

## A missed opportunity? Derogation and the African Court case of *APDF and IHRDA v Mali*

*Brenda K Kombo\**

Post-Doctoral Fellow, Free State Centre for Human Rights, University of the Free State, South Africa

<https://orcid.org/0000-0001-5144-0362>

**Summary:** *The permissibility and application of derogation from human rights obligations in the African human rights system are far from clear. Based on the absence of a derogation clause in the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights has interpreted the Charter as prohibiting derogation even in emergency situations. However, this interpretation is inconsistent with the Commission's practice of reviewing states of emergency during state reporting and creates confusion when considered together with the Commission's conflation of derogation and limitation as well as its references to non-derogable rights. The African Court on Human and Peoples' Rights is yet to pronounce itself on this question. Although Mali invoked a force majeure defence in APDF and IHRDA v Republic of Mali, the Court dismissed the defence without elaborating on its reasoning. As such, the article contends that the Court missed an opportunity to develop its jurisprudence on derogation.*

**Key words:** *derogation; force majeure; Mali; African Court; human rights*

\* BA (Hampshire College) MPhil (Yale) PhD (Yale) JD (Northeastern University School of Law); [KomboBK@ufs.ac.za](mailto:KomboBK@ufs.ac.za)

## 1 Introduction

In the case of *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*<sup>1</sup> (*APDF and IHRDA case*) Mali argued that it did not pass a family code complying with its human rights obligations because of *force majeure* – specifically, a series of mass protests in 2009 by Islamic organisations and members of the general public. The case, decided by the African Court on Human and Peoples’ Rights (African Court) in 2018, is significant not only because it found that Mali’s 2011 Code of Persons and the Family<sup>2</sup> (Family Code) violated women’s and children’s human rights in the Court’s first judgment regarding such rights, but also because it concerned an important exception in human rights jurisprudence. Mali contended that its failure to comply with human rights obligations under various instruments was justified because of protests. For Mali, such protests constituted an emergency situation allowing it to derogate from its human rights obligations. Although the African Court dismissed this argument, one will never really know why, since the Court provided little by way of reasoning despite current uncertainties around how derogation applies under the African Charter on Human and Peoples’ Rights (African Charter) which does not contain a derogation clause.

In this article it is argued that, through its silence<sup>3</sup> in response to Mali’s argument in the *APDF and IHRDA* case, the African Court missed an important opportunity to clarify the currently murky jurisprudence on derogation in the African human rights system. Following some background on derogation in the African human rights system, I provide the context of the *APDF and IHRDA* case, consider Mali’s argument and the Court’s silence, and conclude by reflecting on how the case could have advanced our understanding of derogation from human rights norms on the continent.

## 2 Derogation in the African human rights system

McGoldrick writes that ‘[t]he response of a state to a public emergency is an acid test of its commitment to the effective implementation of

1 *APDF & IHRDA v Mali* Application 46/2016 11 May 2018.

2 Loi 2011-087 du 30 Décembre 2011 Portant Code des Personnes et de la Famille.

3 BK Kombo ‘Silences that speak volumes: The significance of the African Court decision in *APDF and IHRDA v Mali* for women’s human rights on the continent’ (2019) 3 *African Human Rights Yearbook* 389.

human rights'.<sup>4</sup> Less committed states might be prone to respond to a public emergency as if it provides *carte blanche* to jettison human rights obligations. Nevertheless, acknowledging that even the most committed states cannot effectively protect all human rights in all situations but that it is best to ensure the maximum human rights protection, derogation allows a state to temporarily limit or suspend certain rights during an emergency.<sup>5</sup> In addition to applying solely in exceptional circumstances, it generally is subject to strict substantive and procedural conditions, including respect for non-derogable rights and adherence to monitoring requirements.<sup>6</sup> As such, Higgins characterises derogation as a 'technique of accommodation' to ensure that a state can 'perform its public duties for the common good' by balancing individual rights and freedoms with those of the community.<sup>7</sup> The understanding is that the encroachment on individual rights that justifies derogation is required to restore normalcy for the benefit of the whole community.

Although derogation clauses are fairly common in international human rights instruments, the African Charter stands out for not containing such a clause. In this section I highlight the challenges this omission raises in the African human rights system.

## 2.1 African exceptionalism

The African Charter's lack<sup>8</sup> of a derogation clause stands in sharp contrast to the International Covenant on Civil and Political Rights (ICCPR), to which the majority of African states are party,<sup>9</sup> as well as two other regional human rights conventions, namely, the American Convention on Human Rights (American Convention) and the European Convention on Human Rights (European Convention). ICCPR and the European and American Conventions all contain derogation clauses using similar language. Article 4(1) of ICCPR

4 D McGoldrick 'The interface between public emergency powers and international law' (2004) 2 *International Journal of Constitutional Law* 388.

5 R Higgins 'Derogations under human rights treaties' (1976) 48 *British Yearbook of International Law* 281; C Binder 'Stability and change in times of fragmentation: The limits of *pacta sunt servanda* revisited' (2012) 25 *Leiden Journal of International Law* 927.

6 Binder (n 5) 930.

7 Higgins (n 5) 281-282.

8 I use language such as 'lack', 'absence' or 'omission' with reference to the derogation clause because of linguistic constraints and also to signal the African Charter's distinctiveness. However, this should not be understood to have a negative connotation, ie suggesting that the Charter is incomplete. Rather, one of my objectives in this article is to interrogate the implications of this characteristic of the Charter.

9 Comoros is an exception, having signed but not ratified ICCPR. United Nations Treaty Collection 'Status of Treaties – International Covenant on Civil and Political Rights' [https://treaties.un.org/Pages/View\\_Details.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/View_Details.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en) (accessed 5 December 2019).

states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 15(1) of the European Convention provides:

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

Similarly, article 27(1) of the American Convention reads:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

Moreover, these three instruments indicate the provisions from which no derogation is allowed<sup>10</sup> and outline procedural requirements, including notifying the relevant organisation's Secretary-General of the provisions being temporarily suspended, the reasons for the suspension, and the anticipated or actual date of termination of

<sup>10</sup> The instruments prohibit derogation as follows: Art 4(2) ICCPR (right to life; prohibition of torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery and servitude; prohibition of imprisonment for inability to fulfil a contractual obligation; prohibition of prosecutions under *ex post facto* laws and of retrospective criminal penalties; recognition of everyone as a person before the law; and freedom of thought, conscience and religion); art 15(2) European Convention (right to life 'except in respect of deaths resulting from lawful acts of war'; prohibition of torture; prohibition of slavery or servitude; prohibition of punishment without law); art 27(2) American Convention (right to juridical personality; right to life; right to humane treatment; freedom from slavery; freedom from *ex post facto* laws; freedom of conscience and religion; rights of the family; right to a name; rights of the child; right to nationality; and right to participate in government; or 'the judicial guarantees essential for the protection of such rights').

these emergency measures.<sup>11</sup>

Taken together, ICCPR and the European and American Conventions constitute a human rights derogation regime in which, as Sermet explains, derogation must comply with ‘the following four conditions: necessity, proportionality, inviolability and temporality’.<sup>12</sup> In other words, derogation can only be undertaken when a state can justify it as *necessary* in order to address ‘exceptional circumstances’.<sup>13</sup> Additionally, the ‘measures [undertaken] must be *proportionate* to the danger’<sup>14</sup> and must uphold certain *inviolable* rights from which derogation is prohibited.<sup>15</sup> Under all three instruments, states are forbidden from derogating from provisions recognising the right to life as well as prohibitions on torture, slavery, and retrospective criminal penalties.<sup>16</sup> States also must not derogate from peremptory norms of international law or *jus cogens*. Finally, derogation must be *temporary*, meaning that it must end once the emergency is over.<sup>17</sup>

Two other requirements could be added to Sermet’s list. First, ICCPR and the European and American Conventions require that derogation be consistent with the state’s other international law obligations.<sup>18</sup> This poses a challenge for African states given the radically different approaches to derogation in ICCPR and the African Charter. Second, under both ICCPR and the American Convention, derogating states must adhere to the principle of non-discrimination, meaning that measures undertaken should not discriminate against people based on race, sex and other categories unless such action ‘pursue[s] a legitimate aim and [is] proportionate to/reasonable in terms of that legitimate aim’.<sup>19</sup>

One might rather compare the African Charter to the Universal Declaration of Human Rights (Universal Declaration) or the International Covenant on Economic, Social and Cultural Rights

11 See art 4(3) ICCPR; art 15(3) European Convention; and art 27(3) American Convention.

12 L Sermet ‘The absence of a derogation clause from the African Charter on Human and Peoples’ Rights: A critical discussion’ (2007) 7 *African Human Rights Law Journal* 150.

13 As above.

14 N Questiaux Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, Commission on Human Rights (27 July 1982) UN Doc E/CN.4/Sub.2/1982/15 (1982) para 60 (my emphasis).

15 Questiaux (n 14) para 67; Office of the High Commissioner for Human Rights (OHCHR) and International Bar Association (IBA) *Professional Training Series 9: Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers* (2003) 831-832; Sermet (n 12) 150.

16 Questiaux (n 14) para 67.

17 Sermet (n 12) 150-151.

18 OHCHR & IBA (n 15) 877.

19 OHCHR & IBA (n 15) 879 (emphasis in original).

(ICESCR), both of which lack derogation clauses, but contain general limitation clauses. Article 29(2) of the Universal Declaration, for example, provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 4 of ICESCR enables states to impose ‘limitations’ on rights ‘only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. Although the African Charter may arguably lack an explicit general limitations clause, article 27(2) often is interpreted as such.<sup>20</sup> This provision stipulates that ‘[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’. Although limitation clauses allude to public order, welfare or security, they differ from derogation clauses.

Highlighting the differences between the two types of clauses, Müller proposes that while derogation is unwelcome, ‘reasonable limitations are part of the “oil” of the human rights system allowing states to flexibly regulate various conflicts of interest which occur within (democratic) societies’.<sup>21</sup> Not only are limitation clauses aimed at balancing individual rights and community interests, but they also apply to all rights enshrined in a particular instrument and facilitate balancing between different rights.<sup>22</sup> Unlike the derogation clauses described above, general limitation clauses have general applicability as well as more flexible temporality, since they are not limited to emergency situations. More broadly, they do not enumerate strict procedural and substantive safeguards in the same way as derogation clauses. Nevertheless, such limitation is not uncontrolled. Perhaps one of the most important requirements is that it should not excessively interfere with rights.<sup>23</sup> In *Constitutional Rights Project & Others v Nigeria*<sup>24</sup> (*Constitutional Rights Project*) the African Commission on Human and Peoples’ Rights (African Commission), for example, stated that ‘[t]he justification of limitations must be strictly proportionate

20 Sermet (n 12) 146; B Manby ‘Civil and political rights in the African Charter on Human and Peoples’ Rights: Articles 1-7’ in M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008) 177; F Viljoen *International human rights law in Africa* (2012) 329.

21 A Müller ‘Limitations to and derogations from economic, social and cultural rights’ (2009) 9 *Human Rights Law Review*.

22 Müller (n 21) 559-560.

23 Müller (n 21) 561.

24 (2000) AHRLR 227 (ACHPR 1999) para 42.

with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.'

Caution is required since even oil can clog up a system. As such, limitations are subject to various requirements in the different human rights systems, such as proportionality. The African Commission further requires that states demonstrate that their interest is legitimate and that the limitations are necessary.<sup>25</sup>

How then, if at all, does the African Charter fit into the derogation regime? At first glance it might seem as though the Charter qualifies as a significant aberration and does not fit at all. However, as I argue below, the meaning and implications of the Charter's absent derogation clause are far from clear.

## 2.2 Murky terrain: Interpreting derogation under the African Charter

Several scholars<sup>26</sup> have extensively explored derogation in the African Charter even prior to the *APDF and IHRDA* case. As such, this part of the article provides only an overview as context for the subsequent analysis. This section considers the jurisprudence of the African Commission and African Court as well as scholarship in the field.

### 2.2.1 *The African Commission's position(s)*

The African Commission has construed the African Charter as not permitting derogation from human rights obligations even in contexts of 'civil war',<sup>27</sup> 'prolonged military rule',<sup>28</sup> *coups d'état*<sup>29</sup> and other emergencies. Beginning with *Commission Nationale des Droits de l'Homme et des Libertés v Chad (Commission Nationale)* in 1995, the Commission has occasionally but forcefully reiterated this

25 A.J. Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17 *Law, Democracy and Development* 93.

26 See eg R. Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667; F. Ougouergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* trans H. Sutcliffe (2003); Sermet (n 12); C. Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155; Viljoen (n 20); Ali (n 25); M.A. Tolera 'Absence of a derogation clause under the African Charter and the position of the African Commission' (2014) 4 *Bahir Dar University Journal of Law* 229; R. Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019).  
27 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995).

28 *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 73.

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

position. In *Commission Nationale* the Commission concluded that '[t]he African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.'<sup>30</sup>

Again, in *Constitutional Rights Project*<sup>31</sup> the Commission stated that '[t]he African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.' Other communications advancing this position include *Media Rights Agenda v Nigeria*;<sup>32</sup> *Amnesty International & Others v Sudan*<sup>33</sup> (*Amnesty International*); *Article 19 v Eritrea*<sup>34</sup> (*Article 19*); and *Sudan Human Rights Organisation & Another v Sudan*.<sup>35</sup>

Despite its repeated articulation of the prohibition of derogation, the African Commission's individual communications have introduced uncertainty regarding non-derogable rights and the relationship between derogation and limitation. The Commission's references to non-derogable rights seem to entertain the possibility of derogation and to take steps towards identifying non-derogable rights in the African context. For example, aware that its position on derogation diverges from that taken by other human rights bodies, the Commission stated in *Article 19* – where Eritrea argued that it acted 'against a backdrop of war when the very existence of the nation was threatened'<sup>36</sup> – that

[e]ven if it is assumed that the restriction placed by the Charter on the ability to derogate goes against international principles, there are certain rights such as the right to life, the right to a fair trial, and the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances.<sup>37</sup>

Another example is *Amnesty International*, where the Commission reiterated that 'the Charter does not contain a general provision permitting states to derogate from their responsibilities in times of emergency, especially for what is generally referred to as non-derogable rights'.<sup>38</sup> On the one hand, the African Commission's

30 *Commission Nationale* (n 27) para 21.

31 *Constitutional Rights Project* (n 24) para 41.

32 *Media Rights Agenda* (n 28) para 73.

33 *Amnesty International* (n 29) para 42.

34 (2007) AHRLR 73 (ACHPR 2007) para 87.

35 (2009) AHRLR 153 (ACHPR 2009) paras 165 & 167.

36 *Article19* (n 34) para 87.

37 *Article19* (n 34) para 98.

38 *Amnesty International* (n 29) para 42.

jurisprudence seems to render all rights under the African Charter *jus cogens*, as Viljoen contends.<sup>39</sup> On the other, it considers the possibility that derogation from certain core rights is never permitted. This ambiguity calls into question the Commission's interpretation of derogation under the Charter.

A second area of uncertainty emerges from the Commission's perspective on derogation and limitation. In addition to article 27(2) – which, as described above, is treated as a general limitation clause – the African Charter contains multiple 'open-ended'<sup>40</sup> claw-back clauses in articles 6 and 8 to 14 that 'permit[], in normal circumstances, breach of an obligation for a specified number of public reasons'<sup>41</sup> and 'to the extent permitted by domestic law'.<sup>42</sup> For example, article 6 of the Charter on liberty and security provides that '[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law'. Along similar lines, article 11 guaranteeing freedom of assembly stipulates that '[t]he exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedom of others'.

Drawing from Higgins's example,<sup>43</sup> claw-back clauses should be considered along with derogation as some of them pertain to security, democracy and other public welfare concerns. The African Commission has made it clear that such clauses cannot easily provide a basis to justify human rights violations, stating in *Amnesty International*:<sup>44</sup>

The Commission is of the view that the 'claw-back' clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter ... It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause.

Moreover, in *Media Rights Agenda & Others v Nigeria* the Commission emphasised:<sup>45</sup>

To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must

39 Viljoen (n 20) 334.

40 Tolera (n 26) 239.

41 Higgins (n 5) 281.

42 Gittleman (n 26) 691.

43 Higgins (n 5) 282.

44 *Amnesty International* (n 29) para 42.

45 (2000) AHRLR 325 (ACHPR 1999) para 66.

always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.

Through its 'restrictive interpretation'<sup>46</sup> of claw-black clauses, the African Commission has reduced their power.

However, the Commission's treatment of article 27(2) has not been so apparent. In *Constitutional Rights Project*,<sup>47</sup> in addition to the language cited above, the Commission was of the view that '[t]he only legitimate reasons for limitations on the rights and freedoms of the African Charter are found in article 27(2)'. This problematically conflates derogation and limitation despite the distinct differences between the two, as highlighted above, including temporal distinctions as well as distinctions in procedural and substantive safeguards. This potentially creates a situation where derogation is permissible as long as it meets certain requirements. To use Viljoen's words

[i]f such derogation is proportionate and necessary to achieve the protection of the rights of others, collective security, morality, or common interest, and does not erode the right to render it illusory, it may be Charter-compliant.<sup>48</sup>

Thus, derogation that is only meant to apply during emergencies and must meet various strict conditions is merged with the broader features and purposes of limitation.

In addition to these inconsistencies in the African Commission's jurisprudence, Tolera points to another area of ambiguity based on his analysis of state reports and attendant oral examinations and Concluding Observations.<sup>49</sup> He contends that the Commission's position differs from that in its individual communications.<sup>50</sup> Tolera posits that here the Commission does not remind states of the prohibition on derogation, but rather 'seeks to monitor the conduct of member states in taking measures which relieve state parties from honouring some of their obligation[s] under the [Charter]'.<sup>51</sup>

### 2.2.2 *African Court's silence*

Unlike the African Commission, the African Court has not extensively pronounced itself on the question of derogation in the African human

46 Viljoen (n 20) 329; Ali (n 25) 92.

47 *Constitutional Rights Project* (n 24) para 41.

48 Viljoen (n 20) 334.

49 Tolera (n 26).

50 Tolera 258-261.

51 Tolera 260.

rights system. In fact, the Court's silence on this issue is notable. In *African Commission on Human and Peoples' Rights v Libya*<sup>52</sup> the Court made a 'preliminary remark' alluding to derogation under ICCPR without mentioning the same with regard to the African Charter. Recognising the non-derogable nature of articles 6 and 7 of ICCPR (on the right to life and freedom from torture or cruel, inhuman and degrading punishment or treatment), which rights are also largely guaranteed in articles 6 and 7 of the Charter, the Court held that

[d]espite the exceptional political and security situation prevailing in Libya since 2011, the Libyan state is internationally responsible for ensuring compliance with and guaranteeing the human rights enshrined in articles 6 and 7 of the Charter.<sup>53</sup>

Unfortunately, the African Court did not elaborate on derogation under the African Charter or explain its focus on ICCPR. Such silence amplifies the potential significance of the *APDF and IHRDA* case, which is analysed below.

### 2.2.3 *Perspectives from human rights and legal scholars*

Despite the vigorous debate within academia on the significance of the absent derogation clause in the African Charter, many scholars recognise both the positive and negative aspects of this absence. It might be most helpful to view the different perspectives as a continuum. At one extreme is the view that the omission of such a clause is a 'normative innovation'<sup>54</sup> or 'positive development'<sup>55</sup> on the continent. At the other extreme is the view that the omission is 'a defect'<sup>56</sup> or 'deficiency' that should be corrected.<sup>57</sup> The majority of scholars, even most of those from whom the language of the previous two sentences was borrowed, tend to fall somewhere in between. Rather than reiterate arguments that scholars have more eloquently presented in various texts, this part of the article briefly considers some of the arguments supporting and opposing the omission of the derogation clause.

The lack of a derogation clause could be regarded as helping to fulfil the African Charter's objective of responding to African

52 Application 2/2013 (3 June 2016).

53 *Libya* (n 51) para 77.

54 Viljoen (n 20) 334.

55 Ali (n 25) 79.

56 Tolera (n 26) 250.

57 Sermet (n 12) 153.

realities. Given that African countries tend not to follow ICCPR requirements when derogating from provisions under that instrument<sup>58</sup> and that they also violate article 23 of the Vienna Convention on the Law of Treaties by using domestic law to justify non-performance of certain human rights obligations during emergencies,<sup>59</sup> a derogation clause in the African Charter would have been prone to abuse. Thus, its exclusion is a demonstration of 'political expediency'.<sup>60</sup> Other arguments for maintaining the Charter as it is include the following: (i) the Charter follows 'trends of expanding non-derogable rights in human rights instruments';<sup>61</sup> (ii) derogation clauses create a binary framework of derogable and non-derogable human rights despite the general consensus on the inalienability, indivisibility, interdependence and interrelatedness of human rights;<sup>62</sup> and, (iii) because the Charter like ICESCR contains economic, social and cultural rights, there is no need for a derogation clause as derogation from these rights is not necessary in order for a state to quell an emergency – the general limitation clause is sufficient.<sup>63</sup>

However, the omission of a derogation clause could also be regarded as hindering the protection of human rights. This omission, as interpreted by the African Commission, imposes an impossibly high standard where states must protect all rights as *jus cogens*. Murray proposes an alternative perspective as it 'may actually provide states with more discretion by failing to set any standards at all, allowing states to act as they please'.<sup>64</sup> Moreover, the contradictions between the African Charter and ICCPR as well as most national constitutions<sup>65</sup> make it more difficult to govern state action during emergencies.

### 2.3 Recourse to general international law

Although the debate on derogation is far from settled, the African Commission's position has meant that African states determined to legally derogate from human rights obligations would need to seek recourse in general international law or, as Ouguergouz specifies, 'in this instance the law of treaties and/or the law of international

58 Viljoen (n 20) 334.

59 As above; Ali (n 25) 103.

60 Sermet (n 12) 161.

61 Ali (n 25) 84.

62 Sermet (n 12) 160-161; Ali (n 25) 87.

63 Ali (n 25) 86.

64 R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 123.

65 Sermet (n 12) 143; Viljoen (n 20) 333; Tolera (n 26) 230.

responsibility of states'.<sup>66</sup> Such a move actualises the fear of some scholars that states would use and 'abuse'<sup>67</sup> customary law defences. Even in the absence of abuse, Tolera points out that such defences 'lack the necessary power-limiting requirements'<sup>68</sup> that derogation clauses provide.

However, could such a move successfully justify the suspension of human rights obligations? During a 1989 seminar Judge Theodor Meron raised this issue.<sup>69</sup> He asked:<sup>70</sup>

What, then, is the continuing relevance and the scope of applicability of customary law exceptions, such as state of necessity and of *force majeure*? ... Do they apply to human rights treaties that are silent as regards states of emergency? An example would be the African Charter on Human and Peoples' Rights, which does not contain provisions relating to derogations. Can an African state invoke these customary law exceptions to justify derogations of the norms stated in that Charter?

Judge Meron astutely foresaw a situation that crystallised almost three decades later when the *APDF and IHRDA* application was filed.

### 3 *APDF and IHRDA v Mali*

*APDF and IHRDA v Mali* is the African Court's first judgment interpreting the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) and the African Charter on the Rights and Welfare of the Child (African Children's Charter). In this judgment the Court held that Mali had violated the African Women's Protocol, the African Children's Charter and the Convention on the Elimination of All Forms of Violence Against Women (CEDAW) by adopting a family code which violated girls' and women's minimum age of marriage and right to consent to marriage; the right to inheritance for women and children born to unmarried parents – or 'natural' children – as well as the obligation to eliminate traditional practices that are harmful to women and children. The 2011 Code was adopted after violent protests organised by Islamic organisations had followed Mali's National Assembly's passage of a previous Bill on 3 August 2009 which sought to harmonise Malian legislation with its international human rights obligations.<sup>71</sup> As such,

66 Ouguergouz (n 26) 437.

67 Tolera (n 26) 257.

68 Tolera 282.

69 'State responsibility for violations of human rights' (1989) 83 *Proceedings of the Annual Meeting American Society of International Law* 373.

70 As above.

71 *APDF and IHRDA v Mali* (n 1) paras 63-65.

one of Mali's defences in the case was a plea of force majeure.<sup>72</sup> In this part I consider Mali's argument and how the Court missed an opportunity to expand its jurisprudence on derogation in the African human rights system through its dismissal of this argument only by implication and without providing its reasoning.

### 3.1 Brief background to the case

In the late 1990s Mali began to develop a Family Code in order to update the 1962 *Code du Mariage et de la Tutelle*<sup>73</sup> (Marriage and Guardianship Code) and other legislation governing the family that largely stemmed from the Napoleonic Code of 1804. As articulated by the government of then President Alpha Oumar Konaré, the reform project sought to ensure that such legislation reflected Mali's adherence to its international human rights obligations.<sup>74</sup> The government worked closely with international donors and non-governmental organisations (NGOs) to organise public discussions and debates, but Islamic organisations largely criticised the process as Western donor-driven and failing to take Islamic and other Malian socio-cultural norms and practices into account.<sup>75</sup> By 2009 a Family Code Bill was prepared – now under the leadership of President Amadou Toumani Touré – which recognised solely secular and not Islamic marriage, increased the minimum marriage age to 18 for girls, removed a clause requiring women to obey their husbands, guaranteed equal inheritance by men and women, and granted inheritance rights to natural children, among other significant changes.<sup>76</sup> Although the National Assembly passed the Bill by a large majority, Islamic organisations considered it contrary to Islamic and, hence, Malian norms and ideals and consequently voiced their displeasure through protests that mobilised massive segments of the population across the country.<sup>77</sup> Hundreds of Muslim clergy

72 *APDF and IHRDA v Mali* (n 1) para 63; Mali, Defence on the Merits, *APDF & IHRDA* (24 November 2016) Folio page 541 at 537.

73 Loi 62-17 AN-RM du 3 Février 1962 portant Code du mariage et de la tutelle.

74 DE Schulz 'Political factions, ideological fictions: The controversy over family law reform in democratic Mali' (2003) 10 *Islamic Law and Society* 133; R de Jorio 'Between dialogue and contestation: Gender, Islam, and the challenges of a Malian public sphere' (2009) 15 *The Journal of the Royal Anthropological Institute* S98; B Soares 'Family law reform in Mali: Contentious debates and elusive outcomes' in M Badran (ed) *Gender and Islam in Africa: Rights, sexuality, and law* (2011) 275-277; E Burrill 'Legislating marriage in postcolonial Mali: A history of the present' in L Boyd & E Burrill (eds) *Legislating gender and sexuality in Africa* (2020) 29.

75 Schulz (n 74) 133-142; De Jorio (n 74) S98-S99; Soares (n 74) 275-276; O Koné 'La controverse autour du code des personnes et de la famille au Mali: Enjeux et stratégies des acteurs' unpublished PhD thesis, Université de Montréal, 2015 2.

76 Defence on the Merits (n 72) 538.

77 'Threats of violence greet new family code' *The New Humanitarian* 11 August 2009, <http://www.thenewhumanitarian.org/report/85676/mali-threats-violence-greet-new-family-code> (accessed 8 December 2019); 'Code de la

and village leaders came together on 9 August 2009 to protest at Bamako's largest mosque.<sup>78</sup> On 22 August approximately 50 000 opponents of the 2009 draft Bill gathered in a Bamako stadium.<sup>79</sup> Many protesters undoubtedly agreed with the Secretary of Mali's High Islamic Council who characterised the Code as 'a shame, treason'<sup>80</sup> for Muslims, and further stated: 'We are not against the spirit of the code, but we want a code appropriate for Mali that is adapted to its societal values. We will fight with all our resources so that this code is not promulgated or enacted.'<sup>81</sup> Consequently, President Touré sent the Bill back for a second reading, with Islamic organisations playing a more central role in this round of reform.<sup>82</sup>

The Code, ultimately promulgated on 30 December 2011, was reminiscent of previous legislation.<sup>83</sup> Seeking to challenge it on human rights grounds, the APDF and IHRDA filed an application with the African Court in July 2016. The African Court not only held that Mali had violated human rights, as recounted above, but also ordered Mali to 'amend its legislation to bring it in line with the relevant provisions of the applicable international instruments'.<sup>84</sup> Mali is yet to amend the Code. However, the on-going intercommunal and jihadist violence<sup>85</sup> that Mali has faced since a *coup* in March 2012 make it unlikely that such amendments will be made in the near future.

### 3.2 Mali's *force majeure* argument and the Court's silence

Mali invoked the customary law defence of *force majeure* to justify its non-performance of human rights obligations under the African Women's Protocol, the African Children's Charter and CEDAW. A principle of international law codified in the International Law Commission's 2001 Articles on Responsibility of States for

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famille contesté au Mali: le Président débute des consultations' *Islam Pluriel* 26 August 2009, <http://islam-pluriel.net/code-de-la-famille-conteste-au-mali-le-president-debute-des-consultations/> (accessed 8 December 2019); Koné (n 73) 36.

78 *The New Humanitarian* (n 77).

79 *Islam Pluriel* (n 76).

80 *The New Humanitarian* (n 77).

81 As above.

82 A Thurston 'Towards an Islamic Republic of Mali' (2013) 37 *Fletcher Forum of World Affairs* 52-53; Koné (n 75) 196-197.

83 ST Diarra 'Women's rights in Mali "set back 50 years" by new "Family Code" law' *The Guardian* 1 May 2012, <https://www.theguardian.com/global-development/2012/may/01/womens-rights-mali-50-years> (accessed 8 December 2019).

84 *APDF v Mali* (n 1) para 130.

85 International Crisis Group 'Speaking with the "bad guys": Toward dialogue with Central Mali's Jihadists' 28 May 2019, <https://www.crisisgroup.org/africa/sahel/mali/276-speaking-bad-guys-toward-dialogue-central-malis-jihadists> (accessed 11 December 2019).

Internationally Wrongful Acts<sup>86</sup> (ILC Articles), *force majeure* 'is based on the principle that possibility is the limit of all obligation (*ad impossibilia nemo tenetur*). No one is expected to perform the impossible.'<sup>87</sup> Under article 23 of the ILC Articles,

- (1) The wrongfulness of an act of a state not in conformity with an international obligation of that state is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation.
- (2) Paragraph 1 does not apply if:
  - (a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the state invoking it; or
  - (b) the State has assumed the risk of that situation occurring.

Article 26 further stipulates that *force majeure* also cannot apply where this would violate *jus cogens*. Thus, under international customary law, *force majeure* operates as a 'circumstance precluding wrongfulness' or, in other words, serves as a justification for what would otherwise be considered a wrongful act.<sup>88</sup>

Unfortunately, Mali did not present a detailed argument seeking to establish that it met all the elements of *force majeure* because of these protests. The state simply invoked the defence, emphasised the intensity of the protests, and indicated that based on the overwhelming events in the country, it did not violate human rights but, rather, 'in order to safeguard peace and *social cohesion and avoid unnecessary "problems", the government made amendments [to the 2009 text] in order to achieve consensus*'.<sup>89</sup> Claiming that it was unable to adopt the more human rights-compliant 2009 Family Code Bill because of the highly-disruptive protests, Mali asserted that

*a massive protest movement from Islamist circles against the Code halted the process .... But it is not just the pressure from Islamic organisations. Mali was faced with serious threat of social divide, the nation being torn apart and outbreak of violence, the outcome of which could be fatal for peace, harmony and social cohesion. The mobilisation of religious forces reached such a level that no act of resistance could contain it.*<sup>90</sup>

86 Responsibility of States for Internationally Wrongful Acts, General Assembly (28 January 2002) UN Doc A/RES/56/83 (2002).

87 '*Force majeure* and "fortuitous event" as circumstances precluding wrongfulness: Survey of state practice, international judicial decisions and doctrine' International Law Commission Secretariat (27 June 1977) UN Doc A/CN.4/315 (1977) 69.

88 Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) *Yearbook of the International Law Commission* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 71.

89 Defence on the Merits (n 72) 537 (emphasis in original).

90 As above (emphasis in original).

Mali was characterising the protests as ‘an irresistible force’ or ‘unforeseen event’ ‘beyond [its] control’ that made it ‘materially impossible’ to comply with its human rights obligations.

Mali does not elaborate on its argument and neither does the Court. Rather, the Court only alludes to *force majeure* as follows: ‘The Respondent State implicitly admits that the present Family Code, adopted in a situation of *force majeure*, is not consistent with the requirements of international law.’<sup>91</sup> The Court also references the applicants’ contention that the ‘threats’ posed by the protests did not justify Mali’s derogation from its human rights obligations.<sup>92</sup> Interestingly, the Court does not mention the applicants’ reliance on *Commission Nationale*<sup>93</sup> and *Amnesty International*<sup>94</sup> to support this argument.<sup>95</sup>

Given its ultimate finding supporting the violations alleged by the applicants, the African Court can only be assumed to have dismissed Mali’s argument. This dismissal supports the African Commission’s jurisprudence. Elsewhere I argue that the Court correctly decided the case in light of the high burden of proof and the general reluctance of international courts and tribunals to accept a plea of *force majeure*.<sup>96</sup> By way of summary, even if derogation were taken as permissible in the African human rights system, Mali would have faced difficulties in making a successful *force majeure* plea. Although Mali did not violate a peremptory norm, thereby foreclosing a plea of *force majeure*, it would have struggled to prove most of the elements of the plea, namely, that the protests constituted an ‘irresistible force’ or ‘unforeseen event’; that they made performance of its human rights obligations materially impossible; that the protests were not attributable to Mali’s conduct; and that the plea was timely.<sup>97</sup> Mali would have faced difficulties primarily because of the temporal requirement. Article 27(a) of the ILC Articles provides that *force majeure* is temporary. The plea cannot be invoked once the exceptional circumstance ends. For example, in *European Commission v Italian Republic* the European Court of Justice rejected Italy’s *force majeure* plea, finding that

where it is possible to attribute an act to *force majeure*, the effects of that attribution can only last a certain time, namely the time which is in fact needed in order for an administration exercising a normal

91 *APDF and IHRDA* (n 1) para 76.

92 *APDF and IHRDA* para 68.

93 *Commission Nationale* (n 27).

94 *Amnesty International* (n 29).

95 *APDF & IHRDA*, Réplique à la réponse de la République du Mali (1 February 2017) 508.

96 *Kombo* (n 3) 402-405.

97 As above.

degree of diligence to put an end to the crisis which has arisen for reasons outside its control.<sup>98</sup>

No doubt Mali would also be unlikely to succeed arguing, in response to an application filed in 2016, that protests in 2009 still constituted *force majeure*. Even if Mali were to overcome this challenge, showing material impossibility would present another obstacle. The ILC Articles emphasise that '[f]orce majeure does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'.<sup>99</sup> Along the same lines, in the *Rainbow Warrior* affair the tribunal held as follows: 'The test of [*force majeure*'s] applicability is of absolute and material impossibility, and ... a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.'<sup>100</sup> Thus, Mali would be swimming against the current since, as Paddeu contends, 'a plea of *force majeure* will be upheld only very rarely'.<sup>101</sup> This is the case even without taking into account the particularities of derogation in the African human rights system.<sup>102</sup>

### 3.3 Unrealised potential of *APDF v Mali*

While the African Court arguably correctly decided *APDF v Mali*, its decision would have enriched jurisprudence if it had weighed in on the particularities of derogation from human rights in the regional system. Although the case was also decided based on CEDAW which, like the African Charter does not have a derogation clause,<sup>103</sup> the focus here is on the African human rights instruments, and particularly the African Women's Protocol, which is a Protocol to the African Charter. It should be noted that this Protocol and the African Children's Charter similarly lack derogation clauses.

The African Court has jurisdiction to interpret derogation under the Charter and other instruments. Under its contentious jurisdiction as provided in article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), the Court has broad jurisdiction to hear 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this

98 ECJ (4 March 2010) ECR 2009 1-03491 para 48.

99 Draft Articles (n 88) 76.

100 (30 April 1990) RIAA Vol XX 215 para 77.

101 F Paddeu 'A genealogy of *force majeure* in international law' (2012) 82 *British Handbook of International Law* 494.

102 See Kombo (n 3).

103 In fact, General Recommendation 28 of CEDAW provides that '[t]he obligations of states parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters' (para 11).

Protocol and any other relevant human rights instrument ratified by the states concerned'. The Preamble to the African Court Protocol provides that the Court's mandate is to 'complement and reinforce' that of the African Commission. Nevertheless, as a judicial organ as opposed to the Commission's quasi-judicial status, the Court's decisions are binding.<sup>104</sup> Thus, in a case where it formulates an interpretation of the Charter which differs from that of the Commission, the Court's interpretation would take precedence.<sup>105</sup> This means that the African Court could make a different determination regarding derogation than that of the African Commission. However, such a step seems untenable as it would conflict with the Court's mandate to 'complement' the Commission and would create significant confusion.

The *APDF and IHRDA* case provided an opportunity for the Court to respond to the question Judge Meron posed years ago, namely, 'can an African state invoke customary law exceptions to justify derogations of the norms stated in th[e African] Charter?'<sup>106</sup> Specifically, can a state invoke *force majeure* in order to do so? Although one might wonder why the Court did not directly answer this question, rather embarking on a futile mind-reading attempt, I think it is useful to reflect on the questions that the Court might have addressed in order to more clearly identify existing gaps and ambiguities in African human rights jurisprudence. However, this should not be taken to attribute omnipotence to the African Court and the law. Critical legal studies and legal anthropology have demonstrated that the law inherently is indeterminate and often masks the political and ethical choices behind its decisions.<sup>107</sup> Going behind the mask to uncover some of these choices is essential to understanding how the law works and whether and to what extent it can be rendered a tool for the fulfilment of human rights and for justice more broadly.

The main question that the African Court could have addressed is the one posed by Judge Meron above. Answering this question

104 Art 28(2) African Court Protocol.

105 GJ Naldi 'The African Union and the regional human rights system' in Evans & Murray (n 20) 20.

106 Seminar (n 69) 373.

107 SF Moore *Law as process: An anthropological approach* (1978); D Kennedy 'The structure of Blackstone's commentaries' (1979) 28 *Buffalo Law Review* 205; JL Comaroff & S Roberts *Rules and processes: The cultural logic of dispute in an African context* (1981); RM Unger 'The Critical Legal Studies movement' (1983) 96 *Harvard Law Review* 561; F Olsen 'The myth of state intervention in the family' (1985) 18 *University of Michigan Journal of Law Reform* 835; K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; J Comaroff "'Does anthropology matter to law?'" Reflections, inflections, deflections' (2018) 2 *Journal of Legal Anthropology* 12.

would have required not only establishing the permissibility of a *force majeure* plea and the derogation it entailed, but consideration of the elements of such a plea as outlined above, namely, whether Mali made the necessary evidentiary showing, and ultimately whether the plea would be upheld. In so doing, the Court would have had to grapple with the African Commission's derogation jurisprudence and could also have drawn on the jurisprudence of other international human rights bodies.

Nevertheless, the Court would have needed to address *jus cogens* as a preliminary question. Given that derogation from such norms is not permitted, the Court would have needed to consider whether any of the alleged violations constituted violations of *jus cogens*. One of the issues at the heart of the case was discrimination on the basis of sex, which is prohibited both under article 2 of the African Charter and article 2 of the African Women's Protocol. In *Zimbabwe Human Rights NGO Forum v Zimbabwe* the African Commission noted that '[t]ogether with equality before the law and equal protection of the law, the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights'.<sup>108</sup>

However, the African Commission did not go as far as the Inter-American Court of Human Rights (Inter-American Court) which recognised the principles of equality and equal protection before the law as well as non-discrimination as *jus cogens* in its *Advisory Opinion on the Juridical Condition and the Rights of the Undocumented Migrants*.<sup>109</sup> As Contreras-Garduño and Alvarez-Rio contend, the Inter-American Court has gone further than any other regional or international court or tribunal in 'expand[ing] the content of *jus cogens*'.<sup>110</sup> This expansion challenges what might otherwise be considered an essentially Eurocentric concept.<sup>111</sup> Nevertheless, it raises questions about the competence of regional courts to elaborate global norms.<sup>112</sup>

Would the African Court go as far as the Inter-American Court and further than the African Commission by expanding *jus cogens* to include the principle of non-discrimination? In *APDF and IHRDA*

108 (2006) AHRLR 128 (ACHPR 2006) para 169.

109 IACHR (17 September 2003) ser A 18 para 101.

110 D Contreras-Garduño & I Alvarez-Rio 'A barren effort? The jurisprudence of the Inter-American Court of Human Rights on *jus cogens*' (2014) 14 *Revista do Instituto Brasileiro de Direitos Humanos* 113.

111 T de AFR Cardoso Squeff & M de Almeida Rosa '*Jus cogens*: A European concept? An emancipatory conceptual review from the Inter-American system of human rights' (2018) 15 *Revista de Direito Internacional* 130.

112 Contreras-Garduño and Alvarez-Rio (n 110) 124.

this move immediately would have invalidated Mali's *force majeure* plea because the state would have been found to have violated a peremptory norm by passing the 2011 Family Code. Along the same lines, through this case the Court would also have determined whether there are other women's and children's rights norms with peremptory status. Perhaps another case will provide such clarification.

#### 4 Conclusion

*APDF and IHRDA* is a landmark African Court decision that seeks to protect women's and children's human rights in the family, an arena that has often been viewed as private and sacrosanct. The decision nevertheless fell short of its potential to address a thorny issue in African human rights jurisprudence, namely, the issue of derogation and, specifically, whether states can resort to defences such as *force majeure* to justify the temporary suspension of human rights obligations. Mali characterised as *force majeure* the large-scale protests that erupted after its National Assembly had passed a more gender-egalitarian Family Code Bill in 2009 than the Bill ultimately signed into law in 2011. While the Court rejected this argument, it did so without elaboration.

Almost two decades ago and before the African Court had even come into being, Heyns suggested a range of options to address what he outlined as problems created by the African Charter's omitted derogation clause.<sup>113</sup> Among the most drastic possibilities was an amendment of the Charter.<sup>114</sup> Heyns wrote that '[u]ntil such time, a ruling from the Commission (or in future the Court) setting out the conditions for legitimate derogation, is called for'.<sup>115</sup> The *APDF and IHRDA* case could have been such a ruling or, alternatively, could have reinforced existing jurisprudence of the African Commission. Regardless of whether one views the absent derogation clause positively or negatively, additional clarity on its significance could only strengthen the regional human rights system. As the Court recently missed this opportunity, one can only wait to see through what other avenues such clarity might emerge.

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113 Heyns (n 26) 160-162.

114 Heyns 162.

115 As above.