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Forty years of the African Charter and the reform issues facing the discourse and practice of human rights

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Summary: *During its four decades of existence, the African Charter on Human and Peoples' Rights has become the grand human rights instrument that inspired and informed the development of norms and institutions for the promotion and protection of human rights both at the national and continental levels. Despite the normative and jurisprudential contributions of the African Charter and the standard of legitimate state behaviour that it established, currently the Charter and the African human rights system face multifaceted challenges raising questions on the relevance and legitimacy of the African Charter-based human rights system. The central message of this article is that the future and continuing credibility of human rights depend on whether and how its existing and emerging flaws are addressed. Using the insights gleaned from the human rights issues that the COVID-19 pandemic laid bare, this contribution seeks to discuss the reform issues facing the discourse and practice of human rights, in general, and that of the African Charter-based system, in particular. To do so, the article draws on a conception of reform that the late Christof Heyns expounded two decades ago. Accordingly, the areas of reform that this contribution identifies relate to changes in the priorities of focus of the discourse and practice of human rights and the approaches to the promotion and protection of human rights.*

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1 Introduction

Let me start by extending to all the colleagues, friends and participants my warm greetings on this auspicious occasion of the fortieth anniversary of the African Charter on Human and Peoples' Rights (African Charter). I also wish to thank the Centre for Human Rights, University of Pretoria, for organising this event which actually combines two in one. It is an occasion for reflecting on the four-decade journey of the African Charter. It also serves to celebrate the work of the late Prof Christof Heyns, perhaps with a particular focus on his contributions to the African human rights system.

We are marking the 40-year anniversary of the African Charter at a time when the world and Africa are witnessing developments that threaten the human rights system and in the context of the global COVID-19 pandemic. In his address to the United Nations (UN) Human Rights Council in February 2020, the Secretary-General of the UN captured the bleak state of human rights in the world as follows:¹

Human rights today face growing challenges. And no country is immune. We see civilians trapped in war-torn enclaves, starved and bombarded in clear violation of international law. Human trafficking affecting every region in the world, preying on vulnerability and despair. Women and girls enslaved, exploited and abused, denied the opportunity to make the most of their potential. Civil society activists tossed in jail, and religious and ethnic minorities persecuted, under overly broad definitions of national security. Journalists killed or harassed for seeking only to do their jobs. Minorities, indigenous people, migrants, refugees, the [lesbian, gay, bisexual, transgender and intersex] LGBTI community, vilified as the 'other' and tormented by acts of hate.

While this disturbing summary of the state of human rights in the world does not specify the factors and forces that account for these threats facing human rights, it cannot be denied that these are the manifestations of the global trends that threaten human rights at the core.

¹ UN Secretary-General Antonio Guterres 'Basic freedoms under assault, Secretary General tells Human Rights Council, launching call to revive respect for dignity, equality amid rising tensions', <https://www.un.org/press/en/2020/sgsm19985.doc.htm> (accessed 1 December 2021).

Apart from the shift in the global power relations and the adverse ramifications of 'the unravelling of the international order' owing to deepening rivalry between major powers, this also is an era that has witnessed the resurgence of nationalism and populism in many parts of the world. As Mishra pointed out,² the other global trends include the fact that

- authoritarian leaders, anti-democratic backlashes and right-wing extremism define the politics of Austria, France and the United States as well as India, Israel, Thailand, the Philippines and Turkey;
- hate-mongering against immigrants, minorities and various designated 'others' has gone mainstream; and
- the unleashing by globalisation of 'an array of unpredictable new international actors, from English and Chinese nationalists, Somali pirates, human traffickers and anonymous cyber-hackers to Boko Haram' as well as ISIS.

Not surprisingly, these global trends find expression as much in Africa as in other parts of the world, despite the specificity of the form that they take in particular contexts on the continent. We have witnessed a rise of populist authoritarianism and the use of the defence of sovereignty to deflect scrutiny for violations of rights. These developments constitute the backdrop to our consideration of the 40-year journey of the African Charter and what this journey tells one about the current situation *vis-à-vis* the current state and future trajectory of human and peoples' rights on our continent.

Against the background of the foregoing and using the lessons from the COVID-19 pandemic, this contribution seeks to discuss the reform issues facing the discourse and practice of human rights. The contribution is a means by which I wish to make a modest attempt at addressing these reform issues based on my remarks at the Centre for Human Rights event on the fortieth anniversary of the African Charter dedicated to the memory and life of the late Christof Heyns. In this contribution reform focuses mainly on what Heyns called 'changes in the practices of the Commission. It might also manifest itself in the form of new approaches being followed by those who are actually or potentially engaged in the practical implementation of the system.'³

The article consists of six parts. Following this introductory part, the second part discusses the historic contributions by and the current significance of the African Charter. This discussion helps

2 P Mishra *Age of anger: A history of the present* (2017).

3 See C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 156.

to contextualise the 40-year journey of the African Charter. The third part provides a brief analysis of the current state of human rights on the continent. Such analysis presents the human rights situation that highlights the issues of reform and necessitates our consideration of what needs to be done to limit the expanding gap between the African Charter and the actual experience of people on the continent. In part four I discuss the human rights issues that the COVID-19 pandemic has unearthed. Building on the previous part, this discussion identifies other reform issues that were made evident in the context of the COVID-19 pandemic. As a follow up to the preceding part, part 5 presents a summary of the human rights issues that the context of the COVID-19 pandemic laid bare.

2 Contributions by and current status and significance of the African Charter

In its founding and evolution, the African human rights system became more than a regional manifestation or articulation of international human rights.⁴ As the content of the African Charter and the scope of rights and freedoms it enunciated show, the system is a product of the historical, political, socio-economic and cultural experiences of the continent. This can be gathered from not only the equal legal status that it has accorded to civil and political rights and economic, social and cultural rights,⁵ but it can also be discerned from the place of honour the African Charter has vested in peoples' collective rights⁶ and its enunciation of duties of individuals.⁷

Indeed, the African Charter is more than an affirmation of human rights as abstractions of the natural attributes of the human person. Importantly, it also represents an expression of specific historical experiences and civilisations for human freedom and dignity. In this sense, at one level the African Charter is an illustration of the late Christof Heyns's theory of the struggle approach to human rights.⁸ Viewed from this perspective, the African Charter in part is an exercise

4 It is worth noting that the African Charter reiterates the OAU Charter's recognition of the UN Charter and the Universal Declaration of Human Rights. Importantly, it affirms 'that fundamental human rights stem from the attributes of human beings, which justifies their international protection'.

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

6 African Commission State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter (2018); SA Derso 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights' (2006) 6 *African Human Rights Law Journal* (2006) 333.

7 M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the concept of duties' (1995) 35 *Virginia Journal of International Law* 339.

8 CH Heyns 'A "struggle approach" to human rights' in A Soeteman (ed) *Pluralism and law* (Kluwer Academic Publishers 2001) 171.

to articulate the catalogue of rights geared towards removing the conditions of oppression that historically robbed the peoples of the continent of their humanity as Africans and continue to impede their access to the full measure of fundamental rights and freedoms. The African Charter thus gives, among others, recognition to the need to 'eliminate colonialism, neo-colonialism, apartheid, Zionism, and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinion'.⁹

One of the major achievements of the African Charter at the time of its adoption and since was the establishment of a legal regime, as part of the Organisation of African Unity (OAU) system (now the African Union (AU)), for the promotion and protection of human rights. This is significant in two major ways.

First, in making human rights matters of continental concern and, hence, not merely within the exclusive jurisdiction of states,¹⁰ it established the first paradigmatic departure in the OAU's conception of the principles of state sovereignty and non-interference.¹¹ The African Charter not only enunciated the catalogue of rights and freedoms by which state parties to the Charter consented to be legally bound, but also established a mechanism for the monitoring and implementation of the rights and freedoms and for holding states accountable.¹² The Charter thus was the first legal instrument to pierce the veil of sovereignty that excluded any scrutiny of the way in which independent African states treated people under their jurisdiction. On the historical significance of this, one of the drafters of the African Charter, the Gambian jurist Hassan Jallow remarked:¹³

The very notion of creating machinery for the promotion and protection of human rights was itself nothing less than revolutionary

9 Preamble to the African Charter.

10 African Commission on Human and Peoples' Rights and Centre for Human Rights *Celebrating the African Charter at 30: A guide to the African human rights system* (2011) 7: 'The Charter also dealt a blow to state sovereignty by emphasising that human rights violations could no longer be swept under the carpet of "internal affairs".'

11 Subsequently, with the adoption of the Constitutive Act of the African Union, this approach was encapsulated in art 4(h) of the Constitutive Act mandating intervention of the AU in its member states in cases of 'grave circumstances, namely genocide, war crimes and crimes against humanity'. For more, see SA Dersso 'The role of the African human rights system in the operationalisation of article 4(h) of the AU Constitutive Act' in D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect* (2014) 195.

12 For a more recent review of the role of the African Commission, see M Ssenyonjo 'Responding to human rights violations in Africa: Assessing the role of the African Commission and the African Court on Human and Peoples' Rights (1987-2018)' (2018) 7 *International Human Rights Law Review* 1.

13 HB Jallow *The law of the African (Banjul) Charter on Human and Peoples' Rights (1988-2006)* (2007).

in a continent where and at a time when the African states were ultra-jealous of their national sovereignty even and brooked no interference in what they regarded as their internal affairs.

Second, in embracing human rights and extending their scope and articulation, the African Charter ended the debate about the legitimacy of human rights in Africa. This is of particular importance as the African Charter opens further avenues for the recognition and articulation of human rights both at the continental and national levels. The Charter inspired the adoption of various human rights and democracy and governance norms within the OAU and its successor, the AU. This also accounts for the huge space given to human rights in the AU's founding treaty, the Constitutive Act.¹⁴ The African Charter and the various other human rights instruments that succeeded it served as a source of inspiration in the elaboration of national bills of rights and various laws giving effect to specific human rights. The African human rights system also contributed to the recognition of and the affirmation of the legitimacy of the works of civil society organisations (CSOs), human rights defenders, political opposition and the media, despite the increasing assault to which in recent years they have been subjected.¹⁵

Apart from establishing the African Commission on Human and Peoples' Rights (African Commission), the premier human rights body in the AU, the African Charter paved the way for the establishment of other human rights institutions. In 1990, under the African Charter on the Rights and Welfare of the Child (African Children's Charter), the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) was constituted dedicated to securing the rights of children. The 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights established the African Court on Human and Peoples' Rights (African Court) to complement the African Commission. While the African Commission has a wide mandate covering the monitoring, investigation and promotion of human rights, the African Court's mandate is exclusively limited to receiving and adjudicating complaints on violations of human rights. These three institutions, supported by national human

14 For an early review of the AU Constitutive Act, see K Magliveras & G Naldi 'The African Union. A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 415; for a subsequent assessment, see AM Ibrahim 'Evaluating a decade of the African Union's protection of human rights and democracy: A post-Tahrir assessment' (2012) 12 *African Human Rights Law Journal* 30.

15 The African Commission grants observer status to NGOs and it collaborates with NGOs in convening the NGO forum that is organised ahead of the ordinary session of the Commission to provide CSOs with input into the deliberations of the sessions of the Commission. Over 530 national and international CSOs enjoy observer status with the African Commission.

rights institutions and CSOs, make up the human rights bodies of the African human rights system.¹⁶ Together they have become an avenue to hear and respond to various human rights violations affecting various sectors of African citizens.¹⁷ Despite the challenges that they face and the initial doubts about whether they can hold governments accountable, first the African Commission and later the other two human rights bodies have become important sites for exposing human rights violations in African states and lending support to the human rights work of CSOs and the media and for validating the voices of victims.

While many of its promises have been honoured by breach rather than compliance, the foregoing illustrate that the African Charter has broken new ground in both the politico-legal evolution of the continent and international legal recognition of fundamental rights and freedoms. At the global level, it contributed to the enrichment of the international corpus of human rights. It did so both by giving equal legal status to civil and political rights, on the one hand, and economic and social rights, on the other, and by enshrining the collective rights of peoples and the duties of individuals. In so doing, it filled the existing gaps in the international bill of rights.

3 State of human rights in Africa

As Heyns rightly pointed out, 'the ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people'.¹⁸ In this regard, even on the surface review of the state of human rights in Africa reveals the enormous gap that exists between the promise of the human rights system and the lived experience of the overwhelming majority of the people on the continent. Notwithstanding the progress made at normative and institutional levels¹⁹ and the widespread and increasing acceptance and consciousness of the African public regarding human rights, the sources of threats to human rights and the scale and recurrence of violations continue to be increasingly disturbing.

16 See Amnesty International *The state of the African regional human rights bodies and mechanisms 2019-2020* (2020). On the role of national human rights commissions and NGOs, see N Mbelle 'The role of non-governmental organisations and national human rights institutions at the African Commission' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 289.

17 For a recent assessment on this, see Ssenyonjo (n 12) 1.

18 Heyns (n 3) 156.

19 For a recent assessment on this, see Ssenyonjo (n 12) 1.

The African continent, as other parts of the world,²⁰ has continued to witness the shrinking of the civic space.²¹ Governments have been using both legal and extra-legal measures that have inflicted a major assault on freedom of expression, freedom of association and assembly and freedom of the press. The legal regimes that governments use include the adoption of laws with requirements that limit access to foreign funds and entail cumbersome registration processes. The number of governments in Africa imposing restrictions on CSO operations has been on the rise.²²

Governments also resort to the use of 'an ever-expanding array of tools and tactics, including suspension of internet access, surveillance systems, licensing requirements, prohibitive fees, and even raids, arrests, and government violence'.²³ As some of these tactics make clear, in the context of the mobilisation by the public of the online space for exercising their rights and holding officials accountable, the manipulation of digital technology has also become a frontier for authoritarian control.

Another manifestation of the dire state of human rights in Africa is the increasing authoritarian drift of many governments on the continent. Although the trend remains uneven and stands in contrast to the rise in support for accountable and democratic systems of governance on the part of the public, Africa is also witnessing a regression in democratic governance. The 2020 Mo Ibrahim African Governance Index finds that over the past decade 20 countries, home to 41,9 per cent of Africa's population, have experienced declines in indicators that measure security and the rule of law (-0,7) and participation, rights and inclusion (-1.4).²⁴ In North Africa the gains achieved due to the 2010/2011 popular uprisings have largely been reversed and the region is experiencing the resurgence of repressive authoritarianism. Other countries that have experienced this slide to authoritarianism include Tanzania, Uganda, Kenya and Ethiopia in East Africa; Zimbabwe and Zambia in Southern Africa; Benin, Guinea, Senegal and Togo in West Africa; and Cameroon, Chad and

20 J Bossuyt & M Ronceray *Claiming back civic space: Towards approaches fit for the 2020s* (2020).

21 D Kobe 'Civic space restrictions in Africa: Conflict trends' 2018/1 (ACCORD), <https://www.accord.org.za/conflict-trends/civic-space-restrictions-in-africa/> (accessed 1 December 2021).

22 H Smidt 'Shrinking the civic in Africa: When governments crack down on civil society' November 2018, <https://www.giga-hamburg.de/en/publications/11568057-shrinking-civic-space-africa-when-governments-crack-down-civil-society/> (accessed 1 December 2021).

23 C Logan & P Penar 'Are Africans' freedoms slipping away?' Afrobarometer Policy Paper 55 (2019) 23.

24 2020 Mo Ibrahim African Governance Index.

the Democratic Republic of the Congo (DRC) in the Central Africa region.

The prevalence of what political scientists call 'constitutional *coup*'²⁵ has deepened the regression of the democratisation process in Africa. There are more states in Africa that experienced the removal of constitutional limits on the terms of office of presidents than those that uphold the two-term limit. Additionally, the continent has witnessed three instances of military seizure of power in less than half a year during 2021. These developments have raised concerns that the progress registered to end military *coups* is facing reversals.²⁶

The vast majority of the people of the continent lead a life that is stripped of the essential conditions for a dignified life worthy of a human being. In 2020 the number of people living in extreme poverty on the continent jumped to over half a billion. What this means is that some 520 million people live with no or a very low level of income, having no resources necessary to meet basic needs.²⁷ Apart from living in places susceptible to violence and crime and with no social services and hygiene, they suffer from ill-health, a lack of social capital and severe material deprivations.²⁸

The deepening sense of despair engulfing the unemployed and the youth of the continent has become further compounded. In the face of non-existent and declining economic opportunities and deepening inequalities, the democratic governance deficit is heightening the restlessness of the majority of the youthful population of the continent. Not surprisingly, rather than the human rights system, protests and riots have become the preferred avenues for expressing the discontent of the public powered by youth mobilisation and new technology. More gravely, despite the death of nearly 20 000 migrants between 2014 and 2018²⁹ 'turning the Mediterranean Sea into a graveyard',³⁰ an increasing number of people, desperate to find better lives elsewhere, continue to embark on the perilous

25 See AMBM Mangu 'South Africa's contribution to constitutionalism, rule of law and democracy' in AMBM Mangu (ed) *Regional integration in Africa: What role for South Africa?* (2020) 15.

26 <https://amaniafrica-et.org/critical-reflections-on-the-challenges-to-and-means-of-strengthening-the-au-norm-banning-unconstitutional-changes-of-governments-ucg/> (accessed 1 December 2021).

27 For details on the manifestations of poverty, see B Gweshengwe & NH Hassan 'Defining the characteristics of poverty and their implications for poverty analysis' (2020) 6 *Cogent Social Sciences* 1768669.

28 As above.

29 <https://www.infomigrants.net/en/post/23295/over-20-000-migrant-deaths-in-mediterranean-since-2014-iom> (accessed 1 December 2021).

30 <https://www.infomigrants.net/en/post/22931/europe-has-turned-mediterranean-into-migrant-graveyard-ngo-president-claims> (accessed 1 December 2021).

journey across the Sahara for crossing the Mediterranean Sea into Europe. Others hand themselves over to smugglers in the Horn of Africa and Sinai for being thrown onto dangerous boats crossing the Red Sea to Gulf countries and Israel.

Twenty years ago Heyns observed that ‘the level of human rights violations in Africa constitutes a problem of immense magnitude, and that the African Charter system has to date made a far from satisfactory impact in redressing the situation’.³¹ As the foregoing review of the current state of human rights on the continent attests to, the situation has deteriorated from bad to worse since Heyns made these observations. The state of human rights on the continent has increasingly become more concerning today than 20 years ago. This, among others, raises questions about the performance of the African human rights system. The gaps that the foregoing challenges to human rights reveal between the promise of the African Charter and the lived realities of the majority of people on the continent can further erode the already precarious public confidence in human rights, in general, and the African regional system, in particular.

4 Human rights issues that COVID-19 laid bare

The gravity of this risk of further erosion of confidence in human rights has become prominently evident with the advent of the COVID-19 pandemic. Not surprisingly, COVID-19 not only exacerbated existing human rights issues but also triggered the emergence of additional human rights issues. In terms of the picture that emerges in Africa, our analysis of the African human rights system, as gathered from the monitoring work of the African Commission and the various reports the Commission received, shows that COVID-19 relates to five broad issues of human rights.³²

First, COVID-19 of and in itself is a human rights issue. The morbidity and mortality that the pandemic precipitates pose the most serious threat to fundamental human rights, most notably the right to health, the right to personal safety and the right to life. It is a human rights necessity that states in pursuit of discharging their human rights obligations under article 1 of the African Charter, the founding treaty of the African human rights system, take appropriate measures for safeguarding the public from the threat that this pandemic poses

31 Heyns (n 3) 156.

32 See Press Conference of the Chairperson of the African Commission on Human and Peoples’ Rights, <https://au.int/en/pressreleases/20200815/press-briefing-chairperson-achpr> (accessed 1 December 2021).

to health, safety and life. The implication of this is that the state would be responsible where severe sickness and death result from the failure of governments to take the necessary measures within the confines of human rights standards in emergency situations.

The Commission issued the first statement highlighting these points on 28 February 2020 at a time when only a handful of cases in a few countries were reported and before COVID-19 was declared a pandemic by the World Health Organisation (WHO).³³ Considering the weak state of the health systems of many state parties to the African Charter and the lack of preparedness for such contingencies,³⁴ we put particular emphasis on prevention measures, including with an emphasis on the right of access to information on the pandemic.

Second, the vulnerabilities, structural deficiencies and inequalities that COVID-19 brought to the fore are also products of governance and policy failures in implementing human rights commitments.³⁵ In particular, they highlight the neglect by the social and economic policies of our societies as well as by the human rights system of the centrality of socio-economic rights. This is reflected in the lack of due regard to human development in the gross domestic product (GDP) growth-driven economic policies of countries on the continent and the resultant gap between GDP growth and the pervasive socio-economic deprivations on the continent.

These conditions of widespread vulnerabilities arise from the failure of states *vis-à-vis* the provision of access to socio-economic rights. This failure is a result of

- major gaps in the social and economic policy of our states and the resultant lack of investment in access to health care, social security, water, sanitation, education, housing and sustainable employment;
- the perpetuation of the legacies of colonialism and apartheid;

33 According to Amnesty International, the African Commission was the first international body to issue a statement providing legal guidance on COVID-19 and human rights.

34 The African Commission in this respect noted that '[m]ost African states lack a pandemic response and management strategy and plan, thereby forced to resort to ad hoc approaches with a great deal of experimentation and improvisation but often leading to a state centric approach lacking the benefit of public participation and community engagement', <https://au.int/en/pressreleases/20200815/press-briefing-chairperson-achpr> (accessed 1 December 2021).

35 SA Derso 'In the face of the pandemic human rights are a necessity' *Mail and Guardian* 3 April 2020, <https://mg.co.za/article/2020-04-03-in-the-face-of-the-pandemic-human-rights-are-a-necessity-not-a-luxury/> (accessed 1 December 2021).

- the nature of the structure of our economies' dependence on the export of limited raw materials; and
- the economic development paradigm that our countries follow and the global financial and economic system champions and dictates on African countries.

In other words, the vulnerabilities of our societies that COVID-19 revealed are products of current and recent past wrong policy choices and governance failures on the part of our political and economic systems.

This state of affairs, facilitated by the weaknesses of the structure of the economies of many countries on the continent and the commodification of access to socio-economic rights due to the dominant neo-liberal economic policy prescriptions,³⁶ has left those without access to these basic necessities without even the most basic means of protection to the threats of COVID-19 such as hand washing and social distancing. Under these conditions, even those who thought of themselves as being capable of fending for themselves by buying from the market have found themselves unprotected from COVID-19. After all, for pandemics such as COVID-19 and similar threats to public health, it is the existence of public health provisions rather than market-based options that create the minimum conditions for the protection of all.

For us in the African human rights system, this has highlighted two concerns. The first is the existence of a gaping hole in the socio-economic systems and the governance of the state parties to the African Charter. The second is the pervasiveness and gravity of the deprivation of socio-economic rights, which are central not only to the well-being of individuals and communities but also for the safety of our societies as a whole.

Third, despite the necessity for adopting measures for addressing the pandemic, which by their nature may necessitate a restriction of rights, COVID-19 response measures have also given rise to a wide range of human rights problems.³⁷ First, some of the measures

36 In a statement delivered during the 68th ordinary session of the African Commission, ISER pointed out that 'the unregulated expansion of private actors – particularly when they exist in lieu of public options – have been detrimental to the accessibility of health care for vulnerable populations', https://www.iser-uganda.org/images/downloads/ISER_Oral_Statement_to_the_68th_ACHPR_Ordinary_Session.pdf (accessed 1 December 2021).

37 M Segun 'Human rights abuses escalate in Africa during the pandemic' *Business Day* 18 January 2021, <https://www.businesslive.co.za/bd/opinion/2021-01-18-human-rights-abuses-escalate-in-africa-during-the-pandemic/> (accessed 1 December 2021).

adopted by their very nature happen to be not in line with established human rights principles, including, most notably, that of precaution, necessity, proportionality and legality.³⁸ Second, heavy securitisation of the approach for enforcing COVID-19 regulations and the disruption that the regulations caused to access to basic necessities, particularly for the most vulnerable among us, have led to a major increase in violations and in people being deprived of their rights.³⁹

It was in appreciation and anticipation of these plethora of human rights issues (arising from COVID-19 regulations and their enforcement) that the African Commission issued a comprehensive statement on a human rights-based effective response to COVID-19 in Africa on 24 March 2020. The statement, which is divided into 12 operative sections, outlines the human rights principles and standards that state parties to the African Charter and other applicable treaties, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) are expected to follow in designing and implementing their COVID-19 response regulations.

Fourth, it has become clear that the unprecedented nature of the impact of COVID-19 not only on health but also other areas of life means that this pandemic is not a temporary event that will easily pass in a short time. Most notably, the socio-economic and humanitarian fall-out of COVID-19 is widespread and severe. For us, the African Commission, this is perhaps one of the most serious and more enduring challenges that can have catastrophic human rights consequences as tens of millions are pushed into extreme poverty and many others face hunger and starvation. It was in recognition of this that the author and the UN High Commissioner for Human Rights issued a joint statement on 20 May 2020.⁴⁰

Fifth and finally, despite the fact that COVID-19 threatens everyone irrespective of ethnicity, race, gender, social status or any similar basis of difference, the impact of both the virus and the measures instituted for its containment do not affect everyone equally. Given that some people are more vulnerable to the shocks of emergencies on account of intersectionality,⁴¹ they are impacted by the pandemic

38 See the 66th ordinary session of the African Commission dedicated to human rights and the COVID-19 pandemic, <https://au.int/sw/node/39107> (accessed 1 December 2021).

39 As above.

40 'We must act now to avoid catastrophe, say rights chiefs', <https://www.achpr.org/pressrelease/detail?id=505> (accessed 1 December 2021).

41 For an analysis of intersectionality and COVID-19, see K Theidon 'A forecasted failure: Intersectionality, COVID-19, and the perfect storm' (2020) 19 *Journal of Human Rights* 528.

much more than other members of society.⁴² People most affected in Africa include persons with underlying health conditions, the poor, women, internally-displaced persons (IDPs), people in places of detention, asylum seekers, refugees, migrants, persons with disabilities, older persons, minorities and people with precarious employment.

5 Lessons from COVID-19 on the limits of the human rights system

There are a number of observations that emerge from COVID-19's major human rights issues for the human rights system in general. Certainly, COVID19 – in the way it both laid bare the fallacies and falsehoods, to borrow from Secretary-General Antonio Guterres's 18 July 2020 Nelson Mandela lecture,⁴³ in the narrative of progress and development and brought to the fore the vulnerabilities and inequalities that pervade our societies and the deficiencies of our systems of governance and economic development paradigm – has also highlighted the existing gaps and failures of human rights.

It can be said that COVID-19 has presented the foremost challenge to and revealed the shortfalls of the entire human rights movement. Indeed, the pandemic has become an indictment of our human rights work. As the president of Open Society Foundation rightly pointed out, 'the traditional models of advancing democratic values and institutions (human rights) are struggling'.⁴⁴ The human rights movement has generally focused on making its trademark feature of loud reaction to events rather than on proactive action for addressing the structural issues that make those events possible. The seriousness of the limits of this has now become evident for all to recognise, a silver lining from the pandemic.

Viewed through the prism of so-called three generations of rights, COVID-19 has demonstrated the continuing marginalisation and neglect of socio-economic rights. Despite the normative position of the interdependence and indivisibility of rights, in practice civil

42 LJ Wallace et al 'COVID-19 in sub-Saharan Africa: Impacts on vulnerable populations and sustaining home-grown solutions' (2020) 111 *Canadian Journal of Public Health* 649-653.

43 <https://www.un.org/sg/en/content/sg/speeches/2020-07-18/remarks-nelson-mandela-lecture-tackling-the-inequality-pandemic-new-social-contract-for-new-era> (accessed 1 December 2021).

44 M Malloch-Brown 'The fight for open societies begins again' Project Syndicate 7 July 2021, <https://www.project-syndicate.org/commentary/renewing-the-fight-for-democracy-human-rights-open-societies-by-mark-malloch-brown-2021-07> (accessed 1 December 2021).

and political rights continue to dominate much of the practice and discourse of human rights.⁴⁵ Human rights actors, both in their advocacy and in their legal analysis, have not adequately problematised the lack of access to water, sanitation, health care, education, food, and so forth as manifestations of deprivation of socio-economic rights deserving of corrective measures through policy measures and remedial legal actions. The result is that these deprivations have been left barely attended to.

COVID-19 has exposed not only the pervasiveness of socio-economic rights deprivation on the continent but also the consequences of such deprivation both on those affected by such lack of access and on society as a whole. Indeed, with this pandemic it has become clear that water, sanitation, health care, housing and education are fundamental rights to which everyone should have access not only because these rights are a prerequisite to live a life of dignity as human beings, but also because access to these rights by all is a condition for the safety and health of all. Malloch-Brown notes that

many view the renewed attention to deep-seated institutional racism in the United States and around the world – and the recognition that marginalisation based on race, gender, religion, and class is often mutually reinforcing – as exposing the limits of a human rights agenda. Human rights remedies, victims argue, have scratched the surface, not reached the roots.

The other limitation of the human rights system is its bias towards the judicialisation of rights issues. There is no doubt that legal methods and processes are important, but the heavy reliance on legal instruments is not without its problems. Indeed, as Albie Sachs J of the South African Constitutional Court pointed out, the result of such judicialisation is that '[t]he social processes and cultural and institutional systems responsible for the violations remain (or are left) uninvestigated'.⁴⁶ As such, both the diagnosis of the human rights violations and the remedial measures tend to be utmost partial. Indeed, such an approach allows the continuation of the broader conditions that made the perpetration of the violation possible, thereby making the recurrence of violations almost inevitable.

There is also the question of individualisation of violations of human rights and the related tendency of treating violations in isolation from

45 The number and nature of human rights cases with the African Commission and the African Court show that those relating to socio-economic rights remain very few and far between. Cases relating to civil and political rights remain the mainstay of the human rights system.

46 Malloch-Brown (n 44).

and without taking adequate account of the context that have led to such violations. This manifests in the continuing impact of the liberal tradition's bias towards individualism. While this is reflected in terms of the way in which human rights mechanisms are wired, including such as regarding procedural requirements, during the last two decades it found its expression in international criminal justice that is anchored on the Rome Statute of the International Criminal Court (ICC). Here one observes the tendency to individualise responsibility for large-scale violations of human rights and mass atrocities to individual criminal accountability. As such, blame is apportioned and punishment is imposed principally on an individualised way.

Adding to the list, Malloch-Brown highlighted another major flaw in human rights that needs to be addressed urgently. He pointed out that '[w]hereas strong states were the sole or leading human-rights violators during the Cold War, today's world is one of multidimensional human rights menaces'.⁴⁷ Explaining this point further, he notes that '[i]nequalities, exacerbated by unregulated transnational financial and corporate power, together with dramatic shifts in individual states' fortunes, are creating an ever more challenging landscape. The world is becoming more unequal – and angrier.⁴⁸ The result of this is that the scope of authority of the state, which bears the principal obligation under human rights law, have witnessed an increasing decline, and with it the efficacy of a human rights approach premised exclusively on the primacy of the state.

From the African perspective, an equally important gap in the practice and discourse of human rights is the poor attention that is given to the ways in which Africa's place in the global power architecture and, importantly, its economic relations on the international plane affects the policy space of African states and the development of an effective legal, policy and institutional framework for the promotion and protection of human rights. In stating in the Preamble that the peoples of Africa 'are still struggling for their dignity and genuine independence', the African Charter is expressing its recognition of, among others, the adverse impact from the unjust power arrangement of the international system. It thus affirmed that 'it is henceforth essential to pay particular attention to development ... and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'. These preambular statements and the substantive rights, in particular

47 <https://www.project-syndicate.org/commentary/renewing-the-fight-for-democracy-human-rights-open-societies-by-mark-malloch-brown-2021-07> (accessed 1 December 2021).

48 As above.

the collective rights of peoples, expand the conception of injustice undermining the full enjoyment of human rights to encompass the ways in which the international system frustrates the rights of peoples to freely determine their economic and social development according to the policy they have freely chosen as envisaged in article 20 of the African Charter.

This moment presents us with an invitation to rethink both the approach of the human rights movement and its priority issues of concern. There is a need to expand the approach to human rights work beyond court litigation and reactive expressions of outrage. Equally important is prioritising the focus on the promotion and fulfillment of socio-economic rights.

Will the human rights movement recognise the limitations and weaknesses that this pandemic has highlighted? Will it recognise that what COVID-19 represents is a qualitatively unprecedented challenge, which in part is attributable to the human rights issues long neglected? Will the opportunity it affords the human rights system for changing course be seized?

The choice before the human rights system is stark – continue in a business-as-usual fashion and face irrelevance in the effort to overcome the structural conditions of oppression affecting the vast majority of people in the world? Or reprioritise its focus, its approach and sense of urgency to deal with the human rights issues which, in the context of COVID-19, have become the defining human rights issues of our time: massive poverty, widening inequality, gender oppression, racism, the democratic governance crisis and the climate emergency?

6 Conclusion

As the foregoing parts reveal, despite the significant contribution of the African Charter, mainly at the normative and institutional levels, in practice the impact of the African human rights system in ensuring the enjoyment of rights by ordinary people leaves a lot to be desired. Most significantly, the contemporary state of human rights raises even more serious questions about both the implementation gap and the legitimacy crisis that the rising disregard of the rights in the Charter creates to the African human rights system.

In light of these issues and the plethora of both structural and commitment challenges facing human rights, Malloch-Brown was on mark that there is a need 'to address the challenges people actually

face, looking beyond narrow political rights to address the deeper causes of economic and social exclusion'. This will be the key factor that will determine whether the faith of people in human rights will deepen or suffer further erosion in the years to come.

Over the course of the past many years, Africa's economic growth performance has been hailed, giving rise to the 'Africa rising' narrative. While there is no doubt about the GDP growth which a large number of African countries registered over the years, this has been a growth that has not changed the lot of the masses of people on the continent languishing in poverty.

Indeed, the COVID-19 pandemic has exposed the hollowness of this growth narrative, the pervasive fragilities of the economies of the continent and the deep inequalities that pervade most African societies. The arrival of COVID-19 laid bare the pervasiveness of poverty, the lack of social protection, limited access to water and poor sanitation, instability and conflict, expanding environmental degradation and a lack of access to basic health care and decent housing.

Both the structural vulnerabilities and the new emerging challenges that COVID-19 has triggered necessitate that we probe and put on trial the nature of our social and economic systems of governance and, indeed, the model economic development prevalent on the continent.

These conditions necessitate that we rethink the focus or target of our economic development efforts. There is a need for a shift from economic development, of which the primary focus is on securing GDP growth irrespective of its contribution to the improvement in the standard of living of people, to one that focuses on human development.

We need to change the policy orientation in which socio-economic rights are marginalised. We need to change the policy orientation leading to the commodification of access to socio-economic rights, removing the prospect of fulfilment of these rights for the poor and most vulnerable.

From the dusts of COVID-19, we need to articulate and develop a social and economic development policy that invests in socio-economic rights, that affirms these rights and their public funding as collective public good and as fundamental rights.

The articulation as central policy issues of social and political governance of social and economic services as essential public goods for which the access by all the state bears primary responsibility is not only a human rights necessity but also an imperative for the collective well-being and safety of all. This underscores the fact that public services are essential not only for those who depend on such services for leading a life of dignity befitting a human being, but also for those who may afford to access some of these services that may be available from private options. This is because, as COVID-19 demonstrated, the safety of the 'haves' and the 'have nots' is inseparably tied such that the safety of one cannot be assured if there is no minimum guarantee for the safety of the other. Public services that make access to socio-economic rights for all possible are the essential goods that provide that minimum guarantee necessary for the safety of all members of society.

Such social and economic development policy that affirms socio-economic rights as fundamental rights and as fundamental public goods demands that we revisit the role of the state. The rights enshrined in the African Charter demand and require a highly-capable and accountable state. These rights demand a state that has the policy space to make policy choices for crafting a development path that tackles the socio-economic and ecological vulnerabilities of our societies, the gendered and generational inequalities and racism that affect our people within and outside of the continent. The role of the state is not simply to create the space but also to facilitate the mobilisation and deployment of the required resources for the provision of the required public services through a public option that complies with the requirements of applicable human rights principles, including non-discrimination.

The human rights practice and discourse also need to articulate and reformulate gaps in social and economic policies and in the social, political and economic systems of governance that fail to address the socio-economic needs of those without access to social services as manifestations of violations of socio-economic rights for which states can be held accountable. Indeed, the continued relevance of the human rights movement depends, among others, on how it frames socio-economic deprivations as fundamental human rights issues and initiates and mobilises effective responses to remedy these not only through judicial action but also the promotion of policy and institutional changes.

In terms of approach as well, the heavy reliance on legal technics and skills needs to be expanded to include and draw on the expertise and role of other areas of expertise. For example, in the areas of

social and economic sectors, human rights groups should work with and establish processes and partnerships with development economists. This should also involve working with experts in the financial sector and investment experts for pushing against the rush of our developing countries to the bottom in a context in which the existing policy space and regulatory environment is already undermining the provision of secure services and the protection of the rights of the most vulnerable.

A further area that is deserving of higher attention is addressing the challenge of the financialisation and commodification of as well as irresponsible underfunding of the affordable provision of essential social and economic services. On this one can draw on the work of the various UN special mechanism holders relating to water and sanitation, education, and so forth. A good example of that is the report of the UN Special Rapporteur on the Right to Safe Drinking Water and Sanitation.⁴⁹

49 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/193/94/PDF/N2119394.pdf?OpenElement> (accessed 1 December 2021).