use of cannabis. The use of cannabis, as consistently noted, remains illegal. The decision does no more than create a defence for an individual using cannabis. The Court's stance in this regard seems defensible since the 1988 Convention, unmistakably, states that penalisation should be 'subject to [a party's] constitutional principles and the basic concepts of its legal system'.¹²⁹ It may, therefore, be argued that by being alive to the right to privacy, the Constitutional Court in the *Prince 2* case operated within the parameters of the 1988 Convention which gives parties some latitude to accord due regard to their constitutions, a body of law that most, if not all, countries deem supreme. Therefore, it is submitted that should the 2018 Constitutional Court decision be given effect through legislation, it would be in accordance with international law.

The stance taken by the Court in the *Prince 2* case is not unique to South Africa. As noted in the introduction, none of the African states has adopted an approach similar to that of South Africa. However, beyond Africa, several states have set the trend for decriminalisation, with some of them having inspired the decision in the *Prince 2* case.¹³⁰ In Argentina, the Supreme Court unanimously held that article 14(2) of the National Drug Law of 1989 was unconstitutional to the extent that it violated article 19 of the Constitution, which affords protection to private actions that do not harm others.¹³¹ In Mexico, a number of provisions of the law regulating drugs were amended in 2009.¹³² The amendment, among others, precludes the

128 *Prince 2* Constitutional Court decision (n 3) paras 113 & 114.

129 Art 3(2) 1988 Convention.

130 See reference to the practice in states such as Colorado, Mexico and Argentina in *Prince 2* High Court decision (n 43) paras 55-57 & 64-90.

131 *Fallo Arriola* case (2009), <http://druglawreform.info/en/country-information/latin-america/argentina/item/235-the-arriola-ruling-of-the-supreme-court-of-argentina> (accessed 4 November 2019).

public prosecutor from prosecuting consumers for unauthorised possession of substances deemed to be for personal use.¹³³ The provision, however, does not stop law-enforcement officers from arresting users for purposes of conducting investigations and an assessment of whether or not their use falls within the ambit of the exception. The law on the regulation of drugs in Chile provides that the possession of small amounts of drugs for personal use is not punishable.¹³⁴ Considered together, the approach adopted by all the foregoing countries, as in the case of South Africa, suggests that the use of drugs such as cannabis remains unlawful. The approach of these countries arguably is not at odds with international drug laws.

4 Conclusion

The *Prince 2* decision is not just another decision handed down in 2017 and confirmed in 2018, but is one that raises a number of issues. Two of these issues have formed the crux of this article. The article underscored the role that the argument on the right to privacy played in seeing to it that adults desirous of using cannabis receive some remedy. The article also critically engaged with the practical challenges of implementing the decision, all of which could be remedied by appropriate legislative drafting. The analysis revealed that the *Prince 2* decision, on face value, appears to undermine South Africa's international obligations. On closer scrutiny, however, it is established that the decision was carefully crafted as to ensure that it falls within the parameters of the three drug treaties to which South Africa is party. With the practical challenges of implementing the decision, as highlighted in the first part of the article, it remains to be seen how the implementation of the decision will play out.

132 See specifically the 2009 amendments to arts 477, 478, 479 and 480 of the General Health Law of Mexico.

133 As above.

134 Art 4 of Law 20.000 of 2005 of Chile.

Recent developments

Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)*

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Summary

This case discussion examines the recent judgment in Letsweletse Motshidiemang v The Attorney-General in which the High Court of Botswana decriminalised consensual same-sex sexual acts between adults. While many elements of the decision will have far-reaching implications for LGBT rights in Botswana and beyond, this note highlights three areas or themes in respect of which the judgment makes a significant jurisprudential contribution: (i) Its purposive approach to the interpretation of constitutional provisions gives expression to the underlying values of the Constitution, among others, democracy, pluralism, inclusivity, tolerance and diversity. The Court determines the scope of the rights in a way that upholds and relies upon constitutional values. (ii) The Court engages meaningfully with the state's justification for limiting rights and freedoms; particularly meaningful is the Court's rejection of bare assertions of or speculation about public morality and the extent to which the Court seeks to limit the role that public opinion plays in this inquiry. (iii) It used the participation of an amicus curiae to assist

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the Court in relevant matters of fact and law, thus allowing for enrichment of the quality of public-law jurisprudence. The participation by the amicus curiae was shown to be useful, especially since it could demonstrate to the Court the impact that laws criminalising consensual same-sex sexual acts have on the lives of those not in Court as litigants. The judgment also makes a significant contribution to the discourse about consensual anal sexual intercourse being merely a variant of human sexuality. Moreover, it clearly and unambiguously dispels the myth that homosexuality is in any way 'un-African'. The judgment should serve as a highly persuasive precedent to courts across the African region supporting that the rights of LGBT people must be recognised, protected and respected, and that archaic laws that are colonial in origin and discriminatory in tenor cannot persist in the twenty-first century in states that declare themselves founded upon the principles of dignity, tolerance and diversity, but deserve to be relegated to the archive.

Key words: Botswana; gay; transgender; dignity; decriminalisation; homosexuality; equality; public morality; public opinion; LGBT

1 Introduction

The Botswana Constitution is a living embodiment of progressive rights, founded on the values of dignity and inclusivity and capable of adapting to the evolving needs of Botswana society. This much the Court of Appeal of that country acknowledged in its judgment in *Attorney-General v Dow*:¹

The Constitution ... cannot be allowed to be a lifeless museum piece ... the courts must continue to breathe growth and development of the state through it ... I conceive it that the primary duty of judges is *to make the Constitution grow and develop* in order to meet the just demands and aspirations of an ever developing society, which is part of the wider and larger human society governed by some acceptable concept of human dignity.

Consistent with the approach in *Dow*, in a landmark unanimous decision of three judges on 11 June 2019, the High Court became only the second African court, after the South African Constitutional Court,² to decriminalise same-sex sexual conduct or acts among consenting adults. Sections 164, 165 and 167 of Botswana's Penal Code outlawed 'carnal knowledge of any person against the order of nature', attempts to commit carnal knowledge and acts of 'gross

1 (1992) BLR 119 CA, para 166 (A-E) (my emphasis); see also *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)* MAHGB-000591-16 para 72 (*Motshidiemang*).

2 See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC). In this case the South African Constitutional Court found that the common law offence of sodomy was unconstitutional as it breached several rights of gay men, including the right to equality, dignity and privacy. See also H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 221.

indecentcy', respectively. Section 167 was updated in 1998 to apply to same-sex acts between women as well as those between men. These provisions have been interpreted to outlaw or criminalise sexual intercourse and/or attempts at such intercourse between persons of the same sex.³ The provisions carried with them the threat of up to seven years' imprisonment for those found to have contravened them.

Sections 164, 165 and 167 are a remnant of laws the former colonial power, Great Britain, introduced. Their continuing existence is controversial since in 1967 the Wolfenden Committee Report recommended the decriminalisation of consensual same-sex intercourse in the United Kingdom, which led to the removal of punitive laws from its own statute books.⁴ Yet, these laws and their harmful effects continue to act upon behaviour in several former British colonies. Such laws violate the rights of lesbian, gay, bisexual and transgender (LGBT) persons across Africa and inhibit the realisation of their full human potential. The Botswana High Court found that those provisions perpetuate social and structural stigma and that they fuel intolerance, discrimination and persecution on the basis of sexual orientation and gender identity. Botswana's prominent human rights advocacy group, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), was permitted to enter the fray as *amicus curiae* ('friend of the court'). LEGABIBO submitted evidence that demonstrated that the impugned provisions had a range of harmful effects on the daily lives of LGBT persons, including causing them to experience high levels of violence and inhibiting their access to healthcare and other services.

From the judgment it is apparent that the High Court consistently adopted and applied the approach in *Dow* and interpreted the scope and contents of rights in a way that promotes and gives expression to the underlying constitutional values and aspirations of an open and democratic society, founded on basic human dignity,⁵ democracy, pluralism, inclusivity, tolerance and diversity. The High Court's approach is captured by Leburu J as follows:⁶

[O]ur Constitution is a dynamic, enduring and living character of progressive rights; which reflect the values of pluralism, tolerance and inclusivity. Minorities, who are by the majority perceived as deviants or outcast are not to be excluded and ostracised. Discrimination has no place in this world.

Weighing the purpose of the impugned provisions against the underlying values of the Constitution, Botswana's National Vision

3 See the Court of Appeal in *Kanane v The State* 2003 (2) BLR 67 (CA) (*Kanane*).

4 See *Motshidiemang* (n 1) para 57. See also The Sexual Offences Act 1967, an Act of Parliament in the United Kingdom.

5 As demonstrated later in this article, Botswana Courts have adopted this approach in a line of decisions. See eg *Attorney-General v Rammoge* Court of Appeal of the Republic of Botswana, Civil Appeal CACGB-128-14 (2016); and *ND v Attorney-General* MAHGB-000449-11 (unreported, delivered on 29 September 2017).

6 *Motshidiemang* (n 1) para 210.

2036 (which builds and follows on Vision 2016) and societal aspirations, the High Court noted that ‘no solace and joy’⁷ is derived from retaining them. Furthermore, they ‘do not serve any useful public purpose’⁸ in a society that embraces diversity. Instead, the High Court found that they impose an unconstitutional burden on the applicant’s fundamental rights to liberty,⁹ privacy, dignity¹⁰ and non-discrimination.¹¹

While many aspects of the decision will have a far-reaching impact on LGBT rights in Botswana and in Africa, this article highlights three areas or themes where the judgment makes a significant jurisprudential contribution:

- (1) Its purposive approach to the interpretation of constitutional provisions gives expression to the underlying values of the Constitution; among others democracy, pluralism, inclusivity, tolerance and diversity. The Court determines the scope of the rights in a way that upholds and relies upon constitutional values.
- (2) The Court engages meaningfully with the state’s justification for limiting rights and freedoms; particularly meaningful is the Court’s rejection of bare assertions of or speculation about public morality and the extent to which they seek to limit the role that public opinion plays in this inquiry.
- (3) It used the participation of an *amicus curiae* to assist the Court in relevant matters of fact and law, thus allowing for the enrichment of the quality of public law jurisprudence. The participation by the *amicus curiae* was shown to be useful, especially since it could demonstrate to the Court the impact that laws criminalising consensual same-sex sexual acts have on the lives of those not in Court as litigants.

Over and above these three aspects, the judgment makes a significant contribution to the discourse about consensual anal sexual intercourse being merely a variant of human sexuality.¹² It unambiguously dispels the myth that homosexuality is in any way ‘un-African’. The judgment should serve as a highly persuasive precedent to courts across the African region that the rights of LGBT people must be recognised, respected and protected, and that archaic, colonial and discriminatory laws cannot persist in societies, founded on dignity, tolerance and diversity, and should be relegated to the archive.

I will deal with the three aspects of the *Motshidiemang* judgment in part 3. Before doing so, in part 2 I first provide an overview of judicial developments that had significantly contributed towards recognition,

7 *Motshidiemang* para 214.

8 *Motshidiemang* para 207.

9 Sec 3 Constitution of Botswana 1966.

10 Secs 3 & 9 Constitution of Botswana.

11 Sec 15 Constitution of Botswana.

12 See *Motshidiemang* (n 1) para 190.

inclusion and affirmation of LGBT rights and freedoms in Botswana, prior to the country's decriminalisation of consensual same-sex sexual acts between adults in private.

2 Overview of Botswana's judicial developments towards the recognition of LGBT rights before *Motshidiemang*

Sixteen years before the *Motshidiemang* judgment in 2003, in *Kanane v The State*,¹³ the Court of Appeal took a rather different approach. The Court of Appeal found that the time had not yet arrived to treat gays and lesbians as a group deserving of inclusion and that section 15(3) of the Constitution, which protects persons from discrimination, did not extend to the class of LGBT persons. It went on: '[T]he time has not yet arrived to decriminalise homosexual practices, even between adult consenting males in private.' Yet, the Court of Appeal did not close the door to the courts ultimately revisiting the issue 'in order to meet the just demands and aspirations of an ever-developing society'.¹⁴ It simply said that in 2003 the circumstances and the time for the decriminalisation of same-sex sexual acts had not yet arrived.

In the years following *Kanane* a line of cases followed in the courts dealing with sexual orientation and gender identity and highlighting the universality of rights and their equal application to every person, including LGBT persons. That development led to the Court of Appeal's progressive decision in *Attorney General v Rammoge*, in which the Botswana Court of Appeal ordered the government to register LEGABIBO as a non-governmental organisation (NGO) that promotes the rights of the LGBT community in Botswana.¹⁵

The *Rammoge* decision followed after the government of Botswana for several years had refused to register LEGABIBO as the first LGBT organisation in Botswana. The government sought to justify its refusal essentially on three bases. First, the Constitution of Botswana does not recognise 'homosexual persons' and, therefore, they are excluded from the definition of a 'person' in the Constitution. Because of this assertion, the government argued that LGBT individuals were not recognised under the protective rights provisions in the Constitution.¹⁶ Second, they argued that the objectives of LEGABIBO were incompatible with peace, welfare and good order in Botswana. Third, the government asserted that LEGABIBO's intended advocacy, which included reforming the Penal Code to decriminalise consensual same-sex sexual conduct, in effect would popularise criminal offences

13 *Kanane* (n 3).

14 *Dow* (n 1) para 166A-E; see also *Kanane* (n 3) 77.

15 Court of Appeal of the Republic of Botswana, Civil Appeal CACGB-128-14 (2016) (*Rammoge*).

16 See *Rammoge* (n 15) para 21(4).

or consensual same-sex sexual acts and encourage members of LEGABIBO to break the law.¹⁷ Thus, essentially, the government's assertions were founded on the (misconceived) premise that the official recognition of an organisation that protects and promotes the rights of the LGBT community was incongruous in light of the criminalisation of consensual same-sex sexual acts.

In rejecting the government's assertions as unlawful and irrational, the Court of Appeal emphasised that 'an individual human being, regardless of his or her gender or sexual orientation, is "a person" for the purposes of the Constitution'.¹⁸ It further held that 'once we [as a society] recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings ... we must accord them the human rights which are guaranteed by the constitution to all persons, by virtue of their being human, in order to protect their dignity'.¹⁹ The Court of Appeal found that the government's refusal to register LEGABIBO was unlawful and violated LGBT persons' rights to associate freely and participate in democracy. The Court of Appeal said that it did not matter that the views of the organisation are unpopular or unacceptable to the majority.²⁰

The second in this line of cases was *ND v Attorney-General*²¹ in which case the state was ordered to change the gender marker on a transgender man's identity card from female to male after the state initially refused to do so. Then, promoting the Constitution's underlying values and adopting a logic similar to that of the Court of Appeal in *Rammoge*, Nthomiwa J said that '[t]he state has a duty to uphold the fundamental rights of every person and to promote tolerance, acceptance and diversity within our constitutional democracy'.²²

In both cases the courts persisted with a purposive approach that gives expression to the underlying values in the Constitution and to the shared values, vision and aspirations of the nation. For instance, in *Rammoge* the Court of Appeal highlighted the fact that Botswana is a 'compassionate, just and caring nation' and that

members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.²³

17 *Rammoge* para 21(3).

18 *Rammoge* para 58.

19 *Rammoge* para 60.

20 As above.

21 *ND* (n 5).

22 Cited with approval by the High Court. See *Motshidiemang* (n 1) para 151 (my emphasis).

23 See *Rammoge* (n 15) para 60.

Undoubtedly, these decisions advanced the realisation of fundamental rights and contributed to the social recognition and inclusion of LGBT persons in Botswana. Together with other progressive judgments, such as *Dow* and *Ramantele v Mmusi & Others*,²⁴ they helped to cultivate an environment in which the decriminalisation of consensual same-sex sexual acts was possible. What is more, the sustained work of LGBT activists who publicly advocated equal rights and insisted that they should not face discrimination because of their sexual orientation or gender identity, perhaps put even greater pressure on the courts to revisit *Kanane*. In addition, there was an increased recognition in government documents that the rights of LGBT persons need to be protected and respected. All these factors helped set the stage for the decriminalisation of consensual same-sex sexual acts between adult persons.

3 The decriminalisation case: *Letsweletse Motshidiemang v The Attorney-General*

3.1 Facts and background

In 2016 the applicant, a 24 year-old homosexual man, approached the High Court for declaratory relief that sections 164(a) and (c) and 165 of Botswana's Penal Code, which criminalised anal intercourse, were discriminatory against him as a gay man and violated his constitutional rights, including his right to equal protection of the law, the right to freedom from discrimination, the right to liberty and the right not to be subjected to inhuman or degrading treatment.²⁵

According to the applicant the impugned proscription by these sections prohibited him from exercising, enjoying and engaging in anal sexual intercourse with a man which, as a homosexual person, was his only mode of sexual intercourse. Those provisions prohibited him from expressing love through the act of enjoying sexual intercourse with another consenting adult male between whom there is mutual attraction. If he did engage in such method of sexual

24 *Ramantele v Mmusi & Others* CACGB 104-12, 3 September 2013 (CAC), Kirby JP concurring judgment. In *Ramantele* the Botswana Court of Appeal held that four sisters were entitled to inherit the family home under customary law. The case was an appeal from an October 2012 High Court judgment which struck down a customary rule denying women the right to inherit the family home as violating the right to equality under sec 3(a) of the Constitution. When the case came before the Court of Appeal, the four sisters were challenged by the son of their half-brother, Molefi Ramantele, who argued that under customary law the family home was inherited by the youngest son and thus he was entitled to inherit as his father had received the property from the youngest son. At para 77 Lesetedi J noted that customary law was rarely inflexible, stating that customary law 'develops and modernises with the times, harsh and inhumane aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with the society's changing ethos being retained'.

25 See *Motshidiemang* (n 1) para 29.

intercourse, he would have been committing a crime that attracts a sentence of imprisonment for up to seven years.²⁶

In August 2017 LEGABIBO approached the High Court requesting to be granted permission to intervene as *amicus curiae* on the basis that it has an interest in the case as an organisation that works on LGBT issues. It would seek to present factual and legal evidence that would assist the Court in making its determination. The evidence LEGABIBO in due course led sought to demonstrate that the continued criminalisation of consensual same-sex sexual acts perpetuates stigma, intolerance, homophobia and violence against members of the LGBT community in Botswana. In November 2017 the High Court of Botswana decided that LEGABIBO had an interest in the case and that its participation would be useful, assisting the Court in the determination of the constitutional issues. On that basis the Court admitted LEGABIBO as *amicus curiae*.²⁷

3.2 Adopting a purposive approach in interpreting the scope of rights while promoting the underlying values of the Constitution of Botswana

The High Court reaffirmed the principle of constitutional interpretation that constitutional rights should be given a generous and purposive interpretation which will not unjustifiably erode fundamental rights and freedoms enshrined in the Constitution.²⁸ In *Dow*, Justice Amissah explained a generous and purposive approach to constitutional interpretation of the human rights provisions in the Constitution in the following terms:²⁹

Generous construction means in my own understanding that you must interpret the provisions of the construction in such a way as not to whittle down any of the rights and freedoms unless by clear and unambiguous words such interpretation is compelling. The construction can only be purposive when it reflects the deeper inspiration and aspirations of the basic concepts which the Constitution must forever ensure, in our case the fundamental rights and freedoms entrenched in section 3.

Persisting in this approach to constitutional interpretation, the High Court significantly expanded the scope of constitutional rights in so far as they relate to consensual same-sex sexual acts, including the right to privacy, dignity, liberty and non-discrimination. Notably, in determining and interpreting the scope of the constitutional rights in question, the Court sought to promote and uphold the constitutional values that underlie an open and democratic society and the shared

26 Sec 165 of the Botswana Penal Code provides that '[a]ny person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years'. See also *Motshidiemang* (n 1) para 27.

27 *Motshidiemang* (n 1) paras 8-20.

28 *Motshidiemang* para 77. See also *Clover Petrus & Another v The State* (1984) BLR 14 (CA).

29 *Dow* (n 1) para 165.

aspirations of the nation, namely, democracy, compassion, plurality, diversity, inclusivity and tolerance. In adopting this approach, the Court not only broadened the protection of LGBT persons, but also gave expression to the shared values and deeper aspirations of being a more compassionate, fairer, tolerant and just nation. This approach ultimately benefits the society as a whole. Leburu J framed this point in these terms:

To discriminate against another segment of our society pollutes compassion. A democratic nation is one that embraces plurality, diversity, tolerance, and openmindedness. Democracy itself functions, so long as the differences between groups do not impair a broad substrate of shared values. Our shared values are as contained in our National Vision. Further, the task of the law is to bring about the maximum happiness of each individual, for the happiness of each will translate into the happiness for all.

This passage highlights the High Court's purposive and generous interpretation of specific constitutional rights and demonstrates how this approach gives expression to values that underpin the Constitution and the shared aspirations of the Batswana nation. In adopting this approach, the High Court has provided substantive content and significantly expanded the scope of the fundamental rights in question. I deal with the Court's interpretation of these rights below.

3.2.1 *Right to privacy*

The Botswana High Court based its decision on the general notion that the question of private morality and decency between consenting adults should not be the concern the law.³⁰ The High Court declared that sections 164(a) and (c) impaired the applicant's right to express his sexuality with his preferred adult partner. The High Court went on to state that the state has no business in regulating consensual sexual activity between two consenting adults and that when his conduct is not harmful to any person the applicant is entitled to a sphere of private intimacy and autonomy.

Drawing on historical sources and scholarly works, the High Court defined privacy as a multi-faceted fundamental right that includes the right to be left alone, the right to privacy of one's body and the right to choose one's intimate partner.³¹ The High Court also explained that the right to privacy was protected in sections 3(c) and 9(1) of the Constitution and in many of the international treaties to which Botswana is a party.³² Although at first glance the right to privacy framed in section 9 of the Constitution protects only against the search of one's person, property or entry by others onto their

30 *Motshidiemang* (n 1) para 217.

31 *Motshidiemang* paras 108-114.

32 *Motshidiemang* paras 115, 121. The High Court referenced the African Charter, several United Nations Conventions, the Arab Charter of Human Rights, the European Convention on Human Rights and the American Declaration of Rights, among others.

property, the High Court held that such a narrow interpretation not only would water down rights but ran afoul of a generous and purposive constitutional interpretation.³³

Citing comparative jurisprudence from India, South Africa and the United States, the High Court held that the right to privacy also protected personal autonomy, decisional autonomy and the liberty to make certain crucial decisions regarding one's life and well-being without coercion or interference from state or non-state actors.³⁴ This protection includes the right to make personal choices relating to intimate sexual conduct and to engage in such consensual intimacy based on one's sexual orientation without interference by the state.³⁵ The High Court found that the impugned provisions violated the applicant's ability 'to express his sexuality in private' with his preferred consensual adult partner.³⁶ The applicant's exercise of his 'right to a sphere of private intimacy and autonomy' is not harmful to others.³⁷

The High Court recognised that the right to privacy was not absolute and that, in certain circumstances the right could be limited. However, any restriction or interference must be carried out under the aegis of a law. In other words, it must be in the interests of public morality,³⁸ must serve to protect the rights and freedoms of others or there must be another permissible justification for it.³⁹ Furthermore, it must be justifiable in a democratic society.⁴⁰ The High Court found that none of these possible justifiable limitations was satisfied and that limitations not covered by these elements were unconstitutional:

The respondent gave no justification as to why a person's right to privacy and autonomy ought to be curtailed in relation to consensual sexual acts performed in private. In any event, the curtailment of fundamental rights cannot be justified in our democratic dispensation nor does such abridgement satisfy the proportionality test.⁴¹

3.2.2 Right to dignity

The High Court maintained the approach in *Rammoge* and *ND*, which emphasised that LGBT persons, as all other persons, are entitled to respect for their dignity. In *Rammoge* the Court of Appeal stated that

33 *Motshidiemang* (n 1) para 116.

34 *Motshidiemang* para 122.

35 *Motshidiemang* paras 122-124. The Court attached particular weight to the Indian case of *Navtey Singh Johar & Others v Union of India, Ministry of Law and Justice* (Writ Petition 76 of 2016, (Supreme Court)) in which the Supreme Court declared sodomy laws unconstitutional, reasoning that a person's sexual orientation is an indispensable part of their privacy.

36 *Motshidiemang* (n 1) para 127.

37 As above.

38 *Motshidiemang* (n 1) para 119; see also sec 9(2)(a) of the Constitution of Botswana.

39 Sec 9(2)(b) Constitution of Botswana.

40 *Motshidiemang* (n 1) paras 118-119.

41 *Motshidiemang* para 224.

the protection of dignity was the foundation and core of all other rights in the Constitution: 'To deny any person his or her humanity is to deny such person human dignity and the protection and upholding of personal dignity is one of the core objectives of Chapter 3 of the Constitution.'⁴²

Referring to the state's responsibility to promote the values underpinning the Constitution, the Court in *ND* emphasised that the 'state has a duty to uphold the fundamental human rights of every person and to promote tolerance, acceptance and diversity within our constitutional democracy'.⁴³ Judge Nthomiwa went on to state that

[t]he recognition of the applicant's gender identity lies at the heart of his fundamental right to dignity ... Legal recognition of the applicant's gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels psychologically comfortable with.⁴⁴

Expanding on the approach in both *Rammoge* and *ND*, the High Court held that '[t]he applicant's sexual orientation *lies at the heart of his fundamental right to dignity*. It is his way of *expressing his feelings, by the only mode available to him*. His dignity ought to be respected, unless lawfully restricted.'⁴⁵

Addressing the nature of the impact that the laws criminalising consensual same-sex sexual acts have on the applicant's right to dignity, the High Court referred to a body of domestic and foreign jurisprudence that emphasises that human dignity is grounded in one's feeling of self-respect and self-worth, as well as in physical and psychological well-being.⁴⁶ Adopting a similar line of reasoning, the High Court held that denying the applicant the right to sexual expression with his preferred adult partner 'violates his inherent dignity and self-worth'.⁴⁷

3.2.3 *Right to liberty*

The High Court held that laws criminalising same-sex sexual practices violate the applicant's right to liberty as they deny him the ability to choose and express himself sexually with his preferred consensual sexual adult partner.⁴⁸

In line with a purposive and generous interpretation of the right to liberty, the High Court found that that right went beyond mere freedom from physical restraint or detention. Rather, it includes and protects inherently private choices.⁴⁹ It found that 'sexual orientation is innate to a human being. It is not a fashion statement or posture. It

42 *Rammoge* (n 15) para 51.

43 Cited with approval by the High Court. See *Motshidiemang* (n 1) para 151.

44 *Motshidiemang* paras 151-152.

45 *Motshidiemang* para 153.

46 *Motshidiemang* paras 147-149.

47 *Motshidiemang* para 151.

48 *Motshidiemang* para 144.

49 *Motshidiemang* para 143.

is an important attribute of one's personality and identity' and that '[t]he right to liberty therefore encompasses the right to sexual autonomy'.⁵⁰

3.2.4 Right to non-discrimination

The provisions are discriminatory in effect and amount to indirect discrimination

The state argued that sections 164 and 165 of the Penal Code were not discriminatory since they have equal application to all sexualities: The law criminalises anal sexual intercourse in the case of both heterosexual and homosexual persons.

Addressing this argument, the High Court turned to section 15(1) of the Constitution, which provides that '[n]o law shall make any provision that is *discriminatory* either of itself or *in its effect*'.⁵¹ According to the High Court this type of discrimination, commonly referred to as indirect discrimination, occurs when conduct that may appear to be neutral and non-discriminatory nonetheless has a discriminatory result for certain groups.⁵²

The High Court accepted that the state was correct in contending that the provisions were gender-neutral and that they applied to both heterosexual and homosexual persons, but nonetheless agreed with the submissions of the *amicus* that their effects were discriminatory and had a disproportionate impact on the lives of LGBT persons beyond that on heterosexual persons.⁵³ The *amicus* submitted expert evidence that demonstrated this.

According to the High Court laws criminalising consensual same-sex sexual acts are discriminatory in their effect and are a form of indirect discrimination on at least two bases. First, anal sexual intercourse is the only means available to the applicant for sexual expression and the impugned provisions, therefore, deny him the right to such sexual expression as is available to him as a homosexual man, whereas heterosexual persons have the possibility to express their sexuality in other forms and in a manner that is natural to them.⁵⁴ In this respect, the High Court went on to remark that criminalisation has the effect of

oppress[ing] a minority and then target[ing] and mark[ing] them for an innate attribute that they have no control over and which they are singularly unable to change. Consensual sex conduct, per anus ... is merely a variety of human sexuality.⁵⁵

50 *Motshidiemang* para 142.

51 My emphasis.

52 *Motshidiemang* (n 1) para 166. The High Court cited *City Council of Pretoria v Walker* 1998 (2) SA 363.

53 *Motshidiemang* (n 1) paras 162-170.

54 *Motshidiemang* para 169.

55 *Motshidiemang* para 190.

Second, the *amicus* submitted incontrovertible scientific evidence demonstrating the disproportionate negative impact that laws criminalising consensual same-sex sexual acts have on the LGBT community. Such negative effects include dissuading LGBT persons from accessing health facilities and their facing contempt and disdain when they do choose to access treatment and health care.⁵⁶ It perpetuates stigma against and shame in homosexuals and renders them recluses and outcasts.⁵⁷ The High Court acknowledged that these negative effects associated with criminalisation are detrimental to Botswana's public health, more broadly, including its efforts regarding HIV education, prevention and care.

The High Court proceeded to consider the decision in *Toonen v Australia*,⁵⁸ in which the UN Human Rights Committee – the body that interprets the International Covenant on Civil and Political Rights (ICCPR), to which Botswana is a state party – found that laws prohibiting consensual same-sex conduct were in effect discriminatory and therefore violated the right to non-discrimination.

Weighing these factors together with the underlying constitutional values that embrace diversity, the High Court found that the impugned provisions amounted to a form of indirect discrimination based on sexual orientation. In so holding, the Court said:⁵⁹

Any discrimination against a member of the society is a discrimination against all. Any discrimination against a minority or class of people is discrimination against the majority. Plurality, diversity, inclusivity and tolerance are quadrants of a mature and enlightened democratic society.

Turning to the state's argument that the High Court was bound by *Kanane*, the High Court found that *Kanane* differed fundamentally from this case and, therefore, might be distinguished.⁶⁰ According to the High Court, this was because in *Kanane* the Court of Appeal neither considered whether the impugned provisions were discriminatory in their *effect* upon homosexual men nor whether they violated their rights to dignity and privacy. What is more, the circumstances differ from those in *Kanane*. For instance, here expert evidence was adduced that demonstrated that the impugned provisions disproportionately and negatively affect the LGBT community.⁶¹ They perpetuate stigma against homosexuals and render them recluses and outcasts.⁶² None of the evidence demonstrating the impact of the criminal laws on LGBT persons had been placed before the Court in *Kanane*.

56 *Motshidiemang* para 135.

57 *Motshidiemang* paras 181 & 189.

58 Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

59 *Motshidiemang* (n 1) para 173.

60 *Motshidiemang* paras 170-172.

61 *Motshidiemang* paras 170-171 & 181.

62 *Motshidiemang* para 189.

The High Court's acknowledgment of the negative effects of and the social and structural stigma associated with criminalisation undoubtedly was an important pillar in the judgment. This decision attempted to engage substantively with the lived experiences and realities of homosexual persons in Botswana.

The inclusion of sexual orientation as a ground for discrimination under the Constitution of Botswana

The enumerated grounds of discrimination in section 3 of the Constitution are not exhaustive and will expand as other vulnerable groups or classes needing protection emerge over time. This was acknowledged by Amissah P in *Dow*, writing for the majority:⁶³

I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as farsighted people trying to look into the future, they would have contemplated that with the passage of time not only the groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be, and in my opinion, are by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination.

Taking its cue from *Dow*, the High Court found that constitutional provisions that protect vulnerable groups should not be limited to a literal application to the protected classes framed in 1966 when the Constitution was adopted.⁶⁴ Applying a generous and purposive and, indeed, common sense interpretation, the High Court expanded the word 'sex' in section 3 of the Constitution to include 'sexual orientation'. According to the High Court, Parliament itself had taken active steps to amend the language of the Employment (Amendment) Act of 2010 to make it more inclusive. As it now stands the Employment Act outlaws discrimination on the basis of sexual orientation, which makes it illegal to terminate a person's employment on account of their sexual orientation.⁶⁵

By adopting an expansive approach to the word 'sex' to include 'sexual orientation', the High Court aligned itself with Botswana's international obligations. The High Court referred to *Toonen*⁶⁶ where the Human Rights Committee reached a similar conclusion, namely,

63 My emphasis. See *Motshidiemang* (n 1) para 158, the Court citing *Dow* with approval. See *Dow* (n 1) 146(H).

64 The Court reached this conclusion upon reflecting on the Court of Appeal's holding in *Dow*. See *Motshidiemang* (n 1) para 158.

65 *Motshidiemang* (n 1) para 159.

66 Communication 488/1992, United Nations.

that the word 'sex' in articles 2 and 26 of the ICCPR are to be interpreted as including 'sexual orientation'.⁶⁷

3.2.5 *Justifiable limitation of fundamental rights*

The bare assertion of 'public morality' or 'public interest' is not a basis to limit fundamental rights

The High Court reaffirmed the basic principle of constitutional interpretation that a state that seeks to limit fundamental rights bears an onus to prove that such a limitation is justified.⁶⁸ In line with the approach adopted in *Dow*, the High Court found that statutory provisions that limit constitutional rights fall to be construed narrowly, whereas provisions conferring such rights should receive a generous interpretation.⁶⁹

The High Court found that the state provided no actual justification for limiting the constitutional rights of the applicant. It simply made 'bare assertions and/or speculations' that anal sexual intercourse is against public morality and public interest. The state submitted no evidence to substantiate its assertions. The High Court held that 'bare assertions or speculative assertions' of public morality do not qualify as evidence or justification in a court of law.⁷⁰

In addition to providing justification for the limitation of rights the state must prove that there was no alternative, less restrictive, way of limiting the fundamental right. The High Court once again remarked that the state had not done so, instead offering bare assertions.⁷¹ The High Court added that concrete evidence was particularly important in litigation where a law affects fundamental constitutional rights.⁷² By contrast, the High Court found the expert report provided by the *amicus* to be credible evidence that assisted the Court in its interpretation.⁷³

Apart from the fact that bare or speculative assertions have no force of law, the High Court further found that the state's public interest or public morality justification, in any event, would not be 'reasonable and justifiable in an open democratic society'⁷⁴ that embraces diversity. In fact, the High Court went on to state that criminalising consensual same-sex sexual acts between adults was not in the public

67 *Motshidiemang* (n 1) para 161.

68 *Motshidiemang* para 176.

69 As above.

70 *Motshidiemang* (n 1) para 180.

71 *Motshidiemang* para 181. The High Court cited with approval a Botswana Court of Appeal's decision in *Good v Attorney General* (2) 2005 (2) BLR 337 (CA).

72 *Motshidiemang* (n 1) para 181 where the High Court referred to Botswana Court of Appeal's decision in *Attorney-General & Others v Tapela & Others* (CACGB-096-14).

73 *Motshidiemang* (n 1) para 182.

74 *Motshidiemang* para 191.

interest and served no 'useful public purpose'.⁷⁵ It is a victimless crime that disproportionately harms LGBT persons and contributes to social stigma against LGBT individuals and renders them to be recluses and outcasts. It stated:⁷⁶ 'The questioned penal provisions do not serve any useful public purpose. In other words, the means used to impair the right or freedoms articulated above are more than is necessary to accomplish the enforcement of public morality.'⁷⁷

Weighing the state's argument that public morality is a justification for retaining the laws against the values embodied in the Constitution, the Court found that 'there is nothing reasonable and justifiable by discriminating against fellow members of our diversified society'.⁷⁸

Public opinion (on its own) is not a basis to limit fundamental rights

Despite the state's failure to provide evidence that upholding public morality or public opinion is a justification for the existence of laws criminalising consensual anal sexual intercourse, the High Court, nevertheless (out of an abundance of caution), considered it appropriate to consider or test the validity of the state's claim.⁷⁹

The Court explained that, while public opinion is a factor to consider when interpreting the Constitution, it merely is one component in the broader enquiry. It certainly is not decisive. It is the duty of the courts to interpret the provisions of the Constitution without fear or favour.⁸⁰ In adopting this line of reasoning, the High Court followed the example of *Ramantele* where Kirby JP stated that '[p]revailing public opinion, as reflected in legislation, international treaties, the reports of public commissions, and contemporary practice, is a *relevant factor* in determining the constitutionality of a law or practice but it is *not a decisive one*'.⁸¹

The High Court then turned to consider *S v Makwanyane*, in which, on the question of the relevance of public opinion (in this case concerning the death penalty), the South African Constitutional Court held:⁸²

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.

75 *Motshidiemang* para 207.

76 *Motshidiemang* para 189.

77 *Motshidiemang* para 207.

78 *Motshidiemang* paras 108-191.

79 *Motshidiemang* para 183.

80 *Motshidiemang* paras 185-186. See the Court citing with approval *S v Makwanyane* 1995 (3) SA 391.

81 *Motshidiemang* (n 1) 185, citing with approval the concurring judgment by Kirby JP in *Ramantele* (n 24) para 20 (my emphasis).

82 *Motshidiemang* (n 1) para 186, the Court citing with approval *Makwanyane* (n 80) para 88.

The High Court also considered the decision of the Privy Council in *Patrick Reyes v The Queen-PC* where it held that it

has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right, in the light of evolving standards of decency, that mark the progress of a maturing society.⁸³

Notwithstanding the High Court's finding that public opinion is relevant but not decisive in constitutional adjudication, it found that there was compelling evidence to suggest that there has in recent years been a more tolerant and compassionate attitude towards previously taboo subjects such as LGBT rights and that attitudes in Botswana have somewhat softened towards LGBT people. The High Court indicated that legislative and policy actions could represent the will of the people. For instance, in amending the Employment Act to protect the LGBT community against discrimination, Parliament articulated the will of the people of Botswana to protect the LGBT community.⁸⁴ Botswana's National Vision 2036 also supports social inclusion and aspires to protect human rights.⁸⁵ Similarly, Botswana's National Vision 2016 aspires for Botswana to be 'a Moral and Tolerant Nation'.⁸⁶

3.2.6 *The High Court's use of an amicus curiae to assist it 'in this weighty matter'*

The Botswana courts have a wide discretion whether or not to admit an interested party as *amicus curiae*.⁸⁷ In exercising this discretion, the High Court chose to admit LEGABIBO as *amicus curiae*.⁸⁸ LEGABIBO was allowed to participate in the proceedings and to assist the Court.

The judgment demonstrates that the participation of an *amicus* in constitutional proceedings might well be useful and provide assistance to the Court, especially in cases where the Court's decision is far-reaching. It allows for an opportunity to draw the Court's attention to relevant matters of fact and of law that might otherwise not have been addressed.⁸⁹ In this case the involvement of the *amicus* was shown to be particularly useful when the High Court was required to determine the constitutionality of laws that may have an impact beyond the litigants that were before the Court.

83 *Motshidiemang* (n 1) para 187, citing with approval *Patrick Reyes v The Queen-PC*, Appeal 34 of 2001 (2002) UKPC II para 26.

84 *Motshidiemang* (n 1) para 195.

85 *Motshidiemang* para 199.

86 *Motshidiemang* para 197.

87 *Motshidiemang* para 10. See also the High Court citing with approval *Ditshwanelo & Others v The Attorney-General & Another* (1999) 2 BLR 56 (HC).

88 *Motshidiemang* (n 1) paras 8-20.

89 *Motshidiemang* para 11.

The High Court found that the *amicus* was useful and assisted the Court 'in this weighty matter'.⁹⁰ The *amicus* was in a position to place credible expert evidence (or facts) before the High Court on the harmful effects of the criminalisation of consensual adult same-sex sexual acts. This evidence included submissions by an expert which demonstrated that LGBT persons living in Botswana experienced high levels of violence and discrimination when accessing healthcare services.⁹¹ This evidence placed the High Court in a better position to determine the effects of the laws and, more specifically, their negative impact on the LGBT community in Botswana: *In casu* the *amicus*

was a friend in need and a friend indeed. It produced evidence on how the said penal provisions impact negatively on the LGBT community. Such evidence was never controverted.⁹²

Such concrete evidence has been held to be particularly important in litigation where a law affects fundamental constitutional rights.⁹³ The evidence submitted by the *amicus curiae* was shown to be particularly useful as it was able to draw the High Court's attention to the way in which the impugned provisions negatively impact on the broader LGBT community in Botswana. It thus allowed and created the space for the High Court meaningfully to engage with the ongoing lived realities and experience of LGBT persons in Botswana beyond the litigants that were before the High Court. The High Court's utilisation of an *amicus curiae* assisted the Court in arriving at an appropriate decision, thus contributing to the growth and enrichment of the quality of public law judicial jurisprudence 'in ways that enhance promotion and protection of the rights protected under the Constitution'⁹⁴ of Botswana.

4 Conclusion

This case represents a significant development in the advancement of LGBT rights in Africa and beyond. By adopting the approach in the line of decisions represented by *Dow*, *Ramantele*, *Rammoge* and *ND*, among others, the High Court not only recognised and sought to protect the fundamental rights of LGBT persons within the normative framework of the Constitution, but also gave expression to underlying constitutional and democratic values and aspirations. This approach

90 *Motshidiemang* para 227.

91 *Motshidiemang* para 34.

92 *Motshidiemang* para 181.

93 *Motshidiemang* para 181.

94 See eg O Jonas 'The participation of the *amicus curiae* institution in human rights litigation in Botswana and South Africa: A tale of two jurisdictions' (2015) 59 *Journal of African Law* 349-350. The author argues that enhanced participation by *amici curiae* in Botswana could contribute to the quality of its public law jurisprudence. See also JC Mubangizi & C Mbazira 'Constructing the *amicus curiae* procedure in human rights litigation: What Uganda can learn from South Africa' (2012) 16 *Law, Democracy and Development* 214.

benefits society as a whole. In this sense, the judgment constitutes a milestone in the promotion of universal fundamental rights of all persons, including the pivotal right to dignity. Significantly, the judgment reaffirms a fundamental principle of constitutional interpretation. If a state seeks to limit the rights of any person, it must prove that the limitation of those rights is proportionate and reasonably justifiable in a democratic society. A failure to do so is an unjustifiable limitation of the right. Moreover, the state must provide evidence to justify the limitation of the right of any person and that there is no alternative or lesser means than the limitation of the right. Bare assertions by the state to limit fundamental rights simply are not enough. Through sound legal reasoning and constitutional interpretation the High Court of Botswana has set an example for other courts in the region and in Africa, generally, on the important role that courts can and should play in protecting and promoting the human rights of all persons, including those of marginalised and vulnerable groups.

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Position as at 31 July 2019

Compiled by: I de Meyer

Source: <http://www.au.int> (accessed 28 November 2019)

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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		18/07/18	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		18/04/19		18/04/19	18/04/19
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	23/08/18	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	54	46	49	30	42	34

* Additional declaration under article 34(6)

Ratifications after 31 December 2018 are indicated in bold