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For further information, see 'Guidelines for Contributors' after the last contribution in this *Journal*. Also see <http://www.ahrlj.up.ac.za/submissions> for detailed style guidelines.

Editorial

Special focus

This edition of the *African Human Rights Law Journal* starts with a 'Special focus' on the 'Forty years of the African Charter on Human and Peoples' Rights: Honouring the memory of Christof Heyns'. The African Charter on Human and Peoples' Rights (African Charter) was adopted by the OAU Assembly of Heads of State and Government in Nairobi, Kenya, on 27 June 1981 – forty years ago in 2021. The 'special focus' marks this milestone. It also pays tribute to a baobab on the landscape of international human rights law, Professor Christof Heyns.

The special focus brings together eight papers delivered at a conference organised by the Centre for Human Rights (Centre), Faculty of Law, University of Pretoria (UP), in collaboration with the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). These papers were later converted into articles, peer-reviewed and are published here. The Conference, with the theme '40 years of the African Charter: Honouring the memory of Christof Heyns', took place virtually on 2 July 2021. Professor Christof Heyns, a previous Director of the Centre and Dean of the Faculty of Law, University of Pretoria (UP), was recognised internationally for his influential role as Special Rapporteur on extrajudicial, summary or arbitrary executions, and member of the UN Human Rights Committee. He passed away unexpectedly on 28 March 2021, aged 62. At the time of his passing, he was the Director of the Institute for International and Comparative Law in Africa (ICLA), at UP. His death was a great loss to international human rights law and the associated community of scholars and practitioners. Christof was a beloved friend and an inspirational colleague to many. Although he is sorely missed, his legacy lives on – also in this issue of the *African Human Rights Law Journal*.

Christof left a lasting footprint on the African regional human rights landscape. His legacy encompasses multiple elements. He was pivotal in establishing the Master's degree programme in Human Rights and Democratisation in Africa (HRDA) at the Centre. This programme has since 2000 grown into a flagship academic programme with continental reach, shaping African human rights professionals to be agents for social change. Christof contributed to human rights education through his unyielding advocacy of moot court competitions, including the African Human Rights Moot Court Competition. The African Moot is aimed at giving exposure to the African Charter and the jurisprudence of the African Commission and the African Court. Christof cultivated scholarship on the African regional system. He did so as co-founding editor of the *African Human Rights Journal*, published since 2001. The *Journal* is the first and still the only *journal* devoted to human rights in an African setting, with a pride of place given to the African regional system. His research and writing on the impact of human rights treaties also has relevance for Africa. Christof has on several occasions served as technical adviser on human rights to the African Commission, in particular, in developing its influential General Comment 3 on the Right to Life. In its 'Statement on the passing of Prof Christof Heyns', the African Commission acknowledged the 'large number of publications in leading academic journals on the work of the African Commission' from his pen, and its impact in 'making the African human rights system known to the world'.

Twenty years ago, in March 2001, the Centre for Human Rights organised a conference with the title 'The future of the African regional human rights system' to reflect on the achievements of the system and the need for reform to further human rights on the African continent. This conference took place at the 20-year mark since the adoption of the African Charter. At the time, Christof was the director of the Centre. Papers from the conference were published in the second issue of the then newly launched *African Human Rights Law Journal*. Christof was also the author of a seminal paper, 'The African regional human rights system: In need of reform?', delivered at the conference and published in that issue. In the article, Christof noted that engaging in debates about reform of the African regional human rights system 'is to exercise a form of ownership, and to say that since the Charter belongs to all of us, it is up to us to continuously ensure its improvement.' In the 20 years thereafter, the Centre, Christof, and the *Journal* continued their various levels of 'engagement' with the Charter, specifically, and the African regional human rights system, more broadly.

The first of the eight articles in the Special Focus is penned by Solomon Dersso, who at the time the conference took place was the Chairperson of the African Commission. Solomon Dersso is also a 2003 graduate of the HRDA programme that Christof initiated. His contribution 'Forty years of the African Charter and the reform issues facing the discourse and practice of human rights', sets the tone for the discussions in the 'special focus', and contextualises the need for ongoing reform against the background of the COVID-19 pandemic. Okafor and Dzah add their voices to the growing scholarly literature to draw attention – and critically examine – the innovative normative inflections that the Charter brought ('The African human rights system as "norm leader": Three case studies'). They discuss three innovative features of the Charter: the right to remedial secession (on the basis of self-determination); development as a right; and the inclusion of a justiciable right to development.

Rudman shifts the focus to the African Court, which was added to the African human rights system to complement the work of the Commission in 2006. The year 2021 therefore also represented 15 years since the first 11 Judges were elected to this Court, in 2006. One of the major innovations in the Protocol to the African Charter on the Establishment of an African Court (Court Protocol) is the extensive material jurisdiction of the Court, which under article 3(1) of the Protocol includes non-AU treaties ratified by states before the Court. In her contribution ('The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights'), Rudman shows that the fear of the Charter being relegated to 'just one treaty among many' – an apprehension shared by Christof in his 2001 article – was misplaced.

Orao and Durojaye review thematic issues that are at the heart of the Charter in their articles. Orao links the right to life and freedom of assembly ('Protecting the right to life during assemblies: Legal and jurisprudential developments in the African human rights system'), in the process drawing attention to two of the themes defining of Christof's work within the UN. Durojaye elaborates on the role of the African Commission in providing an autochthonous interpretation of one of the socio-economic rights in the Charter, the right to health ('An analysis of the contribution of the African human rights system to the understanding of the right to health'). He also underlines the importance of prioritising the social determinants of health in the ongoing interpretation of this right.

Since the adoption of the Charter in 1981, significant normative expansion has taken place, taking the form of three Protocols to the African Charter. One of these is the 2016 Protocol on the Rights of Older Persons in Africa. Although requiring only 15 ratifications for its entry into force, this Protocol is still far from becoming operational. With reference to the COVID-19 pandemic, Oamen and Ekhatior show the disproportionate impact of COVID-19 on the lives of older person, affecting for example their rights to social security, health and equality. On this basis, they call for the increased acceptance of this Protocol by state parties to the Charter ('The impact of COVID-19 on the socio-economic rights of older persons in Africa: The urgency of operationalising the Protocol on the Rights of Older Persons').

The two final contributions in the 'special focus' part of this edition deal with the reparations and post-reparations phases, respectively. Sánchez interrogates the 'right to reparations' in the jurisprudence of the African Court ('The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: A comparative analysis on account of the revised Rules of Court'), while Murray and Long investigate the African Commission's actual and potential role in the implementation of its decisions ('Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?'). While the Commission has over the last decade or so taken a variety of measures to monitor the implementation of its own decisions, Murray and Long argue that these actions are disparate and lack strategic direction and being institutionally embedded.

Articles

The second part of this issue of the *Journal* consists of 15 articles and a discussion of recent developments pertaining to human rights in Africa.

The first two articles are devoted to issues of general and continent-wide relevance. Analysing the 'business and human rights' and 'corporate social responsibility' approaches against the background of the UN Guiding Principles of Business and Human Rights, Amodu highlights the shared objectives of these two approaches, and calls for the development of an integrated victim-centred accountability remedial framework.

Although the impact on Africa of the COVID-19 pandemic has been relatively contained, as in other parts of the world it did highlight inequality, and placed in stark relief pre-existing governance

challenges. Taking a continental view, Agaba shows how COVID-19 was being exploited to clamp down on opposition politics, and charts the economic implication of the misuse of funds dedicated to curb the effect of COVID-19.

Two contributions are comparative in nature, both involving South Africa and another African country.

Jordaan compares the performance of Rwanda, an 'authoritarian state', and South Africa, a 'liberal democracy', during their tenure as members of the United Nations Human Rights Council. He shows that between 2017 and 2019 Rwanda took positions more supportive of human rights than South Africa did and concludes that this finding contradicts the expected correlation between human rights adherence at the domestic and international levels. Rosenberg draws insights about the best approach to curbing unsafe infant abandonment from a comparison of the mechanism in place in Namibia and South Africa, and concludes that South Africa should urgently introduce 'baby savers' and 'baby safe havens' to prevent the death of abandoned infants. This comparison is particularly apt, since Namibia initially (as South West Africa) adopted the laws of its colonial neighbour, from which it has since departed.

The remaining articles all consider particular aspects of human rights in so far as they relate to specific African countries. Following the Khartoum Agreement between the government and armed groups in 2019, the issue of transitional justice in Central African Republic (CAR) is being debated. Sadiki considers various alternatives to transitional justice in the CAR and concludes that, wherever a combination of options is adopted, the overall capacity of the state has to be significantly buttressed. Buzard analyses ethnocentric nationality in the Democratic Republic of the Congo by assessing the tie between birth-right citizenship and ethnicity to three international human rights treaties to which the state has committed itself. He argues that this apparent violation is actionable under the DRC Constitution, which accords to international treaties a status superior to that of domestic law.

The Constitution of Ethiopia (in article 43(3)) contains a right to sustainable development. Acknowledging that the provision is unclear, Mekonnen expands on his understanding of the right holders and duty bearers, as well as the justiciability and binding nature of the right. The author concludes that the government has a 'soft constitutional obligation' to protect national development-related interests, starting with adopting policy and legislative measures that protect 'development-related national interests'.

As is often the case in this *Journal*, a number of contributions deal with human rights in Nigeria. Adegbite argues that Nigerian abortion laws should be rethought to account for the prevalence of sexual violence, an issue that has been foregrounded by the heightened prevalence of rape by Boko Haram insurgents. She argues that an expansive approach of the phrase 'preservation of the mother's life' be adopted to also take into account the psychological and social well-being of pregnant women. Adeyemo considers the right of victims of core international crimes in Nigeria to reparation. The author critically examines the latest legislative attempt to domesticate the Rome Statute, and recommends that the Bill be reviewed to provide more comprehensive reparation to potential victims of international crimes. In their contribution, Oamen and Erhagbe argue that international cooperation and assistance can and should complement (and not substitute) the Nigerian government's efforts to ameliorate the impact of climate change on economic and social rights realisation in Nigeria. Article 12 of the International Covenant on Economic, Social and Cultural Rights provides for the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Olumese interrogates the impact of this provision on health care in Nigeria, and calls for judicial interpretations foregrounding the connection between the right to health and the right to life.

Two contributions concern South Africa. The first concerns a decision by the Gauteng Division of the South African High Court in a case concerning Grace Mugabe. The Court decided that Grace Mugabe was not entitled to derivative immunity, on the basis that her husband (President Robert Mugabe) would not have enjoyed personal immunity under the same circumstances. Disagreeing with the Court's finding, Dyani-Mhango contends that South African law recognises absolute personal immunity for incumbent foreign heads of state in respect of all crimes committed in South Africa, except international crimes. In another article and against the backdrop of the lockdown due to the COVID-19 pandemic, Eloff analyses the rationality test in South African constitutional litigation with reference to three decided cases (one by the Supreme Court of Appeal and two by the Gauteng Division of the High Court).

Uganda is the area of focus of the last two authors. Deriving from the Ugandan Constitution what he coins the right to 'unlove', Kabumba makes the case that no-fault divorce is in line with the Ugandan Constitution. He argues that fault-based divorce violates constitutional rights, such as the right to privacy and the rights of women and children, and that it is not justifiable under article 43 of the Constitution. He recommends that 'the law should let human being be human'. Namwase examines the role of public interest litigation and structural interdicts to secure law reforms related to the use of force in the context of police militarisation in Uganda. This article focuses on the right to life, which has been one of Christof Heyns' abiding professional and scholarly concerns.

In the section on 'recent developments', Makunya provides an overview, identifies trends and draws lessons from of the 55 decisions delivered by the African Court in 2002. In particular he notes the Court's position, manifest in its multiple findings on election-related human rights violations, against 'manipulations of electoral and constitutional norms to consolidate personal rule'.

Our sincere appreciation and thanks go to all who have been involved in making the *AHRLJ* the quality and well-regarded journal it has become since its establishment in 2001, especially as anonymous reviewers. For this particular issue, we extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights: Ernest Yaw Ako; Jean Allain; Evelyne Asaala; Zemelak Ayele; Victor Ayeni; Seun Bakare; Gina Bekker; David Bilchitz; Yonas Birmeta; Amanda Boniface; Martha Bradley; Lydia Chibwe; Danwood Chirwa; Kobina Daniel; Ebenezer Durojaye; Eghosa Ekhatior; Omotunde Enigbokan; Oludayo Fagbemi; Charles Fombad; James Fowkes; Charlemaine Hüsselmann; John-Mark Iyi; Ademola Jegede; Matilda Lasseko-Phooko; Sandra Liebenberg; Roopanand Mahadew; Trésor Makunya; Stuart Maslen; Nelson Mbu; Gladys Mirugi-Mukundi; Tom Mulisa; Jan Mutton; Robert Nanima; Maria Nassali; Carol Ngang; Mwiza Nkatha; James Nkuubi; Godwin Odo; Godfrey Odongo; Chairman Okoloise; Benson Olugbuo; Ohio Omiunu; Thomas Probert; Adamantia Rachovitsa; Ben Twinomugisha; Martin van Staden; Jane Wathuta; Cori Wielenga; and Amy Wilson.

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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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Key words: *African Charter on Human and Peoples' Rights; legitimacy; COVID-19; reform*

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 Dersso '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 Dersso '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).

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The African human rights system as 'norm leader': Three case studies

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Summary: *Africa (including its human rights system) is rarely imagined or considered an originator, agent and purveyor of ideas, including in the human rights sphere. On this occasion of the fortieth anniversary of the adoption of the 1981 African Charter on Human and Peoples' Rights which founded the African human rights system, it is only fitting that its contributions or otherwise to global human rights praxis, over these four decades, be examined from this perspective. Utilising the theory of the norm life cycle, developed by scholars of international relations who work within 'strategic social constructivism', this article examines how the African human rights system has, or has not, functioned as a 'norm leader' with regard to certain important and increasingly widely-accepted human rights standards. To that extent, the article examines (as examples) certain human rights norms first elaborated and made into legally-binding forms in the African Charter, widely circulated and having achieved a considerable level of global dispersal and adoption, in*

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part, as a result of the work of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. Focusing on three important norms (the right to self-determination, the right to development and the right to the environment) and based on a study of academic and other literature, treaties or instruments, case law and records of international negotiations, the article attempts to respond systematically to this overarching question. The article argues that although the African human rights system clearly is not a state, the critical but globally under-appreciated roles it has played regarding the globalised socialisation of certain human rights ideas fits within, and helps in extending, social constructivist human rights theory and praxis. The article concludes with a reflection on some key limitations that are observable as to how far the system has been able to travel in the direction of norm leadership in human rights law.

Key words: *African human rights system; norm cycle theory; self-determination; right to development; right to the environment*

1 Introduction: Human rights systems and norm creation

The African human rights system is an ensemble of institutions as well as instruments that make provision for individual and peoples' rights and obligations, agents and institutions. In many senses it also is a trailblazer in human rights jurisprudence and the evolution of international human rights law. Yet, despite its influence on regional and global rights theory and praxis,¹ the African human rights system continues to attract relatively marginal and less-than-generous attention.² The significantly underexplored character of the system's law/action thus invites a re-dedication to (some of) its norm-building impacts, especially on this occasion of the fortieth anniversary of the adoption of the African Charter on Human and Peoples' Rights (African Charter).³

The authors argue that the African human rights system has functioned as a 'norm leader' that has made a critical (and even radical) contribution – at least in certain areas – to the global rights

1 OC Okafor 'The future of the UN Human Rights Council: Insights at the inter-luminated juncture of thought and experience' (2020) 23 *Max Planck Yearbook of United Nations Law* 39.

2 JT Gathii 'The promise of international law: A Third World view' (2021) 36 *American University International Law Review* 377; OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 67.

3 520 UNTS 217 (1982) (African Charter).

project. Its praxis has been quite remarkable in some respects and in connection with certain subcategories of rights theory and practice.⁴ It has helped shape developments in other (national, regional and global) human rights systems.⁵ Its praxis informs the diffusion of human rights frames that challenge – at times quite radically – the conceptual and institutional orthodoxy.⁶ It has also served, in these contexts, as a critically important resource for political agents and social activists at both local and international levels.⁷

The African human rights system's significant counter-orthodox accomplishments underscore its normative significance dating back to the decolonisation project in the twentieth century. As Third World Approaches to International Law (TWAIL) scholars such as Gathii argue, 'the critical tradition of international law in Africa predates the rise of dependency theories of the early 1960s, and ... Africa played a central part in anticolonial resistance within international law in the middle of the twentieth century'.⁸ Working broadly within this idiom, the article returns to investigate one strand of these critical traditions of international law on Africa, one defined by contributing through resistance. The article does so by demonstrating the African human rights system's counter-hegemonic leadership in aspects of rights discourse and praxis. In doing this, we rely, albeit only to an extent, on the theoretical guidance of 'strategic social constructivism' to direct our substantive arguments, re-purposing, somewhat, one of its central notions as an analytical aid to our work.

Hence, the article analyses the ways in which the African human rights system has, or has not, functioned as a 'norm leader' in regard to the innovation, application and dispersal of important (and increasingly widely-accepted) human rights standards.⁹ We examine the extent to which certain human rights norms, originally enunciated or first elaborated as legally binding under the African Charter, have circulated and achieved a certain level of global attention, adoption or socialisation, in part as a result of the work and jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court).

4 Okafor (n 1) 43-44.

5 As above.

6 As above.

7 Okafor (n 2) 91-272.

8 JT Gathii 'Africa and the radical origins of the right to development' (2020) 1 *TWAIL Review* 28, 37.

9 AK Perrin 'African jurisprudence for Africa's problems: Human rights norm diffusion and norm generation through Africa's regional international courts' (2015) 109 *ASIL: Proceedings of the Annual Meeting* 32.

We argue that the African human rights system has equipped diverse actors and rights systems with an enhanced toolbox, well beyond what usually is available in mainstream human rights praxis, for evolving norms and strategies for, and intervening in, contentious politico-legal affairs. The transformative force of the African human rights system thus is visible across key aspects of human rights law, especially in the way in which norms emerging from Africa socialise actors and their legal and policy choices and actions. Comprising treaty texts, protocols, declarations and resolutions as well as judicial and non-judicial processes, the African human rights system has enunciated, promoted and practised a significantly (even if only partly) organic African vision of rights, while still being responsive to the necessity for broader approaches to human rights.¹⁰

While Africa's norm-making context certainly is worth investigating, its extraordinary normative content must command similar curiosity.¹¹ Therefore, the article examines the enunciation of, and praxis in regard to, three distinct yet interconnected rights in the African human rights system (the rights to development, environment and self-determination) as examples of its role as a norm leader in the global rights project. In re-examining the impact of the African human rights system over its young career in norm dispersal, the article is sensitive to Africa's political history and how it is tentacled with the normative innovations embedded in the African human rights system, such as the concept of peoples' rights (a novelty at the time of the adoption of the African Charter).¹²

Following this introduction, part 2 outlines this article's theoretical framework. The article adopts and utilises the idea of norm leadership (from strategic social constructivism) which we find useful in discussing the African human rights system's role (through its network of actors, rules and praxis) in explicating and dispersing norms. Part 3 is an uptake of this theoretical framework as it pushes beyond the African human rights system's innovativeness to concrete action by showcasing Africa's pioneering role in rights praxis through its regional efforts. Part 4 focuses on exemplifying these points through an analysis of the explication and dispersal of three different 'peoples' rights' (self-determination, development, and environment). Part 5

10 A Rachovista 'On new "judicial animals": The curious case of an African Court with material jurisdiction' (2019) 19 *Human Rights Review* 255.

11 MA Plagis & L Riemer 'From context to content of human rights: The drafting history of the African Charter on Human and Peoples' Rights and the enigma of article 7' (2020) *Journal of the History of International Law* 1.

12 A Huneeus & MR Madsen 'Between universalism and regional law and politics: A comparative history of the American, European and African human rights systems' (2018) 16 *International Journal of Constitutional Law* 136.

discusses the limits of Africa's norm leadership within the contested discourse on sexual orientation and business and human rights. The article concludes by envisioning Africa's future norm leadership and how the African human rights system anticipates and responds to challenges as it seeks to maintain and bolster its (qualified) leadership role in the human rights sphere.

To be clear, the overarching point the article makes not necessarily is that the African human rights system has itself pushed other international human rights bodies, national institutions, scholars and activists to adopt the human rights ideas that have been innovated to a significant extent in its treaties and jurisprudential action. It is rather that, by innovating and disseminating those human rights ideas, the system extended 'an invitation to mimicry' to these other actors, which was taken up – often enough – in various ways and significant measure. This, the article suggests, is a type of norm leadership. Thus, the task here is not so much to describe in detail the intervening process through which those norms were taken up in other human rights systems and 'places', but mostly to demonstrate and theorise the fact that the innovation and mimicry we point to has in fact occurred under the aegis of the African human rights system.

2 Strategic social constructivism, the norm cycle theory and human rights: A quasi-evolutive process

In crafting the African Charter, the founders of the African human rights system drew on Africa's broadly-shared cosmologies, metaphysical ideas and socio-cultural values on the important balance(s) to be struck as between states and societies, communities and individuals, rights and obligations.¹³ African-rooted ideas animated their praxis, and these founders expressly stated so, notably in the Preamble to the Charter.¹⁴ These ideas have shaped the work and jurisprudence of the African Commission and the African Court, irradiating the African human rights system. Therefore, as many constructivist scholars have correctly noted, ideas do matter, even if they 'do not float freely'.¹⁵

13 T Metz 'African values, human rights and group rights: A philosophical foundation for the Banjul Charter' in O Onazi (ed) *African legal theory and contemporary problems* (2014) 131.

14 African Charter Preamble.

15 See T Risse-Kappen 'Ideas do not float freely: Transnational coalitions, domestic structures, and the end of the Cold War' (1994) 48 *International Organisation* 185-186.

The theoretical focus of the article aligns with this founding principle of the African Charter. It further aligns with the constructivist school of international relations upon which the analysis in the article to an extent relies.¹⁶ The focus on 'strategic social constructivism' advances our thesis, where it exemplifies 'a sociological perspective on world politics, emphasising the importance of normative as well as material structures'.¹⁷ In so doing, constructivism aids our reflection on the innovation and dispersal of certain African ideas as a way of understanding the important role the African human rights system has played, and continues to play, in the global human rights field.¹⁸ In working, in part, within this approach, the analysis in the article is conscious of the power of norms and of the institutions that create, uphold and disseminate new norms.¹⁹

Strategic social constructivism is used by international relations scholars to critically analyse norm production, acceptance and further dissemination. As Finnemore and Sikkink have argued:²⁰

The characteristic mechanism of the first stage [of the norm cycle], norm emergence, is persuasion by norm entrepreneurs. Norm entrepreneurs attempt to convince a critical mass of states (norm leaders) to embrace new norms. The second stage is characterised more by a dynamic of imitation as the *norm leaders attempt to socialise other states to become norm followers*.

Strategic social constructivism provides an analysis of the processual lifecycle of norms. This process explains the progression of norms, occasioned by some necessity from which the norm in question derives its constitutive power, and often advanced by a coalition of states (and non-state actors) that are interested in changing an aspect of social life, either at the local or international level.²¹ This explanation enriches our understanding of the processes that 'give birth to – and continually shape and reshape – these norms', and guide their diffusion.²²

16 A Wendt 'Constructing international politics' (1995) 20 *International Security* 71.

17 R Price & C Reus-Smit 'Dangerous liaisons? Critical international theory and constructivism' (1998) 4 *European Journal of International Relations* 259.

18 MN Barnett & M Finnemore 'The politics, power, and pathologies of international organisations' (1999) 53 *International Organisation* 699, 703.

19 F Kratochwil & JG Ruggie 'International organisations: A state of the art on an art of the state' (1986) 40 *International Organisation* 753.

20 M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organisation* 887, 895 (our emphasis).

21 J Gest et al 'Tracking the process of international norm emergence: A comparative analysis of six agendas and migrants' rights' (2013) 19 *Global Governance* 153.

22 ML Krook & J True 'Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality' (2010) 18 *European Journal of International Relations* 108.

Three stages are apparent in the life cycle of norms. These are 'norm emergence, norm cascade, and norm internalisation'.²³ Norm emergence is attributable to the identification of a problem requiring a solution; that solution being traceable to the belief that a certain course of action is desirable or must be pursued. Regarding norm cascade, a state (or non-state actor) may adopt a norm, as a direct consequence of external pressure, and this might be the case even in the absence of corresponding domestic pressure. Lastly, norm internalisation involves a crystallisation of norms becoming part of social regulation even to the point that the norm becomes integral to everyday life.

The article re-purposes this norm cycle theory, particularly the notion of 'norm leaders,' to characterise international human rights institutional arrangements such as the African human rights system and to analyse the creation, and attempts at diffusion, of certain of its ideational innovations, even though the African human rights system is not a state.²⁴ Although this theoretical move is not dissonant with this constructivist theory, it contributes to expounding one of its under-theorised elements and practical applications, namely, the ways in which international human rights institutions (rather than states) function as norm leaders in the primary sense.²⁵ This re-purposed meaning of norm leadership is then projected onto the field of human rights where Africa sometimes, but not usually, has been acknowledged as a norm maker and shaper.²⁶

3 The African human rights system as norm leader: From vision to action

The African human rights system is founded on a network of treaties and protocols comprising the African Charter, its protocols and allied institutions (including the African Union (AU) and its constituent organs comprising the African Commission (a quasi-judicial body) and the African Court (a judicialised forum)).²⁷ The African human rights

23 B Jose 'Not completely the new normal: How human rights tried to suppress the targeted killing norm' (2017) 38 *Contemporary Security Policy* 237, 240.

24 A Witt 'Where regional norms matter: Contestation and the domestic impact of the African Charter on Democracy, Elections and Governance' (2019) 54 *Africa Spectrum* 106.

25 A Acharya 'Who are the norm makers? The Asian-African Conference in Bandung and the evolution of norms' (2014) 20 *Global Governance* 405.

26 CT Hunt 'African regionalism and human rights protection norms: An overview' (2016) 8 *Global Responsibility to Protect* 201.

27 Arts 30-31 African Charter; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights 10 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III) (African Court Protocol).

system thus is a complex regional framework dedicated to a rights-based order.²⁸ This web of norms and institutions is complemented by a number of sub-regional bodies and courts that have extended their jurisdictions to include human rights adjudication.²⁹

Notwithstanding mainstream/Western influence on its character, African conceptions of human dignity and of the balance between the individual and community inspired the African human rights system. Despite claims to the contrary, African peoples lacked neither their own conceptualisations of human rights nor their functional equivalents or similes.³⁰ For example, in African cosmology an individual's existence matters only in an intricate, dense and inexorable connection to their society, in a way that departs, *to an extent*, from the mainstream (liberal) cosmologies and allied human rights imaginaries.³¹ These African cosmologies have shaped the human rights imaginaries that are prevalent among ordinary Africans. As Viljoen noted, orthodox human rights norms have been 'adjusted to better reflect African conceptual understandings of human rights, and to address issues of particular concern to the continent'.³² This is meet indeed. For, as Gathii puts it, 'the contemporary human rights regime can only be truly universal from the multicultural elaboration of norms'.³³ Hence, the inclusion of certain African ideas in an African human rights treaty, while a comparatively radical step for some, was more of a reaffirmation of already-existing and valid African human rights imaginaries.³⁴ Nonetheless, the adoption of the African Charter in 1981 underscored a pivotal revolution from a Eurocentric conceptualisation to a more Afrocentric approach to human rights.³⁵

Beside this normative agenda, both the African Commission and the African Court have assumed key adjudicative and implementation roles as the African human rights system became firmly established through their jurisprudence. It is not surprising, then, that the

28 GJ Naldi & KD Magliveras 'The African Court of Justice and Human Rights: A judicial curate's egg' (2012) 9 *International Organisations Law Review* 383.

29 JT Gathii 'Variation in the use of sub-regional integration courts between business and human rights actors: The case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 37.

30 RM D'Sa 'Human and peoples' rights: Distinctive features of the African Charter' (1985) 29 *Journal of African Law* 72.

31 NO Imani 'Critical impairments to globalising the Western human rights discourse' (2008) 3 *Societies Without Borders* 280-281.

32 F Viljoen 'Human rights in Africa: Normative, institutional and functional complementarity and distinctiveness' (2011) 18 *South African Journal of International Affairs* 191, 192.

33 J Gathii 'International law and Eurocentricity' (1998) 9 *European Journal International Law* 184, 190.

34 M Chemhuru 'African communitarianism and human rights: Towards a compatibilist view' (2018) 65 *Theoria: A Journal of Social and Political Theory* 37.

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

African human rights system has 'unmistakably influenced normative developments in international law beyond Africa'.³⁶ As Hellsten notes:³⁷

What is relevant here, however, is that African criticism of the Western concept of human rights first turned into an attempt to give alternative philosophical foundations to human rights, and second, this alternative approach to human rights did not remain merely academic or theoretical, but was applied also to African politics.

Thus, the analysis here is informed by the normative structure and allied institutional influences of the African human rights system.

4 Three tales in one: Norm interrelationships, innovation and attempts at dispersal in the African human rights system

The African Charter, which is widely known as 'the [main] foundation of the African regional human rights system',³⁸ articulates the three 'peoples' rights' discussed in the article.³⁹ The remarkable stress placed in the African Charter on peoples' rights flows from a historical awareness of the cosmologies and entailed rights imaginaries of African societies, much of which was incorporated into the Charter. Against this backdrop, we utilise the example of the concept of 'peoples' in the Charter, and its deployment in the work of the pan-continental bodies charged with the Charter's implementation, to develop our arguments regarding the radically important contributions of the rights we focus on to the global human rights imaginary.

To understand the 'concept of peoples' rights' first requires an appreciation of the meaning of the term 'peoples' which was largely left undefined in the African Charter, thereby lending itself to multiple interpretations.⁴⁰ This omission, however, was intended to provoke an organic development of the term through adaptive interpretation.⁴¹ As one scholar suggested, its eventual definition(s)

36 T Maluwa 'Reassessing aspects of the contribution of African states to the development of international law through African regional multilateral treaties (2020) 41 *Michigan Journal of International Law* 327, 334.

37 SK Hellsten 'Human rights in Africa: From communitarian values to utilitarian practice' (2004) 5 *Human Rights Review* 61, 63.

38 SA Dersso 'The jurisprudence of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 358, 359.

39 RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal International Law* 80, 101.

40 As above.

41 C Baldwin & C Morel 'Group rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 244.

'should empower the people to do something about their future; to take charge of their destiny and control their affairs'.⁴² Similarly, the African Commission has since taken positive steps to outline the contours of peoples as it noted that

[i]n the context of the African Charter, the notion of "people" is closely related to collective rights. Collective rights enumerated under articles 19-24 of the Charter can be exercised by a people bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.⁴³

Emerging from this declaration by the African Commission, the supposed indeterminate character of 'peoples' provides Africa's regional and sub-regional adjudicatory bodies with both canvas and brush to paint the broad strokes of 'peoples' and restrict its scope, where appropriate.⁴⁴ The Commission's pronouncement on what peoples could mean, along a continuum of expectations, expands the range of possibilities. Thus, the reasonably flexible character of peoples in the Charter puts it ahead of its co-equivalent regional human rights treaties in the Americas and Europe.

Our material focus in this article is on three case studies that underline the African human rights system's norm leadership in certain aspects of global rights praxis. Our focus on these specific rights is informed by three considerations. First, these are original African contributions to the existing fabric of global human rights; second, their jurisprudence is still evolving and assuming new dimensions; and, third, they are strongly interconnected. Accordingly, some suggest – quite correctly – that the right to development is linked to the right to the environment, and both, in turn, are connected to the right to self-determination.⁴⁵

Therefore, while the African Charter's normative content is positive proof of the African human rights system's norm leadership (that is, in epistemic and conceptual terms), it is through the interpretative jurisdiction (that is, praxis) of the African Commission and the African Court that many aspects of the system's critically significant impacts

42 Kiwanuka (n 39) 101.

43 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (*Southern Cameroons case*).

44 AA Yusuf 'The progressive development of peoples' rights in the African Charter and in the case law of the African Commission on Human and Peoples' Rights' in F Lezerini & AF Vrdoljak (eds) *International law for common goods: Normative perspectives on human rights, culture and nature* (2014) 41.

45 M Montini 'Interplay between the right to development and the protection of the environment: Patterns and instruments to achieve sustainable development in practice' (2004) 10 *African Yearbook of International Law* 181.

on global human rights are visible. Through their jurisprudence, these adjudicative bodies have provided signal leadership in the development of these norms. Although the Commission's decisions are formally non-binding, its recommendations, are not mere suggestions. They signal a particular appreciation of the rights at issue by impelling a juridical effect within a member state, socio-technical change, or resourcing activist forces. Its praxis therefore is no less valuable than the formally-binding decision or orders of the African Court.⁴⁶ Thus, in discussing this trinity of rights – self-determination as remedial secession right; the right to development and the right to the environment – we focus on the African Charter, the African Commission and the African Court, as all three dimensions contribute to the African human rights system's signal norm leadership.

4.1 Right to remedial secession

The right to self-determination is in constant tension with the principle of territorial integrity. While the United Nations Charter endorses the right to self-determination,⁴⁷ it is in common article 1 of the two Covenants (the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)) that a formulation of a definition somewhat emerges.⁴⁸ Both Covenants state that '[a]ll peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.'⁴⁹ Conversely, in respect of territorial integrity, the UN Charter provides that '[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of a state, or in any other manner inconsistent with the purposes of the United Nations'.⁵⁰ Owing to the varied manifestations of the self-determination norm, the article limits its intervention to the prohibition on dismembering established states.⁵¹

Whereas international law neither expressly supports nor rejects secession, secession is considered 'the last resort for ending the

46 M Ssenyonjo 'The African Commission and Court on Human and Peoples' Rights' in G Oberleitner (ed) *International human rights institutions, tribunals, and courts* (2018) 480.

47 United Nations Charter 1 UNTS XVI, art 1 (UN Charter).

48 UN General Assembly Resolution 2200A (XXI) 999 UNTS 3; UN General Assembly Resolution 2200A (XXI) 999 UNTS 171.

49 UN General Assembly Resolution 2200A (n 48) common art 1.

50 Art 2(4) UN Charter (n 47).

51 AE Ouali *Territorial integrity in a globalising world: International law and states' quest for survival* (2012) 2.

oppression of a certain people'.⁵² Of course, we do acknowledge that statehood is an existential fact where secession is successful, and a new state, in fact, has been established out of a parent state.⁵³ Even so, international law accommodates the 'right to secession' in certain situations, including freedom from colonialism.⁵⁴ Somewhat understandably, African states seem 'wedded' to the colonial borders inherited at independence, partly as a way of avoiding *inter-state* conflicts.⁵⁵ Still, the acceptance of colonially-imposed borders by African states is paradoxical considering that much of Africa's frontiers were drawn based on 'maps rather than chaps'.⁵⁶ This concern is reinforced by the fact that though adherence to the *uti possidetis* doctrine has been reasonably successful in fending off violent *inter-state* conflicts in Africa, the continent, still, has been affected by *intra-state* and *internecine* conflicts.⁵⁷

In this light, the high-politics that attend secession negatively affect the 'righting' of secession.⁵⁸ Yet, 'if human rights ought to be meaningful, they ought to prevail over territory. This argument links self-determination, more precisely, the denial of the right to self-determination, to the right to secede from the oppressive state.'⁵⁹ Trindade J's opinion in the *Chagos Islands* case at the International Court of Justice (ICJ) underscores this unassailable point;⁶⁰ one that has a deep pedigree in the dissenting opinions in the *South West Africa* cases.⁶¹ Still, this link between the African human rights system and self-determination, in the aftermath of colonialism, invites further elucidation.⁶²

52 OC Okafor *Redefining legitimate statehood: International law and state fragmentation in Africa* (2000).

53 MG Cohen 'Introduction' in MG Cohen (ed) *Secession: International law perspectives* (2006) 1.

54 OC Okafor 'The international law of secession and the protection of human rights of oppressed sub-state groups: Yesterday, today and tomorrow' (2017) 1 *Nigerian Yearbook of International Law* 143.

55 DM Ahmed *Boundaries and secession in international law* (2015) 11.

56 J Hargreaves 'The making of the boundaries: Focus on West Africa' in IA Asiwaju (ed) *Partitioned Africans: Ethnic relations across Africa's international boundaries, 1884-1984* (1985) 23 (with little regard for ethnic/geographic considerations).

57 Ahmed (n 55) 11-46.

58 Okafor (n 54) 148.

59 S Salomon 'Self-determination in the case law of the African Commission: Lessons for Europe' (2017) 50 *Verfassung und Recht in Übersee* 217, 234.

60 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion) ICJ GL 169 (see the separate opinion of Trindade J).

61 *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa); Second Phase* 1966 ICJ Reports 6 (see the dissenting opinions of Tanaka J (276) and Jessup J (418-419)).

62 Salomon (n 59) 217.

At least in respect of this right to secede, 'Africa stands out as a key battleground of ideas and practice'.⁶³ How Africa handles this contentious politico-legal right is crucial in light of the African Commission's embrace of the relationship between human rights and the explosive topic of self-determination relative to the African human rights system.⁶⁴ As evident from the African Charter,

[a]ll peoples shall have the right of existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.⁶⁵

It is patent from the reading that article 20 of the African Charter focuses on the subject of 'political self-determination'.⁶⁶ Our focus, however, is not to distinguish between internal and external self-determination. Given that Africa's interest in self-determination was driven by decolonisation and the freedom of the post-colonial state to chart its own path without undue external influence, Africa seldom entertained a possible, continuous fracturing of the post-colony.⁶⁷ Thus, as is observed in the jurisprudence of the Organisation of African Unity (OAU) (now the African Union (AU)) and the many international resolutions, including at the UN, which Africa tended to endorse, it (Africa) hardly sanctioned the idea of distinct groups within the post-colonial African state being entitled to secede.⁶⁸

Moving forward, the African Commission's jurisprudence has now clarified (in pioneering ways) the position of African regional law on the subject.⁶⁹ Its jurisprudence on this subject was inaugurated in the case of *Katangese Peoples' Congress v Zaire*.⁷⁰ In this communication the applicant alleged that Zaire (now the Democratic Republic of the Congo (DRC)) had violated article 20 of the African Charter by failing to recognise the right to self-determination of the people of its Katanga province.⁷¹ The African Commission held that the applicants

63 MN Shaw 'Self-determination, *uti possidetis* and boundary disputes in Africa' in Chia-Jui Cheng (ed) *A new international order* (2016) 99.

64 M Mhango 'Governance, peace and human rights violations in Africa: Addressing the application of the right to self-determination in post-independence Africa' (2012) 5 *African Journal of Legal Studies* 199.

65 Art 20 African Charter.

66 R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667, 678.

67 OS Kamanu 'Secession and the right of self-determination: An OAU dilemma' (1974) 12 *Journal of Modern African Studies* 335.

68 AC Ekeke & N Nubisi 'Secession in Africa: An African Union dilemma' (2019) 28 *African Security Review* 245.

69 S Dersso 'International law and the self-determination of Sudan' (2012) Institute of Security Studies Paper 231 1.

70 (2000) AHRLR 72 (ACHPR 1995) (*Katanga* case).

71 R Lemarchand 'The limits of self-determination: The case of the Katanga secession' (1962) 56 *American Political Science Review* 404.

failed to demonstrate that Zaire had denied the Katangese people equal participation in government (article 13 of the Charter); at best, Katanga's attempts at self-determination must be in a form that is 'compatible with the sovereignty and territorial integrity of Zaire'.⁷² Here, the Commission endorsed the right to remedial secession, albeit on a conditional basis, affirming its vesting only where it is observed that the rights of an identifiable 'people' in that state are under very grave threat, to the extent that this distinct group of peoples are unable to enjoy their rights or the political guarantee of self-determination as provided under article 13(1) of the African Charter.⁷³ Therefore, as Okafor (and others) have noted, the Commission 'unanimously held in favour of a limited form of the secessionist entitlement, one that is available only in exceptional circumstances'.⁷⁴

In *Sudan Human Rights Organisation & Another v Sudan* the African Commission was confronted with a similar question of whether the black ethnic groups of Darfur, who had suffered atrocities at the hands of the Janjaweed militia, were 'peoples' within the meaning of the African Charter.⁷⁵ In confirming that these 'groups' were peoples under the Charter, the African Commission, by extension, affirmed the right to remedial secession by noting:⁷⁶

There is a school of thought, however, which believes that the 'right of the people' in Africa can be asserted only vis-à-vis external aggression, oppression or colonisation. The Commission holds a different view, that the African Charter was enacted by African states to protect human and peoples' rights of the African peoples against both external and internal abuse.

In the *Southern Cameroons* case the applicants submitted a communication, on their own and on behalf of the peoples of the Southern Cameroons (previously the British-administered territory of Southern Cameroons), to the African Commission on grounds that Cameroon had violated their individual and collective rights, including their right to self-determination.⁷⁷ In 1961 the territory in question was incorporated into the Republic of Cameroon after a UN-led plebiscite, a process, the applicants argued, failed to consider

⁷² *Katanga case* (n 70) para 6.

⁷³ Yusuf (n 44) 46-48.

⁷⁴ OC Okafor 'Entitlement, process and legitimacy in the emergent international law of secession' (2002) 9 *International Journal on Minority and Group Rights* 41; R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 213.

⁷⁵ (2009) AHRLR 153 (ACHPR 2009) para 219.

⁷⁶ *Sudan Human Rights Organisation* (n 75) para 222.

⁷⁷ C Anyangwe *Betrayal of too trusting a people: The UN, the UK, and the trust territory of the Southern Cameroons* (2009).

their ethnicity and British colonial legacy, thus amounting to 'forceful annexation'.⁷⁸ Just as in the *Katanga* case, the Commission found that although the people of the South Cameroons had a right to self-determination, in the instant case it was unjustifiable.⁷⁹ The Commission acknowledged the Southern Cameroons as a people in the context of the African Charter as they fulfilled 'numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook'.⁸⁰ Yet, the Commission concluded that, in reality, they had not satisfied the test to entitle them to remedial secession as they could not prove the alleged violations were egregious so as to warrant an activation of this right.⁸¹

The pioneering persistence of the African Commission both in upholding and refining this aspect of rights jurisprudence highlights its leadership in this context. The Commission's jurisprudence, aided by the wording of the African Charter, has made a signal contribution in this regard;⁸² one that, for instance, presaged a similar outcome in the famous opinion of the Supreme Court of Canada in the *Quebec Reference* case.⁸³ The *Southern Cameroons* case was the very first decision of an international or domestic dispute settlement body, whether quasi-judicial or judicial, to affirm the existence of a legally-binding right of sub-state groups in established states to enjoy remedial secession, if even only in exceptional cases. Second, in a radical way it contributed to the ongoing shift toward what has been identified as the 'righting of secession'.⁸⁴ Lastly, it placed a strong African imprimatur on the international law of secession, which is deeply rooted in the quotidian human rights struggles of African peoples (not necessarily the states that englobe them), producing a progressive line of legal reasoning that is far ahead of the Asian, European or even inter-American human rights jurisprudence.

From the perspective of norm cycle theory, the important point here is that the African human rights system has innovated and dispersed (or at least attempted to disperse) a remedial secession norm that is on the conceptual and practical leading edge. At the very least, this African normative innovation has appeared subsequently (with or without sufficient attribution) in Canadian jurisprudence and the UN

78 *Southern Cameroons* case (n 43) paras 6-7.

79 FM Ndahinda 'Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 29.

80 *Southern Cameroons* case (n 43) para 179.

81 *Southern Cameroons* case para 203.

82 Yusuf (n 44) 53.

83 Okafor (n 54); [1998] 2 SCR 217.

84 Okafor (n 74).

human rights system.⁸⁵ The system's behaviour in this regard *broadly* aligns with strategic social constructivism's conception of what norm leaders do within the life cycle of human rights norms. It should be noted that the key contribution of norm leaders in such contexts is how they motivate 'a dynamic of imitation' that is produced by their 'attempt to socialise other states to become norm followers'.⁸⁶ In this light, the African human rights system's interaction with the right to remedial secession exemplifies and invites an application of the Finnemore and Sikkink thesis. Following this, the African human rights system's radical work has attempted to drive a dynamic of imitation in global human rights and has succeeded in this attempt.⁸⁷

4.2 Development as a (human and peoples') right

The right to development originated in Africa. It was birthed in Africa's struggle for global socio-economic justice, becoming especially prominent in the post-independence period.⁸⁸ After the formal end of colonialism in the 1960s, African states and other countries of the Global South took a more critical stance on the inequitable global economic infrastructure that underpinned (in part) the Global South's underdevelopment. This was also the moment in which the Global South had begun pushing for radical changes in the international system, including a demand for a new international economic order (NIEO).⁸⁹ Similarly, the Global South espoused, among others, the principle of 'self-determination of peoples', the 'right to development', the prohibition of racial discrimination', and 'sovereign control over natural resources'.⁹⁰ Neocolonialism, attended by a tendency towards ineffective leadership in parts of the Global South, soon ushered many such countries into a period of neo-imperial exploitation in the 1980s to the 2000s, in significant measure through asymmetrical global trade rules and unfair economic exchange.⁹¹

The Global South understood the interaction between human rights and development 'first and foremost as central emancipatory

85 Okafor (n 54).

86 Finnemore & Sikkink (n 20) 895.

87 Okafor (n 54) (as explained in the *Quebec Reference* example).

88 B Ibhawoh 'The right to development: The politics and polemics of power and resistance' (2011) 33 *Human Rights Quarterly* 76.

89 YT Chekera & VO Nmeielle 'The international law principle of permanent sovereignty over natural resources as an instrument for development: The case of Zimbabwean diamonds' (2013) 6 *African Journal of Legal Studies* 69.

90 I de la Rasilla *International law and history: Modern interfaces* (2021) 122.

91 BS Chimni 'Capitalism, imperialism, and international law in the twenty-first century' (2012) 14 *Oregon Review of International Law* 17.

discourses'.⁹² In this respect, Africa was no different from its Global South peers in the Asia-Pacific and Latin America, as it (Africa) considered development as an indispensable condition for political self-determination.⁹³ In revisiting this contentious history in the emergent Pan-Africanism, 'the right to development was intrinsically linked to the right to self-determination'.⁹⁴ Thus, well beyond its inspiration from and activist influence on this political struggle, Africa soon urged international recognition of the right to development.⁹⁵

While accounts vary over whether it was first articulated by the Senegalese jurist, Keba M'Baye, or another Senegalese jurist, Doudou Thiam, a former Minister of Finance and Foreign Affairs and member of the International Law Commission, the 'right to development' undeniably emerged internationally through Africa's activism, more prominently in 1967 at a Group of 77 conference in Algeria,⁹⁶ and then later at the UN.⁹⁷ As a Third World construct, the Global North was quite suspicious of this Africa-led and Global South-backed push to recognise development as a right as it (the North) considered this 'new' right antithetical to its interests. Among the reasons publicly offered for the North's opposition were concerns that it was a peoples' (collective) right and not an individual right, and also that the right was a veiled conduit for reviving the NIEO and enacting 'legally binding treaties that would oblige developed countries to transfer resources to the Global South'.⁹⁸ These concerns from the Global North persisted even after the right was recognised and adopted in a UN Declaration.⁹⁹ Thus, the success of the Global South in institutionalising the right to development on the official UN human rights register has caused much consternation in the north.¹⁰⁰

92 M Bedjaoui 'The right to development' in M Bedjaoui (ed) *International law: Achievements and prospects* (1991) 1182; D Maul *Human rights, development, and decolonisation: The International Labour Organisation, 1940-70* (2012) 6.

93 ME Salomon 'From NIEO to now and the unfinishable story of economic justice' (2013) 62 *International and Comparative Law Quarterly* 31.

94 F Cheru 'Developing countries and the right to development: A retrospective and prospective African view' (2016) 37 *Third World Quarterly* 1268, 1269.

95 NT Saito 'Decolonisation, development and denial' (2010) 6 *Florida A&M University Law Review* 1; NG Villaroman 'The right to development: Exploring the basis of a supernorm' (2010) 22 *Florida Journal of International Law* 299.

96 DJ Whelan "'Under the Aegis of man": The right to development and the origins of the new international economic order' (2015) 6 *Humanity* 93.

97 Gathii (n 8) 37; see generally CC Ngang 'Towards a right-to-development governance in Africa' (2018) 17 *Journal of Human Rights* 107.

98 Cheru (n 94) 1271.

99 J Oduwole 'Global poverty and the right to development: An African perspective on Macklem's *The sovereignty of human rights*' (2017) 15 *Jerusalem Review of Legal Studies* 98.

100 P Uvin *Human rights and development* (2004) 43.

In sharp contrast to the contention that has characterised its installation at the UN and in the African human rights system, the right to development has been embraced in the jurisprudence of both the African Commission and the African Court as these bodies have demonstrated that the right has normative and socio-legal value. For instance, its praxis shows that the right can engender and resource political activism, equip state and non-state actors alike, and inform the content of law and related policies.¹⁰¹ Thus, while this right has now received significant attention in the UN system, it was the extraordinary efforts of Africans to conceptualise it both as a human right and a peoples' right, that led to its subsequent incorporation in article 22 of the African Charter, driving to a robust extent, its endurance in global human rights praxis.¹⁰²

Substantively, article 22 of the African Charter states that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind'.¹⁰³ Article 22 couched this right as a peoples' right, a marked distinction from its later restatement under the UN Declaration on the Right to Development as both an individual and collective human right.¹⁰⁴ For our own part, we agree with other scholars, including Ouguergouz, who have noted:¹⁰⁵

The right to development inevitably has an individual dimension, yet this stems rather from the purpose of the right rather than from the way it is exercised. Failing any proof of the contrary, the view enshrined in the Charter is firmly directed towards the ultimate goal of the full development of the human person. To deny this would be to fail to recognise that each type of rights, individual rights and rights of peoples, in its way strive towards the same goal: respect for human dignity in its two expressions – that of human beings and of human communities.

Yet, given its character as a solidarity right, this right is less intelligible as an individual right, as it attaches more to 'peoples', a society or a

101 SAD Kamga & CM Fombad 'A critical review of the jurisprudence of the African Commission on the right to development' (2013) 57 *Journal of African Law* 196.

102 OC Okafor 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in United Nations Office of the High Commissioner for Human Rights (ed) *Realising the right to development: Essays in commemoration of 25 Years of the United Nations Declaration of the Right to Development* (2013) 373.

103 Art 22(1) African Charter.

104 Declaration on the Right to Development GA Resolution 41/128, Annex, UN GAOR, 41st session, Supp 53 186, UN Doc A/41/53 (1986).

105 F Ouguergouz *African Charter on Human and Peoples' Rights – A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 306.

community.¹⁰⁶ In this light, it may best be described as 'a human right enshrining obligations for which states can be held accountable'.¹⁰⁷

Notwithstanding advances in its normative value, the right to development remains controversial as scholars and practitioners alike have inquired into its enforceability.¹⁰⁸ The queries regarding its implementation echo the historical (Eurocentric) attempts at discrediting its material significance.¹⁰⁹ In this regard, the African human rights system provides insights into the justiciability (and peoples-driven accountability structures) of development as a right as the African human rights system's interaction with this right provides both evidence and guidance for those in search of 'similar accountability or enforcement structures at the global level'.¹¹⁰ Accordingly, in the paragraphs that follow we examine a purposive sample of African jurisprudence relative to this right.¹¹¹

Beginning with *Bakweri Land Claims Committee v Cameroon*, the African Commission has since highlighted the varied dimensions of the right to development by issuing or building on new decisions that redefine its normativity.¹¹² The *Bakweri* case was based on indigenous claims to sovereignty over lands that had been annexed through colonialism and subsequently transferred to the newly-independent state of Cameroon.¹¹³ While the *Bakweri* case did not pass the admissibility muster, it pioneered a train of cases on the article 22 jurisprudence. To this end, Okafor rightly noted that it was the first time the Commission decided 'a communication that was explicitly grounded in article 22 [of the African Charter]'.¹¹⁴

Beyond the *Bakweri* case, the pioneering role of the article 22 jurisprudence was revealed via other cases. The precedent-setting

106 W Scholtz 'Human rights and the environment in the African Union context' in W Scholtz & J Verschuuren (eds) *Regional environmental law: Transregional comparative lessons in pursuit of sustainable development* (2015) 102.

107 O de Schutter 'The international dimensions of the right to development: Enabling poverty-reduction in domestic legal orders by a reformed international legal order' in M Andenas et al (eds) *The fight against poverty and the right to development* (2021) 317, 319.

108 Scholtz (n 106) 102.

109 M Miyawa 'The right to development and non-state actors: Rethinking the meaning, praxis and potential of accountability of non-state actors in international law' (2016) 3 *Transnational Human Rights Review* 39.

110 K Arts & A Tamo 'The right to development in international law: New momentum thirty years down the line?' (2016) 63 *Netherlands International Law Review* 221, 246.

111 Kamga & Fombad (n 101) 196.

112 (2004) AHRLR 43 (ACHPR 2004) (*Bakweri* case).

113 N Kofele-Kale 'Asserting permanent sovereignty over ancestral lands: The Bakweri land litigation in Cameroon' (2007) 13 *Annual Survey of International and Comparative Law* 103.

114 Okafor (n 102) 376.

case of *Centre for Minority Rights Development & Others v Kenya* offers a strong reference for analysis.¹¹⁵ In this application the Endorois community claimed that Kenya had violated African Charter provisions, including article 8 (the right to practise one's religion) and article 22 (the right to development) by failing to engage with them prior to embarking upon development-related activities including establishing a game park that dislodged the community from their ancestral homes with serious impacts on their religion and culture.¹¹⁶ In its review, the African Commission held that the Endorois community in fact were a people under the African Charter and, thus, they had capacity to institute the action.¹¹⁷ The Commission further noted that Kenya's forced removal of the Endorois people from their ancestral Bogoria home violated their religious rights.¹¹⁸

As regards the right to development, the Commission held that Kenya had violated article 22 of the Charter by excluding the Endorois community in consultations on developmental processes related to their land.¹¹⁹ The Commission noted that Kenya's failure to provide suitable, alternative pastoral land for the Endorois people to live and graze their livestock equally violated article 22.¹²⁰ In the Commission's opinion, the substantive and procedural aspects of article 22 were 'constitutive and instrumental, or useful as both a means and an end'.¹²¹ Therefore, it is 'notable that so far, at least one quasi-judicial body has applied the right to development as enshrined in article 22 of the African Charter on Human and Peoples' Rights and subjected it to judicial consideration'.¹²²

Despite its normative importance, the *Endorois* case has been criticised for failing to sketch more precisely the framework of development as envisaged under the African Charter.¹²³ A recurrent critique is that the *Endorois* case did not disclose how the right to development practically combines the post-colonial state's aspirations with the needs of indigenous peoples.¹²⁴ Still, we argue

115 (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

116 *Endorois* case (n 115) paras 147-162.

117 J Gilbert 'Indigenous peoples' human rights in Africa: The pragmatic revolution of the African Commission on Human and Peoples' Rights' (2011) 60 *International and Comparative Law Quarterly* 245.

118 *Endorois* case (n 115) paras 168-173.

119 *Endorois* case para 298.

120 *Endorois* case paras 290-292.

121 *Endorois* case para 277.

122 N Schrijver 'Self-determination of peoples and sovereignty over natural wealth and resources' in United Nations Office of the High Commissioner for Human Rights (n 102) 95, 100.

123 Okafor (n 102) 376-377.

124 KS Abraham & J Shepherd "'In land we trust': The Endorois Communication and the quest for indigenous peoples' rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 57.

that this communication advances an exceptional relationship across land, indigeneity, sovereignty and rights as it equally invites a complex interaction across and within state and non-state actors and varied interests that are indiscernible without sustained scrutiny.¹²⁵ Hence, the *Endorois* case occupies an important place, not only in the African human rights system and related socio-political activism, but also in its global counterpart jurisprudence because, in a very robust way, it is the 'first case [in the African human rights system] to recognise indigenous peoples' rights over their ancestral lands and also the first case adjudicating upon the right to development'.¹²⁶

The case of *African Commission on Human and Peoples' Rights v Republic of Kenya* (*Ogiek* case) builds on the jurisprudence in the *Endorois* case.¹²⁷ It represents a significant normative advance as it pushes the frontiers of the African human rights system, by moving from the recommendatory sphere of the Commission to the legally-binding basis of the African Court. In this case the *Ogiek* people challenged their displacement from their ancestral home at the Commission, alleging violations including a breach of article 22 of the African Charter.¹²⁸ Pending the outcome of the communication, the Commission issued provisional measures.¹²⁹ However, Kenya's non-compliance with these provisional measures resulted in the African Commission, albeit reluctantly, referring the matter to the African Court.¹³⁰

The Court held that the *Ogiek* were a people in the context of article 21 of the African Charter as they had satisfied the condition of being a 'constituent element of a state' and, therefore, entitled to enjoy the right to development.¹³¹ The Court further held that their eviction from the Mau forest violated article 22.¹³² Here, the African Court noted the interaction between article 22 of the African Charter and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) as mutually constitutive in empowering indigenous peoples with a right to assume a significant role in their own 'development'.¹³³ The Court bolstered the norm leadership of the African human rights system (alongside the Inter-American system) in the explication in detail of the relationships among indigenous human rights norms (according

125 Gilbert (n 117) 249-268.

126 L Claridge 'The approach to UNDRIP within the African regional human rights system' (2019) 23 *International Journal of Human Rights* 268.

127 Application 6 (2017) (*Ogiek* case).

128 *Ogiek* case (n 127) para 10.

129 *Ogiek* case para 16.

130 Art 5(1)(a) African Court Protocol (n 27).

131 *Ogiek* case (n 127) para 208.

132 *Ogiek* case (n 127) paras 202-207.

133 *Ogiek* case (n 127) paras 209-211.

to UNDRIP, for example) and this right to ground indigeneity and land claims.¹³⁴ Thus, this unique African experience is a reference point for (worldwide) indigenous sovereignty movements seeking to assert similar rights using the UNDRIP. Additionally, while recognising the Inter-American system's significant work on this subject, the *Ogiek* case still inspires an Africa-led trans-judicial dialogue by providing normative guidance to adjudicative tribunals confronted with similar questions.¹³⁵

Overall, the African human rights system has produced innovative normative texts and jurisprudence that are on the leading edge in this area.¹³⁶ Quite obvious is the fact that its cutting-edge intellectual dynamism resources scholars across the world who work on the right to development. The African human rights system has also equipped human rights systems, activists and peoples all over the world with valuable normative resources to campaign even more effectively for the implementation of the right to development. Largely innovated in the African human rights system, this right has appeared subsequently in the UN, Inter-American, ASEAN and Arab Charter-based human rights systems. Accordingly, it has motivated a dynamic of imitation that has had and is likely to have strong force within and outside Africa well into the future.

4.3 Right to the environment

There was no justiciable right to the environment before the African human rights system innovated and contributed it to the world, thus inviting a dynamic of imitation and dispersal. For Africa, environmental protection was considered a corollary to the struggles of its peoples and leaders for resource sovereignty and the enthronement of an NIEO.¹³⁷ The incorporation of this right in legally-binding form in the African Charter marked a turning point in international environmental and human rights law/activism and a pioneering move in linking both bodies of norms and their praxis.¹³⁸

¹³⁴ *Saramaka People v Suriname* IACtHR Series C 172, 13 IHRR 933 (2007).

¹³⁵ L Claridge 'Litigation as a tool for community empowerment: The case of Kenya's *Ogiek*' (2017) 11 *Erasmus Law Review* 57 (especially in Latin America; the African human rights system also borrows from the Inter-American human rights system in a mutually-beneficial juridical interaction).

¹³⁶ OC Okafor & U Ngwaba 'International accountability in the implementation of the right to development and the "wonderful artificiality" of law: An African perspective' (2020) 7 *Transnational Human Rights Review* 1.

¹³⁷ Salomon (n 93) 41.

¹³⁸ A Boyle 'Human rights and the environment: Where next?' (2012) 23 *European Journal of International Law* 613.

Thus, the human rights-environment nexus in the African human rights system pooled what had hitherto been silos of law into a mutually-reinforcing composite and its extension into current human rights discourse accurately transcended the prevailing normative categories of rights at the time.¹³⁹ This in fact was appropriate, for 'the right to a healthy environment can hardly be approached in isolation. It cannot be considered without reference to another right of the kind, namely, the right to development.'¹⁴⁰ Accordingly, this right must be read together with other rights, including the right to development under article 22, and the corollary right to freely dispose of natural resources in the absolute interest of Africa's peoples under article 21 of the African Charter.¹⁴¹

The foundation of this juridical integration in article 24 proceeds on grounds that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'.¹⁴² Yet, this idea is not particularly novel as environmental consciousness has been both a time-honoured customary value and communal obligation across Africa.¹⁴³ Therefore, it is not surprising that this normative synthesis manifests in both the African Charter and the African Commission's jurisprudence which has rightly rejected siloed human rights imagination by denouncing the artificial division between civil and political rights and social, cultural and economic rights.¹⁴⁴

Thus far, the African Court has yet to decide a case on article 24.¹⁴⁵ Nonetheless, the African Commission's foundational work provides valuable insights into the article 24 jurisprudence. As the Commission stated in the oft-celebrated communication on *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*, 'environmental rights ... are essential elements of human rights in Africa'.¹⁴⁶ In this case the applicants alleged that the joint petroleum

139 L Chenwi 'The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system' in JH Knox & R Pejan (eds) *The human right to a healthy environment* (2018) 59.

140 AAC Trindade 'Environment and development: Formulation and implementation of the right to development as a human right' in AAC Trindade (ed) *Human rights, sustainable development and the environment* (1992) 43.

141 Chenwi (n 139) 62.

142 Art 24 African Charter.

143 MJ Tosam 'African environmental ethics and sustainable development' (2019) 9 *Open Journal of Philosophy* 172.

144 M van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication' (2003) 3 *African Human Rights Law Journal* 167.

145 LJ Kotzé & A du Plessis 'African Charter on Human and Peoples' Rights and environmental standards' in SJ Turner et al (eds) *Environmental rights: The development of standards* (2019) 93.

146 (2001) AHRLR 60 (ACHPR 2001) (SERAC) para 68.

operations between Nigeria and Shell had caused extensive environmental damage, including soil and water pollution leading to a loss of agricultural lands, health issues and land dispossession and displacement.¹⁴⁷ The African Commission held that Nigeria had breached article 24 of the African Charter as it did not take active steps to prevent these violations and was complicit in other breaches including using violent suppression of dissent.¹⁴⁸

The *SERAC* case highlighted 'the role that the arms of justice and quasi-judiciary bodies in Africa could [and do] play to enhance the environmental rule of law'.¹⁴⁹ In related normative advances, the *Endorois* case and the *Ogiek* case reinforce the jurisprudence in the *SERAC* case by integrating development into the environment discourse as cognate components of article 24 jurisprudence.¹⁵⁰ The *SERAC* case highlights the African Commission's leading character in influencing political action, resourcing environmental activism, and popularising binding norms on the right to the environment in Africa.¹⁵¹ It also demonstrates its attempt to spur, more globally, 'a dynamic of imitation' of its praxis and effort to socialise other agents beyond Africa to become norm followers relative to environmental rights.¹⁵² Likewise, domestic rights-based civil society groups have relied on the language of the African Charter in strategically crafting and sustaining similarly-situated public interest environmental litigation before Africa's sub-regional courts, especially in situations where domestic law lacks corresponding justiciable rights and the likelihood that these suits would fail without a reliance on article 24 of the African Charter.¹⁵³ Beyond these important inroads, similar advances are observed in intra-state settings with domestic litigants in African states drawing on the article 24 jurisprudence to foreground domestic guarantees of the right to the environment.¹⁵⁴

147 *SERAC* (n 146) para 10.

148 *SERAC* paras 53-69.

149 F Abioye 'Advancing human rights through environmental rule of law in Africa' in M Addaney & A Jegede (eds) *Human rights and the environment under African Union law* (2020) 81, 92-93.

150 Kotzé & Du Plessis (n 145) 108.

151 J Nwobike 'The African human and people's rights and the demystification of second and third generation rights under the African Charter: Social and Economic Rights Action (SERAC) and Centre for Economic and Social Rights Centre (CESR) v Nigeria' (2005) 1 *African Journal of Legal Studies* 129.

152 Van der Linde & Louw (n 144) 169-170.

153 *Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria* Suit ECW/ CCJ/A PP/ 08/ 09, Rul ECW/ CCJ/ JUD/ 18/ 12 14 December 2012 paras 63-67; and JT Gathii 'Saving the Serengeti: Africa's new international judicial environmentalism' (2016) 16 *Chicago Journal of International Law* 386.

154 C Odote 'Human rights-based approach to environmental protection: Kenyan, South African and Nigerian constitutional architecture and experience' in Addaney & Jegede (n 149) 381; LJ Kotzé & A du Plessis 'Putting Africa on the stand: A bird's eye view of climate change litigation on the continent' (2020) 50 *Environmental Law* 615.

Beyond Africa, the article 24 jurisprudence's early intervention in setting an inaugural example of a binding right to the environment pointedly invited mimicry and helped shape developments in some other human rights systems. Notably, the San Salvador Protocol adopted in 1988 plugged the normative gap on the right to the environment – a right that was left out of the American Convention on Human Rights of 1969.¹⁵⁵ Similarly, the 2004 Arab Charter on Human Rights incorporates such a right.¹⁵⁶ The Paris Agreement also adopted a rights language in the context of climate change and sustainable development.¹⁵⁷

Thus, these strategic advances in international environmental law signal to actors and to activism alike Africa's norm leadership in and beyond Africa.¹⁵⁸ It is rather refreshing that the UN system now recognises 'the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights'.¹⁵⁹ Yet, it is regrettable that the final text of this resolution failed to acknowledge the origins in the African Charter of the formulation of this right as a binding entitlement in international human rights law; a situation that suggests that the marginalisation of Africa's pioneering role in international law continues to pose challenges to a more comprehensive outlook of the global human rights system.

5 Expanding on norm leadership: Venturing into 'new' territories and transcending limitations

Despite these attainments, the African human rights system's norm leadership has yet to extend sufficiently to other human rights spheres. Two such areas are lesbian, gay, bisexual and transgender (LGBT+) issues and norms constraining rights violations committed by businesses. These politico-legal developments continue to attract considerable attention from scholars, human rights activists and non-governmental organisations (NGOs) that advocate the African human rights system to do much more in these directions. Thus, the limitations discussed here raise a measure of doubt as to the extent to which the African human rights system can augment its significant

155 28 ILM 156, art 11.

156 12 IHRP (2005) art 38.

157 UN Doc FCCC/CP/2015/L.9/Rev/1 (12 December 2015) Preamble; S Atapattu 'The Paris Agreement and human rights: Is sustainable development the "new human right"?' (2018) 9 *Journal of Human Rights and Environment* 68.

158 GEK Dzah 'Theorising the right to environment: An Africological typology' (2019) 27 *African Journal of International and Comparative Law* 25.

159 Human Rights Council 'The human right to a safe, clean, healthy and sustainable environment' 48/L.23/Rev.1 (2021).

record of norm leadership by venturing into certain controversial 'new' territories and transcending the entailed limitations in the business and human rights domain.

5.1 In a flux: Sexual orientation

LGBT+ issues have occasioned complicated discussions in the African human rights system in terms of how non-state actors and individuals relate to the system's constituent agencies, and even as between the different agencies within the AU and its allied institutions. The recognition and protection of LGBT+ rights and sexual orientation under the African Charter continues to be a controversial and contentious politico-legal subject. While the Charter seems (at first glance) to be silent on it, some African countries such as South Africa, Lesotho, Gabon, Mozambique, Seychelles and Botswana have either de-criminalised same-sex relations or provided for legal guarantees on sexual orientation.¹⁶⁰ Yet, the majority of African states continue to impose harsh custodial sentences, the death penalty included, for same-sex relationships.¹⁶¹

The African human rights system's position on the issue remained largely untested until the Coalition of African Lesbians (CAL), a South Africa-based NGO, applied for observer status and was rejected by the Commission.¹⁶² CAL reapplied five years later, in 2015, and this time the African Commission accepted and granted CAL observer status on grounds that such accreditation helps protect LGBT+ persons from violence and discrimination.¹⁶³ However, the Commission's decision to grant the application drew the ire of the AU Executive Council which quickly requested the Commission to withdraw the observer accreditation.¹⁶⁴ The ruckus between the AU and the Commission intensified when another NGO, the Centre for Human Rights at the University of Pretoria, joined CAL to request an advisory opinion from the African Court.¹⁶⁵ The Court declined the

¹⁶⁰ D Ewing et al 'Sexual and gender identities: Violating norms' (2020) 34 *Agenda* 1.

¹⁶¹ C Izubgara et al 'Regional legal and policy instruments for addressing LGBT exclusion in Africa' (2020) 28 *Sexual and Reproductive Health Matters* 99.

¹⁶² P Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the history of the European Convention on Human Rights' (2013) 40 *Journal of Law and Society* 249.

¹⁶³ M Killander & MG Nyarko 'Human rights developments in the African Union (January 2017-September 2018)' (2018) 18 *African Human Rights Law Journal* 732.

¹⁶⁴ M Killander 'Human rights developments in the African Union during 2015' (2016) 16 *African Human Rights Law Journal* 532.

¹⁶⁵ Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians 002/2015 (Advisory Opinion) (2017-2018) 2 *African Court Law Report* 606 (CAL Opinion).

request on grounds that the applicant NGOs were not recognised by the AU although both NGOs enjoyed observer status at the Commission.¹⁶⁶ In the CAL Opinion the Court simply affirmed its earlier decision in a previous case on similar grounds of admissibility where an NGO had requested the Court to provide an advisory opinion on whether NGOs have legal standing before the Court.¹⁶⁷ A year later the Commission revoked its grant of observer status to CAL, bringing to an unhappy end – at least for the moment – what some have described as an unfortunate saga.¹⁶⁸

This development has far-reaching implications for Africa's rights jurisprudence, especially the strategic social constructivist role of non-state actors before adjudicative bodies. For example, the African Court's interpretation in the CAL Opinion immediately disadvantages non-state litigators before the Court – the reason being that an accredited NGO with observer status at the Commission, that may bring a communication and appear before that body, cannot simultaneously initiate an action before the Court simply because the AU's political organs have not 'recognised' that NGO.¹⁶⁹ Considering that the AU has demonstrated an unwillingness to expand access to NGOs at the Court through the recognition mechanism under article 4(1) of the African Court Protocol, this situation may not altogether be surprising. Yet, given the disadvantage caused to vulnerable groups such as LGBT+ groups in Africa, and the obvious, possible future limits placed on NGOs making other politico-legal claims, Ben Achour J's appeal to the AU in his separate opinion in the CAL Opinion is both relevant and supportable, and may well become the future position of the law. As Ben Achour J stated:¹⁷⁰

We wish to reiterate our hope that the African Union will amend article 4(1) of the Protocol with a view to opening up possibilities for referrals to [the] African Court and relaxing the conditions required of NGOs to bring their request for Advisory Opinion within the ambit of the Court's jurisdiction; or, the way of amendment being uncertain, to broaden its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

At this time, Heyns's now two-decade old caution also comes to mind and invites further consideration. As Heyns rightly noted, 'care should be taken to ensure that the African Human Rights Court

166 CAL Opinion (n 165) 614.

167 Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP) 1/2013, Advisory Opinion of 26 May 2017.

168 JE Bond 'Intersectionality, women's rights in Africa, and the Maputo Protocol' in VF Bruey (ed) *Patriarchy and gender in Africa* (2021) 47.

169 A Jones 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Opinion' (2017) 17 *African Human Rights Law Journal* 320.

170 CAL Opinion (n 165) 616.

does not undermine the African Commission, either by weakening its budget or by making the Commission irrelevant. Africa needs a fully functioning Commission as well as a Human Rights Court.¹⁷¹ This might well be the time to pause and rethink the relationship between these two adjudicative bodies.

5.2 Business meets human rights

International corporate liability is a matter of great interest for scholars of international law and international relations. The interaction between business and human rights violations presents an evolving challenge in Africa's rights discourse.¹⁷² Accordingly, the AU negotiated and adopted a treaty to criminalise and punish serious corporate violations of human rights in Africa.¹⁷³ The adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) made certain that this subject took concrete form in international discourse.¹⁷⁴ Hence, some contend that the Malabo Protocol will help Africa 'to respond more effectively to challenges posed by corporations'.¹⁷⁵

The Malabo Protocol provides for a regional framework for the criminal prosecution of business entities that commit egregious human rights violations.¹⁷⁶ This framework is critically important for punishing corporations that are deliberately involved in human rights violations or complicit in illegal trade in natural resources, and whose actions or inactions often promote, encourage or result in human rights violations.¹⁷⁷ Hence, as Omorogbe argues, the Protocol 'would enable the prosecution of multinational corporations for crimes against humanity. And if this interpretation is correct, the Protocol would be the first international treaty to do so as a judicial response is currently limited to the national level'.¹⁷⁸

171 C Heyns African regional human rights system: In need of reform? (2001) 1 *African Human Rights Law Journal* 166.

172 OC Okafor et al 'Assessing the African Union's 2016-2019 human rights action planning process: Embracing, and decoupling from, the conventional "ideal"' (2020) 64 *Journal of African Law* 143.

173 VO Nmehielle "'Saddling" the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive, expedient?' (2014) 7 *African Journal of Legal Studies* 7.

174 N Bernaz 'Conceptualising corporate accountability in international law: Models for a business and human rights treaty' (2021) 22 *Human Rights Review* 45.

175 M Sirleaf 'The African justice cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice* 71, 77.

176 Art 46C Malabo Protocol (n 174).

177 O Abe & A Ordor 'Addressing human rights concerns in the extractive resource industry in sub-Saharan Africa using the lens of article 46(C) of the Malabo Protocol' (2018) 11 *Law and Development Review* 843.

178 EY Omorogbe 'The crisis of international criminal law in Africa: A regional regime in response?' (2019) 66 *Netherlands International Law Review* 287, 303.

While this is a welcome addition to the repertoire of normative resources available for redressing human rights violations in Africa, certain challenges remain in the area of the struggle to instate a robust anti-corporate violations regime, particularly regarding the forcefulness with which African states – hostages rather than hosts (in most cases) to powerful Global North-domiciled transnational corporations – in reality, even with the best intentions, can mobilise or encourage the mobilisation of this aspect of the Malabo Protocol to moderate the worst excesses of these enterprises. Another question concerns the speed with which the Malabo Protocol will enter into force, even relative to the usual slow pace of treaty ratification in Africa. Given the magnitude of the human rights violations at issue, it would have been expected that the Protocol (imperfect as it is) would receive a more rapid than usual ratification across Africa. To date, this certainly has not been the case.

6 Conclusion: Toward a stable future as a norm leader

The African human rights system is a leader in the innovative, and even radical, production and clarification of aspects of the normative life of human and peoples' rights, not only in Africa, but across the world.¹⁷⁹ The African human rights system embodies different chapters in Africa's resistance to the orthodoxies of international law and anticipates a future where Africa's experiences and ideas can play a more prominent role in the re-conceptualisation of rights praxis. In developing our argument on the important leadership role the African human rights system has played, the argument was limited to three rights within the normative framework of the African human rights system (remedial secession, development and environment) the global travels and dispersals of which exemplify this norm leadership.

Influenced by strategic social constructivism's norm cycle theory, the article argued that although the African human rights system is not a state (the typical norm leader within this theoretical construct) the critical but globally under-appreciated roles the system has played

¹⁷⁹ M Talbot 'Collective rights in the Inter-American and African human rights systems' (2018) 49 *Georgetown Journal of International Law* 163 (in comparing the African and Inter-American human rights jurisprudence, the author argues that the African human rights system's direct incorporation of collective rights sets the pace for others to follow. In this regard, the author further noted that the African Charter's provisions on reference to other human rights systems also engender a unique approach by the African human rights system to incorporate other non-African perspectives, which helps the African jurisprudence to continue leading the way in human rights jurisprudence.)

in regard to the socialisation of certain human rights ideas fits within, and can also help extend, social constructivist human rights theory. These alternative, African, forms of rights praxis have been mimicked and utilised by a diverse array of human rights systems, activists, jurists, states and even sub-regional organisations that deploy them at different adjudicative levels and fora. Yet, despite its notable and even radical additions to the global human rights corpus and praxis, the African human rights system has been dogged by its relatively little success in charting new paths in certain specific controversial and important areas. In these instances, the African human rights system has not been a norm leader, has not led enough in norm development and application, or has functioned as an agent of 'de-leadership'. If the African human rights system is not to delegitimise its otherwise rightful position as a norm leader in global rights praxis, then these challenges invite deeper introspection and a more hopeful, robust pro-human rights action, of the kind the late Professor Christof Heyns would have been proud to expect of the African human rights system.¹⁸⁰

180 K Mickelson 'Hope in a TWAIL register' (2020) 1 *TWAIL Review* 14 (aligning with TWAIL's call to scholars to assume an activist role through scholarship).

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The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights

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Summary: *In contentious cases the material jurisdiction of the African Court is the jurisdiction to interpret and apply the instruments that are provided for in article 3(1) of the African Court Protocol. For the African Court to appropriately apply these instruments it must perform an interpretive role and utilise, at its discretion, information available from sources other than those that fall under its material jurisdiction and the sources of law stipulated in article 7 of the Court Protocol. In a 2001 article Heyns brought to our attention a number of potential problems related to the material jurisdiction of the African Court. He particularly pointed us to the loss of the 'African' in article 3, the narrow approach to the applicable sources of law in article 7 and the uncertainty of the position of articles 60 and 61 of the African Charter in guiding the interpretive mandate of the African Court. Through an analysis of the Court's jurisprudence, guided by these three essential issues, the article explores how the Court has approached its material jurisdiction during its first*

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ten years of its existence. It further aims to establish what methodology the Court has developed to address the lack of an interpretive provision in the Court Protocol with specific reference to the application of articles 60 and 61 of the Charter. The analysis demonstrates a pragmatic approach to material jurisdiction, firmly grounded in the principle of complementarity.

Key words: *African Court; material jurisdiction; complementarity; interpretive mandate*

1 Introduction

The term ‘jurisdiction’ can best be described as the power that signifies the scope within which an adjudicatory body can act with integrity over persons, matters and territory. As any other court, the African Court on Human and Peoples’ Rights (African Court) possesses jurisdiction over matters only as far as it has been granted such power. The main argument raised in this article is that to fulfil two of the Court’s core values, namely, to apply and interpret the provisions of the African Charter on Human and Peoples’ Rights (African Charter), the Protocol to the African Charter on Human and Peoples’ Rights Establishing an African Court on Human and Peoples’ Rights (African Court Protocol), the 2020 Rules of the Court (Rules) and other relevant international human rights instruments in a fair and impartial way and to be responsive to the needs of those who approach it, the Court must clearly define its material jurisdiction and apply it consistently.¹ In this regard the main focus of the article is to analyse the sources applied by the African Court in the consideration of cases submitted to it in the first ten years of its existence, to present some thoughts on the approach of the Court in defining its material jurisdiction.

The final stretch of negotiations leading up to the adoption of the African Court Protocol saw an addition of important qualifiers to the Court’s material jurisdiction. These changes involved adding references to ‘ratification’ and ‘relevant’ and, more importantly, dropping the reference to ‘African’ before ‘human right instruments’.² Consequently, article 3(1) refers to the ‘interpretation and application of the Charter, th[e] Protocol and any other relevant human rights instrument ratified by the states concerned’. This mandate is

1 <https://www.african-court.org/wpafc/basic-information/> (accessed 1 December 2021).

2 Addis Ababa Draft (1997) OAU/LEG/EXP/AFCHPR/PROT (III) Rev 1.

confirmed in article 7 and Rule 29(1)(a) of the Rules. Accordingly, article 3(1), together with article 7, governs the norms the African Court is authorised to employ as part of its adjudicatory function.

Therefore, when the Court assumed its functions in November 2006, it was set to act under a far broader material jurisdiction than its European and Inter-American counterparts.³ From this perspective, it is understandable that much of the early debate around the Court's material jurisdiction focused on the possible outcomes, and even dangers, of the broad mandate created under articles 3(1) and 7 of the Protocol. In one of the earliest commentaries, by Naldi and Magliveras, the jurisdiction of the newly-conceived Court was described as a 'radical, but welcome, development', not 'without problems, especially as regards their application and enforcement'.⁴

Furthermore, it is common cause that international human rights instruments are drafted in general terms, as a common standard of achievement of the state parties that ratify these. Thus, for the Court to appropriately interpret and apply the instruments referred to in articles 3(1) and 7, it must utilise, at its discretion, information available in sources outside those under its material jurisdiction. However, the Court Protocol lacks an interpretation clause such as those that exist, for example, under the African Charter on Human and Peoples' Rights (African Charter). Under articles 60 and 61 of the African Charter, the African Commission on Human and Peoples' Rights (African Commission) must interpret the Charter pursuant to international human rights law and jurisprudence.

3 In comparison, the material jurisdiction, in contentious matters before the European Court of Human Rights (European Court) is set out in art 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), stipulating that 'jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto'. Similarly, art 1 of the Statute of the Inter-American Court of Human Rights stipulates that the purpose of the Inter-American Court is to apply and interpret the American Convention. This is further confirmed in art 62(3) of the American Convention on Human Rights. Added to this is the limited jurisdiction over arts 8 and 13 of the Protocol of San Salvador. Art 19(6) of the Protocol of San Salvador stipulates that violations of arts 8 (trade union rights) or 13 (right to education) 'may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights'. See YONJ Reventlow & R Curling 'The unique jurisdiction of the African Court on Human and Peoples' Rights: Protection of human rights beyond the African Charter' (2019) 33 *Emory International Law Review* 206-207; A Rachovitsa 'On new "judicial animals": The curious case of an African Court with material jurisdiction of a global scope' (2019) 19 *Human Rights Law Review* 256.

4 GJ Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 435.

In his seminal article Heyns highlighted several potential problems related to the material jurisdiction of the then yet-to-be established Court. In responding to the interpretation of the material jurisdiction as presented by other scholars at the time, he raised the concern that if the Court's jurisdiction would extend to 'any' human rights treaty ratified by a member state of the Court Protocol this could, potentially, cause 'jurisprudential chaos'.⁵ Heyns further suggested that such a broad material jurisdiction would have an adverse effect on the ratification of the Protocol as well as 'any [other] human rights treaty'.⁶ In further elaborating on the danger of the broad material jurisdiction of the Court, Heyns particularly pointed to the loss of 'African' in article 3(1) which, in his opinion, could lead to the abandonment of the 'unique conception of human rights in Africa' and the acceptance of international norms 'with open arms in an uncritical fashion'.⁷ He also emphasised the potential problems with utilising article 7 as an interpretation clause as the wording of this article would not provide the African Court with the same opportunity as that of the African Commission under articles 60 and 61 to correct the 'flaws of the Charter system'.⁸

Guided by these two essential issues, the first objective of this article is to determine how the Court has demarcated its material jurisdiction through an analysis of the Court's originating jurisprudence.⁹ The second objective is to establish what methodology the Court has developed to address the lack of a specific interpretive provision in the Protocol with specific reference to the application of articles 60 and 61 of the African Charter. To achieve these objectives, building on Heyns's methodology, part 2 presents how the Court has delineated its material jurisdiction in its first decade. Part 3 focuses on the relationship between articles 3(1) and 7 and the methodology the Court has developed to address the lack of an interpretive provision in the Court Protocol with specific focus on articles 60 and 61 of the African Charter. Part 4 presents the concluding observations, responding to some of Heyns's concerns.

5 CH Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 167; see also F Viljoen *International human rights law in Africa* (2012) 438.

6 Heyns (n 5) 167.

7 Heyns (n 5) 168.

8 Heyns (n 5) 157, 168-169.

9 This analysis includes jurisprudence originating from the first 10 years of the Court's existence, ie 2008-2018.

2 Establishing its material jurisdiction

The material jurisdiction of the African Court in contentious cases is the jurisdiction to interpret and apply the instruments that are provided for under article 3(1) of the African Court Protocol. As set out in article 1, the jurisdiction of the Court is governed by the Court Protocol. The Court therefore is a 'creature of the Protocol and ... its jurisdiction is clearly prescribed by the Protocol'.¹⁰ During the different phases of its existence, the Court has explored the length and breadth of its jurisdictional mandate to develop a framework within which it justifies its material jurisdiction.¹¹ This, in itself, is an outcome of the Court's mandate to interpret and apply the Protocol.¹² This part discusses critical, inter-linked issues relating to the interpretation and application of the Protocol with regard to the Court's material jurisdiction. This discussion aims to highlight the significance of the reference to 'relevant' and 'human rights' instruments as referred to in article 3(1) of the Court Protocol. Notwithstanding the fact that the Court has not explicitly stated how it defines a 'relevant' human rights instrument, the following part discusses what can be understood as such an instrument through an analysis of the jurisprudence handed down between 2013 and 2016. Considering the Court's broad interpretation of 'relevant', part 2.2 then focuses on how the Court has defined a 'human rights' instrument.

2.1 'Relevant' human rights instrument

In his 2001 article, Heyns suggested that the only treaties that could, theoretically, become 'relevant' for the purposes of article 3(1) would be treaties that 'make express provision for adjudication by the African Human Rights Court'.¹³ He supported this argument by the fact that at the time there were no other treaties that contained such a provision, and therefore article 3(1) should be interpreted to include the African Charter, the African Court Protocol and any future treaty that included such a provision.¹⁴

¹⁰ *Femi Falana v African Union* (Jurisdiction) (2012) 1 AfCLR 118 para 73.

¹¹ For a discussion on the different phases of the Court's jurisprudence, see the Separate Opinion of Achoun J & Tchikaya J to *Fidele Mulindahabi v Rwanda* Applications 4, 5, 10 and 11/2017 (African Court) (Judgment) 26 June 2020.

¹² Arts 3(1), 4 and 27 African Court Protocol.

¹³ Heyns (n 5) 168.

¹⁴ As above. Heyns refers to art 23 of the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women, which later became art 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) appointing the Court as the primary body seized with its interpretation. In addition, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Rights Protocol) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons

Based on the 'express provision', as proposed by Heyns, it is of interest to explore the earliest jurisprudence of the African Court. In 2013 the Court presented its first judgment on the merits in *Tanganyika Law Society v Tanzania*.¹⁵ In *Tanganyika Law Society* the Court, importantly, set out the first parameters of its material jurisdiction, which has guided its jurisprudence going forward. The applicants in this case alleged violations of the African Charter, the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (Universal Declaration).¹⁶ As a point of departure, the Court confirmed that it has jurisdiction over the African Charter, as listed under article 3(1), but, importantly also over ICCPR and the Universal Declaration.¹⁷ However, in its findings it did not find it necessary to consider the application of ICCPR and the Universal Declaration as it had considered the alleged violations under the relevant provisions of the African Charter.¹⁸ Consequently, as a point of departure the Court clarified that it interprets article 3(1) to enable it to assume jurisdiction over United Nations (UN) treaties, such as ICCPR; but that it will not resort to the application of such treaties when the African Charter finds application in a comparable manner. Conclusively, it concluded that it exercises jurisdiction over the entire body of human rights treaties that have been ratified by a state party to the African Court Protocol.

In *Norbert Zongo* the Court further clarified the relationship between the African Charter and other human rights instruments. It also presented its views on the relationship between the Charter and another human rights instrument where the latter is more detailed than the Charter. In this case the claims of the applicants were based on the African Charter, ICCPR, the Universal Declaration and the

in Africa (Older Persons Protocol) contain provisions where the Court plays a subsidiary role to the African Commission where the African Commission may refer matters of interpretation to the Court and where individuals and NGOs in states with direct access to the Court under arts 5(3) and 34(6) of the Protocol can approach the Court with matters of application or implementation. See arts 34(4) and (5) of the African Disability Rights Protocol and arts 22(3) and (4) of the Older Persons Protocol.

15 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (Merits) (2013) 1 AfCLR 34 (*Tanganyika Law Society*).

16 *Tanganyika Law Society* (n 15) paras 76 and 92.

17 *Tanganyika Law Society* (n 15) paras 85 and 91-92. However, in *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (Merits) (2014) 1 AfCLR 219 (*Norbert Zongo*) para 48 (fn 2) the Court confirmed that the Universal Declaration is a declaration and not a treaty and as such it does not fall under the scope of art 3(1). The Court applied a similar approach in *Sebastien Germain Ajavon v Benin* App 13/2017 (African Court) 29 March 2019 para 45, where it concluded that the 1789 Declaration of the Rights of Man and of the Citizen did not fall under its material jurisdiction because this Declaration is not an international instrument, open for ratification, but rather is a text of French internal law which imposes no obligation on the respondent state.

18 *Tanganyika Law Society* (n 15) paras 122-123.

Economic Community of West African States (ECOWAS) Revised Treaty (Revised Treaty). After a preliminary examination of its material jurisdiction, the Court assumed jurisdiction over the treaties, but not the Universal Declaration.¹⁹ The Court took the same position as in *Tanganyika Law Society* and did not find a violation directly based on ICCPR. Having ruled on the relevant obligations in the Charter, in the Court's opinion there was no need to consider the allegations made pursuant to ICCPR.²⁰

However, in *Norbert Zongo* three of the four deceased individuals, on behalf of which claims were presented, were journalists. Thus, considering article 66(2)(c)²¹ of the Revised Treaty, explicitly ensuring the respect for the rights of journalists, the African Court took a different approach. Instead of ruling on article 9(2) of the African Charter, the general right to freedom of expression of all, the Court took the view that the Revised Treaty and the Charter should be read together. Therefore, the Court found a violation of both rights.²² This signalled that the Court approaches its material jurisdiction primarily under the African Charter, but once a more detailed, specific, or extensive right is located in another treaty under its jurisdiction, the Court considers and applies such a right in conjunction with the Charter. By applying the Revised Treaty the Court also, arguably, confirmed that the Revised Treaty, the founding treaty of ECOWAS, was a 'relevant' human rights instrument, confirming the sentiments of Naldi and Magliveras, as discussed by Heyns.²³

In the following case, *Lohé Issa Konaté v Burkina Faso*,²⁴ the issue of freedom of expression of journalists was once again brought before the Court. In this case the applicant similarly relied on the African Charter, ICCPR and the Revised Treaty.²⁵ In the operative paragraph of the judgment the Court assumes jurisdiction over these three instruments.²⁶ However, in contrast to the decision in *Norbert Zongo*, the Court in *Konaté* found several violations based on the African Charter, ICCPR and the Revised Treaty.²⁷ Thus, in *Konaté* the Court,

19 As above.

20 *Norbert Zongo* (n 17) paras 157 & 188.

21 Arts 66 (1) and (2)(c) reads: 'In order to involve more closely the citizens of the Community in the regional integration process, Member States agree to co-operate in the area of information ... [t]o this end they undertake as follows ... to ensure respect for the rights of journalists.'

22 *Norbert Zongo* (n 17) para 203.5. This decision was taken with a narrow majority of five to four, where Niyungeko J, Ouguergouz J, Guisse J and Asa J voted against and presented a separate opinion.

23 Heyns (n 5) 166-167.

24 *Lohé Issa Konaté v Burkina Faso* (Merits) (2014) 1 AfCLR 314 (*Konaté*).

25 *Konaté* (n 24) paras 9-12.

26 *Konaté* para 36.

27 *Konaté* paras 176.3, 176.5, 176.6 & 176.7.

without explicitly stating it, provided proof that UN treaties are deemed 'relevant'. By applying ICCPR, it established that it would not merely use it as an interpretive tool. Arguably, considerable conceptual clarity could have been provided by the Court on this matter if it had offered a clear statement on its considerations in this regard.

The first three cases in a long string of cases, bringing to the African Court's attention violations related to the Tanzanian criminal justice system, further delineated the Court's approach to its material jurisdiction. In *Alex Thomas v Tanzania*²⁸ the Court found violations based on the African Charter and ICCPR by applying article 7(1)(c) of the African Charter 'in light' of article 14(3)(d) of ICCPR.²⁹ The Court furthered this argument in *Wilfred Onyango Nganyi & Others v Tanzania*³⁰ by concluding that where, in comparison to the Charter, a right is more detailed in another human rights instrument, such an instrument will be applied by the Court. The Court stated the following:³¹

In view of the fact that the Respondent ratified the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976, in accordance with Article 7 of the Protocol, the Court can not only interpret Article 7(1)(c) of the Charter in light of the provisions of Article 14(3)(d) of the ICCPR but also *apply* the latter provisions.

Thus, in determining whether Tanzania had violated the applicants' rights to a fair trial, the African Court found recourse in the elements of the right to fair trial as guaranteed under both the African Charter and ICCPR. The Court noted that article 14(3)(d) of ICCPR is more elaborate than article 7(1)(c) of the Charter and that, therefore, measures should have been taken by Tanzania, in the interests of justice, to ensure that the applicants were afforded legal assistance.³²

However, in *Wilfred Onyango* the Court did not follow its approach in *Alex Thomas*. Instead, in applying the methodology set out in *Tanganyika Law Society*, the Court based its findings only on the African Charter.³³ In other words, it referred to the application of the more specific provision in ICCPR, but in essence used the provisions in ICCPR as an interpretive tool to give further contents to the

²⁸ *Alex Thomas v Tanzania* (Merits) (2015) 1 AfCLR 465 (*Alex Thomas*).

²⁹ *Alex Thomas* (n 28) para 114.

³⁰ *Wilfred Onyango Nganyi & Others v Tanzania* (Merits) (2016) 1 AfCLR 507 (*Wilfred Onyango*).

³¹ *Wilfred Onyango* (n 30) para 165 (my emphasis).

³² *Wilfred Onyango* (n 30) paras 162-168. See also *Armand Guehi v Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 (*Armand Guehi*) paras 35-38.

³³ *Wilfred Onyango* (n 30) para 193(viii).

Charter.³⁴ This approach does not make sense in light of what the Court held in *Onyango*, as quoted above, where the Court refers to article 7 of the Court Protocol, not as an interpretive clause but as an instruction to apply ICCPR as a relevant human rights treaty ratified by Tanzania. Curiously, in the following case, *Mohamed Abubakari v Tanzania*,³⁵ the Court returned to its approach in *Alex Thomas* and found a violation of article 7 of the African Charter as well as article 14 of ICCPR.

In summary, the first six judgments on the merits, handed down between June 2013 and June 2016, all have in common that they are focused on the African Charter. Departing from *Tanganyika Law Society* the Court has chiselled out a space for other human rights treaties where it is deemed relevant for purposes of scope and detail. In these judgments the Court developed the three cardinal principles that it has continued to apply in determining its material jurisdiction: first, the preference for the application of the African Charter; second, that it can, and will, assume jurisdiction over sub-regional and UN treaties; and, third, that it will resort to other human rights treaties, that is, such treaties become 'relevant' only when they provide additional detail and scope. However, regarding the latter, the Court has not been consistent in its application of additional treaties as such treaties have been applied, namely, a violation found based on ICCPR, as in *Alex Thomas*³⁶ and *Mohamed Abubakari*,³⁷ and used for interpretive purposes as in *Wilfred Onyango*³⁸ where a reference to ICCPR does not appear in the operative part of the judgment.

2.2 Characterisation of a 'human rights instrument'

The ostensibly simple task of characterising a treaty as a human right treaty is complicated by several factors. As treaties deal with human rights in different ways, to a different extent and sometimes without the express objective of protecting individual rights, the act of pinpointing the object and purpose of a treaty, its rights, and state obligations enunciating individual rights often leaves ample room

³⁴ See 3.2.

³⁵ *Mohamed Abubakari v Tanzania* (Merits) (2016) 1 AfCLR 599 (*Abubakari*). This case was concluded at the same session as the judgment in *African Commission on Human and Peoples' Rights v Libya (Libya)* (Merits) (2016) 1 AfCLR 153 where Ouguerouz], in his separate opinion, points out that '[u]nder Articles 3 ... and 7 ... of the Protocol, the Court is however authorised to "apply" the provisions of the [ICCPR], same as the relatively detailed clauses of the May 2004 Arab Charter on Human Rights to which Libya is also party'.

³⁶ *Alex Thomas* (n 28) para161(vii).

³⁷ *Abubakari* (n 35) para 242(ix).

³⁸ *Wilfred Onyango* (n 30) para 193(viii).

for interpretation.³⁹ As referred to by Heyns, '[p]resumably even environmental treaties and those related to mercenaries etc would become justiciable, in so far as they have human rights implications'.⁴⁰

2.2.1 'Object' and 'purpose'

For an instrument to be classified as a human rights instrument, in general terms, it must secure individual rights, that is, include a direct expression of rights, and its object and purpose must be to promote and/or protect human rights. The importance of the object and purpose of a treaty was first highlighted in the International Court of Justice (ICJ)'s Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide⁴¹ and later repeatedly referred to in the Vienna Convention on the Law of Treaties (VCLT).

The emphasis on the purpose of a treaty finds its reference in, for example, article 31(1) of the VCLT. Critically, however, the VCLT affords no explanation as to the contents of this concept or concepts.⁴² Seemingly synonymous, the terms 'object' and 'purpose', in international law, cover two different aspects of a treaty: first, as suggested by Linderfalk, the rights and obligations that a treaty enunciates, that is, its normative content; and, second, the outcomes envisioned by the parties accomplished by the application of the treaty, that is, the fulfilment of the normative content.⁴³ Hence, the two are linked, but nonetheless representing two different aspects of what often is regarded as a single concept.

2.2.2 Categories of human rights instruments

In reflecting on the methodology that the African Court has developed, primarily in *APDH v Côte d'Ivoire*,⁴⁴ at least three different categories of human rights treaties can be uncovered:⁴⁵ first,

39 G Niyungeko 'The African Charter on Democracy, Elections and Governance as a human rights instrument' (2019) 63 *Journal of African Law* 65.

40 Heyns (n 5) 167.

41 *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (28 May 1951) (1951) ICJ Reports 15.

42 D Kritsiotis 'The object and purpose of a treaty's object and purpose' in MJ Bowman & D Kritsiotis (eds) *Conceptual and contextual perspectives on the modern law of treaties* (2018) 240.

43 U Linderfalk 'On the meaning of the "object and purpose" criterion, in the context of the Vienna Convention on the Law of Treaties, Article 19' (2003) 72 *Nordic Journal of International Law* 433-434.

44 *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (Merits) (2016) 1 AfCLR 668 (APDH) further discussed under 3.2.4.

45 Niyungeko (n 39) 65-70.

treaties with human rights promotion and/or protection as its main object and purpose, which treaties contain provisions that directly enunciate human rights; second, treaties that do not have human rights promotion and/or protection as its main object and purpose, or which have different objectives and purposes of which one is human rights protection, but which contain provisions that directly or indirectly enunciate human rights; finally, treaties that do not have human rights promotion and/or protection as its main object and purpose but which contain provisions that have some – indirect – bearing on human rights.

The first category of treaties, treaties that contain provisions that directly enunciate human rights, arguably is the most distinct category. However, based on their internal structure and phraseology these too can be divided into different sub-groups. These are, first, instruments that directly enunciate human rights and specific human rights protection is envisaged as the outcome, such as the African Charter; the African Charter on the Rights and Welfare of the Child (African Children's Charter); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol); the African Youth Charter; the African Disability Protocol; and the nine core UN human rights treaties.⁴⁶ Second, there are instruments that essentially set out obligations of state parties from which individual human rights can be inferred, such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; the Older Persons Protocol; and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. Finally, there are the instruments that constitute the continental human rights bodies: the African Charter; the African Children's Charter; and the African Court Protocol (the African Charter and the African Children's Charter also qualifying in the first sub-category). The contents of the latter two sub-categories arguably are more challenging to clearly distinguish. The second sub-category, the 'intermediate' category, from the perspective of the wide variety of AU treaties with human rights protection as one of

46 ICCPR; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); the International Convention for the Protection of All Persons from Enforced Disappearance (CPED); and the Convention on the Rights of Persons with Disabilities (CRPD). This category also includes the Second Optional Protocol to ICCPR, aiming at the abolition of the death penalty; the Optional Protocol to CRC on the involvement of children in armed conflict and the Optional Protocol to CRC on the sale of children, child prostitution and child pornography.

their objectives, albeit not the main objective, is the most populated category.⁴⁷ This also is the category of treaties that is most difficult to distinguish as there are arguments on both sides as to why a treaty in this category should or should not be included under the African Court's jurisdiction.

When considering the object and purpose and the presence of direct/indirect rights, the second category of treaties includes the African Charter on Democracy, Elections and Governance (African Democracy Charter) and the ECOWAS Protocol on Democracy and Good Governance, as was confirmed by the African Court in *APHD*, as further discussed under 3.2.4 below. It also, arguably, includes treaties such as the Cultural Charter for Africa; the African Union Convention on Preventing and Combating Corruption; the Charter for African Cultural Renaissance; the African Union Convention on Cyber Security and Personal Data Protection; the Revised African Convention on the Conservation of Nature and Natural Resources; the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development; the OAU Convention on the Prevention and Combating of Terrorism and the Road Safety Charter;⁴⁸ again confirming the fear as expressed by Heyns.⁴⁹

These treaties do not manifest a direct human right objective and purpose. Similarly, these instruments do not set out clear, direct individual rights. However, as an example, article 7(2) of the Revised Convention on Conservation stipulates an obligation on the state to 'establish and implement policies for the planning, conservation, management, utilisation and development of underground and surface water', where the state must attempt to 'guarantee for their populations a sufficient and continuous supply of suitable water'. This statement may be interpreted to present individuals in a state that has ratified the Revised Convention on Conservation with an inferred right to safe drinking water. Furthermore, and perhaps the most discussed example in this category, is the AU Convention on Corruption. One of the objectives of this Convention, as referred to in its Preamble, is to 'respect human dignity and to foster the promotion of economic, social, and political rights'. While most of the articles in this Convention are framed as state obligations to adopt domestic laws, policy and regulations to combat corruption, it infers, as suggested by Viljoen, the right to dignity and related civil

47 Niyungeko (n 39) 69-70.

48 Where, as an example, state parties must safeguard the needs of vulnerable road users and ensure that they are adequately considered in the planning, design and provision of road infrastructure arguably spelling out a right for such road users to have their physical integrity protected.

49 Heyns (n 5) 167.

and political rights.⁵⁰ The AU Convention on Corruption alongside the Convention on the Combating of Terrorism also directly set out the right to a fair trial.⁵¹

In the third category of treaties, the most obvious example would be the AU Constitutive Act. The Preamble together with articles 3⁵² and 4⁵³ of the Constitutive Act contains general references to human rights, which begs the question whether it can be classified as a human rights treaty. The human rights references in the Act refer to the objectives and principles of the AU, conferring the obligation upon its members to act in accordance with these principles. However, it could be argued that such obligations have some indirect bearing on human rights. Furthermore, the application of the AU Constitutive Act clearly envisaged the promotion and protection of human rights.⁵⁴

Even though the reliance on the AU Constitutive Act before the African Court would certainly be sparse, it is not, as suggested by Niyungeko, a purely academic question.⁵⁵ In *Atabong Denis Atemnkeng v African Union*⁵⁶ the applicant raised the question of whether the optional jurisdiction clause in article 34(6) of the Protocol was compatible with the principles and objectives of the AU Constitutive Act. The African Court, however, did not consider the merits of this case as it found that it lacked personal jurisdiction to hear the case.⁵⁷

The argument that the AU Constitutive Act would indeed fall under the Court's material jurisdiction could further be substantiated by the ease with which the Court assumed jurisdiction over the Revised Treaty in *Norbert Zongo and Konaté*.⁵⁸ Neither of these cases

50 Viljoen (n 5) 436-437.

51 Art 14 of the AU Convention on Corruption and art 7(3) of the Convention on the Combating of Terrorism.

52 Arts 3(e) and (h).

53 Arts 4(l) and (m).

54 Preamble to the AU Constitutive Act, '[d]etermined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.

55 Niyungeko (n 39) 68. He suggests that '[the AU Constitutive Act] would surely be a human rights instrument "by default", since many other specific human rights instruments directly address human rights issues'.

56 *Atabong Denis Atemnkeng v African Union* (Jurisdiction) (2013) 1 AfCLR 182 (*Atabong Atemnkeng*) paras 17, 20-21 & 24. See also *Request for Advisory Opinion by Rencontre Africaine pour la Défense des Droits de l'Homme* (Advisory Opinion) (2017) 2 AfCLR 594 where the NGO sought clarification on whether it was possible to institute legal action before the Commission or the Court against a state following an unconstitutional change of government. Part of this request was based on art 4 of the AU Constitutive Act. The request for the Advisory Opinion was denied based on the lack of standing of the NGO.

57 *Atabong Atemnkeng* (n 56) paras 40 and 46(a).

58 See 3.1.

contains an explanation as to why the treaty constituting the revised ECOWAS would be classified as a 'human rights instrument' under the ambit of article 3(1) of the Court Protocol.⁵⁹ Similarly to articles 3 and 4 of the AU Constitutive Act, article 4(g) of the Revised Treaty, albeit in a more direct manner, refers to the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'. The objective of the Revised Treaty, namely, to establish an economic Union in West Africa, must thus be fulfilled with adherence to the rights set out in the African Charter, that is, it is not the main purpose of the treaty. However, as with the AU Constitutive Act it could be argued that this obligation has an indirect bearing on human rights. Considering this, the Treaty for the Establishment of the East African Community would equally fall under the Court's material jurisdiction.⁶⁰

2.2.3 'Individual rights' as 'human rights'

As indicated in the general discussion on the different categories of treaties under 2.2.2 above, the presence of provisions that directly or indirectly enunciate human rights is of key interest in characterising a treaty as a human rights instrument. In this regard, a distinction must be drawn between an 'individual right' and an 'individual human right'.⁶¹ The African Court had the opportunity to clarify this matter in *Armand Guehi* where the applicant relied on the Vienna Convention on Consular Relations (VCCR) to substantiate a claim that he had been denied consular assistance during the time he was arrested, detained, and later sentenced to death. Of interest is the analysis of the African Court of the status of the VCCR, considering the fact that the purpose of this treaty cannot, even in the broadest sense, be classified as focusing on human rights, but containing, in articles 36(1)(b) and (c), what arguably are individual rights. To assume jurisdiction under article 3(1) of the Protocol the VCCR would have to be classified as a 'human rights instrument', articles 36(1)(b) and (c) as 'human rights', and due regard would have to be taken of

⁵⁹ *Norbert Zongo* (n 17) para 48; *Konaté* (n 24) paras 36 & 37.

⁶⁰ See eg the application of art 6(d) of the Treaty for the Establishment of the East African Community in, eg, *James Katabazi v Secretary-General of the EAC* (Reference 1 of 2011) [2013] EACJ 4 (14 February 2013); *Plaxeda Rugumba v Secretary-General of the EAC and Attorney-General of Rwanda* (Appeal 1 of 2012) [2012] EACJ 10 (1 June 2012); *East African Centre for Trade Policy and Law v Secretary-General of the EAC* (Reference 9 of 2012) [2013] EACJ 10 (9 May 2013); and *Samuel Mukira Mohochi v Attorney-General of Uganda* (Reference 5 of 2011) [2013] EACJ 8 (24 May 2013).

⁶¹ G Waschefort 'The subject-matter jurisdiction and interpretive competence of the African Court on Human and Peoples' Rights in relation to international humanitarian law' (2020) 20 *African Human Rights Law Journal* 64-66.

the bearing on the purpose of the former considering the presence of the latter.⁶² This matter has been debated by other regional and international courts. Already in 1999 the Inter-American Court of Human Rights (Inter-American Court), in a request for an Advisory Opinion⁶³ by Mexico, was faced with the question of whether article 36 of the VCCR should be interpreted as containing provisions concerning the protection of human rights.⁶⁴ This question was put forward with specific reference to detainees in ten states in the United States who, like Arman Guehi, had been sentenced to death.⁶⁵

In its analysis the Inter-American Court importantly distinguished between the purpose of the VCCR and the concern of one provision in the VCCR with the protection of human rights.⁶⁶ In this regard the Inter-American Court concluded that

while some of the comments made to the Court concerning the principal object of the [VCCR] to the effect that the treaty is one intended to 'strike a balance among states' are accurate, this does require that the Treaty be dismissed outright as one that may indeed concern the protection of an individual's fundamental rights.⁶⁷

It further concluded that article 36 of the VCCR endows a detained foreign national with individual rights that are the counterpart to the host state's correlative duties.⁶⁸ This, the Inter-American Court resolved, does not automatically mean that this right is a human right.⁶⁹ However, because measures included under article 36 may include providing legal representation and monitoring the conditions under which the detainee is being held, the Inter-American Court found that article 36 concerned the protection of the 'rights of the national of the sending state [that] may be of benefit to him'; thus the Inter-American Court classified these as human rights.⁷⁰

62 This matter has been debated before other regional and international courts; see Inter-American Court of Human Rights Advisory Opinion OC-16/99 of 1 October 1999, *Requested by the United Mexican States 'The Right To Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law'*; *Germany v United States of America* ICJ (27 June 2001) (2001) ICJ Reports 466; *Mexico v United States of America* (31 March 2004) (2004) ICJ Reports 2004 12. For further discussion, see also Rachovitsa (n 3) 265.

63 Inter-American Court of Human Rights Advisory Opinion OC-16/99 of 1 October 1999 *Requested by the United Mexican States 'The Right To Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law'* (Right to Information on Consular Assistance Opinion).

64 Inter-American Court of Human Rights (n 63) para 4.1.

65 Inter-American Court of Human Rights (n 63) para 2.

66 Para 76.

67 As above.

68 Para 84.

69 Para 85.

70 Paras 86-87.

Arguments related to a violation of article 36 of the VCCR have further been heard by the ICJ. In *LaGrande*⁷¹ the ICJ concluded that the text of articles 36(1)(b) and (c) 'creates individual rights' but did not entertain the discussion as to whether these are human rights.⁷² In *Avena & Other Mexican Nationals*⁷³ Mexico contended that the individual rights contained in articles 36(1)(b) and (c) were fundamental human rights. The ICJ found the United States to be in violation of the VCCR, but concluded that

[w]hether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in that regard.⁷⁴

Evidently, the status of the individual rights in the VCCR is debatable and the ICJ's conclusion in *Avena & Other Mexican Nationals* stands in stark contrast to the Inter-American Court's findings in the *Right to Information on Consular Assistance Opinion*. However, the reasoning in *Avena* does not support, as has been suggested, the conclusion that the ICJ has concluded, in an *obiter dictum*, that the rights set out in article 36(1) of the VCCR are individual rights, but not human rights.⁷⁵ In this regard it is essential to point out that the ICJ focused on whether this article contained individual rights, not whether the VCCR could be classified as a human rights instrument.⁷⁶

In returning to the African Court's position in *Armand Guehi*, it neither confirmed the status of the VCCR nor discussed the nature of articles 36(1)(b) and (c). Instead, the Court assumed jurisdiction over the VCCR based on article 7(1)(c) of the African Charter. Similarly to the approach in *Tanganyika Law Society* the Court subsumed the rights in the VCCR under the African Charter, with the significant difference that the right to consular assistance, as set out in articles 36(1)(b) and (c) of the VCCR, does not find any corresponding right under the Charter, as the rights to non-discrimination and to freely participate in government found its counterparts in ICCPR. Thus, the finding of the Court, in favour for the respondent, that it had not violated the right to consular assistance under article 7(1)(c) of the African Charter, arguably found no support in law.⁷⁷

71 *Germany v United States of America* (27 June 2001) (2001) ICJ Reports 466.

72 *Germany v United States of America* (n 71) para 77.

73 *Mexico v United States of America* (31 March 2004) (2004) ICJ Reports 2004 12.

74 *Mexico v United States of America* (n 73) paras 124 & 153.

75 *Rachovitsa* (n 3) 255, 265.

76 *Waschefort* (n 61) 41, 65.

77 *Armand Guehi* (n 32) para 205.

2.2.4 *APDH v Côte d'Ivoire*

Putting some of the ideas discussed above into practice the African Court in *APDH* pioneered its methodology in terms of how it characterises 'human rights' instruments. Faced with submissions based on the African Democracy Charter and the ECOWAS Protocol on Democracy and Good Governance, it had to clarify whether these instruments qualified as human rights instruments within the meaning of article 3(1) of the Court Protocol.⁷⁸ In terms of the African Democracy Charter it is worth noting that it does not appoint the Court to be seized with matters of interpretation relating to it, but refers in general terms to 'the competent court of the Union' to specifically try individual perpetrators of 'unconstitutional change of government defined as illegal means of accessing or maintaining power'.⁷⁹ This reference speaks to a specific type of jurisdiction, namely, individual criminal jurisdiction, which arguably is different from the Court's jurisdiction under article 3(1).⁸⁰

In *APDH* the African Court sought assistance from the AU Commission and the African Institute for International Law (AIIL) to establish its methodology.⁸¹ The AU Commission essentially pointed to the objectives of the treaty in question, indicating, as an example, that the African Democracy Charter includes an obligation on state parties to 'promote adherence ... to the universal values and principles of democracy and respect for human rights' and that these objectives conform to the rights and obligations in the African Charter.⁸² Based on this analysis it concluded that the African Democracy Charter 'may be described as "a relevant human rights instrument" which the Court has jurisdiction to interpret and implement'.⁸³ AIIL suggested that a state that violates its obligations under article 17 of the African

78 *APDH* (n 44) para 49. The applicant also alleged violations of arts 3, 13(1) and (2) of the African Charter, art 1 of the Universal Declaration and art 26 of ICCPR; see para 20.

79 Arts 25(5) & 23. In the Draft of the African Charter on Democracy, Elections and Governance, contained in the Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the Revision of the Lomé Declaration on Unconstitutional Changes of Government in Africa, Executive Council 9th ordinary session 25-29 June, 2006 Banjul, The Gambia EX.CL/ 258(IX) art 27(5) referred to the African Court of Justice and Human Peoples' Rights (Merger Court) as having the jurisdiction to try perpetrators of unconstitutional changes of government. With the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights on 27 June 2014 the jurisdiction to try individuals for the 'crime of unconstitutional change of government' was delegated to the international criminal law section of the Merger Court under art 17. See M Wiebusch et al 'The African Charter on Democracy, Elections and Governance: Past, present and future' (2019) 63 *Journal of African Law* 29-30.

80 Wiebusch et al (n 79) 30.

81 *APDH* (n 44) para 50.

82 *APDH* (n 44) para 51.

83 *APDH* para 52.

Democracy Charter would automatically be in violation of several human rights guaranteed in the African Charter.⁸⁴

AILL furthermore implied that an important link between democracy and human rights had already been established by several other international human rights instruments, especially by the Universal Declaration. Therefore, once there is enough reference between the instrument in question and other recognised human rights instruments such as, for example, the Universal Declaration and ICCPR, such an instrument will qualify as a 'human rights' instrument. AILL proposed that the African Democracy Charter confers rights and freedoms directly on individuals, in effect explaining, interpreting and enforcing the rights and freedoms enshrined in the African Charter and other related instruments.⁸⁵ Consequently, when the Court defines a treaty as a 'human rights' instrument it should consider whether the instrument forms part of the continental human rights architecture and whether it has been integrated into, for example, decisions of the African Commission, in line with the principle of complementarity.⁸⁶

Essentially, both the AU Commission and AILL pointed to the objective and purpose of the treaty, as discussed above under 2.2.1. The AILL furthermore joined the objective and purpose test with a test as to whether a treaty confers rights and freedoms directly on individuals. However, notwithstanding the fact that the analysis of references between regional, continental and international instruments was mainly used to detect synergies to corroborate the purpose of a treaty, the repeated reference to the African Charter and the level of integration of the treaty in question into the continental human rights architecture is not supported by the Court Protocol. The principle of complementarity arguably is an important feature in the continental human rights system, as is further discussed under 4 below. However, it is questionable whether it can be used to define the Court's material jurisdiction as it is fundamentally different to the jurisdiction of the African Commission.

Nevertheless, relying on these submissions, the Court formulated a framework within which it tests whether an instrument indeed is a human rights treaty. It concluded that 'in determining whether a Convention is a human rights instrument, it is necessary to refer

84 *APDH* para 55.

85 *APDH* para 54, referring to the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action, the Declaration on the Principles Governing Democratic Elections in Africa and the Kigali Declaration of 2003.

86 *APDH* (n 44) para 54.

in particular to the purposes of such Convention'.⁸⁷ The reference by the Court to the plural 'purposes' indicates that a treaty falling under its material jurisdiction can have more than one purpose, leaving room for both a holistic and norm-based classification of the treaty, including the second category of treaties as discussed under 2.2.2. Such purposes, the Court explained, are revealed 'either by an express enunciation of the subjective rights of individuals or groups of individuals, or by mandatory obligations on State Parties for the consequent enjoyment of the said rights'.⁸⁸ The explicit expression of subjective rights, according to the Court, is 'illustrated by provisions, which directly confer the rights in question'.⁸⁹ Importantly, the Court noted that when a state ratifies a human rights treaty, international law compels it to take positive measures to give effect to the individual exercise of such rights.⁹⁰ Essentially, the Court set out the test to entail an object and purpose test, determined either by the explicit enunciation of subjective rights or where such rights can be derived from the expressed state obligations.

The main critique that can be directed at the *APDH* judgment is not aimed at the conclusion of the Court to classify the African Democracy Charter and ECOWAS Protocol on Democracy as human rights treaties falling under the material jurisdiction of the Court *per se*. As was discussed above, these instruments fall under the second category of treaties which are subsumed under article 3(1) of the Protocol. Instead, it is the fact that the Court did not systematically engage with the different aspects of the test devised by it that presents a challenge.

The point of departure in the Protocol, and subsequently in the test, is that each treaty must be judged in its own right, based only on its purpose, as intimately linked with the presence of expressly-enunciated rights or where such rights can be derived from the expressed state obligations. For the Court to be able to determine this, it would have had to analyse the relevant treaties and their provisions, as relied upon by the applicant. However, this was never done. Instead, the Court investigated whether the relevant provisions in the African Democracy Charter and ECOWAS Protocol on Democracy were 'aimed at implementing' the right to participate in article 13(1) of the African Charter. In this regard the Court arguably asked the wrong question: It asked whether the relevant articles in the African Democracy Charter and ECOWAS Protocol on Democracy

87 *APDH* para 57.

88 As above.

89 *APDH* (n 44) para 58.

90 *APDH* para 61.

implement an existing right in the African Charter, not whether these articles in themselves contain a legal entitlement that speaks to the objective and purpose of the treaty. Thus, notwithstanding the fact that the Court found Côte d'Ivoire to have violated the relevant articles in the African Democracy Charter and ECOWAS Protocol on Democracy, there is no clarity on whether these provisions contain an express enunciation of subjective rights, or whether such rights can be derived from the expressed state obligations.

Noticeably, individual rights could have been inferred from the express state obligation in the African Democracy Charter to 'protect the right to equality before the law' and the obligation to hold 'transparent, free and fair elections' and in the ECOWAS Protocol on Democracy the obligation to ensure that bodies responsible for organising elections are independent.⁹¹ With this in mind, and considering the purpose of these norms in the African Democracy Charter, to 'promote the universal values and principles of democracy, good governance, human rights and the right to development', and in the ECOWAS Protocol on Democracy referring to rights that have been recognised and guaranteed in 'all international human rights instruments, notably the Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights and the Convention on the Elimination of all forms of Discrimination Against Women' it is fair to reason that even if the main objective of these treaties is not to protect human rights, it is one of their subsidiary objectives. With regard to the object and purpose of the African Democracy Charter, it is further relevant to note that article 17 refers directly to the AU Declaration on the Principles Governing Democratic Elections in Africa, which in turn refers to the African Charter.⁹²

It is evident from the discussion above that the characterisation of a 'human rights' instrument was complicated by the references of the AU Commission and AILL, to, on the one hand, the general relationship between the instruments in question and other recognised human rights instruments and, on the other, the specific relationship between the instruments in question and the African Charter. The key questions in this regard, of which the Court arguably did not take notice, are whether such relationships are relevant in determining the nature of a specific treaty, and whether the rights/obligations, that is, the object and purpose, of one treaty can be

91 In this regard the Court relied on the method developed by the European Court in *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1.

92 Preamble, referring to the 'significance of the African Charter on Human and Peoples' Rights ... which recognised the right of every citizen to participate freely in the government of his or her country whether directly or through democratically elected representatives'.

established by the references to the same in another treaty, thus bringing it under the African Court's jurisdiction.⁹³

On the face of it this relates to the prominence given to the African Charter in the jurisprudence of the African Court.⁹⁴ This hierarchy, however, has no foundation in article 3(1) of the African Court Protocol referring to the 'interpretation and application of the Charter, th[e] Protocol and any other relevant Human Rights instrument ratified by the States concerned'. To extend the Court's material jurisdiction to treaties that merely 'implement' the provisions of the African Charter does not provide any rigour to the material mandate of the Court. It has been suggested, and rightly so, that using the 'intention to implement a provision in the African Charter' test would stretch the Court's jurisdiction too far and could potentially qualify treaties such as bilateral investment treaties as human rights treaties under the Court's jurisdiction, again echoing Heyns's concerns.⁹⁵ On the reverse, it would also prevent the Court from applying human rights treaties that protect rights that are not guaranteed in the African Charter, leaving much room for interpretation and legal uncertainty.

3 Lack of an interpretation clause

The discussion in the preceding parts focused on the material jurisdiction of the African Court; while this part focuses on another aspect of the Court's material jurisdiction, namely, its related interpretive competence. This competence outlines the Court's essential mandate to use sources that do not fall within its material jurisdiction to assist in providing meaning and contents to norms that fall within its material jurisdiction. This part focuses specifically on the applicability of articles 60 and 61 of the African Charter.⁹⁶

Because of their overlapping mandates, the principle of complementarity guides the relationship between the African Commission and the African Court.⁹⁷ This complementary relationship, as noted under 2.2.4, has had a significant impact on how the Court interprets its material jurisdiction, directing it to use an

93 Waschefort (n 61) 66.

94 See 3.1.

95 Rachovitsa (n 3) 262.

96 It is important to note that the Court's interpretive practice is also covered by general rules of treaty interpretation as set out in arts 31-33 of the VCLT. However, the discussion in this part does not engage with the Court's interpretative methodology in general, but with the applicability of arts 60-61 of the Charter.

97 Preamble and arts 2, 8 and 33 of the African Court Protocol. For a further discussion on complementarity, see A Rudman 'The Commission as a party before the Court – Reflections on the complementarity arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 3.

approach that more resembles the approach of the Commission under the Charter than one strictly guided by the Protocol.⁹⁸ In isolation this approach could be deemed problematic, as the jurisdiction and functioning of the Court, under article 1 of the Protocol, is governed by the Protocol, not the Charter. However, considering the principle of complementarity in more detail, the pragmatic approach by the Court, as is further discussed below, has had the important benefit of creating coherence between the decisions of the Commission on individual communications and the jurisprudence of the Court, critically avoiding 'jurisprudential chaos'.

As a quasi-judicial body, the African Commission determines its material jurisdiction, with reference to individual communications, as a matter of admissibility, under article 56(2) of the African Charter.⁹⁹ It makes its decisions on the merits of each case based on the African Charter but may utilise other principles and instruments of an international legal character to determine an individual communication.

The competence of the African Commission is limited to facilitating the implementation of the rights guaranteed in the Charter *vis-à-vis* state parties.¹⁰⁰ In this regard the scope of the Commission's interpretive mandate is set out in articles 60 and 61 of the African Charter; presenting a dual approach, where article 60 specifically refers to international law and human and peoples' rights and article 61 leaves the subject-matter and sources of law open for interpretation. This approach clearly distinguishes the two articles from each other as the instruction in article 60 serves to instruct the Commission to draw inspiration from international human rights treaties beyond its mandate in applying the Charter; while article 61 serves to indicate that the Commission may consider sources outside the human rights domain that can contribute towards the interpretation of the Charter. However, while articles 60 and 61 authorise the African Commission to draw inspiration from other sources of international law in the execution of its mandate and functions, these provisions do not empower it to oversee the application and implementation of other international treaties.¹⁰¹

98 Waschefort (n 61) 55.

99 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (*Gunme*) para 71; *Luke Munyandu Tembani & Benjamin John Freeth (represented by Norman Tjombe) v Angola & 13 Others (Luke Tembani)* African Commission on Human and Peoples' Rights 35th Annual Activity Report (2013) paras 79, 89.

100 *Luke Tembani* (n 99) para 130.

101 *Luke Tembani* para 131.

Articles 60 and 61 have assisted the African Commission in progressively interpreting the African Charter, an approach similarly adopted by the African Court.¹⁰² Heyns made the point that article 7 of the Court Protocol would be applied in a similar manner to articles 60 and 61, to determine the applicable sources to which the Court could resort when applying the African Charter, the Court Protocol or any other relevant human rights instrument ratified by the state concerned.¹⁰³ Under articles 60 and 61 of the African Charter, as mentioned above, when interpreting the Charter, in addition to a wide range of international and regional instruments, the Commission can also refer to international jurisprudence, the statements and conclusions of UN human rights treaty bodies, soft law and general principles of law. As argued by Heyns, if applied with a similar purpose, article 7 severely reduces the sources of law that the Court has at its disposal when interpreting a provision of human rights law by distinguishing only the provisions of the Charter and other relevant and ratified human rights instruments ratified as valid sources, in comparison to the broad sources set out in articles 60 and 61.¹⁰⁴ This would exclude important sources such as General Comments from different UN treaty bodies, as well as jurisprudence from the European and Inter-American Courts. This would not only result in inconsistencies between the Commission and the Court in terms of the interpretation of the rights in the Charter, as suggested by Heyns, but would also construe the rights in the Charter differently in respect of the different state parties, depending on which treaties each state has ratified at the time of the alleged violation.¹⁰⁵

Because the African Commission makes recommendations to member states based on its findings, and not as the African Court produces legally-binding judgments, its material jurisdiction has not been as rigorously defined as that of the Court.¹⁰⁶ In contrast, the Court's material jurisdiction, as discussed in detail under 2, is defined by articles 3(1) and 7. To separate this discussion from the preceding analysis, the material mandate of the Court can be divided into jurisdiction over (i) sources, strictly regulated by the Protocol, which the Court can interpret and apply to alleged violations using the hierarchy of sources it has established; and (ii) sources that it can use to interpret the first category of sources. In terms of the latter category, these are sources that can give guidance and inspiration

102 Viljoen (n 5) 325. See eg *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 49.

103 Heyns (n 5) 168-169.

104 As above.

105 Heyns (n 5) 169.

106 *Gunme* (n 99) paras 88-97.

in the interpretation of the primary sources. However, these are unregulated in the Protocol.

As mentioned in the introduction, articles 3(1) and 7 of the Protocol create symmetrical material jurisdiction, as both provisions refer to the application of the same sources. This is positive as these statements reinforce one another. However, on the reverse, it is questionable whether both these statements are necessary as they do not distinguish between application and interpretation. As article 7 does not refer to interpretation, or as articles 60 and 61 of the Charter to 'inspiration' or 'consideration', there effectively is a *lacuna* in the Protocol in terms of the scope of the Court's interpretive mandate. This, however, is not uncommon under international law.¹⁰⁷

As indicated above, it would not be impracticable to use article 7 for the same purpose as articles 60 and 61, as was initially anticipated, as article 7 can only be used to reinforce the statement in article 3(1). Thus, despite the clear instruction in article 1 of the African Court Protocol, the Court has filled the *lacuna* in its interpretive mandate by using articles 60 and 61 of the African Charter.

In *Tanganyika Law Society* the Court set the benchmark for its interpretive scope by supporting its decision to accept the UN Human Rights Committee (Human Rights Committee) General Comment 25 as an authoritative interpretation of ICCPR, by referring to article 60 of the Charter.¹⁰⁸ The Court indicated that in accordance with article 60, General Comment 25 is an instrument that the Court can 'draw from' in its interpretation of ICCPR which reflects the 'spirit' of the African Charter; using the same language and approach as the Commission based on the same source, namely, the African Charter.¹⁰⁹

As previously discussed, in *Tanganyika Law Society* the African Court determined that it will not resort to the application of treaties

¹⁰⁷ Viljoen (n 5) 325. Other regional and international human rights instruments similarly do not encompass interpretive provisions. However, courts and quasi-judicial bodies customarily refer to a wide range of human rights instruments and documents.

¹⁰⁸ *Tanganyika Law Society* (n 15) para 107.4. See similar approach in *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9 para 108. In this case the Court relied on the Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to identify the characteristics of indigenous peoples. The use of the Report on the Protection of Minorities, for interpretive purposes, was deemed appropriate by the Court 'by virtue of Article 60 and 61 of the Charter, which allows it [referring to the Court] to draw inspiration from other human rights instruments to apply these criteria to this Application'; see also *Libya* (n 35) separate opinion of Ouguerouz J para 7.

¹⁰⁹ *Tanganyika Law Society* (n 15) para 107.3.

beyond the Charter when the Charter finds application in a similar manner.¹¹⁰ Thus, in terms of the application of article 60 the Court pointed out that it has the jurisdiction to apply ICCPR, under article 3(1), and that it uses article 60 to interpret ICCPR through the relevant General Comment of the Human Rights Committee.¹¹¹ Nevertheless, as ICCPR and the African Charter present corresponding rights and obligations, such an interpretation is equally imprinted on the Charter.¹¹²

In *Tanganyika Law Society* the Court moreover established the practice of considering different, non-binding sources for interpretive purposes. In this regard the Court generously referred to the decisions of the Commission,¹¹³ General Comments and views on individual communications of UN treaty bodies,¹¹⁴ as well as jurisprudence from other regional courts.¹¹⁵ The Court used these sources to determine both the procedural aspects of the case and the alleged violations.

In *Tanganyika Law Society* the respondent relied on article 13(1) of the African Charter and argued that the right to freely participate in government must be in accordance with domestic law. In this regard the Court referenced and agreed with the findings of the African Commission in *Amnesty International v Zambia*¹¹⁶ where the Commission concluded that “‘claw-back” clauses must not be interpreted against the Charter’ and that such clauses must be reflected against international human rights law in line with its mandate under article 60.¹¹⁷ Conclusively, the reliance on the jurisprudence of the Commission, clearly considering and applying the principle of complementarity, from this point on has permeated the jurisprudence of the Court.¹¹⁸

The jurisprudence of the Court further supports the conclusion, as set out above, that article 7 refers to application and not interpretation, but not in the clearest terms. In *Alex Thomas*, as discussed under 2.1, the Court referred to article 7 of the Court Protocol and concluded that it has the mandate to ‘interpret article 7(1)(c) of the African

110 See 3.1.

111 *Tanganyika Law Society* (n 15) para 122.

112 See 3.1.

113 *Tanganyika Law Society* (n 15) paras 82.1, 106.1, 109 & 117.

114 *Tanganyika Law Society* (n 15) paras 37 & 107.3.

115 *Tanganyika Law Society* (n 15) paras 37, 82.1, 103, 106.2, 106.4.

116 *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) (*Amnesty International*).

117 *Amnesty International* (n 116) para 42 as quoted in *Tanganyika Law Society* (n 15) para 109.

118 See eg the references in *Peter Joseph Chacha v Tanzania* (Admissibility) (2014) 1 AfCLR 398 paras 27, 119, 143 &, separate opinion by Ouguerouz J para 22; and in *Wilfred Onyango* (n 30) paras 59, 83, 89, 99 & 170.

Charter in light of the provisions of article 14(3)(d) of the ICCPR' thus pointing towards an interpretive use of article 7 of the Protocol.¹¹⁹ However, further on in the case the Court clarifies this statement by indicating that 'even though article 7(1)(c) of the African Charter does not specifically provide for legal aid, the Court can, in accordance with article 7 of the Protocol, *apply* this provision in light of article 14(3)(d) of the ICCPR [emphasis added]'.¹²⁰ This conclusion honours both Articles 3(1) and 7, as Tanzania, the Respondent State, has ratified the ICCPR. A similar application of Article 7 is visible in *Wilfred Onyango*, albeit with a different outcome.¹²¹

The use of Article 7 of the Protocol to support the application of a ratified instrument, only, is also evident in the Separate Opinion of Ouguergouz J in *Tanganyika Law Society*. He uses the reference to Article 7 to flesh out the Respondent's objection that the Treaty establishing the East African Community is not a human rights treaty falling within the ambit of Article 3(1) and 7. In critiquing the majority decisions, the Court, in his opinion, had also to 'determine whether the Treaty establishing the East African Community was *applicable* in the light of Articles 3(1) and 7 of the Protocol'.¹²² This clearly refers to the possibility of applying this particular treaty in this particular case rather than the use of this treaty as an interpretive aid.

4 Conclusion

The expressions that 'hindsight is 20/20' and 'hindsight is good, foresight is better' well encapsulate the analysis in this article. In his 2001 article Heyns urged a continuous analysis of the strengths and weaknesses of the African Court 'to emphasise the strengths and to downplay, if not eliminate, possible weaknesses in a pro-active manner'.¹²³ He also cautioned an approach exclusively relying on the progressive interpretations of a 'creative court' and the 'goodwill of individual judges' to alleviate the ostensible problems related to the material jurisdiction of the Court.¹²⁴

Guided by Heyns's foresight, recognising many – reasonable – concerns about the broad material jurisdiction of the Court and the lack of a specific interpretation clause, this article set out to establish how the Court has approached its material jurisdiction

119 *Alex Thomas* (n 28) para 88.

120 *Alex Thomas* (n 28) para 114 (my emphasis).

121 *Wilfred Onyango* (n 30) para 165.

122 *Tanganyika Law Society* (n 15), separate opinion of Ouguergouz J para 13.

123 Heyns (n 5) 165.

124 Heyns 166.

through an analysis of its originating jurisprudence. This analysis demonstrated the Court's pragmatic approach to its material jurisdiction, firmly grounded in the principle of complementarity. To avoid 'jurisprudential chaos' the Court has methodically strived to harmonise and recognise interpretations provided by the Commission and other human rights bodies to achieve cohesion between the regional and international human rights systems. This shows the Court's willingness to try to counteract the problems that are involved in applying the complex web of state obligations incorporated under the Court's wide material jurisdiction.

In referring to Heyns's argument that the African Charter would become 'just a treaty among many' as alluded to in the title of this article, this is contested by the jurisprudence of the Court. Depending on the nature of the case, the Court, in most cases as shown, has established a clear hierarchy of sources, where the African Charter is the primary source. To some extent, as argued in this article, the Charter may even have gained too much superiority, when reflected against the wording of article 3(1).

Moreover, even though there are some concerns with regard to the disappearance of the distinct 'African' from the continental system, by applying international treaties, possibly succumbing to 'globalisation and universalism in its most pervasive form', there are also some arguments against such a position.¹²⁵ First, the method developed by the Court to only have recourse outside the African Charter when a more detailed provision exists in another human rights treaty ratified by the relevant state seems to defeat such a claim. The 'read-together' approach also effectively guards against the total disappearance of the 'African'. Second, the proliferation of topics covered by AU law enables the African Court to refer to AU sources rather than UN sources, or at least to both, preventing the one-sidedness suggested by Heyns.¹²⁶ The reverse has also been proven to be true. In scenarios where an international treaty, such as ICCPR, is applied to mitigate claw-back clauses or the International Covenant on Economic, Social and Cultural Rights (ICESCR) is applied to balance the minimalist approach to socio-economic rights

125 This risk is mostly visible in the interpretive practice of the Court. See eg JD Mujuzi 'The African Court on Human and Peoples' Rights and its protection of the right to a fair trial' (2017) 16 *Law and Practice of International Courts and Tribunals* 219.

126 See *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 Mali* (Merits) (2018) 2 AfCLR 380 where the African Women's Protocol was applied alongside CEDAW.

in the African Charter, decreasing the distinct 'African' arguably is favourable to the protection of the human rights of Africans.

In terms of the lack of a specific interpretation clause in the African Court Protocol and the possible use of article 7 for this purpose it is clear that the Court has applied articles 60 and 61 of the Charter to ease interpretation, defeat the limitations in article 7, as suggested by Heyns, and to promote complementarity. There is nothing in the Protocol to support this approach, but one argument in favour of this approach, other than the apparent benefits, is that the Protocol, as adopted under article 66 of the Charter, 'supplements' the provisions of the African Charter and can thus be used for the purpose of interpretation.

In conclusion, it is evident from the discussion in this article that many of the problems presented by Heyns did not materialise due to the African Court's own creativeness. Since it first started defining its material mandate in *Tanganyika Law Society*, it arguably has done its utmost to honour both the wording of the Protocol and the principle of complementarity. However, where the words of Heyns have provided the most chilling prediction is in the domain of lack of ratifications and, lately, in terms of the withdrawals from the Court's personal jurisdiction.¹²⁷ In terms of the latter, even though this was not the focus of this article, there may be a link between the way in which the Court has interpreted its material jurisdiction and such withdrawals.¹²⁸ Since its adoption 23 years ago, only 32 state parties have ratified the Protocol, and only two ratifications have been registered in the past five years, namely, that of the Democratic Republic of the Congo (DRC) in December 2020 and Guinea Bissau

¹²⁷ Heyns (n 5) 167.

¹²⁸ Irrespective of the fact that the Court is vested with a broad material jurisdiction, states, with reference to their domestic authority, have continued to challenge the Court's power to scrutinise domestic laws and their application. A reoccurring challenge in this regard disputes the Court's material jurisdiction based on the argument that it encroaches on domestic jurisdiction and therefore violates the sovereignty of the state. This challenge has taken different forms, where the Court is considered to be acting as a court of first instance, as an appellate court or as a legislative body. In terms of the 'first instance' the argument, it is based on the principle of exhaustion of local remedies to prevent any international court from hearing matters *de novo*. In terms of the latter two, the challenges entail that the Court would either nullify or reform the decisions of domestic courts or effectively produce national legislation. By contesting the Court's material jurisdiction in this regard, states have tried, without much success, to, in different ways, limit the reach of the Court's jurisdiction in terms of domestic law and the Court's perceived meddling in domestic affairs. This challenge is ultimately attempting to protect the sovereignty of the state; and the Court's consistent rejection of this challenge was one of the main factors behind Tanzania's withdrawal of its optional declaration in 2019 and Benin's withdrawal in 2020.

in November 2021.¹²⁹ Added to this is the dismal number of states that have accepted and maintained the optional jurisdiction of the Court to hear complaints of individuals and non-governmental organisations (NGOs). Even though Niger and Guinea Bissau recently deposited declarations under article 34(6) of the Protocol, they form part of a group of only eight states that have done so.¹³⁰ In this regard Heyns's warning that the 'wider the discretion granted to judges, the more unpredictable the system becomes, and the less likely states are to submit themselves to the system, and to remain committed to its success' prompts us, 20 years later, to once again consider the possibility of reforming the system.

129 https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 24 June 2021); <https://www.african-court.org/wpafc/democratic-republic-of-congo-ratifies-the-protocol-on-the-establishment-of-the-african-court-on-human-and-peoples-rights/> (accessed 12 July 2021).

130 <https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/> (accessed 1 December 2021).

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Protecting the right to life during assemblies: Legal and jurisprudential developments in the African human rights system

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Summary: *The right of peaceful assembly has been recognised as a critical component of democracy. In Africa it played a significant role in the liberation of states from colonial oppression, and continues to be used to express dissent. The actual exercise of this right, however, faces significant challenges. Too often, police officers use excessive or indiscriminate force during assemblies, leading to violations not only of the right of peaceful assembly but also, in some cases, of the right to life. Alive to the reality of the threat to life and limb posed by the unlawful use of force by the police during assemblies, over the past decades the African human rights system has developed standards for the use of force during assemblies. This article analyses the legal and jurisprudential developments around the protection of the right to life during assemblies and enquires as to whether they are consistent with international standards and whether they are adequate. It finds that despite progressive legal development on the protection of the right to life in law enforcement, in general, there is limited jurisprudence on the specific protection of the right to life in the context of the policing of assemblies. Consequently, the standards expressed in various instruments and resolutions are yet to be adequately interpreted and reinforced.*

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Key words: *African Charter; African Commission; right to life; right of peaceful assembly; use of force*

1 Introduction

On 28 September 2009 thousands of pro-democracy demonstrators assembled at a stadium in Conakry, Guinea to protest against the military rule of Captain Moussa Dadis Camara who took power in a bloodless *coup* after the death of President Lansana Conté.¹ In response to the peaceful protest, law enforcement officials comprising the national police, the national gendarmerie and the presidential guard opened fire on the demonstrators, dispersed significant quantities of tear gas, causing a panicked stampede, and attacked the assembly participants with bayonets and other crude weapons.² By the time the assault ended, at least 156 demonstrators had been killed or had disappeared, and more than one thousand others were seriously injured.³ The gravity of the violations attracted global condemnation, including from the African Union (AU) Peace and Security Council.⁴ A United Nations (UN) International Commission of Inquiry concluded that the violations were serious enough to be considered crimes against humanity.⁵ The Guinea incident was neither the first nor the last time that gross human rights violations, including violations of the right to life, were committed in the context of assemblies. There have since been several incidents across Africa and beyond where assembly participants have lost their lives as a result of exercising their right to peaceably assemble.⁶

1 UN Security Council Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, S/2009/693, annex, paras 44, 61-63.

2 UN Security Council (n 1) para 29.

3 UN Security Council (n 1) para 70.

4 Communiqué of the 207th Meeting of the Peace and Security Council of the African Union, PSC/AHG/COMM.2 (CCVII), 29 October 2009, Abuja, Nigeria, <https://www.peaceau.org/uploads/communiquenguineeeng.pdf> (accessed 14 November 2021).

5 Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea (n 1) para 180.

6 Eg, in 2013 at least 170 protesters in the Sudan were killed by law enforcement officials who opened fire at them to disperse them. See Human Rights Watch “‘We stood, they opened fire’: Killings and Arrests by Sudan’s security forces during the September protests, 2014”, https://www.hrw.org/sites/default/files/reports/sudan0414_ForUpload.pdf (accessed 14 November 2021). More recently, in the #EndSARS protests in Nigeria in October 2020 it was reported that at least 69 people were killed within days of the protest. See J Parkinson ‘Nigeria protests: What’s happening and why are people demonstrating against SARS?’ *The Wall Street Journal* 26 October 2020, <https://www.wsj.com/articles/nigeria-protests-whats-happening-and-why-are-people-demonstrating-11603277989> (accessed 14 November 2021).

Admittedly, some assembly participants can become violent and may pose a threat to the lives of law enforcement officials and other members of the public, thereby justifying an intervention by law enforcement officials, including through the use of force where such a response is necessary and proportionate. However, the overwhelming global concern in relation to the protection of the right to life in the context of assemblies has been the extra-judicial killings of protesters by state actors, or by non-state actors with the acquiescence of the state.⁷ For example, in Resolution 281 of 2014 on the right to peaceful demonstrations, the African Commission on Human and Peoples' Rights (African Commission) expressed concern about the 'excessive use of force, live ammunition and tear gas to disperse peaceful demonstrators' and called on state parties to the African Charter on Human and Peoples' Rights (African Charter)⁸ to ensure that the use of force and firearms by law enforcement agencies complies with international standards.⁹ In Resolution 375 of 2017 on the right to life in Africa, the African Commission expressed particular concern about 'the prevalence of arbitrary deprivations of life occurring in the context of law enforcement operations, often through the use of excessive force by state agents'.¹⁰ Going by the manner in which some protests have been managed in various countries across Africa, these concerns remain relevant.

The right to life and the right of peaceful assembly are both guaranteed in the African Charter. The African Commission has described the right to life as the 'fulcrum of all other rights' and 'the fountain from which all other rights flow'.¹¹ It has also emphasised the democratic significance of the right of peaceful assembly.¹² Violations of the right to life can have a chilling effect on the exercise

7 The UN General Assembly and the UN Human Rights Council have both raised concerns about the use of extra-judicial, summary or arbitrary executions and killings as a means of suppressing protests. See, eg, UN General Assembly Resolution 73/173, Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association, A/RES/73/173, adopted on 17 December 2018 para 3(a); UN Human Rights Council Resolution 38/11, The promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/38/11, adopted on 6 July 2018 Preamble and para 1.

8 Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1981) 1520 UNTS 217.

9 Resolution on the Right to Peaceful Demonstrations, ACHPR/Res.281 (LV) 2014, adopted at the 55th ordinary session held from 28 April to 12 May 2014, Luanda, Angola.

10 Resolution on the Right to Life in Africa, ACHPR/Res.375 (LX) 2017, adopted at the 60th ordinary session of the African Commission held in Niamey, Republic of Niger, 8 to 22 May 2017.

11 *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000) para 19.

12 Guidelines on Freedom of Association and Assembly in Africa, adopted at the 60th ordinary session of the African Commission on Human and Peoples' Rights held in Niamey, Niger, 8 to 22 May 2017.

of the right of peaceful assembly, and this may in turn disenfranchise communities whose only truly effective means of democratic participation is through assemblies. Consequently, safeguarding the right to life during assemblies is crucial.

Through the case law of the African Commission and the African Court on Human and Peoples' Rights (African Court), thematic and country-specific resolutions, Concluding Observations on state reports, and the adoption of guidelines and General Comments, the African human rights system has addressed the question of the protection of the right to life in the context of law enforcement operations. However, there is limited case law specifically on the use of force and the protection of the right to life during assemblies. In addition, in case law, where lives were lost in the context of an assembly, the African Commission has missed opportunities to develop or reinforce standards on the protection of the right to life during assemblies.

This article analyses the legal and jurisprudential developments around the protection of the right to life during assemblies. It begins with a discussion on the nature of the right to life and the right of peaceful assembly and the general obligations of states under the African Charter. This is followed by a discussion on the specific obligations of states to protect the right to life in the context of assemblies. Thereafter, an analysis of the standards on the protection of the right to life during assemblies as developed over time by the African Commission through soft law instruments, resolutions and Concluding Observations is presented. Lastly, the article discusses selected jurisprudence of the African Commission and the African Court in which the protection of the right to life during assemblies was implicated. It also considers selected case law where the African Commission could have but did not reinforce standards on protecting the right to life in the context of assemblies.¹³

2 The right to life and the right to peaceful assembly under the African Charter: General obligations of state parties

Article 4 of the African Charter requires states to respect the right to life of every individual and prohibits arbitrary deprivation of the

¹³ Although both the right to life and the right of peaceful assembly are also guaranteed in the African Charter on the Rights and Welfare of the Child, this article focuses specifically on the African Charter since it is the universally-applicable human rights instrument in the African human rights system.

right. States have a general obligation under article 1 of the African Charter to recognise the rights guaranteed in the Charter and to adopt legislative or other measures to give effect to these. Through its case law, Concluding Observations, resolutions and soft law instruments the African Commission has repeatedly emphasised the central importance of the right to life and clarified the scope of state obligations in relation to the right.¹⁴

The obligation to respect and protect the right to life has both substantive and procedural components.¹⁵ The substantive component requires states to take steps to prevent arbitrary deprivations of life by both state agents and private individuals. A deprivation is considered arbitrary if it is unlawful under either international law or domestic law.¹⁶ Arbitrariness in turn has been interpreted to include elements of inappropriateness, injustice, unpredictability and non-conformity with the requirements of reasonableness, necessity and proportionality.¹⁷ An important step towards the prevention of arbitrary deprivation of life is the development of a domestic legal framework that ensures respect for and protection of the right to life.¹⁸ Such a framework must also adequately regulate the use of force by law enforcement officials in accordance with international human rights standards.¹⁹ States also have an obligation to protect the right to life of individuals from the reasonably foreseeable threats from private parties. A failure to take precaution to prevent such threats from materialising may give rise to liability.²⁰

The procedural component of the right to life requires states to ensure accountability for violations of the right. Thus, states have an obligation to conduct prompt, effective, thorough, impartial and transparent investigations into potentially unlawful deaths.²¹ The Minnesota Protocol on the Investigation of Potentially Unlawful

14 See, eg, Communication 295/04, *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, April 2012, African Commission on Human and Peoples' Rights, 51st ordinary session.

15 UN Human Rights Council Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/HRC/26/36, para 46.

16 General Comment 3: The Right to Life (art 4), adopted during the 57th ordinary session of the African Commission on Human and Peoples' Rights, held from 4-18 November 2015, Banjul, The Gambia para 12.

17 As above.

18 General Comment 3 (n 16) para 7.

19 General Comment 3 para 27. Also see Concluding Observations on the State Report of Eritrea (1999-2016), African Commission on Human and Peoples' Rights 62nd ordinary session, held in Nouakchott, Mauritania, 25 April to 9 May 2018 para 36.

20 General Comment 3 (n 16) para 9.

21 General Comment 3 paras 15-17.

Death²² (Minnesota Protocol) sets out standards that states are expected to meet when investigating suspected unlawful deaths. Although it is a soft law instrument within the UN human rights system, it is widely recognised in the international human rights system as the guidance on the investigation of violations of the right to life.²³ Where it is established that a death was unlawful, the state has a responsibility to criminally prosecute and punish the offender, and provide reparations to the victims.²⁴ According to the African Commission, the failure to investigate suspicious deaths in itself is a violation of the right to life.²⁵ This is also the position in the UN human rights system.²⁶ In order for the obligation to investigate and ensure accountability to be discharged, states must put in place effective investigation and accountability mechanisms such as independent police oversight institutions.²⁷

Article 11 of the African Charter recognises the right of every individual to assemble freely with others. The limitation clause under the provision sets out the potential grounds for restriction of the exercise this right, including national security, the safety, health and the rights and freedoms of others. Unlike other international human rights instruments, article 11 of the African Charter does not expressly stipulate the requirement that assemblies be peaceful. However, read in its entirety, and taking into account the interpretation of article 11 by the African Commission in its case law (and general international law) only peaceful assemblies are protected under the African Charter.

The extent to which states guarantee the right of peaceful assembly has implications for the enjoyment of the right to life. The greater the compliance with international standards on protection of the right of peaceful assembly, the lower the likelihood of the right to life being violated.²⁸ Thus, states have an obligation to establish a domestic legal framework that guarantees the right of peaceful assembly and which complies with international human rights standards.

22 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), (UN Publication, Sales E.17.XIV.3).

23 See, eg, references to the Minnesota Protocol in General Comment 36: Article 6 (The Right to life) 2018, UN Human Rights Committee, CCPR/C/GC/36, para 27 and General Comment 37: Article 21 (The Right of Peaceful Assembly), 2020, UN Human Rights Committee, CCPR/C/GC/37, fn 133.

24 General Comment 3 (n 16) para 15.

25 As above. Also see Resolution on the Right to Life in Africa (n 10).

26 General Comment 36: Article 6 (The Right to life) 2018, UN Human Rights Committee, CCPR/C/GC/36.

27 General Comment 3 (n 16) para 16.

28 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/HRC/17/28, UN Human Rights Council para 13.

The obligation to respect the right of peaceful assembly requires states not to interfere with its exercise, for example, by imposing restrictions that fall outside the scope of article 11 of the African Charter. In its jurisprudence, the African Commission has emphasised the need for states to ensure that any restriction on the exercise of the right of peaceful assembly meets the test of necessity and proportionality. For instance, in *Media Rights Agenda v Nigeria*²⁹ the Commission emphasised that restrictions must not negate the essence of the right of peaceful assembly, but must be aimed at facilitating the exercise of the right.³⁰ The duty to facilitate involves creating an environment that supports the exercise of the right of peaceful assembly by, for example, taking positive measures such as clearing or rerouting traffic.

The obligation to protect requires states to prevent state agents or third parties from interfering with or violating the rights of assembly participants. This duty must be discharged with regard to the principle of non-discrimination, especially because some assemblies pursue controversial or anti-government causes and, therefore, may be more predisposed to interferences.³¹ In the event that force has to be used as a means of fulfilling the obligation to protect, such use of force must comply with international human rights principles governing the use of force by law enforcement officials.

3 Protection of the right to life in the context of assemblies: Specific obligations

As stated earlier, the protection of the right to life in the context of assemblies has been a major concern in the African and international human rights system. The manner in which assemblies are managed by law enforcement officials has a bearing not only on the right of peaceful assembly but also on the right to life. This is particularly so because law enforcement officials may in some cases use force and even firearms against assembly participants. In addition, assemblies that pursue controversial ideas may attract violent responses from other members of the public. It also bears reminding that some assembly participants may be violent and may consequently pose a threat to the lives of other members of the public or law enforcement officials. However, as noted earlier, the more prevalent concern is the

29 (2000) AHRLR 262 (ACHPR 2000).

30 *Media Rights Agenda* (n 29) para 65.

31 See, eg, Resolution on the Right to Peaceful Demonstrations (n 9). The African Commission calls on state parties to protect assembly participants regardless of their political affiliations or sex.

violent suppression of assemblies by state security agencies, thereby leading to loss of life.

The general responsibilities of states with regard to the right to life and the right of peaceful assembly discussed above apply in all contexts. However, the unique challenges that law enforcement officials may face during public order operations call for more context-specific obligations of the state, besides those already noted. To begin with, law enforcement officials have a duty to refrain from using force when policing assemblies, unless force is a necessary and proportionate response to the behaviour of the participants.³² Where some participants are violent, the obligation of the police to facilitate and protect those assembling peacefully remains.³³ Additionally, the violent participants do not lose protection under other provisions of the African Charter.³⁴ Thus, the right to life and bodily integrity of all assembly participants, whether peaceful or not, must be respected and protected. There is also an obligation to refrain from using lethal force against participants, and only resort to such force in order to avert an imminent threat of death or serious injury.³⁵ Further, the use of firearms simply to disperse assemblies is prohibited.³⁶

Law enforcement officials also have a duty to protect the lives of assembly participants from arbitrary deprivation by private individuals. This obligation covers the reasonably foreseeable threats to the lives of the participants. As mentioned before, if lives are lost during assemblies, there is a duty to investigate the deaths and ensure accountability. As part of the duty to protect, states must also take precautionary measures to reduce the likelihood of police resorting to the use of force, whether lethal or less lethal. Such measures include training law enforcement officials on public order management and equipping the police with appropriate less-lethal weapons and protective equipment.³⁷

Invariably, where the right to life is violated in the context of an assembly, the right of peaceful assembly is also violated. However, as will be seen in the selected case law discussed later, greater attention is usually paid to the violation of the right to life and not that of peaceful assembly. As mentioned earlier, the right to life is 'the

32 General Comment 3 (n 16) para 27.

33 General Comment 3 para 28.

34 General Comment 3 (n 16).

35 As above.

36 General Comment 3 para 28.

37 General Comment 3. Also see Concluding Observations on the 6th Report of Namibia para 54; Concluding Observations on the State Report of Malawi, 2015 para 123.

fountain from which all other rights flow'. If it is violated, there is no possibility of enjoying any other right. Therefore, it is not surprising that less attention would be paid to questions concerning peaceful assembly where the right to life has been violated in the context of an assembly. It nevertheless is important to address questions pertaining to the right of peaceful assembly to a greater depth than the African Commission has done before. As mentioned earlier, the greater the protection of the right of peaceful assembly, the higher the likelihood that the right to life would be safeguarded in that context. Given that the use of force by law enforcement officials during assemblies poses an obvious threat to the right to life, the development and reinforcement of standards of protection of the right in the specific context of assemblies are necessary. What follows is a discussion of the standards that have been developed in the African human rights system.

4 Development of standards on protection of the right to life during assemblies in the African human rights system

Mutua argues that while human rights standards have been developed in most areas touching on human dignity, there is still a need to establish new legal frameworks in areas where the norms are not adequately developed, and to elaborate and strengthen norms that are well-established.³⁸ The protection of the right to life and the right of peaceful assembly is firmly entrenched in the African human rights system. However, the establishment of standards around these and other rights is an evolving process which must respond to emerging challenges.

Over the last two decades, global attention has increasingly been paid to the protection of the right of peaceful assembly, and particularly to the potential for large-scale violations of the right to life in cases where states resort to the use of force to suppress dissent. Consequently, there have been significant developments globally and in Africa around the protection of both the right to life and the right of peaceful assembly. In the UN human rights system, the Human Rights Committee adopted General Comment 36³⁹ on the right to life in 2018 and General Comment 37⁴⁰ on the right of peaceful

38 M Mutua *Human rights standards: Hegemony, law and politics* (2016) 141.

39 General Comment 36: Article 6 (The Right to Life), 2018, UN Human Rights Committee, CCPR/C/GC/36.

40 General Comment 37: Article 21 (The Right of Peaceful Assembly), 2020, UN Human Rights Committee, CCPR/C/GC/37.

assembly in 2020. The adoption of these General Comments was preceded by other steps taken to address questions concerning the right to life and the right of peaceful assembly. For example, the UN Human Rights Council established the mandate of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association in 2010 with a view to enhancing the promotion and protection of the right of peaceful assembly.⁴¹ Through various reports to the Human Rights Council and the UN General Assembly, the mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions also addressed the question of protection of the right to life during assemblies.⁴² Also relevant to the protection of the right to life is the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement⁴³ (Guidance on LLWs). In relation to assemblies, the Guidance on LLWs provides that in cases where the use of less-lethal weapons is justified, precaution should be taken to prevent or mitigate the risk of death or serious injury.⁴⁴ It further provides that the use of less-lethal weapons to disperse assemblies should be a measure of last resort,⁴⁵ and that firearms should never be used to disperse assemblies.⁴⁶

In the African human rights system, the African Commission has also continually developed standards on the protection of the right to life and the right of peaceful assembly. Noting the potential for law enforcement officials to infringe on the right to life while policing assemblies, it has also elaborated state obligations to protect lives in the context of law enforcement operations such as public order management. It has done this through its Concluding Observations on state reports, thematic and country-specific resolutions, the development of guidelines and general comments, and through case law, a selection of which is discussed later in the article.

With respect to Concluding Observations, the African Commission in the past has made recommendations on the eradication of

41 UN Human Rights Council Resolution 15/21 The rights to freedom of peaceful assembly and of association, A/HRC/RES/15/21, adopted 6 October 2010.

42 See, eg, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/17/28, 23 May 2011; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014; and Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the proper management of assemblies, Maina Kiai, Christof Heyns, UN Human Rights Council, A/HRC/31/66, 4 February 2016.

43 OHCHR UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (2020).

44 OHCHR (n 43) para 6.3.1.

45 OHCHR para 6.3.3.

46 OHCHR para 6.3.4.

police excesses;⁴⁷ the training of security forces on public order management,⁴⁸ prevention of arbitrary deprivation of life by law enforcement officials,⁴⁹ and accountability of law enforcement officials who violently repress protests.⁵⁰ One of the limitations of the state reporting mechanisms has been that states do not regularly submit their reports, and in some cases reports that have been submitted do not contain adequate information.⁵¹ Further, there is little evidence that states generally implement the recommendations of the African Commission.

In a major step towards elaborating the nature of the right to life and the scope of state obligations, the African Commission adopted General Comment 3 on the right to life under the African Charter. The General Comment interprets the right to life broadly, indicating that the Charter does not merely protect physical existence, but it protects a dignified existence.⁵² It reiterates the substantive obligation of states to prevent arbitrary deprivations of life by both state actors and private individuals or entities.⁵³ It also emphasises the procedural obligation of states to investigate unlawful deaths and ensure accountability of perpetrators.⁵⁴ Further, it establishes that an unlawful attempt by a state agent to kill a person amounts to a violation of the right to life in addition to other rights, even if the targeted person survives.⁵⁵ It further adds that an unlawful threat against the life of a person by a state agent also amounts to a violation of the right to life.⁵⁶ These interpretations have implications in the context of assemblies, particularly where law enforcement officials use force and firearms in circumstances that are not permitted under international law. For example, in relation to unlawful threats against a person's life, it could mean that a threat to use lethal force to disperse peaceful protesters may amount to a violation of the right to life. The African Commission has not determined a communication

47 Concluding Observations on Zimbabwe, 7th to 10th Report (1996-2006), 41st ordinary session of the African Commission on Human and Peoples' Rights, 16-30 May 2007, Accra, Ghana para 29.

48 Concluding Observations on Malawi, 57th ordinary session of the African Commission on Human and Peoples' Rights, 4-18 November 2015, Banjul, The Gambia para 123.

49 Concluding Observations on Malawi (n 48) para 62.

50 Concluding Observations on Ethiopia, 46th ordinary session of the African Commission on Human and Peoples' Rights 11-25 November 2009, Banjul, The Gambia paras 38 & 51.

51 Eg, in its Concluding Observation on Kenya's 8th to 11th periodic report the African Commission observed that that there was no information on the freedom of assembly and of association. See Concluding Observations on Kenya, 8th to 11th periodic report, 41st ordinary session, 16-30 May 2007, Accra, Ghana.

52 General Comment 3 (n 16) para 3.

53 General Comment 3 paras 2 & 7.

54 As above.

55 General Comment (n 16) para 8.

56 As above.

in which security agents threatened the lives of assembly participants but did not actualise the threats, but it has found a violation of the right to life in a case where a person received death threats from security agents.⁵⁷

The General Comment also sets out how the right to life applies in various contexts, including in the context of law enforcement. It affirms the obligation of states 'to take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including but not limited to the provision of appropriate equipment and training as well as, wherever possible, careful planning of individual operations'.⁵⁸ Further, it emphasises the obligation of states to establish a legislative framework regulating the use of force by law enforcement officials which complies with international standards, including the principles governing the use of force.⁵⁹ In relation to the use of lethal force, it states that 'the intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary)'.⁶⁰ The need for states to equip law enforcement officials with less lethal weapons and to train them on their use is also emphasised in the General Comment.⁶¹ Given the central role of law enforcement officials in the context of assemblies, these standards, which reflect international standards, are of particular significance for the protection of the right to life during assemblies. For example, the taking of precautionary measures is an important way of preventing potentially volatile situations from escalating and putting at risk the right to life.

The African Commission has also adopted various resolutions relevant to the protection of the right to life in the context of assemblies. In Resolution 281 of 2014 on the right to peaceful demonstrations, the Commission expressed concern about the excessive use of force, including lethal force to disperse demonstrations and condemned the unlawful killings of peaceful demonstrators. It called on states to

refrain from disproportionate use of force against demonstrators whilst fully complying with international standards on the use of force and firearms by law enforcement officials; conduct impartial and independent investigations into all human rights violations to ensure

57 *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000).

58 General Comment 3 (n 16) para 27.

59 As above.

60 As above.

61 General Comment 3 para 30.

that all perpetrators are held accountable; protect peaceful protesters regardless of their political affiliation, and/or sex.⁶²

Similar concerns about the excessive use of force by law enforcement officials had been expressed in an earlier resolution on police and human rights in Africa.⁶³

These concerns have persisted, as expressed in subsequent resolutions of the African Commission. For example, in Resolution 375 of 2017 on the right to life, the Commission again expressed concern about arbitrary deprivation of life during law enforcement operations through excessive use of force, and the subsequent failure by states to investigate suspicious deaths caused by state security agents. It urged state parties to the African Charter to, among other measures, ensure that their domestic laws on the use of force comply with international standards; that law enforcement officials are provided with appropriate less lethal weapons and personal protective equipment; and to establish accountability mechanisms to ensure independent, effective and thorough investigations into suspicious deaths.

Apart from thematic resolutions, the African Commission also adopts country-specific resolutions to address particular human rights concerns in specific states. For example, in 2019, following mass protests in the Sudan and the violent suppression of the protests, the African Commission adopted Resolution 413 of 2019 on the human rights situation in the Republic of the Sudan.⁶⁴ The Commission expressed concern about the use of excessive force to disperse protesters and use of live ammunition and tear gas against protesters, resulting in deaths and serious injuries. It called on the Sudanese government to refrain from using excessive force against protesters and to ensure prompt, thorough and effective investigations into the allegations of gross human rights violations.

As new concerns emerge, the African Commission has also responded by adopting more resolutions to address the concerns. For example, in a 2021 resolution the Commission noted the potential implications of artificial intelligence (AI) technologies on the right to life and the freedom of assembly, among other rights,

62 Resolution on the Right to Peaceful Demonstrations (n 9).

63 Resolution on Police and Human Rights in Africa, ACHPR/Res 259(LIV) 2013 adopted at the 54th ordinary session of the African Commission on Human and Peoples' Rights, 22 October-5 November 2013, Banjul, The Gambia.

64 Resolution on the Human Rights Situation in the Republic of The Sudan, ACHPR/Res. 413 (EXT.OS/ XXV) adopted at the 25th extra-ordinary session of the African Commission on Human and Peoples' Rights, 19 February-5 March 2019, Banjul, The Gambia.

and committed to undertake a study on the impact of AI and other new and emerging technologies on human rights in Africa.⁶⁵ In the context of the COVID-19 pandemic, the Commission, taking note of the measures taken by states to combat the disease, expressed concern about the

excessive use of force by law enforcement officers against peaceful demonstrators in some African states, including the use of live ammunition, tear gas and water cannons by law enforcement authorities in suppressing and dispersing demonstrators, which had claimed the lives of many people.⁶⁶

It adopted a resolution calling on states to guarantee fundamental human rights, including the right to life and the right of peaceful assembly, when enforcing measures.⁶⁷ The Commission also expressed concern about the use of COVID-19 emergency measures to restrict civic freedoms and particularly highlighted the use of excessive force by law enforcement officials against protesters in Ethiopia, Nigeria, Côte d'Ivoire, Guinea and Uganda.⁶⁸ It adopted a resolution urging state parties to the African Charter to ensure that law enforcement officials involved in the policing of assemblies use force in accordance with international human rights standards.⁶⁹ Although the various resolutions highlight the problem of the use of excessive force leading to loss of life during assemblies, they do not necessarily provide an elaboration of the content of the state obligation to protect life during assemblies.

Aside from the Resolutions, the African Commission has also adopted the Guidelines on the Freedom of Association and Assembly in Africa (Guidelines on Association and Assembly)⁷⁰ and the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa in 2017 (Guidelines on Policing Assemblies).⁷¹

65 Resolution on the Need to Undertake a Study on Human and Peoples' Rights and Artificial Intelligence (AI), Robotics and Other New and Emerging Technologies in Africa, ACHPR/Res. 473 (EXT.OS/ XXXI) 2021, adopted at the 31st extra-ordinary session of the African Commission on Human and Peoples' Rights held virtually 19-25 February 2021.

66 Resolution on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States, ACHPR/Res. 474 (EXT.OS/ XXXI) 2021, adopted at the 31st extra-ordinary session of the African Commission on Human and Peoples' Rights held virtually 19-25 February 2021.

67 As above.

68 Resolution on the Need to Protect Civic Space and Freedom of Association and Assembly, ACHPR/Res. 475 (EXT.OS/ XXXI) 2021, adopted at the 31st extra-ordinary session of the African Commission on Human and Peoples' Rights held virtually 19-25 February 2021.

69 Resolution (n 68) operative para 1.

70 Guidelines on Freedom of Association and Assembly, adopted at the 60th ordinary session of the African Commission on Human and Peoples' Rights, Niamey, Niger, 8-22 May 2017.

71 Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), adopted at the 21st extra-ordinary session of the African Commission on

The Guidelines on association and assembly emphasise the need for states to ensure that laws regulating assemblies are aimed at facilitating the enjoyment of the right.⁷² It also emphasises the duty to protect assembly participants from interference by others, as well as the duty to protect bystanders and other parties.⁷³ The Guidelines on policing assemblies have more specific guidance on the protection of the right to life in the context of assemblies. For instance, it provides that 'firearms are not an appropriate tactical tool for the policing of assemblies' and 'must never be used to disperse an assembly'.⁷⁴ The Guidelines further emphasise the importance of training law enforcement officials on various aspects of policing assemblies, including the use of force and firearms, the use of less lethal weapons, the protection of particularly vulnerable groups, and conflict management in the context of assemblies.⁷⁵ In addition, the Guidelines elaborate the importance of planning operations with a view to minimising the need to use force or firearms.⁷⁶ Guidance is on accountability for the use of force and firearms.⁷⁷

Together, these Guidelines elaborate in detail various aspects of protection of the right to life during assemblies. Although they are soft law instruments, they have been cited by the African Commission in its case law,⁷⁸ Concluding Observations⁷⁹ and resolutions.⁸⁰ This has consequently enhanced their normative value.

5 Selected case law of the African Commission and the African Court

The interpretation of the standards discussed above in actual cases is an important way of clarifying the scope of the state obligation to protect life in the context of assemblies. Generally, the jurisprudence of the African Commission and the African Court is limited. However, there have been cases where the African Commission, in particular, has elaborated the state obligation to protect life in law enforcement operations.

Human and Peoples' Rights, 23 February-4 March 2017, Banjul, The Gambia.

72 Guidelines on Association and Assembly (n 70) para 66.

73 Guidelines (n 70) paras 94-95.

74 Guidelines on Policing Assemblies (n 71) para 21.2.4.

75 Guidelines on Policing Assemblies para 7.

76 Guidelines on Association and Assembly (n 70) para 9.

77 Guidelines on Association and Assembly (n 70) para 8.

78 See, eg, Communication 344/07 *George Iyanyori Kajikabi v The Arab Republic of Egypt* African Commission on Human and Peoples' Rights (2020).

79 Concluding Observations, Eritrea (n 19) para 36.

80 See, eg, Resolution on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States, ACHPR/Res 474 (EXT.OS/ XXXI) 2021; and Resolution 375/2017, Resolution on the Right to Life in Africa, ACHPR/Res 375(LX)2017.

What follows is an overview of four selected cases from the African Commission and the African Court through which the question of protection of the right to life in the context of law enforcement operations, including assemblies, was addressed. Save for one case which was determined in 2020, the remaining cases were all determined before the adoption of General Comment 3 discussed above. As will be seen, the interpretation of the right to life and the obligation of states in that regard in these cases is reflected in General Comment 3 as well as in the resolutions, guidelines and Concluding Observations of the African Commission.

5.1 *Gunme & Others v Cameroon*

The complainants in this case⁸¹ alleged numerous violations of the rights of the people of Southern Cameroon, including violations of the right to life and the right of peaceful assembly. The complaint gave accounts of violent suppression of peaceful protests by state security agencies, leading to a loss of lives. It was also alleged that some demonstrators who were arrested for participating in unlawful political rallies died in detention as a result of ill-treatment.⁸² Although Cameroon cast doubt on the reliability of the evidence presented by the complainants, the African Commission observed that Cameroon did not conduct investigations into the allegations and it also did not provide redress for the victims of the violations.⁸³ Consequently, the Commission found that Cameroon had violated article 4 of the African Charter. It further observed that security agencies in Cameroon had suppressed peaceful demonstrations through the use of force against demonstrators and their arrest and detention under inhumane conditions, thereby causing the deaths of some of the victims. The Commission noted that 'the victims who died, or had been detained suffered while exercising their exercise of the right to freedom of assembly'.⁸⁴ Consequently, it found that article 11 of the African Charter had also been violated.

In this case, when finding a violation of the right to life, the African Commission based its decision primarily on the failure by Cameroon to investigate the alleged violations. It did not delve into the substantive aspects of the obligation to protect life during assemblies. Nevertheless, in its finding of a violation of the right of peaceful assembly, the Commission mentioned in passing that

81 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 110.

82 *Gunme* (n 81) para 136.

83 *Gunme* para 112.

84 *Gunme* 137-138.

excessive force had been used against the demonstrators and as a result lives had been lost. It would have been helpful for the Commission to interrogate in greater detail the circumstances of the use of force by the police against the demonstrators and assess them against international standards. For example, in their defence Cameroon argued that the demonstrators who had died during a confrontation with the police had been involved in an illegal rally.⁸⁵ In response to the defence, the Commission could have affirmed that participation in an assembly considered unlawful under national law does not in itself justify the use of force. Assuming Cameroon had conducted thorough investigations and prosecuted some officers, would the Commission still have found a violation of the right to life? In the absence of a consideration of the violation of the substantive aspect of the right to life, it is difficult to tell what the answer would be.

5.2 *African Commission on Human and Peoples' Rights v Libya*

The brief facts of this case are that following the arrest and detention of an opposition lawyer, peaceful demonstrations took place in Benghazi, Libya between 16 and 19 February 2011. The demonstrations were violently suppressed by security forces who randomly fired live ammunition at the demonstrators. Many were killed while scores of others were seriously injured. It was indicated that the use of excessive force, including by machine guns, by Libyan security forces amounted to gross violations of the right to life, the security of the person, freedom of expression, and the right of peaceful assembly. The case was originally submitted to the African Commission which then referred it to the African Court. In an order for provisional measures, the African Court ordered Libya to 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons'.⁸⁶

Although ultimately the African Court struck out the application due to a lack of evidence,⁸⁷ the order for provisional measures was a step towards urgently putting a stop to the gross violations of the rights of demonstrators by Libyan security forces.

85 *Gunme* para 111.

86 *African Commission on Human and Peoples' Rights v Libya* (2011) AHRLR 175 (ACTHPR 2011) Order for Provisional Measures 4/2011 para 25.

87 *African Commission on Human and Peoples' Rights (Benghazi) v Libya*, App 4/2011, African Court on Human and Peoples' Rights (Order on Merits of the Application) 15 March 2013.

5.3 *George Iyanyori Kajikabi v Egypt*

In this case⁸⁸ a group of about 2 500 Sudanese nationals in Egypt participated in a sit-in demonstration in the Mustafa Mahmoud park close to the offices of the United Nations High Commissioner for Refugees (UNHCR) in Cairo. The number of demonstrators had gradually increased over a period of three months. Riot police forcibly removed them from the park, and in that process about 30 people died and many others suffered varying degrees of injury. Among the issues addressed by the African Commission were the breaking up of the peaceful sit-in protest through the indiscriminate use of force resulting in injury and death, and the failure by Egypt to investigate the alleged violations.

In finding that violations of both the right to life and the right of peaceful assembly had occurred, the African Commission emphasised the obligation of states to take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents. It also emphasised that force may be used in law enforcement only in order to stop an imminent threat of death or serious injury and clarified that force in this context includes deadly force and any other lesser form of force. This appears to be a more stringent standard than the UN human rights system's standard. In UN Human Rights Committee's General Comment 36, the presence of an imminent threat of death or serious injury is required in respect of use of lethal or potentially lethal force, and not lesser forms of force.⁸⁹ Arguably, the UN standard is the more practical one since there may be law enforcement situations that require the use of some level of force in contexts where there is no immediate threat of death or serious injury. For example, if demonstrators block a major highway for a long period, thereby causing great inconvenience to others, law enforcement officials may need to use force to disperse them if they fail to comply with orders to disperse.

The African Commission further emphasised that even if acts of violence occur during assemblies, participants retain their rights to bodily integrity and other rights and force may not be used except in accordance with the principles of necessity and proportionality.⁹⁰ It also noted the need for laws that strictly limit the circumstances

88 *Kajikabi v Egypt* Communication 344/07, African Commission on Human and Peoples' Rights (2020) para 171.

89 General Comment 36 (n 39) para 12.

90 *Gunme* (n 81) para 172.

when firearms may be used in accordance with international human rights standards.⁹¹

The African Commission also considered whether the police, through insufficient planning of the operation, could be held accountable for the deaths even in the cases where death was caused solely by trampling as well as asphyxiation, based on the state's duty to protect life. Given the manner in which the riot police dealt with the crowd, it found that Egypt was responsible for the deaths that resulted from trampling and asphyxiation.⁹² On the duty to investigate, the Commission noted that in relation to the right to life, the duty is on the state to initiate effective investigations and observed that victims have no duty to initiate such investigations.⁹³ This is crucial because in most cases, victims of rights violations by law enforcement agents usually are not able to identify them. Further, in an environment where dissent is suppressed, victims may not be willing to come forward to lodge their complaints for fear of state reprisals. By reinforcing the duty of the state to investigate, the African Commission clarified that the duty is triggered when the state knows or ought to have known about a potentially unlawful death, and not when a victim reports to the state authorities. This is a position that is also reflected in the UN's Minnesota Protocol.⁹⁴

Taken collectively, the Concluding Observations, Guidelines, resolutions and decided cases paint the picture of the African Commission acting proactively to clarify and then to underline relevant standards for the protection of the right to life in the context of assemblies. The *Kajikabi v The Arab Republic of Egypt* case, in particular, provides a comprehensive elaboration of the state's duty to protect the right to life in the context of assemblies. It emphasises the importance of the principles governing the use of force by the police, especially the principles of precaution, necessity, proportionality and accountability as they apply in the context of assemblies. In relation to precaution, it is commendable that the Commission found a violation of the right to life in relation to persons who died as a result of trampling and asphyxiation, since the law enforcement agencies had failed to plan their operation in a manner that would best protect life. This is significant because states are likely to consider such deaths accidental and, therefore, hold no one accountable for them. The Commission's analysis of the principles of necessity and proportionality with reference to Egypt's Police Act also highlighted

91 *Gunme* para 173.

92 *Gunme* para 178.

93 *Gunme* para 185.

94 Minnesota Protocol (n 22) para 15.

the need for states to ensure that their laws do not grant the police broad discretion to use force against assembly participants. That the Commission also affirmed that the duty to investigate is triggered if a state knows or ought to have known about a violation of the right to life is also a positive element of the decision. Deaths in the context of assemblies often may only be reported in the media and the victims' families will often shy away from seeking legal redress especially if their kin have been characterised as offenders. By this decision, whether or not victims' relatives report, states must investigate and a failure to do so is itself a violation of the right to life.

Despite the foregoing, the African Commission and the African Court could still do more to develop jurisprudence on the protection of the right to life in the context of assemblies. Given that direct access to the African Court is limited to the citizens of only six countries that have deposited the relevant declaration under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court (African Court Protocol) the case law of the African Court understandably is limited. In relation to the African Commission, access is much broader. However, given the length of time the Commission takes to determine communications, the quality of access to the Commission may be questioned. For example, the *Kajikabi* case discussed above related to events that took place in 2005. The Communication was submitted in 2007 but was only concluded 13 years later, in 2020. The delay in the determination of the cases may adversely affect the willingness of victims to approach the Commission.

Aside from these challenges, the African Commission has also missed opportunities to reinforce the state obligation to protect the right to life during assemblies through some Communications it has handled before. Two of these Communications are discussed next.

5.4 *International PEN v Nigeria*

This Communication⁹⁵ concerned the detention and trial of Kenule Saro-Wiwa, an activist and president of the Movement for the Survival of the Ogoni People (MOSOP). The trial stemmed from events during a rally organised by MOSOP on 21 May 1994 where four Ogoni chiefs were killed. Saro-Wiwa, who was prevented from attending the rally, was later arrested alongside 14 other defendants and months later was charged with inciting members of MOSOP

⁹⁵ *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 1-13.

to murder the four Ogoni leaders. Nine defendants, including Saro-Wiwa, were sentenced to death and subsequently executed.

The complainants alleged a violation of various provisions of the African Charter, include the right to life and the right of peaceful assembly. The African Commission disagreed with the position taken by the Nigerian tribunal before which the defendants were put on trial that by wrongfully organising political rallies and permitting large crowds of MOSOP youth to assemble, the defendants had 'created the fire that consumed the four Ogoni chiefs'. The Commission observed that such a position could have a negative impact on the right of peaceful assembly.⁹⁶ It found that there had been a violation of the right to life on account of the unfairness of the trial and execution of the defendants. It also found a violation of article 11 of the African Charter. Nevertheless, the African Commission did not adequately address particular aspects of protection of the right of peaceful assembly which the Communication raised. For example, the Commission did not interrogate whether Nigeria had complied with the principle of precaution by putting in place measures to ensure public safety during the assembly and to prevent arbitrary deprivation of life by private parties. Although it found the position of the Nigerian tribunal problematic, it could justly have used stronger language to affirm that organisers of assemblies can only be held responsible for their own unlawful conduct and not the criminal acts of others. Further, the Commission did not adequately link the execution of the defendants (which it found to be a violation of the right to life) to the violation of their right of peaceful assembly. As seen in *Gunme* discussed above, actions taken after assemblies by state authorities may also diminish the protection of the right of peaceful assembly and the right to life and bodily integrity.

5.5 *Movement Burkinabé v Burkina Faso*

This complaint⁹⁷ concerned various human rights violations committed by the Burkina Faso government over several years, particularly between 1991 and 1997 when the Communication was submitted. One of the allegations was that in May 1995, two students were shot dead at close range by security officials during a peaceful demonstration by students. It was further alleged that no investigation had been conducted into the deaths. The African Commission condemned the use of excessive force by state security

⁹⁶ *International Pen* (n 95) para 106.

⁹⁷ *Movement Burkinabé des droits de l'Homme et des peuples v Burkina Faso* (2001) AHR LR 51 (ACHPR 2001) para 10.

agents against demonstrators and noted that excessive force should not be used even in circumstances where the demonstrations are unauthorised. It also observed that 'the public authorities possess adequate means to disperse crowds' and that 'those responsible for public order must make an effort ... to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life'.⁹⁸ The Commission found that there had been a violation of the right to life. However, in spite of its condemnation of the use of excessive force against demonstrators, surprisingly the Commission held that a violation of article 11 of the African Charter had not been established.⁹⁹ Consequently, it did not link the violation of the right to life to the violation of the right of peaceful assembly. In its reasoning, the Commission determined, the complainants had not presented sufficient evidence to show that there had been a violation of article 11. This conclusion was not in harmony with the Commission's own observation on the use of force against peaceful demonstrators.

Notably, these two Communications were both determined before the three progressive ones discussed above. This can be seen as evidence that the African Commission has progressively enhanced the protection of the right to life during law enforcement operations. This growth is also seen in the detail with which the Commission addressed the question of protection of the right to life during assemblies in the recent decision in the *Kajikabi* case, as compared to the earlier case of *Gunme v Cameroon*. However, two key cases over a period of 40 years of the Commission's existence is a drop in the ocean.

6 Concluding remarks

This article has shown that the African human rights system has contributed to the development of standards on the protection of the right to life in law enforcement contexts, including during assemblies. Through several Concluding Observations on state reports, the African Commission has brought to the fore the problem of arbitrary deprivation of life through excessive use of force and made recommendations to states to establish legal frameworks on the use of force that comply with international human rights standards. Through its resolutions, it has also consistently called on states to refrain from using excessive force against demonstrators and to promptly, thoroughly and impartially investigate all cases of

98 *Movement Burkinabé* (n 97) para 43.

99 *Movement Burkinabé* para 45.

suspicious deaths. The Commission has also emphasised the need for states to take other measures such as training of security agencies on public order management and provision of appropriate less lethal weapons.

Some of the recent significant normative developments highlighted in this article include the adoption of General Comment 3 on the right to life and the adoption of the Guidelines on the freedom of association and assembly in Africa and the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. Together, these documents provide detailed guidance to state parties to the African Charter on the implementation of their obligations under articles 4 and 11. The standards contained in these documents are also reflected in the past and more recent jurisprudence of the African Commission. The recent developments provide opportunities to strengthen the protection of the right to life in assemblies. States, for example, can tap into the existing frameworks developed by the African Commission and use these to strengthen or develop their own domestic frameworks. It is crucial that these standards are reflected in domestic legal frameworks of African states since domestic law is the first line of defence for protection of human rights at the national level.

One area where the African human rights system still lags behind is in the entrenchment of the standards in the jurisprudence of the African Commission and the African Court. As the more accessible treaty body, the African Commission has better prospects of developing its jurisprudence and, therefore, should strengthen and make more effective its case-handling procedures in order to improve the quality of access to the Commission. Where Communications raise concerns touching on the right to life in the context of assemblies, the Commission should be deliberate in its interpretation of standards it has developed through other mechanisms such as guidelines and General Comments.

In light of the growing use of new technologies in law enforcement, standards ought to be developed to elaborate state obligations in relation to the protection of the right to life and the right to peaceful assembly. However, it is encouraging that the African Commission has recently adopted a resolution committing to undertake a study to develop guidelines on the use of AI technologies and robotics.

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An analysis of the contribution of the African human rights system to the understanding of the right to health

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Summary: *The right to health is one of the important rights guaranteed in international and regional human rights instruments. Over the years the content and nature of this right have evolved through the works of scholars and clarifications provided by human rights treaty bodies. Focusing on the work of the African Commission on Human and Peoples' Rights, this article assesses the contributions of the African human rights system towards the advancement of the right to health. It outlines some of the major achievements in terms of normative framework as exemplified by the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Youth Charter and the Protocol to the African Charter on the Rights of Older Persons. In addition, it highlights the clarifications provided by the African Commission charged with interpreting the African Charter on Human and Peoples' Rights and the African Women's Protocol. These include the adoption of resolutions, General Comments, guidelines and important decisions which provide a nuanced understanding of the right to health in the African context. The article identifies challenges militating against the full enjoyment of the right to health, including sexual and reproductive health in the region, such as the slow ratification of important human rights instruments, the lack of political will for law*

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reforms, the failure to timeously submit state reports and interference with the work of the African Commission. The article concludes by calling on African governments to exhibit political will in ensuring the effective implementation of the right to health at the national level.

Key words: *right to health; African human rights system; sexual and reproductive health and rights; African Commission on Human and Peoples' Rights*

1 Introduction

It is my aspiration that health finally will be seen not as a blessing to be wished for, but as a human right to be fought for.

Kofi Annan¹

The right to the highest attainable standard of physical and mental health, often regarded as the 'right to health', is one of the important rights recognised under international law. It is guaranteed in most international, regional and national documents. It was first recognised in article 55 of the UN Charter where it was noted that the international community shall promote a higher standard of living, including health.² Since that time the right has evolved and has been given clarifications under international law.³ It is not in doubt that the right is no longer mere wishful thinking but has become binding on states. The enjoyment of the right to health is crucial in realising other rights and in ensuring the well-being of individuals. Without good health, human beings are unable to function and perform their daily chores. In many parts of the world, millions of people struggle to live a dignified life, lack access to healthcare services, including life-saving medications, and contend with negative attitudes on the part of healthcare providers. The outbreak of pandemics such as Ebola, bird flu, SARS and COVID-19 is a reminder that we are all vulnerable and that there is a need to take a more holistic approach to preventing and treating diseases.⁴ The disparity between wealthy and poor nations often contributes to challenges relating to the realisation of the right to health in

1 WHO *25 questions and answers on health and human rights* (2002).

2 United Nations *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

3 See eg UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant) 11 August 2000, E/C12/2000/4.

4 See E Durojaye 'Between a rock and a hard place: (Un)balancing the public health interventions and human rights protection in the COVID 19 era in South Africa' (2021) *International Journal of Human Rights*, <https://doi.org/10.1080/13642987.2021.1926238> (accessed 26 October 2021).

developing countries. Africa would seem to have been worst affected by this development.⁵ This manifests in various ways, including in the high maternal mortality rates; the prevalence of HIV; high rates of unsafe abortion and sexually-transmitted infections; and a high rate of mortality associated with non-communicable diseases. Africa remains one of the most unsafe places to give birth and access to health goods and services remains difficult.⁶ This makes it imperative to address these challenges from a rights-based perspective.

While over the years the norms relating to the right to health have originated from the UN treaty-monitoring bodies, in recent times the African human rights system has made important contributions to our understanding of the right to health, including sexual and reproductive health and rights.⁷ However, these contributions are hardly acknowledged at international law and sometimes completely ignored.

Against this backdrop, focusing on the work of the African Commission on Human and Peoples' Rights (African Commission), this article assesses the contributions of the African human rights system towards the advancement of the right to health. It outlines some of the major achievements in terms of normative framework and the clarifications provided by the African Commission – charged with interpreting the African Charter on Human and Peoples' Rights (African Charter) – and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). It also points out some of the challenges militating against the full enjoyment of the right to health, including sexual and reproductive health in the region. It concludes by offering some recommendations for the way forward.

2 Normative framework

After World War II and the horrendous killings and human rights abuses perpetrated by the Germans, the international community rallied to form the United Nations (UN) in 1945. The primary concern of the UN Charter was to ensure the promotion and protection of human rights by all member states to the body.⁸ In furtherance of this, article 55 of the Charter provides that states should strive towards ensuring

5 L Forman 'The evolution of the right to health in the shadow of COVID-19' (2020) 22 *Health and Human Rights* 375.

6 WHO et al *Trends in maternal mortality: 2000 to 2017: Estimates* (2019).

7 See E Durojaye et al (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and opportunities* (2021) 5-9.

8 As above.

availability of health for all.⁹ In 1946 the World Health Organisation (WHO) in the Preamble to its constitution noted that health is a fundamental right of all and defines health as the 'state of complete well-being and not mere freedom from infirmities'.¹⁰ Subsequently, in 1948 the UN adopted its first human rights instrument, the Universal Declaration of Human Rights (Universal Declaration).¹¹ This was a very important document in the sense that it guarantees both civil and political rights and economic, social and cultural rights. Article 25 of the Universal Declaration recognises the right to an adequate standard of living, including food, water and health for all individuals.¹² While the Universal Declaration is not a binding instrument by any standard, it has remained influential in the drafting of most constitutions of the world. In fact, some commentators have argued that the norms in the Universal Declaration have attained the status of customary international law.¹³

Perhaps the most authoritative provisions on the right to health at the UN is article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This Covenant recognises the right to the highest attainable standard of physical and mental health. This detailed provision further recognises the right to social determinants of health.¹⁴ Other international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁵ the Convention on the Rights of the Child (CRC)¹⁶ and the Convention on the Rights of Persons with Disabilities (CRPD)¹⁷ contain provisions in relation to the right to health of specific groups. They require that states should guarantee the right to the highest attainable standard of physical and mental health to everyone.

9 As above.

10 Preamble to the Constitution of the WHO as adopted by the International Health Conference, New York, 19-22 June 1946.

11 UN General Assembly Universal Declaration of Human Rights 10 December 1948, 217 A (III).

12 As above.

13 See H Hannum 'The UDHR in national and international law' (1998) 3 *Health and Human Rights* 147.

14 International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966, Preamble, GA Res 2200A (XXI) UN GAOR, Supp 16, UN Doc A/6316 (1966) entered into force 2 September 1990.

15 Convention on the Elimination of All Forms of Discrimination against Women adopted 18 December 1979 GA Res 34/180, UN GAOR, 34th session, Supp 46 193, UN Doc A/34/46, UNTS 13 entered into force 3 September 1981 art 12.

16 Convention on the Rights of the Child (CRC) adopted 20 November 1989, GA Res 44/25, annex, UN GAOR 44th session, Supp 49, UN Doc A/44/49 (1989) entered into force 2 September 1990 art 24.

17 Convention on the Rights of Persons with Disabilities adopted 13 December 2006, GA Res A/RES/61/106, UN GAOR, 61st session UN Doc A/61/6111 entered into force 3 May 2008 (CRPD) art 25.

The Committee on Economic, Social and Cultural Rights (ESCR Committee), responsible for monitoring the implementation of ICESCR, issued General Comment 14 to clarify the implications of the right to health guaranteed in article 12.¹⁸ According to the Committee, the right to health should not be interpreted to mean the right to be healthy but rather an obligation on states to ensure access to healthcare services for all.¹⁹ It further explains that the essential elements of the right to health are freedoms and entitlements. The term 'freedoms' implies that no treatment should be conducted on an individual without informed consent, while 'entitlement' means that every individual should have access to health goods and services.²⁰ The ESCR Committee further identified the essential elements of the right to health to include availability, accessibility, acceptability and quality.²¹ States are to ensure that healthcare services are to be available, accessible, acceptable and of good quality. This is often referred to as the '3As and Q'.

It should be noted that the ESCR Committee has adopted the minimum core content of the right to health to include access to healthcare services without discrimination, access to housing, food, and essential medicines. It urges states to work with civil society groups with a view to adopting indicators to monitor the state's obligations to realise the right to health under the Covenant.²² The essence of the minimum core is to emphasise the point that some aspects of the right to health are not subject to progressive realisation. Further, the Committee has noted that states have the obligations to respect, protect and fulfil the right to health. It explains that respecting the right to health implies that states, through their actions or omissions, do not interfere with the enjoyment of the right to health.²³ Thus, states should not adopt laws or policies that make it difficult for individuals, especially vulnerable groups, to enjoy access to healthcare services. The obligation to protect requires states to ensure that the activities of third parties do not undermine the enjoyment of the right to health of their people, while the obligation to fulfil requires states to take necessary measures, including budgetary, judicial, legislative and administrative, towards the realisation of the right to health.²⁴

18 General Comment 14 (n 3).

19 As above.

20 As above.

21 General Comment 14 (n 3) para 12.

22 General Comment 14 para 36.

23 As above.

24 As above.

In 2016 the ESCR Committee adopted General Comment 22 on the right to sexual and reproductive health.²⁵ According to the Committee, the right to sexual and reproductive health is an integral part of the right to the highest attainable standard of physical and mental health.²⁶ It explains that states are obligated to ensure available, accessible, acceptable, and quality access to sexual and reproductive health services for all, especially vulnerable and marginalised groups.²⁷

In addition to the clarification provided by the ESCR Committee, other human rights bodies, such as the CEDAW Committee, the Committee on the Rights of the Child and the Human Rights Committee have made clarifications regarding the nature of the right to health. In its General Recommendation 24 on women and health²⁸ the CEDAW Committee explains that states have obligations to ensure access to healthcare services to women on an equal basis with men. It further notes that a failure to ensure access to healthcare services specifically needed by women will constitute discrimination under the Convention.²⁹ The Committee enjoins states to allocate resources and train healthcare providers to guarantee access to healthcare services specifically needed by women.³⁰ It further notes that states should provide redress for women that have experienced violations of their rights in the healthcare setting.³¹

The CRC Committee has explained in its General Comment 15 that states should adopt a holistic approach, including respect for the general principles of children's rights to ensure unhindered access to healthcare services for children.³² The Committee further emphasises the role of non-state actors in respecting the right to health of children. In some of its other General Comments, the Committee has made important observations that are crucial for the realisation of the right to health for adolescents. These include

25 ESCR Committee General Comment 22 (2016) on the right to sexual and reproductive health (art 12 ICESCR).

26 As above.

27 As above.

28 CEDAW Committee General Recommendation 24: Art 12 of the Convention (Women and Health) 1999, A/54/38.

29 As above.

30 As above.

31 As above.

32 CRC Committee General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24) 17 April 2013, CRC/C/GC/15.

General Comments 3 on HIV/AIDS,³³ 4 on adolescents' health³⁴ and 13 on violence against children.³⁵

While the provisions of the International Covenant on Civil and Political Rights (ICCPR) do not specifically guarantee the right to health, the Human Rights Committee has explained in General Comments 6³⁶ and 36³⁷ on the right to life that states have the obligation to prevent the loss of lives, including deaths associated with unsafe abortion, and to promote maternal health.

The work of the special mechanisms of the UN has equally played an important role in clarifying the meaning of the right to health. In 2000 the UN created the position of Special Rapporteur on the Right to Highest Attainable Standard of Health. Since that time the Special Rapporteur has played a key role in providing clarifications on the understanding of the right to health. Some of the reports of the Special Rapporteur have addressed important issues relating to the understanding of the right to health.³⁸ The work of the Special Rapporteur has given more visibility to the right to health and further consolidated the point that this right is not merely an aspiration but rather an enforceable right.

It should also be acknowledged that over the years the understanding of the right to health has emerged through consensus statements, declarations and other works. Thus, the decisions reached at the International Conference on Population and Development, Cairo, Egypt, in 1994 and the Fourth World Conference on Women in Beijing, China, in 1995 all contain important affirmations relating to the right to health, including the sexual and reproductive health rights of women and girls.

These developments at the international level with regard to the right to health are crucial for the realisation of the right at the national

33 CRC Committee General Comment 3 (2003): HIV/AIDS and the rights of the child 17 March 2003, CRC/GC/2003/3.

34 CRC Committee General Comment 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4.

35 CRC Committee General Comment 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13.

36 Human Rights Committee General Comment 6, art 6 (Right to life) 16th session 1982, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies 176 paras 3, 5 UN Doc HRI/GEN/I/Rev.9 (Vol I) (2008).

37 Human Rights Committee General Comment 36, art 6 (Right to life) 3 September 2019, CCPR/C/GC/35.

38 For the reports of the UN Special Rapporteur on Health, see <https://www.ohchr.org/en/issues/health/pages/srrihealthindex.aspx> (accessed 26 October 2021).

level. The norms and standards serve as important benchmarks to assess the performance of states in their commitments to realise the right to health at the national level. Yamin argues that framing health as a right makes it imperative for states to address health-related issues as a matter of social justice.³⁹ It equally enables states to consider the allocation of resources towards realising this right for all, especially vulnerable and marginalised groups.⁴⁰ More importantly, the framework at the international level requires states to address discrimination and existing inequality in the realisation of the right to health at the national level.

At the regional level, the right to health is guaranteed in article 11 of the European Social Charter;⁴¹ article 10 of the Protocol to the Inter-American Convention;⁴² article 16 of the African Charter;⁴³ article 14 of the African Charter on the Rights and Welfare of the Child (African Children's Charter);⁴⁴ and article 14 of the African Women's Protocol.⁴⁵ The African Commission has attempted to clarify the provisions of the right to health in the African Charter and the African Women's Protocol through its decisions,⁴⁶ resolutions⁴⁷ and General Comments.⁴⁸ These clarifications are discussed in detail below.

Over the years the right to health has increasingly gained recognition at the national level. A study by Heymann et al has shown that approximately 191 member countries of the UN have provisions on the right to health in their constitutions.⁴⁹ After reviewing the

39 AE Yamin 'The right to health under international law and its relevance to the United States (2005) 95 *American Journal of Public Health* 1156-1161.

40 As above.

41 Council of Europe, European Social Charter, 18 October 1961, ETS 35.

42 Organization of American States (OAS) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) 16 November 1999 A-52.

43 African Charter on Human and Peoples' Rights adopted by the Organisation of African Union (OAU) in 1981, entered into force on 21 October 1986.

44 African Charter on the Rights and Welfare of the Child adopted 11 July 1990 art 5, OAU Doc CAB/LEG/24.9/49 entered into force 29 November 1999 (African Children's Charter).

45 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the AU in 2003 entered into force 27 November 2005 (African Women's Protocol).

46 See, eg, *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

47 See, eg, Resolution on Access to Medicines adopted 2008; Resolution on Maternal Mortality; Resolution 265 on Involuntary Sterilisation; and Human Rights and Resolution 275 on Violence Against Persons Based on Gender Identity or Sexual Orientation.

48 See General Comment 1 on arts 14(1)(d) and (e) of the African Women's Protocol; see also General Comment 2 on art 14(2).

49 J Heymann et al 'Constitutional rights to health, public health and medical care: The status of health protections in 191 countries' (2013) 8 *Global Public Health*

constitutions of member states of the UN between 2007 and 2011, the study came to the conclusion that 'seventy-three UN member countries (38 per cent) guaranteed the right to medical care services, while 27 (14 per cent) aspired to protect this right in 2011'.⁵⁰ The authors further note that 'while only 33 per cent of the constitutions adopted prior to 1970 addressed at least one health right, 60 per cent of those introduced between 1970 and 1979 included the right to health, public health and/or medical care'.⁵¹ In addition, three-quarters of the constitutions introduced in the 1980s, and 94 per cent of those adopted in the 1990s, protected at least one of these rights.⁵² Only one of the 33 constitutions adopted between 2000 and 2011 did not protect at least one health right.⁵³

Despite the various norms and standards on the right to health, commentators have not spared the ink in criticising this right. It has been argued that the right to health remains vague, ambiguous, and difficult to enforce.⁵⁴ This is more so given that the right to health forms part of socio-economic rights, which have remained the subject of debate and controversy among states.

3 Contributions of the African human rights system

As the title of this article indicates, the focus here is to highlight the important contributions the African human rights system has made to the advancement of the right to health. It needs to be clarified at this stage that while the title refers to the African human rights system, most of the discussion here will revolve around the work of the African Commission. This is because the African Commission is the oldest human rights body in the region with extensive experience in interpreting the right to health. Where necessary, appropriate references will be made to the work of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the African Court on Human and Peoples' Rights (African Court). The analysis here will be done by examining the normative framework on the right to health, interpretative guidance provided and the jurisprudence of the relevant regional human rights bodies

639.

50 Heymann et al (n 49) 650.

51 As above.

52 As above.

53 As above.

54 See, eg, JP Ruger 'Toward a theory of a right to health: Capability and incompletely theorised agreements' (2006) 18 *Yale Journal of Law and the Humanity* 3; A Buchanan 'The right to a decent minimum health care' (1984) 13 *Philosophy and Public Affairs* 55.

3.1 Normative framework

As discussed above, the UN human rights instruments have served as the pace setter for the conceptualisation of the right to health. Article 12 of ICESCR contains an authoritative provision on the right to health which has been replicated in almost all other regional human rights instruments, including the African Charter. While the provision of article 12 of ICESCR may be said to be authoritative, the provision of article 14 of the African Women's Protocol can be regarded as ground-breaking in a number of ways.⁵⁵ Article 14 of the Women's Protocol, which entered into force in 2005, provides as follows:

- 1 States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
 - (a) the right to control their fertility;
 - (b) the right to decide whether to have children, the number of children and the spacing of children;
 - (c) the right to choose any method of contraception;
 - (d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
 - (e) the right to be informed of one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
 - (f) the right to have family planning education.
- 2 States Parties shall take all appropriate measures to:
 - (a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
 - (b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
 - (c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Article 14 of the African Women's Protocol stands out compared to the provisions on the right to health in UN human rights instruments. Indeed, it can be argued that it not only consolidates the recognition of the right to health but also expands its content. For instance, the provision in article 14(2)(c) is unique and bold in the sense that it is the first time in any human rights instrument that a woman's right

⁵⁵ African Women's Protocol (n 45).

to safe abortion on certain grounds is recognised. Not even CEDAW contains any provision on abortion. As should be noted, abortion is a very controversial issue and often elicits emotional, religious and cultural sentiments whenever it is discussed at any forum. Moreover, unsafe abortion accounts for most of the maternal deaths in the world, especially in Africa.⁵⁶ Efforts at recognising women's rights to abortion at international forums have remained difficult due to religious and cultural reasons. The nearest to addressing this issue was the compromise reached during the International Conference on Population and Development (ICPD) in 1994, where it was noted that a woman may be allowed to undergo abortion if the national law so permits.⁵⁷ Given that many countries in the world still maintain restrictive abortion laws, this compromise does not in the true sense improve the situation of many women in need of safe abortion worldwide. Besides, the consensus statement creates no obligation on states to take decisive measures towards liberalising abortion. It, therefore, is a bold move by the drafters of the Protocol to recognise the rights of women in Africa to safe abortion.

Ngwena has argued that ensuring access to safe abortion services, which includes repealing restrictive laws and policies on abortion, will go a long way in addressing inequality in healthcare services and ultimately promote women's rights to reproductive health.⁵⁸ He has suggested reforms of abortion laws in Africa to prevent needless deaths often associated with unsafe abortion. More importantly, he has argued that the enjoyment of the right to healthcare services, including reproductive health care, obligates African governments to take women's rights seriously by ending deaths occasioned by unsafe abortion.⁵⁹ This will be consistent with the substantive equality approach envisaged by the African Women's Protocol.

The second point that needs to be made regarding the normative framework is that the African Women's Protocol is also the first human rights instrument to specifically protect women's rights in the context of HIV. Articles 14(1)(d) and (e) recognise the rights of women to be protected from sexually-transmitted infections, including HIV, and the right to know one's partner HIV status. The HIV pandemic has since the 1990s impacted negatively on many

56 WHO 'Preventing unsafe abortion', <https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion> (accessed 27 October 2021).

57 International Conference on Population and Development, Cairo, Egypt, September 1994.

58 C Ngwena 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783.

59 C Ngwena et al 'Human rights advances in women's reproductive health in Africa' (2015) 129 *International Journal of Gynaecology and Obstetrics* 184.

lives in Africa. It therefore was a thoughtful decision that the drafters of the Protocol included a provision to protect women in the context of HIV. This is the first time any human rights instrument would recognise the human rights challenge posed by HIV. It is a pragmatic response to the high prevalence of the epidemic in the region. It has been argued that this provision is a pragmatic response to the peculiar challenges women face in Africa with regard to the burden of HIV/AIDS.⁶⁰

Third, while CEDAW does refer to the rights of women to decide freely and responsibly on the number and spacing of their children, article 14 of the African Women's Protocol is more emphatic in recognising the right to sexual and reproductive health of women. As noted above, article 14 provides that the right to health, including the sexual and reproductive health of women, shall be respected and protected. It proceeds to list the various sexual and reproductive health issues to be protected. These include access to contraception, sexuality education, and determining the timing and number of children. This is a bold statement for a continent often referred to as conservative.

Fourth, article 14(2)(a) would seem to have codified the clarification provided by the ESCR Committee in General Comment 14 by urging states to ensure 'adequate, affordable and accessible health services'.⁶¹ This inclusion in a binding instrument such as the African Women's Protocol is important given the debate that often surrounds the legal effects of General Comments. The inclusion in article 14(2)(a) would seem to lay to rest any doubt about the need for African governments to effectively implement the availability, accessibility, acceptability, and quality (3As and Q) framework of the ESCR Committee.⁶² The African Commission has issued two important General Comments to clarify the provisions of article 14. These General Comments are discussed in detail below. The codification of the 3As and Q in the African Women's Protocol makes it imperative for African governments to ensure that the right to health, including the sexual and reproductive health rights of women, are effectively implemented at the national level. This requires the appropriate allocation of resources to ensure access to healthcare services required by women. Indeed, in some of its Concluding Observations to African states, the Commission has expressed concerns about poor infrastructure and shortages of healthcare providers in some African

60 See, eg, RS Mukasa *The African Women's Protocol: Harnessing a potential force for positive change* (2009).

61 General Comment 14 (n 3).

62 As above.

countries.⁶³ Thus, it has emphasised the need to ensure adequate allocation of resources to improve infrastructure in the healthcare sector.⁶⁴

It should be noted that in interpreting article 14 of the African Women's Protocol, reference should be made to its other important provisions, such as articles 1 and 2 on the definition of non-discrimination; article 3 on dignity; article 4 on violence; article 5 on harmful practices; and article 10(h) on committing resources to realise women's rights.⁶⁵ These other provisions will help to elucidate the nature of states' obligations in realising the right to health.

Aside from the African Women's Protocol, the African Youth Charter in article 16 also contains significant provisions relating to the rights to health of young people.⁶⁶ This is a unique instrument, which addresses the human rights of youths in the region. The need to address the rights of the youth might have arisen because a large percentage of the African population is made up of young people threatened by various health challenges, including HIV and teenage pregnancy. Thus, the African Youth Charter perhaps is the only human rights instrument dedicated to the youth, internationally. Article 16 of the Youth Charter contains a detailed provision guaranteeing the right to health of African youths. The provision addresses not only access to healthcare services, but also determinants of health as well as the challenges posed by non-communicable diseases in Africa. Drawing from the language of the African Children's Charter, article 16 provides that the right to physical, mental and spiritual health of young people shall be protected.⁶⁷ It further addresses peculiar challenges facing the well-being of the youth. These include obligating states to make available youth-friendly healthcare services; confidential counselling and testing for HIV; ensuring healthcare services for youths in rural areas; ensuring the provision of food for youths living with HIV; and addressing tobacco, drug and alcohol use among young people.⁶⁸

63 See, eg, Concluding Observations and Recommendations – Nigeria: 5th Periodic Report, 2011 – 2014 adopted at 57th ordinary session 4-18 November 2015 Banjul, The Gambia; see also Concluding Observations and Recommendations – Kenya: Combined 8th-11th Periodic Report, 2008-2014 adopted at 19th extraordinary session 16-25 February 2016, Banjul, The Gambia.

64 As above.

65 See E Durojaye & N Murungi 'The African Women's Protocol and sexual rights' (2013) 7-8 *International Journal of Human Rights* 881.

66 Adopted in Banjul, The Gambia on 2 July 2006, entered into force on 8 August 2009.

67 As above.

68 As above.

The African Youth Charter indeed is a pace setter in holistically protecting the rights to health of young people. It serves as a good model for a comprehensive recognition of the right to health. It places obligations on African governments to address non-communicable diseases, which have become serious threats to many lives in the region. The WHO has noted that non-communicable diseases are the leading cause of death globally accounting for 41 million (71 per cent) of the world's 56 million deaths in 2016.⁶⁹ Furthermore, it is noted that approximately 15 per cent of non-communicable disease-related deaths occur prematurely (ages 30 to 70), while the burden of non-communicable diseases is disproportionately borne by low and middle-income countries, including Africa.⁷⁰ The WHO estimates that these deaths will increase by 17 per cent in 2025, with a 27 per cent increase from Africa.⁷¹ It is also worth noting that in Mauritius, Namibia and Seychelles, non-communicable diseases cause over 50 per cent of all reported adult deaths.⁷² Whether or not this provision of the Youth Charter has been utilised by African governments is a different story entirely. It indeed is surprising that such an important provision in the African Youth Charter has not been put to effective use. This requires African governments to be alive to their obligations to protect the continent from the scourge of non-communicable diseases.

More recently the AU has adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons.⁷³ Although this Protocol is yet to enter into force, it nonetheless contains inspiring provisions on the right to health of older persons. The Protocol in article 15 guarantees the rights of older persons to healthcare services that meet their peculiar needs, to have access to health insurance and ensuring the inclusion of geriatrics and gerontology in the training of healthcare providers. This is a milestone in the recognition of the right to health of older persons. Nowhere else, either at the international or regional level, is such protection found. Therefore, the African human rights system should be applauded for taking a progressive step to address the health needs of older persons. Experience has shown that little attention has been given to the rights of older persons in many parts of the world, including in Africa.⁷⁴ It therefore is a positive development that the

69 WHO *Non-communicable diseases: Country profiles 2018* (2018).

70 As above.

71 WHO 'Africa: Non-communicable diseases', <https://www.who.int/nmh/ncd-tools/who-regions-african/en/> (accessed 25 October 2021).

72 'Non-communicable diseases', <https://www.afro.who.int/health-topics/noncommunicable-diseases> (accessed 25 October 2021).

73 Adopted in 2016, yet to enter into force.

74 See, eg, G Kelly et al "'They don't care about us': Older people's experiences of primary healthcare in Cape Town, South Africa' (2019) 19 *BMC Geriatrics* 98.

AU took the lead by adopting a specific human rights instrument protecting the rights of older persons, in general, and their rights to health, specifically. This instrument provides a shining example for others to follow in the recognition of the rights of older persons.

3.2 Interpretative guidance on the right to health through resolutions/General Comments/guidelines

The African Commission is the body charged with the responsibility of overseeing the implementation of the African Charter and, for the time being, the African Women's Protocol. The African Commission was established in 1987 pursuant to article 30 of the African Charter. It has both promotional and protective mandates. The Commission usually consists of 11 members who are expected to have distinguished themselves in their field of endeavour. The members are to serve in their individual capacity through secret ballot election conducted by the Assembly of Heads of State of the AU. Article 45 of the African Charter empowers the Commission to provide interpretative guidance to the provisions of the African Charter and, by extension, the African Women's Protocol. Relying on this provision, the African Commission has adopted important resolutions and General Comments to provide further understanding of the provisions on the right to health in the African Charter and the African Women's Protocol.

3.2.1 Resolutions

The African Commission has often relied on article 45(1) of the African Charter in providing interpretative guide to the provisions of the Charter and the African Women's Protocol. In 2008 the Commission adopted two important resolutions in relation to the right to health. The first resolution deals with maternal mortality, which is a serious challenge facing the region.⁷⁵ At the time the African Commission adopted its resolution on maternal mortality, the Human Rights Council was yet to adopt its series of resolutions on the same subject. Therefore, one could affirm that the African Commission took the lead in adopting a specific resolution on maternal mortality. In that resolution the African Commission declared maternal mortality a state of emergency in Africa and called on states to take decisive measures to address this concern.⁷⁶ It further affirmed that maternal

⁷⁵ Resolution on Maternal Mortality in Africa reproduced in E Durojaye & G Mirugi-Mukundi (eds) *Compendium of documents and cases on the right to health under the African human rights system* (2013).

⁷⁶ As above.

mortality undermines various human rights recognised in the Charter, including the rights to life, dignity, non-discrimination, and health. The Commission called on African governments to adopt a holistic approach towards addressing maternal mortality in the region.⁷⁷ The Human Rights Council subsequently adopted the first 52 of its many resolutions on maternal mortality drawing on the inspiration of the African Commission resolution on this issue.⁷⁸

In the same year the African Commission adopted another resolution to address access to medicines in Africa.⁷⁹ The resolution was aimed at clarifying states' obligations in relation to the enjoyment of the right to health in article 16 of the African Charter. Concerned about a lack of access to life-saving medications for HIV and inspired by General Comment 14 of the ESCR Committee, the Commission urged African governments to ensure the availability, accessibility, acceptability, and quality of essential medicines for all. It further called on states to respect, protect and fulfil the realisation of access to medicines for everyone. It further urged African governments, when entering into any trade agreements, to consider the implications for access to medicines and the enjoyment of the right to health.⁸⁰ This resolution is significant given that at the time of its adoption, access to life-saving medications for HIV was a serious challenge in Africa. Due to patent rights enjoyed by pharmaceutical companies on anti-retroviral drugs under the World Trade Organisation's Trade-Related Aspect of Intellectual Property Rights (TRIPS) Agreement,⁸¹ the costs were far beyond the reach of many Africans. This resolution, therefore, served as a strong statement to African governments not to compromise the enjoyment of the right to health through trade agreements.

More recently the African Commission adopted two important resolutions crucial to the realisation of the right to health, including sexual and reproductive health. In 2013, at the wake of the disturbing incidents of forced sterilisation of HIV-positive women across Africa, the Commission rose to the occasion by adopting Resolution 260

77 As above.

78 See, eg, Human Rights Council Resolution on Preventable Maternal Mortality and Morbidity and Human Rights 2010; Human Rights Council Resolution on Preventable Maternal Mortality and Morbidity and Human Rights 2011; Human Rights Council Resolution on Preventable Maternal Mortality and Morbidity and Human Rights 2016.

79 Resolution 141 on Access to Health and Needed Medicines in Africa ACHPR/Res 141(XXXIV)08.

80 As above.

81 TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 UNTS 1197 (1994) (TRIPS Agreement).

on Involuntary Sterilisation as a violation of human rights.⁸² The Resolution condemns all forms of involuntary sterilisation targeted at vulnerable groups, such as women living with HIV, as a violation of the rights to dignity, health, non-discrimination and freedom from cruel, inhuman and degrading treatment.⁸³ This timely resolution urges African governments to put in place mechanisms that will ensure that HIV-positive women are not subjected to coercive forms of sterilisation. More importantly, the Commission enjoins states to ensure the participation of women living with HIV in the development of laws, policies and programmes relating to their sexual and reproductive health.⁸⁴ By this statement, the Commission would seem to be echoing the aphorism 'nothing for us without us', an approach that is grounded in the right to participation for vulnerable and marginalised groups in matters affecting their lives. The Resolution recommends the training of healthcare providers and the need for government to put in place redress mechanisms for victims of involuntary sterilisation.

In 2014 the African Commission adopted the landmark Resolution 275 addressing all forms of violence against an individual based on real or perceived sexual orientation or gender identity.⁸⁵ This was the first time the African Commission took a bold step to address this seemingly controversial issue on the continent. Prior to this period, the African Commission had been perceived as homophobic and unwilling to address issues relating to sexual orientation or gender identity.⁸⁶ This is hardly surprising given that many leaders of the AU have expressed stiff opposition to advocating the rights of sexual minorities in their countries. In particular, homophobic statements credited to late Zimbabwean President Robert Mugabe and President Museveni of Uganda all point to intolerance of sexual minorities and a lack of respect for their fundamental rights.⁸⁷ These attitudes tend to fuel violence and human rights abuses of sexual minorities on the continent. Therefore, it was a momentous occasion for the

82 Resolution 260 on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services – ACHPR/Res 260 (LIV) 2013.

83 As above.

84 As above.

85 Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity – ACHPR/Res 275 (2014).

86 For a detailed discussion on this, see V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive health' (2011) 11 *African Human Rights Law Journal* 368.

87 See 'Mugabe condemns gay "filth"' *News24*, <https://www.news24.com/News24/Mugabe-condemns-gay-filth-20110414> (accessed 2 July 2021); see 'Uganda's President Museveni signs controversial anti-gay Bill into law', <https://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill/index.html> (accessed 2 July 2021).

Commission to adopt this Resolution. The Resolution observes that article 2 of the African Charter prohibits discrimination on various grounds including any 'other status'.⁸⁸ It calls on African governments to end all forms of violence and human rights violations perpetrated by the state, its agents or by non-state actors against persons based on their sexual orientation or gender identity.⁸⁹ It particularly requires African governments to adopt laws and policies prohibiting or punishing all forms of violence targeting individuals based on their real or perceived sexual orientation or gender identity.⁹⁰ If properly implemented at the national level, this significant resolution will go a long way in addressing human rights violations experienced by sexual minorities in the region.⁹¹

The African Commission has taken a step further by engaging with states during the reporting process on steps taken to protect the rights of sexual minorities. For instance, in its Concluding Observations to Nigeria the Commission expressed concerns with the enactment of the law criminalising homosexuality in the country, noting that such laws have the potential to engender violence in the country.⁹² The Commission also expressed concerns that this may drive the activities of sexual minorities underground, thereby making them vulnerable to HIV and unable to seek healthcare services.

3.2.2 General Comments

In 2012 the African Commission adopted its first General Comment (General Comment 1) to clarify the provision of articles 14(1)(d) and (e) of the African Women's Protocol.⁹³ As noted above, the provision specifically relates to the protection of women's rights in the context of HIV. In clarifying this provision, the African Commission notes that to prevent women from sexually-transmitted infections, including HIV, states must ensure access to sexual and reproductive health

88 Resolution 275 (n 85).

89 As above. For a detailed discussion of this resolution, see BD Nibogora 'Advancing the rights of sexual and gender minorities under the African Charter on Human and Peoples' Rights: The journey to Resolution 275' in E Durojaye et al (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and opportunities* (2021) 171.

90 As above.

91 As above.

92 See Concluding Observations and Recommendations – Nigeria: 5th Periodic Report, 2011-2014 adopted at 57th ordinary session 4-18 November 2015, Banjul, The Gambia.

93 General Comment 1 on arts 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the African Commission on Human and Peoples' Rights during its 52nd ordinary session in November 2012.

information and services to women and girls.⁹⁴ The Commission further notes that states should ensure the provision of sexuality education and evidence-based policies and programmes on the sexual and reproductive health of women and girls.⁹⁵ With regard to knowing one's HIV status, the Commission notes that while this provision is intended to protect women, it must not be implemented in a manner that will undermine an individual's rights to privacy and confidentiality.⁹⁶ More importantly, the Commission notes that this provision must be carried out in line with international norms and standards. It further explains that the right to self-protection and the right to be protected are intrinsically linked to other rights of women, including the rights to equality and non-discrimination, life, dignity, health, self-determination, privacy and to be free from all forms of violence. The Commission notes that states are to

provide access to information and education, which should address all taboos and misconceptions relating to sexual and reproductive health issues, deconstruct men and women's roles in society, and challenge conventional notions of masculinity and femininity;

provide access to sexual and reproductive health services by ensuring availability, accessibility, acceptability and quality sexual and reproductive health care services for women.⁹⁷

This holistic and gender-sensitive approach by the African Commission is commendable and sets it apart from UN treaty-monitoring bodies such as the ESCR and CEDAW Committees. It would be recalled that as far back as 1990s the CEDAW Committee adopted General Recommendation 15 on Women and HIV/AIDS.⁹⁸ However, unlike General Comment 1 of the African Commission, the General Recommendation of CEDAW is short and fails to address contemporary issues relating to women and HIV. To this extent, General Comment 1 of the African Commission is an important contribution to the understanding of the right to health of women in the context of the HIV/AIDS pandemic. The Commission has recommended to states the need to adopt progressive HIV legislation that will address the needs of vulnerable and marginalised groups, especially women and girls.⁹⁹

94 As above.

95 As above.

96 General Comment 1 (n 93) 26.

97 General Comment 1 (n 93) 40.

98 CEDAW Committee General Recommendation 15: Avoidance of Discrimination against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS), 1990, A/45/38.

99 See, eg, Concluding Observations and Recommendations – Malawi: Initial and Combined Periodic Reports, 1995-2013 adopted at its 57th ordinary session November 4-18 November 2015, Banjul, The Gambia.

In its General Comment 2 on other provisions of article 14 of the African Women's Protocol, the Commission reasons that states are to ensure access to healthcare services on a non-discriminatory basis and in ways that are physically accessible, economically accessible, and in which information is accessible.¹⁰⁰ The Commission explains the relevance of equality and non-discrimination to sexual and reproductive health rights of women.¹⁰¹ It further calls on states to adopt a purposive interpretation of grounds for abortion similar to the WHO Technical Guidance. The Commission explains that when applying a holistic understanding of health as a ground for abortion, the woman's reasons must be taken into account.¹⁰² More importantly, the Commission notes that where risk to 'mental health' is relied upon, it is not necessary to first establish psychiatric evidence.¹⁰³ It explains that states have the duty to remove restrictions that are not necessary for providing safe abortion services such as the requirements of multiple signatures, approval by committees before an abortion can be performed, or restricting the performance of abortion to medical practitioners.¹⁰⁴

In highlighting the nature of states' obligations, the Commission explains that the duty to respect rights requires state parties to refrain from hindering, directly or indirectly, women's rights to sexual and reproductive health and to ensure that women are duly informed on family planning/contraception and safe abortion services.¹⁰⁵ The duty to protect requires state parties to take the necessary measures to prevent third parties from interfering with the enjoyment of women's sexual and reproductive health rights. It particularly cautions on the use of conscientious objection to hinder access to abortion services for women.¹⁰⁶ This clarification becomes important given the serious obstacle conscientious objection has posed to women seeking abortion services across Africa, including in countries with liberal abortion services.¹⁰⁷ The General Comment further explains that the duty to promote imposes an obligation on state parties to create legal, economic and social conditions that enable women to exercise their sexual and reproductive rights with

100 General Comment 2 on arts 14(1)(a), (b), (c) and (f) and arts 14(2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the African Commission on Human and Peoples' Rights during its 54th ordinary session, November 2014.

101 As above.

102 General Comment 2 (n 100) paras 37-38.

103 General Comment 2 paras 39-40.

104 As above.

105 General Comment 2 42.

106 General Comment 2 43.

107 See, eg, S Nabaneh 'Abortion and conscientious objection in South Africa: The need for regulation' in E Durojaye et al (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and opportunities* (2021) 16.

regard to family planning/contraception and safe abortion, as well as to enjoy these.¹⁰⁸ Regarding the duty to fulfil, it requires that state parties adopt relevant laws, policies and programmes that ensure the fulfilment *de jure* and *de facto* of women's sexual and reproductive rights, including the allocation of sufficient and available resources for the full realisation of those rights.¹⁰⁹ General Comment 2 not only provides guidance for states to adopt legislative and policy frameworks to ensure access to safe abortion services, but is also useful in 'educating all stakeholders – including healthcare providers, lawyers, policymakers, and judicial officers at the domestic level – about pertinent jurisprudence'.¹¹⁰ It should be noted that General Comment 2 of the African Commission serves as a pace setter to the ESCR Committee's General Comment 22 on the right to sexual and reproductive health, which was adopted in 2016. Thus, the latter builds on the clarification on the understanding of the right to sexual and reproductive health provided by General Comment 2.

In its engagements with states, the African Commission has emphasised the need for African governments to reduce the incidence of unsafe abortion, as this is responsible for the high maternal mortality rate in the region.¹¹¹ It has further urged African governments to expedite action with the ongoing legislative reforms on abortion in line with the African Women's Protocol.¹¹² The fact that the Commission is beginning to engage with states as regards their obligations under article 14(2)(c) of the Women's Protocol is a positive development that can potentially serve as a catalyst for reforms of abortion laws in the region.

In General Comment 3 on article 4 of the African Charter, dealing with the right to life, the African Commission adopted a progressive interpretation of the right to life as imposing positive obligations on states.¹¹³ According to the Commission, states are not only to refrain from interfering with the enjoyment of the right to life, but they must also ensure the prevention of avoidable loss of life. In particular, the Commission obligates states to ensure the prevention of avoidable death during pregnancy and childbirth as this would

108 General Comment 2 (n 100) 43.

109 General Comment 2 44.

110 C Ngweni, E Brookman-Amisshah & P Skuster 'Human rights advances in women's reproductive health in Africa' (2015) 129 *International Journal of Gynaecology and Obstetrics* 184.

111 See, eg, Concluding Observations and Recommendations – Malawi (n 99) paras 106-107.

112 As above; see also Concluding Observations and Recommendations – Nigeria (n 92) para 118.

113 African Commission on Human and Peoples' Rights General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 18 November 2015.

amount to a violation of the right to life as guaranteed under the African Charter.¹¹⁴ This interpretation is crucial for Africa where the rate of maternal death is alarming and where African governments have not shown enough political will to address this issue. It clearly clarifies states' obligations to take positive steps and measures that would ensure that women do not die during pregnancy or childbirth. The recently-adopted General Comment 36 of the Human Rights Committee on the right to life in article 6 of ICCPR would seem to align with the reasoning of the African Commission on this issue.¹¹⁵

In one of its joint General Comments with the African Children's Committee, the African Commission addresses the issue of child/early marriage which has posed serious threats to the health and well-being of the girl child in the region.¹¹⁶ The joint General Comment is concerned about the prevalence of child/early marriage in the region and its human rights implications. It specifically notes that this practice undermines various rights in the African Charter, the African Women's Protocol and the African Children's Charter. Beyond condemning child marriage as a human rights violation of the girl child, the joint General Comment provides concrete recommendations culturally appropriate for African governments to address this serious human rights concern. These include the need to ensure the verification of births and issuance of birth certificates; to ensure the full implementation of laws and to impose sanctions; education and awareness campaigns; and institutional measures to ensure access to justice and rehabilitation of the girl child already involved in child marriage.¹¹⁷ Other measures include the need to address the root causes of poverty; research to collect data; the prohibition of all harmful cultural practices; engagement with men and traditional rulers; and, above all, the need to address gender-based discrimination.¹¹⁸

This General Comment would seem to take a nuanced approach to addressing a very contentious cultural practice in the region. It not only highlights the health consequences of child marriage to the girl child, but also proffers solutions to African governments to address this. Indeed, the General Comment is a comprehensive diagnosis of

114 As above.

115 UN Human Rights Committee (HRC) General Comment 36, art 6 (Right to Life), 3 September 2019, CCPR/C/GC/35.

116 Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage adopted by the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child 2017.

117 As above.

118 As above.

the root causes of child marriage, its attendant consequences, and pragmatic recommendations to African governments. It is a positive response to the suffocating effects of harmful cultural practices on the enjoyment of women's rights. Tamale has denounced the role culture and morality play in perpetuating the low status of women and the attendant consequences for their health and well-being in Africa.¹¹⁹ She reasons that if women must exercise their sexual agency, then African governments should address structural imbalances that perpetuate poverty and inequality among women.¹²⁰ It is hoped that both the African Commission and the African Children's Committee would engage with African governments during states' reporting processes by inquiring into the implementation status of this General Comment.

3.2.3 Guidelines

An important document adopted by the African Commission in 2010 is the Principles and Guidelines on the Implementation of the Economic, Social and Cultural Rights in the African Charter.¹²¹ This is often referred to as the Nairobi Principles, given that it was adopted in Nairobi, Kenya. The document provides a detailed clarification of the socio-economic rights guaranteed in the African Charter. It echoes the ESCR Committee's explanation in its General Comment 14 on the right to health in ICESCR. These include the fact that states are to ensure available, accessible, acceptable and quality healthcare services.¹²² Furthermore, the Principles affirmed the interdependence and interrelatedness of the right to health with other rights such as the right to life, dignity, non-discrimination and privacy as recognised by the ESCR Committee in its General Comment 14.¹²³ The Commission explains that the right to health is an inclusive right encompassing both the right to health care and social determinants of health.¹²⁴ It identifies the social determinants of health to include access to water, sanitation, adequate food and nutrition, housing and healthy occupational and environmental conditions. The Nairobi Principles further note that the right to health implies refraining from unwarranted interference with one's body, including freedom

119 S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150.

120 S Tamale 'Gender trauma in Africa: Enhancing women's links to resources' (2004) 48 *Journal of African Law* 50.

121 The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights adopted by the African Commission on Human and Peoples' Rights in November 2010 during its 48th ordinary session.

122 As above.

123 As above.

124 Principles and Guidelines (n 121) para 45.

from non-consensual medical treatment, experimentation, forced sterilisation and inhuman and degrading treatment.¹²⁵ According to the Principles, states must recognise the minimum core of the right to health, including access to healthcare services on a non-discriminatory basis; the provision of essential medicines; universal access to immunisation; and measures to prevent and treat epidemic and endemic diseases. The document further enjoins states to link poverty-reduction policies and programmes to the enjoyment of the right to health.

In 2017 the African Commission adopted a very progressive document to combat sexual violence and its consequences in Africa. The Guidelines to Combat Sexual Violence and its Consequences in Africa remains one of the important documents by the African Commission on this issue.¹²⁶ Drawing on existing international norms and standards on sexual violence, the Commission adopts a broad and progressive definition of sexual violence. The document further provides comprehensive examples of sexual violence to include rape, including marital rape; sexual harassment; female genital mutilation/cutting; virginity testing; child marriage; forced pregnancy; forced abortion; nudity; and forced sterilisation. This is a progressive approach by the Commission, which complements the provisions of the African Women's Protocol on violence against women. The progressive approach of the Guidelines would seem to have taken into consideration the lived experiences of African women with regard to all forms of sexual violence they encounter daily. The Commission would seem to have broken the silence by highlighting some acts of sexual violence hitherto disregarded as serious violations of women's rights. In many African countries sexual harassment and marital rape are indulged and are not adequately addressed under the law. For instance, when Nigeria enacted its Violence against Persons Prohibition (VAPP) Act of 2015, it ominously excluded the criminalisation of marital rape, which has continued to threaten the lives and health of many women in the country.¹²⁷ Equally, the Guidelines highlight the danger and consequences of sexual violence among women and girls. These include sexually-transmitted

125 Principles and Guidelines (n 121) para 65.

126 The Guidelines to Combat Sexual Violence and its Consequences in Africa were adopted during the 60th ordinary session of the African Commission on Human and Peoples' Rights, 8-22 May 2017, Niamey, Niger.

127 For a comprehensive discussion of the VAPP Act, see C Onyemelukwe 'Legislating on violence against women: A critical analysis of Nigeria's Recent Violence Against Persons (Prohibition) Act, 2015' (2016) 5 *DePaul Journal of Women, Gender and the Law*, <https://via.library.depaul.edu/jwgl/vol5/iss2/3> (accessed 26 October 2021). See also N Chibueze et al 'Violence Against Prohibition Act, the Maputo Protocol and women's rights in Nigeria (2018) 39 *Statute Law Review* 337.

infection, mental, socio-economic, physical and psychological distress and threats to life. While the African Commission notes that women and girls are more likely to be affected by sexual violence, it nonetheless observes that men and boys are sometimes affected by this menace.¹²⁸

The Guidelines will no doubt go a long way in reorienting states and policy makers on how to address sexual violence and all its ramifications. The document contains concrete measures that states should adopt to prevent this type of violence and to support women who have experienced sexual violence. Perhaps one of the weaknesses of the document is that it focuses rather on the consequences more than the prevention of sexual violence. While this is understandable as sexual violence can lead to deleterious consequences for women and girls, taking measures through legislative and other measures to prevent incidents of sexual violence will not only save money but will further ensure the safety and well-being of women and girls in the region.

3.3 Jurisprudence on the right to health

Over the years the African Commission has handed down important jurisprudence useful in guiding our understanding of the right to health. Some of these cases are directly related to the right to health, while others relate indirectly to this right. In the *Purohit* case the African Commission affirmed that the right to health goes beyond physical access to healthcare services but also includes access to goods and services in relation to health.¹²⁹ More importantly, the Commission made a salient connection between discrimination and the enjoyment of the right to health. The Commission found that the ill-treatment of persons with mental disabilities in an institution was a violation of their rights to health, non-discrimination and dignity guaranteed in the Charter.¹³⁰ It made a very strong statement condemning the poor treatment of persons with mental health challenges. The Commission's reasoning in this case clearly resonates with that of activists for mental health. It broke the silence with regard to stigma and discrimination facing persons with mental illness in the region. This progressive decision came years ahead of the adoption of CRPD. It was one of those decisions by a regional human rights body to affirm the right to dignity of persons with mental ill-health. Thus, the Commission was able to make an important

128 Guidelines to Combat Sexual Violence and its Consequences (n 126).

129 *Purohit* (n 46).

130 As above.

contribution by affirming mental health as part of human rights, in general, and the right to health, in particular. More recently, the UN Special Rapporteur on the Right to Health would seem to have echoed the position of the African Commission in *Purohit* by noting that states should pay attention to mental health as a human rights imperative.¹³¹

In *Free Legal Assistance Group & Others v Zaire* the African Commission made an important connection between the social determinants of health and the right to health.¹³² It noted that a failure by the state to provide basic services such as potable water, electricity and essential medicines constituted a violation of the right to health in article 16 of the African Charter. This decision is crucial for the realisation of the right to health in the African context. It is a known fact that poverty is rife in many African countries, often exacerbated by poor social service delivery. This makes it difficult for vulnerable and marginalised groups to live a dignified life and enjoy their right to health. In his seminal work Farmer explores the notion of structural violence against the poor.¹³³ By this, he means that structural deprivations in many societies lead to poverty and inequality, which in turn exacerbate ill-health.¹³⁴ He argues that promoting the socio-economic rights of the poor is the pathway to upholding their dignity and realising their right to health.¹³⁵ While most governments and international agencies are concerned with cost-effectiveness of addressing health crises in poor communities, Farmer shows that little things, such as providing stipends to patients, ensuring access to nutritious food and transport to attend clinics, are far more effective in preventing ill-health and increasing patients' recovery.¹³⁶ It would seem that this argument resonates with the capabilities approach that has been championed by Noble laureate Sen and, more lately, Nussbaum.¹³⁷ Farmer's analysis speaks directly to the situation in Africa where a significant number of people live in poverty. This implies that for African governments to advance the right to health in the region, they must address inequality and poverty among the people.

131 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health focusing on core challenges and opportunities for advancing the realisation of the right to mental health of everyone (A/HRC/35/21).

132 (2000) AHRLR 74 (ACHPR 1995).

133 P Farmer *Pathologies of power: Health, human rights and the new war on the poor* (1999).

134 As above.

135 As above.

136 As above.

137 For a detailed discussion, see M Nussbaum 'Capabilities and human rights' (1997) 66 *Florida International Law Review* 273.

This decision in *Free Legal Assistance*, therefore, is a wake-up call to African governments to take concrete measures in addressing social determinants of health with a view to mitigating the impact of poverty among the people and ultimately advancing their right to health. This position has been echoed in the *Sudan* case, where the African Commission linked the 'destruction of homes, livestock, farms as well as poisoning of water' of a group of people to the violation of the right to health.¹³⁸ It has been noted that in order for states to address inequality and inequity in access to healthcare services, efforts must be geared towards improving the social determinants of health among vulnerable and marginalised groups.¹³⁹

In the *SERAC* case the African Commission affirmed the duty of the state to protect in the context of the right to health.¹⁴⁰ According to the Commission, a violation of the right to health will occur if a state fails to regulate the activities of a third party, which may interfere with the enjoyment of the right to health of the people. In this case the Commission held that the failure by the Nigerian government to prevent the pollution of water and land of the Ogoni people was in violation of various rights in the African Charter, including the rights to health, life, non-discrimination, housing and food. The *SERAC* case is a leading case in our understanding of the duty of states to protect in the context of socio-economic rights, in general, and the right to health, in particular. Moreover, it is an important case affirming the indivisibility and interrelatedness of rights. A similar decision was reached in the *Pen International* case where the Commission found that the denial of healthcare services to a prisoner was in violation of the right to life.¹⁴¹ It would be recalled that at the Vienna Programme of Action the international community affirmed that all human rights are interrelated, indivisible and interdependent.¹⁴² Similarly, the ESCR Committee in General Comment 14 has noted that the enjoyment of the right to health will dependent on other rights such as the right to life, dignity, equality and non-discrimination, liberty and privacy.¹⁴³ Yamin has argued that in order for a state to guarantee the right to health of its people, it must ensure access to life-saving medications for all.¹⁴⁴

138 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009).

139 See, eg, World Health Organisation Commission on the Social Determinants of Health *Closing the gap in a generation: Health equity through action on the social determinants of health* (2008).

140 *SERAC* (n 46).

141 *International Pen* (n 46).

142 Vienna Declaration and Programme of Action UN General Assembly Doc A/CONF.157/23.

143 General Comment 14 (n 3) para 12.

144 AE Yamin 'Not just a tragedy: Access to medications as a right under international law' (2003) 21 *Boston University International Law Journal* 325.

4 Some challenges to the realisation of the right to health in Africa

While the above discussion has shown the significant strides the African human rights system has made in shaping the understanding of the right to health, several factors in the region hamper the effective realisation of this right. First, the slow ratification of some instruments, including the African Women's Protocol, the African Youth Charter and the Protocol on the Rights of Older Persons is a major concern.¹⁴⁵ It is to be regretted that since its adoption in 2016, the Protocol on the Rights of Older Persons has yet to enter into force. This clearly shows the lackadaisical attitudes of African governments towards addressing the human rights of vulnerable groups.

Second, the effective implementation of the norms and standards developed by the relevant regional human rights bodies at the national level remains a source of concern. It should be noted that despite the progressive provision on abortion in the African Women's Protocol, most African countries still maintain a restrictive abortion law regime. This situation has continued to pose threats to the lives and health of African women and has almost rendered illusory article 14(2)(c) of the African Women's Protocol.

Third, of recent the independence of some regional bodies, such as the African Commission, has been threatened by interference by the Executive Council of the AU.¹⁴⁶ Given its quasi-judicial role, any attempt to interfere in the work of the Commission could undermine human rights in the region. This onslaught on the Commission is a cause for concern, which requires the solidarity of all well-meaning persons interested in advancing human rights, in general, and the right to health, in particular. This portends ominous signs for the promotion and protection of human rights in the region.

Fourth, African governments continue to lag behind in their reporting obligations to the African Commission, especially with regard to the African Charter and the African Women's Protocol. The state reporting process is a means of assessing how states have performed in implementing the provisions of a treaty. A failure to

145 Eg, as of March 2020, 42 countries have ratified the African Women's Protocol. See Centre for Human Rights 'State reporting process under the African Commission', <https://www.maputoprotocol.up.ac.za/index.php/state-reporting> (accessed 25 October 2021).

146 See Executive Council decision EX.CL/Dec.1015(XXIII) adopted at the AU Summit, Nouakchott, Mauritania, 25 June-2 July 2018.

report will make it impossible for a treaty-monitoring body to assess whether a state is living up to its obligations under a treaty. It will make it difficult for the African Commission to monitor progress made by states to realise the right to health guaranteed in the African Charter and the Women's Protocol. Therefore, the reporting process is crucial to the implementation of rights in a treaty at the national level. Currently, while some states are doing well with their reporting obligations, some are falling behind. With regard to the African Charter, so far only two countries are up to date with their reports, while others are in arrears with between one and 15 reports, and seven other countries have never submitted any reports to the Commission since ratifying the African Charter.¹⁴⁷ As for the African Women's Protocol, only nine countries have so far submitted reports to the Commission on the implementation of this instrument.¹⁴⁸ This leaves much to be desired with regard to African governments' commitments to realising women's rights to health in the region.

Fifth, there are many multidisciplinary and multifaceted non-judicial challenges to the realisation of the right to health, of which a discussion is beyond the scope of this article. However, suffice to note the disturbing high level of poverty in the region, which has been exacerbated by the COVID-19 pandemic and is a threat to realising the right to health.¹⁴⁹ As illustrated above, the enjoyment of the right to health will not be possible unless the underlying determinants of health, such as access to housing, food, water, and sanitation, are assured to everyone. Many African countries are lagging behind in ensuring that their citizens lead a dignified life. While progress has been made worldwide in reducing the rate of poverty, a significant number of people in Africa still live in abject poverty.¹⁵⁰ Poverty can aggravate ill-health and, at the same time, ill-health can lead to poverty. Thus, African governments will need to redouble their efforts in combating poverty in line with their commitments under the Sustainable Development Goals and Agenda 2063.¹⁵¹

147 See African Commission on Human and Peoples' Rights 'State reports and Concluding Observations', <https://www.achpr.org/states> (accessed 25 October 2021).

148 African Union 'Maputo Protocol scorecard and index introduced to monitor implementation of Women's Rights', <https://au.int/en/pressreleases/20200623/maputo-protocol-scorecard-and-index-introduced-monitor-implementation-womens> (accessed 25 October 2021).

149 See, eg, R Nanima & E Durojaye *The socio-economic rights impact of COVID-19 in selected informal settlements in Cape Town* (2020).

150 World Bank 'Africa pulse: An analysis of issues shaping Africa's economic future', http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol7.pdf (accessed 26 October 2021).

151 See E Durojaye & G Mirugi-Mukundi (eds) *Exploring the link between poverty and human rights in Africa* (2020).

5 Conclusion

This article examined the contributions of the African human rights system to the understanding of the right to health. It explored the normative framework on the right to health and discussed some unique features of the African human rights system for the realisation of this right. In this regard, the article argued that while the normative framework for the realisation of the right to health originated from the UN human rights system, in recent times the African human rights system has made significant contributions to the understanding of this right. This is evident in the provisions of some human rights instruments relating to the right to health in the region. These include the provisions of the African Women's Protocol, the African Youth Charter and the Protocol to the African Charter on the Rights of Older Persons. As indicated earlier, the African Women's Protocol contains a number of bold and radical provisions on the right to health, including sexual and reproductive health rights of women.¹⁵² It has been argued that some of the provisions in these instruments not only go beyond what is contained in the UN treaties but have also broadened the understanding of this right in a way that has responded to the peculiar challenges in the realisation of the right to health in Africa. Indeed, other regions can learn from these developments in Africa.

Moreover, while the interpretation and clarification provided by the African Commission to the right to health would seem to align with the position of the UN treaty bodies, the Commission has gone a step further by articulating the nuances regarding the enjoyment of this right for African people. Thus, the Commission has interpreted that the enjoyment of this right will only be meaningful if the social determinants of health are accorded important priority in the region. The Commission has reasoned that a lack of access to electricity, adequate housing and essential medicines would undermine the enjoyment of the right to health. This important conceptualisation of the right to health is in response to the lived experiences of many people in Africa, where millions of people struggle to make a living.

The broad framing of the right to health in specific African human rights instruments and the progressive interpretation provided by the African Commission are a testament to the fact that the African human rights system should be taken seriously for its contribution

¹⁵² Eg, the provision of arts 14(1)(d) and (e) protecting women from sexually-transmitted infections, including HIV/AIDS, and 14(2)(c) allowing for abortion on limited grounds.

to the understanding of the right to health. More importantly, it is a clear indication that the UN human rights system and other regions can learn from this unique African experience. While it is important to acknowledge the contributions made by the African human rights system to the understanding of the right to health, it is imperative that some of the challenges identified as militating against the effective implementation of this right at the national level are addressed.

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The impact of COVID-19 on the socio-economic rights of older persons in Africa: The urgency of operationalising the Protocol on the Rights of Older Persons

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Summary: *Since the outbreak of the COVID-19 pandemic across the world, it has been reported that older persons have suffered acute hardship and fatalities more than any other age group. According to the World Health Organisation the fatality rate among older persons is five times the global average, and the United Nations has predicted that the mortality rate could climb even higher. The situation is aggravated on the African continent as a result of a shortage of medical personnel and other resources, as well as inadequate palliative measures to address the issues around the pandemic. Despite the provisions in the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights of Older Persons in Africa which seek to provide some safety nets, many of these senior citizens continue to suffer untold socio-economic hardship. Adopting an analytical and doctrinal methodology,*

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this article examines the Protocol, the International Covenant on Economic, Social and Cultural Rights and several United Nations policy documents aimed at realising the socio-economic rights of older persons. The article finds that there is a lack of political commitment to operationalise the provisions of the Protocol, as evinced by the limited number of countries that have ratified it since its adoption in 2016. It comparatively engages with the provisions of the Inter-American Convention on the Rights of Older Persons to argue that, beyond the normative framing of these rights in Africa, there is a need for deliberate and genuine commitment by governments in Africa, if the rights are to be realised. The article advocates international, regional and national cooperation and calls for a more liberal judicial approach, to ensure that the Protocol's 'paperisation' of the rights of older persons does not lead or continue to lead to their pauperisation.

Key words: *Africa; COVID-19; economic and social rights; impact; older persons; pandemic*

1 Introduction

Older persons, just as every other person, are entitled to socio-economic rights or economic and social rights. However, the COVID-19 pandemic has gravely impacted on the realisation of these rights, because 'while COVID-19 primarily is a public health challenge, the crisis also has economic and social dimensions'.¹ The pandemic has revealed a pathetic situation among older persons, as it has spotlighted the failure of present laws and policies to address the economic and social rights needs of this category of persons. Since the outbreak of the pandemic, it has been reported that older persons have suffered acute hardship and fatalities more than any other age group. According to the World Health Organisation (WHO) the fatality rate among older persons is five times the global average,² and the United Nations (UN) has predicted that the mortality rate could climb even higher.³

1 MJ Nkhata & AW Mwenifumbo 'Livelihoods and legal struggles amidst a pandemic: The human rights implications of the measures adopted to prevent, contain and manage COVID-19 in Malawi' (2020) 20 *African Human Rights Law Journal* 517.

2 WHO 'COVID-19 strategy update – 14 April 2020', <https://www.who.int/publications-detail/covid-19-strategy-update---14-april-2020> (accessed 4 June 2021).

3 UN 'Policy Brief: The impact of COVID-19 on older persons', [un_policy_brief_on_covid-19_and_older_persons_1_may_2020.pdf](#) (accessed 4 June 2021).

Although older persons have over the years been subjected to abuse and deprivation of human rights,⁴ the pandemic has exacerbated the deplorable state in which they have found themselves. The WHO has stated that 'COVID-19 is changing older people's daily routines' with adverse job, health and family implications.⁵

Whereas it was once stated that 'Africa is a youthful continent, as more than half of the population is 19 years of age or younger',⁶ the African continent has now been projected to have the fastest increase in the population of older persons, with a projection that it would 'reach 215 million persons aged 60 or older by 2050, an almost fourfold increase from current figures, doubling its proportion from 5 per cent of the total population in 2010 to 11 per cent in 2050'.⁷

Although a long life ordinarily should be everybody's desire, 'for older people in developing countries today, longevity can be a double-edged sword ... For those who are poor, ageing often means new burdens and worries about making ends meet.'⁸ To echo the famous statement by a former Secretary-General of the UN, Kofi Annan:⁹

We are in the midst of a silent revolution. It is a revolution that extends well beyond demographics, with major economic, social, cultural, psychological and spiritual implications. And it is a revolution that hits developing nations harder than others and not just because the majority of older persons live in developing countries, but because the tempo of ageing there is already – and will continue to be – far more rapid.

Traditionally in Africa, it is taken for granted that one's children would take care of one's material needs at old age. Thus, in one of its reports to the African Commission Kenya stated that it perceived no central issue around the rights of older persons, because 'under traditional African systems children are to take care of their aged parents'.¹⁰ For this reason, perhaps, the debate around the rights of

4 HelpAge International 'State of the world's older people' (2002) SoTWoPeng. PDF (iugm.qc.ca) (accessed 4 June 2021).

5 WHO (n 2).

6 UN Department of Economic and Social Affairs 'Regional dimensions of the ageing situation' (2008) 24, <http://globalag.igc.org/agingwatch/desa/aging/mipaa/regionaldimensions.pdf> (accessed 4 June 2021).

7 C Mahler 'The Independent Expert on the Enjoyment of all Human Rights by Older Persons' Office of the High Commissioner, The United Nations Human Rights, <https://www.ohchr.org/en/issues/olderpersons/ie/pages/ieolderpersons.aspx> (accessed 3 June 2021).

8 HelpAge International (n 4).

9 UN "'Silent revolution' of world ageing has economic, spiritual implications, says secretary-general in message on international day of older persons", <https://www.un.org/press/en/1998/19980930.sgsm6727.html> (accessed 4 June 2021).

10 Report on the African Charter on Human and Peoples' Rights, June 2006 para 164.

older persons has not attracted the deserved traction or, as Kollapan puts it, it does not have the 'sufficient currency in the context of the African human rights system'.¹¹

However, it is arguable that the traditional African context of care has been eroded partly by urbanisation and globalisation and partly by the overwhelming personal needs of the children of the older persons.¹² The UN has noted that 'the well-being of older persons in Africa is affected by a range of regional trends and factors, characterised by changing family dynamics, a growing inadequacy of traditional family support, poverty and material deprivation, ill health and marginalisation'.¹³ Similarly, Aboderin et al argue that there is a growing debate on ageing in sub-Saharan Africa as a result of 'long-standing concerns about impacts of rapid sociocultural and economic change on customary family care systems, which – in the absence of comprehensive formal services – provide the bulk of long-term care across most of SSA'.¹⁴

In the current pandemic situation, for example, several children who hitherto were responsible for the material needs of their older parents may have lost their means of income, making it difficult for them to cater for themselves, and their dependent parents. It has thus become pertinent for governments in Africa to operationalise relevant legal and policy frameworks that are protective of older persons, to ensure a real-world realisation of their economic and social rights.

African governments adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Older Persons Protocol) on 30 January 2016.¹⁵ The Protocol 'represents the highest political commitment from African leaders

- 11 J Kollapan 'The rights of older people – African Perspectives' (2008) 3, <http://globalag.igc.org/elderrights/world/2008/africa.pdf> (accessed 4 June 2021); African Commission 'Guidelines for National Periodic Report' reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 199.
- 12 TBE Omorogiuwa 'COVID-19 and older adults in Africa: Social workers' utilisation of mass media in enforcing policy change' (2020) 63 *International Social Work* 647.
- 13 UN Department of Economic and Social Affairs (n 6) 25.
- 14 I Aboderin et al 'Human rights and residential care for older adults in sub-Saharan Africa: Case study of Kenya' in H Meenan, N Rees & I Doron (eds) *Towards human rights in residential care for older persons: International perspectives* (2016) 14. Also see I Aboderin & JR Beard 'Older people's health in sub-Saharan Africa' (2014) *Lancet online* 6.
- 15 AU 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons', <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons> (accessed 13 November 2021).

in promoting and protecting the rights of older people'.¹⁶ Despite the Protocol and the African Charter on Human and Peoples' Rights (African Charter) which seek to provide some safety nets, many of these senior citizens continue to suffer untold socio-economic hardship.

Using a literature-based method, this article assesses the impact of COVID-19 on older persons' economic and social rights and examines the provisions of the Older Persons' Protocol and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as it relates to older persons in Africa. The article finds that there is a lack of political commitment to operationalise the provisions of the Protocol, as evinced by the limited number of countries that have ratified it since its adoption in 2016. Only two countries, Lesotho and Benin, have ratified the Older Persons Protocol.¹⁷ The Protocol requires ratifications by 15 countries to enter into force.¹⁸ Owing to the non-operationalisation of the Protocol in many African countries, there is a near absence of state reporting on the Protocol during national periodic reports of the African Commission on Human and Peoples' Rights (African Commission) as well as scarce domestic legislation on the subject matter across the African continent.

The article is organised in five parts. While this part introduces the work, part 2 examines the international and regional legal and policy frameworks on the economic and social rights of older persons in Africa while drawing comparative inspirations from the Inter-American Convention on Protecting the Human Rights of Older Persons (Inter-American Convention). In part 3 the article examines the impact of COVID-19 on older persons' economic and social rights. By way of conclusion and recommendations, the article argues in part 4 that, beyond the normative framing of economic and social rights and, indeed, any right of older persons in Africa, there is a need for deliberate and genuine political commitments by governments in Africa, if the rights are to be realised. The article thus advocates a coordinated national, regional and international cooperation and calls for a liberal judicial approach, to ensure that the Older Persons Protocol's 'paperisation' of the rights of older persons does not lead or continue to lead to their pauperisation.

16 J Mwanjisi 'Revising perceptions of the rights of older people in Africa' (2016) *Open Democracy*.

17 AU 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons', <https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%E2%80%99%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20OLDER%20PERSONS.pdf> (accessed 13 November 2021).

18 Art 26 Older Persons Protocol.

2 Legal frameworks on the economic and social rights of older persons

This part presents frameworks that underpin the economic and social rights of older persons in Africa. The part reveals evidence of normative support for economic and social rights, drawing on the UN and African human rights instruments. It asserts that, while there currently is no one-stop shop or single treaty or convention that is specifically devoted to addressing the rights of older persons, these rights can be found and justified in the general human rights instruments within the UN and African human rights systems.

2.1 International legal framework

At the UN level, there is currently no human rights treaty that specifically addresses the concerns of older persons.¹⁹ Hence, there is a growing call for an international convention in this regard.²⁰ However, the absence of a specific international treaty does not mean that older persons 'are entirely without legal protections under international law'.²¹ Certain UN human rights instruments and declarations, such as ICESCR, the UN Vienna International Plan of Action on Ageing of 1982, the UN Principles for Older Persons of 1991, the UN Proclamation on ageing of 1992, and the Madrid International Plan of Action on Ageing of 2002 are analysed below, as providing a good foundation to push for the rights of older persons.

It bears mentioning that 'human rights do not expire as one ages'.²² Thus, just as every other human being, older persons should be beneficiaries of the existing general economic and social rights instruments. The flagship hard law that valorises the economic and social rights of everyone is ICESCR. As of November 2021, 171 countries, including all African states – except Botswana, Mozambique and South Sudan – have either acceded to or ratified ICESCR.²³

19 D Rodríguez-Pinzón 'The international human rights status of elderly persons' (2003) 18 *American University International Law Review* 915-917.

20 I Doron & I Apter 'The debate around the need for an international convention on the rights of older persons' (2010) 50 *The Gerontologist* 586-593; I Doron & I Apter 'International rights of older persons: What difference would a new convention make to the lives of older people' (2010) 11 *Marq Elder's Advisor* 367.

21 AS Kanter 'The United Nations Convention on the Rights of Persons with Disabilities and its implications for the rights of elderly people under international law' (2009) 25 *Georgia State University Law Review* 530.

22 N Todorović 'Wakeup call: Prevention and response to the violence, abuse and neglect' 3, https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2021/02/Natasa-Todorovic_paper-.pdf (accessed 13 November 2021).

23 UN International Covenant on Economic, Social and Cultural Rights, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3>.

While ICESCR is not specifically tailored to address the rights of older persons, the treaty contains several economic and social rights that are pro-older persons. It has been rightly observed that 'in view of the fact that the Covenant's provisions apply fully to all members of society, it is clear that older persons are entitled to enjoy the full range of rights recognised in the Covenant [ICESCR]'.²⁴ A non-exhaustive list of older persons' economic and social rights protected under ICESCR and other human rights instruments is discussed below.

2.1.1 Right to equality and non-discrimination

According to article 3 of ICESCR state parties undertake to 'ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights'. The Committee on Economic, Social and Cultural Rights (ESCR Committee) in its General Comment 6 states that 'states parties should pay particular attention to older women who, because they have spent ... their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow's pension, are often in critical situations'.²⁵ Although these provisions may not accommodate older men, it at least opens up some talking points around the economic and social rights of older persons. Even at that, article 2(2) of ICESCR sufficiently addresses the concerns of both older men and women when it obligates state parties to guarantee that economic and social rights will be 'exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Again, it is clear that there is no specific mention of older persons as a protected group in the foregoing provisions. However, it has been revealed that the omission of 'older persons' in the categorisation was not intentional but due to the fact that when ICESCR was adopted in 1966, 'the problem of demographic ageing was not as evident or as pressing as it is now'.²⁶ Be that as it may, the closing phrase, 'other status' in article 2(2) above has been interpreted to include older persons. According to the ESCR Committee, 'the prohibition of discrimination on the grounds of "other status" could be interpreted

en.pdf (accessed 8 June 2021).

24 I Doron & K Mewhinney *The rights of older persons: Collection of international documents* (2007) 69.

25 ESCR Committee General Comment 6: The economic, social and cultural rights of older persons' (1995) para 5.

26 General Comment 6, para 3(11).

as applying to age'.²⁷ In addition, in General Comment 20 the ESCR Committee states that '[t]he inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category',²⁸ and that '[a]ge is a prohibited ground of discrimination in several contexts'.²⁹ Thus, the ESCR Committee calls on states to eliminate both formal and substantive discrimination.³⁰

Other human rights instruments make provision for the protection of the rights of older persons against discrimination. Perhaps the most essential of these instruments is the Convention on the Rights of Persons with Disabilities (CRPD). Article 3 of CRPD clearly states that its principles include non-discrimination, full and effective participation and inclusion in society, and equality of opportunity. In fact, article 5 of CRPD protects rights to equality and non-discrimination. One interesting aspect of CRPD is that it does not define 'disability'.

The absence of a definition therefore provides an opportunity to stretch the meaning of 'disability' beyond the orthodox medical approach to a rights-based approach, capable of accommodating older persons.³¹ After all, the UN has conceded that

[t]he term 'disability' summarises a great number of different functional limitations occurring in any population ... People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.³²

It therefore is arguable that old age introduces a peculiar disability in and of itself.

By way of soft laws, the Vienna International Plan of Action on Ageing (Vienna Plan) states that '[a]n important objective of socio-economic development is an age-integrated society, in which age discrimination and involuntary segregation are eliminated and in which solidarity and mutual support among generations are encouraged'.³³ In addition, the UN Principles for Older Persons (UN

27 General Comment 6 para 3(12).

28 ESCR Committee General Comment 20: Non-discrimination in economic, social and cultural rights (art 2, para 2 of the International Covenant on Economic, Social and Cultural Rights) 2 July 2009, E/C 12/GC/20 para 15, <https://www.refworld.org/docid/4a60961f2.html> (accessed 8 June 2021).

29 General Comment 20 (n 28) para 29.

30 General Comment 20 para 8.

31 Kanter (n 21).

32 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, annexed to General Assembly Resolution 48/96 of 20 December 1993 (Introduction para 17).

33 Vienna Plan para 25(h).

Principles) require states to treat older persons fairly regardless of age.³⁴ The Madrid International Plan of Action on Ageing 2002 (Madrid Plan) also mandates states to 'ensure the full enjoyment of all human rights and fundamental freedoms by ... combating all forms of discrimination'.³⁵ As discussed below, in several countries this right has been violated in the context of the pandemic.

2.1.2 *Right to work*

The right to work accrues to everyone, young or old. Article 6 of ICESCR provides that state parties recognise 'the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'.³⁶ Similarly, article 7 provides for 'the right of everyone to the enjoyment of just and favourable conditions of work', which include fair wages, equal remuneration for equal work as well as safe and health working conditions, equal promotion opportunities subject to seniority and competence as well as rest or leisure or holiday with pay.³⁷ It is arguable that even in times without crisis, older persons who are not of retirement age usually become targets of retrenchment or job losses. This has caused the International Labour Organisation (ILO) to emphasise the need to protect older persons against job or occupational discrimination based on age.³⁸

The UN soft law contains several provisions that recognise this right. For example, the Madrid Plan mandates states to ensure laws and policies that 'enable older persons to continue working as long as they want to work and are able to do so', as well as 'promote equal access for older persons to employment and income-generation opportunities, credit, markets and assets'.³⁹ Principles 2 and 3 of the UN Principles state that older persons should have the opportunity to work or to have access to other income-generating opportunities and that they should be able to participate in determining when and at what pace withdrawal from the labour force takes place.⁴⁰ Also, the Vienna Plan provides that 'governments should facilitate the

34 United Nations Principles for Older Persons Adopted by General Assembly Resolution 46/91 of 16 December 1991 Principle 18, <https://www.ohchr.org/Documents/ProfessionalInterest/olderpersons.pdf> (accessed 10 June 2021).

35 See paras 21, 28-32 of Madrid International Plan of Action on Ageing 2002, <https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf> (accessed 26 June 2021).

36 Also see art 27 of CRPD.

37 Art 7 ICESCR.

38 See ILO Recommendation 163 (1980) concerning Older Workers paras 3-10.

39 Madrid Plan paras 23, 28(b) & 48(c).

40 UN Principles, Principles 2 & 3.

participation of older persons in the economic life of the society’;⁴¹ that measures should be taken to ‘assist older persons to find or return to employment by creating new employment possibilities and facilitating training or retraining’; and that the ‘right of older workers to employment should be based on ability to perform the work rather than chronological age’.⁴² By Recommendation 38 of the Vienna Plan older persons, just as their younger counterparts, should have satisfactory working conditions and environment. As would be discussed below, the current pandemic has threatened older persons’ right to work.

2.1.3 *Right to social security*

This right seems to be one of the most radical rights of older persons, because of elaborate normative underpinning around it. According to article 9 of ICESCR, state parties recognise ‘the right of everyone to social security, including social insurance’.⁴³ Although the article fails to specify the type or level of social safety protection that could be seen as social security or insurance, the ESCR Committee has clarified that ‘the term “social security” implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person’s control’.⁴⁴

Further, the ILO Social Security (Minimum Standards) Convention provides global standards for nine branches of social security which are medical care; sickness benefits; unemployment benefits; old-age benefits; employment injury benefits; family benefits; maternity benefits; invalidity benefits; and survivors’ benefits.⁴⁵ With specific reference to older persons, article 26 of the above Convention and article 15 of the ILO Invalidity, Old-Age and Survivors’ Benefits Convention⁴⁶ urge member states to put national laws and policies in place aimed at older persons’ ‘survival beyond a prescribed age’.

The right to social security applies to both retirement benefits and other benefits for those older persons who do not work in the formal or pensionable sectors. After all, the Madrid Plan recognises that, in developing countries, most older persons who work are engaged in the informal economy, which often deprives them of the benefits of adequate working conditions and social protection provided by

41 Vienna Plan, Recommendation 37.

42 As above.

43 Also see art 28 CRPD.

44 General Comment 6 para 26.

45 ILO Social Security (Minimum Standards) Convention 1952 (102).

46 Invalidity, Old-Age and Survivors’ Benefits Convention 1967 (128).

the formal sector economy.⁴⁷ Indeed, as the ESCR Committee states, article 9 of ICESCR requires states to 'provide non-contributory old-age benefits and other assistance for all older persons, who ... are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income'.⁴⁸ It is argued that the survival of older persons, rather than their employment entitlement, should be the major factor in determining how states' older persons' intervention should be formulated and implemented.

Specific pro-older persons soft laws have also provided for this right. For example, the Vienna Plan requires states 'to propose and stimulate action-oriented policies and programmes aimed at guaranteeing social and economic security for the elderly'.⁴⁹ Further, the Madrid Plan urges states to develop and implement policies that ensure that older persons have adequate economic and social protection.⁵⁰

However, this right has not found the deserved expression in most developing countries. Older persons are not spared of the endemic poverty and systemic failures in these countries.⁵¹ For example, a UN report suggests that the incidence of poverty in Zambia affects up to 80 per cent of older persons.⁵² What most developing countries call social security systems have produced no social security for their citizens.⁵³ This has led to a situation where the majority of older persons in Africa have little or no social safety net in their favour.⁵⁴ Apart from few African countries, such as Botswana and Lesotho which provide automatic social pension for all older persons,⁵⁵ and South Africa which has a near universal pension scheme,⁵⁶ the majority of older persons in African countries such as Nigeria (most of whom work in the informal sector) still rely on family support to survive.⁵⁷ The pandemic has also adversely impacted this family support.

47 Madrid Plan para 24.

48 General Comment 6 para 30.

49 Vienna Plan para 5(c).

50 Madrid Plan para 51(a).

51 JJ. Dhemba 'Dynamics of poverty in old age: The case of older persons in Zimbabwe' (2014) 57 *International Social Work* 717.

52 UN 'Income poverty in old age: An emerging development priority', <https://www.un.org/esa/socdev/ageing/documents/PovertyIssuePaperAgeing.pdf> (accessed 12 November 2021).

53 M Cichon & P Karuma 'Financing social protection' in ILO *Reflections on reform strategies for social protection in English-speaking African countries* (2000).

54 M Ferreira 'Advancing income security in old age in developing countries: Focus on Africa' (2005) 2 *Global Ageing* 22-29.

55 C Bailey 'Extending social security coverage in Africa' Working Paper ESS 20 Geneva: International Labour Office, 2004.

56 Ferreira (n 54).

57 As above.

3 Right to an adequate standard of living

According to article 11 of ICESCR⁵⁸ everyone has a right to an adequate standard of living, 'including adequate food, clothing and housing, and to the continuous improvement of living conditions'.⁵⁹ The article further provides that this right includes freedom from hunger and thus mandates state parties to ensure that the methods of production, conservation and distribution of food are improved upon.⁶⁰ This is one of the broadly-defined rights of older persons as it cuts across quality food, shelter and clothing.

This right has also adequately been provided for under soft law. For example, Principle 1 of the UN Principles clearly provides that '[o]lder persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help'.⁶¹ Principle 6 provides that '[o]lder persons should be able to reside at home for as long as possible'. Similarly, Recommendations 19 of the Vienna Plan provides that housing for the elderly must be viewed as more than mere shelter, because '[i]n addition to the physical, it has psychological and social significance, which should be taken into account'.⁶² The UN thus urges national governments to ensure that '[w]henver possible, the aging should be involved in housing policies and programmes for the elderly population'.⁶³

4 Right to health

Article 12 of ICESCR confers on everyone the right to enjoy 'the highest attainable standard of physical and mental health' and provides that state parties should take all steps necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.⁶⁴ The ESCR Committee recommends that states should take into account recommendations 1 to 17 of the Vienna Plan, 'which focus entirely on providing guidelines on health policy to preserve the health of the elderly and take a comprehensive view, ranging from prevention and rehabilitation to the care of the terminally ill'.⁶⁵ The ESCR Committee further urges states to 'bear in mind that maintaining health into old age requires investments

58 Also see art 28 of CRPD and art 25 of the Universal Declaration.

59 Also see art 28(1) of CRPD.

60 Art 11(2) ICESCR.

61 UN Principles.

62 Vienna Plan Recommendation 19.

63 Vienna Plan Recommendation 24. Also see Recommendations 20-23.

64 Also see art 25 of CRPD and art 25 of the Universal Declaration.

65 General Comment 6 para 34.

during the entire life span, basically through the adoption of healthy lifestyles (food, exercise, elimination of tobacco and alcohol, etc)' and that 'prevention, through regular checks suited to the needs of the elderly, plays a decisive role'.⁶⁶

The UN soft law also recognises this right. The Madrid Plan states that 'older persons are fully entitled to have access to preventive and curative care, including rehabilitation and sexual health care'.⁶⁷ Principle 11 of the UN Principles also provides that older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.⁶⁸ Further, the Vienna Plan provides that '[t]he care of elderly persons should go beyond disease orientation and should involve their total well-being, taking into account the inter-dependence of the physical, mental, social, spiritual and environmental factors'.⁶⁹ It goes further to state that '[h]ealth efforts, in particular primary health care as a strategy, should be directed at enabling the elderly to lead independent lives in their own family and community for as long as possible instead of being excluded and cut off from all activities of society'.⁷⁰ Arguably, in the COVID-19 context, this is one of the most impacted rights in African countries such as Nigeria and Kenya, as discussed below.

In conclusion, this part has unpacked the normative underpinning, within the UN human rights system, on the economic and social rights of older persons. It shows that, despite the absence of a specific UN treaty or convention on older persons' rights, these rights can safely be accommodated and enjoyed under the general economic and social rights instruments, such as ICESCR. The next part briefly considers the African human rights system legal framework on the economic and social rights of older persons.

4.1 Regional framework on the rights of older persons

Although very few African countries, such as Mauritius,⁷¹ South Africa⁷² and Uganda,⁷³ have some modicum of either constitutional or legislative provisions on ageing, in this part we focus only on the provisions of the African Charter and the Older Persons Protocol.

⁶⁶ General Comment 6 para 35.

⁶⁷ Madrid Plan para 58.

⁶⁸ UN Principles Principle 11. Also see Principles 10 & 12-14.

⁶⁹ Vienna Plan Recommendation 2.

⁷⁰ As above. Also see Recommendations 1 & 3-17.

⁷¹ The Protection of Elderly Persons Act 2005.

⁷² The Older Persons' Act 2006.

⁷³ Constitution of the Republic of Uganda, VII.

Against the background that the article focuses on the impact of COVID-19 on the economic and social rights of older persons in Africa, it is pertinent to unveil how the African human rights system has attempted to address and redress the economic and social rights of this category of persons. The understanding of the framework within the African system would help to project the argument that there is an existing normative grounding for the rights of older persons in Africa, but that what is more essential is the full operationalisation of the relevant framework that would lead to a practical realisation of the rights.

4.1.1 African Charter

It has been noted that '[t]he position of older persons under the African Charter ... was relatively stronger, compared to its counterparts in Europe and the Americas'.⁷⁴ This is because 'it bolstered the superior position of older persons ... by recognising ... the duty to preserve ... the cohesion of the family, to respect one's parents at all times and to maintain parents in case of need'.⁷⁵ It was also 'the first human rights instrument in the world to expressly recognise and protect older persons' rights as a distinct category'.⁷⁶ One of the groundbreaking features of the African Charter is that it guarantees both economic and social rights and civil and political rights equally.⁷⁷ That the Charter recognises economic and social rights as justiciable rights was a reaction to the 'dire poverty' on the African continent as well as 'an acknowledgment that accountability through the law was part of the solution'.⁷⁸

Thus, apart from generally providing for the rights to work,⁷⁹ health⁸⁰ and education,⁸¹ the African Charter heralds provisions specifically directed at older persons. For example, article 18(4) states that the 'aged and the disabled shall ... have the right to special measures of protection in keeping with their physical or moral needs'. It is arguable that the economic and social rights needs of older persons come within the meaning of 'physical or moral needs' as stated in these provisions. Moreover, article 2 of the African

74 DM Chirwa & CI Rushwaya 'Guarding the guardians: A critical appraisal of the Protocol to the African Charter on the Rights of Older Persons in Africa' (2019) 19 *Human Rights Law Review* 59.

75 As above. See art 27 African Charter.

76 As above.

77 L Chenwi 'The African system' in J Dugard et al (eds) *Research handbook on economic, social and cultural rights as human rights* (2020) 27 29.

78 F Viljoen *International human rights law in Africa* (2012) 215.

79 Art 15 African Charter.

80 Art 16 African Charter.

81 Art 17 African Charter.

Charter provides that the rights recognised in the Charter should be enjoyed by all without distinction based on protected characteristics, including 'other status' which, it is argued, includes old age.

However, the provisions in the African Charter have been the subject of criticism on several grounds. These criticisms include the fact that it is too patriarchal in nature;⁸² that it does not clearly compartmentalise the rights of women, persons with disabilities and older persons as distinct vulnerable persons or groups;⁸³ and that article 18 specifically takes a narrow outlook on the rights of older persons by restricting it to familial attachment.⁸⁴ Notwithstanding these criticisms, it is arguable that the Charter provisions have opened up an interesting and novel talking point in the human rights protection of older persons across Africa, and it indeed was the normative foundation for the Older Persons Protocol.

4.1.2 Older Persons Protocol

The Protocol has been described as being 'surprisingly short, consisting of about 20 articles articulating normative principles'.⁸⁵ It has also been observed that the Protocol, unlike the Inter-American Convention, gives no express definition of the rights of older persons, but that it creates an obligation on state parties to enforce those undefined rights.⁸⁶ This is a major flaw which should have been spotted and addressed at the drafting stage. However, from the Protocol's framing of the obligations of states, one can easily deduce the corresponding older persons' economic and social rights envisaged under the Protocol. It is in this perspective of duty-right correlation that we have focused on the Protocol.

Article 3 of the Older Persons Protocol mandates states to prohibit any discrimination against older persons, by eliminating cultural stereotypes, marginalisation and stigmatisation through appropriate laws. Similarly, article 4(1) requires states to ensure that older persons have equal treatment and protection. This resonates with our earlier discussion on equality and discrimination. As regards the right to work and just working conditions, the Older Persons Protocol provides that states shall take measures to eliminate 'work place discrimination against older persons with regard to access to

82 M Mutua 'The African human rights system in a comparative perspective: The need for urgent reformulation' (1992) 44 *Nairobi Law Monthly* 27.

83 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Dickinson Law Review* 679 687.

84 Chirwa & Rushwaya (n 74) 60-61.

85 As above.

86 As above.

employment' and shall ensure 'appropriate work opportunities for older persons'.⁸⁷

As far as social security is concerned, states are mandated to 'develop policies and legislation that ensure that older persons who retire from their employment are provided with adequate pensions and other forms of social security'.⁸⁸ They are to ensure that 'universal social protection mechanisms exist to provide income security for those older persons who did not have the opportunity to contribute to any social security provisions'.⁸⁹ Commendably, this provision, at least normatively, has addressed Ferreira's concern about older persons who do not work in the formal sector of the economy and thus are disentitled from pension.⁹⁰ It would ensure that even those who cannot 'contribute to any social security provisions' by way of contributory pensions are taken care of. This provision is an innovation that the African system has introduced, compared to the Inter-American system.⁹¹

The Older Persons Protocol has not expressly provided for the right to an adequate standard of living (food, shelter, clothing and water). Although articles 10 and 11 of the Protocol give a semblance of states' duties regarding the right to an adequate standard of living, by requiring them to incentivise older persons' family members who provide home care for them, give older persons priority treatment in service delivery, and ensure that residential care for older persons are affordable and of a high standard,⁹² an explicit provision for the right would have been a better way. It has been suggested that the Protocol should have been fashioned after the Inter-American Convention which clearly provides for the right to housing.⁹³

The Older Persons Protocol provides for the right to health whereby states guarantee 'the rights of older persons to access health services that meet their specific needs', as well as 'the inclusion of geriatrics and gerontology in the training of health care personnel'.⁹⁴ To ensure that older persons are not denied medical care owing to poverty, the Protocol mandates states to 'take reasonable measures to facilitate access to health services and medical insurance cover for older persons within available resources'.⁹⁵ Although the rights to

87 Art 6 Older Persons Protocol.

88 Art 7(1) Older Persons Protocol.

89 Art 7(2) Older Persons Protocol.

90 Ferrera (n 54).

91 Chirwa & Rushwaya (n 74) 73.

92 Arts 10-11.

93 Chirwa & Rushwaya (n 74) 71.

94 Art 15 Older Persons Protocol.

95 Art 15(2) Older Persons Protocol.

food and water are not specifically provided for apart from reference to these in the Preamble, the failure to provide for these rights does not exempt state parties from their duty to promote and realise these rights, based on the principle of interdependence of rights.⁹⁶ After all, food and water are social determinants of health.

In summary, this part has revealed that the African human rights system is not bereft of provisions that recognise and protect the economic and social rights of older persons. In fact, it has demonstrated that the African human rights system is one of the most innovative systems in the world, as regards older persons' human rights instruments. However, what is lacking is the political will to put the instruments into practice. Having examined the economic and social rights of older persons in the foregoing parts, it is apposite to examine how the COVID-19 pandemic has impacted these rights, which is the aim of the next part.

5 Impact of COVID-19 on the economic and social rights of older persons

In this part we examine the impact of COVID-19 on select economic and social rights, namely, the rights to work, social security, health and non-discrimination. It has rightly been observed that 'many of the measures taken in response to the pandemic give rise to particular consequences for older persons'.⁹⁷ To these consequences we now turn.

5.1 Impact on the right to work and social security

This right is one of the casualties of COVID-19 as many older persons who are (self)employed people have either not been able to earn a living or have had their working conditions changed to their detriment.⁹⁸ It has been observed that the 'lockdown measures ...

⁹⁶ Chenwi (n 77) 37.

⁹⁷ A Byrnes & T Mattsson 'Human rights of older persons' 22-24 February 2021 Virtual Conference) 13-14, <https://asef.org/wp-content/uploads/2021/02/ASEMHRS20-Background-paper.pdf> (accessed 18 July 2021).

⁹⁸ AgeUK 'COVID-19: The impact on the human rights of older people', <https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/equality-and-human-rights/older-people-and-human-rights-during-the-covid-19-pandemic.pdf> (accessed 13 November 2021).

drastically reduced economic activity making it difficult for people to pursue livelihoods'.⁹⁹ In the peak of the pandemic the UN reported:¹⁰⁰

Where social protection systems were weak or absent, millions of people have been left without an income. Unemployment is already skyrocketing in many countries and hours worked in all countries and regions are estimated by the ILO to have fallen dramatically by 10,7 per cent.

Older persons perform crucial roles in their communities and families, including contributing to household incomes and supporting younger generations, for example, providing child care.¹⁰¹

According to the ILO in 2018,¹⁰² that is, before the COVID-19 pandemic, 56 per cent of older men and 33 per cent of older women formed part of the labour force in African and other low-income countries. However, COVID-19 has directly and indirectly impacted these older workers. Directly, some of these persons in the formal sector have lost their means of livelihood. For example, a survey has revealed that in Nigeria 89 per cent of older persons became concerned over a loss in household finances and another 26 per cent stated that they stopped work because of COVID-19, while 86 per cent of Ugandan older persons were concerned about their household income.¹⁰³ The systemic impact of ageism contributes to loss of livelihood for older persons, who are easily compulsorily retired in favour of younger and allegedly more active workers during economic crises.¹⁰⁴

The problem of those in the formal sector becomes more complicated against the backdrop that social protection schemes in

99 Nkhata & Mwenifumbo (n 1) 532-533; N Holcroft-Emmess 'The impact of Covid-19 on workers' rights (with Michael Ford)', <https://ohrh.law.ox.ac.uk/the-impact-of-covid-19-on-workers-rights-with-michael-ford/> (accessed 13 November 2021).

100 UN 'Policy Brief: World of work and COVID-19', https://www.un.org/sites/un2.un.org/files/the_world_of_work_and_covid-19.pdf (accessed 13 November 2021).

101 UNECE 'Older persons in emergency situations' UNECE Policy Brief on Ageing 25 (November 2020), https://unece.org/fileadmin/DAM/pau/age/Policy_briefs/ECE_WG1_36_PB25.pdf (accessed 13 November 2021).

102 ILO 'Women and men in the informal economy: A statistical picture', https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf (accessed 26 June 2021).

103 F Juergens 'Older people's livelihood, income security and access to social protection during COVID-19 and beyond' Paper presented at 'Building forward better for older persons post COVID-19' UN DESA Expert Group Virtual Meeting, 2-5 March 2021.

104 J Raja 'The global economic crisis: Long-term unemployment in the OECD' Institute for the Study of Labour (IZA), <http://ftp.iza.org/dp6057.pdf>; OECD (2020). OECD 'Employment outlook 2020: Worker security and the COVID-19 crisis', <https://doi.org/10.1787/1686c758-en> (accessed 26 June 2021).

Africa are inadequate. It has been reported that only 22 per cent of older persons receive pensions in sub-Saharan Africa.¹⁰⁵ This percentage not only is pathetic but also is 'a clear violation of the human right to income security in older age, condemning many to live their last years in destitution'.¹⁰⁶

The above 2018 ILO report indicates that 78 per cent of the world's older persons work in the informal sector,¹⁰⁷ and the situation of those in this sector is bleak. According to the UN, in the context of the pandemic, '[i]nformal economy workers are particularly vulnerable to lockdown measures. Their earnings in the first month of the crisis are estimated to have declined by 60 per cent globally (around 80 per cent in Africa and Latin America).'¹⁰⁸ As Juergens argues, the 'informal economy tends to provide lower and more volatile incomes and few social protection benefits ... they are also more likely to work in sectors heavily affected by the pandemic ... and are likely to be excluded from crisis-related assistance'.¹⁰⁹ Thus, the lockdowns or closure of non-essential services meant that the livelihoods of cross-border traders, local and migrant daily labourers, domestic workers, self-employed workers, street vendors and waitrons had been disrupted.¹¹⁰

According to a recent survey carried out in Kenya by Advisory Network, the COVID-19 lockdowns adversely impacted the means of livelihood of older persons. One of the older Kenyan respondents in the informal sector stated during the survey that 'as a shoemaker, before COVID-19, I could receive as high as 500 shillings [\$4,5] a day. But now I hardly take home any money. On a good day, I can get 40 shillings [\$0,36] at most.'¹¹¹ In another report conducted by HelpAge International, 41 per cent of older Kenyan males stated that the pandemic increased their risk of being denied opportunities and services.¹¹² Similarly, in a report by World Vision a South Sudanese older woman was reported to have stated that 'COVID-19 is like a death sentence to us vulnerable women who depend on farming to

105 ILO 'Social protection for older persons: Policy trends and statistics 2017-19', https://www.ilo.org/secsoc/information-resources/publications-and-tools/policy-papers/WCMS_645692/lang--en/index.htm (accessed 28 June 2021).

106 Juergens (n 103).

107 ILO (n 102).

108 UN (n 100).

109 Juergens (n 103).

110 G Dafuleya 'Social and emergency assistance ex-ante and during COVID-19 in the SADC region' (2020) 2 *International Journal of Community and Social Development* 254.

111 Chronic Poverty Advisory Network 'Kenya COVID-19 poverty monitor October 2020', <http://www.chronicpovertynetwork.org/covid19-poverty-monitor/kenya-october> (accessed 28 June 2021).

112 <https://www.helpage.org/what-we-do/coronavirus-covid19/covid19-rapid-needs-assessment-rnas/> (accessed 12 November 2021).

feed our children'.¹¹³ This obviously presents a disturbing situation which needs urgent attention, because with 'lockdown and the restrictions on movement of goods and services, families living on a daily income face[d] the threat of starvation, risking a further fall into abject poverty'.¹¹⁴

Indirectly, COVID-19 has impacted the older persons' means of survival by disempowering and impoverishing younger family members on whom they sometimes depend for survival. In a 2021 research survey in Kenya one of the older respondents stated in the COVID-19 context that '[o]ur income went down since some of my sons who support the household financially lost their employment'.¹¹⁵ Thus, although the African culture expects the youth to take care of older persons, the former would perform this traditional obligation only to the extent of their wherewithal. Unemployed or underemployed children obviously may not be able to meet their personal needs, let alone those of their older parents, uncles or aunts.

With the foregoing, it is argued that the situation that the pandemic has introduced is a clear violation of the right to work. As noted in the discussion on legal framework, everyone, including older persons, have a right to work and a right to work under just and favourable conditions. Pandemic or no pandemic, this right should be given its deserved protection. While it is conceded that the pandemic is an emergency situation which requires emergency measures, it is argued that a balance should be struck between such measures and the need to protect human rights. Although there is little or no comprehensive age-based poverty data on COVID-19 yet,¹¹⁶ and the chronic data invisibility of older persons despite the COVID-19 spotlight on these persons,¹¹⁷ there already is evidence that a loss of income from work, family support and social security would cause many older persons among the 119 to 124 million

113 World Vision 'COVID-19 is like a death sentence to women in South Sudan', <https://www.wvi.org/stories/coronavirus-health-crisis/covid-19-deathsentence-women-south-sudan-after-years-conflict-it> (accessed 26 June 2021).

114 JG Akech 'Exacerbated inequalities: Implications of COVID-19 for the socio-economic rights of women and children in South Sudan' (2020) 20 *African Human Rights Law Journal* 600.

115 Chronic Poverty Advisory Network 'Kenya COVID-19 poverty monitor January 2021', <http://www.chronicpoverty.network.org/covid19-poverty-monitor/kenya-january> (accessed 25 June 2021).

116 HelpAge International 'Data gaps and ageing in the COVID-19 pandemic', <https://www.helpage.org/silo/files/data-gaps-and-ageing-in-the-covid19-pandemic.pdf> (accessed 25 June 2021).

117 Office of the High Commissioner for Human Rights 'Older persons remain chronically invisible despite pandemic spotlight, says UN Expert' 1 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26319&LangID=E> (accessed 24 June 2021).

persons estimated to be in COVID-19-triggered extreme poverty.¹¹⁸ No doubt, poverty among older persons 'naturally has a direct impact on their health and on all their life conditions'.¹¹⁹

Although approximately 215 countries and territories have either established or expanded social protection schemes to meet people's needs during COVID-19,¹²⁰ studies have revealed that the outcomes of these schemes were inadequate to address the situation as most of these were make-shift, rather than institutionalised schemes.¹²¹ Particularly, older persons in Africa and Asia have found it difficult to benefit from COVID-19 social protection packages because of public health restrictions, systemic failure or outright neglect.¹²² This is a clear departure from the rights-based approach that the above UN and African human rights legal framework represent. Older persons' work or means of income needs to be protected by the governments in line with the provisions of the human rights instruments. Therefore, Juergens has argued that 'to protect older people from both idiosyncratic and covariate shocks, government should prioritize the expansion of high-quality social pensions',¹²³ in their favour. There is a need to create or adjust social protection schemes and care services that meet people's, especially older people's individual needs, promote their well-being and maintain their autonomy and independence.¹²⁴

5.2 Impact on the right to health

As regards the right to health, the story does not differ. The UN has observed that the COVID-19-triggered social isolation has limited older persons' access to COVID-19 and non-COVID-19 healthcare services, including regular check-ups and diagnostics, thereby

118 C Lakner et al 'Updated estimates of the impact of COVID-19 on global poverty: Looking back at 2020 and the outlook for 2021' (2021) The World Bank, <https://blogs.worldbank.org/opendata/updated-estimates-impact-covid-19-global-poverty-looking-back-2020-and-outlook-2021> (accessed 28 June 2021).

119 I Doron, B Spanier & O Lazar 'The rights of older persons within the African Union' (2016) 10 *Elder Law Review* 1 18.

120 U Gentilini, M Almenfi & P Dale 'Social protection and jobs responses to COVID-19: A real-time review of country measures' December 2020, <http://documents1.worldbank.org/curated/en/467521607723220511/pdf/Social-Protection-and-Jobs-Responses-to-COVID-19-A-Real-Time-Review-of-Country-Measures-December-11-2020.pdf> (accessed 25 June 2021).

121 Oxfam 'Shelter from the storm: The global need for universal social protection in times of COVID-19', <https://www.oxfam.org/en/research/shelter-storm-global-need-universal-social-protection-times-covid-19> (accessed 24 June 2021).

122 HelpAge International 'SPACE social protection for older people during COVID-19 and beyond', <https://socialprotection.org/discover/publications/space-social-protection-older-people-during-covid-19-and-beyond> (accessed 24 June 2021).

123 Juergens (n 103).

124 Office of the High Commissioner (n 117).

exposing them to risks of chronic conditions and disabilities.¹²⁵ For example, HelpAge International conducted a Rapid Needs Assessments of Older People (RNA-OPs) in eight African countries and the report indicates that over 60 per cent of older person respondents in Kenya, Mozambique, Rwanda and South Sudan did not know where to access a test for COVID-19.¹²⁶ Also, 54 per cent of older South Sudanese confirmed that the pandemic has adversely affected their access to health services, while 97 per cent of older Zimbabweans stated that they reduced the quantity and quality of food they ate owing to the pandemic-triggered hardship.¹²⁷

Further, the lockdown or isolation has led to mental health issues owing to depression and a lack of social and familial interactions.¹²⁸ Thus, studies have revealed that social distancing and isolation, which reduced physical and social activities, led to problems of physical and mental health among older persons.¹²⁹ Todorovic reported that '[i]solation and separation from their loved ones and the fear of being unable to meet their needs-related essential supplies created psychological stress' among older persons.¹³⁰

Across the globe, older peoples' health was aggravated owing to the impact of lockdowns and isolation and the associated social, religious and financial disconnections on mental health and spiritual well-being as well as making their access to healthcare services difficult and deprioritised.¹³¹ For example, according to HelpAge International, in South Africa, while younger people were allowed to come out of the national lockdown, older people were required to stay at home.¹³² A report states that, globally, older persons' 'level of satisfaction regarding the relationship with their families and neighbours was reported as around 60 per cent before COVID-19 dropping to 40 per cent after the COVID-19'.¹³³ Linked to the loss of means of livelihood discussed above, the mental health of older

125 Todorović (n 22).

126 HelpAge International 'COVID-19 rapid needs assessments', <https://www.helpage.org/what-we-do/coronavirus-covid19/covid19-rapid-needs-assessment-rnas/> (accessed 13 November 2021).

127 As above.

128 Todorović (n 22).

129 W Sepúlveda-Loyola et al 'Impact of social isolation due to COVID-19 on health in older people: Mental and physical effects and recommendations' (2020) 24 *Journal of Nutrition, Health and Aging* 1-10.

130 Todorović (n 22).

131 T Girard 'Impact study of COVID-19 on older people and caregivers in the South Caucasus' 1, https://www.un.org/development/desa/ageing/wpcontent/uploads/sites/24/2021/02/Trgachevska_Girard_Paper.pdf (accessed 26 June 2021).

132 HelpAge International 'Older people are bearing the brunt of COVID-19', <https://www.helpage.org/what-we-do/bearing-the-brunt/> (accessed 13 November 2021).

133 Mahler (n 7) 2.

persons also deteriorated owing to digital poverty. Their inability to buy digital devices and data to surf the internet, which would have served as a temporary replacement of the COVID-19 social disconnection, further reveals the growing digital divide between these and younger persons. Also, the sexual and reproductive health rights of older women, which have been ignored for so long, were put in a worse situation by the pandemic.¹³⁴

The healthcare facilities in developed nations, let alone developing nations, were overwhelmed by the pandemic to the extent that 'older persons' access to medical treatments and health care was hindered as health systems had to respond to insufficient resources'.¹³⁵ For example, Dr Solanki, a UK-based medical doctor, who visited Kenya and interviewed older persons at the peak of the pandemic, reported that Kenyan older persons did not have access to basic medical care, and that they were also 'isolated, lonely and malnourished'.¹³⁶ Similarly, in Kenya, HelpAge International reported that at the height of the pandemic, '73 per cent of older women and men and older people with disabilities reported not having enough food', while 48 per cent of older Sierra Leoneans reported that they suffered depression as a result of the pandemic.¹³⁷

From a human rights perspective, the above situation that the pandemic has heralded is antithetical to the relevant human rights provisions. Despite the pandemic, older persons remain imbued with inalienable rights to access medical care at subsidised rates, if not totally free, as provided under the UN and African human rights systems. As noted above, the Vienna Plan expressly mandates states to ensure the total well-being of older persons, in such a way that takes into account the inter-dependence of their physical, mental, social, spiritual and environmental well-being. It is disturbing that most developing countries do not have the gerontological and geriatric medical expertise and services that would help to ensure the medical and mental well-being of older persons. African countries should adopt and operationalise the African Older Persons Protocol which has commendably provided in article 15 that 'the inclusion of

134 R Eghtessadi et al 'Safeguarding gains in the sexual and reproductive health and AIDS response amidst COVID-19: The role of African civil society' (2020) 100 *International Journal of Infectious Diseases* 286-291; T Riley et al 'Estimates of the potential impact of the COVID-19 pandemic on sexual and reproductive health in low- and middle-income countries' (2020) 46 *International Perspectives on Sexual and Reproductive Health* 73-76.

135 As above.

136 BGS 'Impact of COVID-19 on older people in rural Kenya', <https://www.bgs.org.uk/blog/impact-of-covid-19-on-older-people-in-rural-kenya> (accessed 13 November 2021).

137 HelpAge International (n 132).

geriatrics and gerontology in the training of health care personnel' should be taken seriously. A political commitment to the Protocol would ensure that older persons live a healthier life post-pandemic.

5.3 Impact on the right to equality and non-discrimination

The pandemic has gravely impacted on this right, where older persons are being viewed as a liability and disposable items. In the peak of the pandemic, there were reports of 'an increase in discriminatory policies based on age, including triage protocols that use arbitrary age criteria as the basis for allocating scarce medical resources, and a rise in the number of reported cases of neglect of older persons living in institutional settings in many countries'.¹³⁸

For example, in Kenya older persons became anxious or fearful owing to the stigma and discrimination to which they were subjected during the COVID-19 outbreak when the government introduced a 58-year and above age-based restriction.¹³⁹ Also, there have been reports of some countries denying older persons access to the COVID-19 vaccine in an alleged bid to save the younger generation.¹⁴⁰ President Duterte of the Philippines recently stated: 'Let's prioritise those who, once they get a vaccine, there's a chance that he would live and live productively. Most of the senior citizens are no longer that productive.'¹⁴¹ Also, in Indonesia, a clinical trial leader reportedly retorted: 'Why do we target people of a productive age? Because these people can work hard, so the country will not have a deficit.'¹⁴² These not only are unfortunate statements, but they also smack of discriminatory practices, blatant ageism, commodification and commercialisation of human lives.

Fortunately, the WHO has warned that '[t]here is a disturbing narrative in some countries that it's okay if older people die. It's not okay. No one is dispensable ... It is important that everywhere older people are prioritised for vaccination.'¹⁴³ Indeed, no life of an older

¹³⁸ AgeUK(n 98).

¹³⁹ HelpAge International (n 132).

¹⁴⁰ L Kassova 'Bulgaria is sacrificing its older generations – How to stop that?', <https://euobserver.com/coronavirus/151639> ; P Lloyd-Sherlock 'Bulgaria and COVID-19 vaccine ageism', <https://corona-older.com/2021/05/20/bulgaria-and-covid-19-vaccine-ageism/> (accessed 28 June 2021).

¹⁴¹ 'Duterte will "waive" COVID vaccine, saying elderly not a priority' *The Jakarta Post* 13 April 2021.

¹⁴² P Lloyd-Sherlock, P Muljono & S Ebrahim 'Ageism in Indonesia's national COVID-19 vaccination programme' (2021) *BMJ* 372.

¹⁴³ WHO 'WHO Director-General's opening remarks at the media briefing on COVID-19 – 5 February 2021', <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-5-february-2021> (accessed 7 June 2021).

person is disposable at this critical time, because an older person may add more value than a younger person in the fight against the pandemic.

Any discriminatory practice against older persons in the pandemic context smacks of a gross violation of their human rights.¹⁴⁴ Apart from the provisions of articles 2 and 3 of ICESCR which prohibit discrimination, the UN Principles require states to treat older persons fairly regardless of age, while the Madrid Plan mandates states to combat ageism in all its manifestations. Therefore, in the context of COVID-19, paying less attention to older persons with the assumption that they are closer to the grave is not only morally wrong, but also runs contrary to human rights norms.

6 Way forward and concluding thoughts

This article has examined the effect of COVID-19 on the economic and social rights of older persons in Africa. It has provided a modest contribution to the legal and policy frameworks that underpin those rights. It has engaged in some analysis on the normative architecture on the economic and social rights of older persons, which reveals that there is no dearth of legal framework for the promotion of the economic and social rights of older persons in Africa. What is needed is a political will to further that promotion.

International and regional cooperation is paramount for meeting the economic and social rights needs of older persons. According to paragraph 122 of the Madrid Plan, 'enhanced international cooperation is essential to support developing countries, least developed countries and countries with economies in transition' in meeting the economic and social rights needs of older persons. Also, as far back as 1982, the UN noted that '[i]nternational co-operation ... is essential ... and can take the form of bilateral and multilateral cooperation between governments'¹⁴⁵ if the goal of protecting the rights of older persons were to be fully achieved. This could come in the form of financial, economic and technical cooperation and assistance as well as information sharing among countries of the world.

The COVID-19 pandemic has revealed the deep-rooted structural imbalances between developing and developed countries in the

144 Vienna Plan para 25(h).

145 Vienna Plan para 94.

area of vaccine development and distribution.¹⁴⁶ It is essential that developed countries assist developing countries to take care of their older persons in these unprecedented times. This call is supported by several provisions of ICESCR. For example, article 2(1) of ICESCR recognises that national efforts cannot adequately address issues around economic and social rights, hence it clearly provides for states' extraterritorial obligations of international cooperation and assistance.

As the UN Independent Expert on the Rights of Older Persons asserts, the pandemic calls for 'solidarity and for stepping up action towards better protection of the rights of older persons among reports of age-based decisions regarding the allocation of scarce medical resources and the deep-rooted ageism that the pandemic has brought to the fore'.¹⁴⁷

International cooperation and assistance from developed countries may be boosted by a consistent financial contribution of the globally agreed 0,7 per cent of their gross national product (GNP) as the Official Development Assistance (ODA) to developing countries,¹⁴⁸ monitoring of the utilisation of ODA in the recipient states, the provision of technical aid in drafting domestic laws that would address the local context of older persons in the recipient states.

African governments should operationalise the Older Persons Protocol, not only by signing and ratifying it, but also by exploring its provisions on the role of informal care givers. The Protocol recognises 'the importance of traditional family support systems'.¹⁴⁹ As noted above, article 10 recognises that family members should take care of older persons but, more essentially, that states should incentivise such informal caregivers in line with the provisions of the Protocol. In the context of COVID-19, a call has been made that '[w]e should support informal caregivers because they are the ones providing majority of services that support autonomy of older persons'.¹⁵⁰ The government should motivate these care givers by some handsome rewards and awards.

146 HO Yusuf & PE Oamen 'Realising economic and social rights beyond COVID-19: The imperative of international cooperation' (forthcoming in the December 2021 Issue of *II&CLR*).

147 Mahler (n 20) 1.

148 OECD 'Official development assistance', <https://www.oecd.org/development/stats/What-is-ODA.pdf> (accessed 13 November 2021).

149 Chirwa & Rushwaya (n 74) 73.

150 Todorović (n 22) 3.

Further, the national governments in Africa should enact new laws or review existing laws to ensure that human rights are enjoyed at old age, pandemic or no pandemic, thereby addressing the issues of ageism. Such domestic laws should provide effective remedies for direct, indirect and intersectional discrimination based on older age, as well as institutionalise public awareness mechanisms on those rights.¹⁵¹ In addition, a special older persons' unit should be created in the African Union (AU) and in each state party's national human rights institution, to collate and address human rights concerns of this category of persons. The AU unit should oversee the work of the national human rights institution to ensure that they are insulated from domestic political influence.

Moreover, national and regional courts in Africa should adopt a liberal approach to the rights of older persons. Reports indicate that some African countries, such as South Africa, that have rights-based and institutionalised social safety nets were quicker to provide social assistance to address COVID-19 effects than other African countries with weak forms of normative framing.¹⁵² It is arguable that courts' sympathetic approach towards older persons' rights in this pandemic period may attract both direct and symbolic impact. The courts should borrow from the Inter-American Court of Human Rights which recently gave an expansive interpretation to older persons' rights to health and informed consent in *Poblete Vilches v Chile*.¹⁵³ In that case the Court reasoned that the failure to provide an older person with adequate and necessary medical care, leading to his or her death, violated their autonomous right to health to which the Chilean government owed an obligation.

Further, African governments should show genuine political commitment to complying with pro-older person laws and judicial decisions as in the case of the Chilean government. It has been reported that the Chilean government has since started compliance with the orders made in *Poblete*.¹⁵⁴ All stakeholders in Africa should as a matter of urgency cash in on the opportunity that the pandemic has provided through the spotlighting of older persons, by not only including these persons in future public data capturing, but by also

151 A Byrnes 'Building forward better with human rights law and procedures and law reform' Paper presented at the UN Expert Group Virtual Meeting 'Building forward better for older persons post-COVID-19 held on 2-5 March 2021 3.

152 Dafuleya (n 110) 263; B Rohwerder 'Social impacts and responses related to COVID-19 in low- and middle-income countries', <https://www.ids.ac.uk/publications/social-impacts-and-responses-related-to-covid-19-in-low-and-middle-income-countries/> (accessed 25 June 2021).

153 Report 1/16 CASE 12,695.

154 ESCR Net '*Poblete Vilches and Others v Chile*', <https://www.escr-net.org/caselaw/2019/poblete-vilches-and-others-v-chile> (accessed 25 June 2021).

promoting 'a human rights based approach to ageing, one that recognises older persons as rights' holders'.¹⁵⁵

In addition, African governments should comply with the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights which has devoted an expansive attention to vulnerable and disadvantaged groups, including older persons.¹⁵⁶ The Guidelines obligates state parties to 'prioritise the realisation of the rights [ESR] for the poorest and most vulnerable in society', while progressively realising 'the rights for all individuals'.¹⁵⁷ Thus, in the context of older persons who also often suffer poverty, where 'extreme poverty intersects with – and exacerbates – other forms of vulnerability and disadvantage, a state's obligation to intervene to secure the realisation of social rights is urgent and undeniable'.¹⁵⁸

At the regional level, African governments should cooperate by prioritising allocation for assistance to the poorer countries in a bid to realise the economic and social rights of older persons. The AU should coordinate more economic responses to the pandemic. As Iwara notes,

the coronavirus pandemic puts more emphasis on the need for a holistic pan-African response that will not just react to the immediate pandemic, but manage its attendant impacts through commitments to jointly shared instruments, robust economic packages and meaningful investments in public healthcare, education.¹⁵⁹

The AU should urge African governments to establish an institutionalised non-contributory pension or social safety net for older persons. This would ensure that older persons are protected against economic shocks that the pandemic has introduced. The governments should borrow from the Bolivian government which received a global applause for the seamless way in which it addressed older persons' needs with pre-COVID-19 pension programmes. The Bolivian Renta Dignidad programme set up in 2008 effectively gave

¹⁵⁵ Mahler (n 7) 3.

¹⁵⁶ African Commission 'Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights', https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC_E.pdf?sequence=1&isAllowed=y (accessed 25 June 2021).

¹⁵⁷ African Commission (n 156) para 17.

¹⁵⁸ F Viljoen 'Social rights in the African system for the protection and promotion of human and peoples' rights' in C Binder et al (eds) *Research handbook on international law and social rights* (2020) 210.

¹⁵⁹ M Iwara 'Leveraging the African Union's role in the time of COVID-19' *African Arguments* 29 April 2020, <https://africanarguments.org/2020/04/29/leveraging-the-african-unions-role-in-the-time-of-covid-19/> (accessed 27 June 2021).

welfare packages to individuals aged 60 and older, regardless of their level of income.¹⁶⁰ In particular, it is proposed that African leaders should put in place a 'telecare' scheme whereby older persons are given a monthly telephone or digital allowance with which they can reach families and friends, thereby improving their mental health. Engendering such pension and telecare schemes across the African continent would address the needs of older persons, both in peace and 'war' times. Research has shown that this is possible in Africa and should be strived for.¹⁶¹

Further, the AU should encourage its member states to fulfil their commitment to the 2001 Abuja Declaration by allocating not less than 15 per cent of their annual budgets to the healthcare sector.¹⁶² If this is done faithfully, Africa will not need to engage in medical tourism, neither would it be less prepared for future pandemics.¹⁶³

Finally, the UN Principles should be given the necessary attention in the African setting. The Principles require states to carry older persons along in making decisions affecting them. As has been observed, '[t]he COVID-19 pandemic should act as a wakeup call to include older persons in emergency response planning, budgeting, staff allocation and response activities, using their capacity and resources and voicing their concerns and recommendations'.¹⁶⁴ It would be difficult to protect older persons' rights 'without giving them a seat at the [discussion] table'.¹⁶⁵

The issue being discussed calls for an end to 'stigma and generalisations of older persons as being vulnerable, unproductive and a burden to society' as such narratives can trigger or perpetuate abuse, violence and neglect.¹⁶⁶ There needs to be a shift to 'the value and need of inter-generational interaction and support',¹⁶⁷ which older persons bring to the table. National policies that affect their

160 Inter-American Development Bank 'Stepping up during a crisis: The unintended effects of a non-contributory pension programme during the COVID-19 pandemic' IDB Working Paper Series IDB-WP-1153 1; N Bottan et al 'How an existing non-contributory pension programme proved critical during the COVID-19 pandemic' Ideas Matter 19 May 2021, <https://blogs.iadb.org/ideas-matter/en/how-an-existing-non-contributory-pension-program-proved-critical-during-the-covid-19-pandemic/> (accessed 25 June 2021).

161 HelpAge International 'Why social pensions? Achieving income security for all older people', <http://www.pension-watch.net/knowledge-centre/?guid=5ecf33112a9b9&order=n> (accessed 26 June 2021).

162 PE Oamen 'Realisation of the right to health in Nigeria: The prospects of a dialogic approach' (2020), <http://dx.doi.org/10.2139/ssrn.3673480> (accessed 26 June 2021).

163 As above.

164 Todorović (n 22) 3.

165 As above.

166 Mahler (n 7) 1.

167 As above.

health and social well-being should be designed in consultation with them.¹⁶⁸ Rather than regarding them as a liability, older persons should be embraced, cared for and given a voice, not only by their families and societies but by African national and regional political entities. As the UN recently observed, we 'must raise visibility of and pay closer attention to ageist attitudes and behaviors, adopt strategies to counter them, and create comprehensive policy responses that support every stage of life'.¹⁶⁹

We conclude by echoing Scott that the

pandemic has revealed a number of policy and institutional weaknesses that need to be corrected ... The pandemic represents an opportunity to change the narrative around ageing by reducing ageism, raising awareness of diversity in ageing, redefining 'old'.¹⁷⁰

168 As above.

169 UN 'Global report on ageism' (2021) ix.

170 A Scott 'Older persons and the post-COVID-19 agenda' (2020) Background paper for the United Nations DESA 2, https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2021/02/Andrew-Scott_Paper.pdf (accessed 26 June 2021).

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The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: A comparative analysis on account of the revised Rules of Court

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Summary: *The purpose of this article is to examine the possible repercussions that the revised Rules of the Court adopted in September 2020 may have on the right to reparations. In particular, the article focuses on the two procedures to issue a judgment on reparations, specific procedures and third party interventions. The information therein has been assembled by reviewing relevant regional legal instruments such as the African Charter, the African Court Protocol and the Rules of Procedure of the African Commission and the Court with their counterparts in the European and Inter-American systems, as well as through an appraisal of pertinent case law. The revision of the Rules of Court demonstrates a constructive attempt by the African Court to clarify previously imprecise rules, expand the scope of specific procedures and reiterate its competencies. These additions are evident in the new arrangement of the contents of an application, and the inclusion of the pilot-judgment procedure or the revised Rule 72 which reaffirms the*

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binding nature of all Court decisions. The article highlights relevant changes to the Rules of Court while arguing that additional rules need to be amended or expanded to more effectively guarantee the right to reparations. To that end, it provides recommendations for the African Court to consider.

Key words: *African Court on Human and Peoples' Rights; Rules of Court; right to reparations; contentious process; special procedures; third-party interventions*

1 Introduction

The African Court on Human and Peoples' Rights (African Court) adjudicates on cases brought before it by state parties, African intergovernmental organisations, the African Commission on Human and Peoples' Rights (African Commission) and filed by or on behalf of individuals and non-governmental organisations (NGOs) of states that have ratified 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) and made a declaration accepting the competence of the Court under article 34(6) of the Court Protocol.¹

During the years 2009 and 2010 the African Court and the African Commission conducted three joint meetings aimed at harmonising their corresponding interim Rules. This process culminated in 2010 when the Court adopted its Rules of Court on 2 June 2010. These internal rules guided the African Court until 25 September 2020, when the revised Rules of Court entered into force. The Court noted that the revised Rules of Court aspired to enhance the effectiveness of the Court by facilitating access to it, improving the management of cases and ensuring better implementation of the judgments and other decisions.²

1 Organisation of African Unity (OAU) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 art 5 (African Court Protocol).

2 African Court 'The African Court of Human and Peoples' Rights adopts new Rules of Court', <https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-adopts-new-rules-of-court/> (accessed 27 May 2021).

2 Normative framework of right to reparations in the African Court on Human and Peoples' Rights

Adopted in 1981, the African Charter on Human and Peoples' Rights (African Charter) expressly refers to the right to reparations in article 21(2), which reads: 'In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.' Even if this provision only refers to limited forms of reparation, the case law of the African Commission and the African Court has further developed the content and extent of the right to reparations.³ According to article 27(1) of the African Court Protocol, the African Court has an express mandate to award reparation: 'If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.'

Article 27(1) of the Court Protocol, therefore, grants the African Court a great degree of discretion that can be used to achieve a holistic approach to the right to reparations. This provision may be interpreted as an unequivocal and explicit mandate to order reparations when states are found to have violated a right enshrined in the African Charter. Moreover, articles 60 and 61 of the African Charter and revised Rule 29(1)(a) of the Rules of Court provide that the African Commission and African Court draw inspiration and take into consideration African instruments and practices, instruments of international law to which the parties to the Charter are members, as well as legal precedents and doctrine. This means that the African Commission and African Court may expand the concept of reparations in view of the provisions contained in articles 9(5) and 14(6) of the International Covenant on Civil and Political Rights (ICCPR); article 14 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT); articles 16(4) and (5) of the Indigenous and Tribal Peoples Convention; article 19 of the Declaration on the Protection of all Persons from Enforced Disappearance; Principle 12 of the Declaration

3 See, eg, *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) where the Commission urged the respondent state to conduct an investigation, prosecute those responsible and ensure adequate compensation to the victim, but it also appealed to the government to undertake a comprehensive clean-up of lands and rivers damaged by oil operations and to provide information on health and environmental risks to the affected community. See also *Application 13/2011 Norbert Zongo & Others v Burkina Faso* AfCHPR (5 June 2015) para 60, where the Court affirmed that, under international law, reparations may take several forms and used art 34 of the ILC Draft Articles and the jurisprudence of the UN Committee against Torture to exemplify these.

of Basic Principles of Justice for Victims of Crime and Abuse of Power; article 9(2) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms; article 68 of the Third Geneva Convention; and article 91 of the First Additional Protocol to the Geneva Conventions, among others.

In addition, the African Commission and the African Court have developed the right to reparations through decisions and judgments. In the case of *Reverend Christopher R Mtikila v Tanzania* the African Court referred to the jurisprudence of the African Commission to affirm that a state that has violated the rights enshrined in the African Charter should 'take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation'.⁴ This view was later upheld in *Beneficiaries of the Late Norbert Zongo & Others v Burkina Faso* where the Court affirmed that, under international law, reparations may take several forms and used article 34 of the ILC Draft Articles⁵ and the jurisprudence of the UN Committee against Torture to exemplify them.⁶ In the *Norbert Zongo* case⁷ the African Court also recognised the concept of 'full reparations commensurate with the prejudice suffered': 'Reparation consists of measures tending to eliminate the effects of the violations that have been committed.'

2.1 Right to reparations in the Rules of Court

The process by which reparations may be awarded by the African Court is outlined in its Rules of Court. The revised Rule 40(4) relates to article 27(1) of the African Court Protocol asserting that an applicant who wishes to receive reparations should include such request in the original application. The revised Rule 40(4) substituted former Rule 34(5) with two noticeable amendments. The first is that the revised

4 Consolidated Applications 9/2011 and 11/2011, *Reverend Christopher R Mtikila v United Republic of Tanzania* AfCHPR (14 June 2013), quoting *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 229(d).

5 Art 34 of the ILC Draft Articles reads: 'Full reparation for the injury caused by the international wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.'

6 Communication 212/2002, *Kepra Urra Guridi v Spain* CAT (17 May 2005) para 6(8); and Communication 269/2005, *Ali Ben Salem v Tunisia* CAT (7 November 2007) para 16(8).

7 Application 13/2011, *The Beneficiaries of the Late Norbert – Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* AfCHPR 5 June 2015) para 60, quoting *Goiburú & Others v Paraguay* IACHR (22 September 2006) Series C 153 para 143. This concept has been reaffirmed in the *Fact Sheet on Filing Reparation Claims* developed by the African Court in 2019.

Rule does away with the provision that compelled applicants to determine the amount of the reparation together with the application. This change is relevant as it does not forbid applicants from stating a pecuniary amount in the form of compensation for the alleged human rights violations endured but seems to provide applicants with the latitude to subscribe to the diversity of forms of reparation beyond the often over-emphasised right to compensation.⁸

The second relevant change is that the revised Rule 40(4) additionally states that ‘the supporting documents and evidence relating to the claim for reparations must be submitted *together with the application* or within a time limit set by the Court’. The explicit inclusion of this provision seems to respond to a situation endured by the Court where it received applications in which applicants had not duly substantiated specific claims for reparations, which forced the Court to delay a decision on reparations.⁹

2.2 Content of an application in contentious cases

One of the most noticeable amendments to the Rules of Court is the inclusion of Rule 41, which outlines a detailed list of elements that shall be part of an application. This revised Rule codifies previously scattered information and underlines the need to include relevant details towards ensuring the admissibility of the application. Although the list of elements is extensive, making the complaint procedure arguably more intricate, the Registrar avails an application form to all potential applicants wherein the contents of the application are delineated.¹⁰ However, the substantiation of all these elements in the order laid out by the Court may jeopardise the access of applicants who may not have access to legal representation, be currently imprisoned or where the nature of the case may not allow the applicant to include one of the elements. Fortunately, Rule 41(9)(c) allows the Court to accept applications that may present procedural defects. In this regard, the jurisprudence of the Court to date has not struck out any application due to procedural defects. In the case of *Lohé Issa Konaté v Burkina Faso* the Court made an exception to the rule of exhaustion of local remedies as the national legal system

8 In this regard, see the historical separate decision of AA Cançado Trindade J where he reflects on the inhuman interpretation that reduces reparations as measures aimed at simply addressing material and moral damages. *Case of the ‘Street Children’ (Villagrán-Morales et al) v Guatemala* IACHR (26 May 2001) Series C 77.

9 See, eg, Application 4/2013 *Lohé Issa Konaté v Burkina Faso* AfCHPR (3 June 2016) para 42; and *Mtikila* (n 4) para 30 (my emphasis).

10 African Court ‘Application Form – Revised October 2020’, <https://www.african-court.org/wpa/c/forms-for-parties-2/> (accessed 28 May 2021).

did not permit a constitutional review in the instant case.¹¹ Similarly, in *Beneficiaries of the Late Norbert Zongo & Others v Burkina Faso* the Court also applied an exception to the rule of exhaustion after the applicant proved that that domestic remedies had been unduly prolonged and, therefore, there was no obligation to exhaust further remedies.¹²

3 The two procedures to issue a judgment on reparations

Once the African Court has determined its jurisdiction on the matter (Rules 29 and 49), the conditions for admissibility of the application (Rule 50) and any preliminary objections have been raised by parties (Rule 60) following the time limits set by the Court (Rule 44), the Court will proceed to set the date for the hearing (Rule 53). Following the outcome of the hearing, the Court may decide to issue a judgment on the merits and reparations or, if the circumstance so require, issue a separate decision dedicated to reparations (Rule 69). The revised Rule 69(3) merged and clarified the previous seemingly confusing Rules 61 and 63 which dealt with judgments, in general, and judgments on reparations, respectively. Accordingly, the Court may decide on the reparations in two different procedural moments.

3.1 Judgment on the merits and reparations

The African Court may include orders on reparations in the judgment on the merits. This option nevertheless is contingent upon the fulfilment by the applicant of the conditions set forth in Rule 40(4) which comprises the inclusion of sufficient evidence and the justification of the causal link between the violation that occurred, and the damage suffered. In this regard, the Court stated in *Mtikila* that it does not suffice to show that the respondent state has violated one of the rights enshrined in the African Charter, as applicants are expected to prove the damages suffered.¹³ In order to further justify the need to establish a causal link between the violation and the harm suffered, the Court has referred to the jurisprudence of the Inter-American Court of Human Rights and the European Court of

11 Application 4/2013, *Lohé Issa Konaté v Burkina Faso*. AfCHPR (5 December 2014) paras 110-114.

12 Application 13/2011, *The Beneficiaries of the Late Norbert – Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* AfCHPR (24 June 2014) paras 72-106.

13 *Mtikila* (n 4) para 31; *Lohé Issa Konaté v Burkina Faso* (n 9) paras 46 & 47.

Human Rights.¹⁴ With the exception made on moral damages,¹⁵ the causal link generally is never assumed and the burden of proof is on the applicant, who is forced to submit any relevant documents to support the claims of damages and, where possible, assess the consequent pecuniary amount resulting from the wrongful act.

3.2 Separate judgment on reparations

The revised Rule 69(3) foresees the possibility to issue a judgment on reparations in a decision separate from that on the merits. This power allows the African Court to defer a decision on reparations in circumstances where the applicant's prayers on reparations are formally incomplete. Nevertheless, such situations do not impede the Court to order certain reparations that were properly substantiated while leaving the rest for a specific ruling on reparations. This position was demonstrated by the Court in *Onyachi and Njoka v United Republic of Tanzania* where the Court decided to deal with 'certain forms of reparation in this judgment, and rule on other forms of reparation at a later stage of the proceedings'.¹⁶ Additionally, the Court may choose to defer the decision on other forms of reparation such as in *Christopher Jonas v United Republic of Tanzania*, where the Court noted that since none of the parties made any specific prayer regarding other forms of reparation, it decided to make a separate ruling on the matter at a later stage.¹⁷

While there may be different reasons behind the applicant's failure to include a request for reparations, the stand-alone position of former Rule 63, explicitly dedicated to describing the judgment on reparations, may have led to confusion. Applicants and their representatives could have interpreted that the submission of documentation and evidence to justify claims on reparations was only necessary if the Court found that the respondent state had incurred in a violation of one the rights enshrined in the African Charter. Therefore, the codification of the contents of judgments under the revised Rule 69 is a positive step as it explicitly clarifies that the African Court's deliberation on reparations can occur together with the judgment on merits while leaving enough latitude to rule on reparations when the circumstances so require. When read together

14 *Norbert Zongo and Others v Burkina Faso* (n 7) para 82.

15 *Zongo* (n 7) para 55.

16 Application 3/2015, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* AfCHPR (28 September 2017) para 165.

17 Application 11/2015, *Christopher Jonas v United Republic of Tanzania* AfCHPR (28 September 2017) para 97.

with Rule 40(4), Rule 69 supports the Court's desire to elude deferrals in the determination of reparations.

3.3 Role of the Court in granting reparations

Whereas the revised Rules of Court are categorical in compelling applicants to submit their claims for reparation together with the application under Rule 40(4), the Court remains cautious and foresees a possibility to issue a separate decision to rule on reparations under Rule 69(3). The choice to maintain such a possibility ensures that the Court can effectively assess the applicant's needs while granting them the possibility to raise prayers on different forms of reparation that were not originally submitted. Further, this procedure prevents situations where the Court could develop a ruling on reparations without the certitude that such measures would be effective and commensurate with the prejudice suffered.

However, the African Court at times seems to have taken a conservative stance insisting that it will not consider measures of reparation for the violation of a particular right enshrined in the African Charter if the applicant fails to do so in their brief on reparations.¹⁸ This reserved position may trump the Court's jurisdictional mandate to interpret and apply the African Charter established under Rule 29(1)(a). The Court ought to not only interpret the provisions of the African Charter in accordance with the claims raised by the applicant but should assess whether the facts and evidence made available by the parties could amount to additional or alternative violations of the African Charter. As the supreme interpreter of the Charter, the Court cannot be limited by the claims laid down by the applicant and should be able and willing to recognise and address violations of rights that were not explicitly mentioned by the applicant. In fact, this interpretative power has allowed the African Commission and the African Court to develop their jurisprudence around the automatic violation of article 1 whenever a violation of any provision of the Charter is found.¹⁹

The chief goal of the African Court is to safeguard the provisions of African Charter by rendering decisions, including judgments on the merits and reparations, which are necessary to meet the ends of justice.²⁰ Subsequently, the Court cannot be limited by the applicant's prayers for reparative measures and should be able and

¹⁸ *Zongo* (n 7) para 2.

¹⁹ See, eg, *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46; *Zongo* (n 7) para 199.

²⁰ See Rule 90 of the revised Rules of Court.

willing to grant certain reparations to best achieve the principle of 'full reparations, commensurate with the prejudice suffered'.²¹ The Court has taken measures to encourage applicants to make specific submissions on reparations in line with international standards as spelt out in the Court's jurisprudence, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation and in any other relevant instruments adopted by the African Court. To that end, the development of the Fact Sheet on Filing Reparation Claims in 2019 marked an important initiative to guide applicants in forwarding a complete brief on reparations stating all the specific reparations requested from the Court, including the evidence and the causal link between the violation and the harm suffered.²²

Considering the practice of the African Court of granting 30 days to the applicants to submit their request on reparations and 30 days for the respondent state to reply to it,²³ it would be advisable for the Court to set the date for the hearing on reparations three months from the date on which the judgment on the merits is delivered. Should this judgment be publicised during one of the ordinary sessions of the Court, there should be enough time for the parties to submit their views on reparations and hold the hearing during the next ordinary session. This could be both a measure to ensure the promptness of the reparative measures as well as deterring the parties from requesting unnecessary extensions that would further delay the implementation of the reparations. This suggestion might find an exception in cases of collective victimhood where a needs assessment is essential for the Court to issue adequate and effective reparations. In these cases it would be advisable for the Court to take advantage of Rule 55(3) of the Rules of Court and to conduct informal hearings, visiting the affected communities or requesting that a fact-finding investigation be conducted by the African Commission under Rule 36(4).

Making use of these mechanisms may be a way of enhancing victim participation in the process and ensuring that victims' needs are duly considered in view of a decision on reparations. This suggested victim-oriented approach to reparations is in line with the African Commission's Principles and Guidelines on the Right to a Fair

21 *Zongo* (n 7) para 60. In this regard, see also *The Rochela Massacre v Colombia* IACHR (11 May 2007) Series C 163 para 286.

22 African Court 'Fact Sheet on Filing Reparation Claims', https://www.african-court.org/en/images/Basic%20Documents/Reparations_Fact_Sheet-FINAL_25_Nov_2019.pdf (accessed 27 May 2021).

23 See Application 5/2013 *Alex Thomas v United Republic of Tanzania* AfCHPR (20 November 2015) para 159; Application 7/2013 *Mohamed Abubakari v United Republic of Tanzania* AfCHPR (3 June 2016) para 242; *Christopher Jonas* (n 17) para 100.

Trial and Legal Assistance in Africa, which provides several principles that ensure a victim-sensitive approach when affording reparations, including that victims should be treated with compassion and respect for their dignity and have access to prompt redress.²⁴ Regardless of the procedural moment where the Court decides to issue reparative orders, it is critical to be as clear as possible and leave little room for the respondent state to make biased interpretations of the judgment that may contravene the principles of prompt and effective reparations to victims.

Lastly, it is worth noting that the revised Rule 41(1), which describes the elements that shall be contained in any application, is silent regarding claims on reparations. This omission is partially solved in the actual application form provided by the office of the registrar which includes a section dedicated to the prayers to the Court, encompassing a link to the Fact Sheet on Filing Reparation Claims. However, the efforts of the Court to encourage applicants to submit their request for reparations together with the main application would be better met if these become a visible element in one of the most consulted Rules of Court.²⁵

4 Specific procedures and the right to reparations

Chapter IV of the Rules of Court contains several specific procedures. Among these are provisional measures, amicable settlements and the new pilot-judgment procedure that may have an indirect impact on reparations. This section analyses the relevant novelties of specific procedures, compares them with the counterparts in the European and the Inter-American systems and makes suggestions as to how the African Court may interpret and apply these.

4.1 Provisional measures

According to article 27(2) of the African Court Protocol, in ‘cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary’. Provisional measures thus have a clear intent to prevent the continuation of human rights violations until a judgment is delivered. Consequently, the lack of determination of a provisional

24 ACHPR ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’ adopted at the AU Heads of State and Government Summit in Maputo, Mozambique 20, <https://www.achpr.org/legalinstruments/detail?id=38> (accessed 29 May 2021).

25 See African Court (n 10).

measure may cause irreparable harm to the applicant. In turn, the adoption of effective and prompt provisional measures may influence the ruling on reparations. For instance, in cases where the applicant is about to be judicially executed, the adoption of a provisional measure for the state to refrain from executing the applicant will have an impact on the scope and forms of reparation that the Court may determine if it finds that the respondent state is responsible for violating one or more of the rights enshrined in the African Charter.

Provisional measures, previously known as interim measures, are described under the revised Rule 59 which substituted Rule 51. There are two relevant additions to Rule 59. The first is that sub-rule (1) indirectly reiterates that provisional measures are limited in time by the determination of the main application. The second addition, sub-rule (6), explicitly determines that orders for provisional measures are binding on the parties affected.²⁶

Matters that have been considered urgent and grave by the African Court were primarily situations of execution of the death penalty such as in *Dexter Eddie Johnson v Republic of Ghana*, *Mulokozi Anatory v United Republic of Tanzania* and in *Oscar Josiah v United Republic of Tanzania*.²⁷ Other matters that have been considered referred to the applicant's right to health under detention in *Lohé Issa Konaté v Burkina Faso*;²⁸ the applicant's right to have access to his lawyer and communicate with his family while under detention in *Léon Mugesera v Republic of Rwanda*;²⁹ and in *African Commission on Human and Peoples' Rights v Libya*;³⁰ the applicant's rights to property, individually as in *Alfred Agbesi Woyome v Republic of Ghana*³¹ and collectively as in *African Commission on Human and Peoples' Rights v the Republic of Kenya*, where the Court also took into account the right to economic, social and cultural development;³² or the threat

26 The website of the African Court currently offers two different versions of the revised Rules of Court. In one of these Rule 59(6) does not appear. See http://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf against <https://www.african-court.org/wpafc/wp-content/uploads/2021/04/Rules-Final-Revised-adopted-Rules-eng-April-2021.pdf> (accessed 30 May 2021).

27 Application 16/2017, *Dexter Eddie Johnson v Republic of Ghana* AfCHPR (28 September 2017); Application 57/2016, *Mulokozi Anatory v United Republic of Tanzania* AfCHPR (18 November 2016); and Application 53/2016, *Oscar Josiah v United Republic of Tanzania* AfCHPR (18 November 2016).

28 Application 4/2013, *Lohé Issa Konaté v Burkina Faso* AfCHPR (4 October 2013).

29 Application 12/2017, *Prof Léon Mugesera v Republic of Rwanda* AfCHPR (28 September 2017).

30 Application 2/2013, *African Commission on Human and Peoples' Rights v Libya* AfCHPR (15 March 2013).

31 Application 1/2017, *Alfred Agbesi Woyome v Republic of Ghana* AfCHPR (24 November 2017).

32 Application 6/2012, *African Commission on Human and Peoples' Rights v the Republic of Kenya* AfCHPR (15 March 2013).

to undertake actions that may result in the loss of lives and other physical damages in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*.³³

Under certain circumstances, the African Court might deem it necessary to complement the requested measures with other measures that will prevent immediate and irreversible harm to the applicant. The revised Rule 59(1) states that the Court may do so in the interests of the parties or of justice. In practice, the Court granted provisional measures proprio motu in the case of *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*.³⁴

Most of the cases where the European Court granted interim measures are related to deportation and extradition proceedings. In the case of *Mamatkulov and Askarov v Turkey* the Court referred to the importance of Rule 39 of the Rules of Court as interim measures play a fundamental role in 'avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted'.³⁵ According to the Factsheet on Interim Measures, the length of an interim measure generally covers the whole duration of the proceedings before the Court, but can also be shorter.³⁶ While these measures are generally directed against respondent states, the European Court invoked Rule 39 in the case of *Ilaşcu & Others v Moldova and Russia* to urge one of the applicants to call off his hunger strike.³⁷ Moreover, the Factsheet on Interim Measures states that the application of Rule 39 may be revoked at any time by a decision of the Court, but fails to indicate whether this is a discretionary power of the Court or it can also be requested by one of the parties involved. Rule 39 of the Rules of Court includes among the parties entitled to submit an interim measure any other person concerned. This provision serves to give the possibility to relatives of the applicant to seek an immediate remedy to an urgent situation. Even though the binding nature of these measures is not clear under Rule 39, the Court has repeatedly

33 Application 4/2011, *African Commission on Human and Peoples' Rights v State of Libya* AfCHPR (25 March 2011).

34 Application 4/2011 (n 33) paras 10-12.

35 Applications 46827/99 and 46951/99, *Mamatkulov and Askarov v Turkey* ECHR (4 February 2005) para 125.

36 ECHR 'Factsheet on Interim Measures', http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf (accessed 29 May 2021).

37 Application 48787/99, *Ilaşcu & Others v Moldova and Russia* ECHR (8 July 2004) para 11.

insisted on its binding character throughout its case law, especially in conjunction with the right to individual petition.³⁸

The practice of the African Court shows that there is a temporal inconsistency when setting a time limit for respondent states to respond to requests for provisional measures. This uncertainty is particularly severe when related to precarious situations where respondent states are asked to refrain from executing the death penalty on an applicant. Given that there is no specific provision regarding the time limit for responding to requests for provisional measures, the registrar sometimes includes a specific limit. Whereas in the case of *Léon Mugesera v Republic of Rwanda* the registrar requested the respondent state to submit comments on the request for provisional measures within 21 days,³⁹ in *Dexter Eddie Johnson v Republic of Ghana* the registrar indicated that the respondent state could comment on the request for provisional measures within 15 days if they so wish.⁴⁰ This inconsistency also occurs with regard to the time given to respondent states to report on the measures taken to comply with a decision on provisional measures. Whereas the Court ordered the respondent state to report on the measures taken to implement its order on provisional measure within 30 days in the case of *Armand Guehi v United Republic of Tanzania*,⁴¹ the Court granted the respondent state 60 days in *Eddie Johnson v Republic of Ghana*.⁴² Such inconsistency was noted by four judges who dissented with the majority on the time frame given.⁴³ This disparity is further highlighted by Rule 100(5) of the Rules of Procedure of the African Commission which states that the respondent state shall respond on the requested provisional measures within 15 days.

Regrettably, the revision of former Rule 37 into the revised Rule 44 on time limits for responding to pleadings does not include a specific time frame to respond to requests for provisional measures. The different time limits set by the registrar of the African Court to respond to the request for provisional measures and the inconsistent time limits set by the Court in ordering respondent states to report on the measures taken call either for the amendment of the Rules of

38 Application 24668/03, *Olaechea Cahuas v Spain* ECHR (10 August 2006) para 81; and *Mamatkulov and Askarov* (n 35) para 109.

39 *Mugesera* (n 29) para 11.

40 *Dexter Eddie Johnson* (n 27) para 6.

41 Application 1/2015, *Armand Guehi v United Republic of Tanzania* AfCHPR (18 March 2016) para 23; and Application 7/2015, *Ally Rajabu & Others v United Republic of Tanzania* AfCHPR (18 March 2016) para 22.

42 *Dexter Eddie Johnson* (n 27) para 21.

43 See the partly dissenting opinions of Niyungeko and Ben Achour JJ in *Dexter Eddie Johnson* (n 27) and joint separate opinion of Chafika and Mukamulisa JJ in the same case.

Court and the establishment of a unique time limit or, at least, for the development of a public document endorsed by the Court where it is stated that the presiding judge or the judge-rapporteur has a discretionary margin, according to the gravity of the case, to set a time limit for the parties to respond to the request.

Additionally, the African Court should also consider amending the Rules of Court to include the option to evaluate provisional measures in force, either at its own initiative or at the request of a party, with the possibility to maintain, modify or revoke them. While the burden of proof is on the applicant by default, the Court must consider the urgency of the matter and the difficulties in meeting the same standards of proof that are required in other circumstances. This might be particularly pertinent in cases where the applicant is under detention and has limited access to documentary evidence to prepare the submission.

4.2 Amicable settlements

An amicable settlement is an agreement reached by the parties to a case before the African Court whereby the facts and solutions to be adopted are mutually recognised. Within the solutions available, the parties may decide to include reparative measures to solve their dispute. The process by which this accord may take place can be at the parties' own initiative or under the auspices of the Court, in conformity with article 9 of the Protocol to the African Charter and Rules 29(2)(a) and 64(1) of the Rules of Court. According to the revised Rule 64, the parties to a case may resolve their dispute amicably at any point in time before the Court issues its judgment. Once the agreement is attained, the parties must report it to the Court, which will render a judgment supporting the solution adopted. A judgment based on an amicable settlement by the parties has the same enforceability upon the parties in accordance with article 30 of the Court Protocol and Rule 72, which reaffirms the binding nature of all the African Court's decisions.

However, Rule 64(5) foresees that the Court may 'decide to proceed with a case notwithstanding that an amicable settlement has been reached by the parties'. This is an important and relevant provision grounded in the discretionary powers of the Court that ensures the observation of the principles of preservation of public interest and justice. This provision would allow the Court to refuse an amicable settlement in instances where the violation occurred because of discriminatory laws, or a systemic unjust practice of the

respondent state and the solutions contained in the settlement do not include legislative reforms to ensure non-recurrence.

To date, the African Court has not been appraised with any amicable settlement. Nevertheless, the other two institutions in charge of monitoring the compliance of member states with the African Charter and other African human rights instruments have dealt with amicable settlements. In *Government of Malawi v Institute for Human Rights and Development in Africa* the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) handled its first amicable settlement. The Committee endorsed an amicable settlement containing reparative measures aimed at ensuring non-recurrence.⁴⁴ However, the settlement did not address the effects of the damage suffered by victims. Even if the case dealt with widespread violations that occurred due to national legislation contrary to the African Charter on the Rights and Welfare of the Child (African Children's Charter),⁴⁵ the African Children's Committee could have also ordered the state to set up a fund to contribute to children affected by those violations through rehabilitation services and alternative access to education.

In the case of *Open Society Justice Initiative* the parties reached an amicable settlement that was ultimately not complied with by the respondent state. Upon reopening the communication, the African Commission refused the request by the respondent state to grant a second attempt at an amicable settlement and determined that this would only further delay the examination of the communication.⁴⁶ In its decision the African Commission went beyond the original amicable settlement and ordered the respondent state to grant the victim's next of kin with various forms of reparation, including compensation for damaged goods, loss of earnings and moral damages.⁴⁷

The European system foresees under article 39 of the European Convention that the Court may place itself 'at the disposal of the parties concerned with a view to securing a friendly settlement', respecting the human rights enshrined in the Convention as well as in its Protocols. The proactive role that the Court has taken since the implementation of Protocol 11 has materialised in the practice

44 Communication 4/Com/001/2014 *IHRDA on behalf of Malawian Children v Republic of Malawi* ACERWC (2014).

45 African Charter on the Rights and Welfare of the Child adopted by the Organisation of African Unity on 11 July 1990.

46 *Open Society Justice Initiative (on behalf of Njawe Noumeni) v Cameroon* (2006) AHRLR 75 (ACHPR 2006 para 123).

47 *Open Society Justice Initiative* (n 46) para 212.

of the European Court sending settlement proposals to the parties.⁴⁸ The European Court rejected the friendly settlement in the interests of justice reached between the parties in *Ukrainian Media Group v Ukraine*. In this case the Court argued that the rejection was necessary due to 'the serious nature of the complaints made in the case regarding the alleged interference with the applicant's freedom of expression'.⁴⁹

In the Inter-American system the concept of 'full reparations commensurate with the prejudice suffered' is not diminished by the procedural differences between a friendly settlement and that of a contentious process where the Court undergoes a thorough examination of the facts and renders a judgment on the merits. In the case of *García Cruz and Sánchez Silvestre v Mexico* the Inter-American Court endorsed the friendly settlement agreed by the parties but also analysed the reparative measures to determine the scope and method of implementation as the Court has an obligation 'to provide comprehensive redress for the damage caused to the victims'.⁵⁰ However, the Court has been guided by the principles of necessity and suitability in determining that in cases of enforced disappearances where the respondent state denies the existence of such acts, as 'it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment, and to personal liberty'.⁵¹

Even though the African Court is yet to deal with a case where an amicable settlement is proposed, there are important lessons for the Court to reflect upon. First, the Court ought to reasonably consider the uneven power position of the parties and ensure that the solution to the dispute is not unfair to any of the parties. Second, as it is the Court's mandate to uphold the rights enshrined in the African Charter, the recognition of any violations of the rights therein must be included in the amicable settlement. Lastly, the assessment of a violation of the African Charter ought to entail appropriate reparative measures aimed at redressing the situation of the applicant but also at possibly preventing the recurrence of similar violations. Bearing in mind the unequal position of power of the parties, the Court may also make use of Rule 64(5) to avoid ordering reparations that are manifestly unfair or inadequate. For instance, the Court may consider that the payment of US \$5 000 to the immediate relatives

48 P Leach *Taking a case to the European Court of Human Rights* (2011) 64.

49 Application 72713/01, *Ukrainian Media Group v Ukraine* ECHR (29 March 2005) para 36.

50 *García Cruz and Sánchez Silvestre v Mexico* IACHR (26 November 2013) OEA/Ser./L/V/II.118 Doc 70 Rev 2 390 para 66.

51 *Godínez-Cruz v Honduras* IACHR (26 June 1987) Series D 3 (1994) para 49.

of a victim of enforced disappearances in the concept of loss of earnings may be insufficient if not accompanied by other measures such as compensation for moral damages, rehabilitative measures, specific measures of satisfaction and guarantees of non-recurrence in line with the concept of 'full reparations commensurate with the prejudice suffered'.

4.3 Pilot-judgment procedure

The pilot-judgment procedure was introduced by the revised Rule 66 of the Rules of Court. The African Court can initiate this procedure on its own accord or upon a request from any of the parties when several applications are filed against a particular respondent state, and these respond to the existence of 'a structural or systemic problem in the respondent state(s)'.

This pilot-judgment procedure at the African Court draws its inspiration from the European system of human rights protection. The pilot-judgment procedure was created as a measure of procedural economy that sought to respond to the overwhelming number of cases with which the European Court had to deal. In essence, it seeks to both speed up the process and avoid the Court from thoroughly examining cases sharing the same root causes. This procedure relies on the assumption that a remedy to these violations should be obtained more rapidly and effectively at the national level.⁵² To that end, the African Court shall select one case, which presents the gravest human rights violations or that serves to best represent the others, and develop a complete and thorough explanation of the facts, the legal grounds, the operative provisions of the judgment, the decision, and other formalities stated under Rule 71 of the Rules of Court. The aim would thus be to achieve a solution that extends beyond the selected case and to the greatest extent possible cover other cases with the same stemming problem. This procedure is meant to support the respondent state in identifying and putting to an end the structural issues that gave rise to the same human rights violations while granting reparations to those adversely affected.⁵³

In the European system of human rights protection, the pilot-judgment procedure is defined by Rule 61 of the Rules of Court of the European Court. This Rule states that the pilot judgment may indicate the specific time limit for the respondent state to adopt the

52 ECHR 'The Pilot-Judgment Procedure' para 6, https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf (accessed 30 May 2021).

53 ECHR (n 52) para 3.

remedial measures to address the structural or systemic problem. Accordingly, the Court may adjourn the examination of its related applications 'pending the adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment'. Rule 61 also highlights that, should the adjournment take place, the Court will duly inform the applicants of related applications about the decision to adjourn. This time limit might also be suspended at any given time in the interests of justice. The decision to adjourn cases related to the pilot judgment is justified as a way to provide enough time to adopt the remedial measures that should, eventually, serve those applicants to seek effective and prompt remedy at the national level.

The first pilot-judgment procedure conducted by the European Court was in *Broniowski v Poland*.⁵⁴ Subsequently, the Court issued a decision in *EG v Poland* where it concluded the pilot-judgment procedure for the particular case and 175 other cases that shared the same systemic problem.⁵⁵ While the judgment in *Broniowski v Poland* is no different from any other judgment regarding its format, the case of *EG v Poland* presented certain characteristics that became essential for forthcoming decisions issued under the pilot-judgment procedure. First, the Court had decided to adjourn the examination of cases with the same systemic problems identified in the *Broniowski* case. Second, in establishing the facts, the Court succinctly recalled the historical background that all the pending cases shared with the *Broniowski* case and proceeded to analyse the circumstances of the case, focusing on the facts, not the merits. Third, the Court gave effect to the pilot-judgment procedure by connecting the pending cases to the original pilot judgment and subsequently striking them out from the list of cases. Fourth, there was an explanation of the consequences of the execution of the pilot-judgment procedure, indicating that should the respondent state not comply with the measures ordered in the pilot judgment, the Court 'will have no choice but to examine and take to judgment the remaining applications pending before it in order to trigger the execution process before the Committee of Ministers'.⁵⁶ Lastly, the European Court included an annexe with the list of pending cases that were affected by the pilot-judgment procedure. The pilot-judgment procedure had a successful conclusion since the respondent state introduced new legislation to

54 Application 31443/96, *Broniowski v Poland* ECHR (22 June 2004).

55 Application 50425/99, *EG v Poland* ECHR (22 September 2008).

56 *EG v Poland* (n 55) para 28. See also Rule 61(8) of the ECHR Rules of Court.

tackle the systemic problem identified by the Court and the pending cases were settled at the national level.⁵⁷

The practice of the European Court regarding the pilot-judgment procedure is largely influenced by the principle of subsidiarity, in that respondent states generally have a great margin of appreciation in deciding the measures to be taken to comply with the Court's judgments.⁵⁸ However, the African Court should aspire to order clear reparative measures aimed at eradicating the identified dysfunction, including the creation of national mechanisms to give remedy to other similar cases that have arisen or may arise in the future. Therefore, these cases may lay a greater focus on measures of satisfaction and guarantees of non-repetition, especially when it comes to ordering the amendment of domestic legislation contrary to the African Charter or the implementation of new laws and procedural guarantees. Other measures may include training courses aimed at educating the civil servants affected by such changes to accommodate their actions to avoid repeating similar human rights violations in the future. The order on reparations must be very specific, including tight timelines, to avoid biased interpretations of the judgment that may further delay the implementation of reparations aimed at alleviating the damage suffered by the victims.

Additionally, the African Court must bear in mind that the pilot-judgment procedure was created mainly as an additional measure under Protocol 14 to mitigate the backlog of cases pending before the European Court.⁵⁹ Therefore, considering the context wherein the procedure was created, the use of this special procedure must ensure that the cases are very similar in their nature and that the trigger of the procedure does not unduly delay the right to reparations of other applicants. In particular, the due respect owed to the applicants must be reflected by duly informing them of any change in their applications and by paying close attention to any substantial differences between the cases.

57 Council of Europe 'Protection of property: Landmark judgment', <https://www.coe.int/en/web/human-rights-convention/property1> (accessed 30 May 2021).

58 G Füglistaler 'The principle of subsidiarity and the margin of appreciation doctrine in the European Court of Human Rights' post-2011 jurisprudence' (2016), https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF (accessed 30 May 2021).

59 L Wildhaber 'Pilot judgments in cases of structural or systemic problems on the national level' in R Wolfrum & U Deutsch (eds) *The European Court of Human Rights overwhelmed by applications: Problems and possible solutions* (2009) 69-76.

5 Third party interventions and the right to reparations

During the contentious process before the African Court, parties other than the applicants, the respondent state, the Court itself or, when applicable, the African Commission, may intervene. This part aims at differentiating the role of each party in the process and laying out the great impact that these parties may bring when considering reparative measures.

5.1 Interventions by other states

The revised Rules 39(2) and 61 foresee the possibility for states other than the respondent state to participate in the process by submitting written observations on the matter. This, however, is not an automatic competence of third states. First, they must submit an application for leave to intervene in which they must indicate their legal interest in the matter, the purpose of their intervention and a list of all supporting documents. Only then will the Court proceed to rule on the admissibility of the application and set a time limit for the intervening state to submit its written observations. Once the Court has ruled on the admissibility of the application, the intervening states will be invited to submit their written observations and participate during the oral proceedings, should they occur. The impact of these interventions may be helpful in terms of bringing the parties closer to an amicable agreement, by sustaining or disputing the claims of one party or by bringing new relevant information to the matter, including by proposing different forms of reparation. Remarkably, the revised Rules of Court no longer require that the intervening state establishes the relation between it and the parties to the case. This is a substantial revision that may allow third states to intervene in a matter in the interests of justice.

5.2 Witnesses, experts and others

At times the contributions of persons acting as witnesses, experts or in any other capacity may result in beneficially elucidating the facts of the case and contributing to forms of reparation to address the assessed harm. According to Rule 55(1) of the Rules of Court, these persons may be summoned by the African Court itself, at the request of a party or by the African Commission where applicable. For the purposes of protecting the safety of these interveners, the revised Rule 33(2) provides that the Court may request state parties to take

special measures that ensure the security of any party summoned by the Court.

5.3 *Amici curiae*

The African Court referred to the judgment of the Inter-American Court in the case of *Kimel v Argentina* to define the role of the *amicus curiae*. In this case the Inter-American Court stated that *amici curiae* are 'third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court'.⁶⁰

The Inter-American Court also identified the double role of *amici curiae*: on the one hand, their contribution to the legal proceeding, supplementing the arguments of the parties, which enables the Court to be better informed and thus improving the decision-making process and, on the other, their participation itself, which strengthens the legitimacy of the system as it reflects the views of more members of society, furthering democratic values.⁶¹

Even if *amici curiae* are only implicitly mentioned under Rule 55(2) and indirectly under Rule 71(1)(f), the practice of both the African Commission and the African Court *de facto* has included the possibility to receive assistance from them. In fact, the African Commission affirmed in the case of *Muzerengwa* that accepting briefs from *amici curiae* is in sync with its case law.⁶² In the case of *Ingabire Victoire Umuhoza v Republic of Rwanda* the African Court affirmed the possibility to obtain briefs from *amici curiae* stating that the Rules of Court empower the Court to receive evidence from any individual that could contribute to enlighten a case.⁶³ In fact, the Court has insisted that the admission of *amici curiae* is a matter of discretion of the Court, as well as the decision on what it 'considers relevant and non-partisan from the *amicus curiae*'.⁶⁴

The African Court has determined in its Practice Directions the procedure for *amici curiae* to submit a brief to the Court.⁶⁵ First, the

60 *Kimel v Argentina* IACHR (2 May 2008) Series C 177 para 16, mentioned in Application 3/2014, *Ingabire Victoire Umuhoza v Republic of Rwanda* AfCHPR (5 July 2016) para 38.

61 *Kimel v Argentina* (n 60) para 16.

62 *Muzerengwa & Others v Zimbabwe* (2011) AHRLR 160 (ACHPR 2011) para 78.

63 *Ingabire Victoire Umuhoza* (n 60) para 37.

64 *Ingabire Victoire Umuhoza* para 38.

65 African Court 'Practice directions to guide potential litigants', <http://www.african-court.org/wpafc/wp-content/uploads/2020/06/Practice-Directions-to-Guide-Potential-Litigants-En.pdf> (accessed 30 May 2021).

potential *amicus curiae* should submit a request to the Court indicating the contribution they wish to make and the case to which it is related (paragraph 42). The Court will then proceed with the examination of the request and decide whether it is accepted or not (paragraph 43). Successful applicants will be invited to make submissions to the registrar and will receive the application submitted to the Court together with subsequent pleadings related to it (paragraph 44). The *amicus curiae* will be able to submit the brief at any point during the proceedings, which will be immediately shared with the parties to the case (paragraphs 44 and 46). Lastly, the Practice Directions also foresee the possibility for the Court to invite *proprio motu* an individual or organisation to act as *amicus curiae* on a pending case (paragraph 45).

The participation of amici curiae in the contentious process can be very useful in providing information that supplements the arguments of the parties and enriching the knowledge of the Court. The approach taken thus far by the African Court must remain as welcoming as possible; there is no requirement that *amici curiae* be individuals or organisations based in Africa. While *amici curiae* may result especially helpful in assisting the Court with relevant precedents from other regional courts, thus easing the time and budgetary burden on the Court itself, they can also result in being helpful beyond legal arguments and include statistics, forensic expertise, socio-economic considerations and other relevant contributions from a wide range of disciplines.

The important role of *amici curiae* calls for the creation of an inclusive procedure that actively promotes the participation of third party contributors. Once an application has been received by the Court, the office of the registrar develops a summary of the case. Together with the publication of this summary, the registrar could include a second document, a template, an invitation for admission of potential *amici curiae* containing information about the case, time limits and a link to the notice of application to act as *amicus curiae*.⁶⁶ The time limit set by the Court to apply can be 12 weeks, such as that indicated under Rule 44 of the Rules of Procedure of the European Court for third party interventions. This time limit ensures enough time for potential contributors to develop and send their concise requests and ensures that the Court will be able to deal with all requests in an ordinary session. Once the African Court grants

66 African Court 'Notice of application to act as *amicus curiae*', <http://www.african-court.org/en/images/Party%20Forms/AfCHPR%20017%20NOTICE%20OF%20REQUEST%20TO%20ACT%20AS%20AMICUS%20CURIAE%20FORM%20017.pdf> (accessed 30 May 2021).

the status of *amicus curiae* to some or all the interested parties, the registrar should immediately inform them about such decision, share with them the application and subsequent pleadings, and request them to submit their written contribution which may be capped to 10 to 20 pages and a certain font and size. The parties to the case shall also be duly notified of such a decision. Once the registrar receives the contributions of the *amici curiae*, it should make these available to the parties. If deemed necessary, the Court should have the discretionary power to request more detailed information to a particular *amicus curiae*. This suggested procedure must be complemented by measures that increase the awareness of its existence.

The possibility for the African Court to actively approach individual experts and organisations is advantageous in two circumstances: First, in cases where the Court is aware of its limitations as to the facts and legal issues, it allows the Court to contact individuals or organisations and request specific information regarding the problematic issue; and, second, it provides a possibility for the Court to obtain additional information in cases where no parties have requested to act as *amici curiae* during the time limit set or the information provided has not sufficiently assisted the Court in the determination of a case.

6 Conclusions

The revised Rules of Court clarify previously imprecise rules and expand the scope of specific procedures. The revised Rules 40(4) and 69(3) clearly are aimed at encouraging applicants to include all requests for reparations together with the main application for the Court to be able to determine pertinent forms of reparation together with the judgment on the merits. This initiative of procedural economy also seeks to shorten the time for victims of human rights violations to receive reparations for the harm endured.

Whereas there are important developments with regard to provisional measures, such as the implicit reaffirmation of their binding nature under Rule 59(6), the revised Rules of Court fail to address the temporal inconsistency when setting time limits for the respondent state to respond to requests for provisional measures and do not foresee the possibility of amending or revoking them at the initiative of the Court or at the request of a party.

Since the African Court is yet to face an amicable settlement and deal with a pilot-judgment procedure, it is important for the judges

and the registrar to reflect further on and draw inspiration from the experience of other African and regional bodies. In particular, it is suggested that the Court ensures that future amicable settlement provides adequate and effective reparations, taking into account the unequal position that applicants may face in comparison with the respondent states and that all applicants involved in a pilot-judgment procedure are given the opportunity to share their views and are duly informed of any changes affecting their application.

At the reparations stage, by promoting the participation of victims, witnesses, experts and *amici curiae*, the African Court can prepare itself to better assess the harm suffered by the victims and order measures of reparation accordingly. In this regard, it would be advisable for the Court to continue encouraging the participation of *amici curiae* through the amendment of the outdated 2012 Practice Directions in line with the revised Rules of Court and including clear time limits that would avoid undue delays in the examination of the case.

Lastly, the Court could consider speeding up the process of ordering reparations by developing a steady jurisprudence of ordering certain quasi-automatic reparative measures in judgments where the Court finds a violation of the African Charter. These quasi-automatic measures would include both guarantees of non-repetition, which are generally best assessed by the Court itself, and measures of satisfaction that the Court may consider necessary, such as the common order to publish the judgment, public apologies, actions aimed at honouring the memory of the deceased or reminders of states' obligations to investigate and prosecute perpetrators of human rights violations, together with a tight deadline for the respondent state to implement such measures.

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Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?

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Summary: *The African Commission on Human and Peoples' Rights in recent years has put in place various measures to monitor the implementation of its decisions on individual communications. These include a series of panels and seminars, amendments to its Rules of Procedure, extending the mandate of its Working Group on Communications, clarifying more expressly roles for national human rights institutions and civil society organisations, and calling on states to establish focal points and other procedures at the national level. This article considers the effectiveness of these measures and critically evaluates the role of the African Commission in monitoring the implementation of its decisions. The article draws on the findings of a four-year research project conducted by the University of Bristol's Human*

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Rights Implementation Centre, in collaboration with the Centre for Human Rights at the University of Pretoria; the Human Rights Centre at the University of Essex; and the Middlesex University. This project tracked the implementation of selected decisions on individual communications, from the regional and UN human rights bodies, against nine countries from Africa, the Americas and Europe. These decisions were used as case studies to identify and examine the processes in place at the national, regional and international levels, to monitor and facilitate implementation. Among the themes explored was an examination of the extent to which there may be a difference in the discourse and behaviour of various domestic actors depending on which body issued the decision. In relation to decisions of the African Commission, this research identified that while there has been increased attention paid by the Commission to the issue of monitoring the implementation of its decisions, it nevertheless lacks strategic direction and there is a risk that the momentum and opportunities created by these initiatives will be lost without further strategic and institutional development by the Commission to clarify its role.

Key words: *African Commission; implementation; decisions; monitor*

1 Introduction

When the African Charter on Human and Peoples' Rights (African Charter) entered into force and the African Commission on Human and Peoples' Rights (African Commission) started operating in the late 1980s, it was considered pioneering that this new quasi-judicial body was even willing to pronounce on complaints from individuals or organisations alleging violations of the African Charter's provisions. The idea of a court had been rejected during negotiations on the drafting of the African Charter, it was argued, in part, because this did not fit the 'African' approach of settling disputes in an amicable manner. The final provisions of the African Charter suggest, on paper, a potentially weak organ in the African Commission, albeit with both a protective and promotional mandate.

Over the years the African Commission moved from interpreting the African Charter as providing it with the mandate to decide on complaints submitted by individuals and non-governmental organisations (NGOs), initially adopting decisions of only one or two paragraphs in length, to increasingly lengthy decisions that often list detailed reparations that the state authorities must take to remedy the violations found. Yet, as others have observed, relatively little attention had been paid to 'the degree to which, and under what

conditions, states implement the judgments of the legal bodies designed to interpret and enforce those conventions'.¹ During the last decade there has been growing interest in examining the extent to which states implement decisions or judgments from supranational human rights bodies, including the African Commission, partly in response to what has been described as an 'implementation crisis'.² Within this discourse, scholars such as Heyns have considered the criticism levelled at the human rights bodies for the perceived lack of implementation with their decisions and the consequent impact on their legitimacy.³

This article argues that, although the African Commission has to deliver a broad mandate with limited resources, nevertheless, the Commission has a variety of means by which it can, and does, monitor and facilitate implementation of its decisions. However, it has struggled to use these measures systematically and develop a coherent role for itself in implementation. This position has been further complicated by having to share the space, since 2004, of protecting rights in the African Charter with an African Court on Human and Peoples' Rights (African Court). With the African Commission for a long time having been criticised for its ineffectiveness, one of the reasons for the creation of the African Court was the hope that binding judgments from a continental judicial body would be more likely to be complied with than the perceived 'non-binding' decisions from the African Commission.⁴ While this has not been proved correct, and research has demonstrated that factors other than the legal status of a decision or judgment are more significant in determining levels of implementation,⁵ this nevertheless adds a further dimension to how the Commission should define its role.

There is a school of thought that 'enforcement' through processes and clear consequences are more likely to result in implementation

- 1 Open Society Justice Initiative *From judgment to justice: Implementing international and regional human rights decisions* (2010) 12.
- 2 Open Society Justice Initiative (n 1) 11; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 1.
- 3 C Heyns & F Viljoen *The impact of the United Nations human rights treaties* (2002) 6; Murray & Long (n 2); P Engstrom 'Reconceptualising the impact of the Inter-American human rights system' (2017) 8 *Direito & Práxis Revista* 1250.
- 4 UO Umzurike 'The protection of human rights under the Banjul Charter on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* 82; G Naldi & K Magliveras 'The proposed African Court of Human and Peoples' Rights: Evaluation and comparison' (1996) 8 *African Journal of International and Comparative Law* 945; N Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 64.
- 5 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights between 1993 and 2004' (2007) 101 *American Journal of International Law* 33; Murray & Long (n 2).

by states.⁶ Consequently, one of the main criticisms of the African Commission, and other supranational bodies, is that the lack of enforcement mechanisms makes them weak and hinders implementation of their findings.⁷ However, other scholars have argued that persuasion, dialogue and cooperation is more effective in securing implementation.⁸ In practice, supranational bodies can, and do, play a variety of roles in implementation, such as monitoring, persuading, facilitating, and naming and shaming. Drawing upon a project aimed at tracking implementation of supranational bodies' decisions,⁹ this article argues that the African Commission can increase the likelihood of implementation of its decisions by clarifying its role and developing a more strategic approach to using both soft and more forceful approaches at various stages in the post-decision process.¹⁰

Although the African Commission has set up procedures and used its existing mechanisms, as will be seen below, as a way of tracking the measures taken by states, it has employed these inconsistently and has not made full use of the range of tools at its disposal. Overall, it is difficult to discern a clear approach to monitoring implementation.

This lack of clarity has had an impact not only on the extent to which it considers it should, through dialogue, persuade states to implement its decisions, or take more forceful measures, but also how much discretion and leeway it should be providing to states in repairing the harm done; whether and how it will assess whether states have done enough; how visible these processes should be; and when it will increase pressure by referring to judicial or political bodies. If the African Commission were clearer in its role, this could ensure greater consistency and coherence in its approach, thereby increasing the likelihood of implementation.

6 G Downs 'Enforcement and the evolution of cooperation' (1998) 19 *Michigan Journal of International Law* 319.

7 GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 468; L Oette 'Bridging the enforcement gap' in C Hillebrecht, *Domestic politics and international human rights tribunals. The problem of compliance* (2014) 19.

8 OC Okafor *The African human rights system, activist forces and international institutions* (2007) 83-86; C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: What role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71.

9 www.bristol.ac.uk/law/hrlip (accessed 14 November 2021).

10 Sandoval et al (n 8).

2 Setting the scene: The importance of implementation

There is no consistent approach to the application of the terms 'implementation' and 'compliance'. They are used inconsistently and sometimes interchangeably by human rights bodies, states, civil society organisations (CSOs), scholars and other stakeholders. The African Commission is no exception and there is no coherent policy on the terms used, when and in what context.

In this article we apply the term 'implementation' to the process by which states take measures at the national level to address issues of concern raised by the human rights treaty bodies. Typically, this is a legal process to incorporate them in 'domestic law through legislation, judicial decision, executive decree, or other process'.¹¹

The implementation of decisions is important for numerous reasons. First, states have an obligation under international law to repair any harm done to victims of human rights violations. This right is enshrined in numerous treaties and instruments, and the African Commission has reiterated that '[s]tate parties to the African Charter on Human and Peoples' Rights (the African Charter) are obliged to ensure both in law and practice that victims of violations of the human rights enshrined in the African Charter have access to and obtain redress'.¹²

In addition to identifying individual measures that need to be addressed, decisions on individual communications can assist states to identify areas in need of reform. Implementation processes can form part of ongoing efforts to develop strategies that support institutional or legislative reform; capacity building and training of state officials and agents, or anti-corruption initiatives, to strengthen the professionalism of public services and build trust in state institutions.¹³ As the Office of the United Nations High Commissioner for Human Rights (OHCHR) has noted, it is through

the adjudication of individual cases, that international norms that may otherwise seem general and abstract are put into practical effect. When

11 D Shelton 'Law, "non-law" and the problem of soft law' in D Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (2003) 5.

12 Art 5(1) General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment.

13 D Long & R Murray *Providing reparation for human rights cases: A practical guide for African states* (2019), <https://www.bristol.ac.uk/media-library/sites/law/documents/Guide.pdf> (accessed 29 November 2021).

applied to a person's real-life situation, the standards contained in international human rights treaties find their most direct application.¹⁴

Within this implementation dynamic between states and complainants and victims, it is recognised that supranational bodies such as the African Commission have a key part to play to incentivise, facilitate and trigger implementation.¹⁵ In this context, the Commission can, and does, undertake a range of roles in the monitoring its own decisions, whether this is gathering information; reporting on the measures taken; engaging in dialogue with the parties; interpretation and technical assistance; assessment; coordination; or enforcement,¹⁶ although, as this article argues, our research found that the African Commission is not using these approaches systematically or fully.

Softer forms of interaction, such as 'deliberation, cooperation and continuous exchange'¹⁷ (a managerial approach to compliance),¹⁸ may in certain circumstances be more effective. Full implementation can take time and, therefore, the ability to maintain this dialogue over a sustained period, if necessary, is also important.¹⁹ However, dialogue may run its course or not be effective for certain situations and, therefore, the ability to move to less persuasive measures, what Heyns refers to as turning 'the international enforcement screws tighter',²⁰ may be required.

- 14 Office of High Commissioner for Human Rights *Procedure for complaints by individuals under the human rights treaties* (2019), <https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx> (accessed 29 November 2021).
- 15 A Donald, D Long & A-K Speck 'Identifying and assessing the implementation of human rights decisions' (2020) 12 *Journal of Human Rights Practice* 126; Murray & Long (n 2) 119, 135, 136, 139; D Long & R Murray 'The role and use of soft law instruments in the African human rights system' in S Lagoutte, T Gammeltoft-Hansen & J Cerone (eds) *Tracing the roles of soft law in human rights* (2016) 99.
- 16 R Murray et al 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150.
- 17 B Cali, & A Koch 'Lessons learnt from the implementation of civil and political rights judgments' (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1858663 (accessed 29 November 2021).
- 18 A Chayes & A Chayes *The new sovereignty: Compliance with international regulatory agreements* (1995).
- 19 C Sandoval et al Practice Note 'The European system of human rights protection: no Rolls-Royce, but a solid engine fit for the future?' (2020) 12 *Journal of Human Rights Practice*.
- 20 C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483.

3 Overview of African Commission and its procedures to monitor implementation

The African Commission has been willing to take on a monitoring role, as illustrated not only by mechanisms it has set up specifically to follow up on its decisions, but also through the use of its other procedures. Prior to the adoption of revised Rules of Procedure in 2010 there was no institutionalised procedure to follow up on decisions, although the Commission had used its broad range of procedures and mechanisms to follow up on its decisions, albeit on an *ad hoc* basis.²¹ The procedure for follow-up on decisions is now set out under Rule 125 of the newly-revised Rules of Procedure, adopted in 2020.²² This Rule requires the state concerned to inform the African Commission, within 180 days, of the measures that are being taken to implement a decision, where there is a finding of a violation.²³ The Rule also prescribes a role for the commissioner, who is the Rapporteur for the Communication, to be a focal point for monitoring implementation.²⁴ In accordance, with this Rule the African Commission can also raise issues of 'non-compliance' with its decisions, and refer the matter to the attention of the competent policy organs of the African Union (AU).²⁵

However, as discussed below, despite the requirement for the state concerned to reply, and the creation of focal points at the African Commission on specific communications, in practice the time limits for replies are typically ignored, and the Commission struggles to obtain information from the state on its actions post-decision.²⁶ Furthermore, the Commission has appeared reluctant to inform and engage the AU organs, when a state is apparently failing to implement.²⁷

In 2011 the African Commission established a Working Group on Communications, and although initially this Working Group was not given the express mandate to follow-up on decisions,²⁸ this was

21 Murray & Long (n 2) 120-121.

22 African Commission on Human and Peoples' Rights 'Rules of Procedure of the African Commission on Human and Peoples' Rights', <https://www.achpr.org/rulesofprocedure#ch3.3> (accessed 29 November 2021).

23 Rule 125(1) (n 22).

24 Rule 125(5) & (6).

25 Rule 125(8).

26 African Commission on Human and Peoples' Rights 'Report on the Status of Communications and Intersession Report of the Working Group on Communications' (2020) 25-27.

27 Murray & Long (n 2) 119-139.

28 African Commission on Human and Peoples' Rights 'Resolution Establishing a Working Group on Communications and Appointment of Members' (2011).

rectified in 2012 when a resolution was passed which expanded the mandate of this Working Group, entrusting it to:²⁹

- (1) coordinate follow-up on decisions of the Commission on Communications, by concerned Rapporteurs;
- (2) collect information on the status of implementation of the Commission's decisions;
- (3) present a consolidated report on the status of implementation of the Commission's decisions on Communications at each ordinary session, in line with Rule 112(7) of its Rules of Procedure.

This mandate has been renewed in subsequent resolutions, most recently in 2020.³⁰ The Working Group, therefore, has an explicit power and duty to coordinate follow-up activity. However, although the Working Group does submit an activity report with a specific section devoted to implementation of its decisions, these reports nevertheless contain little by way of useful data. The Working Group has highlighted that as a result of a lack of information, 'it is extremely difficult to measure the level of implementation and to assess the impact of the Commission's decisions'.³¹

In recent years the African Commission has reflected on its role in monitoring the implementation of decisions. In 2017 and 2018 it held two regional seminars on this issue, the first in Dakar in August 2017³² and the other in Zanzibar in September 2018.³³ These consultations brought together Commission members with representatives from states, national human rights institutions, and civil society to take stock and discuss ways in which to strengthen the African human rights system, through the Commission's human rights promotion and protection mandate. The outcomes of these discussions provide some useful and practical ideas, although to date very few have been actioned. For example, one of the recommendations was to establish

29 African Commission on Human and Peoples' Rights 'Resolution on the Expansion of the Mandate of the Working Group on Communications and Modifying its Composition' (2012) 1.

30 African Commission on Human and Peoples' Rights 'Resolution 462 on the Renewal of the Mandate, Appointment of the Chairperson and Reconstitution of the Working Group on Communications' (2020).

31 African Commission on Human and Peoples' Rights 'Report on the Status of Communications and Intersession Report of the Working Group on Communications' (2020) para 25, <https://www.achpr.org/sessions/sessionsp?id=354> (accessed 29 November 2021).

32 African Commission on Human and Peoples' Rights 'Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (August 2017) Dakar, Senegal, <https://www.achpr.org/news/viewdetail?id=13> (accessed 29 November 2021).

33 African Commission on Human and Peoples' Rights 'Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (September 2018), <https://www.achpr.org/news/viewdetail?id=3> (accessed 29 November 2021).

an implementation unit in the Secretariat,³⁴ which would provide necessary support to the Working Group on Communications and a vital focal point to request information from states, complainants and other stakeholders on measures taken to implement decisions. Similarly, a recommendation was made to develop a database with up-to-date information on the status of implementation of decisions by state parties.³⁵ Other recommendations from these consultations were also aimed at increasing visibility by, *inter alia*, developing a communication strategy taking into account the special relationships between the Commission, state parties, national human rights institutions and civil society organisations and to collaborate with all stakeholders, including national human rights institutions, in disseminating recommendations and decisions of the Commission.³⁶

Second, the African Commission has used its other mechanisms to seek information on the measures taken by states to implement the decisions, to monitor that and to persuade states to implement.

The state reporting mechanism under article 62 has been used to follow up on decisions, albeit not systematically. Some states have used their periodic state party reports to inform the African Commission on the measures they have taken. For example, the Republic of Kenya included specific information on the *Endorois* case in its combined 13th and 14th periodic reports submitted in March 2021. This provides information on the task force established in 2014 to facilitate implementation, and highlights those measures on which it has taken action, as well as those that are outstanding. It also indicates some challenges for implementation.³⁷

Although by no means typical, the African Commission has sometimes included in its decisions an express recommendation for the state to provide information on implementation in its next periodic report. For example, in the case of *LRF v Zambia* the Commission requested 'the Republic of Zambia to report back to the Commission when it submits its next country report in terms of Article 62 on measures taken to comply with this recommendation'.³⁸ The revised Rules of Procedure, as mentioned above, include a series of deadlines for a violator-state to provide information on implementation, and

34 African Commission on Human and Peoples' Rights (n 33) 9.

35 African Commission on Human and Peoples' Rights (n 33).

36 African Commission on Human and Peoples' Rights (n 33) 9.

37 Republic of Kenya combined 12th and 13th Periodic Reports 2015-2020 paras 144-146.

38 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

these could be reinforced by a standard recommendation in decisions requiring information on implementation in the next periodic report.

In accordance with Rules 7, 76 and 86 of the Rules of Procedure, the African Commission is mandated to undertake promotional and protection missions to states. In a few instances these missions have been used by commissioners as an opportunity to gather information on any measures taken to implement its decisions, and to engage not only with the parties concerned but also other stakeholders such as national human rights institutions and CSOs. For example, during a promotional visit to Mauritania in 2012, questions were asked in relation to a number of related communications.³⁹ Similarly, in a mission to Botswana in 2005 the visiting delegation requested information on the steps taken to implement recommendations on the decision on the *Modise v Botswana* communication.⁴⁰

The African Commission has also been receptive to developing and using other measures to focus on the implementation of its decisions, although such measures are exceptional. For example, back in 1995, even before follow up on decisions was expressly provided in the Rules of Procedure, the Commission used an extraordinary session to focus principally on follow-up on a number of communications involving the government of Nigeria.⁴¹

More recently, mirroring the approach of the Inter-American Court of Human Rights,⁴² the African Commission has held two 'implementation hearings', at the request of the complainants, as a means to gather information and foster dialogue to encourage action by the state to provide the requisite reparations measures, one in respect of a series of cases against Mauritania, the other for a case against Kenya.⁴³

39 African Commission on Human and Peoples' Rights Report of the Promotional Mission to the Islamic Republic of Mauritania (2012) 9.

40 African Commission on Human and Peoples' Rights Report of the Promotional Mission to the Republic of Botswana (2005) 13.

41 African Commission on Human and Peoples' Rights 'Second Extra-Ordinary Session Final Communiqué' 1995) para 1; African Commission on Human and Peoples' Rights 'Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights' (18-19 December 1995).

42 Art 69(3) Inter-American Court Rules of Procedure (2009), <https://www.cidh.oas.org/basicos/english/basic20.rules%20of%20procedure%20of%20the%20court.htm> (accessed 29 November 2021); C Sandoval 'The power of hearings: Unleashing compliance with judgments at the Inter-American Court of Human Rights' 19 February 2021, <https://hrcesses.wordpress.com/2021/02/19/the-power-of-hearings-unleashing-compliance-with-judgments-at-the-inter-american-court-of-human-rights/> (accessed 29 November 2021).

43 African Commission on Human and Peoples' Rights 'Thirty-Fourth Activity Report' (2013) 5; Minority Rights Group International 'The Endorois decision – Four years on, the Endorois still await action by the government of Kenya', <http://minorityrights.org/2014/09/23/the-endorois-decision-four-years-on->

In respect of the *Endorois* decision, the implementation hearing was followed by a workshop held on 23 September 2013 on the status of implementation of the *Endorois* decision, organised by the Commission's Working Group on Indigenous Populations/Communities in collaboration with the Endorois Welfare Council.⁴⁴ Unfortunately, the government of Kenya failed to participate in the implementation workshop and to report back as promised during the oral hearing; consequently the Commission adopted Resolution 257 on 5 November 2013 urging the government of Kenya to implement the decision. Such resolutions, in response to the state's failure to implement its decision, have been typically used, albeit rarely, following consistent pressure from the complainants, or as a result of concern over a deteriorating situation in the country concerned.⁴⁵ These resolutions urge compliance by reminding states of the action they should be taking,⁴⁶ and noting the need for dialogue, including a decision to undertake a promotional mission to the country concerned.⁴⁷

Finally, the former Rules of Procedure of the African Commission enabled the Commission to refer cases to the African Court on the basis of a state's failure or unwillingness to comply with its decisions.⁴⁸ The objective of this procedure was to provide a further avenue to apply pressure on a state to implement, and arguably was founded on the mistaken assumption that states are more likely to implement judgments from a regional court than the decisions of the African Commission. Yet, the Commission used this only twice with respect to failure to comply with its provisional measures,⁴⁹ and never for a decision. The revised 2020 Rules of Procedure make no explicit reference to the ability to refer a decision to the African Court on the basis of failure to implement.

the-endorois-still-await-action-by-the-government-of-kenya/ (accessed 12 July 2017).

44 Minority Rights Group International (n 43).

45 African Commission on Human and Peoples' Rights 'Resolution on the Human Rights Situation in the Republic of Cameroon' ACHPR/Res. 395 (LXII) (2018); Resolution on the Human Rights Situation on Eritrea (21 November-5 December 2005).

46 African Commission on Human and Peoples' Rights 'Resolution Calling on the Republic of Kenya to Implement the Endorois Decision' ACHPR/Res.257 (2013).

47 African Commission on Human and Peoples' Rights 'Resolution on the Human Rights Situation in the Republic of Cameroon' ACHPR/Res. 395 (LXII) (2018).

48 Rule 118 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2011).

49 Application 2/2013, *African Commission on Human and Peoples' Rights v Libya*; Application 6/2012, *African Commission on Human and Peoples' Rights v Kenya*.

4 Observations on the African Commission's approach post-decision?

Through these various rules and mechanisms, the African Commission has tried to articulate and apply an approach to monitoring implementation post-decision. Principally, it has focused on gathering information, mostly kept internally, and reporting sporadically on the measures taken by the state to implement the decision.

In a few instances it has gone further to offer a space for dialogue between the parties, a role favoured by the Inter-American Court, although not one with which the Commission is particularly comfortable. For example, although the government of Kenya failed to engage fully with the implementation hearing, and other discussions, in respect of the *Endorois* decision, the hearing enabled the Commission to offer its 'good offices' to the parties to facilitate implementation, to 'forge dialogue and strategise with the government and civil society'.⁵⁰

Yet, when states have not implemented the decision, or not provided sufficient detail to enable the African Commission to conclude otherwise, subject to a few exceptions, the Commission has been largely unwilling to push it further. Where it has taken on the role of 'enforcer', this has involved, as noted above, publishing limited information on decisions that have not been implemented. Similarly, where it could refer cases of non-implementation to the Court or political organs of the AU, these processes have rarely, if ever, been utilised.

4.1 Degree of discretion to states

The reluctance of the African Commission to take stronger measures in the event of non-implementation, for example, to refer the matter to the AU political organs or the African Court, is reflected in the greater discretion and leeway given to states. For example, it is not uncommon for states to fail to adhere to the deadlines in the Rules of Procedure to reply to the Commission on the measures they have taken to implement the decision. Yet, it is not at all clear what the African Commission does to address this, other than issuing further requests for information.

⁵⁰ <https://achpr.org/news/viewdetail?id=139> (accessed 29 November 2021).

In addition, while its decisions show increasing sophistication and specificity in terms of the content of the reparations,⁵¹ the decisions do not show the same level of nuance, for example, with respect to deadlines or identifying relevant actors.

Specificity can mean different things, from the content of the reparation, to deadlines set, and determining the state actors who are responsible for implementation.⁵² However, the African Commission has again been inconsistent in the approach it has adopted, and the degree of discretion given to states, to interpret and elaborate on measures required to implement a decision, has varied from case to case.

4.2 Whether it will assess implementation

Determining whether implementation or compliance has taken place is not a straightforward task. As Hillebrecht notes, '[i]nternational relations and international legal scholars have long struggled with measuring compliance, and part of this challenge comes from the problem of endogeneity'.⁵³ There may not necessarily be a causal link between the behaviour of the state and the particular rule or finding.⁵⁴ Therefore, the 'influence' that the finding of a human rights body may have on state behaviour is an ambiguous concept,⁵⁵ and low statistics on implementation 'can partly be explained by some of the challenges of the follow-up procedure'.⁵⁶ Others have also cautioned against the use of 'judgment-compliance' as a means to assess the effectiveness of international courts.⁵⁷

With these caveats in mind, while the African Commission has been willing to gather information, including from other sources, on the measures taken by the state to implement the decision, it appears to find it much more difficult to make any assessment on the extent to which these measures are appropriate and fulfil what is required. It has not, for instance, made visible any detailed information on what

51 Communication 426/12 *Agnes Uwimana-Nkusi & Saidati Mukakibibi v Rwanda* (2021).

52 R Murray & C Sandoval 'Balancing specificity of reparation measures and states' discretion to enhance implementation' (2020) 12 *Journal of Human Rights Practice* 101-124. GL Neuman 'Bi-level remedies for human rights violations' (2014) 55 *Harvard International Law Journal* 323.

53 Hillebrecht (n 7) 42.

54 Murray & Long (n 2) 28; F Viljoen 'Exploring the theory and practice of the relationship between international human rights law and domestic actors' (2009) 22 *Leiden Journal of International Law* 177, 180; Viljoen & Louw (n 5) 1.

55 Murray & Long (n 2) 28-29.

56 As above.

57 Y Shany 'Assessing the effectiveness of international courts: A goal-based approach' (2012) 106 *American Journal of International Law* 225.

measures states may have taken to implement a decision, neither has it identified any criteria for how it may determine whether or not those measures are sufficient.

4.3 How much visibility

Writing in 2001, Heyns and Viljoen argue that ‘the widespread ignorance of the treaty system in government circles, among lawyers and in civil societies around the world, effectively blocks any impact that the treaties may otherwise have had’,⁵⁸ a criticism also applicable to the African Commission. Thus, increased visibility of the measures that states have or have not taken to implement decisions may ‘heighten the incentive to comply by publicising non-compliance, and giving discursive tools to civil society and other states interested in pressuring for compliance’.⁵⁹ Supranational bodies, and the African Commission among them, have used what Heyns calls ‘the shame factor’ as a ‘potentially powerful tool to influence the behaviour of states’.⁶⁰

The African Commission Working Group on Communications presents an activity report during the public sessions of the Commission that can include any information received on the status of implementation of its decisions. However, reports are not always presented, and even when they are, these reports typically include no information on implementation of specific decisions; rather they have merely bemoaned the lack of information on implementation.⁶¹ Accordingly, although the process for following up on its decisions now is codified in the Rules of Procedure, to date there is still limited data on implementation that is made public.

Part of the problem is that there is an apparent lack of information being submitted to the African Commission by the state concerned or sometimes the complainant. This is compounded by the limited publicity by the Commission of the information it receives. For example, in its Activity Report for November 2016-May 2017 the Working Group noted that ‘[t]o date, it is not in the remit of the

58 Heyns & Viljoen (n 20) 483.

59 AV Huneus ‘Compliance with international court judgments and decisions’ in AV Huneus et al *Compliance with international court judgments and decisions* 17, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198595 (accessed 29 November 2021).

60 C Heyns & F Viljoen ‘The regional protection of human rights in Africa: An overview and evaluation’ in PT Zeleza & PJ McConaughay (eds) *Human rights, the rule of law, and development in Africa* (2011) 129.

61 African Commission on Human and Peoples’ Rights ‘Report on the Status of Communications and Intersession Report of the Working Group on Communications’ (2020) paras 25-27.

Commission to provide an exhaustive and comprehensive report on the status of implementation of its decisions/recommendations pertaining to Communications'.⁶²

4.4 How and when it will bring other actors in

Heyns's 'holistic view of human rights protection' highlights the need to engage with other actors to facilitate implementation.⁶³ Knowing when to refer to judicial bodies or policy organs can be useful when the mandate of the African Commission proves ineffective or to have reached its limit.

As noted above, the previous Rules of Procedure of the Commission provided that it could refer cases of non-compliance to the African Court. This is inherently problematic. First, it requires the African Commission to have a good sense of what the state has done to implement the decision which, as we have seen, can be difficult to obtain and can be very resource intensive. Second, the reparations need to be implementable but also measurable. Finally, it indirectly asks the African Court to add its weight to a matter where the reputation of the Commission has been insufficient to generate action by the state. In effect, by referral, the African Commission is acknowledging its own weaknesses. It therefore is not surprising that no cases were referred for failure to implement a decision.

Referral to policy organs can also facilitate implementation, as the European experience shows, where monitoring of implementation takes place largely in the hands of political actors and not by the European Court of Human Rights itself.⁶⁴ The African Commission has held on to monitoring its own decisions, despite the potential that could be played by the AU policy organs and in particular its ability to refer matters of 'non-compliance' to the AU organs with a request that they 'take the necessary measures for the implementation of its decisions'.⁶⁵ Conversely, the development of these relationships is also dependant on the response of the AU, and here the African Commission has noted that the AU and its policy organs should 'engage more actively'.⁶⁶ Interaction with other AU organs in

62 African Commission on Human and Peoples' Rights 'Inter-sessional Activity Report' (2017) 6.

63 Heyns & Viljoen (n 60) 129-143; Sandoval et al (n 8).

64 Sandoval et al (n 8).

65 Rules 125(8) and (9), Rule 138 Rules of Procedure of the African Commission on Human and Peoples' Rights (2020).

66 African Commission on Human and Peoples' Rights 'Report on the Status of Communications and Intersession Report of the Working Group on Communications' (2020) paras 27 & 32.

monitoring the implementation of decisions, such as the African Peer Review Mechanism (APRM),⁶⁷ the Peace and Security Council⁶⁸ and the Pan-African Parliament (PAP) has been largely forgotten.

The African Commission's revised Rules of Procedure now expressly enable it to seek information on implementation from 'interested parties',⁶⁹ and explicitly for national or specialised human rights institutions to inform it of any action it has taken to monitor or facilitate the implementation of the Commission's decisions.⁷⁰ These provisions have the potential to directly address an ongoing issue for the Commission of a lack of information on measures taken by the state in respect of decisions, and yet, '[g]leaning information from diverse sources about the actions – or omissions – of states is ... a prerequisite for effective follow-up'.⁷¹ Again, however, despite some innovations by national human rights institutions, such as with the adoption of the Guidelines on the Role of National Human Rights Institutions in Monitoring Implementation of Decisions of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples' Rights, and CSOs, such as the production of an implementation dossier,⁷² these have been at the latter's initiative rather than that of the African Commission.

5 Conclusions

The African Commission has clearly done a great deal to focus on implementation over the last few years. Looked at in the round, it has used all aspects of its mandate to try to monitor what states are doing post-decision, and it has attempted to think more strategically, in particular through its seminars devoted to the issues which concluded with practical recommendations. Yet, these approaches have been inconsistent and the momentum gained through various important initiatives has not been sustained. Some of the very useful proposals made from the Dakar and Zanzibar seminars, such as that the African Commission develop a 'communication strategy', organise 'training sessions and implementation seminars' and develop 'guidelines ... with indicators to assist ... in monitoring implementation of

67 African Commission on Human and Peoples' Rights 'Activities as Special Rapporteur on Freedom of Expression and Access to Information' (2010).

68 Wachira & Ayinla (n 7) 465.

69 Rule 125(6) of the Rules of Procedure (n 65).

70 Rule 125(2) of the Rules of Procedure (n 65).

71 Donald et al (n 15).

72 IHRDA 'Communication Nos 54/91-61/91, 98-93-164/97, 196/97, 210/98, *Malawi Africa Association et al v Mauritania, Implementation Dossier*' (2011).

its decisions',⁷³ have not yet all been implemented. Similarly, the African Commission has yet to action publishing decisions 'as soon as possible', including a 'specific clause in each decision according to which the state is responsible for publicising the decision at the national level', and it is not clear whether it has yet created a database 'with periodic updates on the status of implementation' of decisions.⁷⁴

This sporadic approach, we have argued, is the result of the African Commission lacking clarity about what its role should be and, subsequently, what strategy and mechanisms to use and when. This has resulted in a 'patchwork' approach. While it has indicated a willingness to provide a discretion for states in responding to requests for information, and timeframes within which to implement, and although it has stepped into the role of enforcer, on occasion, it is much more reluctant to do so. The Commission has appeared uncomfortable with the use of the more forceful end of the spectrum, and has been unwilling to draw upon the resources of others who might be best placed to do so.

Effective monitoring requires a strategic consideration of various tools of monitoring implementation, persuasive and more forceful, and a nuanced comprehension to appreciate at what stages they might be best utilised. The African Commission does not lack the tools or relationships to do so, but so far has not settled on a clear strategic role.

73 African Commission on Human and Peoples' Rights 'Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2018).

74 African Commission on Human and Peoples' Rights 'Recommendations from Dakar, General Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2017).

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Business and human rights versus corporate social responsibility: Integration for victim remedies

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Summary: *It is a daunting task to discern between the several debates within and surrounding the corporate social responsibility and the business and human rights movements. At the basic level of objectives, for instance, questions arise as to which movement is substantively or comparatively broader in scope. In contributing to the debates, this article investigates their evolution and the intersections within the fields. It finds both movements to be inextricably-linked regulatory movements directed at establishing accountability for the impact of human rights violations. Using the human rights due diligence requirement elaborated by the influential United Nations Guiding Principles on Business and Human Rights as a springboard, the article integrates the shared objective of the two inseparable movements, describing for scholarship and practice, the ambit of a victim-centred accountability remedial framework for business-related human rights abuses.*

Key words: *accountability; business and human rights; corporate social responsibility; impacts; integration; shared objective; victim remedies*

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1 Introduction

Corporate social responsibility (CSR) is not easy to define; it even is suggested that it is impossible to give a generally-acceptable definition.¹ CSR has been traced to different origins including to a governance code of King Hammurabi dating to 1700 BC in ancient Mesopotamia.² More recently, the CSR movement is traceable to government interventionist corporate governance reforms to check the raw exercise of corporate power in the United States in the 1970s.³ Notwithstanding its unsettled definition and its disputed history, CSR is largely accepted as an evolving concept. It is deemed to have evolved beyond philanthropy or the idea of simply giving back to society out of corporate surplus profits.⁴ It has become an idea geared to sensitive awareness in a complex and multi-dimensional debate which challenges the role of business in contemporary society.⁵ In a development of Galbraith's idea of the state exercising a 'countervailing power' as a check on raw corporate power,⁶ Branson describes the emergence of the CSR movement within corporate governance discourse too as an effective check on the raw exercise of power by corporations.⁷ He notes that the CSR movement in developing a practice beyond corporate charity⁸ as an exemplum of corporate governance reform aimed at a countervail to the raw exercise of corporate power.⁹ Bowen is the first to use the phrase 'corporate social responsibility' and notes that businesses must perform an ethical duty ensuring that the broader social impact of their decisions is considered and that businesses that fail to pay due regard to the social impact of their activities ought not to be seen as legitimate.¹⁰

1 T Campbell 'The normative grounding of corporate social responsibility: A human rights approach' in D McBarnet, A Voiculescu & T Campbell (eds) *The new corporate accountability: Corporate social responsibility and the law* (2007) 529-532.

2 NA Amodu *Corporate social responsibility and law in Africa* (2020) 4-5.

3 D Branson 'Corporate governance "reform" and the new corporate social responsibility' (2001) 62 *University of Pittsburgh Law Review* 605-607-611.

4 'Corporation' and 'business' are terms used interchangeably in this article to connote a legal entity or an incorporated association of persons – regardless of size – carrying on commercial activities using the corporate form. Accordingly, other parts of speech and grammatical forms of these words will have corresponding meanings.

5 J Jonker 'CSR wonderland: Navigating between movement, community, and organisation' (2005) 20 *Journal of Corporate Citizenship* 19-21.

6 JK Galbraith *American capitalism: The concept of countervailing power* (1952) 135-141.

7 Branson (n 3) 607-610.

8 Beyond corporate social responsibility historical perspectives in the philanthropic work of wealthy business owners such as John Rockefeller, Andrew Carnegie and Henry Ford who gave away millions of dollars for social use and causes. Amodu (n 2) 4-5.

9 Branson (n 3) 606.

10 H Bowen *Social responsibilities of the businessman* (1953) 6-10.

The business and human rights movement involves the determination and conceptualisation of a systematic relationship between businesses and human rights.¹¹ Compared to the CSR movement, the concept of business and human rights appeared quite recently. The first discussion of business and human rights in international institutions is traced back to the 1980s with the draft United Nations (UN) Code of Conduct on Transnational Corporations.¹² Significant academic attention to the movement was ignited only in the early to mid-1990s.¹³ The late entrance of business and human rights appears to be informed by the dominant assumption in the early part of the last century that the major responsibility for protecting and advancing respect for human rights lay with government. This view limited corporations to having indirect legal responsibility for human rights abuses.¹⁴ The rise in the power, influence and social control of businesses in the wake of globalisation led to the rebuttal of this assumption and, especially in the 1990s, the efficacy was queried of the formula which underpinned the allocation of responsibility for human rights between businesses and states.¹⁵

Although civil society played a part in raising concerns about the role of corporations in human rights, human rights commitments began to feature in the voluntary ethics codes of major multinational corporations following the infamous execution of Ken Saro-Wiwa and eight other Ogonis by the Nigerian government in November 1995. Summing up, the business and human rights movement is relatively recent and is about reinterpreting and redesigning the international human rights regime in a way that includes and addresses the role of non-state actors and particularly corporations as direct duty bearers.¹⁶

Having traced the evolution of the CSR and the business and human rights movements as regulatory concepts that make businesses answerable for the adverse impacts of their activities, this article investigates the intersection or nexus between the movements. Beyond the further exploration and integration of the shared objectives of the movements, the article targets delimitating

11 F Wettstein 'CSR and the debate on business and human rights: Bridging the great divide' (2012) 22 *Business Ethics Quarterly* 739 742.

12 Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc E/1990/94 12 June 1990.

13 W Cragg, DG Arnold & P Muchlinski 'Guest editors' introduction: Human rights and business' (2012) 22 *Business Ethics Quarterly* 1.

14 As above.

15 Cragg et al (n 13) 2, noting that globalisation gave rise to serious questions about not only the willingness but also the ability of national governments to fulfil their human rights responsibilities.

16 Wettstein (n 11) 743.

the regulatory ambit of a victim-centred accountability remedial framework for business-related human rights abuses.

Structurally, the article is divided into five parts. Following this introduction, part 2 conceptually clarifies important ideas in the article and explores the relationship between the closely linked movements of CSR and business and human rights. It also integrates their shared objectives. Part 3 investigates the extent to which businesses may be liable to fulfil human rights obligations and the limits, if any, of the human rights to be fulfilled. Part 4 uses the human rights due diligence requirement of the United Nations Guiding Principles (UNGPs) as a springboard to describing a victim-focused remediation framework. The recommended framework targets ensuring corporate responsibility and accountability for impacts related to human rights abuses. Part 5 concludes the article.

2 Corporate social responsibility versus business and human rights: Clarifications, gaps and intersections

The ambit of the human rights discussed in this article should be clarified. Human rights have been defined in terms of ethics and morality.¹⁷ Therefore, a human right is an especially urgent and morally-justified claim that a person has, simply by virtue of being a human and independently of membership of a particular nation, class, sex, or ethnic, religious or sexual group.¹⁸ Put differently, human rights are fundamental inalienable and inherent rights to which a human is entitled simply by virtue of being a human person regardless of nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status.¹⁹ The rights are said to be held by humans prior to and independently of any legal or institutional rules. Therefore, as the most important and fundamental category of moral rights, their violations always denote a form of humiliation, that is, a form of disregard of a human being's human dignity.²⁰ It must be noted that the foundation of human rights in human morality or as inherently and inalienably entitled

17 Immanuel Kant in his 1797 work *Die Metaphysik der Sitten* (*The metaphysics of morals*), eg, defined rights as 'moral capacities for putting others under obligations'. I Kant *The metaphysics of morals* trans Mary Gregor (1996) 30.

18 M Nussbaum 'Capabilities and human rights' in P de Greiff & C Cronin (eds) *Global justice and transnational politics: Essays on the moral and political challenges of globalisation* (2002) 135.

19 E Giuliani 'Human rights and corporate social responsibility in developing countries' industrial clusters' (2016) 133 *Journal of Business Ethics* 39 40.

20 J Feinberg *Rights, justice, and the bounds of liberty. Essays in social philosophy* (1980) 151; Wettstein (n 11) 740 741.

to by humans appears queried in recent times. For instance, there is precedent for filing for property-based claims for human rights protection by businesses in relation to intellectual property rights held by them. This protection was successfully claimed in the case of *Annheuser-Busch, Inc v Portugal*²¹ where, after reviewing cases where property rights had been asserted with respect to patents and copyrights, the European Court of Human Rights (European Court) concluded that article 1 of Protocol 1²² is applicable to intellectual property as such and, therefore, concluded that corporate-held intellectual property rights are property interests subject to protection under the human rights framework in Europe. To be clear, the human rights conception in this article is rooted not in morality, but in law or legal obligations²³ and, therefore, may be claimed by juristic persons within the confines of the law. The article discusses human rights in terms of legal or quasi-legal obligations enforced by the state or other international organisations (such as the UN) engaged in global governance.²⁴

Supporting the central theme of this article is to further clarify the conceptual ambit of CSR. The CSR movement essentially is regulatory, it is about the acceptance or imposition of constraint upon the narrow pursuit of the profit goal in the wider public interest.²⁵ Also, it may be described as a corporate governance and business management model through which companies are held responsible for the economic, social and environmental impacts of their operations,²⁶ and with which businesses remain competitive, managing risks associated with balancing their legal, ethical, social, economic and discretionary responsibilities.²⁷ CSR has

21 App 73049/01, 45 Eur HR Rep 36, 78 (Grand Chamber 2007).

22 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art 1, Paris, France, 20 March 1952.

23 JD Bishop 'The limits of corporate human rights obligations and the rights of for-profit corporations' (2012) 22 *Business Ethics Quarterly* 124-139.

24 A Ramasastry 'Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability' (2015) 14 *Journal of Human Rights* 237-240.

25 J Parkinson 'Corporate governance and the regulation of business behaviour' in S Macleod (ed) *Global governance and the quest for justice Volume II, Corporate governance* (2016) 3-4.

26 Against its earlier narrow definition, the EU in 2011 clarified its CSR concept in a broader definition as 'the responsibility of enterprises for their impacts on society'. Sec 3.1 of the EU, Communication from the Commission to the European Parliament 'The Council, the European Economic and Social Committee and the Committee of the Region: A renewed European Union strategy 2011-14 for corporate social responsibility' COM (2011) 681 Final 6; also AG Scherer & G Palazzo 'Toward a political conception of corporate responsibility: Business and society seen from a Habermasian perspective' (2007) 32 *Academy of Management Review* 1096.

27 N Amodu 'Corporate social responsibility and economic globalisation: Mainstreaming sustainable development goals into the AfCFTA discourse' (2020) 47 *Legal Issues of Economic Integration* 71-75.

become about corporate accountability for impacts on corporate stakeholders including employees, creditors, customers, suppliers, contractors, local communities and host governments among other stakeholders.²⁸ Although ‘corporate accountability’ and ‘corporate liability’ have been semantically differentiated,²⁹ this article uses the terms interchangeably to represent instances of liability to be called to account or legal obligations to answer for responsibilities or conducts. Therefore, corporate accountability for human rights, for instance, would mean corporate liability for legal obligations on a business to be responsible and account or answer for adverse human rights impacts.

CSR is a neutral idea.³⁰ As a regulatory concept, it may instrumentally be used as a countervailing power by the state to check adverse human rights impacts the result of the raw exercise of corporate power,³¹ it may also be self-regulatorily used by the business community to manage risks associated with balancing their legal, ethical and socio-economic responsibilities in the wider societal context. Therefore, there is nothing inherently voluntary or mandatory about the CSR movement or about making businesses behave responsibly and accountably. Different regulatory techniques may be adopted across national or intergovernmental levels whether rule-based, principle-based, soft law, hard law, voluntary, mandatory or a smart mix of all of the above. In this light, Garriga and Mélé describe different theoretical perspectives expanding the ambit of CSR. Their classification of CSR perspectives and theories – into instrumental, political, integrative and ethical – generally is accepted as representing a brilliant account of the foremost academic debate on CSR.³²

Not unrelated to the effects of globalisation and the increased power and roles of corporations beyond commercial activities, CSR political perspectives have grown in influence.³³ For instance, Scherer

28 The stakeholder group in businesses varies depending on size, the nature of business or transaction involved, the time in question, among other factors. Amodu (n 2) 48 49.

29 N Bernaz ‘Enhancing corporate accountability for human rights violations: Is extraterritoriality the magic potion?’ (2013) 117 *Journal of Business Ethics* 493 494.

30 N Amodu ‘Sustainable development and corporate social responsibility under the 2018 petroleum host and impacted communities development trust Bill: Is Nigeria rehashing past mistakes?’ (2019) 4 *African Journal of Legal Studies* 319 324.

31 Branson (n 3) 608; Galbraith (n 6) 141; see also specific laws at nn 83 and 84 below.

32 E Garriga & D Mélé ‘Corporate social responsibility theories: Mapping the territory’ (2004) 53 *Journal of Business Ethics* 53 65.

33 K Buhmann ‘Public regulators and CSR: The “social licence to operate” in recent United Nations instruments on business and human rights and the juridification

and Palazzo, underscoring the interwoven nature of the hitherto traditional roles of business and state actors, give their perspective on a 'political CSR' as being about 'an extended model of governance with business firms contributing to global regulation and providing public goods'.³⁴ The CSR discourse, therefore, is not necessarily a discussion about corporations only; its topics and regulatory ideas also pertain to non-corporate actors including the state in seeking a countervailing force to the raw exercise of corporate power. To this end the elaborate principles, and commentaries within the three differentiated but complementary pillars of the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs)³⁵ not only describe how corporations may behave responsibly in society but also clarify the role of state actors in ensuring that corporations within their jurisdictions are well behaved. Technically, therefore, states have CSR (accountability for impacts) obligations, including business-related state obligations to safeguard human rights from any negative social, environmental, and economic impacts of corporate activities.

Having shown that CSR transcends the practice of corporate charity, it is useful to explain why the idea of limiting the CSR discourse to philanthropy appears to have endured especially in the Global South. The Achilles heel in the debate is voluntariness.³⁶ Associating CSR with voluntary donations beyond legal requirements or giving back to society out of corporate surplus became entrenched in business communities and was promoted as the official position in a large economy and host to many of the largest multinational enterprises, the European Union (EU).³⁷

of CSR' (2016) 136 *Journal of Business Ethics* 699 710.

34 AG Scherer & G Palazzo 'The new political role of business in a globalised world: A review of a new perspective on CSR and its implications for the firm, governance, and democracy' (2011) 48 *Journal of Management Studies* 900 901.

35 J Ruggie 'Final report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises' endorsed as the 'Guiding principles on business and human rights: Implementing the United Nations' protect, respect and remedy framework' (UNGPs) A/HRC/17/31, 21 March 2011, <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (accessed 7 June 2021).

36 For criticism of voluntary conceptualisation, see Parkinson (n 22) 4-7; H Ward 'Corporate social responsibility in law and policy' in N Boeger, R Murray & C Villiers (eds) *Perspectives on corporate social responsibility* (2008) 8 11; C Villiers 'Corporate law, corporate power and corporate social responsibility' in Boeger et al (above) 96 100.

37 A Green Paper issued by the European Commission in 2001 defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'. European Union 'Communication of European Union country's commission green paper on promoting a European framework for corporate social responsibility' COM (2001) 366 Final 18 July 2001. While not specifically mentioning CSR, the Organisation for Economic Cooperation and Development

The debate has since moved on, especially in the Global North, as voluntariness appears, with minimal exceptions, no longer fundamentally linked to CSR. The EU changed course in its 2011 communication, deviating from its 2001 earlier voluntarism-based approach, broadly defining CSR in terms of the 'responsibility of enterprises for the impact on society'.³⁸ In the renewed EU CSR policy framework corporations are now expected to identify, prevent and mitigate possible adverse impacts which their activities may have on society.³⁹ However, the harm already has been done as the conception of CSR influenced emerging economies and is still restrictively construed as voluntary corporate philanthropy and undertaking community development projects.⁴⁰

The failure until recently to see CSR as neutral in developed economies also impacted the business and human rights debates because it was assumed that the CSR movement focused only on social and environmental matters and did not integrate concerns for corporate-related human rights abuses,⁴¹ whereas the reality is that CSR scholarship has moved beyond voluntary corporate charity and had incorporated human rights as part of its core topic. However, CSR scholars often did not specifically identify the issues as being about human rights. The disconnect, therefore, seems to be that while many business and human rights scholars assumed that CSR advocates addressed something different from corporate responsibility and accountability including human rights impacts, both movements are in agreement in terms of making businesses answerable for the socio-economic and environmental impacts of corporate activities. Wettstein summarised this view as follows:⁴²

To be sure, these elaborations ought not to imply that CSR has avoided or downright ignored human rights issues; in fact, many of the problems that CSR scholars are regularly dealing with are, at their core, human rights problems. Rather, the problem is that they have seldom truly been addressed as such. For the reasons stated above, they have been addressed not in the terminology of justice, but often in that of

(OECD) appear to also define CSR in light of a set of 'voluntary principles and standards for responsible business conduct consistent with applicable laws'. *OECD guidelines for multinational enterprises* (2011) 13.

38 European Union Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Region: *A renewed European Union strategy 2011-14 for corporate social responsibility* COM (2011) 681 Final 6.

39 European Union (n 38) para 8.

40 Amodu (n 2) 17.

41 Ramasastry (n 24) 239; S Waddock & N Smith 'Relationships: The real challenge of corporate global citizenship' (2000) 105 *Business and Society Review* 47.

42 Wettstein (n 11) 751; also F Wettstein 'Beyond voluntariness, beyond CSR: Making a case for human rights and justice' (2009) 114 *Business and Society Review* 125 (citations omitted).

virtue and beneficence or even philanthropy and charity. This not only sells CSR's own importance and relevance short, but it threatens to empty human rights of the moral urgency that constitutes and defines their very nature as the most fundamental claims and imperatives on the moral spectrum.

These views may hold sway for CSR scholars writing about business and human rights and, although not specifically describing it, a similar approach is correct for business and human rights scholars who discuss topics at the heart of the CSR movement without labelling them. Part 1 of this article alluded to the origins of CSR as a countervailing force by which the state checked the raw exercise of corporate power in society. As is evident from the earlier described origin of business and human rights, the business and human rights movement and writings also are regulatory discussions about countervailing the powerful influence of corporations and redistributing responsibilities, making business accountable for their human rights impacts on society as direct duty bearers.⁴³

The inextricable connection between the regulatory movements of CSR and business and human rights which renders nugatory any attempt to compartmentalise them appears in their ultimate link to the proposals presented by Professor John Ruggie, first within the framework of the United Nations Global Compact (UNGC)⁴⁴ and thereafter with the UNGPs. Ruggie's work is pivotal to these movements; from 1997 to 2001 he served as UN Assistant Secretary-General for Strategic Planning, a post created specifically for him by then Secretary-General, the late Kofi Annan. His areas of responsibility included assisting Mr Annan in establishing and overseeing the UNGC which, as the world's largest CSR initiative, enjoins businesses to support and respect the protection of internationally proclaimed human rights in their sphere of influence. His work from 2005 to 2011 as the UN Secretary-General's Special Representative on Business and Human Rights culminated in the Human Rights Council unprecedentedly and unanimously endorsing UNGPs.

43 While not specifically labelled as human rights obligations on businesses, there are a few statutory provisions in Africa and around the world from which human rights and CSR obligations on businesses may be deduced. Eg, see sec 12(1) of Ghana's Constitution of 1992 with Amendments through 1996; sec 15 of the Constitution of the Republic of Malawi 1994, as amended; sec 8 of the Constitution of the Republic of South Africa, 1996; sec 2 of the Constitution of Zimbabwe 2013; sec 20 of the Constitution of Kenya 2010; see also nn 80 and 81 below.

44 United Nations Global Compact, <http://www.unglobalcompact.org> (accessed 7 June 2021).

Criticism⁴⁵ has trailed the UNGPs in the business and human rights regulatory movement, but it remains firmly embedded in the current regulatory ecosystem for business and human rights⁴⁶ and has successfully elaborated the implications of existing standards and practices for states and businesses by integrating them into a single comprehensive template providing a global common platform for action.⁴⁷ These international instruments are vital to any CSR and business and human rights debate as, although based on voluntary commitment by businesses, they clearly articulate the central theme that CSR and business and human rights really are neutral regulatory ideas about corporate responsibility and accountability⁴⁸ for impacts as there is nothing inherently voluntary, soft law, hard law or mandatory about them. The UNGPs, for instance, confirm that states owe the obligation to ensure businesses respect human rights and promote this practice through 'smart' regulation which confers the regulatory latitude afforded states for a mixture of incentives, soft guidance and hard law.⁴⁹

It can be questioned whether the CSR movement is broader in scope than the business and human rights movement despite their being linked. It is contended that business and human rights is a broader construct than CSR as business and human rights contemplates an explicit and essential role for the state in supervising their corporate citizens.⁵⁰ This argument is based on the view that CSR by contrast

45 LC Backer 'Considering a treaty on corporations and human rights: Mostly failures but with a glimmer of success' in JL Cernic & N Carrillo-Santarelli (eds) *The future of business and human rights* (2018) 92-93; S Deva 'Alternative paths to a business and human rights treaty' in JL Cernic & N Carrillo-Santarelli (eds) *The future of business and human rights* (2018) 13-16; D Chirwa & N Amodu 'Economic, social and cultural rights, sustainable development goals, and duties of corporations: Rejecting the false dichotomies' (2021) *Business and Human Rights Journal* 21.

46 The UNGPs remain relevant within the treaty debate in the activities of the UN Open-Ended Intergovernmental Working Group (OEIWG). The OEIWG was given a mandate in 2014 by the Human Rights Council, post-UNGPs endorsement, to elaborate a legally-binding instrument on transnational corporations with respect to human rights. UNHRC, 26th session 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' 14 July 2014 UN Doc A/HRC/RES/26/9. The Human Rights Council is the key independent UN intergovernmental body responsible for human rights. It was created in 2006 replacing the 60 year-old UN Commission on Human Rights. The Office of the UN High Commissioner for Human Rights (OHCHR) has responsibility for the promotion and protection of human rights in the UN system.

47 N Jagers 'Access to justice for victims of corporate-related human rights abuse: An Echternach-procession' (2015) 33 *Netherlands Quarterly of Human Rights* 269.

48 Para 1 of Ruggie's original mandate reads: 'to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'; UN Commission on Human Rights adopted Resolution E/CN.4/RES/2005/69 (my emphasis).

49 Wettstein (n 11) 701.

50 Ramasastry (n 24) 245.

focuses on company decision making in which corporations are actors that need to address their role in society and engagement with communities and stakeholders.⁵¹ On that note, Ramasastry concludes that CSR remains focused on voluntarism and aspirational notions of how companies should engage with stakeholders, whereas business and human rights seeks accountability for victims from corporations implicated in serious human rights abuses.⁵²

This article clarifies that the meaning of CSR extends beyond voluntariness and, in fact, many CSR scholars regularly address human rights problems although seldom labelled as such. It is submitted that business and human rights is not a broader movement.

In the same vein, some authors instead argue that CSR is the broader movement.⁵³ This view also is rejected and it is contended that the debate is not very useful. The contestation of which is broader in meaning is of little value to victims of business-related human rights abuses who require efficient access to effective remedies. Further, although the UNGPs make no specific reference to CSR, this article argues that a holistic view of the explanatory commentaries together with the operational principles of the framework demonstrate that the UNGPs address issues at the core of CSR, especially as elaborated in Pillar II. In the CSR movement it is not illogical to speak about states' CSR obligations in terms of ensuring corporations fulfil human rights obligations as contained in the Pillar I of the UNGPs. A crucial point which concludes this debate is that when appraised against the background of the UNGPs there is a close, inseparable and undeniable nexus between CSR and business and human rights regardless of whichever is considered to have a broader meaning. The movements should be integrated⁵⁴ as having a shared objective directed at corporations' accountability for the social, economic and environmental impacts of their operations. Both are regulatory movements which hold businesses accountable for impacts on human rights.⁵⁵

51 As above.

52 Ramasastry (n 24) 252.

53 Buhmann (n 33) 700 701.

54 Wettstein (n 11) 739.

55 Needless to add that this article does not subscribe to the view that BHR or CSR should be concerned about the broader role that businesses may play in promoting and securing human rights generally. This debate is not addressed in detail in this article, but this author submits that asking corporations to be responsible for the promotion of human rights generally beyond the scope of human rights due diligence is beneficial, neither to the business community the commercial focus of which will become unduly jeopardised having essentially been enjoined to take over the role of the state or to the BHR and CSR movements which, though recognising that states no longer are the sole bearers of direct human rights obligations, should focus only on failures of HRDD and the extent of complicity in any human rights violations by corporations and

It may be argued that the impacts discussed by the CSR movement appear broader than the human rights impact central to the business and human rights movement. However, this argument is not sustainable and misses the important factor that there are different kinds of human rights ranging from social, economic, cultural, civil, political – including the so-called new generation – rights and are interwoven in their implications impacted by businesses. This point is further developed in the next part in delimiting the extent to which corporations are responsible for human rights.

3 Extent of corporate responsibility for human rights

There are human rights and then there are human rights. The responsibility of business enterprises to respect human rights generally refers to internationally-recognised human rights, at a minimum, meaning those expressed in the International Bill of Human Rights (IBHR) and the rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.⁵⁶ However, there are grey areas where human rights (or the extent to which they may be reasonably secured or fulfilled) vary from society to society based on custom, available economic resources and other factors.

The core of internationally-recognised human rights is contained in the IBHR consisting of (i) the Universal Declaration of Human Rights (Universal Declaration)⁵⁷ and the main instruments through which the declaration has been codified: (ii) the International Covenant on Civil and Political Rights (ICCPR),⁵⁸ and (iii) the International Covenant on

the ultimate obligation to protect, promote and secure human rights remains with state actors. Perhaps lessons should be learnt from the failure of the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights of which the core report was that businesses were responsible for 'promoting and securing the human rights set forth in the [UN] Universal Declaration of Human Rights'. See Preamble para 3 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, 2003 Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12 (Geneva, Switzerland: United Nations). Cf Bishop (n 23), suggesting at 137 that 'in countries in which basic health care and schools are not provided by the state, a corporation would be under an obligation to pay school fees and health insurance', eg, towards securing such rights.

56 UNGPs, Operational Principle 12.

57 United Nations General Assembly, Universal Declaration of Human Rights adopted 10 December 1948, GA Res 217 A (III), UN GAOR, 3rd session, UN Doc A/810 (1948).

58 International Covenant on Civil and Political Rights (ICCPR) 1976, opened for signature on 16 December 1966, 999 UNTS 171 and entered into force 23 March 1976.

Economic, Social and Cultural Rights (ICESCR).⁵⁹ These are coupled with the fundamental rights in the eight International Labour Organisation (ILO) core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.⁶⁰ The first step in understanding the extent of corporate responsibility for human rights is to establish the limits of human rights to which corporations may be held accountable, if they are impacted negatively. The UNGPs, for instance, have not distinguished between different categories of rights as either civil, political, social, economic or cultural, because corporations can have an impact on virtually the entire spectrum of internationally-recognised human rights and their responsibility is to respect all such rights.⁶¹ There is no agreement among human rights scholars on the possibility and desirability of establishing any hierarchy of human rights⁶² and no inherent jurisprudential reason exists for denying the justiciability of any human right.⁶³

In light of the above the value in compartmentalising rights as civil and political rights and others as economic, social and cultural rights appears elusive especially as victims simply seek an effective remedy for violations.⁶⁴ It is arguable that no principled reason exists for upholding the justiciability⁶⁵ of some rights over others,⁶⁶ but there is no gainsaying that the full realisation and fulfilment of some rights may depend on certain circumstances and facts. For instance, it is well established not only within the framework of the ICESCR⁶⁷ but also in scholarship and practice that the fulfilment of the economic, social and cultural rights depends on the maximum

59 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976, opened for signature on 16 December 1966, 999 UNTS 3 and entered into force 3 January 1976.

60 UNGPs, Commentaries to Operational Principle 12.

61 As above. The importation limitation is that even if it applies to all rights, nonetheless they must be in the sphere of the corporations' responsibility as simplified in the HRDD framework.

62 Giuliani (n 19) 41.

63 J Nolan & L Taylor 'Corporate responsibility for economic, social and cultural rights: Rights in search of a remedy?' (2009) 87 *Journal of Business Ethics* 433 436.

64 To this effect, it is curious why two human rights covenants – ICCPR and ICESCR – ended up being adopted where only one originally was envisaged. In the UN General Assembly Draft International Covenant 1950 there was initial support for a single international covenant. Nolan & Taylor (n 63) 435 436.

65 A right is justiciable if it is 'capable of being formulated to impose strict, judicially enforceable obligations' under law. WM Cole 'Strong walk and cheap talk: The effect of the international covenant of economic, social, and cultural rights on policies and practices' (2013) 92 *Social Forces* 168.

66 Nolan & Taylor (n 63) 436.

67 Art 2(1).

economic resources available to individual states⁶⁸ and other similar circumstances.⁶⁹

In light of the foregoing it may be questioned that corporations lawfully can avoid liability and accountability for certain kinds of human rights. As elaborated upon in the paragraph below this article argues against the interests of victims of human rights abuses. Part 4 below describes a framework applicable to all human rights and provides an alternative remedial mechanism based on the human rights due diligence of the UNGPs.

In determining the limit to corporate obligations for human rights, cultural rights (as recognised within the IBHR) add a further dimension to the debate. Culture is a complex whole which includes knowledge, beliefs, arts, morals, laws, customs and any other capabilities and habits acquired by a human as a member of society. Cultural rights may be interpreted broadly and involve the right to take part in cultural life, the right to enjoy the benefits of scientific progress and the right to benefit from the protection of moral and artistic rights derived from production of literary or artistic works or other forms of cultural knowledge.⁷⁰

Understanding culture and cultural rights so broadly, this article submits that the compartmentalisation of rights, if done at all, should be targeted at delimiting the extent of remedies to victims when violated and not in determining whether or not they should be or are capable of being fulfilled by states or non-state actors. A useful example appears in the right to education.⁷¹ Even though the right to education is a cultural right, it can be viewed as an economic right because of the associated ability to earn a living. It may equally be viewed as a social right in the sense that it is a means of and for social participation and community benefit.⁷² The right to education may be categorised as a part of civil and political rights since ICCPR guarantees freedom of thought, conscience and religion in teaching and recognises the liberty of parents to ensure the religious and

68 A Nolan 'Privatisation and economic and social rights' (2018) 40 *Human Rights Quarterly* 832.

69 JL Cernic 'A glass half full: Corporate and state responsibilities under economic and social rights during the on-going European financial crisis' (2014) 11 *South Carolina Journal of International Law and Business* 87 93. The European Court has also not found austerity measures to be in violation of the European Convention on Human Rights (European Convention), as states have been given a wide margin to determine an individual's socio-economic rights in accordance with the available financial resources of the state. *NKM v Hungary* App 66529/11, Eur Ct HR (2013) 71.

70 Arts 22 & 27 Universal Declaration; art 15 ICESCR; art 27 ICCPR.

71 Art 26 Universal Declaration; arts 13 & 14 ICESCR.

72 Nolan & Taylor (n 63) 435.

moral education of their children in conformity with their own convictions.⁷³

In this context corporations will not escape accountability for their failure of human rights due diligence if it negatively impacts the right to education of a victim even if such a right is viewed, for instance, as an economic, social and cultural right which is generally considered inferior or not justiciable.

This article submits that such categorisation of rights should be less articulated in business and human rights and CSR discourses especially in the largely neglected area of establishing an effective remedial framework for victims. Further, compartmentalisation or delimiting the extent of rights appears to be inutile. not only because corporations can and do violate all kinds of human rights but also because the extent of human rights capable of being adversely impacted by corporations varies depending on the level of development of a society's human rights system. Therefore, compartmentalisation into a one-size-fits-all model may disadvantage some victims in certain jurisdictions. For example, the question of the right to keep and bear arms, particularly in relation to gun ownership. It is arguable that a gun is only property and not a necessity for survival. However, this argument is difficult to sustain generally. In many rural areas of developing countries, in Africa for instance, the ownership of firearms is considered essential not only for hunting game but also for religious purposes.⁷⁴ A gun ownership system is presented as part of cultural life and a means of survival for such people and a source of identity, meaning and promoting a sense of belonging and is claimed to require being safeguarded by the state if limited by the rights of other members of society.

This debate is beyond the purview of this article, but the gist lies in the above supporting a view that human rights (or the extent to which they may be negatively impacted by corporations and beyond) may be interpreted differently by a society or culture. Compartmentalising groups of rights jeopardises the interests of victims in individual circumstances and any categorisation or compartmentalisation should be aimed at delineating the nature or extent of the remedy available to victims depending on facts or circumstances involved in individual cases but not to answer the question whether or not a categorised right is capable of being fulfilled or violated.

⁷³ Art 18 ICCPR; art 13(3) ICESCR.

⁷⁴ For the 'Ode' group as local hunters among the Yoruba tribe in Nigeria, guns are not used only for hunting purposes but also as an important expression of their cultural and religious lives.

The focus of business and human rights and CSR movements may be shifted to the much-neglected Pillar III within the UNGPs to getting human rights violations remedied to the extent it does not limit others enjoyment of rights.⁷⁵ This approach corresponds to the UNGPs' recognition that all rights are capable of violation but also is consistent with the Universal Declaration that

[i]n 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.⁷⁶

4 Remedial framework for victims

Following on from the discussion of the inseparable link between business and human rights and CSR as regulatory movements and as sharing an objective of accountability for impacts, this part builds on the argument relating to abandoning the categorisation of human rights in favour of focusing on mechanisms which provide effective remedies to victims of all human rights abuses. It is emphasised that the only limitation to seeking remedies for violations of a victim's human rights should be the law.

A state – whether in a domestic or international human rights legal framework not – providing protection for a human right can be supplemented by the remediation framework described below. The remedial framework below – taking into consideration their individual available economic resources, culture and any other relevant factors – nevertheless depends on states explicitly⁷⁷ prescribing appropriate and complementary legal provisions safeguarding human rights in their corporate law system.

This proposed framework proceeds on the assumption that in the absence of a legally-binding international obligation on corporations to fulfil all human rights, the most useful technique to hold corporations accountable for their impacts is through an accountability mechanism building on the human rights due diligence exercise in the UNGPs. The UNGPs are not legally binding on corporations, but

⁷⁵ Art 30 Universal Declaration.

⁷⁶ Art 29(2) Universal Declaration.

⁷⁷ In many jurisdictions there are haphazard labour or environmental laws or provisions which may border on protection of business-related human rights abuses. See, eg, R Janda & JC Pinto 'Canada' in LH Urscheler & J Fournier (eds) *Regulating human rights due diligence for corporations – A comparative view* (2017) 48.

they constitute a useful reinforcement of societal expectations that corporations owe obligations to respect and safeguard human rights in their sphere of responsibility. The human rights due diligence, therefore, becomes pivotal to business and human rights and CSR as regulatory movements creating accountability for impacts. Human rights due diligence is a process where states and businesses not only ensure compliance with laws but also manage the risk of human rights abuses with a view to avoiding them.⁷⁸ The purpose of the human rights due diligence is not merely to identify and review any negative impacts of company operations on human rights but also to assess possible measures for the prevention or mitigation of such impacts. The scope of due diligence varies from business to business, transaction to transaction depending on circumstances.⁷⁹ This article submits that states should incorporate the human rights due diligence in the fabric of their corporate law system to provide remedies to corporate stakeholders the victims of business-related human rights abuses.

The process encompasses the state imposing a legal obligation in the primary company legislation on its business community. In that way every business is subject to the obligation to not only identify and review any negative impacts of company operations on human rights and the environment but also demonstrate to the reasonable satisfaction of relevant adjudicatory or human rights monitoring bodies that all possible measures for the prevention or mitigation of such violations not only were taken but were seen to have been taken.

The imposition of human rights due diligence as a constraint on the otherwise narrow pursuit of profit by the business community raises the level of alertness in the business community to be accountable for their impacts. The legal obligation should be supported by effective remedies easily accessible by victims. A supposed legal obligation not matched by an effective and accessible remedy is worthless,⁸⁰

78 UNGPs, Operational Principle 17. In the ISO Norm 26000 (point 2.4) due diligence is defined as a review of the 'social, environmental and economic impacts' of business operations.

79 J Fournier & LH Urscheler 'International standards in the domain of corporate social responsibility' in Urscheler & Fournier (n 77) 21.

80 Para 10 of the ICESCR Statement, 'The pledge to leave no one behind: The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development' E/C.12/2019/ adopted by the Committee at its 65th session, held from 18 February to 8 March 2019, https://sustainabledevelopment.un.org/content/documents/21780E_C.12_2019_1_edited.pdf (accessed 7 June 2021); L Sealy 'Directors' "wider" responsibilities – Problems conceptual, practical and procedural' (1987) 13 *Monash University Law Review* 164 177; A Keay 'The ultimate objective of the company and the enforcement of the entity maximisation and sustainability model' (2010) 10 *Journal of Corporate Law Studies* 35 37.

The failure of a demonstrable effective human rights due diligence will result in accountability and liability for the corporation involved.

The manner in which efficient access is granted to victims for effective remedies before competent adjudicatory or human rights monitoring bodies is now the focus. This remedial framework should be adopted by states within their respective corporate legislative framework and linked to an alternative normative and regulatory corporate objective model as has been argued elsewhere.⁸¹ Suffice it to say that the law imposing the human rights due diligence obligations must be worded so as to provide effective access for genuine victims of business-related human rights abuses, but also to keep the commercial focus of businesses in enhancing shareholder value in the confines of the law.

The proposed human rights due diligence framework will be a default⁸² rule of corporate law, which means that it applies automatically to corporations regardless of the contents of their memorandum or articles of association and may be avoided only by discharging the duty to the reasonable satisfaction of adjudicatory bodies. The effective discharge of the legal duty will depend on many factors being considered by the adjudicatory bodies. These factors range from the nature of the human rights violated, the time in question, the size and nature of business of the corporation or the industry or sector of the economy where the corporation operates, and many more. Mitigating factors that may weigh positively on the decisions of the adjudicators will vary from the demonstration of an internalised company policy and work ethic which adheres to CSR and business and human rights standards, requirements and guidelines contained in acceptable foreign or international instruments such as the French *Devoir de Vigilance*,⁸³ the English Modern Slavery

81 N Amodu 'The responsible stakeholder model: An alternative theory of corporate law' (2018) 5 *Journal of Comparative Law in Africa* 1; Amodu (n 2) 64-73 196-206.

82 In corporate governance parlance, default or presumptive rules are provisions in law that automatically apply to businesses or companies regardless of the contents of their memorandum or articles of association and may only be avoided by discharging the duty to the reasonable satisfaction of adjudicatory bodies (regulators and domestic courts). For detailed discussions on the three forms of corporate rules, see BR Cheffins *Company law: Theory, structure and operation* (1996) 218 219.

83 Businesses are already obliged to identify, consider and balance the impacts of their operations within the framework of other laws outside corporate law framework. Eg, the French *Devoir de Vigilance* (the Law on the Duty of Vigilance) Law 2017-399 of 27 March 2017, establishing a duty of vigilance in the French Commercial Code, ie a legal obligation of prudent and diligent conduct, owed by the parent companies of groups that employ at least 5 000 employees in France or 10 000 employees worldwide. These companies are obliged to establish and implement an effective vigilance plan including reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental

Act,⁸⁴ the OECD Due Diligence Guidelines,⁸⁵ the UNGPs, together with other soft law, self-regulatory initiatives, or by membership of international certification or global reporting scheme for responsible and sustainable business conducts such as the Guidance on Corporate Responsibility Indicators in Annual Reports, published in 2008 by the UN Conference on Trade and Development (UNCTAD),⁸⁶ and the Global Reporting Initiative (GRI).⁸⁷

It is crucial to clarify that the demonstration of an effective internal CSR policy, membership or compliance with relevant domestic laws and global best practices or international certification should constitute only a rebuttable presumption and *prima facie* evidence and is not conclusive proof that a corporation behaved responsibly having effectively discharged the human rights due diligence obligation. The conclusiveness or otherwise should be determined, on a scale of probabilities acting both judiciously and judicially, on a case-by-case basis depending on circumstances of time and the facts involved. A finding of a contravention of this default rule need not necessarily lead to financial compensation to victims. Remediation orders not only should fit the nature of the injuries sustained by victims but also consider the question of the long-term survival of the business involved. Such remedies may include any one or a combination of the following: a published apology; restitution; rehabilitation; financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines); as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

freedoms, and the health and safety of persons and the environment resulting from the activities of society and those of the companies it controls directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established commercial relationship is maintained, where these activities are related to that relationship. See also the Conflict Minerals Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017, laying down supply chain due diligence obligations for the EU importers of tin, tantalum and tungsten, their ores, and gold (3TG) originating from conflict-affected and high-risk areas, and ensuring that such imports meet international responsible sourcing standards, set by the OECD, similar to the EU Conflicts Minerals Regulation.

- 84 Under the Modern Slavery Act 2015 (UK), businesses carrying on in the UK with an annual turnover of €36 million or greater are required to make a statement disclosing the steps the business took to ascertain that no slavery was involved in its business or its supply chain towards ensuring that businesses respect the human rights impacts of their operations and do not profit from slavery.
- 85 OECD 'OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas' (2016), <http://dx.doi.org/10.1787/9789264252479-en> (accessed 7 June 2021).
- 86 United Nations Conference on Trade and Development (UNCTAD) Guidance on Corporate Responsibility Indicators in Annual Reports, (UNCTAD/ITE/TEB/2007/6), https://unctad.org/en/docs/iteteb20076_en.pdf?user=46 (accessed 7 June 2021).
- 87 <https://www.globalreporting.org/standards> (accessed 7 June 2021).

It is important that the commercial focus of corporations is kept to enable businesses to enhance shareholder value. Therefore, the proposed framework is not a mandatory but a default rule giving corporations the leeway to self-regulate their human rights due diligence policies in the course of their normal operations but remaining susceptible to state scrutiny when violations are alleged. Further, in giving access to potential victims of human rights violations, minimal procedures may be instituted to ensure that meddlesome interlopers are kept away from interfering with the smooth daily operations of corporations or distracting corporate managers with frivolous claims. To forestall the unnecessary opening of the floodgates to meddlesome petitions and litigation, a potential victim should establish to the reasonable satisfaction of the adjudicatory or human rights monitoring bodies two things, namely, (i) qualification as a legitimate corporate stakeholder relevant to the long-term survival of the corporation involved; and (ii) verifiable abuse or heightened risk⁸⁸ of injury to his or her human rights.

As clarified elsewhere,⁸⁹ this proposal is based on an appreciation of the important contribution of corporate stakeholders such as employees, host communities, customers, creditors, and host governments to the long-term survival of corporations. Therefore, it safeguards the fulfilment of their human rights by the corporations as a reasonable and legitimate societal expectation that the state upholds having created the opportunity for the existence of corporations and having responsibility. If prospective claimants satisfy these demands, the evidentiary burden passes to the corporation which, as part of the default legal obligation for a human rights due diligence, *prima facie* is presumed to have acted irresponsibly in the circumstances to demonstrate that it is not responsible for human rights abuse.

Genuine victims need not establish that the corporation operating within their community is responsible for the damage. The corporation has an obligation to demonstrate its responsibility or otherwise by effectively discharging the human rights due diligence obligation prescribed in the corporate law system. This onus of proof is justified as a countervailing power of the state against the raw

88 These are risks from businesses' potential human rights impacts or violations and such impacts should be addressed through prevention or mitigation. This second hurdle is as important as the first to prevent meddlesome interlopers from successfully instituting frivolous actions and detracting businesses from their commercial focus. This notwithstanding, qualified potential victims as legitimate corporate stakeholders will overcome the obstacle by showing the absence of preventative measures from businesses to address an imminent violation of human rights. See Principles 13(b), 15(b) together with commentaries to Principles 17 and 19 of the UNGPs.

89 See n 81.

exercise of corporate power. It should drastically reducing corporate complicity in human rights violations and discourage activities such as greenwashing by opportunistic rogue businesses that pay only lip service to CSR obligations as they know that their internally developed CSR policies and human rights due diligence exercises are not, in themselves, conclusive proof of behaving responsibly but they will be scrutinised by adjudicatory bodies.

In cases of pollution and environmental degradation of host communities and violations of their human rights (including the constitutionally-guaranteed right to life and related economic, social and cultural rights) by any corporation, the victim corporate stakeholder (any member of the host community) needs to establish only that its legitimate stake – the right to live in and have maintained a safe and conducive environment (which is relevant to the long-term survival of the corporation involved) it has been infringed upon or has come under a heightened risk of infringement and there has been a verifiable injury or heightened risk of injury to its human rights.⁹⁰

The access to a remedy in this proposed framework, though permissive of minimal procedural hurdles for prospective claimants, in order to prevent opening a floodgate of petitions and litigation and maintain the commercial focus of corporations, also excludes irrelevant procedural bottlenecks in approaching the adjudicatory bodies. The emphasis should be placed on the merits and the justice of individual cases as opposed to any technical procedures in order to prevent frustrations encountered by victims attempting to seek a remedy under the US Alien Tort Claims Act (ATCA).⁹¹

90 The case of *Gbemre v Shell & 2 Others* unreported Suit FHC/B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005 appears useful. The Federal High Court of Nigeria in this case had held that the plaintiff (applicant) had enforceable constitutionally-protected human rights including rights to 'clean, poison-free, pollution-free and healthy environment' which the state had a duty to protect and which the respondent, Shell, should respect. The Court found that Shell's action in continuing to flare gas in course of their oil exploration and production activities in the applicant's community violated his right to life and dignity of the human person under the Nigerian Constitution and the African Charter. Even though there was no clear justiciable right to a clean, poison-free, pollution-free and healthy environment in the Nigerian Constitution, the Court adopted an expansive interpretation and construction of the Nigerian Constitution together with the provisions of African Charter (especially art 24) to recognise and apply the said right. O Amao 'The African regional human rights system' in MA Baderin & M Ssenyonjo (eds) *International human rights law: Six decades after the UDHR and beyond* (2010) 251.

91 The US Alien Tort Claims Act (ATCA), codified at 28 USC § 1350, is a US statute that provides that the US district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US. The first requirement – that the plaintiff is an alien alleging a tort – is not controversial; it is the latter requirement a plaintiff prove a 'violation of the law of nations or a treaty of the United States' that has proven

In summing up, this proposal is grounded in law but is not without its shortcomings. It assumes that corporations require registration by states before carrying on business in the state, it also assumes that states not only will be willing but will be capable of adopting the proposal to check any raw exercise of corporate power. Therefore, it assumes that it is in the national interest⁹² of states to adopt the proposal, which may be viewed as overrating the sovereign equality of states doctrine⁹³ and underestimating the power of corporations⁹⁴ domestically and at an intergovernmental level.⁹⁵ Further, the proposal expects states to incorporate the human rights due diligence obligation in their domestic company law systems, which has its limitations in assisting in the successful combatting of cross-border corporate-related human rights abuses even if all businesses are required to incorporate in individual states before operating in the state. Extra-territorial application runs the usual⁹⁶ risk of interstate friction, even though such extraterritorial application is useful as being a counterweight to the power, influence and threat of large corporations. Finally, unless the proposal is adopted as a legally-binding intergovernmental instrument, jurisdictional arbitrage and forum shopping whereby corporations move around scouting for favourable jurisdictions and countries with weak CSR and business and human rights regulatory frameworks to invest in becomes commonplace.

to be a greater obstacle for plaintiffs and has the effect of excluding victims of economic, social and cultural rights abuses from its framework. In *Sosa v Alvarez-Machain* 542 US 2739 (US S Ct, 2004), the US Supreme Court considered ATCA for the first time and confirmed the ability of plaintiffs to bring suits in US courts under ATCA for a 'narrow set' of human rights infringements based on violations of customary international law.

- 92 Legislative attempts to extend human rights liabilities to home-based companies in the form of private members' Bills in the US Congress and the Parliaments of Australia, the United Kingdom and Canada have met with failure. A notable effort is the Bill C-300 *An Act Respecting Corporate Accountability for Mining, Oil and Gas Corporations in Developing Countries*, introduced in the Canadian House of Commons in 2009 but defeated in 2010; also useful to the topic are the debates surrounding and leading to the eventual sec 172 of the 2006 English Companies Act.
- 93 See the Charter of the United Nations, art 2(1) and a corollary principle that no state may interfere in the domestic affairs of another state. See, generally, the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA/Res/2625(XXV): 'No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.'
- 94 Backer (n 45) 95-97.
- 95 Buhmann (n 33) 703.
- 96 OK Fauchald & J Stigen 'Corporate responsibility before international institutions' (2009) 40 *George Washington International Law Review* 1027 1028.

5 Conclusion

The CSR and business and human rights movements have been assumed to have different but related agendas. This article clarifies the issue of whether the CSR movement goes beyond voluntary corporate charity and demonstrates it to be a regulatory movement that not only is used instrumentally as a countervailing power by the state to prevent the adverse human rights impacts of businesses but also has been adopted as self-regulatorily by the business community to manage risks associated with balancing their legal, ethical and socio-economic responsibilities. Adopting a view that transcends the notion that it is the duty of the state to fulfil human rights, the article explains that the business and human rights movement entails a focus on corporate responsibility for any adverse social, economic and environmental impacts on victim corporate stakeholders of human rights abuses. It showed the movements to be inextricably linked and established their shared objective in establishing accountability for impacts and seeking effective remedies for business-related human rights violations.

Both movements are directed at creating corporate liability for the adverse social, economic and environmental impacts of corporate operations in the public interest. The article draws attention to the futility of the debate comparing the movements in relation to finding effective remedies for victims of corporate-related human rights abuses and notes that the social, economic and environmental impacts discussed in the CSR movement are the same as the human rights impacts addressed in the business and human rights movement. The article finds that the disconnect in understanding the similarity had been as a result of many business and human rights scholars assuming that CSR advocates addressed something different from corporate accountability for impacts, including human rights impacts. Both movements expound the limits of making businesses answerable for their adverse impacts on victims' human rights.

The article underscores that the UN Guiding Principles, although not legally binding, are not without value. Based on the human rights due diligence elaborated under the UNGPs, the article proposes a remedial framework within the CSR and business and human rights regulatory movements to secure the human rights of genuine victims of corporate-related human rights abuses. In contributing to the debate about the limits of corporate responsibility for human rights, it proposes a framework focused on offering efficient access to effective remedies to victims and, having discounted any value

being associated with the compartmentalisation of rights, applicable to all human rights.

In order to avoid compromising the commercial focus of corporations, the article maintains that businesses have no obligation to protect, promote or secure human rights beyond the legal obligation for human rights due diligence proposed within the remedial framework. The proposal affords victims a better chance of enforcing corporate fulfilment of their human rights obligations by advocating the exclusion of unnecessary administrative and procedural bottlenecks such as those encountered by claimants using the ATCA. The author identifies challenges in implementation including overrating state sovereignty and assuming the political will and state capability and underestimating corporate capacity to oppose its adoption. There is room for refinement of the proposal in the context of the national interests of individual states. This article offers it as a credible alternative mechanism for state adoption (including in the ongoing treaty-making process) not only as a counterweight to corporate power and as providing effective remedies to victim corporate stakeholders of human rights abuses, but also as supporting businesses to better manage risks associated with their legal, socio-economic and ethical responsibilities in the wider societal context.

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Tackling inequality and governance challenges: Insights from the COVID-19 pandemic

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Summary: *The article addresses inequality and governance in the face of the COVID-19 pandemic. Globally, it highlights ways in which COVID-19 has further exacerbated the already worrying inequality levels. Specifically, it addresses issues such as vaccine nationalism, rising income inequality levels, while the minority become richer, some from the manufacturing and selling of COVID-related products. From a governance perspective, it is argued that the reliance on liberal democracies to deliver equality is proving to be insufficient as these have been noted to pursue and prioritise market-based strategies that ultimately perpetuate inequality. Ultimately, it is forwarded that there needs to be a rethinking of the global political economy policies, including debt, health systems, intellectual property laws and trade, in order to directly address how such systems perpetuate inequality. In the context of the African continent, the article highlights the difficulty in accessing vaccines, posing a major threat to the continent, which is experiencing waves of the pandemic that are more disturbing than those that went before. It also highlights the extent to which paucity of research affects vaccine efficiency on the continent. COVID-19 has further worsened the already precarious political and economic situation in most of Africa, characterised by countries being unable to pay debt,*

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electoral political violence, COVID-19 denialism, exploiting COVID-19 to clamp down on opposition, and misuse of COVID-19 funds. Thus, it is recommended that there needs to be an overhaul of the already broken fiscal and political environments rather than the adoption of piecemeal economic solutions such as debt freezes, or politically-flawed ones, that ultimately do not work.

Key words: COVID-19; inequality; governance; economic policies; vaccines

1 Introduction

Goal 10 of the United Nations (UN) Sustainable Development Goals involves 'reduced inequalities'.¹ It points out inequality in and between countries as a disturbing trend, a factor that has become more noticeable with the COVID-19 pandemic. COVID-19 has adversely affected the poorest and most vulnerable communities, with unemployment levels sky-rocketing, as well as a massive reduction in workers' incomes.² It has negatively affected progress made in the area of gender equality with vulnerable populations in weaker health systems being adversely affected as well as other marginalised groups such as refugees, older persons, migrants and persons with disabilities.³ Political, social and economic inequalities have worsened the impact of the pandemic.

At the 2020 annual Nelson Mandela lecture, the UN Secretary-General highlighted the fact that inequality is a defining feature of our times, comparing COVID-19 to an X-ray that has brought to the surface fractures in the fragile skeleton of the societies we inhabit;⁴ that it has exposed fallacies such as that free markets can deliver health care for all. It should not be overlooked that free markets have become a key feature of liberal democracies. He further reiterated that 26 of the richest people around the world hold wealth equal to that of half the global population. On the African continent, he pointed out factors such as colonialism preceded by slave trade and apartheid in South Africa, among some of the causes of the massive

1 'Goal 10: Reduce inequality within and among countries', <https://www.un.org/sustainabledevelopment/inequality/> (accessed 15 April 2021).

2 As above.

3 As above.

4 A Guterres 'Tackling the inequality pandemic: New social contract for a new era' *Nelson Mandela Foundation* 18 July 2020, <https://www.nelsonmandela.org/news/entry/annual-lecture-2020-secretary-general-guterres-full-speech> (accessed 15 April 2021).

inequality in and between countries. The consequences of this remain all too present, characterised by a global trade system that is in favour of the north, global power relations, under-representation of Africans in global institutions, institutionalised racism, hate crimes and xenophobia, white supremacy, among other factors.⁵

This article addresses inequality and governance in the face of the COVID-19 pandemic. It is highlighted that access to more than enough vaccines by well-resourced countries as opposed to those that are poorly resourced is a vivid example of how inequality between developed and developing nations has perpetuated the pandemic. The quick mutation of the virus into more dangerous variants poses a global risk to the extent that as long as some people remain unvaccinated, there is always the risk that new variants might be more resistant to earlier vaccines. From a governance perspective, the article critiques the misguided notion that liberal democracy, which is the prevalent form of democracy, on its own can bring about equitable development. In the pursuit of the 'free market' ideology which is prioritised in liberal democracies, characterised by profit maximisation, freedoms and entitlements, wealth creation often is at the expense of the public or common good. Thus, the article pushes for a deliberate governance strategy that prioritises or centres equitable development inclusive of a functional health system that prioritises equal health and health care for all.

As far as the African continent is concerned, it is highlighted that COVID-19 has exacerbated the already disturbing inequality levels, living behind dire political and economic situations in some countries. Prior to COVID-19, the health systems in most African countries were already weak. These had gradually become dilapidated as a result of a series of factors, among which were the World Bank-backed neo-liberal policies such as privatisation that led to governments withdrawing from providing much-needed public health care as well as a pervasive lack of accountability and transparency in the implementation of health initiatives.

A linkage is also drawn between COVID-19 and governance highlighting the extent to which COVID-19 has worsened governance in most parts of the continent characterised by further restriction of civil and political rights, including the right to vote, freedom of assembly, information and association, a rise in political conflict, and COVID-related corruption. The article also points out the massive impact of the pandemic on the economic situation of most African

5 As above.

countries characterised by the impact of lockdowns on livelihoods of Africans that rely on informal sectors, the rise in unemployment levels and rising levels of debt. Overall, it is argued that COVID-19 has been a stark reminder that inequalities and inequities are not a natural construction but rather a result of how global political, economic power dynamics function to the detriment of poor, marginalised populations.

2 Inequality and COVID-19

The principle of ‘the right to equality’ is at the heart of human rights and is enshrined in all human rights treaties as a goal that states ought to achieve.⁶ From this legal perspective, formal (*de jure*) equality often is expounded upon as alike things being treated alike and unlike things being treated in line with their unlikeness.⁷ The notion of formal equality has been critiqued for being abstract, universalistic and failing to recognise social and economic disparities between individuals and groups that cannot be remedied by the same treatment of all.⁸ To that end, human rights activists have adopted substantive (*de facto*) equality, which is an equality of outcomes in the sense that it requires that different people are treated differently based on their gender, sex and socio-economic status, with the goal of overcoming the disparities in individuals and groups and ultimately achieving equality.⁹ Human rights bodies such as the CEDAW Committee have refuted the use of equity and equality interchangeably, and have often insisted on using equality referring to substantive equality.¹⁰ While responding to Columbia’s state report, the Committee highlighted that when applying temporary special measures, the state party’s goal often is to achieve equity for women rather than achieving *de facto* equality for women with men. The Committee thus critiqued the concept of equity rather than equality which was often used by the state in the formulation of and designing of women’s programmes.¹¹

Furthermore, from a human rights perspective, equality often goes hand in hand with non-discrimination.¹² While elaborating on the

6 S Fredman ‘Substantive equality revisited’ (2016) 14 *Oxford University Press* 712.

7 T Thabane & M Buthelezi ‘Bridging the gap between *de jure* and *de facto* parliamentary representation of women in Africa’ (2008) 41 *Comparative and International Law Journal of Southern Africa* 178.

8 As above.

9 Thabane & Buthelezi (n 7) 179.

10 A Facio & MI Morgan ‘Equity or equality for women? Understanding CEDAW’S equality principles’ International Women’s Rights Action Watch (IWRAP), Asia Pacific Occasional Paper Series (2009) 6-8.

11 Facio & Morgan (n 10) 7.

12 Fredman (n 6) 712.

right to health, the General Comment on Health sets out that goods and services should be economically and physically accessible to everyone without discrimination.¹³ Even in the case of severe resource constraints, states should ensure that vulnerable members of society are protected by the inclusion of relatively low-cost programmes.¹⁴ Equality also requires meaningful participation as set out in General Comment 14, which includes access to information, accountability and transparency in government or non-governmental organisation (NGO) programmes.¹⁵

Yamin avers that wealth distribution, privilege and inequality in society are not a natural phenomenon but rather a result of socially-created norms, laws and practices that allow and embed those distributions.¹⁶ This also includes systems that favour market expansion at the expense of social protections. To that end, a rights-based framework views a health system as an all-encompassing social institution similar to a fair justice or political system. This implies an all-inclusive structure that is targeted at improving the entire health system rather than fragmented programmes or a delivery machine for goods and services.¹⁷ This goes beyond health promotion to investigating the power dynamics at the heart of people's marginalisation and suffering. Yamin further critiques human rights' narrow focus on states as a factor that obscures the current power relations.¹⁸ She locates most social injustices and inequalities in health systems not in states but rather in the systems of the global political economy, including trade, debt, privatisation, agricultural policies and structural adjustment policies in Africa. Yamin thus proposes interdisciplinary collaboration transcending borders that interrogate budgetary priorities, a systems analysis to discern problems and to recommend dynamic and comprehensive solutions.¹⁹

COVID-19 has exacerbated the already worrying inequality levels, living behind dire political and economic situations in some countries. One example of this is what has been referred to as 'vaccine nationalism' whereby richer countries have been noted to be hoarding inordinately large amounts of COVID-19 vaccines for their

13 UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 14: The right to the highest attainable standard of health (art 12 of the Covenant) 11 August 2000 E/C12/2000/4 paras 12, 18-19.

14 General Comment 14 (n 13) paras 30-33.

15 General Comment 14 paraa 11, 55, 59-62.

16 AE Yamin 'Will we take suffering seriously? Reflections on what applying a human rights framework to health means and why we should care' (2008) 10 *Health and Human Rights* 45.

17 As above.

18 As above.

19 As above.

populations, while poorer countries have access to minimal portions and others to none at all.²⁰ Vaccine nationalism is a situation where governments enter into agreements with pharmaceutical companies in order to be in position to supply vaccines to their own populations prior to these becoming available to other countries.²¹ It is also referred to as the pursuit of vaccines for purposes of national interest through measures such as export bans and supply agreements even when it is damaging to other countries.²²

It has been widely reported that even before the now approved COVID-19 vaccinations had undergone the full clinical trials, countries such as Britain, the European Bloc, Japan and the US had procured several million doses of those vaccines that seemed to be more favourable.²³ Some countries are now even in the process of rolling out campaigns for third dose boosters as well as vaccinating children.²⁴

The fast pace at which the first COVID-19 vaccine (Pfizer-Biotech) was developed and approved was commended as an outstanding success in global health.²⁵ However, this was only a first step and the more challenging step has been how to ensure 'vaccine equity' which entails the way in which to ensure that the vaccine is distributed fairly and reaches different populations regardless of their social, economic and other statuses.²⁶ In early 2021 it was reported that Canada and the UK ordered the highest number of vaccines; the USA purchased 1,2 billion doses of the vaccine, enough to give each person more than three doses, while the entire African Union (AU) had ordered only 270 million which accounted for one vaccination for only 20

20 TA Ghebreyesus 'Vaccine nationalism harms everyone and protects no one' *Foreign Policy* 2 February 2021, <https://foreignpolicy.com/2021/02/02/vaccine-nationalism-harms-everyone-and-protects-no-one/> (accessed 26 November 2021).

21 A Khan 'What is vaccine nationalism and why is it so harmful?' *Al Jazeera Features* 7 February 2021, <https://www.aljazeera.com/features/2021/2/7/what-is-vaccine-nationalism-and-why-is-it-so-harmful> (accessed 26 November 2021); H Kretchmer 'Vaccine nationalism – And how it could affect us all' *World Economic Forum* 6 January 2021, <https://www.weforum.org/agenda/2021/01/what-is-vaccine-nationalism-coronavirus-its-affects-covid-19-pandemic/> (accessed 26 November 2021); JDN Lagman 'Vaccine nationalism: A predicament in ending the COVID-19 pandemic' (2021) 43 *Journal of Public Health* e375-e376; Ghebreyesus (n 20).

22 S Vanderslott et al 'Vaccine nationalism and internationalism: Perspectives of COVID-19 vaccine trial participants in the United Kingdom' (2021) *BMJ Global Health* 6.

23 Khan (n 21).

24 Vanderslott et al (n 22).

25 K Liao 'What is vaccine equity?' *Global Citizen* 2 February 2021, <https://www.globalcitizen.org/en/content/what-is-vaccine-equity-covid-19/> (accessed 26 November 2021).

26 As above.

per cent of its population.²⁷ This situation has been described as a 'moral failure' by the World Health Organisation (WHO) Director-General, Dr Tedros Adhanom, as COVID-19 does not respect borders and, thus, it will continue to be a threat to the world as long as it is present anywhere in the world.²⁸

The obligation of well-resourced countries to essentially put an end to 'vaccine nationalism' and to assist low-resourced countries can be gleaned from a series of binding and non-binding human rights instruments. Desierto sets out a series of binding and non-binding human rights instruments which, when read together, confer upon states the legal obligation to ensure vaccine access to everyone, especially to those in low-resourced settings.²⁹ These include article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which calls upon states, individually and through international assistance and cooperation, either technically or economically, to the maximum of their available resources, to progressively achieve the full recognition of the rights that are recognised in the Covenant, employing all appropriate means. Furthermore, article 12 of ICESCR recognises everyone's right to the highest attainable standard of physical and mental health. Among the steps to be taken by countries in article 12(c) of ICESCR is the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases'. Therefore, article 12 read with article 2 both clearly emphasise that cooperation entails everything that is vital in the prevention, treatment and management of global pandemics such as COVID-19.

In addition, article 1(1) of the 1986 Declaration on the Right to Development recognises peoples' rights to participate and contribute to the enjoyment of economic, social, political, cultural and civil development that is in line with all other human rights and fundamental freedoms. Thus, any obstacle that impedes or massively restricts people's ability to enjoy their right to development, especially a global pandemic that has negatively impacted the economic, political, social and cultural lives of individuals across the world, is one that massively infringes on their right to development.

27 As above.

28 As above.

29 D Desierto 'Equitable COVID vaccine distribution and access: Enforcing international legal obligations under economic, social and cultural rights and the right to development' 2 February 2021, <https://www.ejiltalk.org/equitable-covid-vaccine-distribution-and-access-enforcing-international-legal-obligations-under-economic-social-and-cultural-rights-and-the-right-to-development/> (accessed 20 November 2021).

The disturbingly high levels of ‘vaccine nationalism’ have led to an increase in calls to temporarily remove intellectual property protections pertaining to COVID-19 vaccines. Among the most vocal of these is the ‘Peoples’ Vaccine Alliance’, a coalition of organisations and activists of which the goal is to advocate a peoples’ vaccine for COVID-19. The alliance members include Global Justice Now; Public Citizen; Free the Vaccine; Frontline AIDS; Amnesty International; OXFAM; SumOfUs; and UNAIDS.³⁰ The senior Policy and Campaigns Manager of Global Justice Now stated that ‘the highly effective vaccines we have, are thanks to massive amounts of tax payers’ money, so it can’t be fair that private individuals are cashing in while hundreds of millions face second and third waves completely unprotected’.³¹ On the other hand, manufacturers have argued that patent protection is not the main hindering factor in accelerating vaccine production. Rather, issues such as setting up manufacturing sites, the sourcing of raw materials and the availability of qualified personnel play a role.³²

In addition, on 2 October 2020 India and South Africa submitted a communication to the World Trade Organisation (WTO) Council for the Trade-Related Aspects of Intellectual Property Rights (TRIPS) containing a proposal aimed at temporarily waiving certain provisions of the TRIPS agreement for the prevention, containment and treatment of COVID-19.³³ In June 2021 there seemed to be a ray of hope as the Indian and South African proposal to temporarily waive patents on COVID-19 vaccines received support at the G7 summit held in the UK.³⁴ The additional secretary (economic relations) in the Ministry of External Affairs (MEA) confirmed that there was widespread support at the WTO regarding the proposal and, as a result, the TRIPS Council of the WTO was more likely to commence text-based negotiations on the proposal.³⁵

Similarly, on 5 May 2021 President Joe Biden changed his government’s earlier stance on the Indian/South African proposal, by backing the waiving of intellectual property rights for COVID-19

30 <https://peoplesvaccine.org/> (accessed 7 June 2021).

31 ‘COVID-19 vaccines have spawned nine new billionaires: Campaign group’ *Eye Witness News* 16 May 2021, <https://ewn.co.za/2021/05/20/covid-19-vaccines-have-spawned-nine-new-billionaires-campaign-group> (accessed 7 June 2021).

32 As above.

33 Council for Trade-Related Aspects for Intellectual Property Rights ‘Waiver from certain provisions of the TRIPS agreement for the prevention, containment and treatment of COVID-19’ IP/C/W/669/Rev.1 25 May 2021.

34 ‘India, South Africa’s proposal for patent waiver on vax gets G7 support: MEA’ 13 June 2021, https://www.business-standard.com/article/current-affairs/india-s-africa-s-proposal-for-patent-waiver-on-vax-gets-g7-support-mea-121061300798_1.html (accessed 25 November 2021).

35 As above.

vaccines, followed by a statement by his top trade negotiator, Katherine Tai, backing the negotiations at the WTO.³⁶ The move was predictably opposed by pharmaceutical companies which, as some noted, would mount campaigns to ensure that any waiver that was agreed upon was as limited as possible.³⁷ Other critics described the move as merely a grandstanding move and expressed their scepticism as to whether it would yield any substantial long-term change in patent law.³⁸ Furthermore, despite now being supported by over 100 countries, a small group of opposing WTO members, including the European Union (EU), the UK, Norway and Switzerland, continue stalling any constructive discussions on the proposal.³⁹

The appearance of new variants means that the more people are left unvaccinated, the greater the collective risk. This was echoed by the executive director of the Joint United Nations Programme on HIV/AIDS (UNAIDS) who stressed that while companies that are making massive profits from COVID-19 vaccines refuse to share their science and technology to enable global vaccine supply, the world continues to face the risk of mutations that could reduce the effectiveness of the available vaccines, putting everyone at risk all over again.⁴⁰

On a global scale, the COVID-19 pandemic has further increased the income gap between the rich and the poor, between industrialised countries and those that are less industrialised.⁴¹ The industrialised countries have been enabled by their access to advanced technology, which has enabled the already affluent people to utilise the pandemic to their benefit. Beyond the issue of being

36 Office of the United States Trade Representative 'Statement from Ambassador Katherine Tai on the COVID-19 waiver' 5 May 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver> (accessed 26 November 2021).

37 A Shalal et al 'US reverses stance, backs giving poorer countries access to COVID-19 vaccine patents' *Reuters* 5 May 2021, <https://www.reuters.com/business/healthcare-pharmaceuticals/biden-says-plans-back-wto-waiver-vaccines-2021-05-05/> (accessed 26 November 2021).

38 As above.

39 'Countries must not let another opportunity slip by to advance the global waiver on overcoming COVID-19 medical tool monopolies' 13 September 2021, <https://reliefweb.int/report/world/countries-must-not-let-another-opportunity-slip-advance-global-waiver-overcoming-covid> (accessed 26 November 2021).

40 Oxfam International 'COVID vaccines create 9 new billionaires with combined wealth greater than cost of vaccinating world's poorest countries' 20 May 2021, <https://www.oxfam.org/en/press-releases/covid-vaccines-create-9-new-billionaires-combined-wealth-greater-cost-vaccinating> (accessed 26 November 2021).

41 I Goldin & R Muggah 'COVID-19 is increasing multiple kinds of inequality: Here's what we can do about it' *World Economic Forum* 9 October 2020, <https://www.weforum.org/agenda/2020/10/covid-19-is-increasing-multiple-kinds-of-inequality-here-s-what-we-can-do-about-it/> (accessed 26 November 2021); J Stiglitz 'Conquering the great divide' (2020) *International Monetary Fund*, <https://www.imf.org/external/pubs/ft/fandd/2020/09/COVID19-and-global-inequality-joseph-stiglitz.htm> (accessed 26 November 2021).

able to access vaccines, terminologies such as 'COVID billionaires' have been coined to show an exponential number of people who have joined the billionaire group since the onset of the pandemic.⁴² It was estimated that between mid-March and December 2020 the USA is estimated to have gained 56 new billionaires, bringing the total to 659. It is further projected that America's billionaires hold an estimated \$4 trillion in wealth, a figure that is roughly double that of the 165 million poorest Americans collectively.⁴³

As stocks in pharmaceutical companies rapidly rise, 'vaccine billionaires' are being created as a result of the huge profits from the COVID-19 vaccines over which these companies have a monopoly.⁴⁴ Among those who have benefited from COVID-19 were those dealing with COVID-related supplies through, for instance, the manufacture and supply of the COVID-19 vaccines, personal protective equipment and diagnostics testing.⁴⁵ The Peoples' Vaccine Alliance has stressed that these patents enable pharmaceutical companies to have complete control over the price and supply of vaccines, pushing up profits in order to secure the stocks they require, thereby making it more challenging for the poorer countries to access these vaccines.⁴⁶ The irony in all this is the fact that most of these billionaires are located in North America, which has recorded one of the highest COVID-related death rates. Even more telling are the disproportionately high rates of deaths in the black and Latina communities.⁴⁷

This is a clear illustration of the fact that if clear policies and strategies are not put in place to ensure that a country's wealth is

42 H Woods 'How billionaires saw their net worth increase by half a trillion dollars during the pandemic' *Insider* 30 October 2020, <https://www.businessinsider.com/billionaires-net-worth-increases-coronavirus-pandemic-2020-7?IR=T> (accessed 26 November 2021); C Peterson-Withorn 'Nearly 500 people became billionaires during the pandemic year' *Forbes* 6 April 2021, <https://www.forbes.com/sites/chasewithorn/2021/04/06/nearly-500-people-have-become-billionaires-during-the-pandemic-year/?sh=2b96aeba25c0> (accessed 26 November 2021).

43 MC White 'Wall Street minted 56 new billionaires since the pandemic began – but many families are left behind' *Business News* 30 December 2020, <https://www.nbcnews.com/business/business-news/wall-street-s-best-year-ever-why-pandemic-has-been-n1252512> (accessed 26 November 2021).

44 Oxfam International (n 40).

45 'COVID-19 vaccines have spawned nine new billionaires: Campaign group' *EWN* 16 May 2021, <https://ewn.co.za/2021/05/20/covid-19-vaccines-have-spawned-nine-new-billionaires-campaign-group> (accessed 26 November 2021); G Tognini 'Meet the 40 new billionaires who got rich fighting COVID-19' *Forbes* 6 April 2021, <https://www.forbes.com/sites/giacomotognini/2021/04/06/meet-the-40-new-billionaires-who-got-rich-fighting-covid-19/?sh=20a103ee17e5> (accessed 26 November 2021).

46 As above.

47 B Lovelace 'As US Corona virus deaths cross 100 000, black Americans bear disproportionate share of fatalities' *CNBC* 27 May 2020, <https://www.cnn.com/2020/05/27/as-us-coronavirus-deaths-cross-100000-black-americans-bear-disproportionate-share-of-fatalities.html> (accessed 26 November 2021).

equally distributed in ways that improve the overall health of the population, health and other forms of inequality persist.⁴⁸

3 Governance mechanisms, equality and COVID-19

Despite the criticism it has faced over the years, the notion of 'liberal democracy' practised through constitutional supremacy, the rule of law, individual rights and free markets has managed to remain the prevalent type of political and economic arrangement throughout most of the world.⁴⁹ Proponents maintain that despite its weaknesses, its advantages still supersede its shortcomings. It often is assumed that development is more likely to be achieved in liberal democracies as opposed to authoritarian governments. There has been an argument that the ideals that are found in democratic governments, such as regular elections, universal suffrage, multiparty competition and civil liberties, favour positive health outcomes.⁵⁰ For instance, increased participation and political voice may lead to increased politicians' responsiveness to citizens, fostering the reduction in social disparities and universal access to high-quality health services.⁵¹ On the contrary, authoritarian regimes may produce negative health outcomes as a result of political suppression and limited citizen participation.⁵² This may subsequently affect government responsiveness to citizens, thus hampering the improvement of health and education and a reduced political will to universally spread benefits to the poor.⁵³

Proponents of liberal democracy further allude to the fact that democracy contributes to the reduction in social disparities and, by extension, income inequality by empowering the 'marginalised' with a voice.⁵⁴ These in turn use this political voice to draw attention to unjust practices, thereby contributing to the redistribution or

48 N Lewis 'COVID-19 reminded us of just how unequal America is' *FiveThirtyEight* 29 March 2021, <https://fivethirtyeight.com/features/covid-19-reminded-us-of-just-how-unequal-america-is/> (accessed 26 November 2021); BL Perry et al 'Pandemic precarity: COVID-19 is exposing and exacerbating inequalities in the American heartland' (2021) 118 *PNAS* 1-6; 'Why the US has the highest COVID-19 death toll' *AFP* 23 February 2021, <https://timesofindia.indiatimes.com/world/us/why-the-us-has-the-highest-covid-19-death-toll/articleshow/81163984.cms> (accessed 26 November 2021).

49 D Desilver 'Despite global concerns about democracy, more than half of countries are democratic' *Pew Research Centre* 14 May 2019, <https://www.pewresearch.org/fact-tank/2019/05/14/more-than-half-of-countries-are-democratic/> (accessed 26 November 2021).

50 JP Ruger 'Democracy and health' (2005) 98 *QJ Medical* 299-304.

51 As above.

52 As above.

53 As above.

54 ME Shin 'Income inequality, democracy and health: A global portrait' Paper presented at the conference, *Responding to Globalisation: Societies, groups and individuals*, Institute of Behavioural Science, University of Colorado, 4-7 April 2002 2-3.

expropriation of wealth from those who have it. This also extends to health, taking the example of political instability. It is assumed that democratic values, such as consensus building and participation, reduce the possibility of differences that often lead to political instability. Political instability often has undesirable effects on health, such as an increase in infant mortality rates; the destruction of vital health and social infrastructure; the devastation of national and regional economies leading to long-term health consequences such as malnourishment and poor hygiene, which leads to an increase in communicable diseases.⁵⁵

In comparing democracies and autocracies, Acemoglu and Robinson view a democracy as a dictatorship of the poor and middle class and an autocracy as a dictatorship of the rich.⁵⁶ It thus is assumed that health indicators will improve in a context where public health is a priority for the masses as opposed to one where the rich have control as they tend to be less interested in public solutions.⁵⁷ Furthermore, attributes found in democracies, such as demands for accountability by masses which may result in non-performing leaders being removed from office, have the potential of fostering greater attention to health as opposed to autocracies where accountability is to small groups such as the military or even the fact that they tend to repress opposition and the media which, in turn, frustrates public policy thereby having negative consequences on health.⁵⁸

However, this assertion has been refuted by other researchers who assert that there is a very distal relationship between income inequality and community responsiveness, which is one of the attributes of a democracy.⁵⁹ They allude to the fact that the discussion above in support of democracy overlooks the fact that the transition to democracy not often is a smooth one but rather involves conflict and violence.⁶⁰ Furthermore, liberal democracies often end up prioritising wealth creation, profit making, freedoms and entitlements at the expense of the common good.⁶¹ As a result, democracies such as the USA have been referred to as 'hyper-democratic' on the basis of a failure to ensure universal health coverage and having a healthcare

55 As above.

56 D Acemoglu & JA Robinson 'Persistence of power elites and institutions' (2008) 98 *American Economic Review* 267.

57 T Besley & M Kudamatsu 'Health and democracy' (2006) 96 *American Economic Review* 313-318.

58 Besley & Kudamatsu (n 57) 313-314.

59 Shin (n 54) 3.

60 As above.

61 As above.

system that is expensive, incomplete and highly unequal while paying homage to profit maximisation and freedom of choice.⁶²

COVID-19 has further proved that the idea of democracy as a marker for health improvement is not always valid as it has introduced another vital marker, which is the levels of equality in a country. Statistics from COVID-19 show high numbers of COVID mortality in highly unequal countries such as the United States, Brazil, Mexico, South Africa, Nigeria, Kenya and Tunisia even when they purportedly pursue some form of egalitarian democracy.⁶³ This is attributed to, among others, the prioritisation of neoliberal policies that favour capital and markets while side-lining community health and welfare. While commending globalisation and technology for bringing about gains in income and lifting populations out of poverty, the UN Secretary-General averred that, on the flip side, those developments have brought about shifts in income distribution with the world's richest 1 percent having 27 per cent of the total cumulative growth income.⁶⁴

On the other hand, low-skilled workers are negatively impacted by the massive technological transformation as they face the risk of being replaced by such inventions.⁶⁵ Early evidence has also revealed that the ability to work from home is lower among the low-income earners compared to that of the high-income earners, leading to a high likelihood of the former losing jobs, thus worsening inequality levels in income distribution.⁶⁶ The Secretary-General further noted that there has been an increase in tax avoidance, tax concessions and tax evasion, leading to a decline in corporate taxes which, in turn, has affected social services including health care, education and social protection as there has been a reduction in resources

62 As above.

63 KC Vadlamannati et al 'Health system equity, egalitarian democracy and COVID-19 outcomes: An empirical analysis' (2021) 49 *Scandinavian Journal of Public Health* 104; 'Weekly bulletin on outbreaks and other emergencies' *Situation Reports*, WHO African Region Week 22-28 November 2021 48, <https://www.afro.who.int/health-topics/coronavirus-covid-19> (accessed 4 December 2021); 'Corona COVID-19 cases by country/Africa Trading Economics, <https://tradingeconomics.com/country-list/coronavirus-cases?continent=africa> (accessed 4 December 2021); '2019 rankings of democracies in Africa according to the EIU' *Public Management* 23 January 2020, <https://www.ecofinagency.com/public-management/2301-40885-2019-ranking-of-democracies-in-africa-according-to-the-eiu> (accessed 4 December 2021).

64 As above.

65 As above.

66 A Bick et al 'Work from home after the COVID-19 outbreak' Federal Reserve Bank of Dallas, Working Paper 2017 June 2020; G Cugat & F Narita 'How COVID-19 will increase inequality in emerging markets and developing economies' *International Monetary Fund* 29 October 2020, <https://blogs.imf.org/2020/10/29/how-covid-19-will-increase-inequality-in-emerging-markets-and-developing-economies/> (accessed 4 December 2021).

devoted to these.⁶⁷ He surmised that the current global political and economic system is not contributing to the delivery of critical public goods, namely, health, sustainable development and peace; that the governance structures are pre-occupied with self-interest and the only way in which to address this is to build a new social contract aimed at equitably and fairly apportioning wealth, power and opportunities.⁶⁸ Thus, COVID-19 exposed the already existing cracks in liberal democracies as it exposed inequalities that for so long have been mentioned but not addressed. For instance, the fallacy that 'we are all in the same boat' was proven to be false.⁶⁹

The principles found in egalitarian democracies have further had very little impact in addressing the COVID-19 pandemic. Rather, equality in access to health care is of more importance than the pursuing of egalitarian democratic principles.⁷⁰ In fact, principles such as those of collective participation and citizenry trust may have gotten in the way of making tough choices vital for curbing the pandemic, as in the case of Sweden.⁷¹ A similar scenario was seen in the USA where citizens stormed government buildings demanding an end to lockdown, while countries such as Brazil and Russia delayed their response in order to maintain electoral popularity.⁷² As a result, countries that are considered less democratic, such as Vietnam and Sri Lanka, have been noted to be relatively more successful in curbing the virus compared to the more democratic countries, such as the US, the UK, Spain and Italy.⁷³ Ultimately, it did not come down to how democratic or undemocratic a country was, but rather the extent to which it prioritised the putting in place of an equitable and robust healthcare system.

4 COVID-19 in Africa

Initially, Africa recorded a smaller number of COVID-19 mortalities compared to other continents. However, by May 2021 the numbers were said to be steadily rising in countries such as South Africa, Uganda, the Democratic Republic of the Congo (DRC), Namibia and Angola.⁷⁴ In early June 2021 the WHO regional director warned of

67 Guterres (n 4).

68 As above.

69 As above.

70 As above.

71 As above.

72 As above.

73 As above.

74 P Mwai 'Corona virus in Africa: Concern growing over third wave of COVID-19 infections' *BBC* 7 June 2021, <https://www.bbc.com/news/world-africa-53181555> (accessed 4 December 2021).

rapidly-rising numbers, in the third wave, with new cases rising by over 30 per cent in eight African countries.⁷⁵ The spread of the virus is further worsened by the new variants that have led to an upsurge in both cases and deaths, that cannot be traced easily, are highly transmittable and the testing of which is not widely accessible.⁷⁶ The WHO director urged for the swift ramping up of programmes to ensure that they reach Africans who are most at risk of falling ill and dying from the virus.⁷⁷

Moreover, inequality cuts across all areas and sectors. One such area is research in the sense that, compared to other continents, the research from Africa in line with COVID-19 has been limited. The paucity of research in Africa – with the exception of South Africa and North Africa – has meant that research and information on the virus has mostly been generated from the USA, Europe and Asia.⁷⁸ In April 2020 it was reported that of the 7700 genome sequences of the SARS-Cov2 that had been pooled, only 90 genome sequences came from Africa and they had been collected from five out of 51 infected countries.⁷⁹ It is vital that Africa actively contributes to the vaccine development especially due the various mutations of the vaccine. Otherwise there could be a risk of the developed vaccines being less effective in Africa, due to the fact that they have been developed based on strains that are more predominant in other continents.⁸⁰

For instance, in early 2021 it was reported that the COVID-19 vaccine developed by AstraZeneca together with the University of Oxford provided very little protection against mild disease caused by the South African variant.⁸¹ AstraZeneca stated that it was already in the process of adapting its vaccine to respond to the South African variant and that it would ensure that it advanced rapidly through the clinical development phase.⁸² Other vaccine developers have also stated that their vaccines revealed reduced efficacy in clinical trials conducted in South Africa. The Johnson and Johnson vaccine showed a 57 per cent efficacy rate compared to 72 per cent that was recorded in the USA; Novavax reported that while its vaccine showed an 89,3 per cent efficacy rate in trials conducted in the

75 As above.

76 As above.

77 As above.

78 SA Lone & A Ahmad 'COVID-19 pandemic – An African perspective' (2020) 9 *Emerging Microbes and Infections* 1300-1308.

79 Lone & Ahmad (n 78) 1301.

80 As above.

81 'AstraZeneca COVID jab less effective against South African variant' *Aljazeera* 7 February 2021, <https://www.aljazeera.com/news/2021/2/7/astrazeneca-covid-jab-less-effective-against-s-africa-variant> (accessed 4 December 2021).

82 As above.

United Kingdom, it recorded a meagre 50 per cent in the case of South Africa.⁸³ The investment in research is vital not only for the production of vaccines that respond directly to the sub-Saharan genome, but also, beyond COVID-19-targeted health research will help find solutions to diseases such as HIV/AIDS that still plague African countries.

In order to address such inequities, the COVID-19 Vaccine Global Access Facility (COVAX) was formed to help poorer countries (many of which are found in Africa) to have access to the vaccines.⁸⁴ The coalition (comprising WHO, Gavi, the Vaccine Alliance and the Coalition for Epidemic Preparedness Innovations (CEPI)) has an ambitious goal of securing at least 2 billion doses by the end of 2021, thereby ensuring access to 92 low and middle-income countries that may not be in a position to afford the vaccines on their own.⁸⁵ It remains to be seen if this ambitious goal will come to fruition.

4.1 COVID-19 and governance in Africa

The part below elaborates on the impact of COVID-19 on both political governance as well as its impact on African economies. The part uses a few case studies, such as Ethiopia, Uganda, Tanzania, Zambia, Kenya, South Africa and Zimbabwe, to highlight the impact of COVID-19 on the already fragile African political economies.

COVID-19 has put into stark contrast the connection between health and political governance and how health has been sidelined and underrated for quite some time. Neo-liberal policies such as privatisation of health care have exposed the already weak African public health systems that have not been in a position to respond to the pandemic.⁸⁶ These market-based approaches, such as the privatisation of health care and the introduction of user fees, have pushed the burden of healthcare financing onto the poor, heavily contributing to the rise in inequality levels.⁸⁷ Over the years, international initiatives geared to the Global South, such as the Gates Foundation, Global Fund for HIV/AIDS, Malaria and Tuberculosis, have stepped in to provide much-needed vital health services.⁸⁸

83 As above.

84 K Liao 'What is vaccine equity?' *Global Citizen* 2 February 2021, <https://www.globalcitizen.org/en/content/what-is-vaccine-equity-covid-19/> (accessed 4 December 2021).

85 As above.

86 R Prince 'Universal health coverage in the Global South: New models of healthcare and their implications for citizenship, solidarity and the public good' (2017) 14 *Noe à l'ère av* 153.

87 As above.

88 As above.

Despite their success, these initiatives have been critiqued for sidestepping government healthcare systems and focusing on NGOs, thus organising health care in a specialised, technical, separated format rather than supporting national health systems with the aim of improving public health care.⁸⁹

Furthermore, African governments over the years have grossly under-invested in health, with most falling short of the 15 per cent of their national budgets percentage pledge that they made in the 2001 Abuja Declaration.⁹⁰ All this meant that COVID-19 found ill-prepared health systems, which has had a ripple effect on other diseases. From an equality standpoint, Africa stands at a particular disadvantage. Unlike the high-income countries in North America, Europe and Northern Asia, most of sub-Saharan Africa already bears an infectious disease burden, namely, that of malaria, HIV and tuberculosis.⁹¹ In addition, most countries have weak health systems and most of the population inhabits poor living conditions characterised by limited access to basic social amenities.

COVID-19 further exposed the already-prevailing governance challenges in fragile economies with wide-ranging consequences, including limited spaces for opposition in countries such as Uganda characterised by heavy-handed security operatives and internet shut-downs; COVID-19 denialism in countries such as Tanzania; and conflict in countries such as Ethiopia. COVID-19 corruption was also reported in countries such as Kenya and South Africa.

Approximately 10 African nations have held elections in 2021: Zambia, Uganda, Niger, DRC, Ethiopia, Benin, Chad, Cape Verde, São Tomé and Príncipe and Djibouti. Others, such as The Gambia and Libya, are preparing to hold elections in December 2021.⁹² Elections in most of Africa have long been viewed as nothing more than ticking a box and a 'window dressing' of sorts as they are aimed at gaining or maintaining international legitimacy in order for African countries

89 As above.

90 M Piatti-Fünfkirchen 'What are governments spending on health in East and Southern Africa' (2018) 4 *Health Systems and Reform* 284; WHO 'The Abuja Declaration: Ten years on', https://www.who.int/healthsystems/publications/abuja_report_aug_2011.pdf (accessed 15 June 2021); J Biegon '19 years ago today, African countries vowed to spend 15% on health' *African Arguments* 27 April 2020, <https://africanarguments.org/2020/04/19-years-africa-15-health-abuja-declaration/> (accessed 15 June 2021).

91 E Shadmi et al 'Health, equity and COVID-19: Global perspectives' (2020) 19 *International Journal for Equity in Health* 6.

92 J Siege & C Cook 'Taking stock of Africa's 2021 elections' Africa Centre for Strategic Studies, 9 February 2021, <https://africacenter.org/spotlight/2021-elections/> (accessed 15 June 2021); Electoral Institute for Sustainable Democracy in Africa '2021 African election calendar', updated December 2021, <https://www.eisa.org/calendar.php> (accessed 15 June 2021).

to continue receiving financial aid and other forms of assistance.⁹³ COVID-19 further exacerbated the already fragile political situation in most countries.

In Ethiopia elections which were slated to be held in 2020 were postponed due to COVID-19. The Tigray People's Liberation Front (TPLF) opposed this move claiming that it was an unconstitutional extension of President Abiy's presidential term.⁹⁴ The TPLF decided to hold its own elections that were declared invalid by the Abiy government, sparking what has been referred to as an interstate war between the TPLF and the Ethiopian National Defence Forces (ENDF).⁹⁵ The conflict has sparked an international outcry from NGOs, deploring the numerous violations they allege to have taken place in Tigray, Ethiopia, including violence against civilians; prevalent massacres; rape and other forms of sexual violence; arbitrary detention; the destruction of refugee camps; destroying of civilian infrastructure including hospitals, schools, businesses, and so forth.⁹⁶ The NGOs further claim that these violations go against humanitarian and human rights law and may amount to war crimes and crimes against humanity.⁹⁷ They place these abuses at the hands of all warring parties, notably, the ENDF, the TPLF, the Eritrean Defence Forces and Amra Regional Special Police.⁹⁸ In June 2021 human rights NGOs urged the UN Human Rights Council to adopt a resolution at its 47th session on the ongoing human rights crisis in Tigray, Ethiopia.⁹⁹

In the lead-up to the January 2021 Uganda elections, the opposition alleged that President Yoweri Museveni's government was exploiting COVID-19 Standard Operating Procedures to infringe on their freedom of assembly, association and free speech.¹⁰⁰ The

93 B Mesfin 'Democracy, elections and political parties: A conceptual overview with a special emphasis on Africa' *ISS Paper* July 2008 166.

94 'Explainer: What is happening in Ethiopia's Tigray region' *Al Jazeera* 6 November 2020, <https://www.aljazeera.com/news/2020/11/6/explainer-what-is-happening-in-ethiopias-tigray-region> (accessed 15 June 2021).

95 S Neuman, '9 things to know about the unfolding crisis in Ethiopia's Tigray region' *NPR* 5 March 2021, <https://www.npr.org/2021/03/05/973624991/9-things-to-know-about-the-unfolding-crisis-in-ethiopias-tigray-region> (accessed 15 June 2021).

96 Human Rights Watch 'NGOs call for UN Human Rights Council Resolution on Tigray' 14 June 2021, <https://www.hrw.org/news/2021/06/11/ngos-call-un-human-rights-council-resolution-tigray> (accessed 15 June 2021).

97 As above.

98 As above.

99 As above.

100 M Ndifuna 'Uganda cannot hold free and fair elections under the selective and opportunistic COVID-19 lockdown measures' *Maverick Citizen* 5 January 2021, <https://www.dailymaverick.co.za/article/2021-01-05-uganda-cannot-hold-free-and-fair-elections-under-the-selective-and-opportunistic-covid-19-lockdown-measures/> (accessed 15 June 2021).

government was reportedly using public health guidelines and COVID-19 standard operating procedures (SOPs) to break up opposition public gatherings while those of the National Resistance Movement (NRM) were disregarded.¹⁰¹ In November 2020 the opposition candidate, Bobi Wine, was arrested for allegedly flouting COVID-19 guidelines related to mobilising large crowds, which led to public protests demanding his release.¹⁰² These protests were met with the use of live bullets and teargas by the security agencies, leading to the death of over 50 Ugandans and injuries to hundreds more.¹⁰³ On the eve of the elections, which saw the incumbent President Yoweri Museveni win a sixth consecutive term, there was a country-wide internet shut-down that lasted for about five days, a further infringement on people's freedom of communication, access to vital services during COVID-19 and directly affecting businesses that rely on the internet.¹⁰⁴

The most outstanding feature of Tanzania, in response to the pandemic, has been referred to as 'COVID denialism'.¹⁰⁵ In June 2020 then President John Magufuli put an end to the release of COVID-19 data (at the time 509 cases and 21 deaths had been reported) claiming that it was causing public panic.¹⁰⁶ He subsequently declared Tanzania COVID-free, claiming that prayers had saved the country.¹⁰⁷ This was so, despite reported deaths of doctors, lawyers, priests, nuns, citizens, throughout the country with COVID-like symptoms such as difficulty in breathing which were attributed to asthma, pneumonia or heart disease.¹⁰⁸ Journalists who reported about COVID-19 were censored, and in July 2020 regulations were introduced aimed at controlling COVID-related information with a possible fine or imprisonment as a penalty for those that broke the regulation.¹⁰⁹ The President further cast doubt on COVID vaccines

101 As above.

102 J Ibrahim 'Insecurity and COVID-19: Threats to electoral democracy in Africa' *Mail and Guardian* 14 April 2021, <https://mg.co.za/africa/2021-04-14-insecurity-and-covid-19-threats-to-electoral-democracy-in-africa/> (accessed 15 June 2021); 'Uganda: Authorities weaponise COVID-19 for repression' *Human Rights Watch* 20 November 2020, <https://www.hrw.org/news/2020/11/20/uganda-authorities-weaponize-covid-19-repression> (accessed 15 June 2021).

103 As above.

104 'Statement: Internet shutdowns in Uganda erode citizens' enjoyment of basic human rights' *Global Network Initiative* 5 February 2021, <https://globalnetworkinitiative.org/concerns-internet-shutdowns-uganda/> (accessed 15 June 2021).

105 S Buguzi 'COVID-19: Counting the cost of denial in Tanzania' (2021) 373 *BMJ Feature* 1-2.

106 'Corona virus: John Magufuli declares Tanzania free of COVID-19' *BBC* 8 June 2020, <https://www.bbc.com/news/world-africa-52966016> (accessed 15 June 2021).

107 As above.

108 Buguzi (n 105).

109 As above.

with the claim that very little effort had been taken to put an end to other diseases that ravage Africa, such as tuberculosis, HIV and malaria.¹¹⁰

Ironically, on 17 March the President passed away, reportedly of heart disease.¹¹¹ The Vice-President turned President Samia Suluhu Hassan changed the tune of 'COVID denial' by forming a special committee of health experts to advise and give recommendations on the way forward.¹¹² The committee came up with a series of recommendations, including an overhaul of the country's COVID approach from one of denial, providing information on COVID-19; strengthening interventions throughout the country to prevent the third wave; allowing the use of vaccines listed by WHO; and joining the global COVAX initiative aimed at ensuring access to vaccines to low and middle-income countries.¹¹³ On 12 June 2021 Tanzania submitted a request to the COVAX Programme and in July the Prime Minister announced that the nation had started receiving vaccines, with the first shipment of Johnson and Johnson having been delivered by the US government.¹¹⁴ Furthermore, COVID-19 statistics, which had not been shared during President Magufuli's presidency, were now routinely collected and publicly shared.¹¹⁵ Despite these positive developments, public health officials shared that it would be an uphill task to change peoples' perceptions on the vaccines after many months of denial and misinformation about the virus.¹¹⁶

The illustrations above have demonstrated how COVID-19 has worsened the already precarious political situations in various African countries. It has demonstrated how countries that held elections

110 M Odour 'Tanzania still in denial about COVID-19 existence despite surge in cases' *Africa News* 18 February 2021, <https://www.africanews.com/2021/02/18/tanzania-still-in-denial-about-covid-19-existence-despite-surge-in-cases/> (accessed 15 June 2021).

111 'Tanzania President John Magufuli dies at 61' *Aljazeera* 17 March 2021, <https://www.aljazeera.com/news/2021/3/17/tanzanian-president-john-magufuli-is-dead-vp> (accessed 15 June 2021).

112 T Odula 'Tanzania new President changes policy on COVID-19, media' *AP News* 7 April 2021, <https://apnews.com/article/world-news-pandemics-media-tanzania-coronavirus-pandemic-61073f70a505f055e60d7f6a52be67c7> (accessed 15 June 2021).

113 T Odula 'Tanzania experts suggest overhaul of COVID denial policy' *AP News* 18 May 2021, <https://apnews.com/article/tanzania-africa-coronavirus-pandemic-health-9c9c9473ce9e0e6d103f4eb1e558e20a> (accessed 15 June 2021).

114 S Buguzi 'Tanzania's dilemma: It's not easy to go from vaccine denier to vaccine embracer' *NPR* 28 July 2021, <https://www.npr.org/sections/goatsandsoda/2021/07/27/1021118952/tanzanias-dilemma-its-not-so-easy-to-go-from-vaccine-denier-to-vaccine-embracer> (accessed 26 November 2021).

115 AW Shimanyula 'Tanzania finally shares COVID-19 statistics' *AA Africa* 29 June 2021, <https://www.aa.com.tr/en/africa/tanzania-finally-shares-covid-19-statistics/2288326> (accessed 26 November 2021).

116 Buguzi (n 114).

during the COVID period exploited COVID-19 in ways that further worsened the political environments in these contexts, at times leading to non-COVID-related deaths. Accordingly, despite the fact that various African countries were already faced with several governance challenges prior to COVID-19, the above illustrations demonstrate that the pandemic was exploited by political leadership in ways that further aggravated these challenges. It is thus recommended that political leadership should refrain from exploiting COVID-19 to curtail peoples' freedoms, liberties and rights, thus further worsening their physical, political, economic, social and cultural well-being.

4.2 Economic impact of COVID-19 on Africa

COVID-19 has created a series of economic challenges in several African countries, which have adversely affected fragile African economies.

To start with, the lockdowns that were put in place in several African countries adversely affected business activity. The COVID-19 pandemic presented challenges with which that states never before had had to grapple, and among these was the need to put in place social distancing measures to curb the rapid spread of the virus. This led to the introduction of complete or partial lockdowns around the world. As of July 2021 several African countries had lifted their declared states of emergency, with the exception of countries including Botswana, Chad, Côte d'Ivoire, Eswatini, Guinea and Lesotho. Other counties, such as South Africa, Angola and Zimbabwe, maintained national states of disaster or calamity, while countries such as Uganda retained partial lockdowns.¹¹⁷ From a human rights perspective, any state that limits rights such as the right to movement on grounds of national security should do so with due regard of the law, should consider the least restrictive alternative, put into consideration the general welfare of society, be of limited duration and be open to review.¹¹⁸

States of emergency pose a potential risk as they can be a breeding ground for the abuse of power through the suppression of opposition, thus solidifying autocratic rule, encroaching on

117 'African government's responses to COVID-19: An overview from the COVID-19 Civic Freedom Tracer' 31 July 2021, <https://www.icnl.org/post/analysis/african-government-response-to-covid-19> (accessed 15 June 2021); 'Lockdown partially lifted, but curfew still in place' *Uganda Police Force* 2 August 2021, <https://www.upf.go.ug/lockdown-partially-lifted-but-curfew-still-in-place/> (accessed 4 December 2021).

118 International Covenant on Civil and Political Rights, 1966, art 4(1), General Comment 14 (n 11).

privacy, freedom of assembly and movement.¹¹⁹ Thus, they need to be monitored very closely and on an ongoing basis. In the case of Africa, a series of rights were directly affected by the 'lockdowns', the consequences of which have carried on with the continued partial closure of some countries. Over 85 per cent of the population in sub-Saharan Africa is dependent on the informal sector.¹²⁰ Individuals and families are dependent on daily income for their survival and most have no form of social protection. Therefore, lockdowns, which led to the closure of small businesses such as open markets, street vendors, transportation (motor vehicle, motorcycles, bicycles), agriculture and small-scale retailers, exposed families and individuals to massive economic hardships. For example, the closure of mines, restaurants and bars in Zambia forced many people to lose their informal employment without any form of compensation.¹²¹

Forcing people to stay at home thus directly affects people's livelihoods leading to increased food insecurity and other indirect consequences that were reported, such as an increase in sexual and gender-based violence.¹²² Ultimately, the lockdowns drove up unemployment rates thus adversely affecting fragile African economies. Furthermore, the right to health itself was affected as a result of an obsession with the COVID-19 pandemic to the detriment of other health challenges that remain prevalent in African economies, such as malaria, HIV, tuberculosis, maternity health care, and other non-communicable diseases.¹²³

Additionally, various African countries were already in dire situations, but COVID-19 worsened the situation especially with regard to debt management. Even before the COVID-19 pandemic, several African countries were said to be grappling with debt which is said to have risen by 60 per cent of gross domestic product (GDP) by 2019. It is estimated that prior to COVID-19, eight African

119 S Mollory 'Human Rights in Africa in the context of COVID-19' *International Journal of Constitutional Law* blog 1 May 2020, <http://www.iconnectblog.com/2020/05/human-rights-in-africa-in-the-context-of-covid-19/> (accessed 15 June 2021).

120 E Shadmi et al 'Health equity and COVID-19: Global perspectives' (2020) 19 *International Journal for Equity in Health* 6.

121 As above.

122 'Southern Africa: Homes become dangerous place for women and girls during COVID-19 lockdown' *Amnesty International* 9 February 2021, <https://www.amnesty.org/en/latest/news/2021/02/southern-africa-homes-become-dangerous-place-for-women-and-girls-during-covid19-lockdown/> (accessed 15 June 2021).

123 K Hoffman & S Habhi 'The unanticipated costs of COVID-19 to South Africa's disease burden' (2020) 110 *South Africa Medical Journal* 698-699; AB Hogan 'Potential impact of COVID-19 pandemic in HIV, tuberculosis, and malaria in low-income and middle-income countries: A modelling study' (2020) 8 *Lancet Global Health* e1132.

countries already were in debt distress, 13 faced a high risk of debt distress and 14 were at moderate risk.¹²⁴ This was attributed to heavy borrowing during the credit boom period, mostly geared towards financing ambitious infrastructure projects with some going beyond cheaper sources of lending from institutions such as the World Bank to more non-concessional lenders.¹²⁵ The pandemic has worsened matters with the African Development Bank (AfDB) predicting that the already high debt to GDP ratios are likely to rise by 10 per cent in 2020/2021.¹²⁶

It has been estimated that Africa's growth which stood at 3,9 per cent in 2020 may drop to 0,4 per cent in the best and -3,9 per cent in the worst case scenario.¹²⁷ Particularly in sub-Saharan Africa it is estimated that it may fall between -2 and -5 per cent compared to 2,4 per cent in 2019.¹²⁸ The measures that have been put in place to curb the spread of COVID-19, including travel bans, social distancing, lockdowns and the closure of borders have substantially affected African economies leading to the reduction of the demand in oil, and a substantial reduction in the importation of Chinese goods.¹²⁹ It has increased inflation in the market, led to a reduction in mining thus affecting the mining industry, a substantial reduction in tourism activity, a reduction of investors leading to lower revenues, in turn lowering the tax rates thus affecting the overall revenue in African countries.¹³⁰

Government debt as a share of GDP has grown steadily in sub-Saharan Africa from 31,7 per cent between 2010 and 2015 to 50,4 per cent in 2020 with countries such as Angola, Mozambique and Cape Verde recording staggering debt levels of 90, 106,8 and 118,9 per cent of GDP respectively.¹³¹ It is estimated that 64 countries globally spend more on repaying public debt as opposed to investing in public health.¹³² An example is The Gambia which spends nine times more on external debt repayment compared to

124 P Fabricius 'How to get Africa out of debt' *Policy Briefing* 224 November 2020, South African Institute of International Affairs.

125 As above.

126 As above.

127 Lone & Ahmad (n 78) 1304.

128 As above.

129 As above.

130 As above.

131 COA Ekeruche 'The case for debt relief in Africa amid COVID-19' *AfricaPortal* 14 April 2020, <https://www.africaportal.org/features/case-debt-relief-africa-amid-covid-19/> (accessed 15 June 2021).

132 E Ikouria 'The G20's promise of a debt freeze is not enough for Africa to combat the COVID-19 crisis' *Euronews* 20 April 2020, <https://www.euronews.com/2020/04/20/g20-s-promise-of-a-debt-freeze-is-not-enough-for-africa-to-combat-the-covid-19-crisis-view> (accessed 15 June 2021).

its annual health budget.¹³³ In the same way, countries such as the DRC and Angola spend six times more on external debt repayments than their annual health budgets.¹³⁴ There is also the issue of whether these resources are put to the best use as corruption and a lack of accountability further hinder the effective utilisation of such resources as well as ensuring that they go to those who need them the most. This ultimately hinders the development of most of sub-Saharan Africa thus perpetuating inequality between Africa and the rest of the world.

At the country level, in the midst of the pandemic a series of African countries have admitted to a failure to meet their debt repayments with some declaring bankruptcy. One such country is Uganda which reported that it was most likely to approach creditors such as China or the World Bank in a bid to negotiate the suspension of loan repayments for at least two years.¹³⁵ Uganda's debt has increased to a whopping 35 per cent (\$18 billion) which it attributes to the huge amounts of credit that Uganda had amassed from the International Monetary Fund (IMF), the World Bank and other creditors in 2020 in response to the economic crisis brought about by the COVID-19 pandemic. In addition to the pandemic, Uganda has massively expanded its borrowing over the last decade mostly from China as it undertook ambitious infrastructural developments including power plants, airports and roads.¹³⁶ This wiped out the country's good debt record that had been aided by debt cancellation programmes by the World Bank and the IMF for poor and highly-indebted countries.

The Finance Minister warned that by June 2021 the country's debt load could surpass the 50 per cent GDP mark and by July, Uganda would use 20 per cent of its domestic tax revenue to repay the debts, something that was not sustainable as it was severely affecting the country's public resources.¹³⁷ Ironically, Uganda's economy which is said to have contracted by 1,1 per cent in 2020 is estimated to expand by 3,1 per cent in 2021 due to the prioritisation of agricultural production and an increase in industrial activity. Even worse is the fact that Uganda is in the midst of negotiations for a Chinese loan

133 As above.

134 As above.

135 E Biryabarema 'Uganda says may approach creditors for suspension of debt repayments' *Reuters* 26 April 2021, <https://www.reuters.com/world/africa/uganda-says-may-approach-creditors-suspension-debt-repayments-2021-04-26/> (accessed 15 June 2021).

136 F Draku 'Each Ugandan now owes Shs 1,5m as national debt hits Shs 65t' *Daily Monitor* 26 April 2021, <https://www.monitor.co.ug/uganda/news/national/each-ugandan-now-owes-shs1-5m-as-national-debt-hits-shs65t-3376968> (accessed 15 June 2021).

137 Biryabarema (n 135).

to the tune of \$2,2 billion to move forward with a railway project. China, on the other hand, is insisting that Uganda should utilise revenues from the sale of crude oil to finance the loan, a stipulation that Uganda finds very stifling and is refusing to agree to.¹³⁸

Zambia is another country that was already faced with a debt problem which has escalated into a crisis. In November 2020 Zambia defaulted on a Eurobond repayment valued at \$42,5 million.¹³⁹ It was further estimated that Zambia's external debt repayments had increased from 4 per cent of government revenue in 2014 to an estimated 33 per cent in 2021. This is worsened by high interest loans given by private lenders who often aim to make a high profit.¹⁴⁰ These private lenders, who are estimated to gain 75 to 250 per cent profit from the debt, were exempted from the Debt Service Suspension Initiative which was announced by G20 countries in 2020, declaring that some bilateral debt would be suspended.¹⁴¹ By the end of 2020 Zambia's inflation rate had reached 17,4 per cent. The currency had greatly depreciated leading to increasing poverty levels which have been worsened by the closure of businesses in the informal sector in order to curb the spread of COVID-19.¹⁴² Around June 2021 Zambia was gearing up for talks with the IMF in the hope of receiving a bail-out loan. Economists predicted that the IMF would agree to no deal until after the presidential elections slated to take place in August 2021.¹⁴³

While Zimbabwe's economic crisis has been ongoing for years, it hit an all-time low in 2020 with the onset of the COVID-19 pandemic. The country faced hyper-inflation with figures reaching 1 000 per cent. The pandemic has seen great losses to the tourism sector with few or no tourists. The lockdown also temporarily shut down the informal sector, massively affecting livelihoods that were already living in precarious conditions.¹⁴⁴

138 As above.

139 K Hairsine 'Zambia braces for IMF crunch talks' *DW* 8 February 2021, <https://www.dw.com/en/zambia-braces-for-imf-crunch-talks/a-56496748> (accessed 15 June 2021).

140 V Minisini 'Could Zambia's debt default signal a domino effect on the African continent?' *Global Risk Insights* 19 March 2021, <https://globalriskinsights.com/2021/03/could-zambias-debt-default-signal-a-domino-effect-on-the-african-continent/> (accessed 15 June 2021).

141 As above.

142 As above.

143 Hairsine (n 139).

144 'Zimbabwe's worst economic crisis in more than a decade' *The Economist* 9 July 2020, <https://www.economist.com/middle-east-and-africa/2020/07/09/zimbabwes-worst-economic-crisis-in-more-than-a-decade> (accessed 15 June 2021).

In order to contribute to addressing the economic challenges of African countries as a result of COVID-19, the IMF established a US \$1 trillion lending programme coupled with US \$20 billion from the World Bank as well as other development partners, geared towards assisting African countries to respond to the pandemic.¹⁴⁵ At the country level, the IMF approved a series of loans geared towards addressing the impact of COVID-19 in various countries, such as a loan of US \$491,5 million to Uganda.¹⁴⁶ The IMF executive board also approved US \$4,3 billion in the form of emergency support to South Africa to respond to the COVID-19 pandemic.¹⁴⁷

Furthermore, G20 countries and Paris Club formed the Debt Service Suspension Initiative (DSSI) which agreed to suspend poor countries' debt repayments for a year with the aim of freeing up approximately US \$20 billion to be spent in responding to the COVID-19 pandemic.¹⁴⁸ However, it was emphasised that the debt freeze was not to be interpreted as a debt cancellation as it only applied to debt servicing payments to governments and did not absolve them for paying the debts. The issue here is whether these countries will be able to repay this debt after the debt freeze, owing to the vast negative impact of the COVID-19 virus on economies that already were economically weak prior to the pandemic. At the time some argued that a one-year debt freeze was an insufficient time frame for African countries to come back from the economic consequences of the virus and that a two-year time frame would have made more sense.¹⁴⁹ It is doubtful whether more time would make more of a difference in turning around the dire debt situation in most African countries.

The DSSI has further faced a series of challenges including the refusal of key stake holders to participate in the initiative, including some of the eligible countries such as Kenya, Rwanda and Ghana, which fear that their participation would lead to being downgraded by credit-rating agencies.¹⁵⁰ Furthermore, other vital stake holders

145 J Rega 'G20 freezes poor countries' debts to add \$20B for pandemic fight' *Politico* 15 April 2020, <https://www.politico.eu/article/coronavirus-g20-freezes-poor-countries-debts-to-add-20b-for-pandemic-fight/> (accessed 15 June 2021).

146 E Biryabarema 'IMF approves \$ 491,5 million loan for Uganda to limit corona virus impact' *Reuters* 6 May 2020, <https://www.reuters.com/article/us-health-coronavirus-uganda-imf/imf-approves-491-5-mln-loan-for-uganda-to-limit-coronavirus-impact-idUSKBN22I321> (accessed 15 June 2021).

147 GWS Okamoto 'IMF executive board approves us \$ 4.3 billion in emergency support to South Africa to address the COVID-19 pandemic' *International Monetary Fund* 27 July 2020, <https://www.imf.org/en/News/Articles/2020/07/27/pr20271-south-africa-imf-executive-board-approves-us-billion-emergency-support-covid-19-pandemic> (accessed 15 June 2021).

148 Rega (n 145).

149 Ikouria (n 132).

150 Fabricius (n 124).

that actually constitute a large percentage of external debt, such as the Multilaterals, private lenders and bondholders, have also refrained from participating in the DSSI, citing fears of jeopardising their credit rates.¹⁵¹ For instance, multilateral development banks such as the World Bank and IMF have refrained from participating claiming that it would endanger their Triple-A plus status as the most favourable creditors, thus increasing their interest rates to the very countries they were trying to help. They thus opted for other forms of COVID-19 relief financing, some of which have been highlighted above.¹⁵²

Likewise, private creditors also refrained from participating in the DSSI for fear of hurting their credit rates as well as the fear of incurring opportunity costs of not investing the money in other profitable ventures.¹⁵³ This undermines the DSSI as these groups constitute the bigger percentage of creditors. In 2018 it was estimated that of the US \$278,35 billion publicly guaranteed external debt owed by the 38 DSSI-eligible African countries, 41,3 per cent was owed to multi-lateral development banks, 27,2 per cent to private creditors, 20,7 per cent to China, and 10,7 per cent to other bilateral official creditors (governments).¹⁵⁴

Some of the recommendations that have been forwarded to address the debt challenge are to extend the DSSI to four years; encourage private lenders and multilaterals to join even if indirectly by giving the debt service owed to them by DSSI countries in the form of grants; the UN convening a stakeholders' forum aimed at putting in place a long-term plan to monitor, restructure and, if necessary, cancel unsustainable debt but also put in place strict measures to ensure responsible borrowing and lending to avoid the vicious cycle of debt crises.¹⁵⁵

Ultimately, the fiscal policies in Africa for the most part are unsustainable, a fact that was highlighted by the COVID-19 pandemic. The situation will not be resolved by piece-meal solutions such as debt suspension, or even the granting of more loans. Rather, it is forwarded that the fiscal policy of most countries would need to first be overhauled in order for them to put in place dynamic and contextually-grounded economic policies. Otherwise any measures

151 As above.

152 As above.

153 As above.

154 As above.

155 As above.

adopted in economic systems that are already broken will only add onto the already burgeoning fiscal challenges.

4.3 Accountability and COVID-19

Transparency and accountability are vital for ensuring that the available resources are put to the most effective use. Cases of lack of transparency or misuse of funds impact countries' abilities to effectively respond to the COVID-19 pandemic. There have been several cases of lack of transparency and accountability in the utilisation of COVID-19 funds throughout various African countries. For example, in Uganda NGOs and citizens complained that they were not privy to the details of the Rapid Credit Facility that was set up to respond to the COVID-19 pandemic as well as the health and social protection measures that were being supported by the facility.¹⁵⁶ This in turn hindered their effective participation in programmes aimed at curbing the pandemic.

In addition, there have been several reports of misuse or misappropriation of COVID-19 funds in countries such as South Africa and Kenya. Kenya is said to have received around US \$2 billion in the form of aid or grants to combat COVID-19.¹⁵⁷ Despite these funds coming into the country, health workers continually complained about a severe shortage in public protective equipment and poor working conditions putting their lives at risk.¹⁵⁸ Subsequently, an investigation was conducted by the Kenya Ethics and Anti-Corruption Commission (EACC) which uncovered a series of issues such as tenders allegedly being rewarded to politically-connected businesses and individuals; the inflation of prices of COVID-19 commodities; and criminal culpability by public officials in the purchase or supply of COVID-19 emergency products at Kenya Medical Supplies Authority to the tune of US \$71,96 million.¹⁵⁹

The same applies to South Africa. At the onset of the virus, South Africa put in place a series of measures to counteract the severe impact

¹⁵⁶ 'CSOs call for transparency and accountability in the use of IMF's COVID-19 emergencies loan to ensure it benefits all Ugandans' *OXFAM* 8 May 2020, <https://uganda.oxfam.org/latest/press-release/csos-call-transparency-and-accountability-use-imf%E2%80%99s-covid-19-emergency-loan> (accessed 15 June 2021).

¹⁵⁷ E Igunza 'Corona virus corruption in Kenya: Officials and business people targeted' *BBC* 24 September 2020, <https://www.bbc.com/news/world-africa-54278417> (accessed 30 April 2021).

¹⁵⁸ As above.

¹⁵⁹ 'Procurement corruption darkens Africa's COVID-19 fight' *SciDEV.Net* 1 March 2021, <https://www.scidev.net/sub-saharan-africa/procurement-corruption-darkens-africas-covid-19-fight/> (accessed 15 June 2021).

of COVID-19. These included the R500 billion relief package aimed at availing food parcels for those in need; the temporary employer/employee relief scheme for those whose salaries had been affected; and a short term social grant for over 16 million beneficiaries, among other measures.¹⁶⁰ Reports of the misuse of the funds prompted an investigation which uncovered exorbitantly hiking prices of personal protective equipment.¹⁶¹ From the private sector side, at the onset of the pandemic there were reports of hiking of essentials vital for curbing the pandemic by various private companies. For example, the Competition Commission in South Africa referred Dischem to the Competition Tribunal for the excessive pricing of dusk and surgical face masks.¹⁶² Related to this, the National Consumer Commission (NCC) working together with the Competition Commission opened up an investigation into allegations of excessive pricing by over 30 retailers from various South African provinces, which included branches of companies such as Clicks, Checkers, Pick'nPay and Spar, among others.¹⁶³

The lack of transparency of and accountability for COVID-19 resources is extremely unfortunate especially in the face of a deadly pandemic, which not only consumes lives but also has devastating health, economic and political consequences as outlined above.

5 Conclusion

The article has tackled inequality and governance in the face of the COVID-19 pandemic. It is highlighted that COVID-19 has been a stark reminder that the pursuit of the 'free market' ideology, which is prioritised in liberal democracies, characterised by profit maximisation, freedoms and entitlements, and wealth creation at the expense of the public or common good is becoming increasingly unsustainable. A vivid example of this is the rise of what has been

160 Transparency International 'In South Africa, COVID-19 has exposed greed and spurred long needed action against corruption' 4 September 2020, <https://www.transparency.org/en/blog/in-south-africa-covid-19-has-exposed-greed-and-spurred-long-needed-action-against-corruption> (accessed 15 June 2021).

161 'Corona virus in South Africa: Misuse of COVID-19 funds "frightening"' *BBC News* 2 September 2020, available at <https://www.bbc.com/news/world-africa-54000930#:~:text=Long%20Reads-,Coronavirus%20in%20South%20Africa%3A%20Misuse,CovidCOVID%2D19%20funds%20'frightening'%26text=A%20scathing%20report%20into%20the,audit%20uncovered%20%22frightening%20findings%22> (accessed 15 June 2021).

162 'Dischem faces competition tribunal for hiking prices during Corona virus pandemic' *Business Tech* 24 April 2020, <https://businesstech.co.za/news/business/392301/dis-chem-faces-competition-tribunal-for-hiking-prices-during-coronavirus-pandemic/> (accessed 15 June 2021).

163 'Thirty companies investigated for excessive price hiking' *SA News* 26 March 2020, <https://www.sanews.gov.za/south-africa/thirty-companies-investigated-excessive-price-hikes> (accessed 15 June 2021).

referred to as 'COVID billionaires' in hyper-democracies such as the USA in the face of high COVID mortality rates in marginalised communities. It thus is emphasised that the prioritisation of robust and equitable health programmes rather than the blind reliance on liberal democracies is more guaranteed to deliver quality and equality of health and health care in health systems.

At the African level, it is suggested that COVID-19 found weak health systems in place, specifically public health systems, which have gradually become dilapidated as a result of neo-liberal policies such as privatisation that led to governments withdrawing from providing much-needed public health care. This led to the relegation of healthcare financing to their populations, a factor that has increased inequality levels as it has meant that quality health care can only be accessed by those who can afford it. The difficulty in accessing vaccines on the continent poses a major threat to the continent which by 2021 is experiencing more disturbing waves of the pandemic that are taking more lives compared to the earlier waves. This fact is worsened by the paucity of research on the continent which means limited information on the most effective vaccines. A linkage is also drawn between COVID-19 and governance highlighting the extent to which COVID-19 has worsened governance in most parts of the continent, characterised by further restrictions of civil and political rights including the rights to vote, freedom of assembly, information and association, a rise in political conflict, and COVID-related corruption.

The article also points out the massive impact of the pandemic on the economic situation of most African countries, characterised by the impact of lockdowns on livelihoods of Africans that rely on informal sectors, a rise in unemployment levels and rising levels of debt. Despite debt freezes by international financial institutions, the debt levels of several countries have rapidly risen with some declaring their inability to meet their debt obligations and requesting for the offsetting of these debts. This fact is worsened by the lack of accountability and transparency regarding funds that have been provided to combat the effects of the pandemic. Overall, it is argued that COVID-19 has been a stark reminder that inequalities and inequities are not a natural construction but rather a result of how global, regional and national political, economic power dynamics function to the detriment of poor, marginalised populations. This requires strategic interventions at the international, regional and national level to rethink current political and fiscal policies. This may require overhauling problematic or unsustainable governance and fiscal policies.

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Worthy of membership? Rwanda and South Africa on the United Nations Human Rights Council

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Summary: *The election of human rights-abusing states to the human rights bodies of the United Nations has long been a source of dissatisfaction. There have been repeated calls that such states should not be members of the UN Human Rights Council. This article compares the HRC records of Rwanda, an authoritarian state, with that of South Africa, a liberal democracy. The focus falls on 12 country-specific situations and nine civil and political rights issues that appeared before the HRC from 2017 to 2019. It is demonstrated that Rwanda has been a much stronger defender of international human rights than South Africa. This finding contradicts various empirical and theoretical studies that posit a positive relationship between domestic democracy and respect for human rights, on the one hand, and international support for human rights, on the other. This finding further suggests that demands that the HRC should only have members with respectable domestic human rights records should be tempered.*

Key words: *African foreign policy; Rwanda; South Africa; United Nations Human Rights Council*

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1 Introduction

The election of human rights-abusing states to the human rights bodies of the United Nations (UN) – the UN Commission on Human Rights (CHR) and the organisation that replaced it in 2006, the UN Human Rights Council (HRC) – has long been a source of dissatisfaction. The reason why the CHR became dysfunctional, according to then UN Secretary-General Kofi Annan, was because states ‘sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others’.¹ Following negotiations about replacing the CHR with the HRC, when it became apparent that the new organisation’s membership rules would be similar to its predecessor’s, the US declared that it did not have ‘sufficient confidence’ that the new body would be better than the old and thus voted against the General Assembly Resolution that created the HRC.² More than a decade later Nikki Haley, the Trump administration’s ambassador to the UN, complained:³

Sadly, the case against the Human Rights Council today looks an awful lot like the case against the discredited Human Rights Commission over a decade ago. Once again, over half the current member countries fail to meet basic human rights standards as measured by Freedom House.

Haley demanded that the HRC change its membership rules (and do away with its exaggerated focus on Israel). When Haley’s reform initiative became failed, the US, midway through a three-year membership term, withdrew from the HRC.

South Africa is a liberal democracy. A commitment to human rights is enshrined in its progressive Constitution, elections are free and fair, its press and civil society enjoy extensive freedom, and the judiciary is independent and respected. South Africa is often looked upon – and indeed sees itself – as an international leader of Africa and the Global South.⁴ Since 1994 Freedom House has consistently rated South Africa as ‘free’. In 2019 it was the fifth freest state in Africa.⁵ Rwanda, by contrast, is highly authoritarian. While the rule of Paul Kagame and the Rwandan Patriotic Front has brought

1 K Annan ‘In larger freedom: Development, security and human rights for all’ Report of the UN Secretary-General, UN Doc A/59/2005 (2005) para 182.

2 72nd plenary meeting of the 60th session of the UN General Assembly, UN Doc A/60/PV.72 7.

3 N Haley ‘A place for conscience: The future of the United States in the Human Rights Council’ Remarks at the Graduate Institute of Geneva, 6 June 2017, <https://usun.usmission.gov/remarks-at-the-graduate-institute-of-geneva-on-a-place-for-conscience-the-future-of-the-united-states-in-the-human-rights-council/> (accessed 21 July 2021).

4 C Alden & M Schoeman ‘South Africa in the company of giants: The search for leadership in a transforming global order’ (2013) 89 *International Affairs* 111.

5 Behind Cape Verde, São Tomé and Príncipe, Mauritius and Ghana.

stability after the genocide of 1994, the regime has used enforced disappearance, torture, arbitrary arrest and detention, trumped-up legal charges and unfair trials to suppress dissent.⁶ Freedom House has consistently classified Rwanda as 'not free'. In 2019 Rwanda was ranked the thirty-ninth freest state in Africa out of 54.

Based on their domestic rights records, South Africa appears to be the ideal member of the HRC. Rwanda does not. This article compares the voting records of these two countries during their 2017-2019 terms on HRC, Rwanda's only term on the HRC and the last three years of South Africa's 2014-2019 tenure.⁷ It will be demonstrated that, contrary to what frequent criticisms of the HRC's membership lead us to expect, Rwanda has exhibited much stronger support for human rights in an international context than South Africa.

First, the article will give an overview of the literature regarding the relationship between a state's domestic respect for human rights and its voting record in international human rights forums. The subsequent two parts survey Rwanda and South Africa's voting records on country-specific and civil and political rights resolutions at the HRC, respectively. The focus falls on resolutions on which disagreement was substantial, defined here as resolutions or amendments on which three or more HRC members voted differently to the rest. Resolutions on economic rights and on the international system are not included in this survey, mainly because, in contrast to country-specific and civil and political rights resolutions, there is not much difference between Rwanda and South Africa's voting records on these issues and they often are adopted without a vote, preventing us from seeing where Rwanda and South Africa differ. The purpose of country-specific and civil and political rights parts is to establish the extent of Rwanda and South Africa's support for, or opposition to, international human rights. The concluding part assesses Rwanda and South Africa's records against general empirical and theoretical explanations about the relationship between a state's domestic human rights record and its voting on human rights at the UN, as well as against existing explanations of Rwandan and South African human rights foreign policies.

6 Human Rights Watch 'Rwanda: Events of 2020' (2021), <https://www.hrw.org/world-report/2021/country-chapters/rwanda> (accessed 21 July 2021).

7 South Africa was also an HRC member from 2006 to 2010.

2 Domestic human rights protection and international human rights voting

Every year, as one-third of the seats on the HRC become vacant, the UN General Assembly holds elections to fill these seats. Human rights non-governmental organisations (NGOs) have often used the lead-up to these elections to make their case that domestic rights abusers do not belong on the HRC. In the process, these NGOs present their arguments about why they think that states are worthy of an HRC seat. Freedom House, a think-tank, categorises candidates as either 'not qualified', 'questionable' or 'qualified'. Freedom House's assessment is based on the domestic rights records and the voting in UN organs of the candidate states.⁸ Amnesty International and the International Service for Human Rights (ISHR) have since 2012 hosted voluntary pledging events during which candidate states indicate and answer questions about how they intend to advance human rights if they were to be elected to the HRC.⁹ To accompany these pledging events, the ISHR scores the various candidates in terms of their suitability for membership. Most of the ISHR's criteria focus on a candidate state's formal international human rights commitments and behaviour,¹⁰ but domestic elements such as the presence of a national human rights institution or of protection of human rights defenders, for example, also figure in their list.

Scholars disagree on the relationship between a state's domestic human rights record and its international human rights voting, but the bulk of the research suggests that there is a positive relationship. Hug and Lukács find that a state's domestic rights record and, to a lesser extent, its level of democracy, is important for determining how a state votes on the HRC.¹¹ In a study of country-specific voting on the HRC, Seligman finds that democracies are more likely than

8 Freedom House 'Evaluation of 2008-2011 UN Human Rights Council candidates' 6 May 2008, <https://freedomhouse.org/sites/default/files/Eval2008HRC.pdf> (accessed 21 July 2021).

9 Amnesty International 'A majority of states running for the Human Rights Council participate in pledging event' 27 July 2016, <https://www.amnesty.org/en/latest/news/2016/07/a-majority-of-states-running-for-the-human-rights-council-participate-in-pledging-event/> (accessed 21 July 2021).

10 ISHR's international human rights criteria for assessing the suitability of candidate for HRC membership include a candidate state's pledges; its commitment to objectivity and addressing country-specific situations; its cooperation with special procedures mandate holders; its engagement with the Universal Periodic Review; and whether it has signed up to international human rights treaties. ISHR 'HRC elections: How do the candidates for 2021 rate and what have they pledged to do as Council members?' 28 July 2020, <https://www.ishr.ch/news/hrc-elections-how-do-candidates-2021-rate-and-what-have-they-pledged-do-council-members> (accessed 21 July 2021).

11 S Hug & R Lukács 'Preferences or blocs? Voting in the United Nations Human Rights Council' (2014) 9 *Review of International Organisations* 103.

authoritarian states to support country-specific resolutions. Seligman nevertheless cautions that one should distinguish between Western and developing world democracies, with the latter comparatively less inclined to support country-specific resolutions.¹² In line with the aforementioned research, Hillman and Potrafke argue that democracies are more likely to vote 'ethically' in the UN General Assembly.¹³ In a study of the UN Commission on Human Rights over the period 1977-2001, Lebovic and Voeten find that states with good domestic human rights records are 'significantly more likely' to support resolutions that 'shame' other states over their rights records.¹⁴

A few studies question whether there is a relationship between domestic human rights and human rights voting at the UN. After studying 13 000 voting decisions in the General Assembly from 1980 to 2002, Boockmann and Dreher find that while 'democratic participation rights' matter, a country's domestic human rights record is 'not influential' for the way in which it votes on human rights.¹⁵ In the context of a discussion of a liberal shift on the HRC that began in 2010, Jordaan points out that the African Group became more supportive of country-specific resolutions even though the overall domestic human rights profile of the Group had been steadily deteriorating.¹⁶

Theories of international relations offer various explanations for the above findings. Realism denies that there are universal standards of morality or that morality should guide the international actions of states.¹⁷ To the extent that human rights appear to be a universal morality, it is the result of the preferences and prescriptions of the most powerful states.¹⁸ Remove the state power that underpins international human rights and they will enter their 'end times'.¹⁹ Realists further argue that for a state to try to adhere to a universal

12 S Seligman 'Politics and principle at the UN Human Rights Commission and Council (1992-2008)' (2011) 17 *Israel Affairs* 535.

13 AL Hillman & N Potrafke 'Voting in the absence of ethical restraint: Decoys and dissonance in the United Nations' Paper presented at the fourth annual conference on the Political Economy of International Organisation, Zürich, 27-29 January 2011.

14 JH Lebovic & E Voeten 'The politics of shame: The condemnation of country human rights practices in the UNCHR' (2006) 50 *International Studies Quarterly* 881.

15 B Boockmann & A Dreher 'Do human rights offenders oppose human rights resolutions in the United Nations?' (2011) 146 *Public Choice* 462.

16 E Jordaan 'The African Group on the United Nations Human Rights Council: Shifting geopolitics and the liberal international order' (2016) 115 *African Affairs* 507.

17 GF Kennan 'Morality and foreign policy' (1985) 64 *Foreign Affairs* 205.

18 S Krasner 'Sovereignty, regimes, and human rights' in V Rittberger (ed) *Regime theory and international relations* (1995) 141.

19 S Hopgood *The end times of human rights* (2013) 142.

morality in international politics would be misguided – international politics is about power and self-interest. Moral posturing and talk of human rights are mostly useful to mask or pursue the state's self-interest.

Liberal international relations scholars explain democracies' foreign policy commitment to human rights by directing our attention to the institutional environment in which such a policy is made – one marked by relative openness and in which a wide range of actors compete to shape foreign policy decisions and in which these decisions tend to be subject to more scrutiny than one would find in authoritarian regimes. Outside of government agencies, democracies typically contain an array of actors – newspapers, civil society organisations, human rights institutions, academics, and so forth – that are well-placed to participate in the foreign policy process and push for a human rights-supporting foreign policy.²⁰ Consistent with the liberal approach, Hillmann and Potrafke argue that while democracies might be tempted to vote 'unethically' at the UN, they are constrained by the facts of the matter, more so if the matter receives media attention.²¹

Constructivists see a state's international behaviour as an expression of its national identity – an amalgam of history, political institutions and public values. In the conventional constructivist view, national identity is both a cause of, and a justification for, a state's international behaviour.²² A description of a state's national identity will allow a researcher to infer the types of international actions that are likely to result. To the extent that respect for human rights is important to a state's national identity, which is the case for democracies, one would expect that, consistent with this self-understanding, such states would support human rights internationally.

In closing, it is necessary to point to one important determinant of voting behaviour at the UN that does not fit neatly into any of the main international relations theories – conformity to a regional position, expressed through actions such as bloc voting and joining group statements. Lamenting the HRC's disappointing record during its first few years, Ramcharan blames bloc voting:²³

20 D Forsythe 'US foreign policy and human rights' (2002) 1 *Journal of Human Rights* 501.

21 Hillmann & Potrafke (n 13).

22 T Hopf 'The promise of constructivism in international relations theory' (1998) 23 *International Organisation* 175-177; K Sikkink *Mixed signals: US human rights policy in Latin America* (2003) 6-8.

23 BG Ramcharan *The UN Human Rights Council* (2011) 13.

A key problem of the Council is that the African and Asian groups have been allocated 26 out of the 47 seats. Many countries in these two regions have severe governance problems and have experienced numerous conflicts and situations of gross human rights violations ... [T]hey band together to prevent discussions of situations of gross human rights violations and forthright criticism of such violations.

Boockmann and Dreher find that a state's region matters greatly for how states vote on human rights. They explain that states vote in line with the average level of human rights that obtains in the group to which the state belongs. This means that a domestic human rights violator from a region in which human rights generally are respected will tend to vote for human rights resolutions whereas a domestic respecter of human rights will tend to vote against human rights if it is from a region in which human rights are generally violated.²⁴ In their analysis, region supersedes voting based on national identity and contradicts the frequent view that rights violators vote against human rights UN because they want to protect themselves from future scrutiny.

3 Country-specific situations

This part presents Rwanda and South Africa's votes related to country-specific resolutions. During the period under review resolutions on 12 countries are relevant: Belarus, Burundi, Eritrea, Georgia, Iran, Myanmar, Nicaragua, Philippines, Syria, Ukraine, Venezuela and Yemen. On country-specific situations, Rwanda's actions demonstrate much stronger support for international human rights than those of South Africa.

Approximately a quarter of the resolutions that the HRC adopts during a specific session relate to specific countries. The crucial element in a country-specific resolution is the level of international intrusiveness that it authorises. There are two types of country-specific resolutions. At the less intrusive end of the spectrum are resolutions that require the Office of the United Nations High Commissioner for Human Rights (OHCHR) to provide technical assistance or capacity-building to the country concerned. These resolutions fall under item 10 of the HRC's standing agenda. They are usually adopted without a vote and with the consent of the country concerned. These resolutions imply – a sometimes necessary pretence – that human rights violations are not wilful but stem from the government's lack

24 Boockmann & Dreher (n 15) 462.

of capacity and technical know-how and that the government is committed to remedying its human rights problems.

Much more intrusive and uncomfortable for the government in question are the resolutions adopted under item 4, 'Human rights situations that require the Council's attention'. These resolutions authorise investigations of the human rights situation in the particular country concerned.²⁵ Different measures can be taken. The softest option is to ask the OHCHR to write such a report, but a stronger option is to have an independent expert or group of experts – the so-called 'special procedures' mechanism – conduct an investigation. Such a special procedures mandate is a powerful instrument at the HRC's disposal. Stronger and more intrusive still are commissions of inquiry into human rights violations in a specific country. What sets these apart from special procedures investigations is that commissions of inquiry are usually mandated to conduct investigations and collect evidence aimed at holding accountable perpetrators of human rights violations.

Item 7 on the HRC's agenda is the 'Human rights situation in Palestine and other occupied Arab territories'. The HRC adopts more resolutions on Israel than any other country. From 2017 to 2019 the HRC adopted 16 Israeli resolutions. Over the same period, the second-most resolutions were on Syria (ten) and the third-most on Myanmar (six). Rwanda and South Africa's voting records on Israel-related resolutions are excluded from this analysis because these resolutions are so politicised and, therefore, are poor indicators of a human rights commitment.²⁶ Many states that support the always-strong Israeli resolutions usually oppose strong resolutions on other countries. In 2018, for instance, African states voted for Israeli resolutions 76 per cent of the time, but only voted for resolutions on other countries 23 per cent of the time.²⁷

Belarus has been subjected to a special procedures mandate since 2012, renewed annually. In 2019 the Special Rapporteur on the Situation of Human Rights in Belarus reported that despite years of

25 Intrusive resolutions are typically adopted under item 4 on the HRC's agenda ('Human rights situations that require the Council's attention') but in recent years have also been adopted under item 2 ('Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General').

26 During its various HRC membership terms, South Africa voted for all Israeli resolutions. During its 2017-2019 term Rwanda had to vote on 16 Israeli resolutions. It abstained on 13 and voted yes on three.

27 E Jordaan 'African states at the UN Human Rights Council in 2018' South African Institute for International Affairs' 2 December 2020 12, <https://saiia.org.za/research/african-states-at-the-un-human-rights-council-in-2018/> (accessed 22 July 2021).

recommendations, there has been no significant improvement of human rights in the country, with torture and political repression continuing as before.²⁸ African states have shown almost no willingness to support the annual renewal of the Belarus mandate. In 2017 Ghana was the only African state to vote for the resolution; in 2018 Côte d'Ivoire was the only state. From 2017 to 2019 both Rwanda and South Africa abstained on each resolution vote.

In April 2015 Burundi's president Pierre Nkurunziza announced that he would seek a third term. Protests and a coup attempt followed. The government cracked down. After a Constitutional Court ruling in his favour, Nkurunziza was re-elected in July in a poll marred by violence and intimidation. Regime opponents increasingly used violence after Nkurunziza's re-election, as did regime forces. In September 2016 the HRC established a commission of inquiry to investigate recent human rights abuses and to identify the perpetrators to hold them accountable.²⁹ Burundi would not allow the commission to enter the country. Nevertheless, after conducting more than 500 interviews,³⁰ in August 2017 the commission reported various 'extremely cruel' violations, including extrajudicial executions, enforced disappearances, torture and sexual violence.³¹ Government forces were the 'principal perpetrators'.³² The commission recommended prosecuting these alleged perpetrators³³ and extending the mandate for another year to enable further investigations.³⁴

Burundi rejected the report, objecting on the basis that it was 'biased and based on political motives' and that the commission lacked 'objectivity' and 'Cartesian logic'.³⁵ A European Union (EU) resolution proposed extending the commission's mandate by one year.³⁶ The African Group ran interference for Burundi by presenting a rival resolution. The African Group's resolution proposed sending three OHCHR experts to Burundi to provide technical assistance and do capacity building. Crucially, these experts were to gather information 'in cooperation with the government of Burundi, and

28 Report of the Special Rapporteur on the situation of human rights in Belarus, UN Doc A/HRC/41/52 8 May 2019 3.

29 Human Rights Council Resolution 33/24 Situation of human rights in Burundi, UN Doc A/HRC/RES/33/24 5 October 2016.

30 Report of the Commission of Inquiry on Burundi, UN Doc A/HRC/36/54 11 August 2017 3.

31 Burundi (n 30) 4.

32 Burundi (n 30) 6.

33 Burundi (n 30) 19.

34 Burundi (n 30) 18.

35 'Burundi statement to the Human Rights Council' 19 September 2017, <https://media.un.org/en/asset/k1q/k1qn5qpb4i> (accessed 22 July 2021).

36 Human Rights Council Resolution 36/19 Renewal of the mandate of the Commission of Inquiry on Burundi, UN Doc A/HRC/RES/36/19 4 October 2017.

to forward to the judicial authorities of Burundi such information in order to establish the truth and ensure that the perpetrators of deplorable crimes are all accountable to the judicial authorities of Burundi'.³⁷ In other words, the resolution gave the Burundi government, which was maintaining its innocence, a veto over the report and further trusted the Burundi government to investigate and prosecute its agents.

Both resolutions were adopted by vote, creating two investigative missions, yet only the mission established by the EU's resolution had a credible mandate. All African states except Botswana, which abstained, voted for the African Group's resolution and, thus, to protect Burundi from international scrutiny. Among African states, only Botswana and Rwanda voted for the EU resolution. Through this vote Rwanda was contradicting its vote on the African Group resolution – Rwanda was simultaneously protecting Burundi from, and subjecting it to, international scrutiny. By voting against the EU's resolution, South Africa remained consistent in its shielding of Burundi.

In 2018 the OHCHR experts were unable to table their report – mandated by the African Group-sponsored resolution of the previous year – as Burundi had cancelled their visas before they could begin their study.³⁸ With serious human rights violations continuing into 2018 and the Burundian judicial system unwilling and unable to hold perpetrators to account, the commission of inquiry recommended another extension of its mandate.³⁹ Rwanda was the only African state to support the resolution that put the commission's recommendation into effect.⁴⁰ South Africa abstained. In 2019 it was the same story. The commission of inquiry reported that serious human rights violations, including crimes against humanity, were continuing unabated and with impunity, and so recommended an extension of its mandate for another year.⁴¹ Rwanda again was the only African state to support extending the commission's mandate, while five African states opposed the resolution and the rest, including South Africa, abstained.

37 Human Rights Council Resolution 36/2 Mission by the Office of the United Nations High Commissioner for Human Rights to improve the human rights situation and accountability in Burundi, UN Doc A/HRC/RES/36/2 4 October 2017.

38 Human rights situation in Burundi: Note by the Secretariat' UN Doc A/HRC/39/40 20 August 2018.

39 Report of the Commission of Inquiry on Burundi, UN Doc A/HRC/39/63 8 August 2018 16.

40 Human Rights Council Resolution 39/14 Situation of Human Rights in Burundi, UN Doc A/HRC/RES/39/14 2 October 2018.

41 Report of the Commission of Inquiry on Burundi, UN Doc A/HRC/42/49 6 August 2019 17-18.

Despite positive human rights developments in Iran in recent years, the regime has remained highly repressive.⁴² There has been a special procedures mandate on Iran since 2011. In recent years the vast majority of African states have abstained on the annual Iran resolution vote. In 2017 Rwanda and Botswana were the only African states to support the resolution. Rwanda, however, abstained in 2018 and 2019. South Africa abstained during all three years.

HRC resolutions on Georgia (2017-2019) and Ukraine (2014-2017, 2019) relate to countries that have experienced Russian military intervention and that contain areas controlled by Russian-backed separatists. These item 10 resolutions had the support of the Georgian and Ukrainian governments, respectively, and mandated the provision of technical assistance and capacity building.

The 2017 Georgia draft resolution, sponsored by Georgia and co-sponsored by mostly Western states, highlighted human rights violations in the disputed regions of South Ossetia and Abkhazia and recorded that UN human rights monitors had been denied access to these regions. The draft resolution demanded access for the OHCHR and asked for an OHCHR report.⁴³ Although OHCHR representatives were not allowed to enter South Ossetia and Abkhazia, the ensuing report expressed concern about the inability of persons displaced from these regions to return and found that the available evidence pointed to widespread discrimination on the basis of ethnicity.⁴⁴ The OHCHR also concluded that according to available information discrimination on the basis of ethnicity was widespread in the disputed regions.⁴⁵ The 2018 resolution on Georgia expressed concern at such discrimination and the fact that internally-displaced persons had not been able to return to their homes. The resolution requested another OHCHR report.⁴⁶ In 2019 the HRC's actions with regard to Georgia was a repeat of those of the previous years.

A 2014 OHCHR report remarked that human rights in Ukraine depended 'on the sovereignty and territorial integrity' of the country. The OHCHR concluded that Russia had acted in violation of these principles and thus was undermining 'the enjoyment of human rights

42 Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, UN Doc A/HRC/40/67 30 January 2019 17.

43 Human Rights Council Draft Resolution 34/L.13 Cooperation with Georgia, UN Doc A/HRC/34/L.13 17 March 2017.

44 Report of the United Nations High Commissioner for Human Rights on Cooperation with Georgia UN Doc A/HRC/36/65 17 August 2017 7, 16.

45 Report on Cooperation with Georgia (n 44) 16.

46 Human Rights Council Resolution 37/40, Cooperation with Georgia, UN Doc A/HRC/RES/37/40 9 April 2018.

and fundamental freedoms' in Ukraine.⁴⁷ In 2017 the HRC adopted, as during the preceding three years, a resolution on Ukraine. The resolution, 'Cooperation with and assistance to Ukraine in the field of human rights', welcomed the OHCHR's reporting on Ukraine and asked the OHCHR to continue monitoring and reporting on the human rights situation in Ukraine.⁴⁸ There was no 2018 resolution on Ukraine, but the 2019 text was similar to that of 2017.

Even though these technical assistance and capacity-building resolutions had the support of the Georgian and Ukrainian governments, respectively, the aforementioned resolutions all went to a vote. Against the backdrop of intense major power interests in the conflicts in Georgia and Ukraine, many states remained on the margins, with about half of the HRC typically abstaining on resolution votes. South Africa has been one such state, having abstained on all the Georgia and Ukraine resolutions. While Rwanda abstained on all the Georgia resolutions, it was one of the very few African states to vote yes on the Ukraine resolutions.⁴⁹

Following the Syrian government's crackdown on anti-regime protests that had sprung up as part of the Arab Spring, the country descended into civil war. The horrors and complexity of that conflict need not be recounted here.⁵⁰ In April 2011 the HRC began adopting resolutions on Syria. Since March 2012 the HRC has adopted a resolution on the Syrian conflict at each of its general sessions. In August 2011 the HRC created a commission of inquiry on Syria mandated to establish the facts and 'to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable'.⁵¹ The Syria resolutions expressed concern about the victims, condemned the violence, listed the atrocities, renewed the commission of inquiry's mandate, and criticised the Syrian government's lack of cooperation with it. Between 2017 and 2019 the HRC adopted ten resolutions on human rights in Syria, one of which focused specifically on Syrian government's siege and

47 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine', UN Doc A/HRC/27/75 19 September 2014 8-10.

48 Human Rights Council Draft Resolution 35/L.10 Cooperation with and assistance to Ukraine in the field of human rights, UN Doc A/HRC/35/L.10 22 November 2017.

49 In 2017 Côte d'Ivoire, Ghana and Nigeria also voted for the Ukraine Resolution. In 2019 Rwanda was the only African state to do so.

50 Z. Laub 'Syria's civil war: The descent into horror' Council on Foreign Relations 17 March 2021, <https://www.cfr.org/article/syrias-civil-war> (accessed 23 July 2021).

51 Human Rights Council Resolution S-17/1 Situation of human rights in the Syrian Arab Republic, UN Doc A/HRC/RES/S-17/1 23 August 2011.

bombardment of Eastern Ghouta. These resolutions consistently passed with the support of an absolute majority. Despite the extent of the violence and violations in Syria, South Africa never supported the resolutions, abstaining on all ten. Rwanda's record on Syria, while not without blemish, clearly was in support of human rights. Rwanda voted for all ten resolutions in question. Rwanda's failures concern hostile amendments on the four Syria resolutions adopted in 2018. There were 17 such proposed amendments, all sponsored by Russia. The proposed amendments mainly complained about sanctions targeting certain Syrian government agencies and individuals and tried to characterise regime opponents as terrorists.⁵² As in the case of South Africa, Rwanda abstained on all the amendment votes.

Since 1992 there has been a special procedures mandate on human rights in Myanmar. The plight of the Rohingya, a long-persecuted Muslim minority, was typically addressed as part of the annual Myanmar resolutions.⁵³ In June 2015 the HRC for the first time adopted a resolution that addressed the situation of the Rohingya more directly. This resolution, sponsored by the Organisation of Islamic Cooperation (OIC) and adopted without a vote, asked the OHCHR to report on human rights violations against the Rohingya.⁵⁴ The resulting report described extensive violations against the Rohingya but also noted that Myanmar was going through a political transition and thus recommended giving the new regime space to remedy the situation.⁵⁵ However, the persecution of the Rohingya did not let up.

In March 2017 the HRC, through a consensually-adopted resolution, dispatched a fact-finding mission to Myanmar to ensure 'full accountability for perpetrators and justice for victims'.⁵⁶ The ethnic cleansing of the Rohingya continued. In December 2017 the HRC called a special session. The UN High Commissioner for Human

52 Human Rights Council Amendments to Draft Resolution A/HRC/37/L.1, UN Docs A/HRC/37/L.2-5 2 March 2018; Human Rights Council Amendment to Draft Resolution A/HRC/37/L.38, UN Doc A/HRC/37/L.60 21 March 2018; Human Rights Council Amendments to Draft Resolution A/HRC/38/L.20, UN Docs A/HRC/38/L.28-31 4 July 2018.

53 Human Rights Council Resolution 28/23 Situation of human rights in Myanmar, UN Doc A/HRC/RES/28/23 2 April 2015.

54 Human Rights Council Resolution 29/21 Situation of human rights of Rohingya Muslims and other minorities in Myanmar', UN Doc A/HRC/RES/29/21 22 July 2015.

55 Report of the United Nations High Commissioner for Human Rights on the situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc A/HRC/32/18 28 June 2016 15.

56 Human Rights Council Resolution 34/22 Situation of human rights in Myanmar, UN Doc A/HRC/RES/34/22 3 April 2017.

Rights cited acts of ‘appalling barbarity’ against the Rohingya’.⁵⁷ An OIC-led resolution asked the UN High Commissioner for Human Rights for a report on the situation of the Rohingya and to monitor Myanmar’s cooperation with UN investigations.⁵⁸ The resolution was adopted with strong support: 33-3-9 (yes-no-abstain). A March 2018 resolution, adopted 32-5-10, criticised Myanmar for not cooperating with the international fact-finding mission.⁵⁹ In September 2018 the mission reported widespread ‘horrifying’ violations that ‘undoubtedly amount to the gravest crimes under international law’.⁶⁰ The mission recommended that ‘named senior generals of the Myanmar military should be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity and war crimes’.⁶¹ Following this recommendation, the HRC adopted a resolution (vote count 35-3-7), sponsored by the OIC and the EU, to establish a mechanism to expedite criminal proceedings, the Independent Investigative Mechanism for Myanmar.⁶² Two 2019 resolutions, adopted with overwhelming support, called on Myanmar to cooperate with the various UN human rights mechanisms working in the country.⁶³ Rwanda voted yes on all six of the abovementioned resolutions. South Africa, despite the horrors visited upon the Rohingya, abstained in 2017 and 2018 and only in 2019 began to vote in favour of the Myanmar resolutions.

The Yemeni Civil War began in March 2015. After a number of stymied attempts,⁶⁴ in September 2017 the HRC adopted a Dutch-led resolution mandating a group of eminent international and regional experts to, among other things, ‘establish the facts and circumstances surrounding the alleged violations and abuses

57 Zeid Ra’ad Al Hussein ‘Statement: Special session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar’ 5 December 2017, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22487&LangID=E> (accessed 22 July 2021).

58 Human Rights Council Resolution S-27/1 Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc A/HRC/RES/S-27/1 8 December 2017.

59 Human Rights Council Resolution 37/32 Situation of Human Rights in Myanmar, UN Doc A/HRC/RES/37/32 9 April 2018.

60 Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc A/HRC/39/64 12 September 2018 19.

61 Report on Myanmar (n 60) 1.

62 Human Rights Council Draft Resolution 39/L.22 Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc A/HRC/39/L.22 22 September 2018.

63 Human Rights Council Resolution 40/29 Situation of human rights in Myanmar, UN Doc A/HRC/RES/40/29, 11 April 2019; Human Rights Council Resolution 42/3 Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc A/HRC/RES/42/3 3 October 2019.

64 P Wintour ‘Renewed calls for inquiry into alleged human rights violations in Yemen’ *Guardian* 19 September 2016, <https://www.theguardian.com/world/2016/sep/19/renewed-inquiry-alleged-human-rights-violations-yemen-houthi> (accessed 23 July 2021).

and, where possible, to identify those responsible'. Significantly, the resolution did not state that the purpose of such information gathering was to bring perpetrators to account,⁶⁵ as was the case with resolutions on Burundi and Syria.

In August 2018 the expert group presented its report. It found that the governments of Yemen, Saudi Arabia and the United Arab Emirates (UAE) were perpetrating violations such as unlawful killing, arbitrary detention, rape, torture and enforced disappearance, and were in violation of principles of distinction, proportionality and precaution.⁶⁶ To help readers understand the conflict, the report contained a list of those involved on various sides. It was not an indictment, but with Saudi Crown Prince Mohammad bin Salman's name on the list, Saudi Arabia opposed a 2018 resolution to extend the expert group's mandate.⁶⁷ The 2018 resolution was adopted by a vote of 21-8-18. Unlike after the 2017 resolution, the government of Yemen now refused to allow the expert group to enter the country. Nevertheless, the expert group brought out its report, identifying Saudi Arabia, UAE, Yemen as well as the '*de facto* authorities' responsible for a range of human rights violations, many tantamount to war crimes. The expert group further identified persons who may have been responsible for international human rights crimes and gave the names to the High Commissioner for Human Rights. The 2019 resolution to extend the mandate of the expert group continued to receive pushback and was adopted by a margin similar to the previous year, 22-12-11. Yemen is the only country-specific situation where South Africa's record is superior to that of Rwanda. Both states abstained on the 2018 resolution. In 2019, however, Rwanda again abstained while South Africa voted yes.

Rwanda and South Africa also had to consider new resolutions on two Latin American countries. In response to the Nicaraguan government's brutal response to a series of protests that began in April 2018,⁶⁸ and in 2019 the HRC adopted a resolution asking the

65 Human Rights Council Resolution 36/31 Human rights, technical assistance and capacity-building in Yemen, UN Doc A/HRC/RES/36/31 3 October 2017.

66 Report of the United Nations High Commissioner for human rights containing the findings of the Group of Eminent International and Regional Experts and a summary of technical assistance provided by the Office of the High Commissioner to the National Commission of Inquiry, UN Doc A/HRC/39/43 17 August 2018 14-15.

67 Human Rights Council Resolution 39/16 Human rights situation in Yemen, UN Doc A/HRC/RES/39/16 5 October 2018.

68 Human rights violations and abuses in the context of protests in Nicaragua: 18 April-18 August 2018, Report by the Office of the United Nations High Commissioner for Human Rights August 2018.

OHCHR for a report on human rights in the country.⁶⁹ The resolution was adopted without an absolute majority and a large number of abstentions, 23-3-21. Both Rwanda and South Africa abstained.

In 2018 the HRC adopted its first resolution on Venezuela⁷⁰ in response to the economic collapse and growing authoritarianism in the country.⁷¹ The resolution asked the OHCHR for a comprehensive report on human rights in Venezuela. The resultant report listed human rights violations such the failure to secure the rights to food and health, extrajudicial executions, the lack of an independent judiciary, shrinking democratic space, and severe political repression.⁷² The question was what to do about the report. Two options were put on the table.

The first was an Iran and Russia-sponsored resolution, 'Strengthening cooperation and technical assistance in the field of human rights in the Bolivarian Republic of Venezuela'.⁷³ Introducing the resolution, which had the support of the Venezuelan government,⁷⁴ Iran emphasised the importance of cooperation and respect for Venezuelan sovereignty. Indeed, the resolution hardly mentioned human rights violations, referring to them as 'concerns with regard to the situation of human rights in the country'.⁷⁵ The resolution asked the OHCHR for a report on human rights in Venezuela to 'ensure the accountability of perpetrators and redress for victims', but the duty of accountability was assigned to the Venezuelan government. Various Latin American states,⁷⁶ however, rejected the resolution by citing Venezuela's 'lack of genuine commitment to human rights' and urged other states to vote against it.⁷⁷ These Latin American states recognised the importance of international cooperation on

69 Human Rights Council Resolution 40/2 Promotion and protection of human rights in Nicaragua, UN Doc A/HRC/RES/40/2 4 April 2019.

70 Human Rights Council Resolution 39/1 Promotion and protection of human rights in the Bolivarian Republic of Venezuela, UN Doc A/HRC/RES/39/1 3 October 2018.

71 Human rights violations in the Bolivarian Republic of Venezuela: A downward spiral with no end in sight, Report by the Office of the United Nations High Commissioner for Human Rights June 2018.

72 Human rights in the Bolivarian Republic of Venezuela: Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/41/18 9 October 2019.

73 Human Rights Council Resolution 42/4 Strengthening cooperation and technical assistance in the field of human rights in the Bolivarian Republic of Venezuela, UN Doc A/HRC/RES/42/4 3 October 2019.

74 'Iran statement to the Human Rights Council' 26 September 2019, <https://media.un.org/en/asset/k18/k18aqw8f4u> (accessed 22 July 2021).

75 Human Rights Council Resolution 42/4 (n 73).

76 Argentina, Brazil, Chile and Peru.

77 'Peru statement to the Human Rights Council' 26 September 2019, <https://media.un.org/en/asset/k18/k18aqw8f4u> (accessed 22 July 2021).

human rights, but insisted that there should also be accountability for those who violate human rights.⁷⁸

The second response to the OHCHR's report was a resolution, sponsored by Peru, Canada and nine other Latin American states, to create an independent international fact-finding mission 'to investigate extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment since 2014 with a view to ensuring full accountability for perpetrators and justice for victims'.⁷⁹

Rwanda and South Africa's records on Venezuela are both uneven, but with nothing to redeem South Africa's. Rwanda, at least, supported the 2018 resolution on Venezuela, whereas South Africa abstained. In 2019 both abstained from the vote to create a fact-finding mission and, by voting for Iran and Russia's resolution, shielded Venezuela from international scrutiny over its rights record.

In 2019 the HRC adopted its first resolution on the Philippines. It took the HRC three years to adopt such a resolution – upon assuming office on 30 June 2016, Philippine President Rodrigo Duterte immediately unleashed a vicious campaign of extrajudicial killing upon those allegedly involved in the local drug trade. Despite the extent of the violations in the Philippines, the tepid resolution asking the OHCHR for a report on the human rights situation in the Philippines passed with only weak support, 18-14-15. Rwanda and South Africa abstained.

The HRC adopted its first resolution on Eritrea in 2012.⁸⁰ It was sponsored by Djibouti, Nigeria and Somalia. The resolution was strong – it created a special procedures mandate on human rights in the country – and was adopted without a vote. In 2014 the HRC created a commission of inquiry to investigate violations of international human rights law.⁸¹ In 2015 the commission's mandate was broadened, so the purpose of the investigations became to ensure 'full accountability' for human rights crimes.⁸² The incisiveness of these resolutions and the ease with which they were adopted (always without a vote) reflected Eritrea's diplomatic isolation. In

78 As above.

79 Human Rights Council Resolution 42/25 Situation of human rights in the Bolivarian Republic of Venezuela, UN Doc A/HRC/RES/42/25 8 October 2019.

80 Human Rights Council Resolution 20/20 Situation of human rights in Eritrea, UN Doc A/HRC/RES/20/20 17 July 2012.

81 Human Rights Council Resolution 26/24 Situation of human rights in Eritrea, UN Doc A/HRC/RES/26/24 14 July 2014.

82 Human Rights Council Resolution 29/18 Situation of human rights in Eritrea, UN Doc A/HRC/RES/29/18 22 July 2015.

2019, however, the usual African sponsors of the resolution melted away. This retreat was not the result of an improvement of human rights in Eritrea, but was an acknowledgment of improved relations between Eritrea and Ethiopia. The Netherlands stepped in to sponsor the Eritrean resolution⁸³ and ensure its continuation.⁸⁴ Eritrea objected to three paragraphs in the draft resolution and called for votes on these. The relevant paragraphs proposed extending the special procedures mandate, called on Eritrea to cooperate with the mandate holder, and asked the UN Secretary-General to support the mandate holder. Eritrea's proposals to excise these paragraphs were voted down. The resolution was also put to a vote. Rwanda and South Africa both failed to uphold human rights, abstaining on the paragraph and resolution votes.

In six of the 12 country situations discussed above, Rwanda's record demonstrated stronger support for human rights than that of South Africa: Burundi, Iran, Myanmar, Syria, Ukraine and Venezuela. In five cases, Rwanda and South Africa's records were the same: Belarus, Eritrea, Georgia, Nicaragua and the Philippines. There was only one country situation where South Africa's actions were more supportive of human rights than those of Rwanda: Yemen. During 2017 and 2018 South Africa almost always abstained; its only deviations were to protect the regime in Burundi. In 2019 South Africa's default position remained abstention, but despite a vote to protect the rights-violating government of Venezuela, South Africa displayed a slight but uncharacteristic turn towards human rights through its 'yes' votes on Yemen and Myanmar, the first time in the history of the HRC that South Africa voted 'yes' on an intrusive resolution on a country other than Israel. Rwanda's record is more varied than South Africa's, oscillating between abstention and support for country-specific resolutions. Only twice did Rwanda support an anti-human rights position: the 2017 African Group resolution on Burundi and the 2019 Iran and Russian-sponsored resolution to protect Venezuela.

4 Civil and political rights

This part presents Rwanda and South Africa's records on civil and political rights. As in the previous part, the focus falls on resolutions on which there was voting either on the resolution or on proposals to amend it. Resolutions on civil and political rights, as well as on

83 Human Rights Council Resolution 41/1 Situation of human rights in Eritrea, UN Doc A/HRC/RES/41/1 17 July 2019.

84 'Netherlands statement to the Human Rights Council' 11 July 2019, <https://media.un.org/en/asset/k1d/k1dysgj88d> (accessed 22 July 2021).

economic, social and cultural rights, address human rights issues thematically as opposed to focusing on a specific country. Thematic resolutions typically describe a human rights problem, call on states and other actors to take action, and mandate a report on the issue, whether by the OHCHR or the special procedures mandate holder(s).

At the March 2017 session the HRC considered a draft resolution to extend the mandate of the Special Rapporteur on the Situation of Human Rights Defenders. The draft expressed ‘grave concerns ... with regard to the serious risks faced by human rights defenders due to threats, attacks, reprisals and acts of intimidation against them’ and criticised the use of legislation to hamper and criminalise the activities of human rights defenders.⁸⁵ Before the resolution could be adopted, however, Russia and China tabled five hostile amendments.⁸⁶ Some of the proposals opposed recognising human rights defenders for the work they do and singling them out for protection, proposing, for instance, to replace the term ‘human rights defenders’ with ‘those engaged in the promotion and protection of universally-recognized human rights and fundamental freedoms’.⁸⁷ Another amendment attempted to diminish the work and authority of the Special Rapporteur on Human Rights Defenders by seeking to replace ‘welcomes the work and takes note with appreciation of the report of the Special Rapporteur’ with the dismissive ‘takes note of the work and the report of the Special Rapporteur’.⁸⁸ All five the amendments were rejected through a vote. On the issue of human rights defenders, Rwanda’s record is superior to that of South Africa: Whereas South Africa abstained on all five votes, Rwanda opposed four of the amendments and abstained on a fifth.

The central component of the 2017 resolution ‘Human rights, democracy and the rule of law’ was a proposal for a forum discussion on the role of parliaments in advancing human rights, democracy and the rule of law.⁸⁹ The main dispute was over participants in the forum. The resolution’s sponsors preferred openness: UN institutions, academics, regional organisations, national human rights institutions, and NGOs ‘whose aims and purposes are in conformity with the

85 Human Rights Council Draft Resolution 34/L.5 Mandate of the Special Rapporteur on the situation of human rights defenders, UN Doc A/HRC/34/L.5 17 March 2017.

86 Human Rights Council Amendments to Draft Resolution L.5’, UN Docs A/HRC/34/L.42-L.45 & L.51 21 March 2017.

87 Human Rights Council Amendment to Draft Resolution A/HRC/34/L.5, UN Doc A/HRC/34/L.44 21 March 2017.

88 Human Rights Council Amendment to Draft Resolution A/HRC/34/L.5, UN Doc A/HRC/34/L.51 21 March 2017.

89 Human Rights Council Draft Resolution 34/L.20 Human rights, democracy and the rule of law, UN Doc A/HRC/34/L.20 20 March 2017.

spirit, purposes and principles' of the UN Charter. China, Pakistan and Russia, however, wanted to limit the types of NGOs that could participate. Seeking to exclude critical NGOs, the aforementioned states proposed that only NGOs that respected 'the sovereignty and territorial integrity' of states may participate.⁹⁰ South Africa supported their anti-human rights amendment, whereas Rwanda abstained.

Rwanda's actions on a resolution titled 'Civil society space' provide another example of it acting in a more human rights-supportive way than South Africa. An OHCHR report, published in April 2018, found that civil society organisations that participate in regional and international organisations (or seek to do so) often suffer reprisals or are thwarted by unclear accreditation procedures and decisions.⁹¹ A July 2018 draft resolution addressed these problems by calling on states to respect and protect civil society organisations.⁹² China, however, tabled three hostile amendments to the draft resolution. These sought to limit funding for civil society organisations,⁹³ demanded respect for the sovereignty of states,⁹⁴ and proposed to ignore the recommendations of the High Commissioner for Human Rights' on creating an enabling environment for civil society.⁹⁵ South Africa abstained on all three votes, whereas Rwanda abstained on only one and opposed two of the anti-human rights amendments.

In 2018 the HRC adopted another resolution in the series titled 'The promotion and protection of human rights in the context of peaceful protests'.⁹⁶ Unlike in 2014 and 2016, the 2018 resolution was adopted without a vote. However, there was a vote on a hostile amendment that had been sponsored by China and Russia. They proposed inserting a paragraph calling on states to 'ensure that organisers and leaders of protests are cognisant that they have duties and responsibilities with regard to the proper conduct of

90 Human Rights Council Amendment to Draft Resolution 34/L.20, UN Doc A/HRC/34/L.52 22 March 2017.

91 Procedures and practices in respect of civil society engagement with international and regional organisations: Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/38/18 18 April 2018.

92 Human Rights Council Draft Resolution 38/L.17 Civil society space: Engagement with international and regional organisations, UN Doc A/HRC/38/L.17/Rev.1 4 July 2018.

93 Human Rights Council Amendment to Draft Resolution A/HRC/38/L.17/Rev.1, UN Doc A/HRC/38/L.37 5 July 2018.

94 Human Rights Council Amendment to Draft Resolution A/HRC/38/L.17/Rev.1, UN Doc A/HRC/38/L.38 5 July 2018.

95 Human Rights Council Amendment to Draft Resolution A/HRC/38/L.17/Rev.1, UN Doc A/HRC/38/L.39 5 July 2018.

96 Human Rights Council Resolution 38/11 The promotion and protection of human rights in the context of peaceful protests, UN Doc A/HRC/RES/38/11 16 July 2018.

those participating in the protests organised under their auspices'.⁹⁷ This amendment was familiar from previous years – its intention was to deflect from the responsibilities of states to protect the rights of protesting individuals.⁹⁸ Both Rwanda and South Africa supported the anti-human rights amendment, which was firmly rejected (23-14-8).

On another resolution dealing with the political process, 'Equal participation in political and public affairs', Rwanda and South Africa both cast the same anti-human rights vote, but South Africa's played a more active role in trying to undermine the resolution. The draft resolution remarked on the importance of 'equal and effective participation in political and public affairs' for democracy, the rule of law, economic development, gender equality, and 'for the realisation of all human rights and fundamental freedoms'. The text further endorsed OHCHR guidelines on the effective implementation of the right to participate in public affairs.⁹⁹ South Africa objected – spuriously (see next paragraph) – that there had been inadequate multilateral discussion on these guidelines.¹⁰⁰ South Africa joined China and Pakistan to introduce an oral amendment to emphasise that the OHCHR guidelines were voluntary.¹⁰¹ Rwanda and South Africa voted 'yes' on the amendment.

In 2017 the HRC adopted three resolutions on racism. One of these – to renew the mandate of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance – was adopted consensually. There was more disagreement on the other two resolutions, mainly over the criminalisation of racism. The first of these resolutions cited a 2016 General Assembly resolution¹⁰² instructing the Ad Hoc Committee of the Human Rights HRC on the Elaboration of Complementary Standards to the International Convention on the Elimination of All

97 Human Rights Council Amendment to Draft Resolution A/HRC/38/L.16, UN Doc A/HRC/38/L.26 4 July 2018.

98 Human Rights Watch, 'Open letter to member states of the UN Human Rights Council' 26 March 2014, https://www.civicus.org/images/letter_council_25_protest_oppose_amendments.pdf (accessed 23 July 2021).

99 Human Rights Council Draft Resolution 39/L.14 Equal participation in political and public affairs, UN Doc A/HRC/39/L.14/Rev.1 28 September 2018.

100 'South Africa statement to the Human Rights Council 28 September 2018, <https://media.un.org/en/asset/k1f/k1fxsx6l44> (accessed 23 July 2021).

101 'China statement to the Human Rights Council' 28 September 2018, https://media.un.org/en/search?q=&filter-geographic=SOUTH+AFRICA&sort-by=date_desc&start=190 (accessed 23 July 2018).

102 General Assembly Resolution 71/181 A global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action, UN Doc A/RES/71/181 31 January 2017.

Forms of Racial Discrimination to start negotiations on amending the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to criminalise racist and xenophobic acts.¹⁰³ Western states felt that an expansion of ICERD was unnecessary. The EU remarked that it already criminalised certain forms of racism,¹⁰⁴ while the US maintained that the problem was not a gap in ICERD but the inadequate implementation of its provisions.¹⁰⁵ Some also complained about the process. Brazil – normally a supporter of African-led anti-racism initiatives – objected that the African Group, the resolution's sponsor, was pushing ahead without having built the 'necessary consensus' and 'common understanding'.¹⁰⁶ Unlike in the case of the 'Equal participation in political and public affairs' resolution, such haste did not bother South Africa which, along with Rwanda, voted for the resolution.

The second anti-racism resolution to be adopted by a vote, 'From rhetoric to reality: A global call for concrete action against racism, racial discrimination, xenophobia and related intolerance', covered numerous dimensions of racism.¹⁰⁷ The resolution repeated the demand that ICERD should be expanded so as to criminalise racist and xenophobic speech. Critics of this part of the resolution argued that ICERD was adequate and that more rather than less free speech was a better way to combat racist speech.¹⁰⁸

On the HRC, both Rwanda and South Africa have positive records on matters related to sexual orientation and gender identity. Two resolutions are relevant. The first is a 'Protection of the family' resolution.¹⁰⁹ Dressed up as a concern about the family – a presentation of the issue that invites us to see opponents of the resolution as being against families – the resolution attacks the human rights of lesbian, gay, bi-sexual, transgender and intersex (LGBTI) persons. At the

103 Human Rights Council Draft Resolution 34/L.31 Elaboration of complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc A/HRC/34/L.31/Rev.1 21 March 2017.

104 'Germany statement to the Human Rights Council' 24 March 2017, <https://media.un.org/en/asset/k16/k1642osmo2> (accessed 23 July 2021).

105 'United States statement to the Human Rights Council' 24 March 2017, <https://media.un.org/en/asset/k16/k1642osmo2> (accessed 23 July 2021).

106 'Brazil statement to the Human Rights Council' 24 March 2017, <https://media.un.org/en/asset/k16/k1642osmo2> (accessed 23 July 2021).

107 Human Rights Council Resolution 36/24 From rhetoric to reality: A global call for concrete action against racism, racial discrimination, xenophobia and related intolerance, UN Doc A/HRC/RES/36/24 9 October 2017.

108 'Latvia statement to the Human Rights Council' 29 September 2017, <https://media.un.org/en/asset/k1t/k1tysaj3st> (accessed 23 July 2021); 'United States statement to the Human Rights Council' 29 September 2017, <https://media.un.org/en/asset/k1t/k1tysaj3st> (accessed 23 July 2021).

109 Human Rights Council Resolution 35/13 Protection of the family: role of the family in supporting the protection and promotion of human rights of older persons, UN Doc A/HRC/RES/35/1 6 July 2017.

heart of the matter is the definition of the family. Egypt, the leader of the resolution,¹¹⁰ defines the family as a unit with a married man and woman at its head. This denies that a family with parents of the same sex, for instance, in fact constitutes a family. In the past, opponents of the resolution tried to expand the resolution's definition of the family to include, among others, families headed by same-sex parents. In line with such past attempts, in 2017 the EU proposed to amend the 'Protection of the family' resolution by adding the recognition 'that, in different cultural, political and social systems, various forms of the family exist'.¹¹¹ South Africa supported the EU's proposal while Rwanda abstained. In a second proposed amendment, Switzerland sought to convey the plurality of family forms by proposing that part of the resolution's title be changed from 'role of the family' to the 'role of families'.¹¹² South Africa also supported this amendment while Rwanda again abstained. Both amendments were voted down. The resolution was adopted, with both Rwanda and South Africa, to their discredit, voting 'yes'.

The second and more directly relevant resolution is the 2019 text, 'Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity'.¹¹³ Rwanda and South Africa's record on this resolution is far superior to that of their African peers. The draft resolution proposed extending the mandate of the Independent Expert by another three years and called on states to cooperate with the mandate holder.¹¹⁴ The draft resolution was subject to ten OIC-sponsored hostile amendments. These amendments included proposals to cut the term 'sexual orientation' from the resolution,¹¹⁵ to refocus the resolution on racial discrimination,¹¹⁶ and to claim that sexual orientation and gender identity (SOGI) matters were 'private' and thus not an international human rights issue.¹¹⁷ South Africa opposed

110 In 2017 the main sponsors of the 'Protection of the family' Resolution were Bangladesh, Belarus, China, Côte d'Ivoire, Egypt, El Salvador, Mauritania, Morocco, Qatar, the Russian Federation, Saudi Arabia, Tunisia and Uganda.

111 Human Rights Council Amendment to Draft Resolution 35/L.21, UN Doc A/HRC/35/L.45 20 June 2017.

112 Human Rights Council Amendment to Draft Resolution 35/L.21, UN Doc A/HRC/35/L.47 20 June 2017.

113 Human Rights Council Draft Resolution 41/L.10 Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Doc A/HRC/41/L.10 5 July 2019.

114 As above.

115 Human Rights Council Amendment to Draft Resolution 41/L.10/Rev.1, UN Doc A/HRC/41/L.27 10 July 2019.

116 Human Rights Council Amendment to Draft Resolution 41/L.10/Rev.1, UN Doc A/HRC/41/L.30 10 July 2019.

117 Human Rights Council Amendment to Draft Resolution 41/L.10/Rev.1, UN Doc A/HRC/41/L.32 10 July 2019.

all ten hostile amendments while Rwanda opposed six and abstained on four. Both countries voted for the resolution.

Between 2017 and 2019 the HRC adopted numerous resolutions related to women's rights. All were adopted without a vote, but prior to adoption seven resolutions were subjected to hostile amendments: three on discrimination against women, three on violence against women, and one on forced marriage. Typical among the hostile amendments were proposals to delete a call on states to provide 'comprehensive sexuality education',¹¹⁸ to condone marital rape by deleting mention of 'intimate partner violence' from a paragraph condemning gender-based violence,¹¹⁹ and to diminish the rights of women to control matters regarding their sexuality.¹²⁰ In total, there were 18 hostile amendments related to the aforementioned seven women's rights resolutions. South Africa opposed 16 and abstained on two. Rwanda opposed 17 and was absent for one of the votes.

The HRC adopted resolutions on the death penalty in 2017 and 2019. The records of Rwanda and South Africa on these are uneven but overall affirmative of human rights. During both adoptions, the resolutions were subjected to various hostile amendment proposals – seven in 2017 and four in 2019. The amendments mostly concerned two issues: The first was to detract from the seriousness of the death penalty as a violation of the right to life by, for example, downplaying an OHCHR report on the death penalty¹²¹ or seeking to change the sentence 'strongly deploring the fact that the use of the death penalty leads to violations of the human rights of the persons facing the death penalty'¹²² to one that begins with 'strongly deploring the fact that the use of the death penalty may in some cases lead ...'¹²³ Second, a number of amendments insisted that the use of the death penalty was a national rather than an international decision.¹²⁴ In 2017 Rwanda's record clearly was more supportive of human rights than South Africa's. While both countries voted for the resolution, South Africa abstained on all seven hostile amendment

118 Human Rights Council Amendment to Draft Resolution 35/L.15, UN Doc A/HRC/35/L.40 20 June 2017.

119 Human Rights Council Amendment to Draft Resolution 38/L.1/Rev.1, UN Doc A/HRC/38/L.35 5 July 2018.

120 Human Rights Council Amendment to Draft Resolution 41/L.6/Rev.1, UN Doc A/HRC/41/L.46 10 July 2019.

121 Human Rights Council Amendment to Draft Resolution 36/L.6, UN Doc A/HRC/36/L.38 27 September 2017.

122 Human Rights Council Draft Resolution 36/L.6 The question of the death penalty, UN Doc A/HRC/36/L.6 22 September 2017.

123 Human Rights Council Amendment to Draft Resolution 36/L.6, UN Doc A/HRC/36/L.37 27 September 2017 (proposed addition in *italics*).

124 Human Rights Council Amendment to Draft Resolution 36/L.6, UN Doc A/HRC/36/L.41 27 September 2017; Human Rights Council Amendments to Draft Resolution A/HRC/42/L.37, UN Docs A/HRC/42/L.39-40 25 September 2019.

votes whereas Rwanda opposed five of them and abstained on the remaining two. In 2019 South Africa had the better record. South Africa opposed all four anti-human rights amendments and then voted 'yes' on the resolution. Rwanda similarly voted 'yes' on the final resolution but, inconsistent with this vote, supported three of the hostile amendments while opposing the fourth.

In four of the nine civil and political rights issues discussed above, Rwanda's record demonstrated a stronger commitment to human rights than that of South Africa: human rights defenders; democracy and the rule of law; civil society space; and equal participation in politics. In four of the cases Rwanda and South Africa's records were the same: peaceful protest; racism; women's rights; and the death penalty. South Africa had the better record on only one issue, namely, SOGI.

Rwanda's record was positive on six issues (human rights defenders; civil society space; racism; SOGI; women's rights; the death penalty) and clearly negative on two (peaceful protests and equal participation). South Africa's record was positive on four issues (racism; women's rights; SOGI; the death penalty) and negative on three (human rights defenders; peaceful protests; democracy and the rule of law).

5 Conclusion

On the HRC, Rwanda has been a much stronger defender of human rights than South Africa. Rwanda is an authoritarian state that is overall supportive of human rights at the HRC. South Africa is a democratic state that overall does not support human rights at the HRC.

The above conclusions are based on the general patterns of behaviour that Rwanda and South Africa displayed on the HRC from 2017 to 2019. In drawing these conclusions, the key consideration was whether or not Rwanda and South Africa's actions were supportive of pro-human rights voting options with the purpose of examining the frequent claim that only states that respect human rights domestically should be HRC members.

This article did not delve into the motivations for Rwanda and South Africa's actions. A brief reflection on possible explanations of Rwanda and South Africa's records might nevertheless be helpful.

There is a dearth of research on Rwandan foreign policy.¹²⁵ Moreover, at the HRC Rwanda seldom explained its votes – from 2017 to 2019 Rwanda made only 20 statements during the 30 weeks' worth of general sessions over this period.¹²⁶ Rwanda's statements mostly affirmed the importance of the responsibility to protect,¹²⁷ combating genocide,¹²⁸ sustainable development,¹²⁹ and the work of select human rights mechanisms and mandate holders.¹³⁰ In a few statements Rwanda disputed accusations of reprisals against government critics¹³¹ and of Rwandan interference in the Democratic Republic of the Congo (DRC).¹³² Nevertheless, existing scholarship on Rwandan foreign relations suggest at least three possible explanations of Rwanda's actions on the HRC. The first is that Rwanda is concerned with maintaining and exploiting a 'genocide credit' with the outside world. This involves emphasising Rwandan victimhood and reminding the international community of its failure to prevent the genocide in 1994. The purpose of this strategy is to forestall or deflect criticism of the regime and to gain leverage over international actors.¹³³ On the HRC, Rwanda regularly raises the issue of genocide and occasionally the international community's role in preventing it,¹³⁴ and in March 2018 co-sponsored the resolution 'Prevention of genocide'.¹³⁵ However, the 'genocide credit' explanation falls short. During the period under study, Rwanda did not invoke the 1994 genocide when responding to critics on the HRC.¹³⁶ This explanation also cannot account for actions in which neither Western guilt nor criticism of Rwanda is at stake.

125 A Bolin 'The strategic internationalism of Rwandan heritage' (2021) 15 *Journal of Eastern African Studies* 490.

126 This figure is based on the reports of the nine general sessions that took place from 2017 to 2019.

127 'Rwanda statement to the Human Rights Council' 8 March 2018, <https://media.un.org/en/asset/k1a/k1atn7tuyo> (accessed 13 November 2021).

128 'Rwanda statement to the Human Rights Council' 23 March 2018, <https://media.un.org/en/asset/k1n/k1n9x1cqin> (accessed 13 November 2021).

129 'Rwanda statement to the Human Rights Council' 19 June 2017, <https://media.un.org/en/asset/k1d/k1d103hlmi> (accessed 15 November 2021).

130 'Rwanda statement to the Human Rights Council' 28 June 2019, <https://media.un.org/en/asset/k1u/k1u3779xoi> (accessed 15 November 2021).

131 'Rwanda statement to the Human Rights Council' 19 June 2018, <https://media.un.org/en/asset/k1b/k1bxf29hxs> (accessed 14 November 2021).

132 'Rwanda statement to the Human Rights Council' 27 September 2018, <https://media.un.org/en/asset/k1z/k1zw254hec> (accessed 14 November 2018).

133 F Reyntjens 'Constructing the truth, dealing with dissent, domesticating the world: Governance in post-genocide Rwanda' (2011) 110 *African Affairs* 33; Bolin (n 125) 491.

134 'Rwanda statement to the Human Rights Council' 14 September 2018, <https://media.un.org/en/asset/k1i/k1irb63keg> (accessed 15 November 2021).

135 Human Rights Council Resolution 37/26, Prevention of genocide, UN Doc A/HRC/RES/37/26 6 April 2018.

136 'Rwanda statements to the Human Rights Council' 19 June 2018, <https://media.un.org/en/asset/k1b/k1bxf29hxs>, and 27 September 2018, <https://media.un.org/en/asset/k1z/k1zw254hec> (accessed 14 November 2018).

A second potential explanation holds that Rwanda is highly dependent on foreign aid. Thus, perhaps its pro-human rights record at the HRC is a case of pleasing the Development Assistance Committee (DAC) donors of the Organisation for Economic Co-operation and Development (OECD), which provide the bulk of Rwandan assistance. However, a number of considerations steer one away from this explanation. First, Rwanda has hardly been the only aid-dependent African country on the HRC, yet none match its support for international human rights.¹³⁷ Second, the emergence of China as a major donor to African states, including to Rwanda, has decreased Western leverage over it.¹³⁸ Third, despite its political repression at home and its aggressive actions in the DRC, Rwanda has remained such a 'donor darling' that its actions on the HRC are unlikely to have much impact on aid levels. Indeed, Grimm reports that Rwanda appears unconcerned about losing the DAC's support.¹³⁹

A third, more convincing explanation has to do with maintaining good relations with influential international actors. Following Beswick's argument, the fear of the ruling Rwandan Patriotic Front (RPF) is that international donors will switch support to the RPF's domestic opponents or insist on political liberalisation. Both outcomes would weaken the RPF's hold on power. Indeed, in their analysis of why 'competitive authoritarian' regimes become more democratic, Levitsky and Way point out that strong Western linkages with regime opponents deeply threaten the incumbents.¹⁴⁰ One way for incumbents such as the RPF to keep influential Western actors on their side is, as Beswick points out, to show a commitment to ideals that are important to international donors. Participating in international peacekeeping is one such activity.¹⁴¹ Indeed, at the HRC Rwanda regularly draws attention to its peacekeeping activities.¹⁴² Another ideal important to the West is support for human rights. By supporting human rights on the HRC and being positive about the

137 E Jordaán (ed) 'African states at the UN Human Rights Council in 2017' South African Institute for International Affairs, 10 September 2019, <https://saiaa.org.za/research/african-states-at-the-un-human-rights-council-in-2017/> (accessed 15 November 2021); Jordaán (n 27).

138 S Grimm 'Aid dependency as a limitation to national development policy? The case of Rwanda' in W Brown & S Harman (eds) *African agency in international politics* (2013) 94.

139 Grimm (n 138) 87.

140 S Levitsky & L Way *Competitive authoritarianism: Hybrid regimes after the Cold War* (2010). It should be noted that Levitsky and Way do not regard Rwanda as a competitive authoritarian regime – its politics are not competitive enough.

141 D Beswick 'From weak state to savvy international player? Rwanda's multi-level strategy for maximising agency' in W Brown & S Harman (eds) *African agency in international politics* (2013) 163.

142 'Rwanda statement to the Human Rights Council' 13 September 2018, <https://media.un.org/en/asset/k1r/k1rneb7xze> (accessed 16 November 2021).

institution itself,¹⁴³ the Rwandan regime strengthens its relationship with Western donors and thereby reduces the likelihood of a 'perfect storm',¹⁴⁴ an alignment between donors and the domestic opposition. While this perspective might explain Rwanda's general record, it cannot account for short-term variations, such as Rwanda switching from a 'yes' to an abstention on the same issue from one year to the next.

What about South Africa's motivations on the HRC? One perspective suggests that South Africa's foreign policy indeed is supportive of international human rights if we understand human rights more expansively than the liberal version, which is to say, inclusive of 'broader questions of global socio-economic, political, and racial justice'.¹⁴⁵ However, even if one applied a broader conception, South Africa still would not qualify as an international defender of human rights. Opposing peaceful protest, for instance, cannot be defended from a human rights perspective, especially not from the perspective of the South African Constitution, which South Africa frequently invokes at the HRC. A second explanation sees South Africa as constrained by its desire to be a leader of Africa and the Global South.¹⁴⁶ These regions contain many human rights violators – if South Africa wants to be their leader it must shield these states by opposing country-specific and civil and political rights resolutions. However, such an explanation is unconvincing. The aforementioned regions do not all have the same human rights records nor do they all hold the same view at the HRC.¹⁴⁷ Such diversity means that South Africa has a choice about how it interprets 'African' or 'Global South' positions. Moreover, South Africa on occasion has voted against its usual allies to defend a position it believes in, such as on human rights related to sexual orientation and gender identity, a matter that damaged South Africa's relations with African states.¹⁴⁸

A third explanation focuses on the influence of significant individual actors in the foreign policy-making process, such as presidents, foreign ministers, ambassadors, civil servants and civil

143 'Rwanda statement to the Human Rights Council' 9 March 2017, <https://media.un.org/en/asset/k1v/k1vkw6v2> (accessed 15 November 2021).

144 Beswick (n 141) 173.

145 F Nganje & O Ayodele 'South African foreign policy' Oxford Research Encyclopedia: International Studies (2021), <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-611> (accessed 10 September 2021).

146 Alden & Schoeman (n 4).

147 Jordaan (n 27); Jordaan (n 137).

148 P Fabricius 'Human rights top SA's foreign policy' *Independent Online* 12 September 2011, <https://www.iol.co.za/the-star/human-rights-top-sas-foreign-policy-1135404> (accessed 13 November 2021).

society actors.¹⁴⁹ Such a perspective can account for changes in South Africa's HRC positions from one year to the next, but struggles to specify what has provided the consistency to South Africa's positions over the longer term. A fourth explanation argues that South Africa is motivated by 'anti-imperialism', a perspective that sees international politics as a conflict between the Global North and South. This perspective can explain South Africa's resistance to country-specific resolutions and to addressing human rights problems that are more prevalent in the Global South, such as violations of civil and political rights, and can also account for South Africa's support for addressing human rights problems that are found in all states (violations of the rights of women and LGBTI persons) or mostly in the West (racial discrimination against people of African origin).¹⁵⁰ One shortcoming of the anti-imperialism explanation is its difficulty in accounting for changes in South Africa's positions.

Rwanda and South Africa's behaviour on the HRC also poses difficulties for theoretical predictions on the relationship between domestic democracy and respect for human rights, on the one hand, and international support for human rights, on the other, discussed in part 2 above. Contradicting what liberalism leads us to expect, South Africa's open political system and access for human rights defenders to the foreign policy-making process did not result in a pro-human rights foreign policy, while a closed and repressive political system in Rwanda, one in which human rights defenders have been driven from the field, yielded strong support for international human rights. Constructivism can also not explain Rwanda and South Africa's records. Bluntly put, the prominence of human rights in South Africa's national identity did not find expression in a defence of human rights on the HRC. Rwanda defines itself as a 'post-genocide people'.¹⁵¹ As noted above, matters related to genocide figure prominently in Rwanda's activities on the HRC, but this part of Rwanda's identity cannot explain its positive record on the HRC. Indeed, Rwanda's approach to preventing genocide is incompatible with human rights – Rwanda's need to prevent another genocide has justified repression at home and mass atrocities in the DRC.¹⁵²

149 Eg, L Masters 'South Africa's post-apartheid foreign policy making and the role of the President' (2017) 36 *Politeia* 1.

150 E Jordaan *South Africa and the UN Human Rights Council: The fate of the liberal order* (2020).

151 JR Beloff 'Rwanda, Israel, and Operation Protective Edge' (2016) 10 *Israel Journal of Foreign Affairs* 105.

152 Reyntjens (n 133).

Realism can explain some of the actions of Rwanda and South Africa. From the realist perspective, human rights are useful for allowing states to mask their self-interest. One way to do so, as Kofi Annan has lamented,¹⁵³ is to use human rights to criticise one's enemies. Rwanda, for instance, used human rights to criticise¹⁵⁴ and support international pressure on Burundi, a neighbour with which Rwanda for two decades has had an antagonistic relationship¹⁵⁵ and with which at the time it had broken off diplomatic relations.¹⁵⁶ Similarly, other studies have documented South Africa's frequent and sharp criticisms of Western states on the HRC.¹⁵⁷ Furthermore, Beswick's above-mentioned argument – that Rwanda supports human rights at the HRC to maintain a good relationship with Western donors to prevent them from shifting their allegiance to the domestic opposition – also conforms to realism's allowance for using human rights instrumentally for reasons of national self-interest. What realism cannot explain is when states adopt a principled position that pits them against their friends and groups them with their enemies, such as South Africa's support for rights related to sexual orientation.

The records of Rwanda and South Africa on the HRC further challenge the findings of various empirical studies on the determinants of human rights voting at the UN. Most directly, Rwanda and South Africa's actions contradict studies that have found a positive relationship between domestic democracy and respect for human rights and voting on human rights at the UN. Rwanda's performance – but not South Africa's – also poses problems for those who see the region's human rights profile as the most important determinant of UN human rights voting. In 2019, for instance, only eight out of 54 African states were regarded as 'free',¹⁵⁸ while only two of the 13 African Group HRC members in 2019 were free.¹⁵⁹ According to Boockmann and Dreher, we should expect Africa's poor overall

153 Annan (n 1) para 182.

154 Rwanda statement to the Human Rights Council' 19 September 2017, <https://media.un.org/en/asset/k1q/k1qn5qpb4i> (accessed 14 November 2021).

155 F Reyntjens 'Path dependence and critical junctures: Three decades of interstate conflict in the African great lakes region' (2020) 20 *Conflict, Security and Development* 756.

156 F Reyntjens 'Burundi is trying to come in from the cold' *World Politics Review* 25 August 2021, <https://www.worldpoliticsreview.com/articles/29913/rwanda-burundi-relations-normalize-amid-ndayishimiye-s-charm-offensive> (accessed 10 November 2021).

157 Jordaan (n 150).

158 Botswana, Cape Verde, Ghana, Mauritius, Namibia, São Tomé and Príncipe, South Africa and Tunisia.

159 South Africa and Tunisia; Freedom House 'Freedom in the world 2020: A leaderless struggle for democracy' (2020), https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf, (accessed 23 July 2021).

record to drag down Rwanda and, despite its domestic respect for human rights, South Africa as well. Rwanda, however, has managed to defy the drag of its region to post a positive record on the HRC.

Whatever the awkwardness that the cases of Rwanda and South Africa might cause for existing studies on human rights foreign policy, their inverted relationship between domestic and international support for human rights suggests that demands that the HRC should only have members with respectable domestic human rights records should be tempered because such an insistence might include states such as South Africa that are hostile to international human rights and exclude states such as Rwanda that are willing to defend international human rights. Although this conclusion is based on an analysis of two countries, a further analysis of the HRC records of democracies such as India, Indonesia and Namibia¹⁶⁰ is likely to reveal that the disjuncture described in this study may also be found elsewhere.

¹⁶⁰ For older discussions of India's record on the HRC, see R Jenkins & E Mawdsley 'Democratic emerging powers and the international human rights system' Friedrich Ebert Stiftung (2013), <https://library.fes.de/pdf-files/iez/global/10202.pdf> (accessed 14 November 2021); E Jordaan 'Rising powers and human rights: The India-Brazil-South Africa Dialogue Forum at the UN Human Rights Council' (2015) 14 *Journal of Human Rights* 463.

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Mechanisms adopted in curbing unsafe infant abandonment: A comparison between Namibia and South Africa

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Summary: *This article looks at the development of 'baby safe haven' laws in Namibia as a response to unsafe infant abandonment and examines the lack of similar laws in South Africa to curb this practice. The central question addressed in the article is whether an obligation rests with the South African legislature to prevent unsafe infant abandonment by providing a safe alternative. This question is expounded upon by looking at the approach or the mechanisms adopted in countries around the world with a specific focus on South Africa's neighbouring country, Namibia. The impact of the non-legalisation of any of these mechanisms in South Africa is dealt with through analysing the various human rights that are infringed in terms of the South African Constitution. The previous laws governing the abandonment of infants in Namibia are compared with the more recent introduction of 'baby safe haven' laws, which is indicative of how far Namibia has come in moving from emulating South African laws in the realm of children to taking the lead in introducing a safe alternative to unsafe abandonment. Lastly, the current South African law, which is reactive in its approach to infant abandonment, is dealt with. The conclusion is reached that in view of what Namibia has done*

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an obligation indeed rests on the South African legislature urgently to implement similar laws to save the lives and protect the various other rights of unsafely abandoned infants. It is proposed that 'baby savers' and 'baby safe haven laws' urgently should be introduced in South Africa to prevent further deaths through the unsafe abandonment of infants in places such as toilets, pit latrines and open fields.

Key words: *unsafe infant abandonment; infant death; baby savers; baby safe havens; South Africa; Namibia; human rights*

1 Introduction: The worldwide issue of unsafe infant abandonment with a specific focus on Namibia

The issue of unsafe infant abandonment, which often leads to the death of infants, is a worldwide problem that has seen many countries introduce mechanisms to prevent this practice. The two mechanisms that are discussed are 'baby savers', also referred to as 'baby boxes' or 'baby safes' and 'baby safe havens'. A baby saver is a box-like structure in the wall of a child and youth care centre or a place of safety. Once a baby is placed inside the structure an alarm is triggered that alerts a member of staff that a baby has arrived. The baby is then collected and attended to. A 'baby saver' may also be erected independently and may not necessarily be attached to the wall of a charitable institution. Under such circumstances, first responders and emergency medical services will collect the baby once the alarm is triggered. The advantages of using a baby saver are, first, that it provides a safe alternative to unsafe infant abandonment and, second, that women can remain completely anonymous when relinquishing their infants.

The other mechanism referred to is a 'baby safe haven'. This mechanism involves the personal handover of an infant to a member of staff at a hospital, police station or fire station. In some instances a church may also function as a safe haven. However, in these instances mothers do not have the assurance of complete anonymity.¹

¹ AE Boniface & W Rosenberg 'The challenges in relation to undocumented abandoned children in South Africa' (2019) 1 *Journal of South African Law* 49; Also see AE Boniface & W Rosenberg 'The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa' (2017) 80 *Journal of Contemporary Roman-Dutch Law* 254; In addition, see W Rosenberg 'The illegality of baby safes as a hindrance to women who want to relinquish their parental rights' (2015) 1 *Athens Journal of Law* 201.

In June 2011 China's first baby box was installed in a children's home in Shijiazhuang City, Hebei Province. Thereafter, baby boxes expanded into 32 locations in 16 regions. Dr Wang reports that 1 400 abandoned babies have been accepted through these boxes and that, through the implementation of these boxes, China has improved the survival rate of abandoned babies and in so doing has realised its goal of 'putting life and children's best interests first':²

Through the Baby Box project, we were confronted with the challenge of systematically solving baby abandonment. Abandoned babies are socially vulnerable, so it is the joint responsibility of the government and society to find them as soon as possible and protect them properly. Baby Boxes were installed as a humane measure to protect the right to life of infants, and thus they must be universally established.

India introduced the baby box in the form of a cradle as early 1978 and since then the concept of having a cradle with an alarm attached to it has been followed.³ The Republic of Korea saw the introduction of the first ever baby safe in December 2009 according to Rak, and between December 2009 and the end of December 2017 a total of 1 300 babies have been safely relinquished in this box.⁴

In Africa the development of baby safe haven laws in Namibia came as a result of the rise in the number of babies reportedly dumped on a monthly basis. In 2008 staff at the Gammans Water Care Works in Windhoek reported that 13 babies were dumped or flushed down toilets every month.⁵ Although no official statistics exist, those provided by the police suggest that the problem is a 'significant' one.⁶ The cases of concealment of birth more than doubled between 2003 and 2007 from six to 23 cases. This report is according to Hubbard who suggests that infanticide and baby

2 Z Wang 'Development and challenge of protection measures for abandoned babies in China' (2018) 14th Asian Congress of Health Promotion in Kumamoto 37.

3 S Bhalla 'The present situation and issues relating to children being abandoned in baby boxes/cradle in India' (2018) 14th Asian Congress of Health Promotion in Kumamoto 46.

4 LJ Rak 'Baby boxes past, present and future' (2018) 14th Asian Congress of Health Promotion in Kumamoto 53.

5 K Lewis 'Baby dumping on the rise in Namibia' 4 April 2013, <https://www.voanews.com/africa/baby-dumping-reported-rise-namibia> (accessed 6 February 2020); National Planning Commission with support from UNICEF 'Children and adolescents in Namibia 2010: A situation analysis' 2010, https://www.unicef.org/sitan/files/SitAn_Namibia_2010.pdf (accessed 6 February 2020); D Hubbard 'Baby dumping and infanticide' 2008 Gender Research and Advocacy Project of the Legal Assistance Centre, Windhoek, Namibia 3, <https://www.lac.org.na/projects/grap/Pdf/mono1infant.pdf> (accessed 21 July 2021).

6 Hubbard (n 5) 1, 6. The Namibian delegation, while presenting the report on the Elimination of All Forms of Discrimination Against Women published in 1995 to the United Nations Committee, conceded that 'infanticide is a significant problem in Namibia'.

abandonment could have been on the increase in recent years.⁷ The issue in Namibia was so significant that in 1998 the Deputy Minister of Home Affairs urged fathers to take responsibility by finding out from women what happened to their babies. Speaking out against baby abandonment, in 2003 the Women's Action for Development (WAD), the SWAPO Party Women's Council and the SWAPO Party Youth League called for increased government action and that various stakeholders must develop ways to combat this issue.⁸

Hubbard cites reasons for infant abandonment, including the following: traditional views surrounding pre-marital sex and having a baby outside of wedlock; the reality of having to care for a child on her own; if the woman is involved in prostitution, having a child could hinder her ability to continue earning a living; teenage pregnancy and the mother's lack of readiness to look after a child; a lack of knowledge of other available options and the fear of the child having been infected with HIV.⁹ These reasons were confirmed by Diende from the Congress of Democrats during a parliamentary debate in 2007, when she further stated that the role of the fathers of these abandoned children is not being addressed.¹⁰ She pleaded with families to be more supportive of these women.¹¹ In this parliamentary debate the Minister of Gender Equality and Child Welfare stated that there is a demand to expand certain services to help desperate women in need.¹²

The Deputy Minister of Health stated that a new adolescent-friendly health service was being used to address the problem of baby-dumping through the training of health care workers with the knowledge of how to deal with teenagers more sensitively. This goal coupled with counselling services for pregnant teenagers was being

7 Hubbard (n 5) 2.

8 Hubbard (n 5) 16.

9 Hubbard (n 5) 9. These reasons are similar to those cited by D Blackie 'Child abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa' Fact Sheet on child abandonment research in South Africa research study 20 May 2014; also generally see D Blackie 'Sad, mad and bad: Exploring child abandonment in South Africa' LLM dissertation, University of Witwatersrand, 2014; these reasons were elaborated on in Namibia's parliamentary debate of 2007 after a motion calling for research into the issue of baby dumping had been tabled in the National Assembly by Diende from the Congress of Democrats an opposition party. See Hubbard (n 5) 10-15; see also N Hadimanović 'Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?' 2018, www.comparazionedirittocivile.it. (accessed 21 July 2021).

10 Hansard, National Assembly, 26 September 2007 (Hon Diende); Hubbard (n 5) 10.

11 As above.

12 Hubbard (n 5) 11-12.

developed.¹³ Furthermore, the Minister of Home Affairs offered a list of recommendations, one of which pointed out the importance of the right to life of the child as protected by article 6 of the Namibian Constitution.¹⁴

At the end of the parliamentary debate in 2007 no mention was made of a safe haven law specifically to deal with the issue of baby-dumping. However, the question was left open to the public as to how it should be addressed. At the time only in draft form, the Child Care and Protection Act suggested the implementation of safe haven laws. Issues raised for public debate were highlighted and point to the limitations posed by these laws, such as considering the rights of biological fathers; children being deprived of the right to know their origins; and mothers giving birth in unsafe circumstances.¹⁵ At the same time, the Act set out the advantages of safe haven laws in reducing the number of infant murders and illegal abortions. Additionally, safe haven laws could be a means to reach out to fathers to provide them with an opportunity to care for their children,¹⁶ As a result, in 2019 the baby safe haven laws were introduced in Namibia.

2 Infringement of human rights in the unsafe abandonment of infants under the South African Constitution

Various rights are impacted when an infant is unsafely abandoned. The most obvious of these rights are the infant's right to life as guaranteed in section 11 of the South African Constitution and the infant's right to human dignity as guaranteed in section 10. Each time an infant is discarded in an open field, dustbin or pit latrine, the practice threatens the life of that infant and infringes upon the infant's dignity. Statistics demonstrate that unsafe infant abandonment in more than half of all cases leads to infant death.¹⁷ A further right that is threatened is the infant's right to knowledge of his or her origins because in most cases of unsafe infant abandonment the mother's identity is unknown and, therefore, the child's identity

13 Hansard, National Assembly, 23 October 2007 (Hon Haingura); Hubbard (n 5) 12.

14 Hansard, National Assembly, 22 November 2007 (Hon Nghidiniwa); Hubbard (n 5) 14.

15 P Caplan 'The Draft Child Care and Protection Act issues for public debate booklet 2' (no date), <http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsprr-insert2.pdf> (accessed 6 February 2020).

16 As above.

17 Information compiled by Nadene Grabham Director of the Door of Hope Children's Mission Johannesburg. Up to 8 September 2021 60 infants were unsafely abandoned and 34 of these infants were found dead.

also remains unknown. Although not specifically mentioned in the South African Constitution, this right exists in terms of other rights,¹⁸ such as section 12 (the right to freedom and security of the person), which includes control over one's body and one's mind¹⁹ and, therefore, the child's psychological development may be impacted without this knowledge.²⁰ Section 18, which encompasses the right to freedom of association, also protects the right to knowledge of one's origins. Freedom of association is not limited to companies but also applies to family relations.²¹ A child's right to a legal identity is encompassed in the right to a name and nationality from birth (section 28(1)(a)).²² The right to family and parental care (section 28(1)(b)) entails that where such a family no longer is in existence, then at the very least information must be provided to the child of his or her origins, otherwise the right to knowledge of origins will be infringed.²³ Section 28(2), which deals with the best interests of the child, also includes the right to an identity according to Giroux.²⁴ Lastly, the right to human dignity comprises the right to knowledge of one's origins as various authors suggest that dignity is at the core of psychological well-being.²⁵ Despite the various rights at play arising out of the unsafe abandonment of an infant, the right to life remains the most important of all rights and the threat of an infringement of this fundamental right warrants a look at the alternative options available in lieu of unsafe infant abandonment.

18 W Rosenberg 'Does the right to know one's origins exist and can it be limited?' (2020) 4 *Journal of South African Law* 724.

19 I Currie & J de Waal *The Bill of Rights handbook* (2013) 258; I Rautenbach & R Venter *Rautenbach-Malherbe constitutional law* (2018) 277; also see *AB v Minister of Social Development* 2015 (4) All SA 24 (GP).

20 Rosenberg (n 18) 728.

21 AE Boniface 'Do children in South Africa have a right to a family? An exploration of the development of the concept "a right to a family" in South African Law' 2015 Conference Proceedings International Workshop on Law and Politics 230-242; Rosenberg (n 18) 729.

22 Rosenberg (n 18) 733.

23 However, see Rosenberg (n 18) 724-745 for a discussion on the weighing of the right to knowledge of one's origins versus the right to life. It is found that the right to life prevails and thus the limitation of the right to knowledge of the child's origins is warranted in terms of the limitation clause in sec 36 of the Constitution.

24 M Giroux & M de Lorenzi 'Putting the child first: A necessary step in the recognition of the right to identity' (2011) 27 *Canadian Journal of Family Law* 59-60.

25 DM Ziedonis, C Larkin & R Appasani 'Dignity in mental health practice and research: Time to unite on innovation, outreach and education' (2016) 44 *Indian Journal Medical of Research* 491.

3 Previous laws governing the abandonment of infants in Namibia

Up to this point in Namibia the laws pertaining to children emulated the South African approach. This was because the laws of the Union of South Africa were applied to the territory of Namibia following delegation by the King of Great Britain from the mandate of the League of Nations.²⁶ For example, the Namibian Children's Act 33 of 1960 was inherited from South Africa.²⁷ However, in the sphere of developing a solution to unsafe infant abandonment Namibia now has taken the lead. The abandonment of infants is not an occurrence that is unique to Southern Africa – it occurs in both Europe and America,²⁸ as well as in other parts of Africa and the world, as stated above. Having newly-enacted safe haven laws, Namibia serves as both a positive example as well as a warning to carefully consider each aspect of these laws to avoid repercussions such as those which were experienced in the state of Nebraska.²⁹

The Children's Act 33 of 1960 is Namibia's primary piece of legislation on children and, as stated above, at independence this legislation was inherited from South Africa.³⁰ The law reform came as a result of the outdated nature of this law and the fact that its colonial origin meant it did not cater to the needs of an African

26 For more on how South African law has influenced Namibian law, see SK Amoo *An introduction to Namibian Law: Materials and cases* (2018) 60.

27 For more on how South African law has influenced Namibian law, see Amoo (n 26) 60.

28 The US state of Texas enacted a Baby Moses law in 1999 to stop unsafe infant abandonments when numbers were on the rise. See SE Dreyer 'Texas' safe haven legislation: Is anonymous, legalized abandonment a viable solution to newborn discardment and death?' (2002) 12 *Texas Journal of Women and The Law* 167; M Athans 'Saving abandoned lives: Community programs seek to keep mothers from discarding their newborns' Austin AM.-Statesman, 16 January 2000 A2, https://0-bi-gale-com.ujlink.uj.ac.za/global/article/GALE%7CA66141306/e4e60ac5be9d021c50310be6ed663fca?u=rau_itw (accessed 8 November 2021). In Europe, Germany implemented the use of the *babyklappen* in 2000 and its success is illustrated by the fact that between 2001 to 2007, 143 infants were safely relinquished in these safes. See S Benner *Babyklappe und anonyme geburt: ist die kindesabgabe durch babyklappe und anonyme geburt moralisch vertretbar?* (2010) 18.

29 The state of Nebraska failed to set an age limit for children who may be relinquished safely in terms of safe haven laws and this resulted in a spate of a relinquishment of older children. See DK Donnelly 'Nebraska's youth need help – but was a safe haven law the best way?' (2009-2010) 64 *University of Miami Law Review* 771-808, 775-776; B Neal 'Reforming the safe haven in Ohio: Protecting the rights of mothers through anonymity' (2012) 25 *Journal of Law and Health* 347-380, 353; further see LJ Cornett 'Remembering the endangered "child": Limiting the definition of "safe haven" and looking beyond the safe haven law framework' (2009-2010) 98 *Kentucky Law Journal* 833.

30 Caplan (n 15); P Caplan 'Revision of Namibia's Draft Child Care and Protection Act Final Report' 2010, https://www.lac.org.na/projects/grap/Pdf/ccpa-revision_of_draft.pdf (accessed 6 February 2020).

society.³¹ In terms of the previous Namibian law, section 18 of the Children's Act 33 of 1960 regards the abandonment of an infant as a crime.³² Section 18 also holds both parents liable for the care of the child. Further, the concealment of birth of a child is an offence in terms of section 7 of the General Law Amendment Ordinance 13 of 1962.³³ In addition, similarly to South African law, a parent who abandoned a child could be charged with murder, attempted murder or culpable homicide depending on the circumstances in which the infant was abandoned. Namibia also has the common law crime of 'exposing an infant' which consists of abandoning an infant in a life-threatening environment.³⁴

In the past, a child who was abandoned would be classified as a 'child in need of care' in terms of the Children's Act 33 of 1960. The child would be placed in a foster home or a children's home as places of safety pending an inquiry by the Children's Court.³⁵ After an inquiry the infant would be placed in a more permanent foster home or children's home,³⁶ a medical examination could be ordered if required and, if reunification with the biological parents is not possible, the child would be made available for adoption.³⁷ This procedure after a child has been abandoned is similar to the one currently observed in terms of South African law. The Namibian Children's Act 33 of 1960 has been repealed by the Child Care and Protection Act 3 of 2015.

4 Safe haven laws in Namibia and their shortcomings

Section 227 of the Child Care and Protection Act,³⁸ which entered into force on 30 January 2019, provides the procedure for dealing with abandoned children left with approved authorities. Section 227(1) states that

31 As above.

32 Sec 305(3)(b) of the South African Children's Act 38 of 2005 provides that the abandonment of an infant is a crime and in terms of sub-sec (6) a person is liable to a fine or imprisonment of a period not exceeding ten years.

33 In South Africa the offence of concealment of birth is governed by sec 113 of the General Law Amendment Act 46 of 1935.

34 In South Africa, if murder or attempted murder cannot be proved, the exposure of an infant may warrant the alternative offence of concealment of birth in terms of sec 113 of the General Law Amendment Act 46 of 1935. This in terms of sec 258 of the Criminal Procedure Act 51 of 1977.

35 Secs 26-29 of the Children's Act 33 of 1960.

36 Sec 31 of the Children's Act 33 of 1960.

37 Parental consent for adoption is not necessary if the parent has deserted the child. However, if the parents' whereabouts are known, they must be given an opportunity to be heard. See secs 72 & 73 of the Children's Act 33 of 1960.

38 Act 3 of 2015.

a parent, guardian or care-giver of a child who abandons the child may not be prosecuted under section 254 for such abandonment if the child (a) is left within the physical control of a person at the premises of a hospital, police station, fire station, school, place of safety, children's home or any other prescribed place; and (b) shows no signs of abuse, neglect or malnutrition.³⁹

Further, this section goes on to provide that anyone who finds an abandoned child must report the finding to the police or to a designated social worker.⁴⁰ If the finding is reported to the police, the police must immediately inform a designated social worker.⁴¹ The social worker then has the responsibility to place the child in a place of safety and to start an investigation in terms of section 139 of the Act.⁴² In terms of subsection 5 a social worker who has been notified of an abandoned child must call upon any person to claim responsibility for the child through publication in at least one national newspaper circulating in Namibia and in another in the area in which the child was abandoned. Furthermore, the social worker must cause a radio announcement to be broadcast on at least one national radio station in terms of paragraph (b). Section 227 also makes provision for a person who has changed their mind and wishes to reclaim the child, and subsection 6 gives the person 60 days from the date on which the child was abandoned. However, in this instance the child will be treated as one in need of protective services in terms of section 131(1)⁴³ and the social worker will investigate the circumstances surrounding the child and related issues in terms of section 139 of the Act.⁴⁴ In respect of adoption, an abandoned

39 Sec 254: '(1) Subject to the provisions of s 227(1), a parent, guardian or other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely or temporarily, commits an offence if that parent or care-giver or other person (a) abuses or deliberately neglects the child; or (b) abandons the child, and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. (2) A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.'

40 Sec 227(2).

41 Sec 227(3).

42 Sec 227(4); in terms of sec 139 a social worker has 45 days within which to investigate the circumstances surrounding the child and to compile a report that must be submitted to the Children's Court.

43 'Child in need of protective services (1) In this Chapter, a child is in need of protective services, if that child (a) is abandoned or orphaned and has insufficient care or support.'

44 Sec 139 of the Child Care and Protection Act 3 of 2015 reads as follows: '(3) For purposes of an investigation made under this section, a designated social worker may (a) question any person who may have relevant information in order to establish the facts surrounding the circumstances giving rise to the concern; (b) evaluate the child's family circumstances; (c) evaluate the child's

child may not be made available for adoption immediately after abandonment. A period of 60 days must elapse before such a child may be put up for adoption. The 60 days commence from the date of the newspaper publication or the radio broadcast, whichever is the latest, and provided that no one has claimed responsibility for the child.⁴⁵

It is evident that Namibia was faced with the issue of infant abandonment or baby-dumping and infanticide, as it had been referred to for a long time prior to the enactment of the safe haven laws in 2019.⁴⁶ Not only is the parliamentary debate of 2007 evidence, but case law dating back to 1941 is illustrative of this fact.⁴⁷ The Namibian safe haven legislation, although aimed at curbing unsafe abandonment, failed to deal with certain pertinent issues such as the maximum age of the child that may be abandoned under the safe haven laws. No mention is made of an age requirement which could create a problem similar to the one experienced in the state of Nebraska where initially no age requirement was stipulated and resulted in older children being abandoned by their parents.⁴⁸ The law is not clear as to the procedure to follow should the child show signs of abuse, neglect or malnutrition, although it can be inferred that the person abandoning the child will not enjoy immunity from prosecution. The Namibian safe haven law obviously excludes the possible use of baby safes or baby boxes since it specifies that the child must be left in the physical control of a person at the premises. This stipulation could deter desperate women who do not want to be

environmental circumstances; (d) identify sources who may verify any alleged neglect, maltreatment or abuse of the child; (e) identify the level of risk to the child's safety or well-being; (f) identify actual and potential protective and supportive factors in the home and broader environment to minimise risk to the child; (g) make an assessment of the child's developmental, therapeutic and other needs; (h) request entry into any premises in order to obtain relevant information; (i) enter and search any premises without a warrant if there is good reason to believe that the delay involved in obtaining a warrant would prevent the obtaining of relevant information which is critical to the investigation, but search of a building or structure used as residence, may not be carried out without a warrant, unless the owner or occupier of the residence, has consented to the search or the designated social worker on reasonable grounds believes that a warrant will be granted if applied for and that delay in obtaining such warrant would defeat the objects of the search; (j) be accompanied by a member of the police; and (k) recommend any appropriate protective measures or intervention as provided for in this Act.'

45 Sec 227(7).

46 The case of Nangombe of Ovamboland, Northern Namibia as summarised by M McKittrick & F Shingenge 'Faithful daughter, murdering mother: Transgression and social control in colonial Namibia' in W Woodward, P Hayes & G Minkley (eds) *Deep histories: Gender and colonialism in Southern Africa* (2002) 205; also M McKittrick 'Faithful daughter, murdering mother: Transgression and social control in colonial Namibia' (1999) 40 *Journal of African History* 265; also see *S v Glaco* 1993 NR 141, *S v Shaningwa* 2006 2 NR 552.

47 As above.

48 Donnelly (n 29) 775-776; Neal (n 29) 353; further see Cornett (n 29) 833.

identified when abandoning their children from using safe havens. It also does not make provision for leaving certain non-identifying, or in some cases even identifying, information to help promote the protection of the child's right to knowledge of his or her origins, although this is an optional requirement and the parent is not forced to leave such information. In a similar vein, it does not guarantee the anonymity of the relinquishing person or mother, which could result in greater confidence in using safe havens rather than unsafely abandoning a child.

Further, Namibian law does not specify how it may be verified that someone is the parent of the child when they later seek to reclaim the child in terms of section 227(6), although section 139 states that a social worker must conduct an investigation. By issuing the parent with a unique number when they abandon the child so that if they wish to reclaim the child they have only to produce the unique number as proof, could be a possible solution.⁴⁹ Furthermore, the Namibian safe haven law fails to indicate what happens to mothers who fail to abandon their children safely in accordance with these laws. Should it be assumed that these mothers will be charged with abandonment and face the full force of the law because of the existence of a safe alternative or is there a time period for awareness to be created about these new laws that will allow for leniency to be shown mothers?

Namibian safe haven laws serve as a corrective for the South African legislature on aspects of these laws which should not be erroneously omitted and which other aspects require greater consideration and thought. For a properly-functioning law that succeeds in its aim of saving the lives of infants, factors such as age, procedures and consequences form essential components. Nevertheless, Namibia has taken a step in the right direction by enacting these laws to save the lives of infants being abandoned in life-threatening situations.

5 South African law pertaining to the abandonment of infants

From Roman times there have been dramatic changes in relation to the attitude to infanticide and infant abandonment; according to Roman-Dutch law it became punishable by death, depending on where an infant was abandoned.⁵⁰ English law saw a change in the

49 This is an example of what is done in the state of California. In this regard, see California Health and Safety Code sec 1255.7(b)(1).

50 See eg J van der Linden *Institutes of Holland* (1904) 2.5.13.

attitude of the legislature and the way in which these matters were dealt with by the courts by introducing the crime of infanticide.⁵¹ The recognition of the crime of infanticide saw the introduction of evidence of leniency shown mothers on the grounds of the effects of childbirth and lactation.⁵² A verdict of infanticide was less harsh than one of murder.⁵³ Later South African law introduced the death penalty for the killing or abandonment of infants as there existed no distinction between child murder and other forms of murder.⁵⁴ However, this changed with the introduction of the crime of concealment of birth,⁵⁵ which meant that mothers no longer were subject to the death penalty. The crime of concealment of birth required refining and over the years with each case, the framework of this 'new' crime was established.

An overview of the case law illustrates the empathy with which matters were adjudicated.⁵⁶ The circumstances of the women and their true intent traced in each case before a verdict was rendered.⁵⁷ In most cases women acted out of desperation and confusion. According to the case law, if a child is found alive, concealment of birth is not a competent verdict.⁵⁸ In addition, the actions of the accused are crucial in the rendering of such a verdict. If the accused discloses the fact that she gave birth to a child and the location of the child, this negates a charge of concealment because she is not actually 'concealing' such birth.⁵⁹ Further, concealment of birth can serve as an alternative charge to murder, depending on the circumstances of the case. Another issue that was addressed was the fact that only the mother can be found guilty of the crime of concealment of birth.⁶⁰ This does not cater to a situation where someone else, such as the father or grandmother, removes a child from the mother and

51 See C van der Westhuizen 'An historical overview of infanticide in South Africa' (2009) 15 *Fundamina* 174, 182-185 for a look at the history of abandonment and infanticide in English law.

52 SD Sclater 'Infanticide and insanity in 19th century England' in F Ebtehaj et al (eds) *Birth rites and rights* (2011) 219. Medical knowledge of what is now referred to as post-natal depression took shape in the 19th century where it was first referred to as puerperal insanity.

53 See eg the Infanticide Act of 1922.

54 See P van der Spuy 'Infanticide, slavery and the politics of reproduction at Cape Colony, South Africa, in the 1820s' in M Jackson (ed) *Infanticide: Historical perspectives on child murder and concealment, 1550-2000* (2002 reprinted 2005) 131; Van der Westhuizen (n 51) 174, 188.

55 Cape Ordinance 10 of 1845.

56 *Rex v Arends* 1913 CPD 194 (*Arends*); *Rex v Verrooi* 1913 CPD 864 (*Verrooi*); *Rex v Moses* 1919 CPD 81 (*Moses*); and see especially *Rex v Williams* 1920 EDL 80 (*Williams*) where the Court altered a sentence of six months' imprisonment with hard labour to one of three weeks with hard labour on the grounds that the previous sentence was too severe.

57 As above.

58 *Arends*; also see *Verrooi* (n 56).

59 *Rex v Emma Madimetae* 1919 TPD 60 (*Madimetae*).

60 *Moses* (n 56).

abandons the child. However, section 305(3) of the Children's Act 38 of 2005 provides that *anyone* may be charged with the abandonment of a child and, therefore, sufficiently covers this aspect, and if this child dies, murder, attempted murder or culpable homicide may be an appropriate charge.

The crime of concealment of birth has not been shown to curb abandonment, as the number of concealment of birth cases does not match the estimated number of abandonments, which can be due to a number of factors. First, if a child is found alive, it will not amount to concealment of birth. Second, if the body of a child is found in an open area such as a toilet, drain or open field, a charge of concealment of birth may not be appropriate. Lastly, a huge challenge to a charge of concealment of birth is identifying and locating the mother. In terms of South African law, a mother may still be charged with murder, attempted murder or culpable homicide for abandoning her child.

South African law does have a separate crime of infanticide contained in section 239 of the Criminal Procedure Act.⁶¹ As suggested by the judge in *S v Jokasi*,⁶² this takes into account the circumstances of the mother at the time of abandoning the child, such as her emotional state, the effects of child birth and lactation.⁶³ Therefore, South African law as it pertains to children at one stage adopted a progressive approach by acknowledging the individual circumstances of a mother in a case as serious as that of the abandonment of a child leading to its death. The question then arises as to what has happened to the current law makers and the seeming indifference they exhibited by not recognising the needs of children and mothers. Consider that in 2020 out of a total of 83 infants found unsafely abandoned, only 34 were found alive and the other 49 were found dead. These are cases that were reported, but the majority of cases go unreported. From January to June 2021 a total of 37 infants were unsafely abandoned and of this total only 19 infants were found alive. According to further news reports in 2020 118 new-born infants were abandoned in South Africa's public hospitals.

These numbers are far higher than those experienced in Namibia, yet Namibian law makers saw a 'significant' problem and acted to

61 Act 51 of 1977.

62 1987 (1) SA 431 (ZCS).

63 Today it is referred to as post-natal depression, see Sclater (n 52) 219 for the history of this disease and its recognition as a line of defence in cases of infanticide.

curb the increasing rate of unsafe abandonment and in so doing ensured that children's lives are protected and mothers in desperate need are provided with a safe alternative. South Africa faces a dire situation where mothers who find themselves in a desperate situation have no other option but to unsafely abandon an infant.

A study undertaken by Blackie has revealed that some of the causes of child abandonment in South Africa are 'restrictive legislation, poverty, mass urbanisation, high levels of violence, including rape, extreme gender inequality, HIV/AIDS and diminishing family support'.⁶⁴ With the proposed implementation of baby safes and safe haven laws and with proper awareness brought to the existence of these laws, if the mother still opts to abandon an infant in an unsafe location, a charge of murder, attempted murder or culpable homicide would be justified and this would, as a matter of consequence, question the necessity for the separate crimes of concealment of birth and infanticide.

Currently, infanticide and concealment of birth function as a less severe measure of dealing with unsafe infant abandonment in the face of no legal safe alternative. In the matter of *S v Molefe*⁶⁵ the Court attempted to iron out any uncertainties pertaining to the elements of the crime of concealment of birth. However, the Court was unsuccessful in providing clarity and left the elements of 'disposal' and 'child' unresolved. The link between concealment and abandonment exists in that, in order to conceal the existence of the child, the mother abandons the child – in other words, *gets rid of, discards, does away with* that child. In some examples the body of a child may be so severely decomposed that it is not known whether the child was still alive at the time of abandonment. In that case a charge of concealment of birth may find application. This law neither acts as a deterrent to mothers who are desperate, nor is it enforceable because in most cases the mother cannot be located.

In terms of the Draft Children's Amendment Bill⁶⁶ an extended definition of the terms an 'abandoned child' as well as an 'orphan' is suggested. The impact of these changes will be financial in nature, placing an even greater burden on the state to provide adequate support to these children and still not prevent the practice of unsafe abandonment continuing.⁶⁷

64 Blackie (n 9), where it was found that 3 500 babies were abandoned in 2010 and out of a total of 200 babies abandoned in Soweto and Johannesburg monthly, only 60 are found alive.

65 2012 2 SACR 574 GNP.

66 2018 and 2019.

67 Sec 5(3) of the Choice on Termination of Pregnancy Act 92 of 1996.

With abandonment on the rise, it is easy to deduce that whatever options are available in lieu of abandonment, are not being utilised. Such options include adoption and abortion. An obstacle to adoption is the permission requirement, in that a minor must have the required consent of her parent or guardian should she choose to give her child up for adoption⁶⁸ but the same minor does not need the consent of a parent or guardian should she wish to procure an abortion.

The accompanying message sent by these laws is that adoption is not an accepted practice and perhaps even treated as a last resort whereas procuring an abortion is preferred. This notion is further supported when looking at the proposed amendments in the Draft Children's Amendment Bill.⁶⁹

South African law is purely reactive in the realm of the abandonment of infants. Concealment of birth and abandonment cannot be prosecuted if the mother or anyone else cannot be located, thus the current laws are ineffective.

6 Conclusion

Namibia has developed a safe haven law to curb the issue of unsafe infant abandonment and ultimately save the lives of infants who are at risk of being dumped.⁷⁰ Although these laws are far from perfect and omit crucial details, it is submitted that it is a step in the right direction. As with many states in the US it is only after initial implementation that the laws may subsequently be tailored to meet the needs of the specific state. In fact, these challenges may only be amplified after initial implementation. Namibia's laws provide

68 Sec 233 of the Children's Act 38 of 2005; W Rosenberg 'The legal regulation of infant abandonment in South Africa' LLD thesis, University of Johannesburg, 2020 474.

69 Rosenberg (n 68) 474; specifically with reference to the proposed amendment to sec 249(2)(b)-(g), which suggests that no consideration be paid in respect of adoption, which will ultimately cause adoption services to cease to exist. The emphasis on adoption first came in the 1970s, prompted by the child's right to a family; see also J Goldstein, A Freud & AJ Solnit (eds) *Beyond the best interests of the child* (1973). Morgan has argued that adoption should be seen as a public declaration by the family that they are committed to care for the child; see P Morgan *Adoption and the care of children: The British and American experience* (1998); J Lewis 'Adoption: The nature of policy shifts in England and Wales, 1972-2002' in A Bainham (ed) *Parents and children* (2008) 567. In both the US and the UK it is argued that the state is a bad parent; see IM Schwartz & G Fishman *Kids raised by the government* (1999). Research has shown that children prefer adoption as opposed to foster care because of the stability and security it provides. See J Triselotis & M Hill 'Contrasting adoption, foster care, and residential rearing' in DM Brodzinsky & MD Schechter (eds) *The psychology of adoption* (1990) 107.

70 Child Care and Protection Act of 2015.

a framework for South Africa in which to develop its own laws. It offers a means to educate on what not to do in respect of aspects that should not be omitted, but it also largely serves as an example of why these laws are important. Namibian safe haven legislation was developed because 13 fetuses were abandoned in toilets or other locations in Windhoek every month. This is in stark contrast to the 200 estimated in 2010 to have been abandoned in Soweto and Johannesburg monthly of which only 60 were found alive.⁷¹ Thus, despite all its shortcomings, this law indicates a move on the part of the legislature to protect the rights of infants that were being abandoned in life-threatening situations and equally magnifies the South African legislature's sluggishness and plain indifference in protecting and enforcing the right to life of children as guaranteed in section 11 of the South African Constitution.

71 Blackie (n 9).

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Implementing transitional justice in post-transition Central African Republic: What viable options?

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Summary: *The Central African Republic currently is in search of the most suitable approach to adopt in order to address serious crimes and human rights violations committed in the country in recent years. This article is a contribution to the ongoing debate relating to transitional justice options in post-transition CAR. It suggests a three-pronged policy; focusing on the perpetrators, the victims and on society generally. The proposed policy in respect of perpetrators refers to the International Criminal Court, the Special Criminal Court and the national judiciary. Amnesty could be granted to suspected perpetrators willing to cooperate fully with transitional justice institutions. Such individuals equally could be subjected to diverse forms of lustration in exchange for forgiveness. As far as victims are concerned reparation programmes should be adopted and the necessary skills provided in order to enable them, their relatives and communities to earn a living. Lastly, society-focused transitional justice initiatives could involve the effective operationalisation of the Truth, Justice, Reparation and Reconciliation Commission, the establishment of a permanent national peace and dialogue commission and the involvement of community-based mechanisms and religious leadership. Yet, in order to increase the likelihood of success for the proposed transitional justice policy, the overall capacity of the CAR state*

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ought to be significantly improved. Furthermore, external polities will have to refrain from interfering in the country's internal affairs and, at the same time, the international community should increase its support of the CAR.

Key words: *transitional justice; Central African Republic; war crimes; crimes against humanity; Truth, Justice, Reparation and Reconciliation Commission*

1 Introduction

Since the rise of President Faustin Archange Touadéra to power in March 2016, the Central African Republic (CAR) has attempted to put behind it years of political turmoil and civil war. As in the case of other African countries that have experienced civil war (often fought along ethnic and/or religious identity lines) in recent years, the CAR has had to overcome a multitude of challenges on its path towards building durable peace. One of these challenges relates to the need to address serious crimes and human rights violations committed during the civil war years or the question of transitional justice. In this regard, it is important to recall that the political agreement for peace and reconciliation in the CAR, known as the Khartoum Agreement, signed in February 2019 between the CAR government and 14 armed groups,¹ called for the establishment of the Truth, Justice, Reparation and Reconciliation Commission (CVJRR). This call is consistent with a trend shared by virtually all peace agreements signed in the country in recent years although to date no meaningful steps have been taken to implement the different transitional justice mechanisms provided for in the said agreements.

Two main schools of thought seem to dominate the current debate around transitional justice policy options in the CAR as far as the country's national stakeholders and external partners are concerned.² On the one hand, there are those who believe that there

¹ The full nomination in French of the 14 armed groups are: *Anti-Balaka aile-Mokom*; *Anti-Balaka aile-Ngaïssona*; *Front Démocratique du Peuple Centrafricain* (FDPC); *Front Populaire pour la Renaissance de la Centrafrique* (FPRC); *Mouvement des Libérateurs Centrafricains pour la Justice* (MLC); *Mouvement Patriotique pour la Centrafrique* (MPC); *Rassemblement Patriotique pour le Renouveau de la Centrafrique* (RPRC); *Retour, Réclamation et Réhabilitation* (3R); *Révolution et Justice – aile-Belanga* (RJ-Belanga); *Révolution et Justice – aile-Sayo* (RJ-Sayo); *Séléka Renovée*; *Union des Forces Républicaines* (UFR); *Union des Forces Républicaines – Fondamentale* (UFR-F); and *Union pour la Paix en Centrafrique* (UPC).

² The author has been following the situation in the CAR for the past seven years. He has frequently travelled to the country and spoken to a variety of actors, including the country's most senior officials, civil society representatives, officials

can be no peace and reconciliation without criminal justice. In their view, impunity not only has had the effect of criminalising the CAR's political class, but also has contributed to bad governance and, in so doing, exacerbated the country's recurring crises.³

On the other hand, there are those who argue that the peculiar situation of post-transition CAR, characterised by utter state weakness and the pressing need for inter-community reconciliation, should compel the government to explore and adopt transitional justice mechanisms less likely to compromise the fragile peace currently prevailing in the country.

This article contributes to the ongoing debate relating to transitional justice in the CAR. It argues that as far as post-transition CAR is concerned the need to pursue criminal justice should not be viewed as being in opposition to the goals of restorative and distributive justice. Instead, in designing the country's transitional justice policy, there is a need to take into consideration the peculiar realities of post-transition CAR as characterised by the absence of a clear winner in the latest conflict, the chronic weakness of state institutions (including the judiciary), the large number of atrocities and crimes committed and the actors involved, as well as the urgent need to address strong feelings of mutual resentment among the country's ethno-religious communities. This circumstance, it is argued, should lead to the embrace of a holistic approach to transitional justice that combines aspects of criminal, restorative and distributive justice.

The article is divided into four parts beside this introduction and the conclusion. The first part clarifies the concept of transitional justice and the second part presents a historical background to the CAR's recent crisis and transition. The third part is dedicated to the proposed three-pronged transitional justice policy for the CAR, encompassing perpetrator-oriented mechanisms, victim-targeted processes and society-focused initiatives. The last part looks beyond justice alone and analyses the extent to which state recovery and positive engagement from international role players may contribute to advancing the cause of transitional justice in the country.

representing international organisations working in the CAR (United Nations, African Union, Economic Community of Central African States), members of the diplomatic corps, etc. Much of the information used in this article is derived from these conversations.

3 D Niewiadowski 'Pourquoi le Cameroun se raidit face à la crise centrafricaine' (2016), <http://www.jeuneafrique.com> (accessed 24 May 2017).

2 Understanding transitional justice

The quest for justice is central to processes aimed at stabilising societies emerging from protracted civil war, including conflicts ended through negotiated power-sharing arrangements. The phrase 'transitional justice' thus is grounded in a notion of justice based on a movement away from the situation in which it originates. In this regard, any meaningful grasp of the concept of transitional justice ought to be preceded by a clarification of the notion of justice, as attempted below.

2.1 Defining justice

Kofi Annan regards justice as an ideal, the aim of which is to ensure accountability and fairness through 'the protection and vindication of rights and the prevention and punishment of wrongs'.⁴ In this regard, the form of justice may be retributive, restorative or distributive.

Retributive or criminal justice seeks to re-establish justice 'through the imposition of punishment on the offender consistent with what it is believed the offender deserves'.⁵ It therefore aims to achieve two main goals, namely, to bring perpetrators to account and, in so doing, discourage the rest of society from embarking on a criminal path.

Restorative justice is a process through which all parties with a stake in an offence agree to deal comprehensively with the latter's different dimensions, including its implications for the future.⁶ From a restorative perspective an offence is understood as 'a conflict between victim, offender, and community that needs to be resolved in interaction between those parties'.⁷ Restorative justice therefore aims to repair 'harms and ruptured social bonds resulting from crime'⁸ and to bring about social reconciliation.

Lastly, unlike retributive and restorative justice that focus on the consequences of crimes or conflicts, distributive justice seeks to tackle the roots or the structural factors that lead to violence or the commission of crimes.⁹ According to Kasapas, reparations are

4 K Annan 'The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General' (2004).

5 M Wenzel et al 'Retributive and restorative justice' (2007) 32 *Law and Human Behavior* 375.

6 TF Marshall *Restorative justice: An overview. A report by the Home Office Research Development and Statistics Directorate* (1999).

7 Wenzel et al (n 5) 378.

8 K Daly & R Immarigeon 'The past, present and future of restorative justice. Some critical reflections' (1998) 1 *Contemporary Justice Review* 21.

9 G Kasapas 'An introduction to the concept of transitional justice: Western Balkans and EU conditionalities' (2008) *UNISCI Discussion Papers* 18 66.

'the key element of distributive justice';¹⁰ they entail rectifying past wrongs, restoring property or rights and providing compensation, rehabilitation and satisfaction to the victims. Reparations can be either material (provision of goods, services, monetary compensation) or moral (apologies, acknowledgment of truth, commemoration of victims).¹¹

Justice may also be retrospective or prospective.¹² Whereas retributive and restorative justice fall under the realm of retrospective justice, prospective justice 'describes the improvement of the relationship between the parties to the conflict in the time to come'.¹³ In this regard, justice may be sought not only as redress for crimes, but also as 'as a way of coming to terms with the past and building a peaceful future'.¹⁴ Hence, justice, reconciliation and peace should be seen as 'inextricably intertwined'.¹⁵

Bringing together the past, the present and the future in the search for justice in a post-conflict context constitutes the entry point to understanding transitional justice as shown in the lines below.

2.2 Defining transitional justice

Transitional justice embraces to varying degrees the different aspects of retributive, restorative and distributive justice presented above.

From the outset it ought to be recalled that as a field of study transitional justice is relatively new. This context partly explains the current lack of a common or shared understanding of the concept among scholars.¹⁶ Nevertheless, in recent years there has been abundant literature dedicated to the concept, its origins and historical evolution.

Armstrong and Ntegeye define transitional justice as the full range of processes, strategies and institutions that assist post-conflict or

10 As above.

11 Kasapas (n 9) 66-67.

12 S Buckley-Zistel et al 'Transitional justice theories: An introduction' in S Buckley-Zistel et al (eds) *Transitional justice theories* (2014) 6.

13 As above.

14 W Lambourne 'Transformative justice, reconciliation and peacebuilding' in S Buckley-Zistel et al 'Transitional justice theories: An introduction' in Buckley-Zistel et al (n 12) 19.

15 As above.

16 N Turgis *La justice transitionnelle en droit international* (2014) 11.

post-authoritarian societies in accounting for histories of mass abuse as they build peaceful and just states.¹⁷ It aims to

halt ongoing human rights abuses; investigate past crimes; identify those responsible for human rights violations; impose sanctions for some of those responsible for serious human rights violations; provide reparations to victims; prevent future abuses; preserve and enhance sustainable peace and promote individual and national reconciliation.¹⁸

For the United Nations (UN), transitional justice

comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.¹⁹

Building on the definitions above, it is proposed that four underlining elements combine to bring about the necessity for transitional justice, namely, massive or generalised violations of human rights with a direct or indirect involvement of government, the decree of a transitional process, judicial and/or alternative measures and mechanisms in a holistic process and a justice policy with clearly-identified objectives.²⁰

Transitional justice comprises two main complementary dimensions. On the one hand, there are institutional mechanisms entrusted with the task of manifesting transitional justice such as truth commissions, judicial tribunals, traditional and/or community-based mechanisms, and so forth. There is a need to ensure that these institutions are relevant and effective for a transitional process to be successful. On the other, there are processes involved in (or components making up) transitional justice policies, including prosecution, truth seeking and telling, individual and collective reparations, political and institutional reforms, construction of memorials, and so forth. There is a need to ensure that these processes are regarded as legitimate by the majority of society. Therefore, they ought to be inclusive, nationally owned and entrenched in communities.

17 A Armstrong & G Ntegeye 'The devil is in the details: The challenges of transitional justice in recent African peace agreements' (2006) 6 *African Human Rights Law Journal* 1.

18 CM Fombad 'Transitional justice in Africa: The experience with truth commissions' (2008), <http://www.nyulawglobal.org> (accessed 27 September 2013).

19 United Nations *The rule of law and transitional justice in conflict and post-conflict societies* (2004) para 8.

20 Turgis (n 16) 14-24.

Overall, the literature identifies three main sets of transitional justice mechanisms. The first set is made up of mechanisms aimed at the perpetrators of crimes, including those which are intended to hold them accountable,²¹ namely, trials, exiles, lustrations and amnesties. The second set applies to 'victim-oriented restorative justice processes'²² that include reparations and victims' empowerment programmes. The third set targets the wider society and includes institutional reforms, truth commissions and public memory projects the aim of which is 'to officially recognise but pardon past acts'.²³ Notwithstanding their institutional variation, the shared goal of all transitional justice mechanisms is to restore the dignity of individuals and communities victimised by atrocities, to deter future violations and prevent a repeat of past horrors.²⁴

As both a concept and a set of practices, transitional justice has attracted several criticisms. The first criticism relates to its timing in that the 'post-conflict' context to which transitional justice applies varies from one conflict situation to another. Some authors argue that only processes 'initiated within five years following an armed conflict'²⁵ should be regarded as transitional justice. Yet, experiences in other post-conflict societies highlight instances of transitional justice mechanisms being set up even over a decade after the signing of a peace agreement. Hence, the criticism that transitional justice is sometimes used by governments as a means of pursuing political ends and, in some cases, to settle a score with political opponents.²⁶

A further criticism levelled against transitional justice relates to its scope. Two scenarios ought to be considered in this regard. In cases of civil war won by one of the parties, the transitional justice mechanism is designed by the winners. Hence, it is criticised as victors' justice.²⁷ In cases where the war ended through negotiations transitional justice mechanisms must be agreed upon by all the

21 TD Olsen, LA Payne & AG Reiter 'Transitional justice in the world, 1907–2007: Insights from a new dataset' (2010) 47 *Journal of Peace Research* 803–809.

22 As above.

23 As above.

24 R Bhargava 'Restoring decency to barbaric societies' in RI Rotberg & D Thompson (eds) *Truth v justice: The morality of truth commissions* (2000) 45.

25 HM Binningsbø et al 'Armed conflict and post-conflict justice, 1946–2006: A dataset' (2012) 49 *Journal of Peace Research* 731.

26 Bangladesh provides an interesting case in reference to this argument. In 2014 various high-profile opposition politicians were charged with and convicted for crimes allegedly committed during the 1971 war with Pakistan. They include Zahid Khokon, Motiur Nizami and Ghulam Azam, who were found guilty of war crimes and sentenced to penalties ranging from death to life imprisonment. See P Snyder 'Bangladesh Special Tribunal convicts opposition leader of war crimes' (2014), <https://www.jurist.org> (accessed 9 April 2019).

27 L Reydam's *Let's be friends: The United States, post-genocide Rwanda, and victor's justice in Arusha* (2013).

parties involved, especially the warring parties, resulting in what may be termed 'warrior' justice'.²⁸ In both scenarios, transitional justice is criticised as being primarily a political matter in which justice is only its second, and sometimes long-term, objective.

3 Background to the CAR's recent crises and transition

3.1 From independence to Patassé's fall (1960-2003)

Since gaining formal independence²⁹ from France in August 1960, the CAR has been in a permanent state of crisis as a result of the utter incompetence of the country's political class and France's continuing interference in the country's internal affairs.³⁰

General Jean Bedel Bokassa's 14-year rule (1965-1979) provided the CAR with an opportunity to chart a different path from the *predation politics* the country had experienced in its first five years of post-colonial self-rule.³¹ However, Bokassa's patrimonial governance style contributed to weakening state institutions and rendering them unable to maintain their control over far-reaching peripheries. His repressive and arbitrary rule sowed the seeds of the recourse to violence for political ends.³² Bokassa was eventually deposed by a French-led *Opération Barracuda* in December 1979 and replaced with

28 K Sadiki 'The tensions between power sharing, justice and human rights in Africa's "post-violence" societies: Rwanda, Kenya and the Democratic Republic of the Congo' (2013) 13 *African Human Rights Law Journal* 254.

29 The CAR is a true example of the 'artificial independence' France was eager to grant to its former African colonies. As far as France is concerned independence for its colonies in West and Central Africa was designed merely to serve as a façade while all the structures of its political, economic and cultural control over the newly-independent countries remain unchanged. The CAR, more than any other country, has followed this pattern. It has been argued elsewhere that '[t]he Central African Republic is the epitome of an artificial state, from ... its uncontrolled borders and decades of overwhelming intervention by its former colonial ruler, France, to the complete lack of government presence outside the capital'. See E Bertelsmann Transformation Index 'Central African Republic Country Report' (2010), <http://www.bti2010.bertelsmann-transformation-index.de> (accessed 7 August 2019).

30 See L Lombard & T Carayannis 'Making sense of the CAR: An introduction' in T Carayannis & L Lombard (eds) *Making sense of the Central African Republic* (2015) 1 4. According to the UN Group of Experts, two main features run through the CAR's ruling elite: an insatiable race to self-enrichment; and a total neglect of society's needs; see Groupe des Experts des Nations Unies *Rapport du Projet Mapping documentant les violations graves du droit international des droits de l'homme et du droit international humanitaire commises sur le territoire de la République centrafricaine de janvier 2003 à décembre 2015* (2017) 9 12.

31 Lombard & Carayannis (n 30) 4.

32 CG Ntoutoume *La Communauté Economique des Etats de l'Afrique Centrale (CEEAC) dans la gestion des crises et la promotion de la paix en Afrique centrale: cas de la République Centrafricaine (1998-2016)* (2018) 59.

his predecessor David Dacko who subsequently was overthrown by General André Kolingba in September 1981.

In contrast to his predecessors, Kolingba manipulated ethnic solidarity for political ends, appointing his Yakoma kin to positions in the state apparatus and parastatal companies.³³ This practice is obvious in the defence and security sector as 70 per cent of the national army was drawn from the small Yakoma minority to which Kolingba belonged, although this ethnic group represents only 5 per cent of the country's population.³⁴

Notwithstanding the shortcomings mentioned above, Kolingba is credited with opening the CAR to liberal democratic rule in 1991. He became the CAR's first ever President to hand over power peacefully following the 1993 presidential election that he lost to Ange-Félix Patassé.

In retrospect, Patassé's 10-year stay in power (1993-2003) turned out to be a missed opportunity for the country to move toward stability, value-based politics and national unity. Not only did he further ethnicise the country's politics and the national defence and security forces,³⁵ but he also contemplated staying in power beyond his two-term constitutional limit. More importantly, he exacerbated the issue of external interference in CAR's internal affairs when he allied with Khaddafi's Libya in an attempt to shield his regime from what he regarded as a plot for regime-change organised by France and the Republic of Chad.

3.2 Bozizé, Djotodia and the plunge into anarchy (2003-2014)

With support from Chad and France, General François Bozizé ousted President Patassé in March 2003.³⁶ In an unprecedented move he

33 SW Smith 'CAR's history: The past of a tense present' in Carayannis & Lombard (n 30) 30.

34 International Crisis Group 'Central African Republic: Anatomy of a phantom state' (2007) 136 *Africa Report* 8.

35 TS Possio *La France et la sécurité collective en Afrique subsaharienne: de l'interventionnisme militaire systématique au renforcement des capacités africaines de maintien de la paix* (2003) 79. In fact, instead of addressing the legacy of Yakoma dominance in the public, defence and security sectors inherited from Kolingba in a comprehensive manner, Patassé simply moved to assert the dominance of his own ethnic group (Sara) and co-ethnic Kaba, thus exacerbating the politicisation of ethnic identities and fuelling the sentiment of marginalisation among the Yakoma. See also AS Houénou 'Aspects de la crise en République Centrafricaine' (2016) *Paix et Sécurité Européenne et Internationale*, <https://halshs.archives-ouvertes.fr> (accessed 24 June 2021).

36 See AC Mayneri 'La Centrafrique, de la rébellion Séléka aux groupes Anti-balaka (2012-2014): Usages de la violence, chême persécutif et traitement médiatique du conflit' (2014) 134 *Politique Africaine* 179. According to Marielle, 80% of

committed himself not to stand in the post-*coup* elections anticipated to restore liberal democratic rule in the country. Bozizé did not keep his promise. He stood in the 2005 presidential election and won in the second round with 64,6 per cent of the vote.

Bozizé's ten-year (2003-2013) rule over the CAR represents the most important clue in understanding the recent crisis in the country. He served as general chief-of-staff of the CAR army under President Patassé from 1996 to 2001. He was dismissed amid allegations of collusion with factions of the army involved in repeated mutinies during the Patassé presidency.³⁷ He escaped to Chad from where he maintained close links in the CAR defence and security forces. Support from Chad and France ensured that he captured state power in 2003, as stated previously. In a move calculated to strengthen the chances of staying in power for longer, he premised his presidency on two priorities, namely, national reconciliation³⁸ and the restoration of democratic rule.

Bozizé's national reconciliation efforts – as symbolised by his politics of 'consensus-based transition'³⁹ – never matched the high expectations created by his proclamations. This failure was particularly relevant in respect of the many armed groups mostly based in the northern and eastern parts of the country. With regional facilitation Bozizé's government signed several peace agreements with them. This is the case of the first Libreville Agreement⁴⁰ signed in June 2008 with the facilitation of the Economic and Monetary Community of

troops that helped Bozizé seize power in Bangui in March 2003 were Chadian drawn from among that country's many mobile men-in-arms. See D Marielle 'Fluid loyalties in a regional crisis: Chadian ex-liberators in the Central African Republic' (2008) 107 *African Affairs* 427 225-241; See also International Crisis Group (n 34) 16.

37 N Bagayoko *Comparative study on transitional justice in Africa: Central African Republic* (2018) 18.

38 However, it is important to note that efforts at national reconciliation already had begun under President Patassé through the national dialogue inaugurated in 2002 and which ironically was interrupted following Bozizé's 2003 *coup*. Yet, Bozizé organised his own 'all-inclusive political dialogue' in 2008 bringing together a majority of the country's political leaders. See Groupe des Experts des Nations Unies (n 30) 12-13. He also promulgated an amnesty law in 2008 within the framework of the all-inclusive political dialogue.

39 Le Monde (in collaboration with *Agence France Presse*) 'François Bozizé remporte la présidentielle et les législatives en Centrafrique' (2005), <https://www.lemonde.fr> (accessed 5 January 2019).

40 Also called the Libreville Comprehensive Peace Agreement, it was signed between the CAR government and two 'politico-military' movements, namely, the *Armée Populaire pour la Restauration de la Démocratie* (APRD) and the *Union des Forces Démocratiques pour le Rassemblement* (UFDR), joined a year later by the *Front Démocratique des Peuples Centrafricains* (FDPC). This agreement was complemented by a ceasefire agreement and a peace agreement signed respectively in June 2011 and August 2012 between the government and the *Convention des Patriotes pour la Justice et la Paix* (CPJP). See Groupe des Experts des Nations Unies (n 30) 13.

Central Africa (CEMAC) and the second Libreville Agreement⁴¹ signed in January 2013 under the auspices of the Economic Community of Central African States (ECCAS). Parties to these two agreements included the CAR government under President Bozizé, an array of armed groups and political parties.

The agreements shared several features as both called for

- the cessation of all hostilities;
- armed groups to surrender their weapons and undergo the disarmament, demobilisation and reintegration (DDR) process and transform into political parties;
- the establishment of inclusive transitional dispensations tasked with, among other things, organising free and fair elections;
- the withdrawal of foreign combatants and for foreign states to desist from interfering in the CAR's internal affairs;
- the international community to provide support to the country's transitional authorities.⁴²

Bozizé applied only those aspects in agreements that did not threaten his control over state institutions. In most cases, he reneged on his earlier commitments, a move that repeatedly angered armed groups and, more importantly, the regional leaders involved in the facilitation of the CAR's peace and reconciliation processes.

Internal and external disapproval of Bozizé's regime reached a boiling point after he launched a constitutional amendment aimed at enabling him to remain in power beyond his initial two-term limit.⁴³ Bozizé had all but severed ties with Chad's President Idriss Déby, who had enabled him to topple Ange-Félix Patassé in 2003.⁴⁴ Further, not only did he distance himself from France, he also opened up his country to the influence of China and South Africa; the latter deployed approximately 400 soldiers in the CAR within the framework of a military agreement signed between the two countries in 2007.⁴⁵ Bozizé's decision to free himself from Franco-

41 Also called Libreville Political Agreement for the Resolution of the Political and Security Crisis in the Central African Republic, it was signed between the CAR government, the political opposition, 'non-fighting' armed groups and the Séléka coalition.

42 AZ Tamekamta 'Gouvernance, rébellions armées et déficit sécuritaire en RCA: comprendre les crises centrafricaines (2003-2013)' (2013) 8.

43 Radio Ndeke Luka 'L'opposition politique contre le projet de modification de la Constitution par Bozizé' (2012), <https://www.radiondekeluka.org> (accessed 5 January 2019).

44 See Mayneri (n 36) 179-193.

45 Houénou (n 35). Indeed, through the bilateral military agreement, South Africa had to provide military training to the CAR army. Bado argues that, beyond military training, South African troops in the CAR were also involved in Bozizé's security. See AB Bado 'Une analyse des conflits en République Centrafricaine' (2015) 80-81. South Africa withdrew from the CAR in March 2013 after 13 of its

Chadian tutelage invited his downfall; he was overthrown by the Séléka coalition in March 2013.⁴⁶

Séléka had been established in 2012 and comprised five politico-military movements, namely, the *Front Démocratique du Peuple Centrafricain* (FDPC); the *Convention des Patriotes pour la Justice et la Paix* (CPJP); the *Union des Forces Démocratiques pour le Rassemblement* (UFDR); the *Convention Patriotique pour le Salut du Kodro* (CPSK); and the *Alliance pour la Renaissance et la Réfondation* (A2R). The group enlisted Sudanese and Chadian combatants, a state of affairs exploited by Bozizé and other CAR citizens to portray Séléka as a foreign organisation and the leader, Michel Djotodia, was presented as a puppet of Chad.⁴⁷

Soon after it assumed power, it became clear that Séléka was a 'disparate rebel coalition'⁴⁸ lacking any cohesive governance vision beyond toppling the Bozizé regime. It also became evident that the group's political leadership under Djotodia did not have full control over its military branch.

However, the toughest test of Séléka's ability to rule in CAR came in the form of its relations with the civilian population, most of whom resented the group as Muslim-leaning. Angered by rejection by a majority of the population, Séléka embarked on widespread violence in order to suppress dissent. This strategy backfired as it led to discrediting the group in the eyes of the international community and was used by non-Muslim communities throughout the country as an opportunity to set up an array of self-defence militias which coalesced under the 'Anti-balaka' umbrella.⁴⁹

The rise of the Anti-balaka contributed to a further worsening of the socio-political and security situation in the CAR and led some observers to fear the possibility of genocide. It brought into question Michel Djotodia's ability to rule the country.⁵⁰

Faced with growing criticism of his group's alleged exactions and in a desperate move to salvage his regime, Djotodia decided to dissolve the Séléka coalition in September 2013. In response several Séléka military commanders – some of whom held senior

soldiers were killed in crossfire as the Séléka troops marched toward Bangui to topple President Bozizé from power.

46 Bado (n 45).

47 Ntoutoume (n 32) 76.

48 Lombard & Carayannis (n 30) 2.

49 Bado (n 45) 70-72.

50 Ntoutoume (n 32) 102.

positions in the country's security and defence forces – embarked on a programme to undermine the government's efforts to stabilise the CAR. Subsequently, the coalition began to disintegrate as its various constituent groups sought to recover their autonomy. The result was the emergence of several Séléka factions controlling different parts of the country.⁵¹

On 10 January 2014 ECCAS heads of state and government held an extraordinary summit in N'Djamena, Chad, and compelled Michel Djotodia and Nicolas Tiangaye to resign from their positions as CAR's President and Prime Minister respectively.⁵² The Transitional National Council (CNT) – the country's transitional parliament – subsequently elected Catherine Samba-Panza as CAR's transitional President. At the time of her election, Samba-Panza was the mayor of Bangui, a position to which she had been appointed by Michel Djotodia upon assuming power in March 2013. As the transitional head of state, she principally was tasked with laying the ground for post-conflict peacebuilding and, more importantly, organising the first post-transition free and fair elections in the country. She was succeeded by Faustin Touadéra in March 2016 following the latter's election as the country's new President.⁵³

Table 1: CAR's Presidents since independence

President's name	Period of rule	Means of ascent to power
David Dacko	1960-1965	Popular vote
General Jean Bédél Bokassa	1965-1979	Coup d'état
David Dacko	1979-1981	Coup d'état
General André Kolingba	1981-1993	Coup d'état
Ange Félix Patassé	1993-2003	Popular vote
General François Bozizé	2003-2013	Coup d'état
Michel Djotodia	2013-2014	Civil war
Cathérine Samba-Panza	2014-2016	Vote by transitional parliament
Faustin Archange Touadéra	2016-ongoing	Popular vote

Source: Adapted from Christian G Ntoutoume⁵⁴

⁵¹ Ntoutoume 102-103.

⁵² Ntoutoume 103. It is important to note that ECCAS heads of state and government held four extraordinary sessions between April 2013 and 10 January 2014 on the CAR. All of these were held in N'Djamena as Chadian President Idriss Déby was then Chairperson of the ECCAS summit. A fifth extraordinary session was held on 25 November 2015 in Libreville, five months after Gabonese President Ali Bongo assumed the Chairpersonship of the ECCAS summit.

⁵³ Ntoutoume (n 32) 102-103.

⁵⁴ Ntoutoume 60.

4 Proposal on viable options for transitional justice in the CAR

From the outset it is important to note that '[t]here is no model transitional justice approach that can easily be transferred from one country to another. Each situation requires that the parties to the conflict, civil society, and victim groups negotiate the mechanisms appropriate to their circumstances.'⁵⁵

The lack of a model should not prevent post-civil war countries such as the CAR from taking advantage of valuable lessons derived from the experience of other countries, especially those with which they may share similar historical, political and sociological features.

This part discusses the proposed transitional justice policy for the CAR, including the period and the types of crimes to be covered.

4.1 Delineating the scope of transitional justice in post-transition CAR

It is necessary to acknowledge that it will be impossible for any transitional justice mechanism set up in the CAR to examine all past crimes committed in the country whichever period is considered. Three main reasons support this argument. First, the very large number of the crimes involved make the task a non-starter. Second, the challenges facing the CAR's justice sector, a clear reflection of the country's failed state, will continue to hinder any quest for justice in the short term.⁵⁶ Lastly, by their nature, transitional justice mechanisms are exceptional and interim processes designed to run for a limited period before being phased out and leaving the space to conventional justice to take care of the day-to-day task of delivering justice in the society.

As far as the types of crimes to be considered are concerned, there is a need to recall that due to their limited time scope transitional justice processes generally focus on the most grievous crimes

⁵⁵ African Union *Transitional justice policy* (2019) 7.

⁵⁶ Writing in 2018, Grebenyuk states that well before the 2013 crisis the CAR's justice sector was already very weak, lacking resources, offices and with a small number of personnel, especially outside Bangui. The crisis of 2013 resulted in the close collapse of the justice sector. I Grebenyuk 'La cour pénale spéciale centrafricaine: une illustration de «complémentarité élargie»' (2018) 1 *Revue de Science Criminelle et de Droit Pénal Comparé* 14-15. A few years ago, Niewiadowski regarded the CAR's judiciary as a system in 'decomposition'. See D Niewiadowski 'La République Centrafricaine: le naufrage d'un Etat, l'agonie d'une nation' (2014) 25-27, <https://rongdhrca.files.wordpress.com> (accessed 24 June 2021).

regarded by the international legal system as international crimes, namely, genocide, war crimes, crimes against humanity and crimes of aggression.

Taking into account the observation above, the CAR's transitional justice dispensation ought to focus on war crimes and crimes against humanity. This limitation is relevant as the mapping report produced by the UN panel of experts on the CAR found no evidence of genocide or crimes of aggression for the period between January 2003 and December 2015.⁵⁷

War crimes are grave breaches of the Geneva Conventions of 12 August 1949 directed against persons or property in the form of wilful killing; torture or inhuman treatment, including biological experiments; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war to serve in the forces of a hostile power; depriving a prisoner of war of the rights to a fair and regular trial; unlawful deportation; and taking of hostages.⁵⁸ They also apply to direct attacks against civilian populations and non-military targets or objects; direct attacks against personnel, installations, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter; relocation or deportation of large parts of population; rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation; conscription of children into armed forces or groups, and so forth.⁵⁹

Crimes against humanity, for their part, refer to acts purposely committed and attacks systematically directed against any civilian population. These include

murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilisation; persecution against any identifiable political, racial, national, ethnic, cultural, religious or gender group; enforced disappearance of persons; the crime of apartheid and other inhuman

57 Groupe des Experts des Nations Unies (n 30). Despite the findings by the panel of experts, there is evidence of Chad's significant involvement in the ousting of both Ange-Félix Patassé (2003) and François Bozizé (2013). Both presidents denounced such involvement and what they regarded as Chad's crime of aggression.

58 International Criminal Court *Rome Statute of the International Criminal Court* (2011) 5-8.

59 As above.

acts of a similar character intentionally causing great suffering, or serious injury to body, mental or physical health.⁶⁰

As is apparent from the definitions above, acts qualifying as war crimes are similar to those amounting to crimes against humanity. The main difference between the two categories is that war crimes are committed in the context of armed conflict, crimes against humanity may occur at any time.

The need to focus specifically on war crimes and crimes against humanity is because they are international crimes and, as such, are imprescriptible. Their prosecution will make it possible for the CAR's transitional justice authorities to liaise with judicial authorities around the world and international justice institutions (including the International Criminal Court (ICC)) on the possible pursuit of suspects (both CAR citizens and foreigners) located outside the CAR's borders. A further justification for the focus on war crimes and crimes against humanity is to avoid overwhelming the transitional justice mechanisms given that the existing national judiciary system, with adequate reinforcement, will continue to take care of the other types of crimes committed during the country's recent crises.

As far as the period to be covered by the transitional justice mechanisms is concerned, there is a need to acknowledge from the outset that it will be very difficult to reach consensus. For instance, the presidential decree establishing the Special Criminal Court entrusts it with prosecuting serious crimes committed from 2003 onward. In contrast, the 2015 Bangui Forum empowered the Truth, Justice, Reparation and Reconciliation Commission (CVJRR) to work on the period extending from 1958 to 2015.

However, beyond the time scope there are at least two other options worth considering. One option consists of covering the period comprised between 1958 and 2020 in order to bring, for instance, to light to the mysterious death of Barthélemy Boganda, the 'father of the CAR's independence', in an aeroplane crash in March 1959⁶¹ and to take into consideration the recent insurgency

⁶⁰ International Criminal Court (n 58) 3-4.

⁶¹ For many CAR citizens and observers of the country's politics, the death of Barthélemy Boganda represents a critical moment in CAR's history, with significant implications for the country's post-colonial evolution. See, eg, C Kinata 'Barthélemy Boganda et l'Eglise Catholique en Oubangui-Chari' (2008) 191 *Cahiers d'Etudes Africaines* 549; P Kalck *Bathélemy Boganda: élu de Dieu et des Centrafricains* (1995). It therefore ought to be elucidated as part of the country's effort toward true reconciliation. In similar vein, the year 1958 is also critical in CAR history (likewise that of other former African French colonies) as it marks the successful outcome of the referendum by which the people of the CAR agreed to be part of the community between France and its former African colonies as

waged by the *Coalition des Patriotes pour le Changement* (CPC) led by François Bozizé.⁶² The other option consists of focusing on the post-single party period (1993-2020). In fact, according to Carayannis and Fowlis,

[w]hile civil conflict in CAR until the end of the Cold War had largely been limited to relatively isolated incidents, from 1993 onwards, growing cleavages manifested themselves in dysfunctional and – at their worst – non-existent state institutions, and a prolonged crisis emerged, characterised by low-intensity violence with periodic spikes in fighting.⁶³

This article favours the second option and suggests that the transitional justice mechanisms being designed in the CAR should focus on the period extending from the election of President Ange-Félix Patassé in 1993 to the recent insurgency waged by the CPC. By reducing the temporal scope of the work, this approach appears realistic and cost-effective, yet, it is likely to be opposed by those who have suffered loss at the hands of the different regimes that ruled the country in its first three post-colonial decades (1960-1993).

4.2 Transitional justice options for the CAR

As discussed in the second part above, there are three complementary sets of mechanisms post-conflict or post-authoritarian societies generally use to implement transitional justice. These include perpetrator-oriented mechanisms, victim-oriented processes and society-focused initiatives. However, it is worth recognising that although post-conflict countries such as the CAR ideally should apply evenly and simultaneously all three sets of transitional justice mechanisms mentioned above, experience elsewhere shows that circumstances specific to each country may lead stakeholders to adopt a sequential approach and favour some aspects of transitional justice

suggested by French President Charles de Gaulle. The debate relating to the legality, in international law, of the referendum and similar exercises in other African countries remains a matter of debate among specialists.

62 The CPC is a coalition set up in mid-December 2020 with the double objective of preventing the organisation of the presidential and parliamentary elections scheduled for 27 December 2020 and toppling President Touadera. It comprised six of the 14 armed groups signatories to the 2019 political agreement for peace and reconciliation in the Central African Republic, namely, the *Mouvement Patriotique pour le Changement* (MPC); the *Retour, Réclamation et Réhabilitation* (3R); the *Union pour la Paix en Centrafrique* (UPC); the *Front Populaire pour la Renaissance de la Centrafrique* (FPRC); and the *Anti-balaka/aile-Mokom* and the *Anti-balaka/aile-Ngaïssona*. UPC and MPC have since distanced themselves from the CPC, accusing the latter of preventing humanitarian aid from reaching those in need and deviating from its initial objectives. See JF Koena 'RCA: Le retrait de l'UPC d'Ali Darassa ne convainc pas' (2021).

63 T Carayannis & M Fowlis 'Lessons from African Union-United Nations cooperation in peace operations in the Central African Republic' (2017) 26 *African Security Review* 221.

mechanisms over others.⁶⁴ Therefore, it is imperative to ensure that the design of the CAR's transitional justice policy not only takes into consideration the country's situation, but also carefully balances the demands for justice with the search for peace and reconciliation.⁶⁵

Below is a discussion of the way in which each of the three sets ought to be designed and applied in post-transition CAR if the country's specific circumstances are considered.

4.2.1 *The case for perpetrator-oriented transitional justice mechanisms*

As far as transitional justice in post-violence societies is concerned, it was argued earlier that those suspected of having committed serious crimes and human rights violations face trial in national, mixed (hybrid) or international courts. They may also be prevented from occupying high public office either indefinitely or for a limited period (vetting). Furthermore, those found guilty of committing grievous crimes and other serious human rights violations be compelled to live outside the country for a period. (exile). Lastly, they may be granted amnesty, generally in accordance with provisions contained in peace agreements or after they have contributed to revealing the truth surrounding specific crimes.

In post-transition CAR the prosecution of perpetrators of grievous crimes and other serious human rights violations committed in the country's recent crises thus far has involved national and internationally-backed courts.

At a national level the CAR's judiciary has been involved in the prosecution of several individuals accused of having committed grievous crimes and serious human rights violations in the country. This, for instance, has been the case in the successful prosecution of the former Anti-balaka commander Rodrigue Ngaïbona, also called General Andjilo, in January 2018.⁶⁶ He was tried by the Bangui criminal

64 These circumstances are determined by the country's political situation and economic conditions. They include the mode of war termination as well as the extent of the involvement of external role players. For further insights into differentiated transitional justice paths followed by post-civil war African countries in recent years, see, eg, I Souaré 'Le dilemme de la justice transitionnelle et la réconciliation dans les sociétés postguerre civile: les cas du Libéria, de la Sierra Leone et de l'Ouganda' (2008) 39 *Etudes Internationales* 205-228. See also K Sadiki 'The challenges of power-sharing and transitional justice in post-civil war African countries: Comparing Burundi, Mozambique and Sierra Leone' (2019) 19 *African Journal on Conflict Resolution* 81.

65 African Union (n 55).

66 E Rugiririza 'Centrafrique: un premier chef de guerre condamné par la justice nationale' (2018), <http://www.justiceinfo.net> (accessed 27 December 2018).

court and found guilty of several crimes including multiple murders, criminal conspiracy, armed robbery, illegal possession of weapons and ammunitions of war and kidnapping. He was sentenced to life imprisonment with forced labour.⁶⁷

Another former Anti-balaka military commander, Urbain Samy – also known as Bawa – on 12 December 2018 was sentenced to 20 years in prison by the Bangui criminal court after he had been found guilty of murder, association with criminals, armed robbery and illegal possession of weapons and ammunitions.⁶⁸

Further, on 28 February 2018 the same court sentenced 11 former Séléka combatants to life imprisonment after it found them guilty of threatening state security, rebellion, illegal possession of weapons and ammunitions and association with criminals.⁶⁹

In February 2020 five former Anti-balaka commanders appeared before the Bangui criminal court for the killing of over 70 Muslim civilians in May 2017 in the city of Bangassou. They were found guilty of war crimes and crimes against humanity and were sentenced to life imprisonment with forced labour.⁷⁰

At an international level three cases are worth mentioning as far as the prosecution of those suspected of having committed grievous crimes and serious human rights violations in the CAR is concerned. The first relates to Jean-Pierre Bemba. Despite not holding CAR citizenship, this former Congolese rebel leader was prosecuted by the ICC between 2008 and 2018 for crimes allegedly committed by his group's combatants in 2003 in the CAR where they were deployed in support of President Patassé's government against the threat of an armed insurrection led by General François Bozizé. However, after 10 years the ICC prosecutor failed to bring forward convincing proof against Bemba which resulted in his release in 2018.⁷¹

67 C Ngingui 'Centrafrique: le "général Andjilo" condamné à des travaux forcés à perpétuité' (2018), <http://fr.africanews.com> (accessed 12 December 2018).

68 Radio Ndeke Luka 'Bangui: un ex-Comzone Antibalaka condamné à 20 ans de travaux forcés' (2018), <http://www.radiondekeluka.org> (accessed 27 December 2018).

69 TV5 Monde 'Centrafrique: travaux forcés à perpétuité pour des ex-Seleka' (2018), <https://information.tv5monde.com> (accessed 27 December 2018).

70 Le Monde (in collaboration with *Agence France Presse*) 'En Centrafrique, cinq chefs de milice condamnés à perpétuité' (2020), <https://www.lemonde.fr/afrique/article> (accessed 21 June 2021).

71 Bemba's prosecution has brought to the fore the issue of the independence of the ICC. On the one hand, questions have been raised regarding the Court's decision to prosecute Bemba alone in a case (CAR's civil war) where many other actors may have committed similar crimes. On the other hand, Bemba's arrest in 2008 and release ten years later have occurred against the background of very particular developments in the political calendar in his home country, the DRC. In

The second and third, more recent, cases relate to two former Anti-balaka commanders, namely, Alfred Yekatom (also called Colonel Rombhot or Rambo) and Patrice-Edouard Ngaïssona. Yekatom is a former Corporal in the CAR national army. He joined the Anti-balaka coalition in 2013 and quickly became one of its high-ranking military commanders. In 2016 he was elected member of the country's national assembly where he served until his arrest in October 2018. During his time as an Anti-balaka military commander he was accused of committing war crimes and crimes against humanity between 2013 and 2014, triggering an international arrest warrant from the ICC. He currently is awaiting trial at the ICC and faces charges of murder, torture, targeted attacks against civilian populations and places of worship as well as mutilations.⁷² His former partner, Patrice-Edouard Ngaïssona, was arrested in France and handed over to the ICC in January 2019. He stands accused of war crimes and crimes against humanity that he allegedly committed when he served as an Anti-balaka commander in the fight against the Séléka coalition between 2013 and 2014. He also is awaiting trial in The Hague.⁷³

The last component in the judicial process in respect of the prosecution of crimes committed in recent years in the CAR relates to the Special Criminal Court (SCC). It was set up by Law 15.003 of 3 June 2015 following an agreement between the CAR government and the UN. Although a hybrid tribunal, article 1 of the Law referred to above states that the SCC falls under the purview of the CAR's national judiciary system. It comprises 25 judges (13 CAR citizens and 12 foreign nationals) and applies both CAR and international laws. It is tasked with prosecuting those suspected of committing the most serious violations of human rights and international humanitarian law in the CAR and in foreign countries (if the latter have mutual legal assistance agreements with the CAR) since January 2003.⁷⁴ It

2008 President Kabila had defeated Bemba in the country's presidential election and arrest prevented Bemba from assuming his position as opposition leader. In 2018 Bemba's surprising release came in the context of the approaching 2018 general elections. There are those who believe that Bemba's arrest was a ploy by Western powers to relieve Kabila of a tough opponent while his release in 2018 is regarded as a ploy by the same Western powers to position a tougher candidate against Kabila's anointed Ramazani Shadary after it became clear that Moïse Katumbi would be prevented by the regime from standing in the elections. In the latter case, the Western powers allegedly were in search of a potential ally expected to advance their economic interests in a post-Kabila DRC. La Croix (in collaboration with *Agence France Presse*) 'L'ex-chef de milice centrafricain Alfred Yekatom est arrivé au centre de détention de la CPI' (2018), <http://www.la-croix.com> (accessed 27 December 2018).

72 La Croix (in collaboration with *Agence France Presse*) 'L'ex-chef de milice centrafricain Alfred Yekatom est arrivé au centre de détention de la CPI' (2018), <http://www.la-croix.com> (accessed 27 December 2018).

73 Radio France Internationale 'RCA: l'ex-chef anti-balaka Patrice-Edouard Ngaïssona transféré à la CPI' (2019), <https://www.rfi.fr/fr/afrique> (accessed 21 June 2021).

74 See Grebenyuk (n 54) 3. See also Radio France Internationale 'RCA: inauguration de la Cour pénale spéciale' (2018), <http://www.rfi.fr> (accessed 10 June 2019).

was officially launched in October 2018 and became fully functional in March 2021 following the appointment of its last judges.⁷⁵

Alongside the judicial process, some of those suspected of having committed grievous crimes and serious human rights violations in the CAR in the last 25 years have benefited from amnesty provisions contained in some of the peace agreements signed between the government and different rebel groups. Indeed, all agreements signed since 2008 to end civil wars in the CAR have included provisions relating to amnesty for all involved in the commission of atrocities and crimes,⁷⁶ although the precaution has been taken throughout not to include war crimes and crimes against humanity.

No Central African politicians or those linked with armed groups thus far have been forced to leave the country as a result of their involvement in the country's recent crises. As far as the suggested transitional justice policy is concerned, exile should not be considered an option unless freely chosen by those accused of crimes and fearing for their lives. In that case exile may be granted in exchange for full cooperation with transitional justice authorities.

Amnesty ought to be considered in connection with the implementation of the 2019 Khartoum Agreement, signed between the government and the 14 armed groups mentioned earlier in order to end the armed conflicts raging in the country since the arrival of the Séléka coalition in power in 2013. Most of these armed groups are factions previously connected to the Séléka and Anti-balaka coalitions. Granting amnesty to some key leaders and other military commanders of these groups constitutes an important incentive to be used in order to convince them to lay down their weapons and lead their fighters into the disarmament, demobilisation and reintegration (DDR) process. As Tunamsifu argues, 'when the national army fails to defeat a rebel movement, negotiating a peace agreement remains the final option'.⁷⁷ In such a scenario warring parties responsible for serious crimes and human rights violations only commit to sign and abide by the signed agreements when the latter offer clear guarantees or some forms of personal and/or collective amnesty. Should an amnesty policy be agreed upon in the

75 JF Koena 'La cour pénale spéciale lance ses travaux en RCA, espoir pour les victimes' (2021), <https://www.dw.com/fr> (accessed 22 June 2021).

76 There is a need to highlight that although the Khartoum Agreement opposes any idea of impunity, it acknowledges the discretionary power of the head of state to grant pardon. See *Accord politique pour la paix et la réconciliation en République Centrafricaine* (2019) 19-20.

77 SP Tunamsifu 'Transitional justice processes in Africa: The case of the Democratic Republic of the Congo' (2018) *CSVR Comparative Study in Transitional Justice in Africa Series* 55.

CAR, provision ought to be made explicitly not to cover war crimes, crimes against humanity and genocide.

It is necessary to highlight the fact that the idea of amnesty meets much resistance in the CAR, among both the political class and society in general. For instance, the majority of participants in the 2015 Bangui Forum clearly voiced their opposition to amnesty. The general feeling was that granting amnesty appeared to entrench impunity and can be viewed as an incentive for 'warmongers' to persist on the path of insurgency,

Notwithstanding the relevance of the argument above, this article argues that to attempt to avoid granting amnesty at all costs in the CAR appears unrealistic and is not feasible on at least two accounts. First, given the current weakness of the CAR's security and defence forces (compounded by the economic hardship facing the country) and the dominant paradigm in the United Nations Stabilisation Mission in the Central African Republic (MINUSCA) (opposition from troops contributing countries to any robust and aggressive mandate) there is no possibility armed groups in the CAR will be defeated militarily in the near to medium term.⁷⁸ The longer the current situation continues the more likely these armed groups will split, making any task of resolving the crisis most difficult. Furthermore, the CAR's current armed groups are better off fighting and staying out of any DDR process. In this regard, any talk of denying them amnesty will contribute to a sense of justification and strengthen their agenda of controlling large tracts of land, exploiting natural resources and acquiring more weapons. The result will be a national government confined to Bangui and its surroundings, as has been the case in the past decade.

Second, this view has no solid backing from a comparative perspective. Experience on the African continent shows that in all countries where civil wars could not end in outright military victory by one of the parties, they have had to adopt some form of amnesty measures in order to convince former fighters to commit to peace. This has been the case in Liberia, Sierra Leone, Burundi, the Democratic Republic of the Congo (DRC), Sudan, Mozambique and, more importantly, South Africa. Of course, the adoption of amnesty in all these countries has been met with protests from

⁷⁸ Military support from Russia and Rwanda in December 2020 onward helped galvanise loyalist troops in their fight against the CPC. However, as this author learned from his latest visit to Bangui in April 2021, the CAR's national army is far from being self-reliant while the military support the government currently receives from its partners may not be sustainable in the medium to longer term.

victims, their families and other socio-political groups opposed to the perceived impunity that is granted. Yet, it is difficult for even the most optimistic supporters of an exclusively retributive approach of transitional justice to tell how South Africa, for instance, would have moved beyond minority rule without the incumbent regime being militarily defeated or its key players being granted some form of amnesty.

In respect of vetting or lustration provision will have to be made to ensure that those who meet such measures are not prosecuted in order to avoid the penalty of double jeopardy. Lustration and a guarantee of 'no-prosecution' can be offered as an option to political role players involved in the commission of crimes and other human rights violations who are willing to disclose the truth about these crimes and violations.

Lastly, the new transitional justice policy should ensure that no CAR citizens, whatever their roles in the country's recent crises, should be compelled to go into exile. This is relevant insofar as throughout its political history the CAR has experienced cases of violent regime change driven by prominent CAR citizens living outside the country, albeit with external support. Therefore, the emphasis should be on national reconciliation among all citizens in the country. However, should individuals freely choose to leave the country (as a result of holding dual citizenship, for example) they should be granted amnesty in exchange, provided they commit to abstaining from involvement in any activities aimed at destabilising the country or be exposed to prosecution.

4.2.2 *The case for victim-oriented transitional justice processes*

The recent crises experienced by the CAR have had a negative impact on the country's population. It is estimated that close to 5 000 people have lost their lives since the beginning of the country's latest insurrection in 2012. According to the UN Office for the Coordination of Humanitarian Assistance (OCHA), by October 2020, 742 000 people were displaced in the country while the number of people in need of humanitarian assistance in February 2021 climbed to 2,8 million people out of a total population estimated at 4,9 million.⁷⁹ Meanwhile, the total number of CAR citizens living as refugees,

⁷⁹ Office for the coordination of humanitarian assistance 'Central African Republic: humanitarian situation update' (2021) 2 4.

mainly in neighbouring Cameroon, DRC, Chad, Sudan, Congo and South Sudan, is estimated at 695 115.⁸⁰

Due to their communal dimension, wrongly presented as a confrontation between Muslims and Christians (or northerners and southerners), these recent crises have had a significant toll on civilian populations, many of whom have seen their livelihoods (housing, farms) destroyed by their real or perceived enemies.

Although the Khartoum Agreement has called upon the government to initiate restoration and reparation programmes aimed at victims,⁸¹ there is a need to acknowledge that the CAR's current transitional justice dispensation has not adequately taken account of the issue of victims' empowerment and compensation. The country's economic predicament explains partly this circumstance. As the country works to define its comprehensive transitional justice policy, it is imperative for all involved stakeholders to factor in a dimension relating to reparations or compensations and victims' empowerment. On the one hand, there ought to be programmes designed to assist affected populations to rebuild their livelihoods, including houses, farms, and so forth and on the other, training programmes ought to be initiated and directed to victims, especially the youth, so as to help them learn critical skills to enable them to earn a decent living, outside recruitment into armed groups.

4.2.3 *The case for society-focused transitional justice initiatives*

Without a proper engagement with the past and the institutionalisation of remembrance, societies are condemned to repeat, re-enact and relive the horror. Forgetting is not a good strategy for societies transiting to a minimally-decent condition.⁸²

Ongoing transitional justice initiatives in the CAR have included institutional reforms. In fact, between 2016 and 2021 the country had a national ministry of national reconciliation. Its main objective consisted of creating the conditions and undertaking actions for national reconciliation and long-term peaceful coexistence among the country's communities.

80 United Nations High Commissioner for Refugees 'Refugees from the Central African Republic' (2021), <https://data.unhcr.org/en> (accessed 23 June 2021).

81 See *Accord politique pour la paix et la réconciliation en République Centrafricaine* (n 76) 20.

82 Bhargava (n 24) 54.

The ministry sought to establish decentralised structures in the country's 16 regions or *préfectures* expected to lead reconciliation initiatives throughout the country. However, the inability of the national government to control the whole of the national territory prevented the extension of the national reconciliation ministry's work outside Bangui. It can be anticipated that the task of national reconciliation will be pursued by the new ministry of humanitarian action, solidarity and national reconciliation set up following the recent cabinet reshuffle in June 2021.

Furthermore, as argued earlier, the Khartoum Agreement provides for the establishment of the Truth, Justice, Reparation and Reconciliation Commission (CVJRR) as recommended during the 2015 Bangui Forum. On 6 June 2020 President Touadéra launched national public consultations for the establishment of the CVJRR. However, the consultations could not be held in most of the country's regions as they were under the control of armed groups.

The CVJRR law was enacted on 7 April 2020. Article 5 of the law provides that the CVJRR is tasked with establishing the truth, seeking justice, restoring the dignity of the victims and promoting national reconciliation. According to article 6 of the Law, the CVJRR is set to hold hearings involving victims, witnesses and suspects of crimes so as to establish the responsibilities of the different role players in the crimes committed during the period extending from 1958 to 2015.⁸³ With regard to the management of the Commission the 11 commissioners provided for in article 7 of the CVJRR were selected in December 2020. However, the December 2020 elections and the CPC insurgency have delayed their taking an oath and the assumption of office. The CVJRR is set to run for four years with a possibility of a 24-month extension.

Lastly, to date no public memory projects have seen the light of day in post-transition CAR. In theory such projects have the potential to help the nation remember one of the darkest episodes of its existence as an independent state. The law on the CVJRR referred to above in article 6 provides for the erection of a memorial for the victims. The fact that the larger part of the country remains under the control of armed groups continues to impede the realisation of such initiatives. Further, the fact that there are ongoing efforts aimed at resolving different aspects of the conflict calls for additional

83 In taking into consideration political and security developments in the CAR since 2015, there is a high likelihood for the scope of the Commission to be extended to take into account the insurgency waged by the CPC since December 2020.

time before a comprehensive understanding is reached of a feasible 'national public memory project' agreed upon by all stakeholders,

As the CAR seeks to adopt a comprehensive transitional justice policy, there is a need for critical thinking regarding society-focused initiatives. Indeed, setting up a ministry of national reconciliation (led by a politician linked to the ruling party or coalition) runs the risk of unnecessarily politicising the national reconciliation project. Instead, there should be a National Peace and Dialogue Commission, led by a prominent civil society personality. This commission should have offices in each of the country's 16 regions also led by prominent local civil society leaders. The commission should be a permanent state organ with administrative and financial autonomy. It should be able to seek additional technical and financial support from national and external partners. The national and regional commissioners should be appointed through a parliamentary process. It ought to be emphasised that in order to avoid duplication the National Peace and Dialogue Commission should be put in place only once the CVJRR will have completed its work. Hence, the selected members of the CVJRR should take the oath of office at the soonest opportunity for the Commission to begin its work.

At the same time the CAR should undertake major work in the area of public memory projects. In this regard the country should adopt a National Reconciliation Day to be declared a public holiday. The day should be used by the government to strengthen national unity and foster peaceful coexistence. In addition to the victims' memorial provided for in the Khartoum Agreement, other public memory projects to be considered include erecting large 'national unity monuments' in Bangui and the country's 16 regional capitals. In order to ensure public involvement and ownership the monuments should be designed by local people in competition processes run by the National Peace and Dialogue Commission.

Lastly, reference ought to be made to traditional conflict resolution mechanisms as well as to the role of religious and community leaders. In recent years the leadership of the Catholic, Protestant and Muslim religious communities have demonstrated their ability to work in unity in resolving conflict in the CAR. The proposed transitional justice mechanism, therefore, ought to take advantage of such efforts by including these leaders and others in its processes. In similar vein, to avoid the criticism of elite bias the proposed transitional justice mechanism should provide space for communities' participation in cities and in the countryside.

5 Looking beyond justice: State recovery and international engagement in post-transition CAR

There is a need to acknowledge that no single mechanism is capable alone of addressing the demands of justice and reconciliation in a post-conflict or post-authoritarian country. Consequently, transitional justice mechanisms are most effective only when implemented as part of a flexible, inclusive and holistic post-conflict peacebuilding strategy.⁸⁴

The previous part set out the content of the transitional justice mechanism that ought to be implemented in post-transition CAR. However, for such a policy to bear any meaningful fruit there is a need to look beyond justice alone and pay adequate attention to various critical issues to ease the task of transitional justice in the country. This part focuses on two of these issues, namely, state recovery and international engagement.⁸⁵

5.1 State recovery and transitional justice in post-transition CAR

As the CAR moves to adopt a transitional justice policy to address the most grievous crimes and serious human rights violations committed in the country in recent years, it is necessary to acknowledge that this project can be achieved only if meaningful efforts are committed for the state to recover from its current fragility.

First, state recovery in the CAR implies strengthening public institutions throughout the country, which includes deploying territorial administration in all 16 regions and, in so doing, re-affirming government's full control over the entire territory. It also means rebuilding the country's defence and security forces (army, gendarmerie, police and intelligence) as well as the justice sector (judiciary and prison services) through comprehensive security and justice sector reform processes. At the same time, an effort ought to be undertaken to entrench democracy and guarantee meaningful public participation in order to ensure the legitimacy of the governing class.

Second, state recovery also implies economic recovery, which includes adequately equipping public agencies tasked with collecting

84 African Union (n 55) 7.

85 The role of state recovery and international support for peacebuilding and stabilisation in the CAR is analysed in an ongoing study by the author.

taxes and revenues. In similar vein, government should work toward re-organising the mining sector with the aim of putting an end to illegal mining that feeds the activities of some of the country's numerous armed groups. The agricultural sector should be given the necessary means for its development, including providing farmers with lands, tools, agricultural inputs and expert support for more productivity. However, it is necessary to emphasise that there will be no economic recovery in the CAR without a comprehensive infrastructure development programme. This programme primarily should target roads and bridges. The priority should be to link the country's 16 regional capitals and should be extended to roads linking the CAR to its neighbours, namely, Cameroon, Chad, Congo, the DRC, South Sudan and Sudan.

Third, state recovery implies nation building. Although it may not necessarily portray the reality on the ground, the 2013 crisis has been regarded – including by some of the country's role players – as a confrontation between the northern Muslims and the southern Christians. The Séléka and Anti-balaka coalitions have exploited this perception to secure population adherence and, at times, seek external support. Therefore, in the context of post-transition CAR state recovery ought to include nation building, understood here to mean strengthening the sense of (national) belonging among the country's citizens despite ethnic, religious and linguistic differences. This goal is relevant insofar as numerous former Séléka and Anti-balaka fighters, after undergoing demobilisation and disarmament, will have to return to civilian life. Unless they have been prepared to welcome them through social cohesion capacity-building programmes, the population may find it hard to live alongside their former victimisers.

5.2 International engagement and transitional justice in post-transition CAR

The discussion above has shown that state recovery (understood in its three dimensions of state building, economic recovery and nation building) is a critical ingredient in the success of the future transitional justice mechanism in the CAR.

Nevertheless, in addition to state recovery, the success of the CAR's transitional justice efforts depends very much on the extent of the support the country will receive from its international partners. Two main reasons help explain the pressing need for international support of the CAR's transitional justice efforts, namely, the severe

weakness of internal mechanisms and the long-standing interference of external actors in the CAR's crises.

International engagement insofar as the CAR's transitional justice process is concerned should include the strengthening of MINUSCA's⁸⁶ mandate with more involvement of African troops. More support should be provided for the effective implementation of the Khartoum Agreement and its attendant processes, including a comprehensive security sector reform. Similarly, the CAR government ought to convince its international partners (the African Union, United Nations, the European Union) to adopt a realistic and reasonable view of transitional justice in the CAR, taking into consideration the country's predicament. The UN Peacebuilding Commission should adopt a meaningful programme for the CAR commensurate with the country's priorities and needs. For their part, the African Union and regional organisations of which the CAR is a member state (ECCAS,⁸⁷ ICGLR⁸⁸ and CEN-SAD⁸⁹) should design a joint peacebuilding intervention strategy for the CAR, in coordination with the UN and other international partners. Furthermore, cooperation between the national judiciary, the Special Criminal Court and the International Criminal Court should be strengthened. Lastly, the CAR government should agree with its development partners (the World Bank, International Monetary Fund, the African Development Bank) on

86 The United Nations Stabilisation Mission in the Central African Republic (MINUSCA) has been deployed in the CAR since 2014. It replaced the African Union-led International Support Mission for CAR (MISCA). One of the largest UN peacekeeping missions, MINUSCA by 20 January 2021 comprised 13 511 uniformed personnel, 1 231 civilian staff and 254 UN volunteers. However, in response to the CPC's insurrection that started in mid-December 2020, the UN Security Council adopted Resolution 2566 on 12 March 2021 through which it decided to increase the level of MINUSCA's uniformed personnel by 2 750 soldiers and 940 police officers, <http://www.minusca.unmissions.org> (accessed 24 June 2021).

87 Economic Community of Central African States. It was established in October 1983 with the aim of promoting regional integration in the Central African region. It comprises 11 member states, namely, Angola, Burundi, Cameroon, the CAR, Chad, Congo, the DRC, Equatorial Guinea, Gabon, Rwanda and São Tomé and Príncipe. ECCAS is recognised by the African Union (AU) as a regional economic community (REC). It is based in Libreville, Gabon.

88 International Conference on the Great Lakes Region. It was established in 2008 with the main aim of building peace and stability in the Great Lakes region. Its member states are Angola, Burundi, CAR, Congo, DRC, Kenya, Rwanda, South Sudan, Sudan, Tanzania, Uganda and Zambia. It is based in Bujumbura, Burundi.

89 Community of Sahelo-Saharan States. It was established in 1998 with the aim of addressing the specific challenges confronting states located in Africa's Sahel and Saharan regions, including drought, desertification, climate change and food insecurity. It has 29 member states, namely, Benin, Burkina Faso, Cape Verde, CAR, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Eritrea, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Libya, Liberia, Mali, Mauritania, Morocco, Niger, Nigeria, São Tomé and Príncipe, Senegal, Sierra Leone, Somalia, Sudan, Togo and Tunisia. The organisation is based in Tripoli, Libya, and is recognised as a REC by the AU. However, as a consequence of the Libyan crisis, the organisation's headquarters temporarily have been moved to N'Djamena, Chad, since April 2019.

specific comprehensive financial assistance programmes aimed at re-starting the country's economy, including through infrastructure building and the development of the agricultural sector.

As far as curbing external interference is concerned, the CAR government should strike a deal with countries such as France, Chad and the Sudan as, directly or indirectly, they play a significant role in the country's transitional justice process and will compel these countries to strengthen judicial cooperation with the CAR and to limit the movement of CAR's suspected criminals on their soil, and so forth. Lastly, the CAR government should establish and strengthen partnerships with its neighbours (Cameroon, Chad, Congo, DRC, South Sudan and Sudan) so as jointly to secure their common borders, especially the infamous 'triangle of death' between the CAR, Chad and Cameroon.

6 Concluding remarks

The CAR is at a crossroads. The country must chart a new path leading out of its recent episodes of armed violence. Dealing effectively with the numerous crimes and human rights violations committed in the country in the last two decades – and possibly beyond – represents a major challenge facing the CAR, but at the same time, it could prove a critical linchpin in the country's post-conflict peacebuilding process.

The elevation of President Touadéra to power in March 2016 provided an environment conducive to the pursuit of transitional justice in the CAR. Yet, there is no common understanding among stakeholders regarding the content to be bestowed on a future CAR's transitional justice mechanism. This article sought to contribute to an ongoing debate. Taking into consideration the efforts being deployed by the government, this article has suggested a three-pronged transitional justice policy for the country.

It is argued that the ICC and the Special Criminal Court – working in close coordination with the national judiciary – are an important element in a framework designed to assist the country in dealing with those accused of committing serious crimes and human rights violations. Such individuals may be granted amnesty if they display a willingness to fully cooperate with transitional justice authorities. They equally may be subjected to vetting or lustrations, that is, being compelled to withdraw either temporarily or indefinitely from active politics in exchange for forgiveness.

As far as victims are concerned, restoration and reparation programmes ought to be applied targeting victims of violence. Priority should be afforded to activities aimed at assisting victims, their relatives and communities at large to rebuild their livelihoods and provide them with the necessary skills to earn a decent living.

Lastly, transitional justice efforts in post-transition CAR should focus on society in general. To this effect the CVJRR should become operational and be provided with the necessary means to undertake its work of revealing the truth about the past and laying the ground for national reconciliation within the set time frame. As far as institutional building is concerned, a National Peace and Dialogue Commission ought to be established as a permanent institution tasked with fostering national unity, social cohesion and peaceful coexistence. Furthermore, a national reconciliation day ought to be agreed upon by all stakeholders, and consensus-based reconciliation monuments ought to be erected in Bangui and regional capital cities. Civil society's participation in the form of the role of religious and traditional leaders as well as community involvement, should be guaranteed.

The CAR's transitional justice mechanism should deal only with the most grievous crimes and serious human rights violations committed during the earmarked period, that is, between 1993 and 2020. At the same time, it is necessary to emphasise that, in order to increase the likelihood of success for the suggested transitional justice policy adequate attention will have to be paid to state recovery and international engagement. Deploying and strengthening state institutions throughout the country, meaningfully improving the country's economic condition as well as fostering national cohesion are critical to the success of the CAR's transitional justice process. So too is the support of external partners, manifested, among other things, by refraining from interference in CAR's internal affairs and the provision of the required diplomatic, technical and financial support.

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Ethnocentric nationality in the Democratic Republic of the Congo: An analysis under international human rights law

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Summary: *In order to dismantle institutionalised tribalism in the Democratic Republic of the Congo, which has fostered recurring war and armed conflict, its lynchpin of ethnocentric citizenship must be removed. Due to the Congolese law of nationality by birth being grounded in ethnicity, Congolese nationality has been and remains subject to political manipulation, particularly concerning the Banyamulenge people. In the latter half of the twentieth century the Congolese state has alternatively granted, withdrawn and reinstated their Congolese citizenship. Fundamentally, the basic Congolese nationality law – anchored in the Congolese Constitution – perpetuates a legal framework for racial division which does nothing to hinder but only enables malicious sympathies that tend toward exclusion, persecution, expulsion and genocide. To address this existential flaw, this article describes how the primacy of ethnicity in the Congolese law of nationality by birth violates three international human rights treaties that the DRC has accepted, thus laying a foundation for legal action to change the Constitution and nationality law of the DRC.*

Key words: *Banyamulenge; DRC; nationality; ethnic; discrimination*

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1 Introduction

Only two decades ago, nearly four million human beings perished during seven official years of war, from 1996 to 2003, in the Democratic Republic of the Congo (DRC), formerly known as Zaïre.¹ This was primed two years earlier by the slaughter of over 800 000 human beings in the space of less than four months, during the Tutsi genocide in neighbouring Rwanda.² Lower levels of armed conflict and violence continue some 20 years later.³ Dubbed 'Africa's World War'⁴ for having engaged ten African nation states besides the Congo,⁵ the accounts of its particular causes and participants' motives vary.⁶ However, one thing is certain: A perennial dispute over the nationality of a minority ethnic group known as the Banyamulenge plays a central role in the conflict.⁷ The Banyamulenge are concentrated in DRC's South Kivu province, in an unincorporated zone named Minembwe located up on the high plains of Itombwe. They are pastoral cattle herders, of Tutsi ethnicity, whose ancestors migrated from present-day Rwanda and Burundi into the DRC many generations ago. For this reason, they are considered non-indigenous to the Congo.⁸

The DRC Constitution prescribes acquisition of Congolese nationality in one of two ways: either 'by origin' (birthright), or 'individually acquired' (naturalisation).⁹ Defining the parameters of naturalisation is deferred to the legislature.¹⁰ The Constitution, however, defines acquisition of nationality at birth – but not as

1 There are several widely-divergent estimates of the total death toll during the Congo wars, ranging from 200 000 to 3,8 million. T Turner *The Congo wars: Conflict, myth and reality* (2007) 1-3.

2 See generally G Prunier *Africa's world war: Congo, the Rwandan genocide, and the making of a continental catastrophe* (2009); Turner (n 1).

3 See generally K Berwouts *Congo's violent peace: Conflict and struggle since the Great African War* (2017); S Autesserre *The trouble with the Congo: Local violence and the failure of international peacekeeping* (2010).

4 See Prunier (n 2); Turner (n 1).

5 These states were Rwanda, Uganda, Burundi, Zimbabwe, Angola, Namibia, Chad, Soudan, Libya and the Central African Republic. M Ould Lebatt *Facilitation dans la tourmente: Deux ans de médiation dans l'imbroglio congolais* (2005) 21 fn 1.

6 See N Alusala 'Boarder fragility and the causes of war and conflict in the Democratic Republic of the Congo' in I Moyo & CC Nshimbi (eds) *African borders, conflict, regional and continental integration* (2019) 89.

7 See S Koko 'State-building, citizenship and the Banyarwanda question in the Democratic Republic of Congo' (2013) 35 *Strategic Review for Southern Africa* 41; Alusala (n 6) 89.

8 See generally I Ndaywel è Nziem *Histoire général du Congo: De l'histoire ancien à la République Démocratique* (1998) 381-382; LS Rukunda 'Justice and righteousness in Matthean theology and its relevance to the Banyamulenge community: A post-colonial reading' PhD thesis, University of Pretoria, 2005 93-174; and sources at nn 13-15 below.

9 Art 10 para 2(1) DRC Constitution.

10 Art 10 para 2(3) DRC Constitution. See the 2004 Act on Nationality.

being born either on Congolese soil, or of a Congolese parent, or a combination of the two, as is the norm throughout most of the world.¹¹ Rather, it defines the concept by declaring 'to be Congolese by origin all person[s] belonging to ethnic groups whose persons and territory constituted that which became the Congo (currently the Democratic Republic of the Congo) at independence'.¹²

Determining birthright nationality by reference to when one's ancestors came onto the territory and whether they owned land, makes that nationality susceptible to political manipulation.¹³ Depending on who has wielded the levers of power, the Congolese state, since independence from Belgium, has alternatively granted, withdrawn and reinstated the Banyamulenge's Congolese citizenship.¹⁴ The issue was at the heart of the Congo wars and continues to foment conflict.¹⁵ Fundamentally, by tying birthright citizenship to ethnicity, the basic Congolese nationality law perpetuates a legal framework for ethnic division and tribalism.

However, this provision of the DRC Constitution directly conflicts with at least three human rights treaties which the Congolese state, while named Zaïre, either ratified or acceded to: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);¹⁶ the International Covenant on Civil and Political Rights (ICCPR),¹⁷ and the African Charter on Human and Peoples' Rights (African Charter).¹⁸ This article discusses each violation in turn, and concludes by examining how they are actionable under Congolese law.

11 See D Klusmeyer 'Introduction' in TA Aleinikoff & D Klusmeyer (eds) *From migrants to citizens: Membership in a changing world* (2000) 5.

12 Art 10(2)(2) DRC Constitution (author's translation throughout).

13 A Court 'The Banyamulenge of South Kivu: The "nationality question"' (2013) 72 *African Studies* 416; S Jackson 'Of "doubtful nationality": Political manipulation of citizenship in the DR Congo' (2007) 11 *Citizenship Studies* 481; G Nzongola-Ntalaja 'The politics of citizenship in the Democratic Republic of Congo' in S Dorman et al (eds) *Making nations, creating strangers: States and citizenship in Africa* (2007) 69.

14 See K Vlassenroot 'Citizenship, identity formation and conflict in South Kivu: The case of the Banyamulenge' (2002) 29 *Review of African Political Economy* 499; MM Ruhimbika *Les Banyamulenge (Congo-Zaïre) entre deux guerres* (2001).

15 See G Mathys 'Bringing history back in: Past, present, and conflict in Rwanda and the Eastern Democratic Republic of Congo' (2017) 58 *Journal of African History* 465; J Stearns & Anonymous *Banyamulenge: Insurgency and exclusion in the mountains of South Kivu* (2013); M Mamdani 'Tutsi power in Rwanda and the citizenship crisis in Eastern Congo' in M Mamdani *When victims become killers: Colonialism, nativism, and the genocide in Rwanda* (2001) 234.

16 International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966) 660 UNTS 195 (ICERD).

17 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR).

18 African Charter on Human and Peoples' Rights (27 June 1981) 1520 UNTS 217 (African Charter).

2 Violations of international human rights law

2.1 International Convention on the Elimination of All Forms of Racial Discrimination

The DRC acceded to ICERD on 21 April 1976, without lodging any reservation, understanding or declaration, and has made none since.¹⁹ Article 1(1) of ICERD prohibits 'racial discrimination' which it defines as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'.²⁰ The Convention further mandates, at article 2(1)(c), that state parties 'shall take effective measures to ... amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination'.²¹

Furthermore, since ICERD's entry into force in 1969²² its prohibition of racial discrimination has attained the status of *jus cogens*.²³ That is, it has entered that category of peremptory general rules of international law including 'apartheid, slavery and genocide' which are 'accepted by the international community as standards from which no derogation is permitted'.²⁴ Moreover, it also has attained the concomitant status of an obligation *erga omnes*: counted among those 'obligations of a state towards the international community as a whole' which, 'by their very nature ... are the concern of all states', and for which 'all states can be held to have a legal interest

19 See 'International Convention on the Elimination of All Forms of Racial Discrimination, Table of Participants, Dates of Signatures and Ratifications, Declarations and Reservations, and Objections' *UN Treaty Collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-2&chapter=4&clang=_en#EndDec (accessed 14 April 2021) (ICERD Table).

20 Art 1(1) ICERD.

21 Art 2(1)(c) ICERD.

22 On 4 January 1969 in accordance with art 19 ICERD. See ICERD Table (n 19).

23 N Lerner *The UN Convention on the Elimination of All Forms of Racial Discrimination* (rev ed 2015) xxv (citing JD Ingles 'Study on the implementation of article 4 of the Convention on the Elimination of All Forms of Racial Discrimination: Positive measures designed to eradicate all incitement to, or acts of racial discrimination' UN Doc A/CONF 119/10.CERD 2 (1986) 38); Juridical condition and rights of undocumented migrants IACHR Advisory Opinion OC-18/03 (17 September 2003) Ser A/ Doc 18: 'The principle of ... non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle in acceptable, and discriminatory treatment of any person, owing to ... ethnic ... origin ... is unacceptable. This principle ... forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*' para 101 (unanimous opinion).

24 A Cassese *International law* (2005) 65. See also art 53 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

in their protection'.²⁵ The International Court of Justice (ICJ) recently clarified that any state 'and not only a specially affected state', may hold another state to account 'with a view toward ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end'.²⁶

The DRC itself has recognised the *jus cogens* status of ICERD's prohibition, albeit indirectly: In a case it brought against Rwanda in 2002, its representative argued before the ICJ in 2005²⁷ that the *jus cogens* prohibitions on genocide and racial discrimination preempt any state party reservation to the Court's jurisdiction under either the Genocide Convention²⁸ or ICERD.²⁹ In its brief, the DRC also recognised the *erga omnes* obligation of all states to protect against violations of 'the basic rights of the human person, including ... racial discrimination'.³⁰

In addition to prohibiting racial discrimination generally, ICERD enumerates many specific contexts in which the prohibition operates. Among these is the enjoyment of the human right to nationality.³¹ Article 5(d)(iii) provides that '[s]tate parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ... ethnic origin, to equality before the law, notably in the enjoyment of ... in particular ... the right to nationality'.³²

25 *Case Concerning the Barcelona Traction, Light and Power Co, Belgium v Spain* ICJ (5 February 1970) (1970) ICJ Reports 3 32 paras 33-34. See generally Cassese (n 24) 16, 64-68, 195, 262 (discussing obligations '*erga omnes contractantes* laid down in a multilateral treaty safeguarding fundamental values').

26 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide: The Gambia v Myanmar* ICJ (23 January 2020) (2020) ICJ Reports 13 para 41. In so holding, the Court overruled Myanmar's objection that The Gambia – located on a different continent – lacked standing to bring a claim due to The Gambia not being a state 'injured' by Myanmar's alleged misconduct (unlike, eg, Bangladesh due to flows of Rohingya refugees from adjacent Myanmar). (2020) ICJ Reports 12 para 39.

27 *Armed Activities on the Territory of the Congo, DRC v Rwanda* ICJ (8 July 2005) Hearing on Jurisdiction and Admissibility, *verbatim* record paras 12.7-12.9, <https://www.icj-cij.org/public/files/case-related/126/126-20050708-ORA-01-00-BI.pdf> (orig), <https://www.icj-cij.org/public/files/case-related/126/126-20050708-ORA-01-01-BI.pdf> (trans) (accessed 6 December 2021).

28 Convention on the Prevention and Punishment of the Crime of Genocide, art 9 (9 December 1948) 78 UNTS 277.

29 Art 22 ICERD.

30 *DRC v Rwanda* ICJ (28 May 2002) Application Instituting Proceedings 29 (quoting *Barcelona Traction* (1970) ICJ Reports 32 para 34) <https://www.icj-cij.org/public/files/case-related/126/7070.pdf> (accessed 6 December 2021).

31 Art 15(1) Universal Declaration of Human Rights (10 December 1948) GA Res 217 (III) A (Universal Declaration).

32 Art 5(d)(iii) ICERD.

Article 10 of the DRC Constitution,³³ replicated in its implementing legislation,³⁴ starkly contrasts with article 5(d)(iii) of ICERD by purposely distinguishing those eligible for citizenship by origin from those not eligible for citizenship by origin, on the basis of *ethnic* origin. Moreover, the provision clearly contradicts article 1(1) of ICERD, in that it creates a 'preference based on ... ethnic origin'³⁵ regarding access to Congolese citizenship. Article 10 of the DRC Constitution, therefore, violates ICERD both generally at article 1(1), and also specifically at article 5(d)(iii).³⁶ Hence, the DRC must 'amend, rescind or nullify' this constitutional provision and its corresponding legislation, both explicitly per article 2(1)(c) of the Convention, and also implicitly per article 216 of the DRC Constitution³⁷ – especially given ICERD's *jus cogens* status, a status acknowledged by the DRC.

However, there is a potential defence in that article 1(3) of ICERD, on the face of it, could be read so as to preclude scrutiny of state party citizenship and naturalisation laws. The provision reads: 'Nothing in this Convention may be interpreted as affecting in any way the legal provisions of state parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality.'³⁸

33 See text accompanying n 12.

34 Art 6 of Law 4/024 of 12 November 2004 relating to Congolese nationality. Although pre-dating the 2006 Constitution, when enacted the Law was in implementation of a similar provision in the transitional Constitution of 1 April 2003, which had been adopted as part of the peace accords ending the Second Congo War, establishing a government of transition with a view toward a constitutional plebiscite in 2006. The Law grew out of those accords and the Inter-Congolese Dialogue held shortly thereafter. See Introductory Remarks to Law 4/024 of 12 November 2004 (17 November 2004) 45 *Official Gazette of the Democratic Republic of the Congo* (special issue) i-v. The legislation adopted was a compromise, not an absolute guarantee of the Banyamulenge's Congolese nationality. See Jackson (n 13) 491. See also J Sarkin 'Towards finding a solution for the problems created by the politics of identity in the Democratic Republic of the Congo (DRC): Designing a constitutional framework for peaceful cooperation' in Konrad-Adenauer-Stiftung (eds) *Politics of identity and exclusion in Africa: From violent confrontation to peaceful cooperation* (2001) 67.

35 Art 1(1) ICERD.

36 Jackson (n 13) 489, citing S Ogata *The turbulent decade* (2005) 380 fn 37 (summarising UN Office of Legal Affairs 'Communication from Under Secretary-General for Political Affairs Marrack Goulding to High Commissioner for Refugees Sadaka Ogata' (24 May 1996); per email from the UN Office of Legal Affairs to this author on 11 October 2020, the communication remains confidential and not releasable to the public). See also AN Makombo 'Civil conflict in the Great Lakes region: The issue of nationality of the Banyarwanda in the Democratic Republic of the Congo' (1997) 5 *African Yearbook of International Law* 58 (asserting, at the advent of the transitional government under Laurent Kabila, that Congolese nationality law was incompatible with 'general principles of law' which include 'the right to a nationality'; written by a UN Department of Peace Keeping Operations Political Affairs Officer, with the caveat that the views expressed therein were 'not necessarily those of the United Nations' (49).

37 See nn 159-163 below and accompanying text.

38 Art 1(3) ICERD.

By 'bracket[ing] the use of race as a criterion for citizenship',³⁹ it appears that article 1(3) 'makes it clear' that ICERD may not be applied to state party laws⁴⁰ and, hence, that state party citizenship and naturalisation are exempt from the reach of ICERD.⁴¹ Such a reading would be consistent with traditional deference to the sanctity of state sovereignty,⁴² especially during the post-colonial liberation era of the Convention's drafting,⁴³ because determining the parameters of citizenship, under international law, has traditionally been the unique province of the nation state.⁴⁴

However, interpreting article 1(3) so as to preclude scrutiny of state party nationality laws would frustrate ICERD's object and purpose, which is determined by reference to its Preamble.⁴⁵ In its fifth preambular paragraph, ICERD specifically incorporates the 1963 United Nations Declaration on the Elimination of All Forms

39 P.J. Spiro 'A new international law of citizenship' (2011) 105 *American Journal of International Law* 716.

40 G. Nystuen *Achieving peace or protecting human rights? Conflicts between norms regarding ethnic discrimination in the Dayton Peace Agreement* (2005) 116.

41 B. Manby *Citizenship and statelessness in the member states of the Southern African Development Community* (2020) 104, https://reliefweb.int/sites/reliefweb.int/files/resources/Statelessness_in_Southern_Africa_Dec2020.pdf (accessed 6 December 2021). However, Spiro puts this view in context: 'In its original conception, at least, the Convention was not intended to constrain criteria for admission from outside the existing community. [At that time] international law had nothing to say about a citizenship regime that had the clear effect of excluding outsiders on the basis of race.' Spiro (n 39) 716 (citing Lerner (n 23) 28-32).

42 See D. Mahalic & J.G. Mahalic 'The limitations provisions of the International Convention on the Elimination of all Forms of Racial Discrimination' (1987) 9 *Human Rights Quarterly* 79, 82: '[The subsection was] designed to assure state parties that due respect is given to state sovereignty in areas concerning naturalisation ... Naturalisation laws have always been considered a prerogative of state sovereignty ... Consequently, the limitation provisions articulated in Article 1(3) have generated little controversy and merited only minor attention.' See also UN Charter art 2 para 7.

43 See P. Thornberry *The International Convention on the Elimination of All Forms of Racial Discrimination* (2016) 157: 'As the travaux suggest, the restrictive approach to non-citizens was to some extent bound up with the necessity of strengthening the sovereignty of newly independent states and nascent problems of the nationalisation of resources including personnel.'

44 *Nottebohm case, Liechtenstein v Guatemala* ICJ (6 April 1955) (1955) ICJ Reports 20 ('[i]t is for Liechtenstein, as it is for every sovereign state, to settle by its own legislation the rules relating to the acquisition of its nationality'). See generally A. Kaczorowska 'Nationality, statelessness, refugees and internally displaced persons' in A. Kaczorowska *Public International Law* (2005) 306-309.

45 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v United Arab Emirates* ICJ (4 February 2021) (2021) ICJ Reports para 84, <https://icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf> (accessed 6 December 2021). In the process of discerning ICERD's object and purpose, the International Court of Justice found it unnecessary to go beyond the treaty's text (para 89), in this case its Preamble (para 84), applying the customary rules of treaty interpretation reflected in arts 31 and 32 of the Vienna Convention on the Law of Treaties, specifically the very first rule: A 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (para 78) (quoting Vienna Convention on the Law of Treaties art 31(1)).

of Racial Discrimination,⁴⁶ and affirms that state parties 'desir[e] to implement the principles embodied in' the Declaration 'and to secure the earliest adoption of practical measures to that end'.⁴⁷ The Declaration itself admonishes that 'particular efforts shall be made to prevent discrimination based on ... ethnic origin, especially in the fields of ... access to citizenship'.⁴⁸

Moreover, well prior to ICERD, in April 1955, the ICJ had made clear that, despite the sovereign prerogative of citizenship and naturalisation, nationality laws nevertheless are subject to international scrutiny when they have 'international effect' in their application.⁴⁹ The Court at the time recognised that 'the diversity of demographic conditions ha[d] thus far made it impossible for any general agreement to be reached on the rules relating to nationality'.⁵⁰ Since then, one rule has emerged: the prohibition of discrimination on the basis of race, including ethnic origin, reflected in article 5(d) (iii) of ICERD. ICERD was concluded in July 1966, entered into force in January 1969, attained near universal ratification or accession in the following years,⁵¹ and its principles have evolved into *jus cogens* general rules of international law.⁵²

Furthermore, the dual use of the term 'nationality' in article 1(3) renders the provision ambiguous. Is the term 'nationality' as used in the first clause, that is, synonymously with 'citizenship', used similarly in the second? Or, rather, in the second clause, is 'nationality' analogous to the term 'ethnicity', as it is in article 1(1)?⁵³ Very little of ICERD's *travaux préparatoires* specifically addresses article 1(3) as such, but it does indicate the latter. As related by Thornberry in his recent and exhaustive commentary:⁵⁴

The view that 'nationality' shifts its meaning in [article] 1(3) from the legal concept to a concept closer to ethnicity was expressed by the representative of the UK ... who observed, following the voting on the article, that 'nationality' 'was obviously interpreted in different ways in different countries; her delegation understood the word "nationality"

46 UN Declaration on the Elimination of All Forms of Racial Discrimination (20 November 1963) GA Res 1904 (XVIII) (ERD Declaration).

47 12th preambular paragraph ICERD.

48 Art 3(1) ERD Declaration (n 46).

49 *Nottebohm case* (1955) ICJ Reports 21.

50 (1955) ICJ Reports 23.

51 See ICERD Table (n 19).

52 See n 23 and accompanying text.

53 Art 1(1) ICERD (defines the bases of 'racial discrimination' to include 'national or ethnic origin'). *Qatar v UAE* (2021) ICJ Reports para 105 ('the term "national origin" in Article 1, paragraph 1, of the Convention does not encompass current nationality').

54 Thornberry (n 43) 144 fnn 35 & 36 (citing UN GAOR 20th Sess 1307th 3rd Comm Mtg (12 October 1965) UN Doc A/C.3/SR 96-97 paras 24 & 28 (internal citation omitted)).

as used at the end of the new text ... to mean persons of a particular national origin'. The representative of Canada explained that he had voted in favour of [article] 1(3) 'because the text adopted made it clear that individuals could have a nationality on the basis of race as well as citizenship'.

Likewise, the scant academic commentary discussing article 1(3) militates for reading its second clause's use of 'nationality' as 'national origin'⁵⁵ – although the earliest of the three commentators demurs, if 'for no other reason than because it ought not to be lightly assumed that within one sentence the same term is given two different meanings'.⁵⁶ Thornberry himself posits that article 1(3) exists to qualify its predecessor, article 1(2), which reads: 'This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a state party ... between citizens and non-citizens'.⁵⁷ For Thornberry, article 1(3) serves 'as an exception to the exception that reinstates, within its frame, the non-discrimination principle as applicable among non-citizens when it concerns a particular nationality'.⁵⁸

The jurisprudence of the United Nations Committee on the Elimination of Racial Discrimination (ERD Committee) bears this out. The ERD Committee is the treaty body established by the Convention⁵⁹ to monitor and promote compliance with ICERD through both periodic review of state parties' practice,⁶⁰ and also to consider complaints – called 'communications' – against any given state party, brought by an individual or group of individuals,⁶¹ or another state party.⁶²

At its sixty-fifth session in 2004, the ERD Committee adopted a General Recommendation (GR) on the topic of non-citizens, in order to address the plight of so-called foreigners – not only in the sense of refugees and migrants, which it had done in 1993,⁶³ but also of people whose nationality is questioned even when they 'have lived

55 Thornberry (n 43) 145 fnn 45-46 (citing I Diaconu *Racial discrimination* (2011) 166; Lerner (n 23) 35 (1980 1st edn 30)).

56 Thornberry (n 43) 145 fnn 43-44 (quoting E Schwelb 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *International and Comparative Law Quarterly* 1009).

57 Art 1(2) ICERD.

58 Thornberry (n 43) 146.

59 Art 8 ICERD.

60 Art 9 ICERD.

61 Art 14 ICERD.

62 Art 11 ICERD.

63 General Recommendation on non-citizens, CERD GR 11 (9 March 1993), UN Doc A/48/18 (1993).

all their lives on the same territory',⁶⁴ such as the Banyamulenge. This GR incorporated an earlier GR that has addressed article 1(3). The 1993 GR had explained that article 1(3) qualifies article 1(2)'s exemption of those 'actions by a state party which differentiate between citizens and non-citizens' from the definition of racial discrimination, 'by declaring that, among non-citizens, state parties may not discriminate against any particular nationality'.⁶⁵ As part of its 2004 update the ERD Committee recommended that state parties 'recognise that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of state parties' obligations to ensure non-discriminatory enjoyment of the right to nationality'.⁶⁶ The ERD Committee further recommended that state parties '[r]eview and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination'.⁶⁷

If article 1(3) prohibited scrutiny of state parties' nationality laws, then the 2004 GR would be an absurdity. Indeed, in the sole complaint brought before the ERD Committee in which the respondent state party raised article 1(3) as a jurisdictional defence, the ERD Committee rejected the defence outright, citing the 2004 GR, and declared the communication admissible.⁶⁸

Furthermore, as in the case of article 15(1) of the Universal Declaration of Human Rights (Universal Declaration),⁶⁹ article 5(d) (iii) of ICERD does not purport to *create* the right to nationality. As the ERD Committee clarified, the non-exhaustive enumeration of specific human rights in article 5 of ICERD represents an 'assumption' by state parties of both 'the existence and recognition of these rights'.⁷⁰ Rather, what ICERD does is 'oblige' each state party 'to prohibit and eliminate racial discrimination in the enjoyment of such human rights'.⁷¹ Exempting scrutiny of state party laws which define nationality would allow state parties to discriminate on the basis of

64 General Recommendation on discrimination against non-citizens, CERD GR 30 (20 August 2004), UN Doc A/59/18 (SUPP) (2004) 93.

65 CERD GR 11 113.

66 CERD GR 30 95 para 14.

67 CERD GR 30 94 para 6.

68 *Pjetri v Switzerland* Communication 53/2013, CERD (23 January 2017), UN Doc CERD/C/91/D/53/2013 (2017) 13 paras 6.1-6.4 (although not directly attacking the state party's nationality law *per se*, the complainant alleged that the law as applied adversely affected his access to nationality).

69 'Everyone has the right to a nationality.' Art 15(1) Universal Declaration of Human Rights (10 December 1948) GA Res 217 (III) A (1948) (Universal Declaration).

70 General Recommendation on article 5 of the Convention, CERD GR 20 (8 March 1996), UN Doc A/51/18 (1996) 124 para 1.

71 CERD GR 20 124 para 1.

race in the granting of citizenship – a prerequisite to its enjoyment – and thus defeat ICERD's object and purpose.⁷²

Moreover, 'a distinction' in national law 'is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms'.⁷³ An impairing effect will be found if the law 'has an unjustifiable disparate impact upon a group distinguished by ... ethnic origin'.⁷⁴ Perhaps, facially, the distinction among ethnic groups on the basis of presence on and possession of territory in the DRC Constitution and corresponding nationality law cannot, in the abstract, be said to 'impair' the right to nationality *per se*. However, the effects of the law's reference to the ambiguous concepts of an ethnic group's presence on and ownership of territory at any given time have had, and continue to have, an unjustifiably disparate impact upon the Banyamulenge.

In practice before the ERD Committee, it is worth noting that the government of the DRC itself acknowledges that article 1(3) does not prohibit scrutiny of its nationality laws, insofar as the DRC submitted those laws for the ERD Committee's consideration in the context of the DRC's most recent (2006) Periodic Report submitted per article 9 of the Convention.⁷⁵ The ERD Committee did in fact scrutinise those laws, albeit perfunctorily, and in its Concluding Observations noted its concern 'that in practice Congolese nationality is particularly difficult to acquire by members of [the Banyarwanda] group'.⁷⁶ No mention whatsoever was made of article 1(3) of ICERD. The ERD Committee also invited the DRC 'to ensure that the application of [its nationality laws] does not give rise to discrimination in the enjoyment of the right to nationality by members of certain ethnic groups residing within its territory (art 5(d)(iii))'.⁷⁷ Moreover, the Committee 'note[d] with concern that ... there is no definition of racial discrimination in domestic law that reflects the definition given in article 1 of the Convention'.⁷⁸ The ERD Committee therefore recommended that the DRC 'take the necessary legislative measures

72 Although affirmative 'special measures' to grant nationality may be remedially warranted, and thus are permitted under ICERD arts 1(4) and 2(2). See generally General Recommendation on the meaning and scope of Special Measures, CERD GR 32 (24 September 2009) UN Doc CERD/C/GC/32 (2009).

73 General Recommendation on art 1(1) of the Convention, CERD GR 14 (17 March 1993), UN Doc A/48/18 (1993) 115 para 1.

74 CERD GR 14 115 para 2.

75 See 15th Periodic Report of the Democratic Republic of the Congo, CERD (3 August 2006) UN Doc CERD/C/COD/15 (2006) 10, 12 & 16, paras 40, 41, 51, 71 & 72.

76 Concluding Observations on the 15th Periodic Report of the Democratic Republic of the Congo, CERD (17 August 2007), UN Doc A/62/18 (SUPP) (2007) 66 para 331 (brackets in original).

77 As above.

78 Concluding Observations (n 76) 65 para 326.

to adopt in domestic law a definition of racial discrimination that is fully consistent with article 1 of the Convention'.⁷⁹

More than half a century has elapsed since ICERD's inception. More than a decade ago 'the view ha[d] emerged that the prohibition of discrimination [under the Convention] applies fully to nationality legislation'.⁸⁰ Just this year (2021) the ICJ found and declared ICERD's object and purpose as being 'to bring to an end all practices that seek to establish a hierarchy among social groups as defined by their inherent characteristics ... [by] eliminat[ing] all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth'.⁸¹

The Convention 'is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society'.⁸² It is time to leverage ICERD to uncouple ethnicity entirely from the laws of nationality.

2.2 International Covenant on Civil and Political Rights

DRC acceded to the International Covenant on Civil and Political Rights (ICCPR) on 1 November 1976 and, as with ICERD, without any reservation, understanding or declaration and has not made any since.⁸³ Unlike ICERD however, ICCPR does not enumerate the right to nationality. It explicitly mentions the right only indirectly, in discussing the rights of the child.⁸⁴ Nevertheless, article 16 of ICCPR directs that '[e]veryone shall have the right to recognition everywhere as a person before the law',⁸⁵ implementing *verbatim* article 6 of the Universal Declaration.⁸⁶ ICCPR further directs, at article 26, that '[a]ll persons are equal before the law and are entitled without any

79 As above.

80 I Ziemele *State continuity and nationality: The Baltic states and Russia: Past, present and future as defined by international law* (2005) 294, quoted by Spiro (n 39) 722 fn 176.

81 *Qatar v UAE* (2021) ICJ Reports para 86.

82 CERD GR 32 (n 72) 2 para 5. See generally D Keane & A Waughray *Fifty years of the International Convention on the Elimination of All Forms of Racial Discrimination: A living instrument* (2017) 14-23.

83 See 'International Covenant on Civil and Political Rights, table of participants, dates of signatures and ratifications, declarations and reservations, and objections' *UN treaty collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 28 January 2021) (ICCPR Table).

84 Art 24(3) ICCPR ('Every child has the right to acquire a nationality').

85 Art 16 ICCPR.

86 Art 6 Universal Declaration.

discrimination to the equal protection of the law',⁸⁷ implementing nearly *verbatim* article 7 of the Universal Declaration.⁸⁸

The modern political world organises humankind into independent sovereign nation states, and tasks nation states with the enforcement of all rights, including human rights. Consequently, the individual must look to the nation state for vindication of his or her rights.⁸⁹ It necessarily follows that an individual's entitlement to the protection of a nation state derives from his or her nationality. As the ICJ remarked in 1955, 'it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection'.⁹⁰ Although this speaks to protection on the international plane, the Court pointed out that the effects of nationality extend to and are especially relevant in the domestic sphere:⁹¹

Nationality has its most immediate, its most far-reaching and, for most people, its only effects in the legal system of the state conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the state in question grants or imposes on its nationals.

Thus, in this world of independent sovereign nation states, deprivation of nationality amounts to 'the total destruction of the individual's status in society'.⁹² For those so deprived, 'their plight is not that they are not equal before the law, but that no law exists for them'.⁹³ In other words, the right to nationality equates to 'the right to have rights'.⁹⁴

87 Art 26 ICCPR.

88 Art 7(1) Universal Declaration ('All are equal before the law and are entitled without any discrimination to equal protection of the law').

89 See generally E Bates 'History' in D Moeckli et al (eds) *International human rights law* (2018) 3-21; Cassese (n 24) 3-4 & 142-150; L Henkin 'Rights in a world of states' in L Henkin *The age of rights* (1990) 43-50.

90 *Nottebohm case* (1955) ICJ Reports 13 (quoting *The Panevezys-Saldutiskis Railway Case, Estonia v Lithuania* PCIJ (28 February 1938) (1938) PCIJ Reports ser A/B 76 16 para 65). In the earlier case, the Permanent Court of International Justice – predecessor to the International Court of Justice – continued: 'Where the injury was done to the national of some other state, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a state is entitled to afford nor can it give rise to a claim which that state is entitled to espouse'. *Panevezys-Saldutiskis Railway Case* (1938) PCIJ Reports ser A/B 76 16 para 65.

91 *Nottebohm case* (1955) ICJ Reports 20. The Court concludes this paragraph with the sentence: 'This is implied in the wider concept that nationality is within the domestic jurisdiction of the state.'

92 *Trop v Dulles* 356 US 86 101 (1958) (holding that the Eighth Amendment to the US Constitution prohibits punitive denationalisation, finding it to be a cruel and unusual form of punishment).

93 H Arendt 'The decline of the nation-state and the end of the rights of man' in H Arendt *The origins of totalitarianism* (1958) 295-296.

94 Arendt (n 93) 295 (quoted without citation in *Trop v Dulles* 356 US 102). However, see K Rubenstein 'Globalisation and citizenship and nationality' in C Dauvergne (ed) *Jurisprudence for an interconnected globe* (2003) 171-172 ('Citizenship is no longer legitimately the major foundation upon which rights

Over half a century after these classic mid-twentieth century pronouncements, commentators continue to observe that ‘although “everyone has the right to recognition everywhere as a person before the law”, it is precisely lack of such recognition that generates many of the problems the stateless face’.⁹⁵ ‘Without citizenship in at least one state, it is impossible to enjoy most human rights; indeed, some stateless people are even enslaved.’⁹⁶ For the African Court on Human and Peoples’ Rights (African Court), nationality provides ‘the capacity to enjoy rights and exercise obligations ... since it is the legal and socio-political manifestation of the right’ to legal personality.⁹⁷ A Beninese commentator sums it up as follows: ‘*l’acquisition de la nationalité est la première image de l’existence juridique de l’être humain.*’⁹⁸

Therefore, the guarantees under international law to everyone of recognition everywhere as a person before the law and to all persons of equality before the law, as reflected in articles 16 and 26 of ICCPR, imply by necessity that ICCPR also guarantees the right to nationality. The jurisprudence of the United Nations (UN) Human Rights Committee (HR Committee)⁹⁹ bears this out, both in its two General Comments which touch on deprivation of nationality, and also in its views issued in the two communications brought before it which addressed the right to nationality.

In late 1989, by way of interpreting the principle of non-discrimination in article 26 of ICCPR, the HR Committee interpreted

are restricted and determined, even within the nation-state’) (quoted in Spiro (n 39) 719 fn 167).

95 KA Belton ‘Statelessness: A matter of human rights’ in RE Howard-Hassmann & M Walton-Roberts (eds) *The human right to citizenship: A slippery concept* (2015) 37 (quoting art 6 Universal Declaration (internal citation omitted), which ICCPR art 16 tracks nearly *verbatim*).

96 RE Howard-Hassmann ‘Introduction: The human right to citizenship’ in Howard-Hassmann & Walton-Roberts (n 95) 4; see also L van Waas ‘Nationality and rights’ in BK Blitz & M Lynch (eds) *Statelessness and citizenship: A comparative study on the benefits of nationality* (2011) 23.

97 *Robert John Pennessi v Tanzania* Judgment 013/2015, African Court on Human and Peoples’ Rights (28 November 2019) para 89, <https://www.african-court.org/cpmt/details-case/0132015> (accessed 6 December 2021), quoting *Open Society Justice Initiative (OSJI) v Côte d’Ivoire* Communication 318/06, African Commission on Human and Peoples’ Rights (27 May 2016) 25-26 paras 95-97, <https://www.achpr.org/sessions/descions?id=228> (accessed 6 December 2021).

98 ‘The acquisition of nationality is the first manifestation of the human being’s legal existence.’ RF Avlessi ‘La prévention de l’apatridie dans le système Africain des droits de l’homme’ (‘The prevention of statelessness in the African human rights system’) (2019) 3 *African Human Rights Yearbook* 286.

99 The treaty body established by ICCPR arts 28-45 to monitor and promote compliance with ICCPR, similar to the Committee on ERD for ICERD.

ICCPR as incorporating the terms of the earlier ICERD, as noted in its General Comment on non-discrimination:¹⁰⁰

The Covenant neither defines the term 'discrimination' nor indicates what constitutes discrimination. However, article 1 of [ICERD] provides that the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Moreover, article 26 of ICCPR does not limit the scope of rights protected against discrimination. Rather, 'it prohibits discrimination [as defined by ICERD] in law or in fact in any field regulated and protected by public authorities ... In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.'¹⁰¹

Furthermore, 'when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory'.¹⁰² It follows, therefore that, upon discovery of an incompatibility with the non-discriminatory requirement of article 26 of ICCPR, article 2(2) of the Covenant requires a state party to amend extant legislation in order to cure the violation. In 2004 the HR Committee made this clear:¹⁰³

Article 2, paragraph 2, requires that state parties take the necessary steps to give effect to the Covenant rights in the domestic order ... Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.

State parties also must act promptly to amend their laws after discovery of prohibited discriminatory effect. Bringing domestic law into compliance with ICCPR is not a mere goal to be achieved progressively,¹⁰⁴ as in the case of economic, social or cultural rights: 'The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified

100 General Comment on non-discrimination, UNHR Committee General Comment 18 (10 November 1989) UN Doc HRI/GEN/1/Rev 9 (Vol I) (1989) 2 para 6.

101 UNHR Committee General Comment 18 3 para 12.

102 As above.

103 General Comment on the nature of the general legal obligation imposed on state parties to the Covenant, UNHR Committee General Comment 31 (26 May 2004) UN Doc CCPR/C/21/Rev 1/Add 13 (2004) 5 para 13.

104 Compare with art 2(1) of the International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3 (ICESCR).

by reference to political, social, cultural or economic considerations within the state.¹⁰⁵

In addressing the two individual communications which alleged violations of ICCPR due to a denial of citizenship,¹⁰⁶ the HR Committee indicated – albeit indirectly – that ICCPR does encompass the right to nationality. Both cases were brought against Estonia, by persons who had served in the Soviet military during the time Estonia was part of the Soviet Union. Both communications’ authors alleged unlawful discrimination on the basis of their membership in a social group – former Soviet military officers – in the application of Estonian nationality law denying them Estonian citizenship, on national security grounds. In both cases, Estonia replied that the communications were not admissible because ICCPR does not expressly mention the right to nationality.

In response to the first communication, Estonia asserted that ‘the right to citizenship, much less [to] a particular citizenship, is not contained in the Covenant’.¹⁰⁷ The HR Committee rejected Estonia’s position, observing:¹⁰⁸

The author has not advanced a free-standing right to citizenship, but rather the claim that the rejection of his citizenship on the national security grounds advanced violates his rights to non-discrimination and equality before the law. These claims fall within the scope of article 26 and are, in the Committee’s view, sufficiently substantiated for purposes of admissibility.

In the second case Estonia went further, asserting ‘that the communication is manifestly ill-founded’ because ‘the right to citizenship is neither a fundamental right nor a Covenant right’.¹⁰⁹ The HR Committee tersely rejected this, stating that it ‘does not find the state party’s argument persuasive and finds that the author’s claims are sufficiently substantiated, for purposes of admissibility’.¹¹⁰

¹⁰⁵ UNHR Committee General Comment 31 (n 103) 6 para 14.

¹⁰⁶ *Borzov v Estonia*, Communication 1136/2002, UNHR Committee (25 August 2004) UN Doc CCPR/C/81/D/1136/2002 (2004) and *Šipin v Estonia*, Communication 1423/2005 (4 August 2008) UN Doc CCPR/C/93/D/1423/2005 (2008).

¹⁰⁷ *Borzov v Estonia* (n 106) 5 para 4.6.

¹⁰⁸ *Borzov v Estonia* 9 para 6.6. On the merits, however, the HR Committee held that the national security grounds asserted by Estonia were permissible under the circumstances, and found no violation of ICCPR. *Borzov v Estonia* 9-10 paras 7.1-8.

¹⁰⁹ *Šipin v Estonia* (n 106) 5 paras 4.1 & 4.3.

¹¹⁰ *Šipin v Estonia* 8 para 6.2. Again, however, the HR Committee decided for Estonia on the merits. *Šipin v Estonia* 9 para 8.

Regrettably, in its views on these two communications, the HR Committee did not affirmatively state that ICCPR implicitly contains the right to nationality. Yet, the authors of those communications had not placed that question before the HR Committee. Rather, it was the respondent state party who asserted the proposition, albeit in the negative, namely, that the right to nationality *is not* contained in ICCPR. This the HR Committee squarely addressed, and firmly rejected.

In sum, articles 16 and 26 of ICCPR oblige the DRC to guarantee the right to nationality to all persons within its jurisdiction without any discrimination, including racial discrimination. ICCPR incorporates ICERD which defines 'racial discrimination' to include discrimination on the basis of ethnic origin. In the attribution of nationality under Congolese law, article 10 of the DRC Constitution and the corresponding DRC nationality law distinguish on the basis of ethnic origin, or create a preference based on ethnic origin; hence, they violate articles 16 and 26 of ICCPR. Therefore, article 2(2) of ICCPR obligates the DRC to amend, rescind or nullify article 10 of its Constitution and the corresponding nationality law, so as not to define 'nationality by origin' on the basis of or with reference to ethnic origin.

2.3 African Charter on Human and Peoples' Rights

The DRC ratified the African Charter on 28 July 1987, with effect from 28 October 1987.¹¹¹ As in the case of ICCPR, the African Charter does not explicitly mention the right to nationality. However, like article 16 of ICCPR, article 5 of the African Charter prescribes the right of everyone to be recognised as a person before the law.¹¹² Yet, the Charter goes deeper, by associating the individual's right to legal status – or 'juridical personality'¹¹³ – with human dignity itself: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of legal status.'¹¹⁴

Also, article 2 prohibits discrimination in the effectuation of rights, notably racial discrimination. The African Charter, however,

111 African Commission Table of Ratification and Adherence 1520 UNTS 245 n 1.

112 Art 5(1) African Charter.

113 *The Nubian Community in Kenya v The Republic of Kenya*, Communication 317/2006, African Commission on Human and Peoples' Rights (30 May 2016), <https://www.achpr.org/sessions/descions? id=229> (accessed 6 December 2021) 28 n 47.

114 Art 5(1) African Charter.

unlike ICCPR, explicitly lists 'ethnic group' as a prohibited basis of discrimination, nesting it between 'race' and 'colour':¹¹⁵

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Moreover, the stated object and purpose of the African Charter includes the 'dismantling' of 'all forms of discrimination, particularly those based on race, ethnic group, colour', and so forth.¹¹⁶

Furthermore, the African Charter mandates that its interpreters – notably, the African Commission on Human and Peoples' Rights (African Commission) – embrace other international human rights instruments:¹¹⁷

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of ... the Universal Declaration of Human Rights [and] other instruments adopted by the United Nations and by African countries ... as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Also, 'to determine principles of law' which apply to it, the Charter further mandates:¹¹⁸

The Commission shall also take into consideration other general or special international conventions ... African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

Due to the African Charter's invoking the Universal Declaration, the African Court in late 2019 held that the African Charter encompasses the right to nationality as articulated by article 15 of the Universal Declaration, and guarantees it via article 5 of the African Charter.¹¹⁹ The Organisation of African Unity (OAU), now the African Union (AU), had established the African Court in 1998 so as 'to complement and reinforce the functions of the African Commission' judicially,¹²⁰ and

115 Art 2 African Charter.

116 Ninth preambular paragraph African Charter.

117 Art 60 African Charter.

118 Art 61 African Charter.

119 *Penesis v Tanzania* (n 97) para 168(v).

120 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (9 June 1998) OAU Doc OAU/LEG/EXP/ AFCHPR/PROT (III) (1998), <https://www.africancourt.org>.

to be able to render binding findings as well as recommendations.¹²¹ The DRC recently recognised the African Court's authority, by ratifying the Protocol establishing the Court¹²² on 8 December 2020.¹²³

Regardless of whether the entire world views the Universal Declaration as having crystallised into an actionable instrument binding upon all states, the African Court 'recognise[s] it] as forming part of customary international law'.¹²⁴ Moreover, the DRC Constitution itself, if not outright incorporating the Universal Declaration, nevertheless 'reaffirms' the Congo's 'adhesion and attachment' to it.¹²⁵ For the African Court – due to the status of the Universal Declaration as customary international law, and because 'everyone shall have a right to nationality' under article 15 of the Declaration – the right to nationality 'applies' as a 'binding norm'.¹²⁶ This is founded, first, in 'the right to nationality' being 'a fundamental aspect of the dignity of the human person';¹²⁷ and, second, because 'the expression "legal status" under article 5 of the Charter encompasses the right to nationality'.¹²⁸ Therefore, 'article 5 of the Charter and article 15 of the Universal Declaration of Human Rights' 'guarantee' the right to nationality.¹²⁹

The African Commission, for whose work the African Court exists 'to complement and reinforce',¹³⁰ had opined in 2016 that article 5 of the African Charter encompasses the right to nationality, albeit not necessarily on the basis of the Universal Declaration. Rather, for

org/en/images/Basic%20 Documents/ african-court-humanrights.pdf (accessed 6 December 2021), eighth preambular paragraph (African Court Protocol).

121 See generally F Viljoen *International human rights law in Africa* (2012) 414-420.

122 African Court Protocol (n 120).

123 African Court on Human and Peoples' Rights 'Press release: Democratic Republic of Congo ratifies the Protocol on the Establishment of the African Court on Human and Peoples' Rights' (11 December 2020), <https://www.african-court.org/wpafc/democratic-republic-of-congo-ratifies-the-protocol-on-the-establishment-of-the-african-court-on-human-and-peoples-rights/> (accessed 6 December 2021). However, the DRC did not make the necessary declaration under art 34(6) African Charter permitting the Court to accept complaints against it from individuals and NGOs.

124 *Anudo Ochieng Anudo v Tanzania* Judgment 12/2015, African Court on Human and Peoples' Rights (22 March 2018), <https://www.african-court.org/cpmt/details-case/0122015> (accessed 6 December 2021) para 76 (citing *Case Concerning United States Diplomatic and Consular Staff in Tehran, USA v Iran* ICJ (24 May 1980) (1980) ICJ Reports 42 (Universal Declaration 'enunciates' 'fundamental principles' of international law) and *Matter of South-West Africa, Ethiopia v South Africa, Liberia v South Africa* ICJ (21 December 1962) (1962) ICJ Reports 358-360 (J Bustamente separate opinion) (the 'declaration' of an international trusteeship constitutes an 'agreement' among its parties to abide by its terms)).

125 DRC Constitution 5th preambular paragraph.

126 *Penessis v Tanzania* (n 97) para 85.

127 *Penessis v Tanzania* (n 97) para 87 (expressly so holding).

128 *Penessis v Tanzania* (n 97) para 89.

129 *Penessis v Tanzania* (n 97) para 168(v).

130 African Court Protocol 8th preambular paragraph.

the Commission it was founded on the attributes of 'legal status' invoked in article 5: that is, 'the ability of an individual to have rights and obligations', of which nationality is 'a basic component' because 'it is the legal and socio-political manifestation' of legal status.¹³¹ The year prior, the African Commission had 'agreed with the position espoused' by the Inter-American Court of Human Rights, 'that nationality (or citizenship) is a prerequisite for recognition of juridical personality',¹³² and that, therefore, 'a claim to citizenship or nationality as a legal status is protected under article 5 of [the African Charter]'.¹³³

The question originally came to the African Commission's attention through complaints of arbitrary denial of nationality, mass expulsions of non-nationals, and resulting statelessness, which the Commission viewed through the lens of human dignity: 'forcing people to live as stateless persons ... constitutes a violation of the dignity of a human being, thereby violating article 5 of the Charter'.¹³⁴ After over a decade of addressing such cases, particularly those involving women and children, and lobbying by African national human rights institutions and international organisations, the African Commission organised a series of debates and conferences, culminating in 2013 with adoption of its Resolution 234 on the right to nationality.¹³⁵ Thereby, the Commission

express[ed] its deep concern at the arbitrary denial or deprivation of the nationality of persons or groups of persons by African states, especially as a result of discrimination on grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status¹³⁶

and declared itself to be 'convinced that it is in the general interest of the people of Africa for all African states to recognise, guarantee and facilitate the right to nationality of every person on the continent and to ensure that no one is exposed to statelessness'.¹³⁷ It therefore

131 *OSJI v Côte d'Ivoire* (n 97) paras 96-97.

132 *Nubian Community v Kenya* (n 113) para 139 (citing *Case of the Yean and Bosico Children v Dominican Republic* IACHR (8 September 2005) Ser C/ Doc 130 para 178).

133 *Nubian Community v Kenya* (n 113) para 140.

134 *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 58.

135 See African Commission on Human and Peoples' Rights 'The right to nationality in Africa: Study undertaken by the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, pursuant to Res 234 of April 2013 and approved by the Commission at its 55th Ordinary Session, May 2014' (2015), <https://www.achpr.org/legalinstruments/detail?id=52> (accessed 6 December 2021).

136 Resolution on the right to nationality, Resolution 234, African Commission on Human and Peoples' Rights (23 April 2013) para 7, <https://www.achpr.org/sessions/resolutions?id=260> (accessed 6 December 2021) (African Commission Resolution 234).

137 African Commission Resolution 234 (n 136) para 9.

'call[ed] upon African states to refrain from taking discriminatory nationality measures and to repeal laws which deny or deprive persons of their nationality on ground of race, ethnic group, colour, [etc]'.¹³⁸

However, in terms of an actionable right for all – men, women, and children alike – the Commission alluded to a pre-existing general right to nationality, by 'recalling' article 15 of the Universal Declaration, and 'noting the provisions of other human rights treaties relating to nationality, including article 5(d)(iii) of [ICERD]';¹³⁹ and then '[reaffirm[ed]] that the right to nationality of every human person is a fundamental human right implied within the provisions of article 5 of the African Charter on Human and Peoples' Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter'.¹⁴⁰

The African Commission's next opportunity to address nationality as a right came in 2015, when it cited the Resolution in a communication,¹⁴¹ and in 2016 it 'confirmed this position by reaffirming' the Resolution in another communication.¹⁴²

The facts behind the latter communication, *Open Society Justice Initiative v Côte d'Ivoire*, are particularly salient to the cause of the Banyamulenge. The case was brought by a non-governmental organisation (NGO) on behalf of the Dioula people, a distinct ethnic group that had migrated from present-day Mali, south into present-day Côte d'Ivoire, several centuries ago, but who still bear the brunt of being labelled 'foreign'.¹⁴³ Ivorian nationality law grants Ivorian citizenship at birth to those 'of Ivorian origin', without defining what constitutes 'Ivorian origin'.¹⁴⁴ Politicians exploit this ambiguity to claim that the Dioula are not 'of Ivorian origin', and successive regimes have taken advantage of the vague law on nationality to pursue a discriminatory policy against the Dioula, leading to continuous civil strife and war.¹⁴⁵ The African Commission condemned the ambiguous Ivorian law as violative of articles 2 and 5 of the African Charter.¹⁴⁶ In contrast, the DRC Constitution, unlike Côte d'Ivoire's nationality law,

138 African Commission Resolution 234 para 11.

139 African Commission Resolution 234 para 5.

140 African Commission Resolution 234 para 10.

141 *Nubian Community v Kenya* (n 113) para 140 n 52.

142 *OSJI v Côte d'Ivoire* (n 97) para 97.

143 See generally Minority Rights Group International 'Côte d'Ivoire: Manding (Dioula)' *MinorityRights.org*, <https://minorityrights.org/minorities/manding-dioula/> (accessed 6 February 2021).

144 *OSJI v Côte d'Ivoire* (n 97) para 54.

145 *OSJI v Côte d'Ivoire* (n 97) paras 53-61.

146 *OSJI v Côte d'Ivoire* (n 97) para 207(ii).

indeed does define 'Congolese origin'. Unfortunately, it does so on the basis of membership in an ethnic group – a distinction expressly prohibited by article 2 of the African Charter. A definition of 'origin' may be needed, but not one that perpetuates tribalism.

Therefore, in the terms of article 2 of the African Charter, to make 'any kind' of 'distinction' on the basis of 'ethnic group' in the 'enjoyment of' the right to nationality – a right 'guaranteed in [African Charter]' article 5,¹⁴⁷ – violates the Charter.¹⁴⁸ Because article 10 of the DRC Constitution and the corresponding nationality law plainly distinguish on the basis of ethnic group in the attribution of nationality by origin, they patently violate article 2 of the African Charter. It follows, therefore, that article 1 of the African Charter obliges the DRC to rectify its Constitution and nationality law, insofar as the DRC, by ratifying the African Charter, pledged to 'undertake to adopt legislative or other measures to give effect to' 'the rights, duties and freedoms enshrined in' the Charter.¹⁴⁹

3 DRC's monism renders these violations actionable

Finally, the tie of citizenship to ethnic group reflected in article 10 of the DRC Constitution and its corresponding legislation runs counter to Congolese law itself. This is because the DRC Constitution expressly incorporates 'duly ratified treaties' into Congolese law,¹⁵⁰ and assigns to them 'an authority superior to that of [domestic] laws'.¹⁵¹ Hence, the violation of an international instrument to which the DRC is party – such as ICERD, ICCPR and the African Charter – constitutes a violation of Congolese municipal law. Moreover, treaty provisions attain domestic force of law 'as of their publication', and Congolese courts may apply them directly, without a need for implementing legislation.¹⁵²

This is contrary to most common law jurisdictions, derived from Anglo-Saxon legal tradition, which take a 'dualist' approach to international and domestic law: viewing each as a separate legal system, and requiring explicit domestication of treaty provisions through implementing legislation before domestic courts may

147 Both by its consecration of juridical personality (human dignity plus legal status) and also via the Universal Declaration and other international instruments, notably ICERD and ICCPR.

148 Art 2 African Charter (tracking the article's language).

149 Art 1 African Charter.

150 Art 153(4) DRC Constitution.

151 Art 215 DRC Constitution.

152 As above.

apply them.¹⁵³ Yet, the Congolese legal system is heavily derived from that of Belgium and other civil law jurisdictions. Hence the DRC Constitution, by directing Congolese judges to apply treaties and international agreements,¹⁵⁴ reflects a 'monist' theory, where international and domestic law are integrated into one system, and in which international law has pride of place.¹⁵⁵

Some criticise such internationalist monism as being unrealistic and inconsistent in practice, particularly on the African continent.¹⁵⁶ This is due to the inevitable conflict between national interests and international obligations in a world order where national sovereignty is sacrosanct.¹⁵⁷ However, the DRC has achieved success in following the monist approach, as seen in recent years through its courts having directly applied the substantive provisions of the Statute of the International Criminal Court (Rome Statute) many years before the DRC National Assembly enacted legislation domesticating the Rome Statute.¹⁵⁸

True to the monist approach, the DRC Constitution states that 'if the Constitutional Court ... declares that a treaty or international agreement contains a clause contrary to the Constitution, [its] ratification or accession may only occur after revision to the Constitution'.¹⁵⁹ This reflects the prime monist principle, namely, that treaty law has 'an authority superior to that of' national law,¹⁶⁰ and that even the national Constitution must bend to it. Granted, this provision speaks in a context of *pre*-ratification or accession. Yet, a fact of non-conformity is the same regardless of which came first, the treaty or the national Constitution.¹⁶¹ Monism militates for the correction of the domestic law whenever non-conformity with the international is revealed.¹⁶² This should be particularly true when the

153 See generally DL Sloss 'Domestic application of treaties' in DB Hollis (ed) *The Oxford guide to treaties* (2020) 358.

154 Art 153(4) DRC Constitution.

155 See generally Cassese (n 24) 215.

156 See generally Viljoen (n 121) 518.

157 See Cassese (n 24) 213-237.

158 See JB Mbokani *Congolese jurisprudence under international law: An analysis of Congolese military court decisions applying the Rome Statute* (trans 2017) (2016).

159 Art 216 DRC Constitution.

160 Art 215 DRC Constitution. Arts 215 and 216 are modelled upon the French Constitution of 1958. Viljoen (n 121) 518 fn 6.

161 Art 10 of the 2006 Constitution is substantially the same as art 10 of the DRC's first Constitution, adopted in 1964. See 'Constitution de la République Démocratique du Congo du 1er août 1964' (1 August 1964) 5 *Moniteur Congolais* 3, <https://mjp.univ-perp.fr/constit/cd1964.htm> (accessed 26 November 2020). Therefore, the provision arguably pre-dates ICERD, ICCPR and the African Charter, if indeed the temporal sequence of national and international provisions is relevant.

162 Cassese (n 24) 216 ('it follows that international values override national ones and that state officials must always strive to achieve the objectives set by international rules').

treaty's purpose has evolved into a *jus cogens* norm, on a par with the prohibitions of apartheid, slavery and genocide.¹⁶³ Therefore, within the monistic framework, should a court of competent jurisdiction find a new constitutional provision to be contrary to a previously-ratified treaty, such provision must nevertheless be brought into conformity with the treaty.

4 Conclusion

Hence, the DRC Constitution's attribution of nationality on the basis of ethnic group not only violates international human rights law but, as a practical matter, also is actionable under Congolese law. The process and procedure of such an action, beginning in the Congolese Constitutional Court and continuing in regional and international fora, is beyond the scope of this article.¹⁶⁴ Suffice it to say that Congolese human rights defenders and champions of ostracised ethnicities are not without recourse.

163 UNHR Committee General Comment 31 5 para 13 (n 103 and accompanying text).

164 For such an analysis, see DA Buzard 'The Banyamulenge and ethnocentric nationality in the Congo: A litigation strategy for peace' LLM thesis, Regent University, 2021.

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The right to sustainable development in article 43(3) of the Ethiopian Constitution

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Summary: Article 43(3) of the Constitution of the Federal Democratic Republic of Ethiopia provides that all international agreements concluded by the country shall respect Ethiopia's right to sustainable development. The concept of the 'right to sustainable development' contained in this provision is somewhat unclear. Issues such as the right holders and duty bearers, justiciability and binding nature of this right require clarification in order to effectively enforce it. This article argues that both the state and its people, but not individuals, are the right holders of this right. Under the Constitution the state is the duty bearer of fundamental human rights and freedoms, which include the right to sustainable development. It is the duty of the government to ensure that all international agreements adopted by Ethiopia respect the country's right to sustainable development. Although this right is contained in the Constitution as a goal and group right which does not impose a binding obligation to be enforced by courts, the state should take steps to progressively realise the right by adopting international agreements that incorporate the economic, social and environmental objectives of sustainable development in a balanced manner. In general, the government has a 'soft constitutional obligation' to respect and enforce the right to sustainable development stipulated in article 43(3)

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in order to protect development-related national interests, ensure legal certainty and consistency, and avoid indirect foreign interference which may occur under the disguise of international agreements and cooperation.

Key words: *Federal Republic of Ethiopian Constitution; group rights; justiciability; right holders and duty bearers; right to sustainable development*

1 Introduction

The main objective of this article is to examine the concept of ‘the right to sustainable development’ contained in article 43(3) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) as the term requires some clarification for effective implementation, and the issue of sustainability is becoming increasingly important for Ethiopia and today’s world at large.

The FDRE Constitution has addressed the issue of sustainable development in many respects and requires the government to formulate policies that enable the country to take into account economic, social and environmental concerns when embarking upon any developmental projects. Article 43(1) of the Constitution stipulates that ‘the People of Ethiopia as a whole ... have the right to improved living standards and to sustainable development’. It further stipulates in article 43(3), which is the focus of this work, that all international agreements concluded by the country shall respect and ensure Ethiopia’s right to sustainable development. Elias argues that one can question the constitutionality of a given international agreement if it does not protect and ensure Ethiopia’s right to sustainable development.¹

The right to sustainable development is contained in the Constitution as a sub-set or one element of the right to development. Like the right to development, the right to sustainable development is guaranteed in the Constitution as a fundamental right, particularly as a democratic right. One can understand this by looking at the content and categorisation of human rights provisions of the Constitution, which places the right to sustainable development under chapter three. This right is a group right and like the right

¹ E Nour ‘The investment promotion and environment protection balance in Ethiopia’s floriculture: The legal regime and global value chain’ PhD thesis, University of Warwick, 2012 101.

to development and economic, social and cultural rights, the state is required to progressively realise the right, taking into account its resource capacity or level of development since it is not fully integrated into current international law.

One may wonder what the similarities and differences are between the right to development and the right to sustainable development. Their differences may be articulated in two major areas. First, the scope of the right to development is limited to actual individuals and peoples, while the right to sustainable development includes both current and future generations. Second, the right to development mainly comprises economic, social, cultural and political aspects of development, whereas the right to sustainable development concerns on the integration of environmental concern into development.²

Unlike the wealth of literature dealing with the right to development and the general concept of sustainable development, published works focusing on the right to sustainable development are scant. This work attempts to add an original voice by critically discussing and analysing the concept of the right to sustainable development.

Overall, this article examines whether the right to sustainable development is a binding and justiciable right, and an individual or group right. It is also worth examining whether the concept of sustainable development contained in the Ethiopian Constitution is similar to the international: Does it reflect the economic, social and environmental pillars in a balanced way?

The article comprises three main parts. Part 1 discusses the conceptual and legal frameworks of the right to development, which is an important term that gives a background concept for the right to sustainable development. Part 2 discusses the concept and components of sustainable development contained in the FDRE Constitution. The third part critically analysis the conception of the right to sustainable development focusing on issues such as the nature and type, duty bearers and right holders, and justiciability of this right. Finally, the article ends with concluding remarks.

2 J Gupta & K Arts 'Achieving the 1.5°C objective: Just implementation through a right to (sustainable) development approach' (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 19.

2 Conceptual and legal frameworks of the right to development

It is imperative to start the discussion of the article with the right to development as it gives some background points on the right to sustainable development.

Internationally there is disagreement on the definition, content and legal status of the right to development, especially after the adoption of the United Nations (UN) Declaration on the Right to Development (DRD) in 1986. However, this does not mean that its concept was first introduced during this time or in the DRD. M'baye, a Senegalese jurist, was the first person to introduce the right to development in 1972.³ He asserts that '[t]o comprehend true development, the idea of a real improvement in living standards must be taken into account; it is not a longer life for every person that matters but a better life'.⁴ He also attempts to illustrate that the right to development is a universal right.⁵

There are different definitions of the 'right to development' given by different commentators and scholars. Nonetheless, the definition provided in DRD is the well-known and commonly cited one. The Declaration provides in article 1 that '[t]he right to development is an inalienable human right by virtue of which every human person and all people are entitled to participate in and contribute to and enjoy economic and political development in which all human rights and fundamental freedoms can be fully materialised'.⁶

Three main principles may be derived from this definition as articulated by Sengupta, the former UN Independent Expert on the Right to Development. These are that (i) the right to development is a fundamental human right; (ii) there is a specific process of economic, social, cultural and political development that is favourable to the recognition of human rights; and (iii) everyone is entitled to participate, contribute and enjoy the specific process of development.⁷

3 J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California Western International Law Journal* 474.

4 M Belachew 'The politics underpinning the non-realisation of the right to development' (2011) 5 *Mizan Law Review* 252.

5 Donnelly (n 3).

6 Art 1 UN Declaration on the Right to Development (DRD).

7 A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 846.

Since the adoption of the DRD, the right to development has been arousing legal and political controversies. Generally, it is criticised for being vague, contradictory, ideological and over-ambitious.⁸ Bedjaoui argues that the right to development is 'the alpha and omega of human rights, the first and the last human right, the beginning and the end, the means and the goal of human rights; in short, it is the core right from which all the others stem'.⁹ Marks, on the other hand, argues that the right to development contained in the DRD is not based on the well-known theories of justice, but is rather framed through political negotiation.¹⁰

Despite its controversial status, the right to development has been incorporated in different multilateral and regional instruments, especially since the adoption of the Vienna Declaration and Programme of Action, which describes the right to development as an essential component of fundamental human rights.¹¹ The first agreement was reached between states on the concept of the right to development at the Vienna World Conference on Human Rights in 1993 which led to the adoption of the Vienna Declaration and Programme of Action.¹²

Even if it is contained in several multilateral and regional instruments, the right to development is binding only according to the African Charter on Human and Peoples' Rights (African Charter)¹³ and the Arab Charter on Human Rights.¹⁴ Its legal status is either controversial or clearly provided as a non-binding right in the other multilateral and regional agreements. The African Charter in article 22(2) imposes a duty on state parties to ensure the enjoyment of the right to development individually or collectively.¹⁵ Here, a question arises as to how the right to development is enforced or violated. The African Charter contains no specific provision in this regard but, in general, state parties have the duty to realise the rights provided for in the Charter.¹⁶ As far as the right to development is concerned, the African Commission on Human and Peoples' Rights (African Commission) has specified how the right may be violated. The

8 J Kuosmanen 'Repackaging human rights: On the justification and the function of the right to development' (2015) 11 *Journal of Global Ethics* 303.

9 M Bedjaoui 'The right to development' in M Bedjaoui (ed) *International law: Achievements and prospects* (1991) 1177.

10 S Marks 'Obligations to implement the right to development' in B Andreassen & S Marks (eds) *Development as human right* (2006) 62.

11 Vienna Declaration and Programme of Action (1993) (VDPA) para 10.

12 As above.

13 A Kwame 'The justiciability of the right to development in Ghana: Mirage or possibility' (2016) 1 *Strathmore Law Review* 86.

14 Art 37 Arab Charter on Human Rights.

15 Art 22(2) African Charter.

16 Art 1 African Charter.

African Commission in the *Endorois* case expressed the view that the 'right to development is violated when the development in question decreases the well-being of the community'.¹⁷ This mainly concerns developmental projects that may affect the local community.

Moreover, the right to development is also explicitly or implicitly contained in the Rio Declaration, the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Monterrey Consensus, the World Summit Outcome Document, the Declaration on the Rights of Indigenous Peoples, and the Arab Charter on Human Rights.¹⁸ For example, the Rio Declaration provides that the right to development should be achieved in order to fairly meet the interests of current and future generations.¹⁹

Different international initiatives also adopted a rights-based approach to development. For example, the 2030 Agenda for Sustainable Development reaffirms the DRD and states that '[t]he new Agenda recognises the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development)'.²⁰ The incorporation of the right to development in the 2030 Agenda has re-activated the discussion on the right and its importance with regard to the new Sustainable Development Goals (SDGs).²¹

At the national level there is a provision dealing with the right to development in the FDRE Constitution, but the right is defined in neither the Constitution nor in any other domestic laws. It is guaranteed in the Constitution as a fundamental democratic right similar to the right of thought, opinion and expression, freedom of movement, the right to property, the right to labour, freedom of association and economic, social and cultural rights.

Under the heading 'The Right to Development' article 43 of the FDRE Constitution provides:²²

17 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 294 (*Endorois* case).

18 UN Human Rights Office of the High Commission 'The right to development at a glance', http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf (accessed 5 October 2018).

19 Rio Declaration on Environment and Development (Rio Declaration) Principle 3.

20 UN General Assembly 'Transforming our world: The 2030 Agenda for Sustainable Development' (2015) para 35.

21 Kuosmanen (n 8).

22 The Constitution of Federal Democratic Republic of Ethiopia, 1995 (as set out in art 43 of *Federal Negarit Gazeta*, Extraordinary issue, Proc 1, 1st year, No 1 9 (FDRE Constitution)).

- (1) The Peoples of Ethiopia as a whole, and each nation, nationality and people in Ethiopia, in particular, have the right to improved living standards and to sustainable development.
- (2) Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.
- (3) All international agreements and relations concluded, established or conducted by the state shall ensure respect for Ethiopia's right to sustainable development.
- (4) The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.

Four main elements may be derived from this provision to precisely articulate the concept of the right to development under the Constitution. These are (i) the right to improved living standards; (ii) the right to sustainable development; (iii) the right to participate in the national development decision making; and (iv) that development should boost the capacity of citizens and meet their basic needs. As will be discussed in detail in the next parts, the central issue of this work is derived from the second element or sub-article (3) of the above provision.

The scope of the right to development in the Constitution seems to be broad. It covers different issues that may be difficult to implement altogether to ultimately realise the right in its full sense.²³ To solve this potential difficulty, especially in order to determine whether or not the right has been violated, it is suggested that its scope should be construed narrowly during implementation by interpreting it in light of the African Commission's decision in *Endorois*. This kind of reference to international instruments has a constitutional base as stated in article 13(2) of the FDRE Constitution. This provision stipulates that the fundamental rights and freedoms mentioned in chapter three, which includes article 43, shall be interpreted in a way that conforms to the principles of the international human rights and other instruments adopted by Ethiopia.²⁴ Arriving at the issue at hand, the African Commission expressed the view that the right to development is violated 'when the development in question decreases the well-being of the community'.²⁵ The Commission further stated that the failure to ensure a reasonable share from development projects also constitutes a violation of the right to

23 Z Woldemichael 'The right to development under the Constitution of the Federal Democratic Republic of Ethiopia: Some reflections' (2015) 4 *PROLAW Student Journal of Rule of Law for Development* 9.

24 Art 13(2) FDRE Constitution.

25 *Endorois* case (n 17) para 294.

development.²⁶ For example, the living standard or well-being of the local community may be diminished after they have been displaced for the purpose of investment projects without or with insufficient compensation. In this example, based on the African Commission's interpretation, the Ethiopian government has violated its duty to respect or protect the right to development because of its action or inaction in the investment project concerned. Elias asserts that '[t]he right to development enshrined in the Ethiopian Constitution thus envisages not only "*Bills of Rights*" but also "*Bills of Responsibilities*" of individuals, investment projects, neighbourhoods, communities and the state'.²⁷

Despite its potential difficulty for implementation due to its broadness, the incorporation of the right to development at a constitutional level has a significant value for Ethiopian people as development is a significant issue that needs to be guaranteed by law in a manner that obliges the government to respect, protect and fulfil it. The Constitution should be appreciated and may be considered an advanced document with respect to this specific issue. One reason for the domestication of the right to development might be to ease the enforcement of such a right provided for in the African Charter, which is a binding treaty that requires states to enforce the provisions of the Charter through all available means including legislative measures.²⁸

3 General concept of sustainable development under the FDRE Constitution

At the international level, sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.²⁹ The concept of sustainable development should contain and balance the economic, social, and environmental objectives – known as the three pillars of sustainable development.³⁰ In general, the integration and interdependence of those three pillars are considered a standard of sustainable development. This means that sustainable development cannot exist if one of these pillars is

26 *Endorois case* (n 17) para 224.

27 Nour (n 1) 99.

28 Art 1 African Charter.

29 UN 'Report of the World Commission on Environment and Development: Our Common Future' (UN Doc A/42/427 1987).

30 Johannesburg Declaration on Sustainable Development 'Report of the World Summit on Sustainable Development' Johannesburg, South Africa, 2002; N Schrijver *The evolution of sustainable development in international law: Inception, meaning, and status* (2008) 120-131.

missing.³¹ From recent international instruments, the 2030 Agenda for Sustainable Development ‘has a rhetorical commitment to “sustainable development” (mentioning it 85 times)’.³² The SDGs are agreed upon by all governments and cover the three pillars of sustainable development in a balanced manner.³³

As one element of the right to development, the concept of sustainable development is explicitly enshrined in the FDRE Constitution in two places. The first is in article 43(1) which provides that ‘[t]he People of Ethiopia as a whole, and each Nation, Nationality, and People in Ethiopia, in particular, have the right to improved living standards and to sustainable development’.³⁴ The second is in article 43(3) which provides that all international agreements adopted by the country shall respect and ensure Ethiopia’s right to sustainable development.

There are different arguments relating to the concept of sustainable development in the Constitution and its importance for Ethiopia. Belay supports the incorporation of the concept of sustainable development in the Constitution asserting that ‘sustainable development is valid to keep our development pass to the next generation. It seems imperative for Ethiopia’s development in general.’³⁵ Minasse, on the other hand, argues that the incorporation of sustainable development in the Constitution does not comply with Ethiopia’s demand for economic development.³⁶

With regard to the components of sustainable development, Abdi argues that the concept of sustainable development contained in the Constitution comprises environmental protection, economic and social development pillars, mentioning these in separate provisions.³⁷ Tsegai, on the other hand, argues that sustainable development incorporated in the Constitution primarily focuses on equitable economic development.³⁸

31 H Cabezas et al ‘Sustainable systems theory: Ecological and other aspects’ (2005) 13 *Journal of Cleaner Production* 456; R Emas ‘The concept of sustainable development: Definition and defining principles’ Global Sustainable Development Report 2015.

32 J Gupta & C Vegelin ‘Sustainable development goals and inclusive development’ (2016) 16 *International Environmental Agreements* 440.

33 Transforming our World (n 20) 1.

34 Art 43(1) FDRE Constitution.

35 G Belay ‘Critical analysis of the applicability of the right to development in the Ethiopian context’ LLM dissertation, Addis Ababa University, 2009 38.

36 M Haile ‘The new Ethiopian Constitution: Its impact upon unity human rights and development’ (1996) 20 *Suffolk Traditional Law Review* 70.

37 J Abdi ‘The right to development in Ethiopia’, https://www.academia.edu/9359320/The_Right_to_Development_in_Ethiopia (accessed 22 July 2018).

38 B Tsegai ‘Interrogating the economy-first paradigm in “sustainable development”: Towards integrating development with the ecosystem in Ethiopia’ (2017) 11

The incorporation of the concept of sustainable development in the Constitution is a significant contribution towards ensuring inclusive development in Ethiopia. Ensuring sustainable development is one of Ethiopia's national interests and is a matter of survival as the country is frequently affected by drought and famine due to climate change. Therefore, any developmental project needs to be environmentally sustainable. Moreover, the incorporation is important to invoke a constitutional duty of ensuring sustainable development when negotiating international agreements that may affect Ethiopia's interests related to sustainable development. It is also part of the country's international obligations as it has adopted multilateral and regional agreements that require states to ensure sustainable development by integrating it into their national development policies.

As far as the components of sustainable development are concerned I support the argument of Abdi. I argue that the Constitution implicitly recognises the need for balancing the three pillars of sustainable development by mentioning them separately in deferent provisions. I shall demonstrate how the Constitution implemented this.

3.1 Economic development

A close reading of article 43 reveals that economic growth should comply with sustainable development: The main aim of developmental projects must be to boost the development capacity of citizens and to satisfy their basic needs.³⁹ Besides, article 89(2) of the Constitution requires the government 'to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them'.⁴⁰ Similarly, the Constitution under article 89(4) requires the government to accord special assistance to the most disadvantaged section of society in economic development.⁴¹ Those provisions indicate the need for creating economically sustainable development by adopting different mechanisms that enable the country to realise equitable economic development. One way of realising this goal is by designing and implementing developmental projects that do not create income inequality between different parts of the country or different sections of society.

Mizan Law Review 79.

39 Art 43(4) FDRE Constitution.

40 Art 89(2) FDRE Constitution.

41 Art 89(4) FDRE Constitution.

3.2 Social development

The Constitution stipulates the obligation of the state to apportion the necessary resources to access social services.⁴² Articles 42 and 89(8) of the Constitution stipulate the duty to implement and respect labour rights and standards and create a healthy and safe environment.⁴³ Internationally-recognised human rights are enshrined under chapter three of the Constitution, and the government is obliged to respect and enforce those rights.⁴⁴ Besides, article 89(7) requires the government to ensure the equal participation of women with men in all social development activities.⁴⁵ These provisions address some essential elements of social development (human rights, labour, health and safety standards and gender equality). These provisions are crucial to create socially-sustainable developmental projects. This is so because the introducers of developmental projects have a constitutional obligation to comply with the relevant standards, such as human rights, labour, health and safety, in their operations. Therefore, I argue that the Constitution has also stressed the need for ensuring socially-sustainable development.

3.3 Environmental protection

Article 44(1) of the Constitution guarantees the right to a clean and healthy environment for all people.⁴⁶ The Constitution further provides in article 92(2) that the design and implementation of development programmes and projects in the country should not damage or destroy the environment. As Damtie and Bayou assert, this provision of the Constitution is enshrined to indicate the need for conducting environmental impact assessments during the implementation of developmental projects.⁴⁷ Article 92(3) of the Constitution also provides that '[p]eople have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly'. It can be construed from those provisions that in addition to guaranteeing environmental rights, the Constitution has stressed the need for protecting the environment and the livelihood of the community when implementing developmental projects. The 1997 environmental policy of Ethiopia states that '[e]

42 Art 41(4) FDRE Constitution.

43 Arts 42 & 89(8) FDRE Constitution.

44 Art 13(1) FDRE Constitution.

45 Art 89(7) FDRE Constitution.

46 Art 44(1) FDRE Constitution.

47 M Damtie & M Bayou 'Overview of environmental impact assessment in Ethiopia' January 2008, <https://chilot.files.wordpress.com/2011/01/overview-of-eia-book-html.pdf> (accessed 2 December 2017).

nvironmental sustainability is recognised in the Constitution and in the national economic policy and strategy as a critical prerequisite for lasting success'.⁴⁸ Therefore, the cumulative reading of those provisions reveals how environmentally-sustainable development is also given a place in the Constitution in the same way as the other two pillars. The above provisions require the need for taking into account environmental concerns while designing and implementing socio-economic developmental policies and projects. This commits or enables the government to integrate environmental matters into the other two pillars when making development-related decisions.

Generally, the Constitution has addressed the three pillars of sustainable development in a manner that indicates that all three pillars are equally crucial for Ethiopian people. One may ask how the provisions that deal separately with each pillar relate to the concept of sustainable development contained in article 43. I argue that the Constitution intended to ensure sustainable development in the country in two ways: first, by explicitly mentioning the term 'sustainable development' in article 43 to afford it constitutional recognition; second, by incorporating other provisions that address the relevant elements or pillars of sustainable development that give colour to article 43 and simplify its implementation. It is difficult to conclude that the constitutional concept of sustainable development is the balance of the three pillars by merely analysing article 43. The overall contents of the Constitution should be analysed to reach this conclusion. Based on this approach, I argue that the Constitution implicitly provides the need for balancing economic, social and environmental matters while designing and implementing developmental policies and projects.

4 The concept of the right to sustainable development

This part discusses the origin, nature, type and legal status of the right to sustainable development.

At the international level, different agreements, reports and commentaries provide explicit or implicit content to the notion of the right to sustainable development. The right emerged in the United Nations Framework Convention on Climate Change (UNFCCC) in 1992.⁴⁹ Article 3(4) of the Convention provides:⁵⁰

48 The Environmental Policy of Ethiopia (1997) para 1.4.

49 Gupta & Arts (n 2) 19.

50 United Nations Framework Convention on Climate Change (UNFCCC) art 3(4).

The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

According to this provision, the member states have the right and duty to promote sustainable development. It may be construed that the provision calls for integrating social, economic and environmental matters into the development process in such a way that balances the interests of present and future generations. Moreover, UNFCCC in its Preamble affirms that 'responses to climate change should be ... taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty'.⁵¹

Referring to UNFCCC, Moellendorf gives examples to show how the right to sustainable development works in the context of developing countries. He asserts that respect for the right to sustainable development entails ensuring that developing countries are permitted emission allotments adequate to attain development within a plan of global emission reductions which is two degrees Celsius as agreed in the Copenhagen Accord.⁵² He further asserts that to respect the right to sustainable development, an international treaty should require developed nations to make substantial capital investments in clean technology in developing nations.⁵³ This example works in the context of investment agreements. To ensure respect for the right to sustainable development, a treaty provision may allow developing countries to emit allotments sufficient to attain development and require developed countries to use sound technology that enables them to reduce emission as per the global standards of sustainability. A provision may also be incorporated in investment agreements to require developed countries to transfer intellectual property rights to cleaner technology to developing countries. Thus, the right to sustainable development not only is a negative duty to allow developing countries to attain development, but also includes a positive duty to provide resources helpful to achieve the required development.⁵⁴

51 United Nations Framework Convention (n 50) Preamble.

52 D Moellendorf 'A right to sustainable development' (2011) 94 *The Monist* 437.

53 Moellendorf (n 52) 439-440.

54 As above.

The African Charter also implicitly guarantees the right to sustainable development as can be understood from the cumulative reading of articles 22(1) and 24. Article 22(1) provides that '[a]ll peoples shall have the right to their economic, social and cultural development'.⁵⁵ Article 24 provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'.⁵⁶ The right to sustainable development is also contained in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) which explicitly provides that all women have the right to sustainable development.⁵⁷ From recent international documents, the post-2015 development agenda gives implicit recognition to the right to sustainable development making a cross-reference to UNFCCC which explicitly recognises such a right.⁵⁸

Overall, the right to sustainable development has been explicitly or implicitly recognised in some international agreements. The next task will be to examine its nature of obligation and whether it is an individual or a group right.

Under international law, it appears that scholars agree that the right to sustainable development is a group right, but there is no full consensus on the nature of the obligation. The notion of sustainable development as a right has evolved through time from the interpretation of the right to life with dignity and the right to an adequate standard of living.⁵⁹ The understanding is that those fundamental human rights include issues of livelihood and human well-being attainable in the process of development.⁶⁰ As in the case of other group rights, the right to sustainable development is considered a 'third generation human right'.⁶¹ It can be understood from the African Charter and African Women's Protocol that the right to sustainable development is a group right as these instruments afford such a right to the people and women as a whole respectively.

The right to sustainable development in UNFCCC imposes a soft obligation as article 3(4) uses the word 'should' rather than 'shall': 'The Parties have a right to, and should, promote sustainable

55 Art 22(1) African Charter.

56 Art 24 African Charter.

57 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) art 19.

58 Gupta & Arts (n 2) 20.

59 Universal Declaration of Human Rights (Universal Declaration); International Covenant on Civil and Political Rights (ICCPR).

60 C Ngang 'Indigenous peoples' right to sustainable development and the Green Economy Agenda' (2015) 44 *Africa Insight* 37.

61 Moellendorf (n 52) 445.

development.’ This weakens the nature of the duty.⁶² Gupta and Arts argue that states have a legitimate right to promote the right to sustainable development and achieve it progressively, which means, not as a binding obligation since it is not fully integrated into current international law.⁶³ Windfuhr has a similar view: Like the right to development, the right to sustainable development needs to be realised progressively.⁶⁴ Moreover, the African Commission in *Gunme* asserted that the ‘respondent state is under obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights’.⁶⁵ It may be inferred from this assertion that the right to sustainable development, impliedly contained in the African Charter, is also a kind of right that can be progressively realised by states.

Moellendorf argues that the right to sustainable development is a group right and it is ‘consistent with very important individual interests and widely recognised individual human rights’.⁶⁶ This argument is supported by Wang: The right to sustainable development includes all parts of development and human rights.⁶⁷

The right to sustainable development is similar to the right to development in some cases such as in the context of a sustainable global energy policy.⁶⁸ Generally, the two rights ‘are not quite so different in the post-2015 world’.⁶⁹

Nationally, the right to sustainable development was first introduced into the current Ethiopian Constitution adopted in 1995.⁷⁰ The Constitution has not yet been amended; hence, no revision has been made with regard to such a right. The previous Ethiopian Constitutions/Charter adopted in 1931, 1955, 1987 and 1991 did not include the right to sustainable development.

62 Gupta & Arts (n 2) 14.

63 As above.

64 M Windfuhr ‘Economic, social and cultural rights and development cooperation’ in A Frankovits & P Earle (eds) *Working together: The human rights-based approach to development cooperation* (2000) 31.

65 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 206.

66 Moellendorf (n 52) 445.

67 X Wang ‘On the right to sustainable development: Foundation in legal philosophy and legislative proposals’ in P Marks (ed) *Implementing the right to development: The role of international law* (2008) 39–46.

68 Moellendorf (n 52) 437.

69 Gupta & Arts (n 2) 13.

70 Arts 43(1) & (3) FDRE Constitution.

Ethiopia ratified UNFCCC in May 1994,⁷¹ but it is not clear whether it was this Convention that instigated the incorporation of the right to sustainable development in the Constitution; nothing is mentioned in the explanatory notes (preparatory work) of the Constitution regarding this issue. However, one might suspect that, as far as the incorporation of sustainable development is concerned, the drafters of the Constitution might have been inspired by the Rio Declaration and UNFCCC or incorporated it as it was regarded as part of the country's international obligation since it had ratified these agreements, which require parties to ensure and promote sustainable development, including at national level. Further, it is difficult to determine the intention of the drafters and the reasons why they incorporated the right to sustainable development as there is no recorded debate on this issue.

The right to sustainable development is guaranteed in the Constitution as a fundamental right, particularly as a democratic right. Chapter three of the Constitution incorporates the right to sustainable development under part four, which contains democratic rights such as economic, social and cultural rights (article 41); the right to labour (article 42); and environmental rights (article 44). Here, a question may be asked regarding the nature of the obligation of the right to sustainable development and whether it is considered an individual or a group right under the Constitution. With respect to the nature of the obligation, it may be said that it is more obligatory than the right contained in UNFCCC as the provision (article 43(3)) uses the word 'shall' instead of 'should'. The provision reads that all international agreements concluded by the state shall respect and ensure Ethiopia's right to sustainable development.⁷² Tsegai argues that '[e]ven if the concept of sustainable development in the Constitution is stated as a right, it is difficult to pin it down as a specific right. Although it is fundamental in character, it cannot be characterised as a specific and mandatory right.'⁷³

It is also argue that, even if the term 'shall' is used in the provision, the right remains a type of soft obligation placed as a policy goal. The basis of this argument is the explanatory notes to the Constitution, which equate article 43 with national principles and objectives contained in chapter ten of the Constitution, including foreign policy principles, social, economic, environmental objectives, and

71 Ethiopian Environmental Protection Authority 'United Nations Conference on Sustainable Development' (Rio+20 National Report 2012) 22.

72 Art 43(3) FDRE Constitution.

73 Tsegai (n 38) 80-81.

so forth.⁷⁴ Those principles and objectives are incorporated to serve as guidelines in the implementation of the Constitution and other subsidiary laws.⁷⁵ Moreover, the explanatory notes explicitly state that article 43(1), which stipulates that the peoples of Ethiopia as a whole, and each nation, nationality, and people, in particular, have the right to sustainable development, should be seen as a principle or long-term goal; and further provides that article 43 as a whole does not constitute a justiciable right.⁷⁶

It can also be understood that the right to sustainable development in the Constitution is a group right. It seems that it is intended to give domestic and international dimensions to the right to sustainable development in Ethiopia. As a domestic dimension, the Constitution provides in article 43(1) that the peoples of Ethiopia as a whole, and each nation, nationality, and people, in particular, have the right to sustainable development. When one examines the international dimension, which is the focus of this work, article 43(3) states that all international agreements concluded by the state shall respect and ensure Ethiopia's right to sustainable development. Here, it is clear that this right is a group right as it is given to the peoples of Ethiopia (as a domestic dimension) and to Ethiopia as a state (as an international dimension). The right is broad, comprising the economic, social and environmental rights provided in different provisions of the Constitution.⁷⁷ Yeneabat asserts that

the right to sustainable development recognised under the FDRE constitution includes the right to sustainable utilisation of the natural resources, the integration of environmental protection and economic development programmes, the right to development which is the right of rights, the pursuit of equitable allocation of resources.⁷⁸

As far as article 43(3) is concerned, one issue may be raised, namely, whether or not it requires a specific implementing law. Yirga expresses the view that the provision should be directly implemented without the need for enacting an implementing proclamation.⁷⁹ The government has enacted a treaty-making and ratification proclamation which stipulates that general principles and procedures apply to all international treaty-making processes, but

74 Explanatory notes of the 1995 FDRE Constitution (HOPR-Documentation 1995) 98.

75 Art 85(1) FDRE Constitution.

76 Art 43 FDRE Constitution.

77 Tsegai (n 38) 80-81.

78 D Yeneabat 'The right to development under the RTD Declaration, African Charter on Human and People's Right and FDRE Constitution: A comparative study' (2015) 3 *International Journal of Political Science and Development* 447.

79 B Yirga, director of legal drafting, Ethiopian General Prosecutor, Addis Ababa, Ethiopia, 9 July 2018.

it does not contain sustainable development-related principles and guidelines.⁸⁰

4.1 Legal meaning of 'respect' in article 43(3) of the FDRE Constitution

Clarifying the meaning of the word 'respect' used in article 43(3) is essential to understand the concept and objective of the provision. However, before clarifying the legal meaning of 'respect', it is necessary to discuss from where and how it is derived in the context of this work. The English version of the FDRE Constitution in article 43(3) states that '[a]ll international agreements and relations concluded, established or conducted by the state shall protect and ensure Ethiopia's right to sustainable development'.⁸¹ This provision uses the expression 'protect and ensure' to demonstrate the type of obligation required in international agreements *vis-à-vis* the right to sustainable development. However, this expression is not the correct translation of the Amharic version of the provision, which is the final legal authority as provided in the Constitution itself.⁸²

The Amharic version uses the word የሚያስከብሩ (*yemiyaskebru*) which means 'respect' in its correct translation. The word *yemiyaskebru* is translated as 'respect' in another provision of the Constitution (article 86(1)) which deals with a related issue. This provision, under the heading 'Principles for External Relations', reads '[t]o promote policies of foreign relations based on the protection of national interests and respect for the sovereignty of the country'. In this provision, unlike the above article 43(3), the word 'protection' is also correctly translated from the Amharic version which is 'የሚያስጠብቅ' (*yemiyastebk*). Therefore, the English version of article 43(3) needs to be revised as '[a]ll international agreements and relations concluded, established or conducted by the state shall respect and ensure Ethiopia's right to sustainable development'.

It is incontrovertible that the correct translation should be used of the two words 'respect' and 'protect' as they impose different duties on the state. In general, the duty to protect 'requires preventive action to ensure that potential threats are halted before they result in actual violations'.⁸³ It is somewhat of a positive duty that requires

80 Ethiopian International Agreements Making and Ratification Procedure Proclamation 1024/2017, *Negarit Gazeta* 23rd Year No 55 (Addis Ababa 7 July 2017).

81 Art 43(3) FDRE Constitution.

82 Art 106 FDRE Constitution.

83 Ngang (n 60) 38.

states to protect the human rights of their citizens from violation by third parties/non-state actors.⁸⁴ The duty to respect will be explained below as it is the central issue of this sub-section.

The Constitution uses the word 'respect' in many instances, especially when providing the duties of the state related to human rights. For instance, article 13(1) provides that the legislative, executive and judiciary organs of the government shall have the duty to respect fundamental rights and freedoms. It is difficult to understand the legal meaning of 'respect' as neither the Constitution nor its explanatory note defines it. It is also not defined in other domestic laws although the word is used in many respects such as to express the human rights obligations of the government. Hence, as an alternative, it is crucial to assess its meaning in international instruments ratified by Ethiopia and adapt it to the word 'respect' used in the Constitution (the Constitution allows this as discussed in part 1). Based on this approach, it will be crucial to explore the meaning of 'respect' from ICESCR as the right to sustainable development mostly relates to the rights enshrined in this Covenant; and it is also adopted by Ethiopia.⁸⁵

Generally, as provided in article 2(1) of ICESCR, state parties are required to respect and ensure the economic, social, and cultural rights provided in the Covenant. A detailed explanatory note on the meaning of 'respect' is provided in ICESCR's General Comments. The General Comment provides that the duty to respect commits member states to abstain from meddling with the enjoyment of the Covenant rights.⁸⁶ This duty is a type of negative obligation that requires states to do nothing or to do no harm.⁸⁷ The General Comment further explains the obligation to respect as follows: 'The obligation to respect economic, social and cultural rights is violated when state parties prioritise the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights.'⁸⁸

The obligation to respect covers both theoretical and practical aspects. Theoretically, states are required to ensure respect for economic, social and cultural rights, refraining from adopting laws

84 General Comment 24.

85 Wikipedia 'Treaties of Ethiopia' ratified since 21 August 1995, https://en.wikipedia.org/wiki/Category:Treaties_of_Ethiopia (accessed 4 October 2018).

86 General Comment 24.

87 M Langford 'The justiciability of social rights: From practice to theory' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2009) 14.

88 General Comment 24.

that contradict such rights. According to this aspect, 'states parties should identify any potential conflict between their obligations under the Covenant and under the trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist'.⁸⁹ The practical aspect, on the other hand, entails that states should not jeopardise the implementation of the rights. The implementation problem may occur, for example, when forced displacement is ordered for the purpose of investment projects.⁹⁰

Therefore, the meaning of the word 'respect' mentioned in article 43(3) of the Constitution may be interpreted in line with the meaning given in the General Comments. However, it should be noted that this meaning has no binding effect as the ICESCR General Comments are non-binding documents.

Ngang asserts that the duty to respect the right to sustainable development requires states to refrain from interfering with the enjoyment such a right.⁹¹ In the context of article 43(3) of the Constitution, the word 'respect' means that international agreements should not be used as instruments to interfere with the enjoyment of Ethiopia's right to sustainable development. The Ethiopian government has the duty to ensure that the texts of any international agreements and their implementation respect and ensure Ethiopia's right to sustainable development.

4.2 Right holders and duty bearers of the right to sustainable development

The objective of this sub-section is to identify the right holders (beneficiaries) and duty bearers of the right to sustainable development. This is crucial in order to establish who can claim such a right if it is not respected; and which is the responsible body to enforce it. These and other related issues are discussed below.

4.2.1 *Right holders*

Generally, rights holders of human rights are individuals or groups that have particular claims with respect to certain duty bearers.⁹² Regarding the specific issue at hand, I explained in the preceding

89 As above.

90 As above.

91 Ngang (n 60) 38.

92 UNICEF 'Glossary: Definitions A-Z' Gender Equity UN Coherence and You 1997, <https://www.unicef.org/gender/training/content/resources/Glossary.pdf> (accessed 12 November 2018).

sub-section that the right to sustainable development is a group right. This finding provides an indication as to who the general right holders are. They should be a group of people or a state or states, but not individuals. This can be demonstrated by analysing the international and national laws that guarantee the right to sustainable development.

From international instruments, the first document to be analysed is UNFCCC as the concept of the right to sustainable development originates from this document. Referring to article 3(4) of the Convention, which states that '[t]he Parties have a right to, and should, promote sustainable development', I assert that the right holders are the member states (each state individually). This is also true for other treaty laws under the sponsorship of the UN.

Unlike UNFCCC, in the African Charter peoples are the right holders of the right to sustainable development; states or individuals are not the direct beneficiaries of such a right. This is also affirmed by the African Commission decision in *Gunme v Cameroon*. The Commission expressed that the rights mentioned in articles 19 to 24 of the African Charter 'can be exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds'.⁹³ As discussed earlier, the African Charter implicitly guarantees the right to sustainable development in articles 22(1) and 24. Thus, it is necessary to be a group of people to claim the right to sustainable development under the African Charter.⁹⁴ The African Women's Protocol also grants the right to sustainable development to women as a group. Article 19 of the Protocol, under the heading 'right to sustainable development', provides that '[w]omen shall have the right to fully enjoy their right to sustainable development'.⁹⁵

As in the above international instruments, individuals also are not the beneficiaries of the right to sustainable development under the FDRE Constitution. As per article 43(1) of the Constitution, which reflects the domestic dimension of the right to sustainable development, the right holders are the peoples of Ethiopia in general, and each nation, nationality, and people in particular. It is clear from this provision that a group of people are the beneficiaries of the right to sustainable development. Here, it is imperative to find the meaning of nation, nationality, and people in order to identify

93 *Gunme* (n 65) para 171.

94 Arts 22(1) & 24 African Charter.

95 African Women's Protocol (n 57).

the exact beneficiaries of such a right. This can be discerned from the Constitution itself which defines these terms in article 39(5). This provision states:

A 'Nation, Nationality or People' for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

It seems that the scope of these terms is broad, but it can be precisely expressed as a group of people having common characteristics.

Coming to the international dimension of the right to sustainable development stipulated in article 43(3) of the Constitution – at face value – it seems that Ethiopia as a state is a right holder. However, this provision should not be considered as it excludes the peoples from being the beneficiaries of such a right. The ultimate beneficiaries of the right to sustainable development are the peoples of Ethiopia. This is already guaranteed in article 43(1) of the Constitution, as discussed above. States cannot be the active subject of human rights; human rights are inherent to human beings.⁹⁶ This also does not mean that states are not totally the right holders since, generally, 'the right to development was recognised due to demands of developing countries for a new international economic order'.⁹⁷ Hence, the balanced approach is to make both the state and its people the holders of the right to sustainable development. This assertion will be more convincing when one evaluates it in line with the African Charter, the African Women's Protocol and UNFCCC.

Ethiopian peoples and women are the holders of the right to sustainable development pursuant to the African Charter and the African Women's Protocol respectively as these instruments have become part of the country's laws through ratification. On the other hand, Ethiopia as a state is the holder of such a right under UNFCCC. This instrument has also become part of the country's laws as it has been ratified by Ethiopia.

Overall, I argue that under the Constitution, Ethiopia as a state and its peoples are the holders of the right to sustainable development, but individuals are not. This means, for example, in the context of foreign investments, that an individual cannot claim that a given

96 Abdi (n 37) 90. The Ethiopian Constitution in art 10 also stipulates that '[h]uman rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable'.

97 Absi (n 37).

investment project has violated his or her right to sustainable development, but only the state and/or a group of people can have such kind of a claim. However, this does not mean that individuals have no right to make a claim. They may make a claim as an integral part of a collective right.

4.2.2 *Duty bearers*

Duty bearers are those persons who have obligations to respect, protect, promote and fulfil human rights.⁹⁸ The term mostly refers to state actors, but non-state actors such as individuals, private companies and international organisations may also be duty bearers.⁹⁹

The duty bearers of the right to sustainable development in different international instruments are almost the same. Under UNFCCC, the duty bearers are each party individually.¹⁰⁰ A state has extraterritorial obligations as its activities may affect the right of another state. In addition to the Convention, this kind of duty also emanates from the general obligation to cooperate in international development which is a long-standing custom in international law.¹⁰¹ We also find the 'duty to cooperate' in DRD. The Declaration states that '[a]ll states should cooperate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all'.¹⁰² States may also owe a collective duty if the concerned issue is global since the policy or behaviour of each state may contribute to the violation of the right to sustainable development. Thus, states have national and international duties to ensure such a right.

As in the case of UNFCCC, under the African Charter states are duty bearers (individually or collectively) of the right to sustainable development. Article 1 of the African Charter requires the member states to recognise and enforce the rights and freedoms contained in the Charter by adopting legislative and other measures.¹⁰³ The African Women's Protocol also imposes a duty on member states to take all appropriate measures to ensure and promote women's rights to sustainable development.¹⁰⁴

98 UNICEF (n 93) 1.

99 As above.

100 Gupta & Arts (n 2) 16.

101 Schrijver (n 30) 164-167.

102 Art 6(1) DRD (n 6).

103 Art 1 African Charter.

104 African Women's Protocol (n 57).

Under the FDRE Constitution the state is the duty bearer of fundamental rights and freedoms in general. This is clearly provided for in article 13(1): The legislative, executive and judicial bodies of the government shall have the duty to respect and enforce the provisions of chapter three of the Constitution which includes the right to sustainable development.¹⁰⁵ According to this provision, it is the duty of government ensure that all international agreements adopted by Ethiopia respect and ensure the country's right to sustainable development. As per article 43(1) of the Constitution, the government also has a duty to respect and enforce the right to sustainable development of the peoples of Ethiopia as a whole, and each nation, nationality, and people in particular.¹⁰⁶ Besides, pursuant to UNFCCC, the African Charter and African Women's Protocol, it is the duty of the government to respect, protect, promote and fulfil such a right. For example, in the context of foreign investments, it is the duty of the government to protect its citizens' rights to sustainable development from violations by foreign investors. This is due to the fact that only the government can be a claimant or defendant in disputes or concerns arising from investment agreements or foreign investment contracts.

4.3 Justiciability of the right to sustainable development

As explained above, there are right holders and duty bearers of the right to sustainable development. This leads us to the question of whether the right holders can bring legal action against the duty bearers concerned provided that the latter failed to respect, protect or fulfil the right to sustainable development. In other words, is the right to sustainable development justiciable? For example, there can be a complaint that the investment project of company X, which was registered in country Y, pollutes a nearby river, resulting in the loss of human and animal lives; the investment activities of the company contradict the religious and cultural values of the local community; and 97 per cent of the workers of the company are highly-skilled men, creating income inequality among the local community. These examples are derived from the environmental protection, social and economic development pillars of sustainable development in order to show how concerns can be raised over each pillar. Moreover, concerns may be raised that the bilateral investment treaties between Ethiopia and country Y do not incorporate provisions that enable the host state to regulate the sustainability of foreign investments, which may be regarded as contrary to the constitutional provision requiring

105 Art 13(1) FDRE Constitution.

106 Art 43(1) FDRE Constitution.

all international agreements to respect and ensure Ethiopia's right to sustainable development. The next issue will be whether the affected community or any other stakeholders can bring the case before a court and the latter declares that the investment project of company X and the BIT of Ethiopia and country Y but do not respect and ensure Ethiopia's right to sustainable development.

According to the explanatory notes to the FDRE Constitution, the right to sustainable development mentioned in article 43(3) is not justiciable. It clearly states that people cannot request courts to enforce the rights mentioned in articles 41 to 44 of the Constitution.¹⁰⁷ The explanatory notes further provide that those rights are similar to the national policy objectives and principles stipulated in chapter ten of the Constitution.¹⁰⁸ These are principles of external relations and national defence and economic, social, cultural, and environmental objectives.¹⁰⁹ As the explanatory notes provide no further explanation concerning the justiciability issue of the right to sustainable development, it will be essential to infer some detailed lessons from the explanatory notes to chapter ten as their status or nature is equated with article 43.

As far as the national principles and objectives provided in Chapter ten are concerned, the Constitution states that '[a]ny organ of government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter [the chapter deals with national policy objectives and principles]'.¹¹⁰ The explanatory notes provide that those national policy objectives and principles are not justiciable. During the discussions of the Constitution's drafting committee, it was asked what the relevance was of the national principles and objectives if they were not justiciable. The response was that '[u]nless such principles are explicitly stated, government organs would not know the course they should take and the public would not have standards to evaluate its representative'.¹¹¹ If the government fails to fulfil the national principles and objectives, the option of the citizens may be to punish the government by their vote during an election.¹¹²

¹⁰⁷ Explanatory notes (n 78).

¹⁰⁸ As above.

¹⁰⁹ Arts 86-92 FDRE Constitution.

¹¹⁰ Art 85 FDRE Constitution.

¹¹¹ Stated in the explanatory notes of 1995 FDRE Constitution and translated by Belay Getachew; Explanatory notes (n 78) 22.

¹¹² Belay (n 35).

Truly speaking, it is difficult to argue for the justiciability of the right to sustainable development providing a clear and binding legal authority from the Constitution. As explained earlier, there also is no other specific law enacted to implement this right. Moreover, Ethiopian courts' precedents also are not available as courts usually decline to apply the provisions of the Constitution as a basis for their decisions. The reason is a lack of clear rules concerning the extent of courts' power to interpret and apply the Constitution.¹¹³

Overall, the right to sustainable development may be regarded as a goal and non-binding right to be achieved by the state progressively taking into account the country's level of development. This can be justified based on article 2(1) of ICESCR which requires member states to progressively realise socio-economic rights 'to the maximum of its available resources'.¹¹⁴ In principle, there is no minimum threshold requirement that judicial authority can identify and enforce socio-economic rights.¹¹⁵

For example, in the context of investment, stakeholders may advocate that the government should take the necessary steps to ensure the sustainability of foreign investment, including renegotiating bilateral investment agreements. However, for example, if employees incur damage, due to poor labour, health and safety standards of a given investment project, they can bring the case before court and make the concerned foreign company liable for compensation and so forth. This is not an issue of sustainability, but rather a kind of extra-contractual liability or a violation of a single human right such as the right to life, and the victim also is not claiming that his right to sustainable development has been violated.

5 Conclusion

From the aforementioned analysis I argue that like the national principles and objectives, the right to sustainable development is not a binding right to be enforced by courts. It is rather a goal to be achieved by the state, progressively taking into account the country's level of development and the government may be required (by a group of people as right holders) to take administrative action if such a right is violated. Here, the issue is how and when the government should start implementing the realisation of this right. As can be

113 A Sisay 'The constitutional protection of economic and social rights in the Federal Democratic Republic of Ethiopia' (2008) 22 *Journal of Ethiopian Law* 143.

114 Art 2(1) International Covenant on Economic, and Cultural Rights (ICESCR).

115 APAP 'Justifiability of ESC rights: A paper presented in the training workshop for the federal courts judges' (2006) 11.

understood from ICESCR, states should take steps to progressively realise economic, social and cultural rights, including by taking legislative measures. The African Charter also requires states to recognise and enforce human and peoples' rights (which include the right to sustainable development), among others, through legislative measures.

Therefore, by drawing lessons from the African Charter and ICESCR and its General Comment, I argue that legislative or policy measures are the initial steps to start the realisation process of the right to sustainable development contained in article 43(3) of the Constitution. This measure refers to negotiating international agreements that incorporate the three pillars of sustainable development in a balanced manner as the right to sustainable development cannot be respected without equally treating the economic, social and environmental concerns in any developmental projects governed by such agreements. For example, in the context of foreign investments, the Ethiopian government is required to initiate the realisation of the right to sustainable development by concluding investment agreements that incorporate the economic, social and environmental and human rights objectives of sustainable development in a balanced manner. This means that the investment agreements enable the government, as a duty bearer, to enforce the constitutionally-guaranteed right to sustainable development in the foreign direct investment sector.

In general, the government has a 'soft constitutional obligation' to respect and enforce the right to sustainable development stipulated in article 43(3) in order to protect development-related national interests, ensuring legal certainty and consistency, and avoiding indirect foreign interference that may occur in the guise of international agreements and cooperation.

Rethinking abortion laws in Nigeria: The trauma of rape victims of Boko Haram

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Summary: *Abortion is the medical procedure of expelling a fetus from the uterus before it can result in a live birth. Several means are adopted to achieve this, either by taking medication or having a surgical procedure. 'Abortion' in the context of this research differs from 'miscarriage', a situation whereby pregnancy ends naturally without medical intervention, often referred to as spontaneous abortion. Reasons for abortion vary, ranging from health risks to economic factors, personal misadventure, socio-cultural factors and many others. Diverse justifications have been advanced both in favour of and against the liberalisation of abortion laws globally. Nigerian laws allow abortion only to preserve the life of the mother in the case of medical challenges; abortion done for any other contrary reason is proscribed and regarded as a crime. However, the recent experience of the Boko Haram insurgency resulting in humanitarian crises is novel to the existing legal framework. Abducted under-aged girls and women were severely and repeatedly raped and sexually abused, resulting in unwanted pregnancies. Upon being rescued, the traumatised victims' desire for elective abortion unfortunately is not captured in the nation's abortion laws. In this research the issues of rights to the life, sexual and reproductive rights and the economic implications of unwanted pregnancies are critically examined and the well-being of these victims is juxtaposed with the restrictive abortion*

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laws in Nigeria predating the emerging trends. The article recommends an amendment allowing elective abortion in certain circumstances as this will create a new balance and reflect positive social change.

Key words: *abortion; abortion law; sexual and reproductive rights; well-being; victims of Boko Haram*

1 Introduction

The topic 'abortion' is a sensitive one in many jurisdictions and for a long time has elicited heated debates. There are many arguments both for and against it, and such arguments have found their basis in law, human rights, culture, religion and morality. There are extremists on both sides of the debate holding tenaciously onto their views on abortion, with both situating their positions on human rights and the value to be attached to human life. Such extremists can do anything to uphold their views.¹ In the same way, nations are torn between the debates; some have very liberal laws as regards abortion, some are neutral, while others have very stringent laws. Nigeria is one of the nations with strict anti-abortion laws. It permits abortion only in minimal instances, when it borders on the medical ground of preserving a mother's life. Nigeria's jurisprudence may be founded on its cultural, social and religious background and perceptions, although there may be little correlation between the laws and the realities based on available statistics of illegal and unsafe abortion-related deaths in Nigeria.²

This article is neither joining issue with the pro- or anti-abortionist nor is it strictly interrogating the aptness or otherwise of Nigeria's legal position. Rather, it aims at expanding the discussion by bringing into focus emerging trends that can broaden further conversations and extend the examination of Nigerian laws, inquiring into whether the laws ever anticipated exigent issues congruent in expanding the jurisprudence in the laws. The article does not project abortion rights on the broad spectrum, nor does it discuss the historical antecedents of the jurisprudence criminalising abortions. It rather brings into focus emerging national challenges in Nigeria which should set the pace

1 G Falk *Religion and social change: The influence of religion on American culture* (2018) ch 8.

2 FE Okonofua et al 'Attitudes and practices of private medical providers towards family planning and abortion services in Nigeria' (2005) 84 *Acta Obstetrica et Gynecologica Scandinavica* 270-280. See also A Rafiu 'Unsafe abortions causes 20 000 deaths a year in Nigeria' 2002, <https://doi.org/10.1136/bmj.325.7371.988/d> (accessed 15 October 2018).

for further discussion on abortion laws in Nigeria. It aims to discuss these challenges, and to argue for an expanded interpretation of the existing law. The article examines how the present legal framework on abortion fails to cover emerging realities and how it falls short in protecting the victims/survivors of sexual assault by Boko Haram, particularly their sexual and reproductive rights. The article starts by examining the concept of abortion and aligning it in the context under which it will be used in this work and the abortion laws in Nigeria. Subsequently the insurgency of the sect referred to Boko Haram is examined, its involvement, beliefs and activities. The victims/survivors' dilemma and ordeal are exposed in the course of the discussion after which the various issues arising from these are examined. The discussion cumulates into issues of the suitability of the current legislation in Nigeria with respect to the novel incidences and experiences of the victims of insurgency and their rights within the law. The article concludes by making recommendations as to the need for reform of the existing legal framework to reflect and provide for the current socio-political tide.

2 Abortion

Abortion has been described as the abnormal termination of pregnancy,³ the ending of a pregnancy before the fetus can survive outside the womb of the mother.⁴ The word 'abortion' originated from two Latin words, *abortus* and *abortive* meaning miscarriage, premature birth or perishing by an untimely birth.⁵ The widest connotation of abortion includes all cases of fetal expulsion from the womb, whether through miscarriage, otherwise known as spontaneous abortion, or through induced or deliberated expulsion. In medical terms, the two words 'abortion' and 'miscarriage' refer to the termination of pregnancy before the fetus is capable of survival outside the womb.⁶ However, the term 'abortion' in social terms often represents the deliberate and direct termination of pregnancy as opposed to spontaneous loss.

Abortion could either be spontaneous or induced.⁷ Spontaneous abortion, often referred to as miscarriage, occurs when the pregnancy

3 A Faundes & J Barzelatto *The human drama of abortion: A global search for consensus* (2006) 13.

4 D Callaham 'Abortion' in *World book encyclopedia Chicago* (1979) 149.

5 *Roe v Wade* 1973 410 US 113, 93 SCt 705. See also *Webster v Reproductive Health Services* 1989 109 SCt 3040, 106 L Ed 2d 410; see also Callaham (n 4) 149.

6 *Farlex medical dictionary*, <https://medical-dictionary.thefreedictionary.com/abortion> (accessed 30 September 2018).

7 Faundes & Barzelatto (n 3) 13.

is terminated without any intentional external intervention.⁸ This may be caused by the presence of a disease in the body of the pregnant woman or through existential crisis and genetic defect in the fetus.⁹ Induced abortion, on the other hand, known as *abortus provocatus*, is the deliberate termination of pregnancy by external intervention.¹⁰ Niedermeyer states that when abortion is induced by external action, it is unnatural.¹¹ Pregnancy can be terminated through the use of drugs or through surgical intervention after the implantation and before *conceptus*¹² becomes independently viable.¹³ Induced abortion could be direct or indirect. When it is direct, it is intended as an end or a means to an end; it is artificially carried out and the death of the fetus is always the intended result.¹⁴ Indirect induced abortion, on the other hand, occurs when the death of the fetus is never intended as the end result of a medical procedure. The death of the fetus only occurs as a permitted and unavoidable side effect of an action, maybe the treatment of another disease condition in the body of the mother.¹⁵

As stated above, abortion is carried out before the fetus becomes viable. The question then arises as to when the fetus can be termed viable. According to the World Health Organisation (WHO), the viability of a fetus is at 22 completed weeks of gestation or a weight of 500 grams.¹⁶ By implication, therefore, any pregnancy that terminates before this threshold is defined as abortion, whereas any termination when the fetus is above this limit will be considered premature birth.¹⁷

The purpose for which abortion is induced equally varies. It could be induced to save the life of the woman, referred to as therapeutic abortion. Medical indications could give rise to therapeutic abortion, where such conditions may threaten the life of the mother.¹⁸ At other times it is induced at the request of the woman for reasons personal

8 As above.

9 MA Gatzoulis, GD Webb & PEF Daubebery *Diagnosis and management of adult congenital heart disease* (2010).

10 JI Ikechebelu et al 'Should we re-define age of fetal viability in Nigeria? A case report of newborn survival from pre-viable pre-labour rupture of membranes' (2014) *Journal of Women's Health, Issues and Care* 3.

11 A Niedermeyer *Compendium of pastoral medicine* (1960) 211. See also J Schenker & J Cain 'FIGO Committee Report: FIGO committee for the ethical aspects of human reproduction and women's health' (1999) 64 *International Journal of Gynecology and Obstetrics* 317-322. See also SA Mccurdy 'Abortion and public health: Time for another look (2016) 83 *Linacre Quarterly* 20-25.

12 This means the product of conception.

13 Ikechebelu et al (n 10). See also Faundes & Barzelatto (n 3) 21.

14 Callahan (n 4) 149.

15 J Okoye *Abortion and euthanasia the crime of our day* (1987) 17.

16 Ikechebelu et al (n 10).

17 Faundes & Barzelatto (n 3) 21.

18 Okoye (n 15) 18.

to her which centre on her choice and right to reproduction.¹⁹ Essentially, for the purpose of this discussion, abortion is the deliberate expulsion of the living viable fetus from the womb of a woman before it can thrive outside the womb. This is done deliberately with the aim of ending the development of the fetus into a living person.

3 Abortion laws in Nigeria

Abortion is strongly restricted in Nigeria with the use of two main sets of laws: the Criminal Code Act, which is operative in the southern part of the country; and the Penal Code, which operates in the northern part.²⁰ Articles 228-230, 297, 309 and 328 of the Criminal Code are provisions applicable to abortion. Section 228 explicitly provides that anyone who, with the intent to procure miscarriage by unlawfully administering on a woman any noxious substance which incurs miscarriage or uses force of any kind will be guilty of a felony and liable to imprisonment of 14 years. However, section 297 of the Act makes provision for therapeutic abortion by providing that anyone who, in good faith and with reasonable caution and skill, performs surgery on any woman for her benefit or upon the unborn child for the preservation of the mother's life will not be criminally liable in so far as it is done with regard to the state of the patient at the time and the circumstances. The Penal Code, which is applicable in the northern part of the country, contains a similar provision in section 232.

There have been a number of efforts in the past at liberalising these strict laws but such attempts have been unsuccessful. The Nigerian Medical Association (NMA) made an attempt at reforming abortion laws at its conference in 1972, but it suffered a setback. Similarly, the National Population Council advocated women's access to safe and legal abortion on the basis of promoting good health and well-being, but this attempt also suffered the same failure of the past.²¹ In 1981 the Nigerian Society for Gynaecology and Obstetrics sponsored a Termination of Pregnancy Bill. The Bill proposed that abortion should be permitted if, by the certification of two physicians, it is stated that the continuance of a pregnancy would occasion risk to the mother's life or her physical or mental health, or that it will create serious harm to any of the existing children in her family or produce a greater risk than if the pregnancy were terminated. It also proposed that

19 *Farlex medical dictionary* (n 6 above).

20 Criminal Code Act Cap C38 LFN Nigeria 2004. The Penal Code, Laws of Northern Nigeria, Cap 89, Nigeria 1963.

21 LO Ilobinso 'Policy on abortion in the Nigerian society: Ethical considerations' unpublished Master's dissertation, Linkopings Universitet, 2007.

abortion should be allowed if there is a substantial risk that, if born, the child would suffer a mental or physical handicap and that such abortion should be carried out in the first 12 weeks of pregnancy. However, physicians should be permitted to refuse the performance of an abortion on the ground of conscience. Unfortunately, the Bill was rejected and was never passed into law.²² In 1992, under the leadership of the late Prof Ransome Kuti, the Minister of Health, a draft decree was sponsored titled 'The termination of unsafe pregnancy and other related matters', but this attempt also failed. There have been many other initiatives aimed at defending women's sexual and reproductive rights and eliminating unsafe abortion. The campaign against unwanted pregnancy (CAUP) was created in 1991 and, in addition to several of its works, CAUP's focus since 2002 has been abortion bill reform which has suffered repeated revisions and failures.²³ Notwithstanding the various efforts at altering abortion law and jurisprudence in Nigeria, the position remains as strict as it is, and abortion can only be legally performed for remedial and therapeutic purposes, the aim of which is to save or preserve the life of the mother.

4 Boko Haram insurgency in Nigeria

In recent times Nigerians have suffered vicious confrontations and unimaginable serious assaults from terrorist organisations, leaving a trail of blood-letting and destructive implications. There have been demonic brutality, heinous killings, mindless savagery, and flagrant disobedience to the principles of peace and stability by the terrorist groups.²⁴ One of these vicious organisations is the Islamic sect called *Jama'atul Alhul Sunnah Lidda' Wat, Wal Jihad*, commonly known as Boko Haram,²⁵ which literally translates as 'Western education is forbidden'. Many uncertainties exist as to the origin of this sect which is based in the north-eastern part of Nigeria, mainly between Maiduguri and Yobe. It is believed by some scholars that this sect was founded with the trade name *Sahaba* by Lawan Abubakar who

22 R Dixon-Mueller & A Germain 'Population policy and feminist political action in three developing countries' (1994) 20 *Population and Development Review* 197.

23 BA Oye-Adeniran, CM Long & IF Adewole 'Advocacy for reform of the abortion law in Nigeria' (2004) 12 *Reproductive Health Matters* 209.

24 MB Muraina, UD Uyanga & KO Muraina 'Historical antecedents of Boko Haram insurgency and its implications for sustainable and educational development in north Central Nigeria' (2014) 5 *Journal of Education and Practice* 59.

25 House of Representative Committee on Homeland Security Sub-committee on Counter Terrorism and Intelligence 'Boko Haram: Threat to the US' 2011, <https://www.gpo.gov/fdsys/pkg/CPRT-112HPRT71725/.../CPRT-112HPRT71725.pdf> (accessed 7 January 2019). See also T Johnson Council on Foreign Relations 'Boko Haram' 7 November 2011, <http://www.cfr.org/africa/boko-haram/p25739> (accessed 20 November 2018); S Sani 'Boko Haram: History, ideas, and revolt [2]' *The Guardian* 8 July 2011.

later conceded the leadership to Mohammed Yusuf when Lawan Abubakar left Nigeria for studies in Saudi Arabia.²⁶ In other discussions on the evolvement of the group, Shehu Sanni, a civil rights activist based in the northern part of Nigeria, reportedly is the founder of the sect which became militant and deadly in 2009.²⁷ Another report regarding the origin of the group is given by Amnesty International (AI), namely, that the extra-judicial execution in 2010 of its leader, Mohammed Yusuf, by the Nigerian security forces turned the group into a cell of mindless monsters whose focus of attacks are vulnerable targets.²⁸ Others ascribed its origin to 'elite's politics'. According to Mbah et al, the emergence of Boko Haram is not *sui generis* but, rather, a reflection of the zero-sum character for the struggle for the acquisition of political power, especially between the north and south.²⁹ Allegations abound that the sect emerged as a form of political instrument in the hands of the northern elites and politicians which they used to ascend into political offices,³⁰ although one may be tempted to agree with this proposition that the group's onslaught has the colouration of politics and religion because the sophistication of the weaponry employed by the sect is a confirmation of the massive support being enjoyed from the 'big weights', the unseen political forces that to date have remained unmasked.

The group's ideological leaning forbids everything Western or what it regards as man-made laws, Western education, culture and civilisation. It extols Shari'a law as the best form of laws which must be forcibly applied across all 36 states of Nigeria. In carrying out its beliefs, the sect has absolutely no regard for human life, so much so that children, girls, women, persons with disabilities and the aged have ceaselessly fallen victims to them. It uses terror, dread,

26 JA Falode 'The nature of Nigeria's Boko Haram war, 2010-2015: A strategic analysis (2016) 10 *Perspectives on Terrorism* 41.

27 ND Danjibo 'Islamic fundamentalism and sectarian violence: The Maitatsine and Boko Haram crisis in Northern Nigeria' (2009) Peace and Conflict Studies Paper Series Institute of African Studies, University of Ibadan, http://www.ifranigeria.org/IMG/pdf/N_D_DANJIBO_Islamic_Fundamentalism_and_Sectarian_Violence_The_Maitatsine_and_Boko_Haram_Crisis_in_Northern_Nigeria.pdf (accessed 10 January 2019). See also J Langmang 'The upsurge of religion fundamentalism: A critical reflection in the light of the Boko Haram phenomenon in Northern Nigeria' in GS Best (ed) *Religion and post conflict peace building in Northern Nigeria* (2011); UO Uzodike & B Maiangwa 'Boko Haram terrorism in Nigeria: Causal factors and central problematic' (2012) 9 *African Renaissance* 41; J Adibe 'Boko Haram: One sect, conflicting narratives' (2012) 9 *African Renaissance* 27.

28 "'They betrayed us': Women who survived Boko Haram rape starved and detained in Nigeria' 2018, <https://www.amnesty.org/download/Documents/AFR4485292018ENGLISH.pdf> (accessed 22 October 2018).

29 P Mbah, C Nwangwu & HC Edeh 'Elite politics and the emergence of Boko Haram insurgency in Nigeria' (2017) 21 *TRAMES* 173.

30 F Onuoha 'Boko Haram: Nigeria's extremist Islamic sect' (2012) Al Jazeera Centre for Studies, 29 February 2012 1-6, <http://studies.aljazeera.net> (accessed 1 December 2018).

horror and violence as its *modus operandi*, attacking both soft targets and governmental institutions, including schools, markets, villages, social gatherings, motor parks, worship centres, public institutions, international institutions and security outfits such as police stations, prisons, banks and military formations. The deadly attack on the United Nations (UN) Office in Abuja on 26 August 2011 remains indelible. Habitually, the sect does not act defensively but rather operates offensively and repressively, always positioning itself to attack and inflict maximum pain and mayhem.

5 Women and girls as victims of rape and sexual assault

One of the tactics of terror employed by the Boko Haram is kidnapping. The group kidnaps men and boys whom they indoctrinate and enlist into their sect to fight and carry arms, while women and girls are kidnapped either for domestic use, sexual pleasure or as a means of negotiation with the government. Prior to 2014 there have been pockets of kidnappings and raping of women and girls perpetrated by this dreaded group,³¹ but it assumed a gruesome dimension on 14 April 2014 when the group changed tactics and simultaneously abducted 276 girls from a government secondary school in Chibok, Borno State.³² In October 2016, following negotiations brokered by some international organisations, the movement released 21 of the kidnapped Chibok girls and subsequently, in May 2017, another 82 of the girls were freed, leaving 113 girls either still in Boko Haram's captivity or unaccounted for.³³ On 19 February 2018 it again abducted girls from the Government Science and Technical College at Dapchi in Yobe State, in the north-east of Nigeria, where another set of 110 girls were kidnapped.³⁴ Nearly a month after the abduction of the Dapchi girls, 105 of the girls were returned on 21 March 2018. Five of the girls purportedly were dead while one of the girls, a Christian, was not released based on her refusal to embrace Islam.³⁵ These two accounts perhaps are the most pronounced and publicised abductions, but several other women and under-aged girls have been victims of kidnapping and rape. Many of the abducted women

31 VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 18.

32 'Nigeria Chibok abductions: What we know' *BBC* 8 May 2017, <https://www.bbc.com/news/world-africa-32299943> (accessed 20 November 2018).

33 As above.

34 'Parents of abducted Dapchi schoolgirls protest in NASS, demand rescue' *Punch Newspaper* 8 March 2018.

35 'Kidnapped Dapchi schoolgirls freed in Nigeria' *BBC* 22 March 2018, <https://www.bbc.com/news/world-africa-43484146> (accessed 10 December 2018).

and girls have been taken into captivity in the remote jungle referred to as Sambisa forest.

However, some of the women and girls have been able to regain their freedom, especially with the military rescue operations carried out in the sect's major hide-outs in the dreaded Sambisa forest. Upon release, many of these girls and women were found to be pregnant as a result of severe serial sexual abuse and violation by the Boko Haram fighters. On 3 May 2015, when 234 women, girls and children were rescued from the Sambisa forest in Borno State by the Nigerian army, a sizeable number of the rescued girls were visibly pregnant. Nigeria's military gave information that as at 30 April 2015 nearly 500 women and girls were released that week. However, the girls and women had suffered significant trauma as a result of abduction and incarceration in the den of Boko Haram. One of the indelible traumas is pregnancy which the released girls and women had to endure. While some of the pregnancies are visible, some are still at the early stages while some of the girls and women are even unaware that they are pregnant. The executive director of the United Nations Population Fund (UNFPA), Prof Babatunde Osotimehin, disclosed that in the last year the organisation had taken deliveries of more than 16 000 pregnancies in the troubled north-eastern part of the country. Obviously, the majority of the conceptions were Boko Haram-induced rape-related cases. This is besides several psychological services offered to the affected women and children. According to Osotimehin, UNFPA is providing dignity for women, although the main focus of the government is the provision of food, water, sanitation, tents and housing. However, women and girls have specific needs that are very important and different from the need of the average community. Prof Osotimehin further stated that UNFPA ensures that these women and girls receive antenatal care that will enable them to deliver properly even if and when they require a Caesarean section.³⁶

6 Discussion

One of the aftermaths of the severe rape and sexual assault by Boko Haram is unwanted pregnancy. Ordinarily, pregnancy should be a planned occurrence or at least the consequence of a conscious and consensual choice, but when it occurs as a result of unplanned,

36 T Macfarlan "'They turned me into a sex machine': Woman made pregnant by Boko Haram rapist reveals her horror – as UN reveals 214 of 500 rescued in last week are with child' *Daily Mail* May 2015. See also S Ogunidipe, C Obinna & G Olawale 'Boko Haram: 214 rescued girls pregnant – UNFPA' *Vanguard Newspaper* 2014.

tragic or even traumatic actions such as rape, the trauma can be both lifelong and inoperable. The concern is, since the initial abduction by Boko Haram is a failure on the part of the Nigerian state government to provide adequate safety and security for the victims, as a result of which they were subjected to such humiliating experiences, whether the trauma should be continued by disallowing the victims to exercise their rights to either keep the pregnancy or have it aborted. As the current legal framework fails to provide for such instances, the question arises as to whether the law should be expanded to accommodate the exercise of sexual and reproductive rights in this direction. In view of the current realities, grounds for expanding the law are very cogent and gamine and are hereunder discussed.

6.1 1999 Constitution

The most explicit provision for the right to health is in section 17(3)(d) of the 1999 Constitution, which guarantees 'adequate medical and health facilities for all persons'. The right to health, which includes sexual and reproductive health,³⁷ is part of the socio-economic rights aimed at securing for citizens a basic quality life; rights that enable people to live meaningful and dignified lives.³⁸ Section 17(3)(d) is part of the Fundamental Objectives and Directive Principles of State Policy, which are made non-justiciable by virtue of section 6 of the Constitution. The Constitution has employed section 6 to oust the jurisdiction of the Nigerian courts from entertaining any of the provisions of chapter II and, by implication, the right to health is unenforceable. The right to health has shifted to the arena of discretion of the government since it is unenforceable by citizens.³⁹

However, the Constitution provides that the welfare and security of Nigeria is of paramount importance and, as such,⁴⁰ the Constitution places a duty and responsibility on all organs of the government to observe, conform to and apply the provisions of chapter II.⁴¹ The

37 United Nation ESCR Committee General Comment 14 'The right to the highest attainable standard of health' (art 12) adopted at the 22nd session of the Committee on Economic, Social and Cultural Rights, 11 August 2000 (contained in Document E/C12/2000/4).

38 A Haruna 'Realisation of the right to health-care in Nigeria: Need for paradigm shift African' (2020) 4 *Journal of Law and Human Rights*. See also G Erasmus 'Socio-economic rights and their implementation: The impact of international law on domestic law' (2004) 32 *International Journal of Legal Information* 243; M Brenman 'To adjudicate and enforce socio-economic rights: South Africa proves that the courts are a viable option' (2009) 9 *Queensland University of Technology Law Journal* 64, <https://doi.org/10.5204/qutlr.v9i1.42> (accessed 20 June 2021).

39 See Justice Ayoola's lead judgment in *Williams v Akintunde* (1995) 3 NLR 101.

40 Sec 14(2)(b) Constitution of the Federal Republic of Nigeria 199 as amended.

41 Nigerian Constitution Nigeria 1999 (n 40) (as set out in sec 13).

welfare of citizens includes enjoyment of all the socio-economic rights such as food, shelter and, of course health, which is critical to the enjoyment of other fundamental rights as provided for in chapter IV of the Constitution, which are civil and political rights. The two words 'duty' and 'responsibility' as provided for in section 13 entail that there is an obligation on the government through its several organs to promote, protect and fulfil the provisions in section 17(3)(d). The Constitution is supreme, and the basis on which other laws, including the Criminal Code and the Penal Code, derive their validity. Any legislation that is inimical to the provision of the rights to health as provided for under the Constitution therefore are unconstitutional. Impliedly, the right to health no longer is discretionary but obligatory on the part of the government, and the sexual and reproductive rights of women is included in the right to health. Commenting on the position of the non-justiciability of the right to health under the Ugandan Constitution, Ngwena states that 'directive principles cannot be dismissed as inconsequential constitutional artefacts. At the very least, they serve to provide a context within which justiciable rights under the Constitution, including the right to life, can be meaningfully understood.'⁴² Ngwena states further that directive principles can be used to support and clarify the normative content of fundamental rights to access safe abortion that derives from justiciable rights.

The Nigerian Constitution, therefore, should follow examples laid by some other jurisdictions such as that of India which has been able to move to the justiciability of the Directives Principles of State Policy.⁴³

6.2 International obligations and provisions

Over the years Nigeria has signed and ratified several international and regional treaties that directly or indirectly protect the right to health, and opened the discussion on the need for expanded discussion on the restrictive abortion laws. On the international scene, there is the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁴⁴ the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of

42 CG Ngwena 'Taking women's rights seriously: Using human rights to require state implementation of domestic abortion laws in African countries with reference to Uganda' (2016) 60 (110) *Journal of African Law* 122-123.

43 *Bharati v State* (1973) 4 SCC 225; see also O Ikpeze 'Non-justiciability of chapter II of the Nigerian Constitution as an impediment to economic rights and development' (2015) 5 *Developing Country Studies* ISSN 2224-607X (Paper) ISSN 2225-0565, www.iiste.org (accessed 10 June 2021).

44 Art 12.

Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the International Convention on the Elimination of all Forms of Discriminations (ICERD). Regional treaties include the African Charter on Human and Peoples' Rights (African Charter) and, most importantly, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).⁴⁵ Many interpretations have been given to the various provisions of these treaties which have supported the need for a progressive discussion on restrictive abortion laws or its total criminalisation. For instance, article 7 of ICCPR is a determinant of article 3 (the right to equality).⁴⁶ The CEDAW Committee also implicitly linked restrictive abortion laws to discrimination on the basis of gender and biology.⁴⁷ The Committee on the Rights of the Child has acknowledged the fact that adolescent girls who are in need of safe abortions due to sexual exploitation may be exposed to significant health risks.⁴⁸ Such adolescent girls, therefore, have the right to both physical and psychological therapy and 'social reintegration in an environment that fosters health, self-respect, and dignity'.⁴⁹

Article 14(2)(c) of the African Women's Protocol has been a much-discussed provision that has generated many sentiments between the pro- and anti-abortionists. However, this article takes the position of the literal meaning as stated in the provision, namely, that state parties shall take all appropriate measures to protect the reproductive rights of women and, in so doing, they shall authorise medical abortion in instances of rape, sexual assault, incest and where the continuation of such pregnancy poses a threat to the life or physical and mental health of the mother or the fetus. The implication of this provision is that the state has a duty to ensure that any woman who has suffered any of the listed misfortunes in the article should be provided safe facilities and opportunities to do away with such pregnancy. This provision appears clearly not discretionary or open to options because it has created an obligation

45 Adopted by the 2nd ordinary session of the Assembly on the Union, Maputo, Mozambique, 11 July 2003, entered into force 25 November 2005.

46 CG Ngweni 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783, 789.

47 UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, ch 1, <https://www.refworld.org/docid/453882a73.html> (accessed 29 July 2021).

48 UN Committee on the Rights of the Child (CRC) General Comment 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4, <https://www.refworld.org/docid/4538834f0.html> (accessed 29 July 2021).

49 Ngweni (n 46) 791.

for state parties to fulfil.⁵⁰ Article 14(2)(c) is clearly espousing the position being conversed in this article that pregnancies resulting from rape and trauma as experienced by the victims of Boko Haram should be afforded the rights to do away with the pregnancies and not be forced to continue such pregnancies simply because there is no such specific provision under Nigerian abortion laws.

6.3 Issues of rights

6.3.1 *Rape and its effects on 'life'*

Rights – including the right to life – are inherent to all human beings regardless of race, nationality, ethnicity, language, religion, status and sex.⁵¹ Several legislations have evolved at the local and international scenes entrenching this in our legal structures. The right to life even on the face of it may be read as a right to liberty and security of the person, as no one shall be in slavery or servitude, that such right shall be protected and that no one shall be arbitrarily deprived of his or her life.⁵² However, the right to life is a parasitic right that cannot be realised without the effective presence of some other kinds of rights because it is generated from other rights.⁵³

The effect of rape on its victim is enormous and affects the 'life' that such a victim will lead afterwards. Although the victim may not literally be deprived of her physical life by being killed, other rights that enable her to enjoy the life she still possesses have already been violated, such as the right to dignity, privacy, family life, and so forth. For a person to truly enjoy his or her right to life, there must be the emotional and psychological balance which makes their life worth living, thus the right to life of the victim is dependent on the content of such life after the trauma of rape. A major obstacle to being free from the trauma is the continuing presence of the 'fruit' of the rape, namely, the unwanted and unplanned pregnancy, while victims have the right to be free from trauma.

To begin with, the assailants were many and the number of times they were raped and assaulted equally were numerous. Combined

50 CG Ngwena 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level' (2010) 110 *International Journal of Gynecology and Obstetrics* 163-166.

51 United Nations 'Human rights', <http://www.un.org/en/sections/issues-depth/human-rights/> (accessed 10 February 2019).

52 Art 3 Universal Declaration of Human Rights; art 6 International Covenant on Civil and Political Rights (ICCPR).

53 JO Famakinwa 'Interpreting the right to life' (2011) 29 *Diametros* 30.

with this is the fact that the girls and women had been victims of other forms of horror before the additional trauma of rape and sexual assault: They have been abducted and displaced from their homes in the most gruesome manner; the assailants are unknown and may never be known; and, finally the dastardly act resulting in pregnancy. These several factors simply heighten the ordeal of the victims of rape and sexual assault by Boko Haram. Sexual assault and rape could have diverse effects on victims/survivors ranging from physical to social and psychological/emotional effects. Psychologically, the self-esteem of the victim is affected and battered; the victim loses confidence, and has a belittling outlook of herself and develops poor self-perception. One major aspect of the psychological effect is the nightmares and flashbacks to the act which often occur to the victims, especially whenever they stumble upon items, locations or people that remind them of the abuse. Emotionally, such victims experience fear, anger, isolation, guilt, sadness and confusion all rolled together into one ball of depression.⁵⁴

Sexual violence affects the mental health of the victim, exemplified by the many women with mental disorders who had suffered rape or sexual assault either in childhood or adulthood,⁵⁵ with varying degrees of consequences resulting from the mental ill health, such as suicide or even killing the perpetrator as a means of escape. Therefore, it is safe to conclude that the combination of trauma suffered by victims of Boko Haram, namely, the abduction, the displacement and the rape and sexual assault, challenges their mental well-being and, as such, the permanent imprint from the experience will definitely aggravate their mental ill-health. For victims to enjoy their right to life, therefore, the source of aggravation must be attended to, and if the source of discomfort to their lives is the pregnancy, then there should be a legal remedy which enables the victims to seek succor by doing away with an unwanted and traumatic pregnancy. The efficacy of rape and sexual assault as a ground for abortion lies in the fact that 'the law enforcement aspect of rape is disentangled from abortion service provision'.⁵⁶ The affected woman or girl should be believed first, and the immediate focus should be on providing access to safe abortion.

54 JM Santiago et al 'Long-term psychological effects of rape in 35 rape victims' (1985) 142 11 *American Journal of Psychiatry* 1338-1340.

55 H Khalifeh et al 'Domestic and sexual violence against patients with severe mental illness' (2015) 45 *Psychological Medicine* 875.

56 Ngwena (n 46) 791.

6.3.2 *Sexual and reproductive rights of victims*

Denying victims the options of doing away with an unwanted traumatic pregnancy clearly is a violation of their sexual and reproductive rights, in respect of which Nigeria has obligations to respect, protect and fulfil, derived from several domestic and international laws. Couples as well as individuals have the right to freely and responsibly decide on the number, spacing and timing of their children. This includes the right to be free from discrimination, coercion and violence in making this choice.⁵⁷ Reproductive health rights entail the right to control fertility; to decide whether to have children; the number and spacing of children; to choose a method of contraception; to self-protection against sexually-transmitted infections including HIV; and to family planning education.⁵⁸ Sexual and reproductive rights as enumerated in multiple human rights instruments include the right to life and survival;⁵⁹ the right to be free from inhuman and degrading treatment;⁶⁰ the right to family and private life,⁶¹ to prohibition from discrimination; and the right to education.

CEDAW,⁶² which Nigeria has ratified, enjoins state parties to take all appropriate measures to eliminate discrimination against women in the field of health care, which includes access to healthcare services such as family planning.⁶³ It further provides that women should be accorded the rights to freely and responsibly decide on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights.⁶⁴ Nigeria has the obligation to refrain from interfering with the enjoyment of this right, to protect it by prevention of the violation, and to fulfil by taking appropriate measures towards the full realisation of this right. The victims have the right to reproduction and self-determination, and they have a right to determine whether they should have a child and found a family. They have the right to the number and spacing of children without the control or coercion

57 International Conference on Population and Development (ICPD) Programme of Action, (1995) para 7.3 UN Doc A/CONF.171/13 1994, ch 7.A. repeated in paras 95 and 223 for the Beijing Platform for Action, <https://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf> (accessed 20 November 2018).

58 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (African Women's Protocol).

59 Art 6 ICCPR. See also Constitution of Nigeria 1999 (as set out in sec 33(1)).

60 Nigerian Constitution Nigeria 1999 (as set out in sec 34).

61 Nigerian Constitution Nigeria 1999 (as set out in sec 37).

62 Nigeria Ratified CEDAW in 1985 without reservation and signed the Optional Protocol to the Convention in 2000 and ratified same in 2004.

63 Art 12(1) Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

64 Art 16(e) CEDAW.

of the government. According to Cook,⁶⁵ the state should have 'little power to prevent women's choice about whether and when to have a child, or women's full exercise of their right to private and family life'.

6.3.3 *Right to health*

Every human being, including every woman, has the right to health. States have the obligation to support the right to health, and states must prioritise the needs of those who have been left the furthest behind, so as to achieve greater equity.⁶⁶ Women are part of these most vulnerable groups. Health has been defined by the WHO as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'. Therefore, the right to health implies the right to the highest attainable standard of health and complete well-being, not merely the absence of disease.⁶⁷ The right to health is central and dependent upon the realisation of other rights such as the right to food, housing, education and other rights that will help in procuring well-being.⁶⁸

Two principles are prominent under this right – the right to control and the right of entitlement. The right to control refers to having a decisive say over what happens to one's body, which is referred to as autonomy. Every competent person has the right to choose what course of treatment should be administered to him or her; to accept or refuse treatment and to generally participate in every decision pertaining to treatment that will be administered to his or her body.⁶⁹ The principle of autonomy is one of the essentials of health care.⁷⁰ Beauchamp referred to it as the legal principle of respect for self-determination.⁷¹ Cardozo J in *Schloendorff v New York Hospital* stated that 'every human being of adult years and sound mind has a right to determine what shall be done to his own body'.⁷² Therefore, women who have been raped and violated have rights to determine what should be done to their bodies and states should

65 RJ Cook 'International protection of women's reproductive rights' (1992) 24 *New York University Journal of International Law and Politics* 645.

66 Transforming our World: The 2030 Agenda for Sustainable Development UN General Assembly 2015 21 October UN Doc. A/RES/70/1.

67 WHO 'Human rights and health' 2017, <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> (accessed 15 March 2021).

68 As above.

69 M Hendry et al 'Why do we want the right to die? A systematic review of the international literature on the views of patients, carers and the public on assisted dying' (2013) 27 *Palliative Medicine* 13.

70 J Herring *Medical law and ethics* (2010) 192.

71 L Beauchamp and LB McCullough *Medical ethics* (1984) 42; see also *McFall v Shrimp* (1978) 10 Pa D & C (3d) 90.

72 (1914) 105 NE 92.

give the freedom for self-determination. The second, the right of entitlement, entails the right to be afforded all necessary care to ensure a person's well-being.

The right to health has indeed become one of the fundamental human rights which can be enforceable, borrowing a leaf from India, where the courts had played a key role and led in legitimising the Constitution by enforcing the socio-economic obligations of the state in the area of the right to basic nutrition.⁷³ The Supreme Court of India expanded this jurisprudence and has been able to develop the right to life to include other rights which may hitherto have been regarded as socio-economic rights that are unenforceable. In fact, the Indian Supreme Court has been able to develop a comprehensive body of judgments that deals with social welfare rights as protected by the unqualified right to life which is enshrined in the Indian Constitution.⁷⁴

6.4 Continuance of unsafe abortion

Nigeria has one of the highest recorded number of maternal deaths with an estimated maternal mortality rate (MMR) of 840/100 000 live births in the world.⁷⁵ A major contributory factor is the high number of unsafe abortions clandestinely done which account for 30 to 40 per cent of maternal deaths.⁷⁶ An estimated 1,25 million induced abortions occurred in 2012 of which the majority were unsafely procured in spite of the restrictive laws.⁷⁷ According to the Guttmacher Institute report, one-fourth of the 9,2 million pregnancies in Nigeria were unintended, translating to 59 unintended pregnancies per 1 000. Out of these unintended pregnancies, 56 per cent ended in induced abortion, 32 per cent in

73 *People's Union for Civil Liberties (PUCL) v Union of India Writ Petition (Civil) 196 (2001) (India)* and subsequent interim orders, <http://www.righttofoodindia.org/case/case.html> (accessed 14 March 2021); see also Interim Order of 2 May 2003, *PUCL v Union of India Writ Petition (Civil) 196 (2001) (India)*, <http://www.righttofoodindia.org/orders/may203.html> (ordering distribution of ration cards to vulnerable individuals and families); Supreme Court Order of 28 November 2001; *PUCL v Union of India Writ Petition (Civil) 196 (2001) (India)*, <http://www.righttofoodindia.org/orders/nov28.html> (accessed 15 March 2021).

74 M Khosla 'Making social rights conditional: Lessons from India' (2010) 8 *International Journal of Constitutional Law* 741.

75 MC Hogan et al *Maternal mortality for 181 countries, 1980-2008: A systematic analysis of progress towards millennium development goal* (2010) 5. See also WHO 'Trends in maternal mortality: 1990 to 2008'. Geneva: Estimates developed by WHO, UNICEF, UNFPA and World Bank; 2010.

76 Oye-Adeniran et al (n 23).

77 A Guttmacher Institute Factsheet 'Abortion in Nigeria' (2015). The estimated abortion rate was 33 abortions per 1 000 women aged 15 to 49 in 2012, <https://www.guttmacher.org/sites/default/files/factsheet/fb-nigeria.pdf> (accessed 14 March 2021).

unplanned birth and 12 per cent in miscarriage.⁷⁸ Unsafe abortion has many health implications and several forms of complications such as pain, haemorrhage, sepsis, renal failure, uterine perforation, gastro-intestinal tract injuries, pelvic infections and, ultimately, death, particularly where there is no emergency expert care following the unsafe abortion.⁷⁹ A significant number of these unsafe abortions are performed by persons pretending to be medical doctors, traditional birth attendants and untrained medical professionals, while those performed by physicians are done in private hospitals under secretive conditions and/or unhygienic environments.⁸⁰ Notwithstanding the legal restriction of abortion, women continue to resort to unsafe abortion, thereby increasing maternal death and morbidity. This raises the issue of how restrictive laws really can restrict and to what extent it should restrict. The reality is that some of the victims of rape and sexual assault by Boko Haram will resort to unsafe abortion and a large percentage of these unsafe abortions will result into morbidity and mortality.

6.5 Re-construing the meaning of 'preserving the life of the mother'

Nigerian law currently allows abortion only for the 'preservation of the mother's life'. The questions therefore arise as to what constitutes the life of a woman; how one should construe 'saving the life of a mother'; the indices that can be used to measure the life of a woman; and whether such indices are purely medical or whether they go beyond medical aspects. Literally taking the term 'saving a mother's life' or 'preservation of the mother's life' does not include traumatic, social, emotional or psychological issues. How should one define the health indicator used in allowing therapeutic abortion, and are they hinged only on medicals? What are the components of 'life' as provided by the law? Should the right to life be literally interpreted simply as the right not to be physically killed or are there other components to that right? These are the issues that must be resolved in order for the 'real life' of the mother to be preserved or saved.

⁷⁸ Alan Guttmacher Institute Factsheet (n 77).

⁷⁹ WHO *Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008* (2011).

⁸⁰ BA Oye-Adeniran, AV Umoh & SNN Nnatu 'Complications of unsafe abortion: A case study and the need for abortion law reform in Nigeria' (2002) 10 *Reproductive Health Matters* 18-21, 10.1016/S0968-8080(02)00024-1 (accessed 14 March 2021).

As stated earlier, the right to life is dependent for its realisation on the presence of other rights.⁸¹ For example, in so far as the right to health promotes life, the right to health supports and advances the right to life. However, the right to health is not exclusive to physical health, but includes physical, mental, emotional and social well-being. Life should correspondingly not be strictly construed to the breath that is emitted from the nostrils, but must include every other variable that makes that breath possible and worth breathing. In the Indian case of *Francis Coralie Mullin v The Administrator, Union Territory of Delhi & Others*⁸² the Indian Supreme Court held that the right to life being the most precious human right, it should be expanded in meaning and reach rather than attenuating its meaning and content. It should 'be interpreted in an expansive spirit that will intensify its significance by enhancing the dignity and worth of the individual and his life'. The Court stated that human life is not merely animal existence or physical survival, but includes living with dignity and fulfilling the barest.⁸³

Nigeria can further draw from the Kenyan public interest case of *Federation of Women Lawyers (FIDA-Kenya) & 3 Others v Attorney-General & 2 Others*,⁸⁴ where the Kenyan High Court made several pronouncements which give good insight into the parasitic nature of the right to life. The victim in this case who fell pregnant as a result of rape was unable to procure a safe abortion since the Kenyan law forbids abortion unless, in the opinion of a trained health professional, there is a need for emergency treatment or where the life or health of the mother is in danger.⁸⁵ The Court had to make pronouncements on the several issues, part of which involved what the right to health and the right to reproductive health entailed, and whether pregnancy resulting from sexual violence fall under the circumstances for abortion allowed by the law. The Court held: 'In our view therefore, women and girls in Kenya who find themselves pregnant as a result of sexual violence have a right ... to have an abortion ... Health, in our view, encompasses both physical and mental health.' According to the Court, when life is endangered, this includes the mental, psychological or physical life of the mother.⁸⁶ The case affirms the position that the right to life encompasses the right to health since both life and health must co-exist on an equal

81 Famakinwa (n 53).

82 (1981) 2 SCR 516.

83 See also para 2.1 of the petitioner writ in *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

84 Petition 266 of 2015; *East Africa Centre for Law and Justice & 6 Others (Interested Party) and Women's Link Worldwide & 2 Others (Amicus Curiae)* [2019] eKLR.

85 Art 26 Kenya Constitution 2010.

86 Para 362 of the judgment.

footing. Drawing from several international instruments and cases, the Court also held that 'the inter-link and inter-dependence of rights is recognised, and in this regard, the right to health is an underlying determinant of the enjoyment of other rights'.⁸⁷

In the same vein, the rape victims of Boko Haram may have no physical diseases indicative of a therapeutic abortion. However, they are bedeviled with many mental, social, psychological and emotional disorders which have constituted a threatening lump to their lives which should form a pointer for redress. The enjoyment of the highest standard of health is part of the fundamental rights of every human being, including the female victims of Boko Haram who were impregnated through violation, sexual assault and rape. Obviously, these victims lack social, emotional and mental wellness. Preserving their lives, therefore, can be achieved by promoting their well-being which may be accomplished through the termination of the pregnancy that remains traumatic and a threat to their lives. The nation owes them all a duty to preserve and save their lives by promoting their well-being. As such, legal provisions must be widened to accommodate interventions for victims of rape and sexual assault, particularly the Boko Haram victims of rape and sexual assault, which is another dimension of the 'preservation of mother's life'.

6.6 Economic implications

Another consideration supporting this argument are the financial implications of the pregnancies both now and in the future. Since Nigeria is a state with little or no social security and health insurance structure, the question arises as to who bears the financial burden of the unwanted pregnancies and children resulting from the rape and sexual assault. Apparently, the victims who have been displaced from their homes and disconnected from their means of economic livelihood cannot provide even for their own basic needs; most were temporarily resettled in the Internally Displaced Persons (IDP) Centres. Ordinarily, even if they were not pregnant, they deserve every financial support and attention that will assist in reintegrating them back into the society. Consequently, the burden of unwanted pregnancies may be too cumbersome for their social and financial well-being. The reintegration of these victims may not be fully achieved when they are saddled with the responsibilities of catering for unwanted children by unknown fathers, men who have abused

87 Para 337 of the Judgment.

them severely and towards whom they bear the deepest hatred and disdain. The education of some of these teenage mothers already has been disrupted and hanging in the balance of probability. Allowing them to additionally carry to term undesired pregnancies will be an added burden to both the victims and society, thereby increasing the statistics of miscreants and an army of unschooled children in Nigeria.

6.7 Need for reform

Nigeria appears to treasure its socio-cultural and religious heritage and sees it as a mechanism for preserving the morality of society. While the laws and public policies of any nation should reflect its moral and ethical standpoints, and must constantly be employed to safeguard its future, it should create opportunities for new dynamics. The strict anti-abortion law in Nigeria is directed at protecting lives, especially that of the unborn child and equally to preserve public decency. It was enacted as a means of balancing the rights of both the mother and the unborn child who equally has a right to life. However, there are changing dynamics in every society based on emerging trends. Our social existence currently is being challenged by so many factors that were not taken into consideration in the Criminal Code Act of 1916 and the Penal Code of 1959. The current realities of our time have presented the compelling paradigms to us as a nation, and the law should likewise respond and be an instrument of social change. Therefore, it is apposite that the current laws should be expanded to accommodate new discoveries, knowledge swell, and changing paradigms of the present age within the socio-cultural beliefs of the country. Nigeria has never recorded this extent of deadly terrorism and insurgency currently being experienced. The unimaginable dimension and its consequences on humanity need to be addressed both socially and legally.

Medical indices can no longer constitute the legal and sole determinant for allowing legal abortions in the bid to preserve and save the mother's life. There is a need to give the pregnant victims of Boko Haram trauma a choice to do away with such pregnancies if it inhibits the attainment of well-being. Victims must be allowed to exercise their sexual and reproductive rights. Whereas the choice to abort may not be arbitrarily deregulated, an apparatus of law must be in place to continually preserve the sanctity of Nigeria's principles of anti-abortionists' viewpoints. However, the law should be reformed so as to allow deserving mothers with justifiable contingencies to be legally considered for abortion, particularly the survivors of abduction and kidnapping. Giving the option of abortion is a pathway to

healing, and the most important gift that can be offered to any of the victims. It also offers a 'soft landing' that will reintegrate them into society and return their hope for living.

The state should help preserve the family units within the country. Therefore, if the termination of unwanted pregnancies resulting from deadly insurgent activities will help preserve and stabilise homes and societies, such demand should not be viewed as flippant and unlawful by the state. Based on the circumstances of each case, there should rather be medico-legal arrangements. The victims should be presented with the choice of how to handle such pregnancies. Should a victim be unable to achieve a state of health and well-being as a result of the entire experience climaxing in the pregnancy, then psycho-therapeutic abortion should be allowed for the interests of such a victim to be better served.

Nigeria should also abide by article 14(2)(c) of the African Women's Protocol of which it is a state party, which states that 'states parties shall take all appropriate measures to protect reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus'.⁸⁸

7 Conclusion

Abortion is the expulsion of a viable fetus from the womb of a woman before it can survive outside the mother's womb. Abortion is allowed in Nigeria only for the purpose of preserving and saving the life of the mother. However, there are compelling paradigms necessitating that this strict anti-abortion law be relaxed or recalibrated to allow elective abortion in some instances. Part of these instances is the trauma suffered by the victims of the Boko Haram insurgents who kidnap, rape and sexually abuse women and young girls, thereby resulting in pregnancies. It is argued in this article that the 'preservation of the mother's life' based on health should be expanded to include psychological, social and mental well-being and not only physical or medical wellness. Further, individuals as well as couples should be allowed to exercise their sexual and reproductive rights to decide whether or not they wish to have a child, the timing and spacing of such child or children, and the state should respect, protect and fulfil

⁸⁸ African Women's Protocol (n 58).

The rights of victims of core international crimes to reparation in Nigeria

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Summary: *Generally, the rights to reparation of victims of crime is largely controverted, especially in common law jurisdictions such as Nigeria where there is no express provision conferring or denying such right. With the rising number of victims of core international crimes in Nigeria, there is an increasing need to evaluate Nigeria's disposition to the plight of victims of core international crimes within its jurisdiction in light of the provisions of the Rome Statute. The article evaluates the possibility of the recognition of the right of victims of core international crimes to reparation in Nigeria. Although there are fragmentary provisions in the existing legislation that may be explored to ground the rights to reparations of victims of domestic crimes generally, the flaws and inadequacy of those laws are apparent in the face of the gravity and demands of core international crimes. The article argues that Nigeria owes an obligation to repair the harms suffered by victims of core international crimes in line with the provisions of article 75 of the Rome Statute which unequivocally confers such rights on victims, and the principle of ubi jus ibi remedium. The article concludes by making concise recommendations with respect to legal provisions on victims' rights to reparation in Nigeria in the context of international criminal law.*

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Key words: *victims; reparation; criminal justice; rights; International Criminal Court*

1 Introduction

Nigeria is a common law jurisdiction with an adversarial criminal justice system which does not accord any precise recognition to the concept of reparation to victims. Although the criminal justice system in Nigeria makes specific provision for compensation and restitution in some cases, such may be inapplicable to core international crimes.¹ Global trends in the late twentieth century increased the focus on victims' rights and remedies in criminal law.

At the international level the subject of victims' rights started to gain more recognition following the world wars which revealed atrocious activities against persons and the emergence of international human rights.² Subsequently, the development of regional human rights systems and the increase in international and domestic armed conflicts amplified the focus on victims' rights to remedies following violations. The concept of victims' rights gained prominence in domestic jurisdictions in the 1980s, paving way for other forms of rights, such as the right of participation in the case of domestic crimes.³ States' reluctance to be accountable to individual victims for state-sponsored violations culminated in the adoption of the two legal instruments on victims' rights and remedies in 1985 and 2005.⁴ The two documents laid the foundation for the negotiations leading

1 'Core international crimes', also referred to as core crimes, as used in this article, denote the four main international crimes over which the International Criminal Court may exercise jurisdiction, namely, war crimes; crimes against humanity; genocide; and the crime of aggression. Sec 365 of the Nigerian Criminal Procedure Code provides for the award of compensation generally for criminal injury suffered by a victim. Secs 321, 341 and 342 of the Administration of Criminal Justice Act 2015 (ACJA) also provide for compensation and restitution of property by the accused to victims of crime. There are also provisions that allow victims the option of obtaining a remedy by suing the accused under separate civil proceedings post-prosecution of the accused. A Olatubosun 'Compensation to victims of crime in Nigeria: A critical assessment of criminal-victim relationship' (2002) 44 *Journal of the Indian Law Institute* 209.

2 MC Bassiouni 'International recognition of victims' right' (2006) 62 *Human Rights Law Review* 203.

3 Bassiouni (n 2) 212.

4 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power UN/GA/RES/40/34 of 29 November 1985; United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law A/RES/60/147 of 16 December 2005 respectively.

to the adoption of the specific victims' rights in the Rome Statute of the International Criminal Court (ICC) (Rome Statute).⁵

Distinctively, article 75 of the Rome Statute makes provision for reparation to victims at the Court.⁶ The Rome Statute grants the Court the power to order reparations to victims of core international crimes upon application to the Court by the victims, or *suo motu* by the Court in 'exceptional circumstances'.⁷ Such reparative order may be in form of monetary compensation, restitution of property, rehabilitation or symbolic measures such as apologies or memorials.⁸ Generally, the right to reparations itself is largely controversial and a subject of debate in international law. In contemplating a general right to reparations, some international human rights documents⁹ admit a right to reparations with respect to certain violations.¹⁰ Following the express provision of article 75 of the Rome Statute, it may be argued that while the Court has the discretionary power to grant reparations, the Rome Statute tacitly implies that victims have the right to reparations. In this regard, victims have the right to approach the Court in this respect to make representations to the Court in respect of reparations.¹¹

5 PV González 'The role of victims in international criminal court proceedings' (2006) 5 *International Journal on Human Rights* 19. Sperfeldt is of the view that the negotiations on the inclusion of reparation at previous international criminal tribunals such as the ICTY was raised but did not make it to the final Statute. C Sperfeldt 'Rome's legacy: Negotiating the reparations mandate of the International Criminal Court' (2016) 17 *International Criminal Law Review* 356. McCarthy reports that the inclusion of reparation in the Rome Statute evolved at the last stage of the negotiations of the Statute, with which Sperfeldt agrees. C McCarthy *Reparations and victim support in the International Criminal Court* (2012) 36.

6 According to the view of the ICC Pre-Trial Chamber I in *The Prosecutor v Thomas Lubanga Dyilo* in the Decision on the Prosecutor's application for a warrant of arrest, 'the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is to some extent linked to its reparation system.' Pre-Trial Chamber I, 10 February 2006 ICC-01/04-01/06 para 136.

7 Art 75(1) of the ICC Statute; Rule 95 of the International Criminal Court Rules of Procedure and Evidence (ICC RPE).

8 Art 75(2) of the ICC Statute. Broadly, reparation at the ICC may not admit of such measures as guarantees of non-repetition and some satisfaction measures. These measures may require a high level of co-operation from the state for implementation.

9 Art 2(3) of the International Covenant on Civil and Political Right (ICCPR) provides for the right to an effective remedy from which several human rights bodies, such as the Inter-American Court of Human Rights, have repeatedly inferred a general right to reparations. Authors such as De Greiff argue that victims indeed have a right to reparations. P de Greiff 'Justice and reparation' in P de Greiff (ed) *Handbook of reparation* (2006) 451; Bassiouni (n 2) 203.

10 Arts 9(5) and 14(6) of ICCPR and art 14(1) of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) provide specifically for the right to reparations with respect to certain violations such as the right to reparations against unlawful arrest or detention, false conviction and torture, respectively.

11 Art 75(3). E Barmugartner 'Aspects of victim participation in the proceedings of the International Criminal Court' (2008) 90 *International Review of the Red Cross* 409; S Garkawe 'The victim-related provisions of the Statute of the International

Nigeria is a signatory to the Rome Statute and has since 2010 been under preliminary examination by the ICC for allegations of crimes against humanity, especially in the embattled north-eastern region of the country.¹² In December 2020 the Office of the Prosecutor concluded a preliminary examination of the Nigerian situation and decided to proceed to full investigation of the situation in Nigeria.¹³ Currently, there are hundreds of thousands of displaced victims of the insurgency and armed conflicts in the country. Unfortunately, in 2020 a Bill was introduced to the federal legislative house, purportedly aimed at granting amnesty and offering foreign training to Boko Haram members who had renounced their membership, in order to reintegrate them into society.¹⁴ This was in furtherance of previous amnesty operations initiated since 2016. However, it is ironical that while the federal government has been progressively focused on alleged perpetrators, victims of the heinous crimes committed by the alleged perpetrators are at the mercy of the meagre humanitarian assistance they receive from non-governmental organisations (NGOs). Strangely, Nigeria has refused to keep up with positive global trends that recognise the rights of victims and comprehensive remedies to victims of crime. There are pieces of provisions in the criminal legislations, but none absolutely acknowledges or caters for the need for reparations of victims.¹⁵ Victims of internal armed conflict in the embattled north-eastern region of Nigeria and several other spates of violence in certain regions of the country, which possibly constitute core international crimes, may have no respite than to rely on meagre assistance measures from national and international NGOs. The lack of comprehensive provision for reparation heightens the risk of re-victimisation and the gravity of injury perpetrated against victims appear to stall any possibility of a resolute end to the grievous crimes being perpetrated daily. This raises questions relating

Criminal Court: A victimological analysis' (2001) 8 *International Review of Victimology* 269. Barnugartner and Garkwe, in line with the provisions of the Rome Statute, state that victims of crimes committed by a convicted person could apply to the Court for reparations following conviction.

- 12 ICC – 'Situation Report on Nigeria', <https://www.icc-cpi.int/nigeria> (accessed 21 March 2021). Following the insurgency by an Islamist group that has been identified as Boko Haram in the north-eastern region of Nigeria, Nigeria has since 2009 been undergoing armed conflicts.
- 13 ICC – The Office of the Prosecutor. Report on Preliminary Examination Activities 2020 – 'Nigeria' 67 para 265, <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (accessed 21 December 2020).
- 14 'Senator introduces Bill to create agency for repentant Boko Haram members' *Premium Times Ng Online* 20 February 2020, <https://www.premiumtimesng.com/news/headlines/378212-breaking-senate-introduces-bill-to-create-agency-for-repentant-boko-haram-members.html> (accessed 21 April 2020). Although the Bill was strongly condemned and largely rejected by the public and never made it through the legislative house, it sadly depicted the disposition of the Nigerian government.
- 15 There have been several failed attempts by the National Assembly to legislate victims' remedies in the criminal justice system.

to the legal recognition of the rights of victims of core international crimes and the legal obligations of a state in respect of such victims. Consequently, it is imperative to consider the scope of the obligation of the national criminal justice system in relation to victims of crime. It is in light of the above that this article interrogates these questions by examining the rights to reparation of such victims in Nigeria.

This article employs the doctrinal approach to examine the concept of reparation to victims of core international crimes. Flowing from the provisions of the Rome Statute, the article argues for the recognition of the rights to reparation for victims of core international crimes in Nigeria. The article is divided into six parts. The first part gives an overview of the background to the need for reparation for victims of core international crimes in Nigeria. The second part examines the concept of reparation and the rights of victims to reparation. The third part analyses the provisions of the Rome Statute with respect to the rights to reparation of victims of core international crimes. The fourth part analyses the provision of the Administration of Criminal Justice Act in light of the concept of reparation to victims of crimes in Nigeria, and further examines the concept of a victim in the context of domestic and international criminal law and the concept of reparation. The fifth part evaluates the Nigerian criminal justice system and the position of victims, examining the possibility of the recognition of the rights to reparation of victims of core international crimes in Nigeria. The article finally makes concise recommendations with respect to legal provisions on victims' rights to reparation in Nigeria in the context of international criminal law.

2 The concept of reparation and rights to reparation of victims in international criminal law

2.1 Defining reparations

Literally, reparation may not be unconnected with the Latin word *reparare* which literally translates as 'to make ready again', or the Latin word *reparatio* which means 'to repair'.¹⁶ In the broad legal sense reparation has been defined as the 'act of making amends for a wrong; a compensation for an injury or wrong, especially for wartime damages or breach of international obligations'.¹⁷ This definition largely reflects an expression of reparation from the perspective of

16 *Online etymology dictionary*, <https://www.etymonline.com/word/reparation> (accessed 19 April 2020).

17 BA Garner *Black's law dictionary* (2014) 1490.

civil damages or general remedies for a civil wrong suffered by a claimant. It also establishes that the claim for reparation may arise from both domestic and international legal obligations or laws. Thus, in conceptualising reparations it is important to distinguish obligations for reparation at the domestic level from obligations for reparations created under international law.¹⁸ In international law, under the law of state responsibility, reparation refers to all measures through which a state repairs the consequences of the breach of its obligations under international law, and this usually involves obligations between states. At the domestic level, reparation is often recognised as one of the transitional justice mechanisms that aim at redressing victims personally and repairing the consequences of gross and systemic violations of human rights.¹⁹

Thus, there is general consensus that reparation includes such measures or actions that are channelled towards repairing and redressing injury suffered as a result of wrongs committed.²⁰ The words 'redress' and 'repair' are two important key words underlying the concept of reparations.²¹ These two key words are conjunctive in operation. Thus, it is not reparation if it is not redressing and repairing the harm perpetrated against the victim. This is the reason why mere criminal prosecution cannot be regarded as a reparative measure because, although it may be argued that prosecution is a form of redress for the harm perpetrated against the victim, it does nothing to repair it, except where the victim is awarded reparative measures that restore the victim.²² The two key words may be broadly

18 D Shelton *Remedies in international human rights law* (2015) 16.

19 P de Greiff 'Theorising transitional justice' (2012) 51 *American Society of Political and Legal Philosophy* 34. ICTJ 'Reparations', <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (accessed 19 April 2020); Shelton (n 18) 16; Inter-American Court of Human Rights in *Loayza Tamayo v Peru* (Reparations), IACHR 27 November 1998 Series C No 42 para 85.

20 L Moffett 'Reparative complementarity: Ensuring an effective remedy for victims in the reparation regime of the International Criminal Court' (2013) 17 *International Journal of Human Rights* 369. Roht-Arriaza describes reparation as 'a society's recognition, remorse and atonement for harms inflicted'. Her definition captures the themes of reparation largely to the extent that society's attempts are focused on the victims. N Roht-Arriaza 'Reparations decisions and dilemmas' (2004) 27 *Hastings International Law and Comparative Law Review* 159.

21 The provisions of Principle 15 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law UNPR) A/RES/60/147 adopted by the United Nations General Assembly (UNGA) Resolution on 21 March 2006 expresses reparations as intended to 'promote justice by redress', <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> (accessed 20 March 2021); Roht-Arriaza (n 20).

22 The aim to 'restore the victim' may appear wide and ambiguous if not well defined. However, whatever interpretation is ascribed to 'restoration of victim', it must translate to offering the victim an opportunity to recover from the loss, shock and damage of the violation he has suffered. The extent of the restoration offered in each case is subject to the peculiar circumstances of each case.

interpreted to embrace a wide range of actions that are aimed at restoring victims *restitutio in integrum*, that is, to the position in which they would have been had the violations not occurred.²³ This sets out the aim of reparations as ambitious and unrealistic especially in situations where it is practically impossible to restore previous circumstances, such as in cases of rape, death or permanent psychological damage.²⁴ In the same vein, reparations are no less important merely because circumstances exist that place limitations on full restoration.

A defining feature of reparation is its direct focus on victims with the end result of directly repairing victims' harm.²⁵ As De Greiff contends, reparations potentially have a direct impact on victims since it is focused on the victims more than other recognised forms of transitional justice.²⁶ In contrast with other forms of transitional justice such as prosecutions, amnesty or lustrations, reparations embody a victim-centric approach to justice by focusing on the needs of the victim. While prosecution essentially focuses on retribution, reparation is principally restorative and reparative in nature. Victims may not necessarily be interested in prosecutions or lustrations as much as they are interested in recovering their source of livelihood, the restitution of their property, the restoration of the healthcare system, and so forth.²⁷ Studies reveal that victims generally have needs that may be psychological, physical or otherwise and such needs are uniquely different owing to the scale and magnitude of the crime.²⁸ Thus, it is imperative to distinguish between measures that may have a reparative effect in terms of providing legal remedies to the victims and may not necessarily offer any benefit to the victims and measures actually aimed at repairing the damage or harm inflicted on the victims.

23 Roht-Arriaza (n 20) 160; Moffett (n 20) 369. The ICJ held that reparations are set to 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'. *Germany v Poland, The Factory at Chorzow* Permanent Court of International Justice, File E. c. XIII. Docket XIV: I Judgment 13, 13 September 1928 (*Chorzow Factory* case) para 125.

24 Roht-Arriaza describes it as an 'impossible' mission. Roht-Arriaza (n 20) 158.

25 Unlike other juridical and administrative measures of redressing harm suffered by victims, reparation is victim-centric with the aim of directly restoring the victim by providing privileges that they have been denied due to the harm they have suffered. However, unlike the way in which De Greiff describes it, reparation is not a 'benefit' as though unduly obtained, but rather a restored 'right'. De Greiff (n 9) 453.

26 De Greiff (n 19) 36.

27 De Greiff (n 19) 34. C Lasco 'Repairing the irreparable: Current and future approaches to reparations' (2003) 10 *Human Rights Brief* 18.

28 L Moffett 'Elaborating justice for victims at the International Criminal Court: Beyond rhetoric and The Hague' (2015) 13 *Journal of International Criminal Justice* 5.

Reparation may be largely juridical or administrative in nature. Juridical reparation is infused in both retributive and restorative aims of criminal justice, while administrative reparation essentially follows restorative and reparative aims of criminal justice. Although widely perceived as and equated to monetary compensation, reparations take many other forms as recognised by the United Nations (UN),²⁹ such as rehabilitation; restitution; satisfaction measures which include moral reparations in the form of public apology; acknowledgment of injustice; access to information about violations; or a guarantee of non-repetition.³⁰ While not limited to juridical forms, reparations in the context of criminal justice should neither be construed as assistance programmes offered to victims of gross violations of human rights on humanitarian grounds, nor are they development programmes, as some authors may want to posit.³¹ It is difficult to conceive reparations as development programmes even though reparation efforts, especially those administered as programmes, may translate into development realities. Development programmes are not necessarily targeted at victims but at the entire community or society and, in such sense, they cannot be regarded as 'reparative' even though they may make some form of impact on the victims, but may not necessarily account for recognising and repairing the damage suffered by the victims.³² Development programmes are obligations that the state owes the entire citizens in the state. Thus, victims cannot be short-changed by such development efforts where these are disguised or represented as reparations.

2.2 Right to reparation for victims

The inclusion of reparation to victims in international criminal law by the provisions of the Rome Statute may be described as an international criminal justice measure which bears semblance to the practice of reparation to victims of gross human rights violations in domestic transitional justice efforts. Before the existence of the Rome Statute individual victims were not accorded a direct recognised

29 Basic Principles and Guidelines (n 4).

30 De Greiff (n 9) 452.

31 Authors such as Roht-Arriaza are inclined to view reparation in the same light as assistance programmes to victims. Roht-Arriaza (n 20) 187. The provision of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration of Justice) clearly highlights the difference between reparation and assistance measures to victims. While victims should enjoy rights to both, assistance measures are not obligatory and are based on voluntary disposition of non-governmental organisations and the community. Reparations, on the other hand, are an obligation of the offender or the state to which the victim is entitled as a right. Paras 8-13 of the UN Declaration of Justice, adopted by United Nations General Assembly Resolution 40/34 of 29 November 1985.

32 De Greiff (n 9) 470.

right to reparation under international law. Rather, states, which were the subject of international law, had the right and obligation of receiving and making reparation, respectively.³³ In international law, reparation is often interpreted by states in the generic sense to include all forms of redress, that is, procedural and substantive, to gross violations of human rights which may not necessarily be reparative. Thus, in situations of gross violations of human rights, the general rights to reparation of victims are highly controverted. However, the provision of the Rome Statute has laid this controversy to rest in so far as core international crimes are concerned.

The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNPR)³⁴ provide, broadly, for the rights of victims of 'serious' or 'gross' violations of both international human rights law and international humanitarian law to an effective remedy,³⁵ and specifically the rights of victims to 'adequate, effective and prompt reparation for harm suffered'.³⁶ This suggests that the right to reparation is only afforded to victims who have suffered from 'gross' or 'serious' breaches of the international human rights law or international humanitarian law. This further infers that the right to reparation may only be applicable to such victims who have incurred harm resulting from the required threshold of seriousness or gravity of violation in the context of the provisions of the UNPR. The UNPR gives no further insight as what may be considered 'gross' or 'serious' violations.³⁷

33 Previous international criminal law statutes such as the Charter of the International Military Tribunal at Nuremberg (IMT/Nuremberg Charter) agreed upon in the London Agreement of 8 August 1945, Charter of the International Military Tribunal for the Far East (Tokyo Charter) by special proclamation of the Supreme Commander of the Allied Powers of 19 January 1946, and later international humanitarian law documents such as the four Geneva Conventions made no clear provisions relating to victims' rights other than being witnesses. At best victims could rely only on domestic legal provisions in respect of remedies for civil wrongs.

34 A/RES/60/147 of 16 December 2005.

35 Principle 3(d) UNPR (n 34).

36 Principle 11(b) UNPR. The UN Declaration of Justice, which may be regarded as a predecessor document to the UNPR, generally infers the rights of victims to reparations by providing for victims' rights to restitution and compensation in criminal cases and cases of abuse of power. Also, the United Nations Declaration on Enforced and Involuntary Disappearances establishes state obligations to investigate crimes and compensate victims and the in cases of forced disappearances. The obligation to compensate may be inferred as creating a right to receive compensation in such cases. International Convention for the Protection of All Persons from Enforced Disappearance adopted 20 December 2006 and entered into force 23 December 2010.

37 The qualification of the violation with words such as 'gross' or 'serious' suggests that there may be violations that may be considered 'unserious'. Certainly, core crimes are serious and gross violations that clearly are within the contemplation of the UNPR.

The term 'effective remedy' broadly covers a wide range of victims' rights, which have been categorised into procedural rights to justice and substantive remedies to victims for injuries inflicted owing to the violations committed against them.³⁸ The term 'effective remedy' may be interpreted as access of victims to factual information regarding the violations perpetrated against them, access to justice and reparation for harm inflicted on the victim. This interpretation is equally applicable to the use of the term in other international human rights legal documents, as discussed above.³⁹ In pursuance of this right, the victim is entitled to a certain ancillary right which arises by reason of the right of the victim to receive reparation. Victims have a right to relevant information regarding the violations perpetrated against them and the reparations mechanism available to them.⁴⁰ Victims who have suffered some form of violence or trauma must be afforded 'special consideration and care' to prevent re-traumatisation in the course of providing justice and reparation to them.⁴¹ Thus, the UNPR extends the right to reparations to victims beyond specific cases, as observed in previous human rights documents.

In respect of victims' rights to reparations, the UNPR creates legal obligations on states to provide reparation to victims for violations that may be attributed to states, whether actively as 'acts' or passively as 'omissions'.⁴² The UNPR identifies victims' rights to reparation in a broad sense to include victims' rights to justice and their rights to truth.⁴³ Although such broad construction may only point to other forms of transitional justice mechanisms that may not necessarily fall under reparations, it only points to other ideals that reparation may promote and protect. The right to truth may aptly fit the work of a truth commission, while the right to justice may generally embrace all forms of transitional justice processes which may embody prosecutions. Hence, the UNPR recognises the possibility of a concurrent operation of both reparations and other forms of transitional justice that may offer justice to the victims.

38 J Garcia-Godos 'Victim reparations in transitional justice – What is at stake and why?' (2008) 26 *Nordisk Tidsskrift for Menneskerettigheter* 115. According to the UN Human Rights Committee, the term 'effective remedy' includes reparation. UN Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 15.

39 Although De Greiff argues that the term 'effective remedies' as contained in many of the human rights documents appears vague and may need further clarification through judicial interpretation, Shelton opines that most human rights documents guaranteeing the right to an effective remedy can be interpreted to include both a procedural and substantive right to a remedy. In effect, it could be deduced that reparation is essentially the substantive remedy made available to the victim. De Greiff (n 9) 455; Shelton (n 18) 58.

40 Principle 11 of the UNPR.

41 Principle 10 of the UNPR.

42 Principles 15 and 16 of the UNPR.

43 Principle 24 of the UNPR.

While various international and regional legal instruments such as conventions and treaties establish the substantive right to reparations and provide for binding obligations on states, the UNPR, on the other hand, provides useful suggestions on the means to fulfil their obligations, hence the exhortatory nature of the UNPR. The provisions on the right to reparation contemplate both substantive and procedural rights of victims. Hence, victims have a right to access effective means by which they may obtain reparation and, in the same vein, the right to actual adequate, effective and prompt reparation. Although the UNPR is soft law which creates no binding obligations, its provisions make relevant and insightful provisions that affirm provisions of binding international legal instruments and may provide reference for a prospective general right to reparation.

3 Rome Statute and victims' rights to reparation

The provisions of article 75 of the Rome Statute are sacrosanct in respect of reparation to victims in international criminal law. The Rome Statute expressly grants victims of core international crimes the right to make applications for reparations to the ICC. It confers on the Court the right to at its own volition grant reparative reliefs to victims before the Court even where victims make no initial application to the Court.⁴⁴ In furtherance of the victims' right to reparations, the Victims Trust Fund may also provide reparations to victims of international core crimes within the jurisdiction of the Court.⁴⁵ Thus, the Rome Statute recognises that reparation in the context of international criminal law incorporates both court-ordered and administrative reparations to victims. From the provisions of the Rome Statute, a sequel to the right to reparation is the right of victims to present their views and concerns before the Court.⁴⁶ The Rome Statute provisions in respect of reparations provoke questions in relation to the obligations of state parties to recognise this right in their respective jurisdictions. Would the states be obliged to recognise victims' rights to reparation in the same context as the Rome Statute?

The right to redress of a person for a wrong suffered as a result of the action of another is well established in most domestic legal

44 This is a significant shift away from the general rule in domestic jurisdictions such as that of Nigeria that the Court is not 'Father Christmas' who will grant orders that have not been expressly prayed before the Court, although this rule is not without exceptions.

45 Rule 98(5) of the ICC Rules of Procedure and Evidence.

46 Art 68 Rome Statute.

systems.⁴⁷ Apart from being deeply rooted in traditional practices of the criminal justice system which preceded the formal criminal justice system, it has a legal basis in the civil law of torts.⁴⁸ It is also a trite principle of the law of torts which is domiciled in the civil justice system. The legal principle which affords victims the right to redress is well captured by the Latin maxim *ubi jus ibi remedium* which literally means 'where there is a wrong, there is a remedy'.⁴⁹ This principle is the bedrock of remedies for wrongs in the law of tort and is further enunciated in the English case of *Ashby v White*.⁵⁰ Although it may be argued that the principle cannot be construed to mean that there is a remedy for every possible wrong, as there are limitations to the application of this principle both in common law and equitable jurisdictions, the law leaves no room for the wrongful invasion of rights. Hence, it may be argued that the concept of reparation is built on the same principle although with marked differences in operation and application.

Therefore, states' obligations to provide reparation to victims in their jurisdictions are in tandem with their obligations under the Rome Statute and the legal principle of *ubi jus ibi remedium*. From international human rights and humanitarian law perspectives, the obligation to provide reparation to victims can equally be argued. Victims of core international crimes are inextricably victims of massive violations of human rights. The crimes are against the individual victims as much as they have collective state and global concerns. The provisions of the international human rights and humanitarian law documents clearly not only create a right to reparation for victims but also a corresponding obligation on states to implement the right in line with their domestic laws and policies, hence states have this obligation to victims within their jurisdictions.

47 Bassiouni states that there is no legal system known to humankind that ever denies the right of a victim to redress for wrongs suffered. Bassiouni (n 3) 207. However, Bassiouni consistently referred to the right to redress as a right embedded in a private claim, ie, the claim does not lie against the state as the collective entity but against the perpetrator/offender.

48 TO Olukayode 'Traditional versus modern judicial practices: A comparative analysis of dispute resolution among the Yoruba of South-West Nigeria' (1998) 23 *African Development* 212; OO Elechi, SVC Morris & EJ Schauer 'Restoring justice (ubuntu): An African perspective' (2010) 20 *International Criminal Justice Review* 73.

49 The Latin expression has also been interpreted to mean 'where there is a right, there is a remedy'; per Marshall CJ in *Marbury v Madison* (1803) 5 US 1 *Cranch* 137 163-166.

50 (1703) 92 ER 126. Holt CJ's *dictum* that 'it is a vain thing to imagine a right without a remedy: for want of right and want of remedy are reciprocal' has often been quoted by Nigerian courts to reiterate the right of a victim to redress.

4 Reparation for victims of crimes in the administration of criminal justice in Nigeria

In the context of large-scale human rights abuses, there are no existing domestic provisions that recognise or conceptualise reparation as a component of the Nigerian criminal justice system. At transition to a democratic system of government in 1999, Nigeria had received a recommendation from the Human Rights Violations Investigation Commission (commonly referred to as the Oputa Panel)⁵¹ for reparations to victims of human rights abuses of repressive military regimes, which was largely ignored.

Victims of crime in Nigeria are generally neglected and relegated as an extension in the prosecution's case in the administration of criminal justice in Nigeria. Fragmentary provisions in the preceding criminal statutes, such as the Criminal Code and the Penal Code, the Criminal Procedure Act (CPA)⁵² and the Criminal Procedure Code (CPC),⁵³ provide for restitution of stolen property and compensation, which are merely 'compensatory' and not necessarily reparative. The Administration of Criminal Justice Act 2015 (ACJA) makes a more commendable attempt at victims' reparation in relation to domestic crimes, although limiting it to compensation and restitution.⁵⁴ In spite of the innovative provisions of the ACJA, the concept of

51 The inaugural speech of the President on the mandate of the Commission as referenced in the report; HVRIC Report: Synoptic Overview 9, <http://www.justiceinperspective.org.za/images/nigeria/Nigeria%20Oputa%20Recommendations.pdf> (accessed 8 May 2021). The Oputa Panel was a similitude of a truth commission established by the successive democratic government after transition from long years of military regime in Nigeria.

52 Sec 261 of the CPA provides for compensation or an award of damages to the victim where the main charge of theft or receiving stolen property cannot be sustained against the accused person but establishes a civil offence of wrongful conversion or detention of property and the amount awarded is not more than N20 Naira (almost one-thirtieth of a dollar). Apart from being obsolete and grossly irrelevant in light of modern-day realities, the provisions of the CPA in no way are altruistic to promoting the interests of victims of crime, neither are they protective of their right to reparation for the injuries suffered because of crime. Sec 267 provides for restitution of land to a victim who has been unlawfully dispossessed of it. Sec 270 provides for restitution of stolen property and, upon return, sec 268 provides for reimbursement of an innocent purchaser of stolen property. However, sec 270's provision does not seem like restitution channelled to redress the victim's loss. One of the requirements states that victim may have to pay a certain sum to the person in whose possession the stolen property was recovered, and this does not qualify as restitution, but at best it may be regarded as 'buying back'.

53 Secs 365 and 360, 367 of the CPC provide that a court may award compensation to the victim in addition to an imposition of a fine on the accused and restitution of property respectively.

54 Some states of the federation that have adopted and adapted the provisions of the ACJA have equally included the provisions regarding compensation and restitutions in their various laws. However, in reality prosecutors do not even pursue such provisions on behalf of victims. Prosecutors are often minded with obtaining a conviction against the offenders. It remains to be seen what the courts' disposition will be to the particular provision of the law.

reparation to victims of crimes generally remains largely elusive, although it may be argued that the provisions of the ACJA implicitly suggest that victims have a right to some form of reparation. A more explicit recognition of a victim's right to reparation appears in the Criminal Justice (Victim's Remedies) Bill 2011, which was never passed.⁵⁵ The ACJA empowers the court, irrespective of the limits to its civil or criminal jurisdiction, to award compensation, restitution or restoration of property to victims or victims' estates against the accused/defendant or even the state.⁵⁶ By virtue of the provisions of the ACJA, the obligation to provide reparations lies with the defendant primarily; however, the Act also contemplates an award against the state. This only suggests that the state may be equally liable to provide reparation to victims of crime although the nature and scope of state's liability is not explicit on the face of the provisions.

There are two possible interpretations to the provisions of the Act. First, the state may be liable where it is adjudged the 'offender' through its agents. The second possible interpretation contemplates a situation where the defendant is unable to discharge his liability to the victim in reparations, due to bankruptcy or such other reasons that may render him incapable. The state becomes liable to discharge the defendant's liability while the defendant remains liable to the state in a fashion similar to the ICC reparation system. Whichever interpretation is adopted, the general notion is that the state is also responsible to victims in reparation, especially with regard to the forms of reparation which are solely within the purview of the state's power, such as a guarantee of non-repetition. Sections 314 and 321 of the ACJA expressly refer to compensation or restitution in favour of the 'victim' or 'victim's estate'. In another breath, section 319 refers to compensation to 'any injured person' specifically ordered against

55 This Bill is subsequently referred to as the Bill/Victims' Bill/VBR Criminal Justice (Victim's Remedies) Bill 2006 and 2011 respectively. The 2011 Bill contained 74 sections divided into two parts. The first part dealt with victims' rights while the second part dealt with a national compensation scheme to make an *ex gratia* award to victims of violent crimes.

56 Sec 314(1) of the Administration of Criminal Justice Act includes 'the state', specifically. Apart from compensation and restitution, the ACJA makes a provision regarding restoration of property to a victim who was forcefully disposed by the defendant in sec 336. Even though secs 340 to 342 refer to restitution of property, but refer to persons 'who appear to be the owner' of the property who may not necessarily be victims of crime, hence, this may not be deemed reparation. The ACJA also makes a similar provision to the provision of sec 261 of the CPA by providing for restoration of property to the person entitled to it where a criminal charge cannot be sustained but a civil case of wrongful conversion or detention of property is established. Sec 328 of the ACJA. Where there is a conditional discharge or dismissal of the charge against the defendant, the court is empowered by secs 454(3) and (4) of the Act to order compensation or restitution instead of a conviction or refer to 'a person' who has suffered loss owing to the act or omission of the defendant.

the accused/defendant. It is unclear whether the provisions above refer to the victim and injured party as one and the same person. However, it may be safely concluded that the provisions contemplate the meaning of a victim and an injured person differently from each other as the Act offers no definition for either term. In addition to victims and injured persons, '*bona fide* purchasers for value' may also be awarded compensation.⁵⁷ Compensation in the context of the ACJA seems to refer to pecuniary forms of compensation. A compensation order may be made irrespective of other court impositions on the accused persons in the form of fines or and criminal sanctions.

4.1 Defining a victim in the criminal justice system

There is no general statutory definition specifically ascribed to victims of crime. The construction of the term 'victim' in a criminal context is usually based on the statutory provisions criminalising the alleged act or omission. However, the Criminal Justice (Victim's Remedies) Bill 2011 (VBR) attempts to define a victim in line with the provision of the UNPR.⁵⁸ According to the Bill, 'victim' means a person or group of persons on whom harm has been inflicted individually or collectively, resulting from the perpetration of a crime, or their immediate family or dependants, guardian or ward. A persons on whom harm has been inflicted while intervening to assist victims in distress is also regarded as a victim. It is immaterial that the victim has any familial relationship with the offender or that the offender has not been identified, apprehended, prosecuted or convicted.⁵⁹ Specific legislations such as the Violence Against Persons (Prohibition) Act 2015 (VAPP Act) define victims along the same lines as the proposed Bill.⁶⁰ It is notable that the VRB considers a child that is born to a deceased victim after his demise an indirect victim, provided that he would have been a dependant of the deceased victim if he had not died. Although this construction of a victim

⁵⁷ Sec 319(1)(b) ACJA.

⁵⁸ Principle 8 of the UNPR (n 34) defines victims as 'persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions ... Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.' As in the case of other international legal documents, the UNPR defines victims in the context of actions/omissions that it criminalises. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 defines a victim in similar terms in Principles 1 and 2.

⁵⁹ Sec 3 VBR.

⁶⁰ Sec 46 of the Violence Against Persons (Prohibition) Act 2015 (VAPP Act) defines victims in similar terms and further categorises harm in terms of physical, emotional, economic injury or substantial impairment of the victim's fundamental human rights, just as the Bill also defines harm in sec 3(1).

is exclusively applicable to the provision in Part II, it is instructive that the Bill contains extensive provisions with reference to victims. Hence, it may be construed that a foetus, by extension, may be regarded as a victim. A person other than a law enforcement agent is also regarded as a victim where he suffers injury or dies in the course of arresting a suspected offender or preventing the commission of crime or further damage resulting from the crime.⁶¹

The definition of a victim in the context of international criminal law does not elicit much difference. The Rome Statute makes no express provision for the definition of a victim. The ICC has adopted the conventional definition of victims, regarding them as natural or juridical persons on whom harm has been inflicted, owing to the perpetration of any of the crimes within the jurisdiction of the Court.⁶² It may seem that this definition appears wide and general. However, it is contextualised within the jurisdictional crimes of the Court. Thus, victims of other international crimes will not be regarded as victims before the Court. Further, the definition reveals that the conceptualisation of victim in international criminal law follows the concept of harm occasioned by crimes prohibited. With respect to reparation, the ICC further narrows the concept of a victim through eligibility criteria and the conviction of the accused.⁶³ Hence, a victim is seen along the same lines in both domestic and international contexts. In both instances victims are defined in the context of the acts or omissions prohibited by law. Although the ICC recognises juridical victims, it is not clear whether the Nigerian criminal laws recognise juristic persons as victims.

5 Recognising the right to reparation for victims of core international crimes in Nigeria

Attempts to domesticate the Rome Statute have repeatedly been unsuccessful as Bills to domesticate it are usually introduced and abandoned at the national legislative house.⁶⁴ The latest Bill is

⁶¹ Sec 37(3) Victim's Bill.

⁶² Rule 85 of the International Criminal Court Rules of Procedure and Evidence. In the case of *The Prosecutor v Thomas Lubanga Dyilo* the Court held that victims are those whose harm and personal interest are connected with the charges against the accused before the Court.

⁶³ *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Eng, <https://www.icc-cpi.int/drc/lubanga/Documents/lubangaEng.pdf>. (accessed 30 March 2021); *The Prosecutor v Germain Katanga* ICC-01/04-01/07 Eng, <https://www.icc-cpi.int/drc/katanga/Documents/katangaEng.pdf>. (accessed 30 March 2021); *The Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15, <https://www.icc-cpi.int/mali/al-mahdi/Documents/al-mahdiEng.pdf> (accessed 30 March 2021).

⁶⁴ There have been four differently-proposed Bills aimed at domesticating the Rome Statute in 2001, 2006, 2012 and 2016, the recent being 2016 respectively.

the Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill (2016).⁶⁵ The Bill neither makes any significant provision for reparation to victims, nor does it define who a victim is, although it recognises the families of victims. Ironically, the Bill makes provision for the national enforcement of a reparation order by the ICC but there is no concrete provision regarding domestic reparation to victims.⁶⁶ The Bill provides for a trust fund for victims, the funding of which is dependent on the forfeiture orders and fines ordered by the Court, but otherwise there is no provision as to the funding of the trust fund.⁶⁷ The Bill suggests that the accused forfeits his assets to the Special Trust Fund where the Court so determines. This seems to be the only express provision regarding funding of the trust fund.

The functions of the trust fund are totally unclear from the provisions of the Bill. Although the Bill states that the trust fund is to be established for the 'benefit of the victims and families of the victim' and victims are entitled to 'compensation, restitution and recovery for economic, physical and psychological damages' from the Special Trust Fund for Victims, it does not state how the trust fund may execute its functions for this purpose.⁶⁸ It may only be inferred that victims of core international crimes in Nigeria have a right to pursue some form of reparation. While the Bill presupposes a right, it is not clear what procedural steps victims may follow to access this right. Victims have the burden of instituting a civil action, presumably to claim reparations against 'appropriate parties'. The Bill provides no clarification of who such 'appropriate parties' might be but, in the same breath, it suggests that victims are entitled to receive reparation from the Special Trust Fund.⁶⁹ The Bill simply states that victims may institute a civil action against 'appropriate parties'. Assuming – but not conceding – that the term 'appropriate parties' refers to the accused, can it also be inferred that the accused alone bears the burden of reparation to victims? In the alternative, since the term 'appropriate parties' is in the plural suggesting more

65 The 2016 Bill was a Bill to provide for the enforcement and punishment of crimes against humanity, war crimes, genocide and related offences and to give effect to certain provisions of the Rome Statute of the International Criminal Court in Nigeria. The Bill titled Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill (2016), however, has not moved beyond the National Assembly.

66 Sec 84 Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill (2016).

67 Sec 93 of the proposed Bill makes provision for a Special Trust Fund for victims without any elaborate provisions regarding the functions of the Trust Fund. According to the provisions of sec 93(2) of the Bill, upon conviction the Court can only order forfeiture of the offender's declared assets to the Special TFV.

68 Secs 93(1) and (6) of the Bill.

69 Sec 93(6).

than one, would it be safe to conclude that the Bill contemplates parties other than the accused?

It is difficult to overlook other manifest flaws and inadequacies in the provisions of the Bill. First, victims of core international crimes may have no respite with regard to reparation. The Bill does not guarantee realistic and accessible means for victims of crimes of such magnitude to receive reparations for the harm they have suffered in the criminal justice system. Aside from the inherent trauma in standing as witnesses for the prosecution's case against the accused, victims have the additional burden of instituting a separate legal action at their cost. Given the probable financial, psychological and vulnerable position of victims of core international crimes, the inherent diversity of their claims and the attendant difficulties that trail civil actions in ordinary cases, the practical feasibility of the provision is almost non-existent.

On the other hand, the VBR aptly identified and guaranteed victims' pre-trial, trial and post-trial rights, which are in line with the provisions of UN Declaration and the Basic Principles. The pre-trial rights of victims included the rights to immediate assistance;⁷⁰ information on available pre-trial services; progress of the investigation; a decision not to prosecute and release of the offender on bail;⁷¹ immediate repossession of property;⁷² and the right to confer with the prosecutor.⁷³ Although there was no express provision for victims' participation in criminal proceedings, in the Bill, during trial victims have a right to be present at all times throughout the trial proceedings⁷⁴ and give evidence of the injury or damage suffered during trial either personally or through other witnesses.⁷⁵ A victim who is not a prosecution witness has the right to apply to the Court. Thus, the Bill granted restricted participation to victims in order to establish the nature and extent of injury, loss or damage for the purpose of restitution or compensation.

Apart from being a witness for the prosecution and making presentations on his injury or damage, the victim may not actively participate in the criminal proceedings except for his right to be present. This is similar but substantively different from the practice at the ICC where victims actively participate in the criminal proceedings

70 Sec 4 VBR.

71 Secs 5-6, 7 12 and 13 VBR respectively.

72 Sec 8 VBR. Sec 10 of the same Bill conferred on the victim the right to apply for the return of the victim's property recovered during investigation.

73 Sec 11 VBR.

74 Sec 12 VBR.

75 Secs 21-22 VBR.

besides making representations for reparation. Although the Bill made no further procedural provisions with respect to the actual modalities of such presentation by the victim, it is presumed that such presentation may be made alongside the prosecution case although independently of the case. The provision of the Bill suggests that such presentation may be made at any time before the sentencing stage.⁷⁶ Nothing in the Bill suggests that the prosecution will be involved in assisting the victim to make his presentations, except where it relates to the enforcement of a reparation award by the court.⁷⁷ However, recourse may be made to the practice at the ICC where victims have a separate legal representative who makes presentations to the Court on their behalf during the reparation proceedings. Following the experience of the ICC, allowing victims to participate in criminal proceedings would not significantly affect the proceedings, such as unduly delaying the accused's trial.

A significant provision of the Bill relates to some form of reparation award to victims during trial which, although limited to compensation and restitution, obviates the need for victims to institute a separate civil action for remedies.⁷⁸ The Bill made express provision for a similitude of juridical reparation in Part I thereof.⁷⁹ The provision for *ex gratia* payments in Part II of the Bill, via the Criminal Injuries Compensation Tribunal, cannot in any way be described as reparations to victims of crimes.⁸⁰ The title already suggests that such payments are not obligatory for the state but voluntary. The limitation on the period of application and amounts payable in light of the scope of the award clearly steer the provision off reparative content.⁸¹ Reparations are neither voluntary nor can they be limited to mere payments as suggested by the tone of the wording of Part II of the Bill. The maximum of N10 000 contrasts starkly with the provision of the first part of the Bill, which seems to accord some form of significance and dignity to victims of crimes.⁸²

76 Sec 22 VBR.

77 By virtue of the provisions of sec 31 of the VBR, the prosecutor may enforce an order for reparation to the victim on his behalf.

78 Sec 26 VBR.

79 Secs 1-36 VBR.

80 The Bill established a Criminal Injuries Compensation Board which oversees the compensation programme and the activities of the Tribunal. Sec 44 VBR.

81 Sec 53 of the VBR clearly placed a limitation of one year within which a victim may apply for *ex gratia* payments while the operation of the Act cannot be backdated to apply to crimes committed before its commencement. Sec 56 states that the Tribunal cannot make an award in excess of 10 000 Naira. However, given the interpretation ascribed to injury in sec 37(1) and the very wide categories of criteria that the Tribunal must consider in assessing a victim's claims, outlined in sec 58 of the Bill, it is ironical and inimical to victims' rights that the Bill placed such a limitation on time and amount payable.

82 Following the exchange rate as at September 2020, the value of the maximum amount is the paltry sum of US \$26. It is practically difficult to concur that such

It appears that while the provisions on reparation in the Bill might have been gleaned from the Rome Statute on reparation, the drafters seem to avoid the use of the word 'reparation' while limiting the remedies available to the victims to compensation and restitution. Following the meaning ascribed to restitution, which simply implies replacement, it possibly may not cater for the restitutive need of the victim.⁸³ Conversely, the Bill proposes a huge improvement in the position of victims in the administration of criminal justice in Nigeria. Unlike the previous position, victims would be active participants in the criminal justice process, although their participation is limited to proceedings that establish the nature and extent of the victim's injury. An important highlight of the Bill is the provision on victims' rights and remedies in the course of criminal proceedings as a guiding principle of the administration of criminal justice in Nigeria.⁸⁴ This represents a significant shift in Nigeria's perception of the criminal justice. The Bill as proposed, however, needs to be reviewed with regard to specific areas in order to extensively protect and guarantee victims' rights in the administration of criminal justice, especially with respect to victims of core international crimes in Nigeria.⁸⁵

6 Recommendations and conclusion

The rights of victims to access justice encompasses their right to reparation. The right to reparation is particularly important to victims of core international crimes, for what is justice to such victims if the harm they have suffered as a result of the crimes perpetrated against them are not repaired? Hence, with the increasing number of victims of core international crimes in Nigeria, it is becoming imperative to consider enshrining their rights to reparation and making adequate provisions to fulfil the right. Nigeria must take the first step in the right direction by recognising that victims of core international crimes are deserving of reparations not only by the magnitude of the harm they have suffered but by virtue of its obligation under the Rome Statute and the established legal principles of *ubi jus ibi remedium*. While it is important to focus on retribution and rehabilitation of repentant offenders, it is equally important to actively engage in repairing the harms perpetrated against the victims directly, in so far

amount will make any significant reparative impacts for victims of violent crimes as purported by the Bill.

83 Sec 73 VBR.

84 Secs 2(e) and (g) VBR.

85 Besides some of the obvious inadequacies of the Bill, the Bill may not have anticipated unforeseen circumstances such as where a victim dies in the course of the application for reparation but before an award is made. There is nothing to suggest that the court or tribunal may countenance the needs of the dependants of the victim in the eventual award of reparation.

as it is possible to do so. Previous attempts at domesticating the core international crimes and also incorporate some form of reparative provisions are commendable but, *prima facie*, these are grossly inadequate. The Bills have failed to comprehensively recognise and capture the essence and concept of reparation to victims of core international crimes.

Core international crimes must be properly domesticated in line with the spirit and intendments of the provisions of the Rome Statute. Nigeria must adopt a definitive legal framework on reparation to victims of core international crimes. The legal framework may include both a juridical and administrative reparation system, which operates differently from juridical reparations obtainable through the courts. In designing such a system, priority must be given to the establishment of a Victims' Trust Fund for the purpose of administering and implementing reparation to victims. The core functions of the trust fund must be clearly defined and stated. The composition and powers must also be clearly stated and be free from ambiguous interpretations.

Second, Nigeria must recognise victims' rights to reparation by making express provision for reparation to victims in its domesticating instrument and including the salient issues discussed with regard to fulfilling victims' rights to reparation. The legal provision must clearly define who a victim is and the substantive and procedural measures for realising the right to reparation. The concept of reparation must be clearly defined to incorporate all five recognised forms of reparation. The provisions of the law must be clear on the type of reparation available to victims. The law must expressly provide victims with the right to access juridical reparation in the criminal justice processes, although via civil proceedings. The model adopted by the ICC is adaptable and can be used within the Nigerian criminal justice system. The burden of pursuing reparations by the victims should not be borne solely by the victims. The cost of legal action and representation should largely be borne by the state.

In addition to legislating on victim's rights to reparation and the attendant procedural issues, the law should be devoid of ambiguities with respect to the obligation for reparation. Clearly, the accused bears the burden of reparation to the victim. However, where the accused is unable to discharge such a burden due to verified indigence, the burden shifts to the state through the trust fund. Hence, the law must be clear on the funding of the trust fund. Besides funding through forfeited assets and funds of the accused, contributory funding by the state should be expressly provided for. Contributions may be

received from the states of the federation as well as from voluntary donations by international and non-governmental organisations that so desire.

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The impact of climate change on economic and social rights realisation in Nigeria: International cooperation and assistance to the rescue?

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Summary: *The role of international cooperation and assistance in the realisation of economic and social rights has not been given sufficient attention in existing literature. It is also quite concerning that, although the impact of climate change has dominated scholarly debates in recent times, most of the discussions focus on environmental and economic perspectives, with scanty reference to its specific impact on the realisation of economic and social rights. However, the fact is that climate change not only alters the environment, but also adversely affects the realisation of economic and social rights of people, especially the most vulnerable groups of society. This article appraises these adverse*

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effects of climate change in Nigeria and argues for an international cooperation approach towards mitigation and adaptation mechanisms. Drawing on several United Nations human rights and climate change instruments, the article theorises 'contributory and legally obligatory grounds' to affix an international obligation to developed countries in favour of developing countries such as Nigeria, in the latter's efforts to address the socio-economic impact of climate change. However, it notes that international cooperation is complementary, not substitutive of the Nigerian government's obligation to realise economic and social rights with locally-available resources.

Key words: *climate change; economic and social rights; impact; international cooperation; Intergovernmental Panel on Climate Change*

1 Introduction

Without a choice, the world has come to accept climate change with its ferocious effect on virtually every aspect of human life. It has become 'an undeniable environmental threat of the 21st century which the world is currently experiencing and seeking measures to adapt and mitigate its impact'.¹ According to the International Federation of Red Cross (IFRC) '[c]limate change is here to stay and will accelerate'.² Thus, from environmental discourse to socio-economic development studies, it is commonly agreed that the change in climate has its attenuating effect on the day-to-day living conditions of people. These negative effects are more pronounced in the Global South, where people live in acute poverty and where climate change has radically affected their means of livelihood.³ It has also been established that climate change particularly affects those who are socially, economically, culturally, politically or institutionally marginalised or vulnerable.⁴ The African continent, where Nigeria is geographically located, has been described as 'one of the most vulnerable continents due to its high exposure and low adaptive capacity'.⁵ In spite of states' commitments under several

1 NE Ebele & NV Emodi 'Climate change and its impact in Nigerian economy' (2016) 10 *Journal of Scientific Research and Reports* 2, <http://www.journaljsrr.com/index.php/JSRR/article/view/21917/40737> (accessed 8 July 2020).

2 IFRC 'Aggravating factors: Climate change', <https://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/aggravating-factors/climate-change/> (accessed 8 July 2020).

3 Intergovernmental Panel on Climate Change (IPCC) 'R5 climate change 2014: Impacts, adaptation, and vulnerability' IPCC's Working Group II's 5th Assessment Report (AR5) 1205.

4 Ebele & Emodi (n 1) 6.

5 IPCC (n 3) 1205.

treaties to, for example, 'achieve ... stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'⁶ or to minimise temperatures 'well below 2°C' so as to 'pursue efforts to limit the temperature increase to 1,5°C',⁷ the present reality across the globe does not seem to evince a positive outcome of these commitments. Thus, it has been noted with great concern that 'states' current commitments ... are insufficient to limit global warming to 1,5°C and that many states are not on track to meet their commitments'.⁸

Although there are several independent and related effects of climate change in terms of environmental and economic challenges, there is a need to specifically situate its impact in the economic and social rights context. According to the United Nations (UN) Intergovernmental Panel on Climate Change (IPCC) Report, on the African continent 'extensive pressure is exerted on different ecosystems by human activities (deforestation, forest degradation, biomass utilisation for energy) as well as processes inducing changes such as fires or desertification',⁹ and all of these have a negative impact on the realisation of economic and social rights. The more challenging aspect of this issue is the fact that 'without mitigation and adaptation, these impacts will intensify as time progresses'.¹⁰ Recently, the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) observed that 'climate change constitutes a massive threat to the enjoyment of economic, social and cultural rights'.¹¹

This article seeks to articulate the concerns around climate change and the realisation of economic and social rights in Nigeria. To this end, the article appraises the adverse effect of climate change in Nigeria *vis-à-vis* the realisation of some select economic and social

6 Art 2 United Nations Framework Convention on Climate Change (UNFCCC).

7 Art 2 2015 Paris Agreement.

8 'Joint Statement on "Human rights and climate change"' by Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities (19 September 2019), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E#_edn1 (accessed 8 July 2020).

9 IPCC 'AR4 climate change 2007: Impacts, adaptation, and vulnerability' IPCC's Working Group II's 4th Assessment Report (AR5) 442.

10 J Fanzo et al 'The effect of climate change across food systems: Implications for nutrition outcomes' (2018) 12 *Global Food Security* 12.

11 See ESCR Committee Statement on Climate Change and the International Covenant on Economic, Social and Cultural Rights 8 October 2018, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E> (accessed 9 July 2020).

rights, and canvasses for an international cooperation approach towards mitigation and adaptation mechanisms. Drawing on several UN human rights and climate change instruments, the article theorises 'contributory and legal obligation grounds' to affix an international obligation to developed countries in favour of developing countries such as Nigeria, in the latter's efforts to address the socio-economic impact of climate change. Against the backdrop of the developed nations' historical contribution to the anthropogenic causes of climate change and the low effect the change has on them,¹² coupled with the legal obligations under international human rights law instruments, the article situates aid from the developed nations in a human rights-based context. It thus argues that such aid, if given to combat climate change in developing countries, should be seen as a commendable compliance with international human right obligations, not as an act of charity. Of course, this position does not excuse the developing countries' governments, including the Nigerian government, of its economic and social rights obligations to their citizens. Rather, what is argued here is that developed countries should, through international cooperation and assistance, complement their efforts as a matter of obligation. Thus, developing countries should leverage on the window of international cooperation and assistance to bolster their efforts towards providing a social protection safety net to protect the most vulnerable groups from the socio-economic impact of climate change.

The article proceeds in seven parts. While this part introduces the article, part 2 conceptualises climate change and economic and social rights. Part 3 examines the legal framework for economic and social rights in Nigeria, and part 4 assesses the adverse effect of climate change on the realisation of economic and social rights. In part 5 the article explores the role of international cooperation and assistance in the realisation of climate change-impacted economic and social rights, while part 6 examines the role of national and regional bodies in realising economic and social rights in Nigeria. Part 7 concludes the article and summarises the recommendations offered.

12 See DS Ward & NM Mahowald 'Contributions of developed and developing countries to global climate forcing and surface temperature change' (2014) *Environmental Research Letters* 6; MGJ den Elzen et al 'Countries' contributions to climate change: Effect of accounting for all greenhouse gases, recent trends, basic needs and technological progress' (2013) 121 *Climate Change* 397.

2 Conceptual clarification

In this part of the article the authors unpack the key terms 'climate change' and 'economic and social rights' and contextualise the meaning given to these terms in the article.

2.1 Climate change in definitional and causative contexts

According to the UN Framework Convention on Climate Change (UNFCCC) climate change means 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'.¹³ Further, the IPCC defines climate change as 'change in the state of the climate that can be identified (eg using statistical test), by change in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer'.¹⁴ It refers to a long-term shift, an alteration in the type of climate prevailing over a specific location, a region or the entire planet.¹⁵ Although a major feature of climate change is variability, an argument has been put forward that '[t]he most crucial things about the concept of climate change is not only the time periods involved but also the degree of variability that the change is subjected to as well as the duration and impact of such variability on man and the ecosystem'.¹⁶ This implies that the concept cannot be discussed fully without having regard to its impact on human life. Palaeoclimatologically speaking, the world has not really been static but has always gone through changes. These changes have only become of concern lately because of their impact on man and the ecosystem, and this impact differs from country to country.¹⁷ Two major factors have been identified as triggering climate change. These are biogeochemical (natural events and processes) and anthropogenic influences (human activities).¹⁸ Although a detailed discussion of these factors is outside the scope of the article, it is generally agreed among scholars that the

¹³ Art 1(2) UNFCCC.

¹⁴ IPCC 2007.

¹⁵ JO Ayoade *Climate change* (2004) 45-66.

¹⁶ E Ikpe, BA Sawa & LU Ejeh 'Evidence of climate change and adaptation strategies among grain farmers in Sokoto State, Nigeria' (2017) 11 *IOSR Journal of Environmental Science, Toxicology and Food Technology* 1.

¹⁷ AO Jegede 'Climate change as a "constitutional essential": Trend and significance for Africa' in M Addaney & AO Jegede (eds) *Human rights and the environment under the African Union law* (2020) 233; PAO Odjugo 'The impact of climate change on water resources: Global and Nigerian analysis' (2009) 4 *FUTY Journal of the Environment* 59.

¹⁸ Odjugo (n 17) 61.

anthropogenic factors are the major cause of global warming and other climate change situations.¹⁹

2.2 Unpacking economic and social rights

Economic and social rights are a set of rights recognised under international human rights law instruments²⁰ and some national constitutions,²¹ which seek to address the problem of material deprivation in society. In fact, not less than 90 per cent of the 195 constitutions in the world recognise one or the other economic and social right, either in a justiciable or aspirational status.²² Part III of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the flagship treaty on economic and social rights, recognises these rights as including the right to work;²³ the right to just and favourable conditions of work, and fair remuneration;²⁴ the right to form and join trade unions;²⁵ the right to social security;²⁶ the right to the protection of family;²⁷ the right to an adequate standard of living, including adequate food, housing and clothing, and the continuous improvement of living conditions;²⁸ the right to enjoy the highest attainable standard of physical and mental health;²⁹ the right to education;³⁰ and the right to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which a person is the author.³¹

19 HD Matthews et al 'National contributions to observed global warming' (2014) 9 *Environmental Research Letters* 1. Also see J Wang & B Chameides *Global warming's increasingly visible impacts: Environmental defense* (2005); NP Gillett et al 'Improved constraints on 21st-century warming derived using 160 years of temperature observations' (2012) *Geophysical Research Letters* 39.

20 Particularly the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

21 Although the Mexican Constitution of 1916 was the flagship constitution to have recognised ESR, the Constitution of the Republic of South Africa debatably stands out as the most promising national constitutional recognition of ESR because of the outright justiciability status it confers on ESR. These rights are also contained, albeit as directive principles, in ch II of the Nigerian Constitution. C Jung, R Hirschl & E Rosevear 'Economic and social rights in national constitutions' (2014) 62 *American Journal of Comparative Law* 1053.

23 Art 6 ICESCR.

24 Art 7 ICESCR.

25 Art 8 ICESCR.

26 Art 9 ICESCR.

27 Art 10 ICESCR.

28 Art 11 ICESCR.

29 Art 12 ICESCR.

30 Arts 13 & 14 ICESCR.

31 Art 15 ICESCR.

3 Legal framework on economic and social rights in Nigeria

Economic and social rights are contained in the Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution) as directive principles. Thus, the provisions of sections 13 to 24 of the Constitution can safely be said to accommodate economic and social rights.³² The section contains economic and social objectives (similar to the economic and social rights provisions in ICESCR) geared towards the promotion of these rights in Nigeria. These provisions reflect the high ideals of a liberal democratic polity and serves as guidelines to action or major policy goals.³³ The economic and social rights, having been described in the Nigerian Constitution as directive principles, were meant to have lesser force than the civil and political rights which the Constitution refers to as fundamental rights.³⁴ Although generally they are not judicially enforceable solely on the basis of their constitutional recognition,³⁵ the Directive Principles provide a yardstick for the critical assessment of government(al) actions,³⁶ and they can be specifically made justiciable by legislative interventions made pursuant to the Constitution.

Section 6(6)(c) of the Nigerian Constitution, which provides that the courts cannot enquire into issues relating to the Directive Principles, equally provides that judicial intervention is permissible where the Constitution provides otherwise. In other words, the judicial powers shall not extend to economic and social rights issues 'except as otherwise provided by this Constitution'.³⁷ The use of the phrase 'except as otherwise provided by this Constitution' indicates that the non-justiciability clause in section 6(6)(c) is not an absolute bar. Section 4 of the Constitution gives the Nigerian legislature the

32 By virtue of sec 6(6)(c) of the Nigerian Constitution, judicial powers do not extend to questions as to whether the Directive Principles have been complied with by government and its agencies, except if it is otherwise provided for by the Constitution.

33 O Agbakoba & U Emelonye 'Test of progressive realisation of economic, social and cultural rights in Nigeria' (1990-1999 Budget Analysis) (2001) *HURILAWS* 1-2, cited in S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 239.

34 See PE Oamen 'The justiciability of economic, social and cultural rights in Nigeria: A call to follow global trends' (2017) 3 *International Journal of Law and Interdisciplinary Legal Studies* 51; R Ako, N Stewart & EO Ekhatior 'Overcoming the (non)-justiciable conundrum: The doctrine of harmonious construction and the interpretation of the right to a healthy environment in Nigeria' in A Diver & J Miller (eds) *Justiciability of human rights law in domestic jurisdictions* (2016) 123.

35 See *Femi Falana v Attorney-General of the Federation* Suit FHC/IKJ/CS/M59/2010 (unreported) delivered on 10 January 2011.

36 BO Nwabueze *Constitutional law of the Nigerian republic* (1964) 408.

37 Sec 6(6)(c) Nigerian Constitution.

powers to make laws for the peace, order and good government of Nigeria or any part thereof.

Thus, despite the general non-justiciability of economic and social rights under the Constitution, in *Attorney-General of Ondo State v Attorney-General of the Federation and Others*³⁸ the Supreme Court of Nigeria held that the Directive Principles (which contain economic and social rights) can become justiciable if the constitutionally-recognised legislature (for instance, the federal legislature – the National Assembly) makes a specific legislation which recognises these rights as justiciable. Put differently, where a particular statute specifically provides that economic and social rights are justiciable, it would not be a good argument to state that the economic and social rights are constitutionally non-justiciable, provided that the statute was passed in accordance with the constitutional legislative authority, power and procedure.³⁹ There are a number of statutes that can pass this test.

One major statute in this regard is Nigeria's African Charter on Human and Peoples Rights (Ratification and Enforcement) Act⁴⁰ which domesticates the provisions of the African Charter on Human and Peoples' Rights (African Charter). The Charter provides for clearly justiciable economic and social rights,⁴¹ and article 24 provides for a climate change-related right by guaranteeing everyone's right to a 'general satisfactory environment favourable to their development'. Thus, the Nigerian Supreme Court held in *Abacha v Fawehinmi*⁴² that the African Charter (and *a priori* the African Charter Ratification and Enforcement Act) not only is binding on Nigeria but that it also enjoys superiority over all domestic laws, except the Constitution. The apex court impliedly gave a stamp of justiciability to economic and social rights in Nigeria by virtue of the provisions of the domesticated African Charter. Also, in *Gbemre*⁴³ the High Court held that the applicant's right to health, and a healthy and satisfactory environment under articles 16 and 24 of the African Charter, were

38 (2002) 9 NWLR (Pt 772) 2; *Federal Republic of Nigeria v Anache & Others* (2004) 3 MJSC 1; *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation* (2019) 5 NWLR (Pt 1666) 518.

39 Sec 4 of the Constitution gives the legislature the power to make laws for the peace, order and good governance of Nigeria.

40 Cap A9, Laws of the Federation of Nigeria, 2004.

41 See arts 14-17 of the African Charter.

42 (2000) 6 NWLR (Pt 660) 228; *Ogugu v State* (1994) 9 NWLR (Pt 366) 1.

43 *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005) AHRLR 151 (NgHC 2005). Also see *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/0808.

justiciable. The *Gbemre* case is notable as it is one of the earliest climate change-implicated cases in the world.⁴⁴

However, Enabulele and Ewere have criticised the judicial reasoning in the *Fawehinmi* case, which criticism can affect the commendable judicial decision in *Gbemre* case. According to these scholars,

The ACHPR (Ratification and Enforcement) Act cannot allow what the CFRN [Constitution of the Federal Republic of Nigeria] has prohibited in Nigeria; the Constitution having made the aforementioned ESC rights non-justiciable, the ACHPR (Ratification and Enforcement) Act cannot make them justiciable ... the ACHPR (Ratification and Enforcement) Act ranking secondary to the Constitution under Nigeria law, it could be concluded that ESC rights, having been made non-justiciable by the Constitution, cannot be litigated before a Nigerian Court through the ACHPR (Ratification and Enforcement) Act.⁴⁵

To summarise, the above scholars' argument is that, by virtue of the supremacy of the Constitution,⁴⁶ which was recognised by the Court itself in the *Fawehinmi* case, the economic and social rights provisions in the African Charter remain non-justiciable since the Charter is inferior to the Constitution. While we agree with the authors as to the superiority of the Constitution, we depart from their reasoning on the justiciability of economic and social rights in Nigeria, pursuant to the African Charter. To be clear and, as noted above, the constitutional bar on the justiciability of economic and social rights in Nigeria is not absolute. Section 6(6)(c) which makes them non-justiciable provides that they remain non-justiciable 'except as otherwise provided by this Constitution'. Further, as stated above, section 4(2) of the Constitution gives the federal legislature the power to make laws for the peace, order and good government, in which economic and social rights matters are included. Arguably, it was pursuant to this power that the Nigerian National Assembly passed the African Charter (Ratification and Enforcement) Act.⁴⁷

44 D Esrin & H Kennedy 'Achieving justice and human rights in an era of climate disruption' International Bar Association Climate Change Justice and Human Rights Task Force, International Bar Association (2014) 83; OO Olashore 'Implementation of the international legal framework regarding climate change in developing countries: A review of Nigeria, Kenya, and Botswana's environmental provisions governing climate change' (2019) 21 *Environmental Law Review* 199.

45 AO Enabulele & AO Ewere 'Can the Economic Community of West African States Community Court of Justice enforce the African Charter replicas of the non-justiciable chapter II human rights provisions of the Nigerian Constitution against Nigeria' (2012) 1 *International Human Rights Law Review* 322-324.

46 Sec 1(1) of the Constitution states that the Constitution is supreme and binding on all persons and authorities.

47 As at the time the Act was passed, the 1979 Constitution was in operation, but its sec 4(2) and the extant sec 4(2) are identically framed.

Therefore, it is argued that, by conferring law-making power on economic and social rights matters and all other matters on the legislature, section 4(2) serves as an exception envisaged by section 6(6)(c). We argue that any product or outcome of the section 4-inherited law-making power and process enjoys the same exception and thus are unaffected by the non-justiciability provisions in the Constitution. We are not unmindful of the provision of section 1(3) of the Constitution which states that any law that conflicts with the Constitution shall be null and void. However, we argue that our present analysis is not caught by section 1(3) as the constitutional non-justiciability of economic and social rights is not absolute.

The phrase 'except as otherwise provided by this Constitution' could not have been inserted in section 6(6)(c) for cosmetic reasons or for no reason. Since the Constitution nowhere expressly provides for the justiciability of economic and social rights, it is arguable that what the law makers had in mind when inserting the phrase in section 6(6)(c) was section 4 and item 60(a) of Part I of the Second Schedule to the Constitution which give the legislature the power to make these rights justiciable. Thus, we argue that the African Charter Ratification Act is unaffected by section 6(6)(c). It rather is an exception to the rule in that section. This reasoning perhaps influenced the decision of the Supreme Court in the above-mentioned *Ondo State* case.⁴⁸ Therefore, it is safe to conclude that economic and social rights are justiciable in Nigeria.

The above arguments notwithstanding, climate change litigation has not been sufficiently explored to push for the realisation of economic and social rights in Nigeria. As Etemire notes, 'climate change litigation is in its infancy in Nigeria',⁴⁹ and the obstacles to climate change litigation have been identified as including 'the lack of an adequate climate legislative regime, an unduly restrictive standing rule and a discouraging judicial posture'.⁵⁰

Having said that, the recent Supreme Court decision in *Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation (NNPC)*⁵¹ has clearly heralded a robust climate change litigation opportunity in Nigeria. In that case the apex court not only upheld the contention that oil companies (both public and private) in Nigeria have a duty to prevent environmental degradation or oil

48 *Ondo State* (n 38).

49 U Etemire 'The future of climate change litigation in Nigeria: *COPW v NNPC* in the spotlight' (2021) 2 *CCLR* 158 165.

50 As above.

51 (2019) 5 *NWLR* (Pt 1666) 518.

spillage, but also widened the scope of those who can challenge such degradation in court. The Court observed that the instant suit was a public interest litigation and, as such, the appellant non-governmental organisation (NGO) had the *locus standi* to institute the case. This is a novel and welcome development, because before this case 'NGOs could not successfully access the Nigerian courts to protect the environment'.⁵²

With this apex court's decision in the *COPW* case, the future of climate change litigation looks bright, since 'every person, including NGOs, who *bona fide* seek the due performance of statutory functions or enforcement of ... public laws designed to protect human lives, public health and environment, should be regarded as proper persons clothed with standing in law to request adjudication on such issues of public nuisance'.⁵³ Also in this case, the apex court interestingly gave an indivisibly-aligned interpretation to the right to life and the right to a clean environment.⁵⁴ This case has indeed 'set the tone of environmental and climate change enlightenment in the judiciary',⁵⁵ and it is hoped that the political branches would follow suit by making and implementing the appropriate pro-climate laws and policies in Nigeria.

There is no gainsaying the fact that the courts have a key role to play in effectuating the realisation of economic and social rights in the face of climate change. Climate change litigation has been 'transformed from a creative lawyering strategy to a major force in transnational regulatory governance of greenhouse gas emissions'.⁵⁶ As courts in several countries, including the United States of America, the United Kingdom, Canada, Germany, India and Pakistan, have deployed climate change litigation to change the narrative, Nigerian courts should also key into the potential of using this channel to promote human rights.⁵⁷ As unregulated climate change leads to

52 MC Anozie & EO Wingate 'NGO standing in petroleum pollution litigation in Nigeria – *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*' (2020) 13 *Journal of World Energy Law and Business* 491.

53 *COPW* (n 51) 595.

54 Etemire (n 49) 169.

55 Etemire (n 49) 167.

56 WCG Burns & HM Osofsky 'Overview: The exigencies that drive potential causes of action for climate change' in WCG Burns & HM Osofsky (eds) *Adjudicating climate change: State, national, and international approaches* (2009) 1.

57 For a detailed discussion on climate change litigation, see LJ Kotze & A du Plessis 'Putting Africa on the stand: A bird's eye view of climate change litigation on the continent' (2020) 50 *Environmental Law* 615; E Okumagba 'Examining global court practices in reducing climate change impacts through litigation: Lessons for Nigeria' in EO Ekhatior, S Miller & E Igbinosa (eds) *Implementing the Sustainable Development Goals in Nigeria: Barriers, prospects and strategies* (2021); KP Oniemola 'A proposal for transnational litigation against climate change violations in Africa' (2021) 38 *Winconsin International Law Journal* 301.

the 'death of the citizens that have been affected by GHG emissions, failing to address climate change is failing to keep to terms with the right to a healthy environment'.⁵⁸ The courts would be complicit if they do not activate their judicial powers to address and redress the impact of climate change on economic and social rights.

4 Impact of climate change on economic and social rights realisation

Having examined the legal architecture for economic and social rights in Nigeria, it is pertinent to explore the effect of climate change on these rights. As noted in the introduction, climate change has the potential to attenuate, if not eliminate, people's enjoyment of economic and social rights. According to the Malé Declaration on the Human Dimension of Global Climate Change, 'climate change has clear and immediate implications for the full enjoyment of human rights including inter alia the right to life,⁵⁹ the right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health'.⁶⁰

It has also been argued that '[c]limate change has myriad implications for the health of humans, our ecosystems, and the ecological processes that sustain them'.⁶¹ As far back as 2008, the UN also acknowledged that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.⁶² Even the IPCC in its fifth Assessment Report on Climate Change has warned that climate change would lead to greater risk of injury, disease and death due to increased heat and fire, a higher risk of undernutrition owing to decreased food availability and accessibility, lowered work capacity and productivity, and greater risk of food, water, and vector-borne diseases.⁶³

58 Oniemola (n 57) 313.

59 See, eg, WHO *Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s* (2014) where it was projected that between 2030 and 2050, climate change could lead to approximately 250 000 deaths per year because of malnutrition, malaria, diarrhoea and heat stress alone.

60 'Malé Declaration on the Human Dimension of Global Climate Change', www.ciel.org/Publications/Male_Declaration_Nov07.pdf (accessed 7 July 2020).

61 C Machalaba et al 'Climate change and health: Transcending silos to find solutions' (2015) 81 *Annals of Global Health* 445.

62 See the Resolution of the 7th session of the Human Rights Council, passed on 26 March 2008 A/HRC/7/L.21/Rev.1.

63 IPCC 'AR5 Climate Change 2014' (n 3).

Although the impact of climate change could be felt by both developed and developing nations, it would be graver in the latter as they lack the needed coping institutional mechanisms to withstand the situation.⁶⁴ Ebele and Emodi argue that although climate change has a global effect, it is felt the most among the poorest people who, ironically, make the least contribution to the change.⁶⁵ Conversely, the developed nations, with a majority of well-to-do population, suffer a less severe impact of the crisis. The fact that the developed nations suffer a less severe impact does not suggest any form of immunity for them, because 'even though some richer countries may have enjoyed small benefits on average from temperature increases, the evidence suggests that all countries will eventually be negatively affected by climate change'.⁶⁶ The reason for this differential in impact lies in the fact that the developed nations possess the needed coping adaptation strategy, research and technological wherewithal to deal with the effect of climate change.⁶⁷ Unfortunately, Nigeria happens to be among the developing nations with the poorest people. This means that the country stands a high risk of being negatively affected, not only because of the above indices, but also because approximately two-thirds of its land mass lies in the semi-arid region, and at the moment the country is under threat and stress of desertification and frequent drought.⁶⁸ The problem of climate change is already having somewhat of a ravaging effect in some parts of Nigeria. Some of the implicated economic and social rights include rights to health, food, housing and work. We now turn to these rights.

4.1 Climate change and the right to health

The right to health is recognised in article 12 of ICESCR,⁶⁹ which is strengthened by the provisions of ESCR Committee General Comment 14. According to the said article, '[t]he States Parties ... recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and that '[t]he steps to be taken by the States Parties ... to achieve the full realisation

64 AD Mshelia 'Adaptation strategies to climate change' (2005) 18 *Journal of Energy and Environment* 74-81.

65 Ebele & Emodi (n 1) 2.

66 UNDP 'Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century' (Human Development Report 2019) 181.

67 C Mcguian, R Reynolds & D Wiedmer 'Poverty and climate change: Assessing impacts in developing countries and the initiatives of the international community' London School of Economics Consultancy Project for The Overseas Development Institute, 2002.

68 PAO Odjugo & Al Ikhuoria 'The impact of climate change and anthropogenic factors on desertification in the semi-arid region of Nigeria' (2003) 2 *Global Journal of Environmental Science* 118-126; CPN Nyelong 'Lake Chad: From megalake to minilake' (2004) 6 *Arid Wetland Bulletin* 24-27.

69 Also see arts 16(1) & (2) of the African Charter.

of this right shall include those necessary for ...the improvement of all aspects of environmental and industrial hygiene'.⁷⁰ Thus, the right to health in this respect goes beyond being healthy or having access to healthcare facilities; it is a multi-factored right. As Beaglehole argues, environmental, social, cultural, economic, political and associated conditions are as important as access to medical care in health discourse.⁷¹ Accordingly, the ESCR Committee interprets the right to health as an inclusive right which embraces social determinants such as access to safe and potable water, adequate and nutritious food, housing, health-related information, and healthy occupational and environmental conditions.⁷² The right is also recognised in the constitutions of more than 100 nations across the globe,⁷³ either as a fundamental right or as a directive principle.⁷⁴ It has also been judicially affirmed by some national courts.⁷⁵

Additionally, the right to health enjoys a special recognition under the UNFCCC. As a UN report noted, '[t]he protection of all human rights from the impact of climate change is fundamental for the protection of the right to health. Internationally, however, there is growing recognition of the specific interlinkages between climate change and the human right to health.'⁷⁶ Thus, article 1 of the UNFCCC discusses climate change and its adverse effect on human health and welfare, while article 3 requires state parties to the UNFCCC to take measures that would reduce those effects. Further, article 4 requires state parties to reduce the impact of climate change mitigation and adaptation responses on public health.

Unfortunately, climate change undermines the potential for healthy occupational and environmental conditions for the populations. It has long been reported that climate change has the potential to have a system-wide negative impact on human health

70 Arts 12(1) & (2)(b) ICESCR.

71 R Beaglehole 'Overview and framework' in R Detels (ed) *Oxford textbook of public health* (2002).

72 ESCR Committee General Comment 14: The right to the highest attainable standard of health (art 12) para 11.

73 E Kinney & B Clark 'Provisions for health and health care in the constitutions of the countries of the world' (2004) 37 *Cornell International Law Journal* 285.

74 It is recognised as a directive principle under sec 17 of the Nigerian Constitution.

75 See *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 721 (CC) (where the South African Constitutional Court affirmed the right of infected nursing mothers to have access to HIV drugs) and *Mendoza & Others v Ministry of Public Health and the Director of the HIV-AIDS National Programme* Resolution 0749-2003-RA, 28 January 2004 (where an Ecuadorian court held that withdrawal by a public hospital of antiretroviral therapy from HIV/AIDS patients was a violation of their right to health).

76 UN Human Rights Council 'Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health' Report of the Office of the United Nations High Commissioner for Human Rights 6 May 2016 13.

that could result in death.⁷⁷ Even in the developed world, there is no immunity against the scourge. According to a recent report, '[i]n some developed countries there is also evidence that prenatal heat exposure increases the risk of maternal hospitalisation and of hospital readmission in the first year of life for newborns'.⁷⁸

Climate change can affect the health of Nigerians either directly or indirectly. While the direct effect emanates from acute weather conditions such as heat waves or extreme cold, flooding, hurricanes, landslides, wildfires, storms and droughts, which could lead to sicknesses, injuries, incapacitation and even death, the indirect impact can be in the form of malnutrition due to food shortages; the spread of infectious disease and food and water-borne illness such as typhoid and cholera.⁷⁹ Thus, it has been observed that climate change and disasters accelerate the prevalence, distribution and gravity of new diseases.⁸⁰ One reason that could be attached to this is the rise in temperature. For example, it has been reported that since the 1980s temperatures have been rising unprecedentedly in Nigeria,⁸¹ and that it would continue to rise in all zones in decades to come.⁸² While Amadi and Udo argue that high temperature is one cause of tropical diseases such as heat strokes and meningitis,⁸³ Nkechi et al colleagues also observe that drought in the Savanna and Sahelian region can reduce the quantity of fresh water, thereby leading to risk of illness such as diarrhoea and cholera due to poor hygiene occasioned by a lack of adequate and safe water.⁸⁴ There is also evidence from research that meningitis cases may increase

77 Second Assessment Report of the Intergovernmental Panel on Climate Change 'Synthesis of scientific-technical information relevant to interpreting article 2 of UNFCCC' (1995) 35.

78 UNDP (n 66) 182.

79 H Haider 'Climate change in Nigeria: Impacts and responses' (2019) K4D Helpdesk Report 675 (Institute of Development Studies, Brighton) 3, https://assets.publishing.service.gov.uk/media/5dcd7a1aed915d0719bf4542/675_Climate_Change_in_Nigeria.pdf (accessed 2 July 2020); A McMichael 'Global environmental changes, climate change and human health' in K Lee & J Collin (eds) *Global change and health* (2005) 140.

80 CEDAW General Recommendation 37.

81 IC Enete 'Impacts of climate change on agricultural production in Enugu State, Nigeria' (2017) 5 *Journal of Earth Science and Climatic Change* 234, <https://www.omicsonline.org/openaccess/impacts-of-climate-change-on-agricultural-production-in-enugu-state-nigeria-2157-7617.1000234.php?aid=32633> (accessed 8 July 2020).

82 A Akande et al 'Geospatial analysis of extreme weather events in Nigeria (1985–2015) using self-organizing maps' (2017) *Advances in Meteorology*, <https://doi.org/10.1155/2017/8576150> (accessed 8 July 2020).

83 SO Amadi & SO Udo 'Climate change in contemporary Nigeria: An empirical analysis of trends, impacts, challenges and coping strategies' (2015) 7 *IOSR Journal of Applied Physics* 1-9.

84 O Nkechi et al 'Mitigating climate change in Nigeria: African traditional religious values in focus' (2016) 7 *Mediterranean Journal of Social Sciences* 299.

in Northwest Nigeria because of acute temperatures.⁸⁵ Also, elevated carbon dioxide levels decrease the protein, mineral and vitamin content of many staple food crops.⁸⁶ Further, the higher the temperature, the more likely more bacterial contaminants of food and water will survive and replicate themselves, thereby undermining the health and hygiene of people.⁸⁷

Moreover, as Caney argues, climate change affects the right to health, whether viewed from a deontological perspective or from a teleological standpoint. Deontologically, engaging in activities that expose other human beings to dangerous health effects of climate change disrespects their freedom, moral standing and dignity which are all inherent in the right to health.⁸⁸ Teleologically, exposing people to climate change health hazards undermines their capacity to lead a decent life.

Going by the frightening impact of climate change, the World Health Organisation (WHO) has warned that 'the overall health effects of a changing climate are likely to be overwhelmingly negative'.⁸⁹ Consequently, Hunt and Khosla argue that '[g]iven the massive public health challenge posed by climate change, especially in the developing world [including Nigeria], there is an urgent need for a global [and national] partnership aimed at establishing an effective, integrated environmental regime capable of ensuring healthy environmental conditions for all'.⁹⁰

4.2 Climate change and the right to food

The right to food is recognised by article 11(1) of ICESCR which provides that everyone has a right to 'an adequate standard of living for himself and his family, including adequate food'⁹¹ and

85 AF Abdussalam et al 'The impact of climate change on meningitis in Northwest Nigeria: An assessment using CMIP5 climate model simulations' *AMS100* 379, <https://journals.ametsoc.org/doi/full/10.1175/WCAS-D-13-00068.1> (accessed 10 July 2020).

86 L Ziska et al 'The impacts of climate change on human health in the United States: A scientific assessment' *US Global Change Research Program* (Washington DC 2016) 189.

87 United Nations Department of Economic and Social Affairs World Economic and Social Survey 2009: Promoting Development, Saving the Planet, UN Doc E/2009/50/Rev 1, ST/ESA/319 (2009) (WESS 2009) 79.

88 S Caney 'Climate change, human rights and moral thresholds' in M Langford & AFS Russell (eds) *The human rights to water: Theory, practice and prospects* (2017) 79.

89 WHO 'Climate change and health' Fact Sheet 266, www.who.int/mediacentre/factsheets/fs266/en/ (accessed 12 July 2020).

90 P Hunt & R Khosla 'Climate change and the right to the highest attainable standard of health' in S Humphreys (ed) *Human rights and climate change* (2009) 238.

91 Also see art 25(1) of the Universal Declaration of Human Rights.

that everyone has a fundamental right 'to be free from hunger'.⁹² Also, articles 4, 16 and 22 of the African Charter protect the right to food.⁹³ The right to adequate food is the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.⁹⁴

This right can also be affected by climate change. For example, unpredictability in rainfall, acute temperature and drought have the potential to affect food production and the food supply chain in Nigeria.⁹⁵ This is so, because crops cannot survive without water; climate change can affect water which in turn can affect the survival of crops.⁹⁶ The fact that a greater percentage of crop farming takes place in the worst-hit north of Nigeria signals a huge risk to food security in the country.⁹⁷ Similarly, the survival of animals – which supply nutrients to humans – is dependent on climate change. Acute heat from global warming can lead to the death or infertility of animals.⁹⁸ Studies have indicated that 'flooding will also lead to crop failure ... freak weather events will also destroy agriculture'.⁹⁹ According to the World Bank, a 2°C increase in average global temperature would put approximately 100 to 400 million people at risk of hunger, especially in sub-Saharan Africa and South Asia.¹⁰⁰ A country such

92 Art 11(2) ICESCR.

93 Art 4 (right to life); art 16 (right to health); and art 22 (right to economic and social development) have been interpreted by the African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights as also implying the right to food. Also see art 15 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

94 Food and Agricultural Organisation (FAO) 'Right to adequate food in constitutions', <http://www.fao.org/3/ca3518en/CA3518EN.pdf> (accessed 13 July 2020).

95 ZA Elum et al 'Climate change mitigation: The potential of agriculture as a renewable energy source in Nigeria' (2017) 24 *Environmental Science and Pollution Research* 3260, <https://www.ncbi.nlm.nih.gov/pubmed/27933500> (accessed 13 July 2020).

96 As above.

97 IA Madu 'Spatial vulnerability of rural households to climate change in Nigeria: Implications for internal security' (2012) Robert S Strauss Center for International Security and Law 37, <https://www.strausscenter.org/researchreports?download=105:spatial-vulnerability-of-rural-household-to-climate-change-in-nigeria> (accessed 20 July 2020).

98 A Nardone et al 'Effects of climate changes on animal production and sustainability of livestock systems' (2010) 130 *Livestock Science* 57.

99 Caney (n 88) 81.

100 World Bank 'World development report' (2010) 4-5. Also see B Hare 'Relationship between increases in global mean temperature and impacts on ecosystems, food production, water and socio-economic systems' in HJ Schellnhuber et al (eds) *Avoiding dangerous climate change* (2006) 179.

as Nigeria, which does not have an effective social protection safety net, would certainly not be able to save its vulnerable groups from the impending disaster, if national and global action plans are not put in place upfront.

Another area of concern is the security of lives and property. As it is commonly noted, a hungry man is an angry man and an angry man can cause crises. Thus, Madu argues that a lack of water and food scarcity can lead to conflict among people which may threaten the public peace.¹⁰¹

4.3 Climate change and the right to housing

The right to housing has also been impacted by climate change. Due to flooding, many people in the coastal areas have lost their houses.¹⁰² Further, tropical storms can affect housing by removing roofs from peoples' homes and destroying their means of communication and other household items.¹⁰³ With particular reference to the Niger Delta region of Nigeria, studies have shown that the rise in the sea level has caused flooding and erosion that have displaced many of the local people.¹⁰⁴ The precarious position of this right in the face of climate change can better be appreciated with the benefit of hindsight wherein over 3 million people were displaced from their homes in the 2012 flooding in the Niger Delta region.¹⁰⁵ It has been observed that climate change is one of the major causes of displacement in the north-eastern part of Nigeria in recent times.¹⁰⁶ As Alobo and Obaji note, Nigerian internally-displaced persons debatably 'suffer the worst violations of their fundamental human rights',¹⁰⁷ but we add that climate change would exacerbate the situation if something urgent is not done to meet the economic and social rights needs of those affected. Future projections are frightening as they predict a rising trend of displacement of people due to climate change challenges.¹⁰⁸

¹⁰¹ Madu (n 97) 37.

¹⁰² Odjugo (n 17).

¹⁰³ E Mills 'Insurance in a climate of change' (2005) 80 *Science* 1040-1044.

¹⁰⁴ E Uyigue & M Agho 'Coping with climate change and environmental degradation in the Niger Delta of Southern Nigeria' (2007) Community Research and Development Centre, Abuja, Nigeria 4.

¹⁰⁵ O Ohwo 'Climate change impacts, adaptation and vulnerability in the Niger Delta region of Nigeria' (2018) 8 *Environmental Earth Sciences* 171-179.

¹⁰⁶ M Addaney, E Boshoff & B Olutola 'The climate change and the human rights nexus in Africa' (2017) 9 *Amsterdam Law Forum* 20.

¹⁰⁷ E Alobo & S Obaji 'Internal displacement in Nigeria and the case for human rights protection of displaced persons' (2016) 51 *Journal of Law, Policy and Globalisation* 30.

¹⁰⁸ See E Uyigue & AE Ogbeibu 'Climate change and poverty: Sustainable approach in the Niger Delta region of Nigeria' Proceedings of the Conference

Also, population relocation and redistribution occasioned by climate change would worsen communal clashes and conflicts.¹⁰⁹ As the European Commission to the European Council notes, climate change is 'a threat multiplier which exacerbates existing trends, tensions and instability'.¹¹⁰ With the infiltration of herdsmen into the southern part of Nigeria, it also is not surprising that desertification in one place leads to overpopulation and potential ethnic clashes in another place.¹¹¹

4.4 Right to work/means of livelihood

According to article 6(1) of ICESCR, everyone has a 'right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. Article 7 of ICESCR also provides for everyone's right to just and favourable conditions of work which are needed to earn a decent living. Similarly, the African Charter states that '[e]very individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work'.¹¹²

Although there are white collar jobs in Nigeria, at least 70 per cent of the country's population still engages in agricultural activities as a major means of livelihood.¹¹³ However, coastal erosion caused by climate change serves as a threat to the economic activities of the people in this agrarian sector, as it prevents them from engaging in farming and fisheries.¹¹⁴ Also, it has been reported that gas flaring, oil spill, and the rise in sea level, which can increase salinity of surface and underground water, will lead to the death of susceptible aquatic plants and animals.¹¹⁵ This no doubt will adversely affect those whose

on the Human Dimensions of Global Environmental Change, Amsterdam, The Netherlands, 24-26 May 2007.

109 See B Chellaney 'Climate change and security in Southern Asia: Understanding the national security implications' (2007) 152 *Royal United Services Institute Journal* 63; S Atapattu *Human rights approaches to climate change: Challenges and opportunities* (2016) 242.

110 The High Representative and the European Commission to the European Council, 'Climate change and international security' 2 14 March 2008, www.consilium.europa.eu/uedocs/cms_Data/docs/pressData/en/reports/99387.pdf (accessed 12 July 2020).

111 O Nkechi et al 'Mitigating climate change in Nigeria: African traditional religious values in focus' (2016) 7 *Mediterranean Journal of Social Sciences* 299.

112 See art 15 of the African Charter.

113 CJ Onwutuebe 'Patriarchy and women vulnerability to adverse climate change in Nigeria' (2019), <https://doi.org/10.1177/2158244019825914> SAGE (accessed 12 July 2020).

114 LF Awosika 'Impacts of global climate change and sea level rise on coastal resources and energy development in Nigeria' in JC Umolu (ed) *Global climate change: Impact on energy development* (1995) 83.

115 Uyigüe & Ogbeibu (n 108) 4.

source of livelihood is dependent on such plants and animals, not to mention its effect on food security.

As Addaney et al argue, '[o]ne way in which climate change could impact on the right to dignity of people who are affected by it is if, for example, a subsistence farmer loses his livelihood through a harsh drought which wipes out all their crops and livestock, and with no insurance or support from the government, he is reduced to begging to provide for his family'.¹¹⁶ Further, climate change will impact on the country's economy since agriculture remains a major source of employment for the Nigerian people.¹¹⁷ The UN recently announced that '[i]n 2017, 153 billion labour hours were lost because of heat, an increase of more than 62 billion hours since 2000'.¹¹⁸ Moreover, a recent study reveals that 'unmitigated warming is expected to reshape the global economy by reducing average global incomes roughly 23 per cent by 2100 and widening global income inequality, relative to scenarios without climate change'.¹¹⁹ There is no evidence to suggest that Nigeria is immune to or has taken steps to avert this projection.

Anyone who loses his food, means of earning, house or even loved ones to climate change is most likely to have mental health challenges which may lead to suicide. A study suggests that incidents of suicide among farmers increase during prolonged drought.¹²⁰ A related point is the economic losses and concomitant deaths that result from climate change. According to a 2019 UN report, 'during the period 1998-2017, direct economic losses from disasters were estimated at almost \$3 trillion. Climate-related and geophysical disasters claimed an estimated 1,3 million lives'.¹²¹

Thus, a government's failure to meet the economic and social rights needs of its population in the face of climate change-induced hardship could trigger frustration, lead to tensions between different ethnic and religious groupings in countries and to political or

116 Addaney et al (n 106) 15.

117 Ebele & Emodi (n 1).

118 UNDP 'Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century' (Human Development Report 2019) 181.

119 M Burke, SM Hsiang & E Miguel 'Global non-linear effect of temperature on economic production' (2015) 527 *Nature* 235-239.

120 SK Padhy et al 'Mental health effects of climate change' (2014) 19 *Indian Journal of Occupational and Environmental Medicine* 3.

121 United Nations Economic and Social Council. Special edition: Progress towards the Sustainable Development Goals Report of the Secretary-General 2019 19, <https://unstats.un.org/sdgs/files/report/2019/secretary-general-sdg-report-2019--EN.pdf> (accessed 4 July 2020).

religious radicalisation, which could destabilise countries and even entire regions.¹²²

To end this part of the article, it is apposite to reflect on the words of the European Commission, that '[c]limate change impacts will fuel the politics of resentment between those most responsible for climate change and those most affected by it. Impacts of climate mitigation policies (or policy failures) will thus drive political tension nationally and internationally.'¹²³ This climate change challenge, therefore, calls for international cooperation.

5 Role of international cooperation and assistance

The role of international cooperation and assistance cannot be overemphasised in the realisation of economic and social rights, especially against the backdrop of a climate change-induced threat to these rights. Just as the way in which developed countries are eagerly interested in the realisation of civil and political rights by their monitoring and funding mechanisms of the civil and electoral processes in the developing countries, it is argued that they should also devote the same or even a higher measure of interest, participation and financial commitment towards the realisation of economic and social rights.

Economic and social rights deserve better attention than civil and political rights. To borrow from the words of Hoveyda, '[w]hat, for instance, is the meaning of freedom of speech in a society where everything is sadly lacking, with no hope in sight for betterment, or freedom of speech where everybody is illiterate ... without carrying out the basic needs of human beings, all other rights are mere illusion'.¹²⁴ This view is buttressed by the fact that 'the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible'.¹²⁵ This view really should spring no surprise, because political rights without social rights, justice without social justice, political democracy without economic democracy for a people are meaningless.¹²⁶ Thus, the developed world should

122 The High Representative and the European Commission to the European Council 'Climate change and international security' 14 March 2008 2, www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/reports/99387.pdf (accessed 12 July 2020).

123 High Representative and European Commission (n 122) 5.

124 F Hoveyda 'Not all clocks for human rights are the same' *New York Times* 18 May 1977.

125 Art 13 of the United Nations Conference on Human Rights, Proclamation of Teheran, 13 May 1968, A/CONF. 32/41.

126 See SMR Pahlavi 'Text of address by His Imperial Majesty the Shahinsha Aryamehr' International Conference on Human Rights, 22 April 1966 3 S-0883-

pay more attention to the economic and social rights needs of the people of the developing world through international cooperation and assistance.

In the same way as individuals are entitled to economic and social rights from their respective states, so are developing countries entitled to economic and social rights by way of international cooperation and assistance from the developed countries, though for and on behalf of their citizens. To put it in Burke's words, '[s]tates were [are] themselves the bearers of some kind of social rights, which the international community was [is] urged to protect'.¹²⁷ This, of course, does not mean that states should abandon or suppress the protection of civil and political rights in the guise of protecting economic and social rights, but there should be a striking of balance.¹²⁸ It also does not mean that states should abdicate their economic and social rights obligations. It is argued that international cooperation and assistance should be complementary to, not substitutive of, national responsibility for the realisation of economic and social rights.

The concept of international cooperation and assistance found its way into ICESCR through the vigorous arguments by Mahmud Azmi, the Egyptian delegate at the Working Group of the Commission on Human Rights which drafted ICESCR. According to his argument, it was unlikely that 'the available resources of small countries, even if utilised to the maximum, would be sufficient'¹²⁹ and that 'those countries would have to fall back on international cooperation'¹³⁰ if the resource-drawing economic and social rights were to be achieved in their jurisdictions.

Regarding the realisation of economic and social rights in times of climate change challenges, it is argued that the need for international cooperation and assistance from developed countries to developing countries can be justified on two grounds. These are the contributory ground and the legal obligation ground.

5.1 Contributory ground

As discussed above, there is no gainsaying the fact that human activities adversely affect climate change on global and regional

018-008, UN Archives.

127 R Burke 'Some rights are more equal than others: The Third World and the transformation of economic and social rights' (2014) 3 *Humanity Journal* 439.

128 As above.

129 Commission on Human Rights, Summary Record of the 236th, 10 May 1951, E/CN.4/SR.236 18.

130 As above.

scales, in terms of sea level pressure, precipitation, and ocean heat content. It has also been established that 'greenhouse gas emissions, mostly CO₂, are the most important anthropogenic forcing on climate'.¹³¹ However, it has been scientifically proved that developed countries' historical contributions to climate change or global warming outweigh that of developing countries. Without any intention to engage in technical analysis, this article presents what some scholars have found, to the effect that

[r]esults show that the contribution to the increased CO₂ concentration from 1850 to 2005 estimated ... is 61% from the developed countries and 39% from the developing countries (for BNU-ESM the split is 63%-37%). A simple carbon-cycle model simulated the contributions as 70% and 30% for developed and developing countries, respectively ... Robust evidence ... shows significant changes in the atmosphere, ocean, and cryosphere in response to climate change that may be attributed to radiative forcing. Radiative forcing is proportional to the logarithm of CO₂ concentration and is divided 53-47% by CESM (BNU-ESM 62-38%) for the developed and the developing countries from 1850 to 2005 using the normalised proportional approach.¹³²

Also, Matthew et al argue that 'the sources of ... emissions have and continue to vary dramatically between regions and individual countries, with countries in the developed world responsible for the vast majority of historical emissions'.¹³³ Further, Den Elzen et al assert that '[a]t the end of last century, the developed countries were the main contributors to the anthropogenic rise in atmospheric GHG concentrations'.¹³⁴

It is rather bewildering that empirical results indicate that the emissions-reduction commitments by developed countries does not 'reflect their historical ethical responsibility, which still accounts for greater than half of the total climate change impacts ... despite the rapid growth in emissions from the developing world'.¹³⁵ On this score, it is argued that the only reasonable response from the developed countries should be to 'repair' the developing countries as a matter of an obligation, to account for their historical contributions to the global problem of climate change.

131 T Wei et al 'Developed and developing world responsibilities for historical climate change and CO₂ mitigation' (2012) 109 *Proceedings of the National Academy of Sciences* 12911 (footnotes omitted).

132 Wei et al (n 131) 12912 (footnote omitted).

133 Matthews et al (n 19).

134 GJ Michel et al 'Countries' contributions to climate change: Effect of accounting for all greenhouse gases, recent trends, basic needs and technological progress' (2013) 121 *Climatic Change* 398.

135 As above.

Another point on contributory ground relates to developed countries' colonisation of most of the developing countries. While it is agreeable that the developing world cannot continue to brood over what transpired centuries ago, one cannot underestimate the adverse effect that colonial rule has had on the colonised territories, which is evident in the lack of infrastructure that is needed for the enjoyment of economic and social rights. As Burke notes, '[w]hen in power, colonial administrators delivered few civil and political rights, and decidedly limited social rights ... they could, begrudgingly, deliver statehood and independence to their colonies ... But they could not deliver the majority of the more substantial social rights: health, shelter, and education.'¹³⁶

Thus, from a Third World Approaches to International Law (TWAIL) perspective, it can be argued that colonialism directly or indirectly attenuated the ability of the governments in developing countries to meet their economic and social rights needs.¹³⁷ Colonialism disrupted the social and economic structures and conditions in the Third World, so much so that it determined their place or status in the world economy.¹³⁸ Thus, there cannot be an honest and conclusive assessment of economic and social rights realisation in the developing countries if and when issues of colonialism are divorced from the discourse. It is worth reiterating that '[t]his is not about crying over milk that was spilt many decades back but about being intuitive in understanding the systemic and structural constraints on the Third World that are heritages of a colonial legacy'.¹³⁹

Finally on this ground, the current neo-colonial tendencies or activities across the Third World countries also attenuate economic and social rights realisation. It has been reported that forces from developed countries have resorted to land grabbing, acquiring large expanses of land in Third World countries, such as Ethiopia, Madagascar, Mali, Sierra Leone, South Sudan, Tanzania and Zambia for 'outsourced farming and biofuel' purposes. According to a 2011 report on those countries by the Oakland Institute, 'largely unregulated land purchases are resulting in virtually none of the promised benefits for native populations, but instead are forcing millions of small farmers off ancestral lands'.¹⁴⁰ In a subsequent

¹³⁶ Burke (n 127) 441.

¹³⁷ See A Anghie & BS Chimni 'Third World approaches to international law and individual responsibility in internal conflicts' (2003) 2 *Chinese Journal of International Law* 83-84.

¹³⁸ See R Austen *African economic history* (1987) 138.

¹³⁹ OA Badaru 'The right to food and the political economy of Third World states' (2014) 1 *Transnational Human Rights Review* 116.

¹⁴⁰ The Oakland Institute: Special/Investigation: Understanding land investment deals in Africa (July 2011).

report, the Institute stated that '[t]ens of millions of hectares of land on the African continent have been grabbed by foreign investors in recent years. This has led to loss of life, land, and livelihoods for millions, and threatened the very survival of entire communities and indigenous groups.'¹⁴¹ These reports are disturbing and the developed world should take concrete steps to remedy the deplorable situation regarding economic and social rights that such acquisitions have triggered.

5.2 Legal obligation ground

Legally, those developed countries that are parties to ICESCR and the climate change instruments have an obligation to internationally cooperate and assist the developing countries or, indeed, Nigeria, towards the realisation of economic and social rights in the latter's jurisdictions, whether generally or in the face of climate change. Below, the article examines the general obligation and the climate change-induced obligation of international cooperation and assistance.

5.2.1 General obligation

According to article 2(1) of ICESCR states are required to, 'individually and through international assistance and co-operation, especially economic and technical', take steps towards a progressive full realisation of economic and social rights. Specifically, on the right to food, article 11(1) of ICESCR provides that states shall take steps while 'recognising ... *the essential importance of international cooperation*', towards the realisation of the right to food. As discussed above, the incorporation of these provisions was informed by the argument that was put forward by the Egyptian delegate during the drafting of ICESCR, to the effect that developing countries cannot internally muster the resources needed for economic and social rights realisation.

The role of international cooperation and assistance is also well articulated in the ESCR Committee jurisprudence and other international instruments.¹⁴² For example, in April 2020 the ESCR Committee released its latest General Comment which emphasises

¹⁴¹ Oak Institute 'World Bank fuels land grabs in Africa through shadowy financial sector investments' 1 May 2017, <https://www.oaklandinstitute.org/world-bank-fuels-land-grabs-africa-through-shadowy-financial-sector-investments> (accessed 22 July 2020).

¹⁴² See, eg, art 23 of the Covenant of the League of Nations; arts 55 & 56 of the Charter of the United Nations.

the importance of international cooperation in combating climate change. According to the General Comment 25, 'international cooperation is essential because the most acute risks to the world related to science and technology, such as climate change, the rapid loss of biodiversity ... are transnational and cannot be adequately addressed without robust international cooperation'.¹⁴³ It further provides that '[s]tates should promote multilateral agreements to prevent these risks from materialising or to mitigate their effects'.¹⁴⁴ Further, states have the extraterritorial obligation to ensure that multinational corporations that are headquartered in their jurisdictions take no action that would exacerbate the climate change crises in another state, for instance, through the activities of their subsidiary companies in that other state.¹⁴⁵

Further, General Comment 3 of the ESCR Committee states that '[t]he Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a state and those available from the international community through international cooperation and assistance'.¹⁴⁶ These provisions evince the fact that developing countries are expected to draw from the resources of the developed countries and the international community in a bid to realise economic and social rights. The developed nations should intervene when approached, because 'international cooperation for development and thus for the realisation of economic, social and cultural rights is an obligation of all states. It is particularly incumbent upon those states which are in a position to assist others in this regard'.¹⁴⁷ Thus, as regards the right to food, the ESCR Committee requires states to carry out their tripartite obligations of respecting, protecting and fulfilling economic and social rights both territorially and extraterritorially.

A similar obligation holds out for the right to health where '[s]tates ... should recognise the essential role of international cooperation and comply with their commitment to take joint and separate

143 ESCR Committee General Comment 25 (2020): Science and economic, social and cultural rights (arts 15(1)(b), (2), (3) & (4) of the International Covenant on Economic, Social and Cultural Rights) para 81.

144 As above.

145 See ESCR Committee General Comment 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities para 37. Also see EO Ekhatior 'Regulating the activities of multinational corporations in Nigeria: A case for the African Union?' (2018) 20 *International Community Law Review* 30.

146 ESCR Committee General Comment 3: The nature of states parties' obligations (art 2 para 1 of the Covenant) para 13.

147 General Comment 3 (n 146) para 14. Also see ESCR Committee General Comment 12: The right to adequate food (art 11) para 36.

action to achieve the full realisation of the right to health'.¹⁴⁸ They are also expected to recognise the fact that 'the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries'.¹⁴⁹ Thus, as Curtis and Darcy argue, 'international cooperation can be characterised as a means of addressing the power differential between wealthy influential states and those states unable to realise the rights of their people'.¹⁵⁰

Again, the foregoing should not be taken as a suggestion that developing countries are exempt from meeting the economic and social rights needs of their people. Although a detailed discussion of the obligations of domestic governments to realise economic and social rights is beyond the scope of this article, it is agreed that the 'primary obligation to implement the right to food [and all economic and social rights] rests with the home government, so another government cannot be obliged to guarantee complete implementation of the right ... in other countries, but only to assist'.¹⁵¹ This is a justified position, because 'international obligations are not a substitute for national responsibility. International action, however, is indispensable for addressing obstacles that are beyond the capacity of national governments to tackle on their own'.¹⁵² A needy state is expected to formally seek such assistance or cooperation¹⁵³ which should be considered in good faith by the developed country or countries.¹⁵⁴

148 ESCR Committee General Comment 14: The right to the highest attainable standard of health (art 12) para 38.

149 As above. See similar provisions in General Comment 15: The right to water (arts 11 and 12 of the Covenant) paras 30-35; ESCR Committee General Comment 18: The right to work (art 6 of the Covenant) paras 29-30; ESCR Committee General Comment 23 (2016) on the right to just and favourable conditions of work (art 7 of the Covenant) para 66.

150 J Curtis & S Darcy 'The right to a social and international order for the realisation of human rights: Article 28 of the Universal Declaration and international cooperation' in D Keane & Y McDermott (eds) *The challenge of human rights: Past, present and future* (2012), <https://aran.library.nuigalway.ie/bitstream/handle/10379/2185/CURTIS%20AND%20DARCY%20Article%2028%20and%20International%20Coop.pdf?sequence=1&isAllowed=y> (accessed 21 July 2020).

151 UN Commission on Human Rights 'The right to food: Report by the Special Rapporteur on the Right to Food', Jean Ziegler, UN Doc E/CN.4/2005/47.

152 S Fukuda-Parr 'International obligations for economic and social rights: The case of the Millennium Development Goal eight' in S Hertel & L Minkler (eds) *Economic rights: Conceptual, measurement and policy issues* (2007) 293.

153 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013) para 34. Also see HO Yusuf & PE Oamen 'Realising economic and social rights beyond COVID-19: The imperative of international cooperation' (2021) *Indiana International and Comparative Law Review* (forthcoming).

154 Maastricht Principles (n 153) para 35.

5.2.2 *Specific climate change obligation*

Apart from ICESCR, ESCR Committee jurisprudence and other international human rights instruments mentioned above, the UNFCCC and the Paris Agreement also mandate developed countries to engage in international cooperation and assistance in favour of developing countries. For instance, articles 4(4) and (5) of the UNFCCC state that '[t]he developed country Parties ... shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects' and that they 'shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to ... developing country Parties, to enable them to implement the provisions of the Convention'.

For its part, the Paris Agreement requires developed nations to recognise 'the need to support developing country Parties for the effective implementation' of the Agreement in response to climate change issues.¹⁵⁵ This position is further strengthened by article 7(6) of the Agreement which provides that 'Parties recognise the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.' Further, article 8(3) of the Agreement mandates state parties to take actions on a 'cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change'. More fundamentally, article 9(1) clearly provides that '[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention'. Where they are already supporting, an obligation remains on developed countries to continue to take the lead in mobilising climate finance from a wide variety of sources, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of the developing country.¹⁵⁶

Thus, a combined reading of the UNFCCC, the Paris Agreement, and the ICESCR provisions and ESCR Committee practice supports the argument that developed countries have a legal, not a moral, duty to help in addressing economic and social rights realisation in the

¹⁵⁵ See art 3 of the Paris Agreement.

¹⁵⁶ See art 9(3) of the Paris Agreement.

developing countries, in the face of climate change. The provisions of articles 13(9) and (10) of the Agreement also commend themselves in aid of the instant argument, by stating that the Transparency Framework under the Agreement shall require developed countries and developing countries to supply information on support rendered or received in accordance with the foregoing provisions on international cooperation.¹⁵⁷ This support may be rendered through information sharing, the strengthening of institutional arrangements, the strengthening of scientific knowledge, direct financial or economic support, technology transfer, and capacity building to address the socio-economic effect of climate change in developing countries.¹⁵⁸

6 Role of the Nigerian government and the regional body (African Union)

Having argued that international cooperation and assistance should be explored and exploited to push for the realisation of economic and social rights in Nigeria, the point should be made that this call does not attenuate the role of the Nigerian government in realising those rights. After all, Nigeria on its own contributes to climate change through its oil exploration and manufacturing activities.¹⁵⁹ National and regional bodies should not abdicate their responsibility solely because they depend on international cooperation. As Coomans argues, economic and social rights obligations acquire a domestic character in nature.¹⁶⁰ Thus, '[a] person's home state is certainly the first place to look to in terms of the protection of economic rights – and all other human rights as well'.¹⁶¹

Therefore, both the Nigerian government and the African Union (AU) have a key role to play in the realisation of the economic and social rights of Nigerians. As noted above, Etemire has attributed the lack of climate-related legislation as one of the obstacles to climate change litigation. While it is commendable that the Supreme Court has taken a bold step in the *COPW* case to open up the space for

¹⁵⁷ See art 12(3) of UNFCCC.

¹⁵⁸ Art 4 UNFCCC and arts 7(7), 9(1) & 10 Paris Agreement.

¹⁵⁹ SI Ladan 'An appraisal of climate change and agriculture in Nigeria' (2014) 7 *Journal of Geography and Regional Planning* 176; OO Emoyan 'The oil and gas industry and the Niger Delta: Implications for the environment' (2008) 13 *Journal of Applied Sciences and Environmental Management* 113.

¹⁶⁰ F Coomans 'The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights in the work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 25.

¹⁶¹ SI Skogly & M Gibney 'Economic rights and extraterritorial obligations' in Hertel & Minkler (n 152) 267.

climate change litigation, the political branches should also come alive by enacting and implementing relevant laws that are protective of climate change-impacted economic and social rights of Nigerians. Thus, climate laws and policies should be enacted and implemented as a matter of urgency. The truth remains that, without the support of the executive and legislative arms of government, whatever value the recent and commendable Supreme Court's decision in the *COPW* case may have will not be worth the while. Without political collaboration, the judicial decision may sound only in the realm of symbolic victory, rather than having a direct or real-world impact on the lives of those affected. It would take a deliberate inter-institutional collaboration to effectuate a rewarding climate change litigation and economic and social rights realisation.

At the regional level, the AU should strive to ensure that the African human rights system delivers on the goals of meeting the economic and social rights needs of Africans, in the context of climate change. The AU should develop or redact its laws and policies with a view to protecting the right to a safe climate.¹⁶² The AU institutions, including the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), should provide, or continue to provide, a more robust articulation and interpretation of the relevant laws and policies that are pro-economic and social rights. The AU should seek to harmonise and operationalise all its climate change treaties and policies, although such attempt would face a challenge from the principle of state sovereignty.¹⁶³

Despite the problem of dualism in the Nigerian legal system, it is heart-warming that the African Charter and the entire AU jurisprudence have gradually started to have impact on Nigeria.¹⁶⁴ To bring about much more impact, the AU should adopt a truly Pan-African human rights and climate change philosophy. Thus, it has been suggested that climate change cases should be allowed for adjudication in African countries other than where those issues arose, so that 'a breach of climate change regulation for actions leading to

162 AO Jegede 'Should a human right to a safe climate be recognised under the AU human rights system?' in Addaney & Jegede (n 17) 55; AO Jegede 'Climate change and socio-economic rights duties in Nigeria' (2017) 73/74 *Dignitas* 13.

163 E Ekhaton 'Sustainable development and the African Union legal order' in O Amao, M Olivier & K Magliveras (eds) *The emergent African Union law: Conceptualisation, delimitation, and application* (2021), <https://ssrn.com/abstract=3804404> (accessed 21 July 2020).

164 As above.

violation of human rights due to the release of GHGs in Nigeria may be addressed in any African country even if the act was committed in Nigeria'.¹⁶⁵ The regional and sub-regional courts in Africa should also be able to drive robust climate change litigation in order to ensure environmental sustainability.¹⁶⁶ All of this extraterritorial litigation, of course, will unsettle state sovereignty. However, it is argued here that what African states need among themselves really is not an absolute sovereignty but a shared sovereignty. Africans are known for their communal living and such communality should also reflect in the state-state relationship, under the leadership of the AU. A shared sovereignty may lead to a more fruitful and mutually-rewarding interdependence, rather a somewhat unrewarding independence among African states.

7 Final thoughts

While Nigeria has overtaken many African countries in terms of economic indices, the realisation of the economic and social rights of its citizens still significantly lags behind. The economic and social rights challenge is further exacerbated by the emerging problem of climate change. This article has examined the impact of climate change on the realisation of economic and social rights. The findings reveal that climate change has further weakened the realisation of these rights in Nigeria. The article has thus recommended an international cooperation and assistance model as a part of the solution, without undermining the role of domestic government and institutions. As a UN Human Development Report recently observes, 'nature's degradation is often linked with power imbalances ... the unequal distribution of power during colonial times was explicit, with colonies meant to provide natural resources for the colonial power. Power imbalances meant that most benefits were concentrated in the colonial power.'¹⁶⁷ Thus, poor countries, including Nigeria, should not be left to sink or swim with their meagre resources while the rich countries protect their own citizens against climate change.¹⁶⁸ It has thus been argued that assisting the developing countries in combating economic and social rights challenges is helping the

¹⁶⁵ Oniemola (n 57) 325.

¹⁶⁶ Oniemola (n 57) 325-327.

¹⁶⁷ UNDP 'Human development report 2020: The next frontier – Human development and the anthropocene', <http://hdr.undp.org/sites/default/files/hdr2020.pdf> (accessed 21 July 2020).

¹⁶⁸ See UNDP 'Human Development Report 2007/2008: Fighting climate change – Human solidarity in a divided world', http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf (accessed 21 July 2020); UN, 'Sink or swim: Can island states survive the climate crisis?' <https://news.un.org/en/story/2021/07/1096642> (accessed 21 July 2020).

developed countries to stay out of trouble. An economic and social rights-triggered conflict in the developing world surely would, albeit slowly, have a ripple or spiral effect on the developed world. The international cooperation model conceptualises international cooperation and assistance as a binding, not hortative, duty on developed countries. As Caney asserts, 'any account of the impacts of climate change which ignores its implications for people's enjoyment of human rights is fundamentally incomplete and inadequate'.¹⁶⁹

As a final remark, the words of the UN Secretary-General are worth echoing, to the effect that '[o]n all fronts, multilateral action is essential. Only together can countries find solutions to poverty, inequality and climate change, the defining challenges of the times'.¹⁷⁰ United, we all shall triumph; divided, we all shall perish in a climatically changing world.

¹⁶⁹ Caney (n 88) 80.

¹⁷⁰ United Nations Economic and Social Council (n 121)38.

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Duty without liability: The impact of article 12 of the International Covenant on Economic, Social and Cultural Rights on the right to health care in Nigeria

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Summary: *The right to health care under article 12 of ICESCR is an instrumental right because it bears vital linkages to the realisation of other rights. For the many Nigerians living in poverty, their health may be the only asset on which they can rely for the exercise of other rights, such as the right to work or the right to adequate housing. Conversely, ill-health can be a liability to the many people living in poverty in Nigeria, even more so in the absence of equal access to affordable and essential healthcare services. This article aims to review the implication of article 12 of ICESCR on some of the existing initiatives for achieving the right to health care in Nigeria, especially in respect of human rights law and policy. The article argues that for Nigeria to meet its international obligations under the right to health care, it must commit to adequate funding of healthcare services and engage with regional and international partners to ensure compliance with article 12 of ICESCR. Given that the right to health care presently is not justiciable in Nigeria because of the ouster clause contained in section 6(6)(c) of the Nigerian Constitution, the article calls for an attitudinal change in the judicial perception of economic and social rights that come before the courts.*

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It urges Nigerian courts to adopt the principle of the interdependency and indivisibility of rights, whereby judicial measures to enforce the right are given effect through the formally-enforceable civil and political rights contained in chapter four of the Nigerian Constitution. The Indian Supreme Court is reputable for taking this approach to the interpretation and enforcement of economic and social rights because the enjoyment of civil and political rights is linked to the satisfaction of economic and social rights, such as the right to health care. Finally, because of the importance of health care to a life of dignity, the article calls for Nigerian courts to adopt a progressive and broader approach when dealing with economic and social rights because of the evident connection between, for example, the right to health care and the right to life.

Key words: *right to health care; economic and social rights; maximum available resources; minimum core approach; Nigerian Constitution*

1 Introduction

Nigeria is the most populous country in Africa¹ and is reliant on oil exports as the *mainstay of its economy*. Despite the strategic position of the country in Africa, the country is greatly underserved as far as health care is concerned. In most areas the available healthcare facilities are inadequate. The healthcare system in Nigeria is fragile as a result of systemic neglect and gross inefficiency with regard to public spending on health. Its services are fragmented, and the healthcare infrastructure is in a state of decay which has affected the quality of healthcare services in the country. This has led to the country having one of the highest out-of-pocket expenditures on health care for citizens as households currently cover the cost of 75,5 per cent of the country's total healthcare spending.²

Several initiatives, both domestic and international, have been put in place to achieve the right to health care in Nigeria. However, most of these have ended up as mere exercises in target setting³ without the desired impact on the ground, mainly because of the inability of the government to pursue a coherent health strategy and to create the necessary atmosphere for these healthcare initiatives to flourish.

1 See <https://www.unfpa.org/data/world-population/NG> (accessed 20 October 2021).

2 WHO Global Health Expenditure Database, https://apps.who.int/nha/database/Country_Profile/Index/en (accessed 20 October 2021).

3 O Enabulele 'Achieving universal health coverage in Nigeria: Moving beyond annual celebrations to concrete address of the challenges' (2020) 12 *World Medical and Health Policy* 47.

Crucially, there is no local judicial enforcement mechanism for the right to health care in Nigeria, as the Constitution effectively bars economic and social rights litigation, thereby denying liability for health rights violations.

Nigeria has committed itself to delivering universal health coverage (UHC) and has established a comprehensive national UHC policy framework.⁴ However, the implementation of this framework has seen limited progress and, therefore, needs to be given greater momentum. For example, healthcare financing by the Nigerian government is among the lowest in the region and, therefore, health outcomes are correspondingly poor.⁵

Following the adoption of the Sustainable Development Goals (SDGs) at the United Nations General Assembly (UNGA) in 2015, states committed to achieving universal health coverage as part of the health-related SDGs. UHC is based on the World Health Organisation (WHO) Constitution which declares health a fundamental human right and commits to ensuring the highest attainable level of health for all. UHC means giving all people access to the essential health services that they need without financial hardship.⁶ It is closely aligned with primary health care which, according to the WHO, is the most effective way to sustainably solve today's health and health system challenges,⁷ hence, 'a state party in which any significant number of individuals is deprived ... of essential primary health care ... is, *prima facie*, failing to discharge its obligations under the Covenant'.⁸

This article aims to review the implication of article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on some of the existing initiatives for achieving the right to health care in Nigeria, especially in the area of human rights law and policy. It makes recommendations on how best to strengthen these initiatives to achieve the aim of complying with article 12 of ICESCR. The article argues that for Nigeria to meet its international obligations under the right to health care, it must pay more than cursory attention

4 A Ugwu & M Atima 'Next level agenda in the journey towards UHC: Health for all Nigerians' *Nigeria Health Watch* (Abuja) 17 December 2020, https://allafrica.com/stories/202012170571.html?utm_campaign=allafrica%3Aeditor&utm_medium=social&utm_source=twitter&utm_content=promote%3Aaans%3Aabkgta (accessed 20 October 2021).

5 WHO 'World health statistics 2018: Monitoring health for the SDGs' (2018) 37.

6 [https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-\(uhc\)](https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-(uhc)) (accessed 20 October 2021).

7 WHO 'Global conference on primary healthcare from Alma-Ata towards universal health coverage and the Sustainable Development Goals' 26 October 2019, <https://apps.who.int/iris/bitstream/handle/10665/328123/WHO-HIS-SDS-2018.61-eng.pdf?sequence=1&isAllowed=y> (accessed 20 October 2021).

8 General Comment 3 para 10.

to the funding of health care and engage with international and regional efforts aimed at the realisation of the right to health care. Finally, given that health care is central to a life of dignity,⁹ I argue for access to seeking judicial remedies where and when the right to health care is violated. Although economic and social rights, such as the right to health care, are not presently justiciable in Nigeria because of the ouster clause contained in section 6(6)(c) of the Nigerian Constitution, I make the case for Nigerian courts to adopt the principle of the interdependency of rights whereby economic and social rights, which are currently unenforceable in Nigeria, are given effect through (formally-enforceable) civil and political rights. The Indian Supreme Court is reputable for taking this approach to the interpretation and enforcement of economic and social rights. According to the African Charter on Human and Peoples' Rights (African Charter) 'civil rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.¹⁰

The article is presented in two parts. In the first part the author analyses the theoretical framework and implications of article 12 of ICESCR for countries such as Nigeria that have ratified it. Although article 12 of ICESCR is a large subject to cover within an article of this length, the author identifies the relevant issues around the right that are relevant to the discussion of the right from the perspective of Nigeria's human rights practice.

In the second part the author analyses the legal framework for human rights practice in Nigeria. The author discusses the themes that have been extrapolated from the examination of article 12 of ICESCR in part one of this article. These themes are then explored under the broad and critical headings of the judicial and budgetary measures taken, or that should be taken if the right to health care in Nigeria is to be realised. Because of the grossly inadequate institutional support for the implementation of the right in Nigeria, the article proposes that an enhanced role should be provided for the courts in the adjudication of cases involving the right to health care. Admittedly, there is an entrenched, traditional and long-standing objection to courts getting involved in the area of public and social policy,¹¹ but given the systemic failures that have bedevilled successive healthcare policies in Nigeria, and the instrumental nature of the right, there is

9 J Juškevičius & J Balsienė 'Human rights in healthcare: Some remarks on the limits of the right to healthcare' (2010) 4 *Jurisprudence* 95.

10 Preamble African Charter.

11 C Gearty & V Mantouvalou *Debating social rights* (2011) 116.

a need for the courts to engage the other arms of government with regard to the realisation of the right. Where this is not possible, the courts should be willing to demonstrate judicial activism by pushing the text of the law when deciding matters connected to economic and social rights, such as the right to health care.¹²

2 Brief analysis of the right to health care and obligations of state parties under international law

Since article 12 of ICESCR is the framework on which the subject of this article is hinged, it is apposite to consider the provisions of the said article:¹³

- (1) The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.¹⁴
- (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) the provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
 - (b) the improvement of all aspects of environmental and industrial hygiene;
 - (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) the creation of conditions which would assure to all, medical service and medical attention, in the event of sickness.

From the provisions of article 12 above, I will focus on two critical and relevant elements of the provision with regard to the right to health care in Nigeria. These elements are taken from articles 12(1) and (2)(d) of ICESCR, which are (i) the highest attainable standard of physical and mental health; and (ii) the creation of conditions that would assure to all medical service and medical attention in the event of sickness.

The choice of these two elements is informed by the WHO's position on the right, which states that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of

12 M Langford 'Judicial politics and social rights' in KG Young (ed) *The future of ESR* (2019) 69.

13 Art 12 ICESCR.

14 In contrast, art 16 of African Charter refers to the right to enjoy the best attainable state of physical and mental health.

every human being without distinction of race, religion, political belief, economic or social condition'¹⁵ and a personal conviction¹⁶ that these two elements provide sufficient constructs within which to discuss and analyse the freedoms and entitlements inherent in the right to health care in relation to Nigeria. For instance, it may be argued that articles 12(2)(a) to (c) are adjuncts of article 12(2)(d) because to achieve these, it will require following the provisions of paragraph 12(2)(d). In my opinion, articles 12(1) and 12(2)(d) provide a conceptual framework for analysing the right to health care in Nigeria. In any case, the instances or examples listed in 12(2)(a) to (d) are for illustrative purposes only and are not exhaustive.¹⁷ Having said that, it remains an indisputable fact that Nigeria as a contracting party to ICESCR is responsible for taking effective measures that will lead to the actualisation of the highest attainable standard of physical and mental health through the creation of conditions that would assure medical services and medical attention in the event of sickness for all Nigerians. That, in short, makes it incumbent on Nigeria to fulfil its duties and obligations under ICESCR.

In General Comment 9¹⁸ the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) stated that the central obligation of a state party is to use all the means at its disposal to give effect to the rights arising from international human rights obligations within its jurisdiction without which international human rights law is deprived of its efficacy. Although ICESCR does not stipulate the specific means by which it is to be implemented domestically, there is an obligation on states to give effect to the rights recognised in ICESCR within their jurisdictions.¹⁹ General Comment 9 does not provide the precise method by which a state is to give effect to ICESCR, but it has been argued that one of the viable ways of giving effect to the provisions of ICESCR is by directly incorporating its provisions into domestic law.²⁰ It would appear that direct incorporation of ICESCR into the state's legal system is the desired approach by the ESCR Committee as it 'avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation'²¹ in the legal

15 See Preamble to the WHO Constitution.

16 General Comment 14 para 8.

17 General Comment 14 para 7.

18 Para 2.

19 J Asher *The right to health: A resource manual for NGOs* (2004) 15.

20 L Chenwi & DM Chirwa 'Direct protection of economic, social and cultural rights in international law' in DM Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 33.

21 General Comment 9 para 8.

system. However, the domestication of international law treaties in many countries, including Nigeria, depends on the nature of the legal system of that country, particularly its mode of reception of international law treaties.²²

Although article 12 of ICESCR provides for the universal right of 'everyone to the enjoyment of the highest attainable standard of physical and mental health',²³ it does not clarify the specific minimum or the essential elements of the right. It also fails to provide the duties or minimum core obligations that have to be fulfilled by the state in respect of the right. However, the ESCR Committee issued General Comment 14 to clarify these ambiguities with regard to the standard of the contents of the right as well the minimum core and non-derogable duties that are required to be fulfilled, in order to progressively realise the full implementation of the right. The right creates both general and specific legal obligations.²⁴ With regard to the general obligations of the right, there is an immediate obligation to ensure that the right is exercised without discrimination of any kind as provided in article 2(1) of ICESCR. States are to ensure that steps are taken towards the full realisation of the rights.²⁵ States also have specific legal obligations, which are to respect, protect and fulfil the right.²⁶ The obligation to respect creates a negative duty on the part of the state to refrain from denying or restricting equal access to the right. For example, a state that provides discriminatory access to healthcare facilities based on the status or race of its citizens would be violating this obligation.²⁷ The obligation to protect requires states to ensure that measures are in place to prevent third parties that provide health care and health-related services from interfering with the access of individuals to the right. For example, there have been many cases of female genital mutilation (FGM) reported in Nigeria²⁸ and part of the Nigerian government's response was to outlaw such practices through the instrumentality of legislation.²⁹

22 Monism and dualism are the dominant legal systems in many African countries. Broadly speaking, monism considers international and domestic law systems as one. International law will apply if it is binding on the state concerned. In contrast, dualism views international law and domestic law as separate systems, so that international law may be deemed part of domestic law only when it has been ratified by the state's legislature.

23 Art 12(1).

24 General Comment 14 para 30.

25 As above.

26 General Comment 14 paras 34-36.

27 L Hiam & M McKee 'Making a fair contribution: Is charging migrants for healthcare in line with NHS principles?' (2016) 109 *Journal of the Royal Society of Medicine* 226.

28 C Onuoha 'Female genital mutilation persists despite outlaw' *Nigerian Vanguard* (Abuja) 27 April 2018, <https://www.vanguardngr.com/2018/04/female-genital-mutilation-persists-despite-outlaw> (accessed 30 October 2019).

29 Prohibition of Female Circumcision Act 1985; Female Genital Mutilation Act 2003 (UK); Violence Against Persons (Prohibition) Act 2015 (Nigeria).

The obligation to fulfil requires states to sufficiently recognise the right to health care in their national political and legal systems and to adopt measures such as the implementation of legislation and a national health policy for the realisation of the right to health care.

The minimum core approach to implementing economic and social rights can become a formidable framework for the implementation of these rights, especially in cases where judicial remedies are sought. Minimum core obligations, in the author's opinion, will avail the court of a useful tool with which to measure the compliance of the government. It is important to understand that the minimum core obligation of states with respect to the right is primarily about equal access to essential primary health care that is available, accessible, affordable and of good quality.

3 Overview of the framework for the realisation of the right to health care in Nigeria

Having briefly examined article 12 of ICESCR and the obligations of states that have ratified it, the focus shifts to the second part of the article which seeks to apply the provisions of article 12 to the situation of health care in Nigeria. I propose to discuss these under two critical themes of judicial and budgetary measures in the realisation of the right.

With respect to the themes of judicial and budgetary measures in Nigeria, a few questions might help focus on and order the pattern of the analysis on the right to health care in Nigeria. What is the legal position on the right to health in Nigeria? Is Nigeria meeting the obligations of the highest attainable standard of health care in line with the core principles of article 2 and, more specifically, article 12 of ICESCR? What is the state of health care in Nigeria? Does Nigeria adequately and appropriately allocate resources to health care? Is there access to healthcare facilities? Finally, as far as these questions are concerned, one should establish what the role in and attitude of courts towards the right to health care in Nigeria are, at least from an enforcement perspective. In the part that follows I discuss these questions and offer my thoughts thereon.

3.1 Judicial measures and the right to health care in Nigeria

Nigeria operates a dualist legal system with a Constitution that is supreme to all other laws, including international treaties,³⁰ as far as their application is concerned in Nigeria.³¹ The implication of this is that, no matter how popular and desirable the provisions of an international treaty may be, such provisions would not be regarded as comprising part of the domestic law in Nigeria, until the legislature has taken definite measures to locally enact such treaty into the *corpus juris* of Nigeria.³²

The right to health care is not explicitly provided for in the Nigerian Constitution. Section 17(3)(c)(d) in chapter two of the Constitution³³ makes what could be described as a passing and vague reference to the right to health care by stating that the duty of the state is to ensure that there are adequate medical and health facilities for all persons. However, in section 6(6)(c) of the Constitution the judicial powers of the courts to review any question relating to the rights created under chapter two, including section 17, are ousted. The Constitution provides that '[t]he judicial powers vested in the courts shall not extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution'.³⁴ The implication of this provision is that it impedes the building of a constitutional foundation for access to the right to health care in Nigeria, at least from a rights-based perspective, because of the state's reluctance to accept its 'duty and responsibility'³⁵ to provide health care for its citizens, so that anyone seeking to enforce their right to health care through the court

30 Under the Nigerian dualist legal system, international treaties such as ICESCR and the African Charter do not assume automatic force of law in Nigeria, except when their provisions have been enacted into law by an Act of the National Assembly. See sec 12 of the Constitution.

31 Sec 1 of the Constitution of Nigeria; see also *Abacha & Others v Fawehinmi* (2001) AHRLR 172 (NgSC 2000), where the Supreme Court of Nigeria held that although the African Charter is in a special class of legislation arising out of Nigeria's international obligations, it nonetheless was subject to the Constitution of Nigeria.

32 See sec 12 of the Constitution of Nigeria. The Nigerian legislature has domesticated the African Charter, which is known as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.

33 This chapter is titled Fundamental Objectives and Directive Principles of State Policy. It first entered Nigeria's constitutional law lexicon in the 1979 Constitution which is the predecessor to the 1999 Constitution of Nigeria. It is believed to have been transplanted from the Indian Constitution of 1949, as amended in 1951. See J Akande *The Constitution of the Federal Republic of Nigeria 1979 with annotations* (1982) 13.

34 Sec 6(6)(c) Constitution of Nigeria.

35 Sec 13 Constitution of Nigeria.

usually is incapable of doing so because of the position of the law on economic and social rights.³⁶

Furthermore, the African Charter, an international treaty to which Nigeria is a signatory, provides for the right to health care. Article 16 provides:³⁷

- (1) Every individual shall have the right to enjoy the best³⁸ attainable state of physical and mental health.
- (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Given that there is no clear-cut provision for the right to health care in the Nigerian Constitution, the provision of article 16 referred to above could have been adequate to fill the *lacuna* in the Constitution, especially when it comes to the issue of accessing the courts to press for the enforcement of the entitlements and freedoms of the right to health care in Nigeria. However, there is a constitutional impediment in Nigeria to enforcing the above provision of the African Charter. Section 1(3) of the Constitution is very instructive in this regard. It provides that '[i]f any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void'. It follows, therefore, that when section 1(3) is read together with section 6(6)(c)³⁹ of the Constitution, one can only conclude that article 16 of the African Charter is not enforceable in Nigeria since the courts do not have the jurisdiction⁴⁰ to adjudicate on economic and social rights.

The above situation raises an important constitutional question regarding the status of the African Charter and its provisions within the Nigerian legal system. For a long time it was assumed that the provisions of the African Charter as ratified by the Nigerian legislature⁴¹ had equal standing with the Constitution⁴² because

36 See *Okogie v Attorney-General of Lagos State* (1981) 2 NCLR 337 57; see also *Attorney-General, Ondo State v Attorney-General, Federation* (2002) 9 NWLR (Pt 772) 22, where the Supreme Court of Nigeria suggested ways in which this provision of the Constitution could be circumvented.

37 Sec 16 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 is similarly worded.

38 Art 12 of ICESCR refers to the 'highest attainable state'.

39 This section ousts the jurisdiction of the courts in respect of social and economic rights contained in ch two of the Constitution of Nigeria.

40 *Abacha v Federal Republic of Nigeria* (2014) LPELR-22014 (SC).

41 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.

42 *Comptroller General of Prison v Adekanye* (2002) 15 NWLR (Pt 790) 318; *Fawehinmi v Abacha* (1996) 9 NWLR 710 (CA). See generally O Nnamuchi 'Kleptocracy and its many faces: The challenges of justiciability of the right to healthcare in Nigeria' (2008) 52 *Journal of African Law* 1; O Ajigboye 'Realisation of health right

of its international status which no single state could unilaterally modify. However, in the case of *Abacha v Fawehinmi*⁴³ the Supreme Court, relying on the decision of the Privy Council in *Higgs*,⁴⁴ held as follows:⁴⁵

No doubt Cap 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation ... But that is not to say that the Charter is superior to the Constitution ... Nor can its international flavour prevent the National Assembly ... removing it from our body of municipal laws by simply repealing Cap 10. Nor also is the validity of another statute to be necessarily affected by the mere fact that it violates the African Charter or any other treaty, for that matter.

The import of the foregoing is that as it currently stands in Nigeria, the status of the African Charter, strictly speaking, is no more than an Act of the legislature. The provisions of article 16 of the African Charter, therefore, are applicable only to the extent permitted by the legislature, and since the courts do not have the judicial powers to adjudicate on economic and social rights, including the right to health care, the position of law enunciated in the *Abacha* case⁴⁶ constitutes a serious impediment to the right to access health care in Nigeria. Furthermore, because of the ouster clause in section 6(6)(c) of the Constitution, the courts as a matter of practice have generally refrained from exercising jurisdiction in matters relating to the justiciability or enforcement of social and economic rights. The principle of law here is that the courts can only invoke their judicial powers under the Constitution where a matter is justiciable. The courts will have no competence to invoke their judicial powers if a matter is not justiciable, because it is a trite principle of Nigerian law that a court cannot adjudicate on matters over which it has no jurisdiction.⁴⁷

The above position of law in Nigeria has attracted considerable debate from experts in human rights. According to Okere, a recommendation to the Constitutional Drafting Committee (CDC) to allow for limited justiciability of economic and social rights was

in Nigeria: A case for judicial activism' (2014) 14 *Global Journal of Human Social Science* 23-34.

43 *Abacha v Fawehinmi* (n 31).

44 *Higgs & Another v Minister of National Security & Others* (2000) 2 WLR 1368.

45 This position was fully restated by the Nigerian Court of Appeal in *Odebunmi v Oladimeji* (2012) LPELR-15419 (CA).

46 *Abacha v Fawehinmi* (n 31).

47 *Nigericare Development Company Ltd v Adamawa State Water Board* (2008) WRN (Vol 20) 166.

refused on the basis that it could lead to friction between the various arms of government. Moreover, the CDC took the view that economic and social rights were not proper rights which individuals could seek to enforce in a court of law.⁴⁸ Even the suggestion of declaratory reliefs⁴⁹ was also rejected by the CDC because it was thought that these economic and social rights would be too expensive for the government to implement. Furthermore, it was rejected on the basis that the courts do not have the democratic mandate and institutional competence to interfere in the area of public and social policy which is thought to be an area within the exclusive remit of the executive, even though it is now widely held that every court enforces some vision of economic and social rights.⁵⁰ However, Onyemelukwe apparently does not agree with the position taken by the CDC. He argues that by virtue of section 13 of the Constitution, the judiciary has a responsibility and is duty-bound to observe and apply the provisions of chapter two of the Constitution.⁵¹ Akande does not agree. She hinges her objection on the ground of limited resources. She further posits that enforcing the provisions of chapter two of the Nigerian Constitution, which contains a semblance of the right to health care, would come at a considerable cost to the Nigerian government⁵² which, unlike the governments of the more affluent and industrialised Western states such as the UK and US, cannot afford to guarantee the right to health care for its citizens.⁵³ However, Nnamuchi disagrees with the above position, contending that even though Nigeria cannot provide access to health care at the same level as wealthier Western countries, it can progressively improve upon the minimum core obligations of the right. Nigeria might not be able to operate the social welfare model of affluent Western industrialised countries, but it can certainly provide at least some basic services such as primary health care. Similarly, Odinakalu, relying on the decision in *SERAC*,⁵⁴ contends that although there might be issues with adequate resources, the government has a duty to ensure the immediate realisation of the non-derogable elements

48 O Okere 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution' (1983) 32 *International and Comparative Law Quarterly* 214.

49 As above.

50 M Tushnet *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2008) 227.

51 See generally C Onyemelukwe 'Access to anti-retroviral drugs as a component of the right to health in international law: Examining the application of the right in Nigerian jurisprudence' (2007) 7 *African Human Rights Law Journal* 446; EB Omoregie & D Momodu 'Justifying the right to healthcare in Nigeria: Some comparative lessons in Nigeria' (2014) 12 *Nigerian Juridical Review* 13.

52 O Eze *Human rights in Africa* (1984) 31.

53 J Akande *The Constitution of the Federal Republic of Nigeria 1979 with annotations* (1982) 18.

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

of the right to health care which are consistent with the obligations to respect, protect and fulfil its obligations under ICESCR.⁵⁵

Notwithstanding the foregoing postulations by experts in Nigerian human rights law, the judicial position with regard to economic and social rights remains that they are unenforceable except if the legislature changes the law regarding the justiciability of economic and social rights.⁵⁶ However, there have been a few cases where the Nigerian courts have displayed some form of responsive judicial interpretation with regard to the right to health care. The case of *Odafe* is particularly noteworthy.⁵⁷ The applicant, along with three other inmates, suffered from HIV/AIDS and was being held in a prison facility in Nigeria. He applied to the Court seeking to enforce his right to treatment pursuant to sections 8 and 12 of the Nigerian Prisons Act which creates a duty on the prison authorities to cater for the health of prisoners in their charge. Relying on these sections of the Nigerian Prisons Act, the Court decided in favour of the applicant. Interestingly, in the process of reaching its decision the Court also referred to article 16 of the African Charter which is similar to article 12 of ICESCR. According to the Court:⁵⁸

Article 16 of African Charter Cap 10 which is part of our law recognises that fact and has so enshrined that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health'. Article 16(2) places a duty on the state to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. All the respondents are federal agents of this country and are under a duty to provide medical treatment for the applicants.

The unique feature and success of this case is the fact that it was hinged on the duty of the Minister for Internal Affairs and the Comptroller General of Prisons to provide health care for prisoners under their charge since the prisoners could not afford to do so on their own due to their being in detention.

Similarly, in the case of *Gbemre v Shell Petroleum Development Company Nigeria Limited*⁵⁹ the applicant prayed for the Court to declare that the rights to life and dignity provided under the Nigerian

55 C Odinkalu 'The impact of economic and social rights in Nigeria: An assessment of the legal framework for implementing education and health as human rights' in V Gauri & DM Brinks (eds) *Courting social justice judicial enforcement of social and economic rights in the developing world* (2008) 187.

56 *Federal Republic of Nigeria v Anache* [2004] 1 SCM 36 78.

57 *Odafe vs AG Federation* (2004) AHRLR 205 (NgHC 2004).

58 *Odafe* (n 57) paras 33 & 34.

59 (2005) AHRLR 151 (NgHC 2005).

Constitution⁶⁰ include the right to a clean, poison-free, pollution-free and healthy environment. Delivering its judgment, the Court held that the rights to life and dignity guaranteed under the Nigerian Constitution included the right to a clean, poison-free, pollution-free healthy environment and declared that the respondent should be restrained from further flaring gas in the applicant's community.⁶¹

The decisions in the *Odafe*⁶² and *Gbemre*⁶³ cases provide a unique opportunity for creativity on the part of the judiciary in Nigeria by relying on the fundamental rights provisions of the Constitution. For example, section 33(1) of the Nigerian Constitution provides for the right to life. On the basis of the interdependency of rights, the courts should rely on the evident connection between the right to health care and the right to life, thereby giving effect to an enforceable right to health care in Nigeria as was seen in India.⁶⁴ Under the Indian Constitution the state has a duty to improve the standard of living and health care. This provision is contained in part 5 of the Indian Constitution relating to the directive principles of state policy which are not legally enforceable. Notwithstanding this, the Indian Supreme Court has developed a method of adjudicating such matters by giving a broader interpretation to the right to life. For instance, in the case of *Paschim Banga Khet Mazdor Samity*⁶⁵ the Court held that the right to life enshrined in article 21 of the Indian Constitution imposes an obligation on the state to safeguard the right to life of every person and that the denial of timely medical treatment necessary to preserve human life is a violation of the right to health which is linked to the right to life, which is justiciable under the Indian Constitution. The Court also held that the state was bound to provide medical care irrespective of resource constraints.⁶⁶

It is submitted that even if the right to health care under the Nigerian Constitution is not justiciable, this does not mean that the right as currently couched under the Constitution does not create obligations and duties to which the state is bound. Therefore, it behoves the judiciary to hold the state to account for failing to fulfil

60 Secs 33(1) & 34(1)

61 The right to a healthy environment is provided for in sec 20 under chapter two of the Nigerian Constitution which is constitutionally not enforceable.

62 *Odafe* (n 57).

63 *Gbemre* (n 59).

64 *Vyas v Chariman, Disciplinary Authority* (1997) 4 SCC 565; *Reliance Natural Resources Ltd v Reliance Industries Ltd* (2010) 4 SCC 376.

65 *Paschim Banga Khet Mazdor Samity & Others v State of West Bengal & Another* (1996) 4 SCC 37.

66 As above; see also the case of *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161, where the Court declared that the right to live with human dignity derives its life breath from the directive principles of state policy and therefore, it must include protection of the right to health care.

its obligations with regard to the right. While it is understood that the provision of quality health care is resource-dependent, the state must implement healthcare schemes provided for in law, such as the National Health Insurance Scheme Act 2004, and the National Health Act 2014, which provides for a minimum package of healthcare services for all Nigerians. For instance, the National Health Act 2014 provides for the right to emergency healthcare treatment under the Act.⁶⁷

With regard to the application of article 12 of ICESCR in Nigeria, I do not seek to give the impression that a rights-based approach – the domestication of ICESCR and the provision of judicial remedies – is the only effective way of realising the right to health care. However, I am inclined to make the case that projecting human dignity and health care through a rights-based framework indeed helps to give added visibility to the debate and potential implementation of economic and social rights. Viewed from a legal perspective, the idea of a rights-based approach creates corresponding duties and obligations on the part of the state and its agencies, to pay more than passing attention to the realisation of the right to health care. Sen aptly captures this perspective when he says that ‘a human right can serve as a parent not only of law, but also of many other ways of advancing the cause of that right ... for all’.⁶⁸

Towards the realisation of the right to health care, the dualist nature of the Nigerian legal system should be reconsidered, so that the relevant provisions of international human rights treaties such as article 12 of ICESCR can be directly implemented, as has been done in Kenya.⁶⁹ If this point were to be considered, the Nigerian legislature will need to review the relevant parts of the Constitution, especially section 12 which effectively creates a dichotomy in the relationship between public international law and national law, to bring it in line with a similar provision in the Kenyan Constitution which automatically makes any treaty ratified by Kenya part of the law of Kenya.⁷⁰ While this may not bring about any dramatic and sudden changes to the realisation of the right, it will certainly change the nature and impetus of the economic and social rights discourse in Nigeria. It will embolden the courts to hold the responsible

67 Sec 20.

68 A Sen ‘Why and how is health a human right?’ (2008) 372 *The Lancet* 1.

69 Kenya amended its Constitution in August 2010, following a referendum that saw 67% of Kenyan voters in support of the proposed changes to the 1963 Independence Constitution of Kenya. As result of this amendment, international treaties, including human rights treaties, no longer require legislative assent before becoming part of the law in Kenya. See art 2(5)(6) of the Kenyan Constitution 2010.

70 As above.

institutions and agencies of government to account for the measures being taken to realise the right and ultimately address the pervasive inequities in respect of access to health care in Nigeria.

3.2 Budgetary measures: Funding, resource allocation and the right to health care in Nigeria

Effective resource allocation is paramount in order to achieve the right to health care as envisaged in article 12 of ICESCR. As funding is critical, so also is the issue of its adequacy to meet a growing demand for health care rights-based services and access to facilities. This will inexorably lead to resource management decisions which can also impact access to the right to health care.

In December 2014 Nigeria finally passed a long-awaited and much-debated National Health Act (Act) which, among others, provided for the right to emergency healthcare treatment.⁷¹ The Act also made it an offence for a healthcare provider to refuse to provide emergency treatment.⁷² While this provision on the face of it is commendable, it does seem to be an attempt by the government to shift its obligations under the right to health care to healthcare providers, most of whom are run privately and receive no funding from the government. In the absence of financial and technical support from the government, it is morally wrong and unacceptable for the government to ask healthcare providers to bear the duty of providing emergency healthcare treatment. This provision in the Act raises an important question, at least from the perspective of those needing emergency healthcare treatment. Assuming that the argument can be made that section 20 of the Act creates an enforceable right with a corresponding duty on the part of the government to protect such a right, the question arises as to where there has been a failure to protect such right, what remedy would be available to such an individual (assuming they are still alive at the time), and against whom could they sue to enforce such right. Why would the government seek to punish the healthcare provider, whereas it is the government that has effectively failed to provide the needed resources for the provision of healthcare treatment?

71 See sec 20 of the National Health Act 2014. This provision was meant to check the attitude of some healthcare providers in Nigeria, who refuse to treat victims of crimes without clearance from the police especially in cases where such victims suffer injuries (bullet wounds) due to the use of firearms, because of Nigeria's strict laws on the possession of firearms. It was also meant to protect patients needing emergency medical care, but have no means of paying for it, since most private healthcare providers in Nigeria normally ask for a monetary deposit before administering any treatment to patients.

72 As above.

Furthermore, this kind of situation can lead to a serious moral dilemma for many private healthcare providers, especially as health care should be provided according to need and not the ability to pay, a practice that has won the National Health Service in the UK global acclaim.⁷³

The foregoing highlights the importance of adequate funding if the right to health care is to be realised in Nigeria. Despite the debate on the justiciability of economic and social rights, the right to health care can only be effective with strong institutional support backed by a functional regime of resource allocation, making the right decisions and setting the right priorities for health care. Indeed, ICESCR enjoins state parties to take steps, individually and through international assistance to the maximum of available resources, towards the progressive realisation of economic and social rights through the adoption of appropriate means including, particularly, the adoption of legislative measures.⁷⁴

At the heart of the problem of realising economic and social rights is the question of available resources as resource constraints are essential when it comes to measuring a state's compliance under ICESCR. It is an important factor when considering whether a state has taken steps towards the progressive realisation of economic and social rights.⁷⁵ However, in assessing whether a state has taken steps towards realising economic and social rights, the question as to what resources a state should devote to realising economic and social rights must first be considered. Although the term 'maximum available resources' is not defined in ICESCR, the evolving doctrine to be gleaned from the work of the ESCR Committee⁷⁶ and the opinion of experts⁷⁷ points to the fact that it is the totality of a state's resources including, but not limited to, budgetary allocation. Thus, these

73 The Commonwealth Fund 'Mirror mirror on the wall, 2014 update: How the UK healthcare system compares internationally', <http://www.commonwealthfund.org/publications/fund-reports/2014/jun/mirror-mirror> (accessed 28 September 2021).

74 Art 2 ICESCR.

75 RE Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social, and cultural rights' (1994) 16 *Human Rights Quarterly* 703.

76 General Comment 3 paras 3-7; UN ESCR Committee 'An evaluation of the obligation to take steps to the "maximum available resources" under an optional protocol to the Covenant' 10 May 2007, <https://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf> (accessed 10 October 21).

77 See D Elson et al 'Public finance, maximum available resources and human rights' in A Nolan et al (eds) *Human rights and public finance: Budget and the promotion of economic and social rights* (2013) 1; R O'Connell et al *Applying an international human rights framework to state budget allocations: Rights and resources* (2014) 61.

would include technical, administrative and other resources that can be maximally deployed without compromising other rights.⁷⁸

ICESCR has a robust and relatively established approach in assessing the issue of maximum available resources and the concrete steps that states must take to meet their obligations under ICESCR, particularly those provided under article 2 of ICESCR. Following the work of the ESCR Committee in this regard, six different lines of approach have been identified as emerging from the practice of the Committee with regard to what amounts to the available resources.⁷⁹ It is clear from the analysis that the maximum available resources obligation covers an extensive aspect (financial and non-financial) of a state's socio-economic activities. Based on the Committee's approach, it could also include the way resources are allocated within the state. For instance, the ESCR Committee in its Concluding Observations on Guinea⁸⁰ expressed concern over the lack of resources allocated to health care and education despite the strong economic growth that had been witnessed in Guinea. It also expressed concern over the inadequate measures the state had taken to fight corruption and recommended that the state party implement effective measures to combat corruption.⁸¹ The persistence of corruption in the state would seem to indicate a lack of commitment to its obligations under international law.

Given Nigeria's financial resources alone, especially from the sale of petroleum minerals,⁸² it cannot be described as a poor country.⁸³ Its biggest challenge is the high level of institutional corruption and near absence of accountability by state institutions.⁸⁴ In view of these

78 See report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (UN Human Rights Council 2009) A/HRC/11/12/Add. 2.

79 R Uprimny et al 'Bridging the gap: The evolving doctrine on ESCR and "maximum available resources"' in KG Young (ed) *The future of economic and social rights* (2019) 627.

80 Concluding Observations on the Initial Report of Guinea, ESCR Committee (30 March 2020) E/C.12/GIN/CO/1 (2020).

81 Para 11.

82 As of 2020 Nigeria was the largest oil producer in Africa. See J Faria 'Main oil producing countries in Africa 2020' 29 July 2021, <https://www.statista.com/statistics/1178514/main-oil-producing-countries-in-africa/> (accessed 18 October 2021).

83 A Enumah 'EU withdraws financial support for Nigeria, says country not poor' *Thisday* (Abuja) June 2017, <https://www.thisdaylive.com/index.php/2017/06/30/eu-withdraws-financial-support-for-nigeria-says-country-not-poor/> (accessed 18 October 2021).

84 O Nnamuchi 'Bloated remuneration of political office holders as a violation of human rights: The case of right to health in Nigeria' 6 August 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306486 (accessed 20 October 2021). According to Transparency International, Nigeria is one of the lowest scoring countries on the corruption perception index (CPI), underscoring a need for urgent action, <https://www.transparency.org/en/cpi/2020/index/nga> (accessed 20 October 2021).

significant shortcomings in the Nigerian healthcare policy approach, I am of the considered opinion that Nigeria violates its obligations under ICESCR. The ESCR Committee in its Concluding Observations on Nigeria raised a concern about corruption and underfunding of health services in the country which has led to the rapid deterioration of health infrastructures in the country.⁸⁵ Although the report was released during the military regime in Nigeria, the issues identified in the report have remained relevant to the reality of healthcare services in Nigeria.

In terms of funding for the right, it is apparent that Nigeria is yet to fully commit to meeting its minimum obligations with regard to the right to health care as envisaged by ICESCR. It is regrettable that Nigeria has no functional public healthcare system and, to complicate matters, there is no known legal mechanism by which the actions or inactions of the government could be challenged, as was seen in South Africa, for example.⁸⁶

In 2001 heads of state of African Union (AU) countries met and pledged to allocate a minimum of 15 per cent of their annual budget to improve health care in their respective countries. The 2011 progress report by the WHO indicates that Nigeria consistently failed to meet this target at any time during the period.⁸⁷ Although the foregoing report was released in 2011, there is no evidence of a shift in the direction of achieving the 15 per cent minimum budgetary allocation to health care. A few examples will suffice to substantiate this assertion. In 2012 the federal government of Nigeria allocated a paltry 7 per cent of the national budget to health. In 2013 it amounted to 6 per cent and in 2014 it was 8 per cent of the national budget.⁸⁸ In 2020 only 4 per cent of the national budget was allocated to health care. Out of this fraction, only 22 per cent was committed to funding capital projects that are meant to have a progressive impact on the right. The remainder was spent on recurrent expenditure such as the payment of salaries and allowances for employees and political appointees working in the Nigerian healthcare sector.⁸⁹ This trend continued in 2021. Amid the ongoing COVID-19 pandemic,

85 Concluding Observations on Nigeria (16 June 1998) E/C 12/1/Add.23 (1998).

86 See, eg, *Minister of Health & Others v Treatment Action Campaign & Others* (2002) AHRLR 189 (SACC 2002).

87 WHO 'The Abuja Declaration: Ten years on' August 2011, http://www.who.int/healthsystems/publications/abuja_report_aug_2011.pdf?ua=1 (accessed 20 October 2021).

88 A sizeable portion of this sum allocated to health care is spent on the payment of salaries and other overheads.

89 'Nigeria budgets N2 000 for the healthcare of each citizen in 2020', <https://www.premiumtimesng.com/health/health-features/361373-nigeria-budgets-n2000-for-the-healthcare-of-each-citizen-in-2020.html> (accessed 18 October 2021).

the country's budgetary allocation to health amounted to less than 5 per cent of the budget.⁹⁰

It is not surprising that in the WHO healthcare expenditure information on Nigeria, the government provided only 4 per cent of the total cost of financing health care in the country.⁹¹ On the other hand, 76,6 per cent of healthcare financing – known as out-of-pocket payments – came from private households.⁹² This underscores the huge economic burden of financing health care on individual households in Nigeria.

In 2016 Nigeria published a revised National Health Policy.⁹³ According to the policy, the overall goal was 'to strengthen Nigeria's health system, particularly the primary health care sub-system, to deliver effective, efficient, equitable, accessible, affordable, acceptable and comprehensive healthcare services to all Nigerians'.⁹⁴ Despite the introduction of the revised policy and its avowed goal, Nigeria still has one of the highest rates of child and maternal mortality in the world.⁹⁵ According to the WHO a major contributory factor to the high level of maternal mortality is the corresponding high level of inequities in access to healthcare services. This highlights the need for the Nigerian government to address this issue by ensuring that access to health care is improved through the provision of more funds for healthcare facilities in the budget, as more than half of the world's maternal deaths occur in sub-Saharan Africa, of which Nigeria forms part.⁹⁶ With respect to the right, the issue here is not the dearth of healthcare policies and legislation, but a puzzling absence of the required will to follow these policies through. As a result, the progressive realisation⁹⁷ requirement of the right to health care has been anything but progressive. Despite all the rhetoric and target setting that have characterised the push for the realisation of the right to health care, there is still evidence of a

90 <https://www.devex.com/news/sponsored/2-decades-on-nigeria-falls-short-of-landmark-health-pledge-99555> (accessed 21 October 2021).

91 WHO Global Health Expenditure Database (2020), http://apps.who.int/nha/database/country_profile/Index/en (accessed 18 October 2021).

92 Out-of-pocket payments are defined as direct payments made by individuals to healthcare providers at the time of service use.

93 The initial policy was made in 1988 and revised in 2004.

94 Federal Ministry of Health 'National Health Policy: Promoting the health of Nigerians to accelerate socio-economic development' September 2016, <https://naca.gov.ng/wp-content/uploads/2019/10/National-Health-Policy-Final-copy.pdf> (accessed 18 October 2021).

95 'Nigeria maternal mortality rate' IndexMundi (2019), http://www.indexmundi.com/nigeria/maternal_mortality_rate.html (accessed 18 October 2021).

96 WHO 'Maternal mortality fact sheet (2019), <http://www.who.int/mediacentre/factsheets/fs348/en/> (accessed 18 October 2021).

97 Art 2 ICESCR.

lack of commitment judging by the negligible amount allocated to health care in successive Nigerian budgets.

Under ICESCR⁹⁸ states are enjoined to take steps to progressively achieve the highest attainable standard of health care to the maximum of available resources. It is doubtful whether less than 5 per cent of the annual budget allocated to health care amounts to the maximum of available resources.

4 Conclusion

Despite the far-reaching international commitments to take the necessary steps towards ensuring the protection and fulfilment of economic and social rights by the Nigerian government, the country still lags behind when compared to many countries in terms of the various health care performance indicators, thus effectively repudiating liability for a failure to protect the right to health care. The right to health care is a fundamental human right and is critical to the enjoyment of other human rights. It ties in with the central theme of human rights which is the protection of the dignity of the human person. The government, therefore, must take all reasonable steps within its powers to ensure that this right is enjoyed to a reasonable standard by all Nigerians. The current level of commitment to realising the right to health care is far from impressive and, what is more, the situation of health care in Nigeria today is inexcusable. The blatant display of inadequate levels of commitment to successive healthcare policies must be reversed if Nigeria is serious about meeting its international obligations with regard to the right to health care in article 12.

The ESCR Committee in General Comment 14 stated that the realisation of the right to health care should be pursued through numerous complementary approaches, including appropriate legislative, administrative, budgetary, promotional and judicial measures. However, the evidence reviewed in this article reveals that authorities in Nigeria are yet to fully commit their resources in pursuing the realisation of the right, especially in the area of resource allocation which, as already stated, is critical to the realisation of the right to health care in Nigeria.

With reference to the role of the judiciary in promoting the right to health care, the courts should be more receptive to the principle

98 As above.

of the interdependency of rights when they adjudicate matters concerning economic and social rights. In a few instances the courts have stretched the provisions of chapter four of the Nigerian Constitution to include elements of the rights provided in chapter two, and they should be commended for taking that approach. However, the point should be made that the decisions of courts with respect to justiciable and enforceable economic and social rights may not always have the desired impact on the lives of the citizens if the other arms of government, especially the executive, lack the will to implement those decisions. For example, the National Health Act 2014 has created a few agencies with specific duties, the performance or non-performance of which could potentially have an impact on the right to health care. It therefore is important that persons who feel that the acts of these agencies have been unlawful are able to approach the courts for redress. For its part, the government must be prepared to give effect to the provisions of the Act for the promotion of the right to health care.

With access to health care increasingly assuming the language of human rights, a pivotal role for Nigerian courts in the implementation of the right to health care cannot be ignored. It is time that the Nigerian courts were supported to perform these roles effectively. The courts should be willing to engage the other arms of government in some constitutional and democratic conversation⁹⁹ with regard to the right to health care and should not allow the judicial institution to be marginalised or snagged by what seems to be outdated and insupportable theories premised on the idea of separation of powers, a lack of institutional capacity and democratic legitimacy,¹⁰⁰ especially as (albeit limited) studies¹⁰¹ carried out so far have highlighted the benefits of a constitutionally-guaranteed healthcare right, especially in a country such as Nigeria, where the government is less politically sensitive to the will of the citizens.

Section 13 of the Constitution creates a duty on the part of the government, and the unique nature of this situation is that where there is a duty, there must be a corresponding right to demand the performance of such a duty. The Constitution cannot, therefore, create such a duty without liability for some sort of justiciability

99 M Tushnet 'Dialogic judicial review' (2008) 61 *Arkansas Law Review* 205.

100 G van Bueren 'Including the excluded: The case for an economic, social and cultural Human Rights Act' (2000) *Public Law* 1.

101 See D Brinks & V Gauri 'A new policy landscape: Legalising social and economic rights in the developing world' in V Gauri & D Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 303; S Gloppen 'Litigating health rights: Framing the analysis' in A Yamin & S Gloppen (eds) *Litigating health rights: Can courts bring more justice to health?* (2011) 17.

for economic and social rights, especially the right to health care. Rights are what people possess by reason of their humanity.¹⁰² Rights are not grants by the state and where there is a systemic failure to grant access to such rights, the courts must be able to find ways of overcoming these obstacles on the presumption that the legislature cannot legislate to oust the obligations into which a state has freely entered internationally. Therefore, the Nigerian courts should display an increased willingness to give economic and social rights a progressive interpretation based on the notion of the interdependency of rights.

102 B Fortman "'Adventurous" judgments: A comparative exploration into human rights as a moral-political force in judicial law development' (2006) 2 *Utrecht Law Review* 22.

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Revisiting personal immunities for incumbent foreign heads of state in South Africa in light of the *Grace Mugabe* decision

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Summary: *In the Grace Mugabe decision in which the conclusion was arrived at that Grace Mugabe was not entitled to spousal immunity by virtue of being the wife of the then incumbent foreign head of state, Vally J remarked that the late former President Mugabe would not have been entitled to immunity had he been accused of committing the assault. This article analyses this remark and its potential negative impact on South Africa's relationship with other African states. The analysis is valuable as South Africa has positioned itself as being a human rights state that strives to play a significant role in peace making in Africa and consistently has argued that removing customary international law immunity, to which foreign heads of state are entitled, may undermine these intentions. The article examines South Africa's position on personal immunity for foreign heads of state in customary international law against the backdrop of the Mugabe decision. It argues that as it currently stands South African law recognises absolute personal immunity for foreign heads of state in cases not relating to the perpetration of international crimes.*

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Key words: *Grace Mugabe; personal immunities; foreign heads of state; state immunity; customary international law; Foreign States Immunities Act; Diplomatic Privileges and Immunities Act; separation of powers*

1 Introduction

The scenario I imagine is as follows: Kaavia James, an incumbent head of an African state, visits South Africa with her family on holiday. During an excursion, recklessly driving a rented car, Kaavia James causes the death of a person. This incident attracts widespread reporting in South Africa and internationally. At the same time the incident is the cause of a political and foreign relations nightmare for the executive in South Africa. Opposition political parties and civil society organisations put pressure on the police to investigate the incident before James returns home. Under pressure the police initiate an investigation for possible culpable homicide charges against Kaavia James. Before any substantial progress has been made the Minister of International Relations and Cooperation exercises her power under South African law to grant Kaavia James immunity from criminal investigation and possible prosecution before the South African courts. The Minister claims that an incumbent head of state is entitled to customary international law personal immunity in South Africa by virtue of their office. The opposition political parties and civil society organisations apply to the High Court in a challenge to the Minister's decision as irrational and unconstitutional and argue that in accordance with South African law Kaavia James is not entitled to immunity before the South African courts because she caused the death of a person. The Court agrees with the applicants. The Court reasons that although customary international law immunity for foreign incumbent heads of state is recognised in South African law, an exception exists when a head of state causes an injury to or the death of a person. The Court orders Kaavia James to be investigated for possible criminal charges and grants an interdict which prevents her from leaving the territory of South Africa until the matter reaches a conclusion. The South African government is faced with a political backlash in other African states as a result of this court order.

The above scenario is imaginary. A cursory reading of Vally J's judgment in the *Mugabe* decision¹ suggests that an incumbent foreign head of state accused of committing a crime while visiting South Africa loses their claim to personal immunity and may be

¹ *Democratic Alliance v Minister of International Relations and Co-operation & Others; Engels & Another v Minister of International Relations and Co-operation & Another* 2018 (2) SACR 654 (GP) (*Mugabe* decision).

brought before the national courts. This imaginary case reflects the status of customary international law and the immunity of heads of state, as does the remark of Vally J in the *Mugabe* decision, although that case related to whether Grace Mugabe was entitled to immunity in South Africa as a spouse of a foreign head of state. Vally J remarked:²

In terms of s 6(a) [of the Foreign States Immunities Act 87 of 1981] former President Mugabe would not have enjoyed the immunity *ratione personae* had he been the one accused of perpetrating the alleged assault on Ms Engels, for such immunity has specifically been withdrawn by the section. In this regard our law has parted company with the customary international law and [section] 232 of the Constitution [of the Republic of South Africa, 1996] allows for this.

This article focuses on the implications of this remark, which has the potential of affecting the status of foreign heads of state's customary international law immunities in South Africa. The question is posed: Was Vally J correct in reaching the conclusion that an incumbent foreign head of state is not entitled to customary international law immunity before national courts if he or she causes an injury to a person in the territory? The focus of this article is to exclude a discussion of whether Vally J is correct in finding that Grace Mugabe was not entitled to derivative spousal immunity. The possibility of a customary international law rule on the derivative immunity of spouses of foreign heads of state is not relevant to the discussion. In any event, the question of Grace Mugabe's immunity is moot as her husband had ceased to hold office and had died. She remains a criminal suspect in South Africa.

Various reasons aroused my taking an interest in this *Mugabe* decision. First, the South African courts³ increasingly have been criticised by academics for their interpretation and application of international law.⁴ The *Mugabe* decision is an example of a case that was criticised, including for its interpretation of South African domestic law. Second, remarks made by judges in their judgments have the potential to being taken as binding law, for example the

² Para 40.

³ See, eg, *Law Society of South Africa & Others v President of the Republic of South Africa & Others* 2019 (3) SA 30 (CC); *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA); *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP).

⁴ See, eg, AK Zouapet & MA Plagis 'Braamfontein encroaching? An internationalist reading of the South African Constitutional Court judgment on the SADC Tribunal' (2020) 35 *South African Journal on Human Rights* 378 (arguing that 'the Constitutional Court's use of international law has endangered its own decision, as its positions are not defensible within the discipline of public international law'); D Tladi 'The interpretation and identification of international law in South African courts' (2018) 135 *South African Law Journal* 708, criticising the Constitutional Court's interpretation and application of international law.

remarks made by Mogoeng CJ in *My Vote Counts II*⁵ which were invoked by litigants in a subsequent case, *New National Movement*,⁶ as the sole reason for the applicants' case. Madlanga J refused to categorise the remarks as an obiter dictum, although submissions in this regard were made by the parties.⁷ I submit that Vally J's remarks have the potential to be harmful to South Africa's diplomatic and foreign relations, considered an achievement of the executive.⁸

The article discusses the facts, question of law and the judgment in the *Mugabe* decision. Then the article deals with the following issues: first, it examines the status of heads of state personal immunities in general; second, it scrutinises the status of foreign heads of state personal immunities for criminal jurisdiction in South Africa by examining relevant provisions of the three pieces of legislation that deal with immunities of heads of state in South Africa – the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act);⁹ the Diplomatic Immunity and Privileges Act 32 of 2001 (DIPA);¹⁰ and the Foreign States Immunities Act (FSIA);¹¹ and, lastly, it investigates whether Vally J by his remark in the *Mugabe* decision was incorrect. I make three arguments: (i) that current South African law recognises absolute immunity for incumbent heads of state before the national courts in criminal proceedings except for international crimes; (ii) that the applicable statute in the *Mugabe* decision was the DIPA and not the FSIA; and (iii) that Vally J exceeded his authority when he made that remark and applied the FSIA in this case, deciding on an issue that was not brought before the court.

Before exploring these arguments, I present an overview of Vally J's judgment in the *Mugabe* decision as it forms the basis of this discussion.

5 *My Vote Counts NPC v Minister of Justice and Correctional Services & Another* 2018 (5) SA 380 (CC) para 29. See also *New Nation Movement PPC & Others v President of the Republic of South Africa & Others* 2019 (5) SA 533 (WCC) paras 11 and 22, where Desai J observed that the applicant relied solely on Mogoeng CJ's remark.

6 *New Nation Movement NPC & Others v President of the Republic of South Africa & Others* (CCT110/19) [2020] ZACC 11 (11 June 2020).

7 *New Nation Movement PPC* (n 5) para 100, where Madlanga J pronounced that 'it is unnecessary to enter that debate for that matters not in the circumstances'.

8 H Woolaver 'Domestic and international limitations on treaty withdrawal: Lessons from South Africa's attempted departure from the International Criminal Court' (2017) 111 *American Journal of International Law Unbound* 453 (arguing, in relation to treaty withdrawal, that '[t]he executive, often with the legislature's input, is best placed to undertake these decisions').

9 Act 27 of 2002.

10 Act 32 of 2001.

11 Act 87 of 1981.

2 The *Mugabe* decision

2.1 The facts

Grace Mugabe, the spouse of the late former President of Zimbabwe, Robert Mugabe, was accused while visiting South Africa of having committed assault with intent to do grievous bodily harm against Ms Engels.¹² The Minister of International Relations and Cooperation (Minister) decided to confer immunity on Grace Mugabe in terms of section 7(2) of the DIPA.¹³ The Minister conferred the immunity in terms of a minister's minute and a government notice. The government notice reads as follows:¹⁴

It is hereby published for general information that the Minister of International Relations and Cooperation has, in terms of section 7(2) of the [DIPA] recognised the immunities and privileges of the First Lady of the Republic of Zimbabwe in terms of international law.

One of the issues considered by the Minister was that international and domestic law recognise personal immunity for heads of state, heads of government and ministers of foreign affairs, which 'precludes any enforcement action against the holder'.¹⁵ The Minister acknowledged that there are exceptions to this rule in relation to specific crimes but argued that this was not an issue in the current case.¹⁶ The Minister had to consider whether Grace Mugabe was entitled to derivative immunity as the spouse of an incumbent foreign head of state. Referencing the domestic law of states such as Switzerland, India, Hong Kong, the United Kingdom and Australia, the Minister argued that state practice supported the notion of derivative immunity for spouses of sitting foreign heads of state.¹⁷ The Minister referred to these examples as constituting evidence of customary international law, and as the basis for her exercise of discretion in terms of section 7(2) of DIPA.¹⁸

12 See, eg, eNCA 'Grace Mugabe assaulted me: Joburg woman' 14 August 2017, <https://www.enca.com/africa/grace-mugabe-assaulted-me-claims-joburg-woman> (accessed 7 November 2019); K Motau 'DA: Grace Mugabe must hand over passports as she remains a massive flight risk' EyeWitnessNews 18 August 2019, <https://ewn.co.za/2017/08/18/da-grace-mugabe-must-hand-over-passports-as-she-remains-a-massive-flight-risk> (accessed 7 November 2019).

13 Para 8. This provision states: '[t]he Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*'.

14 Para 8.

15 Para 6.9.

16 As above.

17 Para 6.10 and paras 22-24.

18 Para 6.11.

The Democratic Alliance (DA), the main opposition political party in South Africa, challenged the Minister's decision to confer diplomatic immunity on Grace Mugabe before the High Court on the basis that it was unconstitutional and unlawful. Three *amici curiae*, the Commission for Gender Equality (CGE), the Women's Legal Centre Trust (WLC) and the Freedom Under Law (FUL), in supporting the relief sought by the DA relied on different grounds. The CGE and the WLC argued that the Minister's decision 'violated [her] obligation in [section] 7(2) of the Constitution to "respect, protect, promote and fulfill" the rights of women, and that it violated South Africa's international obligations concerning violence against women'.¹⁹ FUL argued that the Minister had failed 'to appreciate that [section] 232 of the Constitution pronounces that any customary international law that is inconsistent with the Constitution is invalid';²⁰ the Minister's decision violated various provisions of the Constitution and that, therefore, it was unlawful and unconstitutional irrespective of whether or not it was based on customary international law.

Vally J was called upon to deal with the following issues:²¹

- (a) Does [Grace] Mugabe enjoy immunity for the alleged unlawful act perpetrated against Ms Engels by virtue of being a spouse of a [HoS]?
- (b) If not, was the decision of the Minister to confer or grant immunity to [Grace Mugabe] constitutional and lawful?

Below is Vally J's response to these questions.

2.2 Vally J's judgment

Vally J examined both customary international law and South African statute law to determine whether Grace Mugabe enjoyed personal immunity in South Africa. On customary international law, he confirmed that in order for the foreign head of state spouse to enjoy immunity it had 'to be found that there exists a settled practice which is widespread and extensive (ie, recognised by a majority of states) (the *usus*) and that the practice occurs out of a sense of legal obligation by the states'.²² The Court correctly stated that the Minister bore the burden to prove both elements of a customary

¹⁹ Para 11.

²⁰ As above.

²¹ Para 13.

²² Para 21; see also art 38 of the Statute of the International Court of Justice, United Nations, *Statute of the International Court of Justice* 18 April 1946, <https://www.refworld.org/docid/3deb4b9c0.html> (accessed 18 April 2020), which defines customary international law 'as evidence of a general practice accepted as law'.

international law rule as the Minister 'must go beyond simply identifying a practice (*usus*)'.²³

Vally J rejected the authorities upon which the Minister relied on the following grounds:²⁴

A crucial factor that needs to be borne in mind about that case is that it fell within the jurisdiction of the [US] where the courts tend to show extensive, if not absolute, deference to the decision of the executive to grant immunity to the official or spouse of the official from the sending state. The principle was established as long ago as 1882 by the [US] Supreme Court in [United States v Lee 106 US 196 (1882)]

Vally J explained that the US position on immunities 'clearly indicates that it is the "duty of the court to 'surrender' jurisdiction upon the motion by the executive that the court lacks jurisdiction as it (the executive) saw fit to grant the person immunity"''.²⁵ Based on this reasoning, Vally J held that the decisions of the US courts did not reflect customary international law rule but 'domestic choices made for policy reasons'.²⁶ Accordingly, Vally J found that this did not reflect the law in South Africa as 'the executive is constrained by the Constitution and by national legislation enacted in accordance with the Constitution'.²⁷ In this regard and, according to Vally J, the Constitution permitted the executive to grant personal immunity if such immunity is derived from one of the three categories: '(i) a customary norm that is consonant with the prescripts of the Constitution, or (ii) the prescripts of an international treaty which is constitutionally compliant; or (iii) national legislation which is constitutionally compliant'.²⁸

Vally J relied upon the International Law Commission (ILC) Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction to reject the Minister's argument that personal immunity for the family member or spouse of a foreign head of state acquired the status of customary international law (the Minister had argued that 'customary law "has always granted members of the family" of [a foreign incumbent head of state] immunity').²⁹ Vally J found that the ILC Special Rapporteur observed that 'there was a marked lack

23 Para 21.

24 Para 25. In *Lee* it was held that 'every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government ... It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit.'

25 Para 26.

26 Paras 28-30.

27 Para 30.

28 As above.

29 Para 33.

of homogeneity in the judgments of various national courts dealing with the issue of family members of a [foreign incumbent] head of state'.³⁰ Therefore, 'the granting of [personal immunity] under international law to the family members of the entourage of a head of state remains an uncertain matter'.³¹ Vally J also noted that there were differing opinions among scholars on the issue of spouses' immunity under customary international law.³² He then concluded that

the evidence is too contradictory to support the definitive finding ... that [personal immunity] is extended to the family members of a head of a foreign state where such immunity was granted it was on the basis of international comity rather than on the basis of a finding that it is a principle of international customary law.³³

In order to determine whether derivative spousal personal immunities exist in domestic law, Vally J examined the FSIA, which provides that a 'foreign state shall be immune from the jurisdiction of courts of the Republic except as provided in this Act or in any proclamation issued thereunder'.³⁴ According to the FSIA, the term 'foreign states' includes the head of state in his or her capacity as such.³⁵ Vally J observed that the FSIA 'was clearly intended to expound, with as much precision as possible at the time of its enactment, the parameters of immunity from the jurisdiction of our courts that foreign states enjoy'.³⁶ The judge accentuated that there is an exception to this provision in terms of section 6(a), which states that 'a foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to the death or injury of any person'.³⁷ Consequently, Vally J held that Grace Mugabe was not entitled to derivative immunities in terms of the FSIA as former President Mugabe would not have enjoyed personal immunities himself under these circumstances.³⁸ This meant that Grace Mugabe should have been arrested and charged with assault with intent to do grievous bodily harm.

30 As above.

31 Para 34.

32 As above.

33 Para 35.

34 Sec 2(1).

35 Sec 1(2)(a).

36 Para 38.

37 Para 39.

38 Para 40.

3 The South African law position on foreign incumbent heads of state personal immunities for criminal proceedings before the national courts: Which statute applies?

Before exploring the South African law position on foreign incumbent heads of state personal immunities, it is important first to ascertain the status of personal immunities for incumbent heads of state under customary international law in general. The Constitution of the Republic of South Africa, 1996 recognises customary international law as part of the South African law if it does not conflict with the provisions of the Constitution or an Act of Parliament.³⁹ In this regard, the Constitution endorses the common law position which supported the monist approach in relation to customary international law before the Constitution entered into force.⁴⁰ Customary international law recognises personal immunity or immunity *ratione personae* for a foreign head of state before national courts.⁴¹ Personal immunity is described as 'a rule of international law that facilitates the performance of public functions by the state and its representatives by preventing them from being sued or prosecuted in foreign courts'.⁴² The rule forms part of state immunity in order to protect foreign states from a violation of their sovereignty or an interference with the official functions of their agents under the pretext of dealing with an exclusively private act.⁴³ Professor Zappala explains this protection of foreign heads of states from a possible interference with their official functions as follows:⁴⁴

Protection is generally afforded when a Head of State is abroad both for official missions and for private visits (or even incognito). In the former case immunity for private actions guarantees the scope of the mission and the fulfilment of the particular tasks involved, While in the latter, immunity is afforded in order to protect the general interest of the state to be represented (on the basis of a principle comparable

39 Sec 232 of the Constitution of the Republic of South Africa, 1996.

40 See also A Coutoudis & J Dugard 'The place of international law in South African municipal law' in J Dugard et al *Dugard's international law: A South African perspective* (2019) 57, 62, 67.

41 This article focuses only on personal immunities, which bar courts from exercising jurisdiction over incumbent foreign heads of state while they are still in office. The article deliberately ignores immunity *ratione materiae* which bars courts from exercising jurisdiction over foreign heads of state for official acts attributed to the state. See J Crawford *Brownlie's principles of public international law* (2012) 489.

42 Crawford (n 41) 487.

43 A Cassese 'Where may senior state officials be tried for international crimes?' (2002) 13 *European Journal of International Law* 853, 862.

44 S Zappala 'Do heads of state enjoy immunity from jurisdiction for international crimes? The *Ghaddafi* case before the French *Cour de Cassation*' (2001) 12 *European Journal of International Law* 595, 599.

to *ne impediatur legatio*). There are two main reasons that justify this approach: The first is reciprocal respect and courtesy (international comity); the second is linked to the particular position of the Head of State, and consequently, without territorial limitations. These two aspects of personal immunity ensure that the Head of State is fully shielded from interventions in his or her personal sphere.

The International Court of Justice (ICJ) in the *Arrest Warrant* case⁴⁵ and several decisions of the International Criminal Court (ICC)⁴⁶ have confirmed the existence of personal immunities for incumbent foreign heads of state in customary international law. The *Arrest Warrant* case, the principle authority on this subject, established that 'certain holders of high-ranking office in a State, such as the Heads of State, Heads of Government and Ministers for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal'.⁴⁷ In explaining the nature of the customary international law on immunities of a foreign incumbent Minister for Foreign Affairs, the ICJ pronounced that 'the immunities accorded to Minister for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States'.⁴⁸

The *Arrest Warrant* case was recently endorsed in the ICC Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa Separate Opinion of the Appeals Referral Judgment,⁴⁹ stating that 'the operation of the idea of immunity *ratione personae* in [the *Arrest Warrant* case] must be confined to the exercise of criminal jurisdiction by national courts without more'.⁵⁰ South African courts have endorsed the *Arrest Warrant* case in their judgments in cases such as *Minister of Justice and Constitutional Development v Southern African Litigation Centre*,⁵¹ and even in the *Mugabe* decision.⁵² It must be emphasised that personal immunities are temporary in nature and lapse once the person to which the immunity was attached

45 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment (2002) (14 February 2002) ICJ Reports 3 (*Arrest Warrant* case).

46 See, eg, *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* ICC-02/05-01/09 (9 April 2014) para 25; *Decision under article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir*, ICC-02/05-01/09-302 (6 July 2017) para 68; *Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139-Corr (15 December 2011) para 34.

47 *Arrest Warrant* case (n 45) para 51.

48 Para 53.

49 ICC-02/05-01/09-397-Anx1-Corr 17-05-2019 1/190 NM PT OA2 (6 May 2019).

50 Para 185.

51 *Minister of Justice v Southern African Litigation Centre* (n 3) para 85.

52 Para 18.

ceases to hold office.⁵³ Further, personal immunities are invoked only in order to bar national courts from exercising jurisdiction over a foreign head of state without dealing with the merits of the case,⁵⁴ for that reason a head of state is not required to be present when such a determination is made.⁵⁵

The above discussion demonstrates that customary international law recognises absolute personal immunity for a foreign incumbent head of state before national courts. The application of this rule depends also on the domestic law of the state in question;⁵⁶ and the discussion now turns to South African law on personal immunities for foreign incumbent heads of states.

South Africa has three pieces of legislation that deal with the issue of customary international law immunity for incumbent foreign heads of state: the ICC Act, the DIPA and the FSIA. In this part I analyse these three pieces of legislation and demonstrate that each deals with personal immunity for incumbent foreign heads of state differently. It is important to make this distinction and to know what kind of facts trigger application of which statute. Later in this article I argue that Vally J did not make that distinction.

3.1 Personal immunity and the ICC Act

The ICC Act domesticates the Rome Statute to which South Africa is party.⁵⁷ The ICC Act is not applicable in this scenario as it does not recognise any type of immunity irrespective of anyone's status. In this regard, the ICC Act, in its long title, confirms that it was enacted, among others,

[t]o provide for a framework to ensure the effective implementation of the Rome Statute of the [ICC] in South Africa [and] to provide for the prosecution in South Africa and beyond the borders of South Africa ... of persons accused of having committed [international] crimes and their surrender to the [ICC] in certain circumstances.

⁵³ *Minister of Justice v Southern African Litigation Centre* (n 3) para 66.

⁵⁴ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* Judgment (2012) (3 February 2012) ICJ Reports 99 para 93, confirming that '[t]he rules of state immunity are procedural in character and are confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state'.

⁵⁵ Eg, sec 2(2) of the FSIA, which states that '[a] court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question'.

⁵⁶ Crawford (n 41) 488.

⁵⁷ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another* 2015 (1) SA 315 (CC) para 33.

Further, section 4(2) of the ICC Act does not recognise invoking head of state immunities as a defence or to reduce the sentence of the person convicted of international crimes. In interpreting this provision, the Supreme Court of Appeal (SCA) in *Minister of Justice and Constitutional Development v Southern African Litigation Centre* held that this provision reflects section 27(1) of the Rome Statute titled 'Irrelevance of official capacity', which recognises neither the immunities or the status of anyone brought before the ICC.⁵⁸

The ICC Act is 'a specific Act dealing with South Africa's implementation of the Rome Statute' and it enjoys priority in relation to criminal proceedings pertaining to international crimes.⁵⁹ The question that remains to be explored further is which of the remaining statutes applied, in order to establish if FSIA is the correct piece of legislation as relied upon by Vally J. It is to this discussion that I now turn.

3.2 Personal immunity and the FSIA

The FSIA is the oldest of these three statutes as it was enacted in 1981. The purpose of the FSIA is 'to determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic; and to provide for matters connected therewith'.⁶⁰ It defines the term 'foreign state' to include a foreign head of state 'in his capacity as such Head of State'.⁶¹ There are three interesting provisions of the FSIA that are of value to this discussion in relation to immunity of incumbent foreign heads of state. The first provision is section 2(1), which provides that '[a] foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder'. The second provision is section 2(3), which provides that '[t]he provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic'. The third provision is section 6(a), which states that 'a foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to – (a) the death or injury of any person'.

58 Para 93. For a different view on the interpretation of this provision, see D Tladi 'The duty of South Africa to arrest and surrender Al Bashir under South African and international law: A perspective from international law' (2015) 13 *Journal of International Criminal Justice* 1027, 1038.

59 *Minister of Justice v Southern African Litigation Centre* (n 3) para 102.

60 Preamble.

61 Sec 1(2)(a).

These three provisions seem to be contradictory and to resolve the matter it is crucial to consider the background to the FSIA, and to establish if the drafters intended for this Act to apply to criminal proceedings involving an incumbent foreign head of state. I argue that the drafters of the FSIA did not so intend and show that the FSIA adopts the doctrine of absolute immunity when it comes to incumbent foreign heads of state in relation to criminal proceedings before the South African courts.

The genealogy of the FSIA may be traced to the United Kingdom (UK) law on state immunity. It must be clarified that state immunity is distinct from head of state immunity in that state immunity is broader and also covers heads of state immunity;⁶² it 'protects a state and its property from the jurisdiction of the courts of another state. It covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity)'.⁶³ It reflects the equality of states as entrenched in article 2(1) of the United Nations (UN) Charter⁶⁴ and confirms 'the principle of the sovereign equality of all [the UN] members'.

Many Western states have adopted the doctrine of restrictive immunity because state enterprises otherwise are favoured when concluding commercial agreements with non-state enterprises.⁶⁵ The doctrine of restrictive immunity means that immunity is available in relation to governmental activity (*jure imperii*) and not when the state participates in commercial activity (*jure gestionis*).⁶⁶ For a period the courts in the UK 'followed the traditional doctrine of absolute immunity in terms of which a foreign state [was] immune from the jurisdiction of the municipal courts of the country irrespective of the nature of the transaction in which it engages'.⁶⁷ Absolute state immunity included the commercial activities of a foreign state.⁶⁸ Because of respect for the doctrine of judicial precedent,⁶⁹ the UK

62 P Stoll 'State immunity' (2011) *Max Planck Encyclopedia of Public International Law* para 21.

63 Stoll (n 62) para 1; see also *Ex Parte Pinochet (No 3)* [2000] 1 AC 147, 201; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588.

64 UN Charter 1945.

65 Eg, Austria, Belgium, Italy and the United States. See also MN Shaw *International law* (2017) 529.

66 Shaw (n 65) 526-527.

67 N Botha 'Some comments on the Foreign States Immunities Act 87 of 1981' (1982) 15 *Comparative and International Law Journal of Southern Africa* 334; Shaw (n 65) 526; J Dugard 'Immunity from jurisdiction' in Dugard et al (n 40) 350.

68 Shaw (n 65) 526.

69 *The Parlement Belge* (1880) 5 PD 197, holding that '[t]he principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its

was one of the last states to change to the doctrine of restrictive immunity.⁷⁰ From *Thai-Europe Tapioca Service Ltd v Government of Pakistan*, *The Harmattan*⁷¹ the rationale for this change is because

a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises, which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities ... it thereby enters into the market places of the world; and international comity requires that it should abide by the rules of the market.⁷²

The UK enacted the States Immunity Act of 1978, which gives effect to restrictive foreign state immunity⁷³ and to 'bring [the UK's] law on the immunity of foreign states more into line with current international practice'.⁷⁴

South Africa adopted the restrictive approach in enacting the FSIA, which is modelled on the UK's States Immunity Act.⁷⁵ *The Akademik Fyodorov: Government of the Russian Federation & Another v Marine Expeditions Inc* confirms that

[t]he law relating to such immunity has been codified in the [FSIA]. The Act adopts what has been referred to as a doctrine of relative foreign State immunity, as opposed to absolute immunity, in that, generally speaking, it grants immunity to foreign states from the adjudicative jurisdiction of the courts and from the processes for enforcement of the orders of the courts in relation to acts performed in the exercise of sovereign authority of a foreign state, but not for acts relating to commercial transactions undertaken by a state. This was the trend adopted by our courts shortly before the Act came into effect.⁷⁶

territorial jurisdiction over the person of any sovereign or ambassador of any other state'; see also R Higgins 'Recent developments in the law of sovereign immunity in the United Kingdom' (1977) 71 *American Journal of International Law* 423.

70 *Trendtex Trading Corporation v The Central Bank of Nigeria* [1977] QB 529, 554-G-H, famously known for holding that 'international law knows no rule of *stare decisis*'; and subsequent cases such as *I Congresso del Partido* [1983] 1 AC 244.

71 [1975] 1 WLR 1485.

72 1491. See also *Trendtex Trading Corporation* (n 70) 588, holding that '[i]f a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.'

73 Botha (n 67).

74 Hansard, House of Lords, vol 388, c59, 17 January 1978 (Second Reading) as quoted in Crawford (n 41) 491.

75 See Botha (n 67) 335 fn 7 comparing the FSIA provisions to those of the States Immunity Act.

76 1996 (4) SA 422 (C) 441 D-F.

The FSIA and the UK's States Immunity Act extend general immunity to foreign heads of state in their provisions.⁷⁷ Accordingly, heads of state enjoy personal immunities from the jurisdiction of the national courts.⁷⁸ Further, both make it clear that courts are barred from exercising criminal proceedings over incumbent foreign heads of state. Section 2(3) of the FSIA and section 16(4) of the UK's States Immunity Act expressly state that '[t]he provisions of [these two Acts] shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts'. Dugard confirms that 'section 2(3) [of the FSIA] makes it clear that the Act is not to be construed as subjecting a foreign state to the criminal jurisdiction of South African courts'.⁷⁹ It is apparent that although both statutes adopt the doctrine of restrictive approach when it comes to commercial activities into which a state enters with corporations, there is absolute immunity from criminal jurisdiction of national courts over incumbent foreign heads of states.

To illustrate this point further, the ICJ in the *Jurisdictional Immunities of the State* judgment, which deals with civil proceedings in relation to foreign state immunity in jus cogens situations, made reference to section 6(a) of the FSIA and its counterpart in the UK's States Immunity Act, among others, in order to determine state practice.⁸⁰ The ICJ observed that these states 'have adopted provisions to the effect that a state is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum state'.⁸¹ It is clear from this that section 6(a) of the FSIA applies to civil claims to the exclusion of criminal proceedings and in relation to the state's commercial activities. Equally, the United Nations Convention on Jurisdictional Immunities of States and their Property⁸² which, although not yet in force,

77 Sec 1(2)(a) of the FSIA and sec 14(1) of the States Immunity Act, which states that 'references to a state include references to (a) the sovereign or other head of that state in his public capacity'.

78 See sec 2(1) of the FSIA and sec 1(1) of the States Immunity Act.

79 See Dugard (n 67) 350 fn 27. Cf 355, where Dugard seems to endorse the *Mugabe* decision on its interpretation of sec 6(a), where he observes that '[a]s Robert Mugabe himself would not have been able to succeed in a claim for immunity on account of section 6 [(a) of the FSIA], it follows that his wife – if she was entitled to immunity as his spouse – would not have been able to claim immunity either'. See also Botha (n 67) 336 confirming that sec 2(3) 'expressly provides that criminal jurisdiction is not affected by the [FSIA]; and Crawford (n 41) 499 confirming that the States Immunity Act excludes criminal proceedings from its scope.

80 *Jurisdictional Immunities of the State* case (n 54) para 70. For further discussion on this case, see A Orakhelashvili 'Jurisdictional Immunities of the State (*Germany v Italy; Greece Intervening*)' (2012) 106 *American Journal of International Law* 609.

81 Para 70 (my emphasis).

82 GA Res 59/38, 2 December 2004.

codifies customary international law in jurisdictional immunities,⁸³ also recognises the doctrine of absolute immunity in relation to incumbent heads of state (although it adopts the doctrine of restrictive immunity in relation to commercial activities of states).⁸⁴

In addition, it is important to revisit the current work of the ILC on personal immunity for foreign heads of state from foreign criminal jurisdiction, which confirms absolute personal immunity.⁸⁵ The ILC provisionally adopted Draft Article 4, which determines the scope of personal immunities for incumbent foreign heads of state as follows:

Scope of immunity *ratione personae*

- (1) Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
- (2) Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
- (3) The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

The Draft Article 4 reflects the *Arrest Warrant* case principle as discussed earlier.

From the above discussion, I submit that section 6(a) of the FSIA did not apply to the *Mugabe* decision. It makes sense to conclude that section 6(a), read together with section 2(3) of the FSIA, confirms that the FSIA was enacted in order to deal with commercial activities involving a foreign state before South African courts as opposed to criminal litigation.⁸⁶ I submit that Vally J did not make this important

83 See, eg, the Preamble to the Convention on Jurisdictional Immunities of States and their Property confirming that '[c]onsidering that the jurisdictional immunities of states and their property are generally accepted as a principle of customary international law'. See also *Jurisdictional Immunities of the State* case (n 54) para 55.

84 Art 3(2) of the United Nations Convention on Jurisdictional Immunities of States and their Property (n 82), which stipulates that '[t]he present Convention is without prejudice to privileges and immunities accorded under international law to heads of state *ratione personae*'.

85 General Assembly, International Law Commission, *Seventh report on immunity of state officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, *Special Rapporteur*, 71st session, Geneva, 29 April to 7 June 2019 and 8 July to 9 August 2019 69, draft art 3; see also UN General Assembly, International Law Commission, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction* by Concepción Escobar Hernández, *Special Rapporteur*, 68th session (Geneva, 2 May-10 June and 4 July-12 August 2016), Supplement 10 (A/71/10) para 196, endorsing this view that there is no evidence from state practice that shows exception to personal immunities at horizontal level.

86 Botha (n 67) 334.

distinction and, as a result, misapplied the FSIA. It is not clear why he did not mention section 2(3) of the FSIA in his judgment, even though the parties did not bring that provision to light, Vally J could have decided on that provision *mero motu*, especially since he referenced section 2(1) – a provision that shares the same section as section 2(3). To do so would not have been unusual as courts have always exercised this power, the Constitutional Court in *CUSA v Tao Ying Metal Industries & Others* held:⁸⁷

Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.

I have argued that there has been a misinterpretation of the law and the remark by Vally J in the case affects personal immunities of incumbent foreign heads of state and requires the need to explore the meaning of section 2(3) of the FSIA.⁸⁸

I now turn to the DIPA to ascertain whether it provides for personal immunity to incumbent foreign heads of state.

3.3 Personal immunity and DIPA

The DIPA was enacted specifically to confer 'immunities and privileges [to] heads of state, special envoys and certain representatives' from both criminal and civil jurisdiction of the South African courts.⁸⁹ Unlike the FSIA, section 4(1) of the DIPA explicitly states that '[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as (a) heads of state enjoy in accordance with the rules of customary international law'.⁹⁰ This type of immunity is conferred by the Minister of International Relations if it is in the national interest to do so, and the conferral of personal immunity has to be published in the Government Gazette.⁹¹

87 (2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC) para 68.

88 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & Others* (2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) para 39, holding that '[a] court is not always confined to issues of law explicitly raised by the parties. If a litigant overlooks a question of law which arises on the facts, a court is not bound to ignore the question of law overlooked.'

89 Long title.

90 My emphasis.

91 Sec 7 (my emphasis).

The DIPA has been a source of controversy in the recent past as reflected in *Minister of Justice and Constitutional Development v Southern African Litigation Centre*.⁹² In that case the question was whether the former President of Sudan, Al Bashir, as the then incumbent foreign head of state was entitled to customary personal immunity barring South African courts from exercising jurisdiction. The ICC had issued two warrants of arrest against him and further requested state parties to the Rome Statute to arrest and surrender him to the Court. I do not intend to reopen that debate.⁹³ However, for the purposes of this article the SCA made a clear distinction between the application of immunities to persons wanted for international crimes (whether before the national courts or the ICC per the ICC Act) and the application of immunities to persons wanted for other crimes (before our courts per the DIPA). The SCA explained the relationship between DIPA and the ICC Act as follows:⁹⁴

It is rather more an example of the application of the related principle in the converse situation embodied in the *maxim generalia specialibus non derogant* (general words and rules do not derogate from special ones). Where there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes co-exist alongside one another, each dealing with its own subject matter and without conflict. In both instances the general statute's reach is limited by the existence of the specific legislation. So DIPA continues to govern the question of head of state immunity, but the Implementation Act excludes such immunity in relation to international crimes and the obligations of South Africa to the ICC.

From the above quotation legislation applicable in the *Mugabe* decision clearly is the DIPA as determined by its specificity to the issue at hand. If one compares the DIPA to the FSIA, the DIPA specifically deals with customary international law heads of state immunity whereas the FSIA deals with state immunity in relation to commercial activities. Hence, the application of the FSIA is erroneous.

92 *Minister of Justice v Southern African Litigation Centre* (n 3).

93 See, eg, N Dyani-Mhango 'The ICC Pre-Trial Chamber's decision on South Africa's failure to arrest and surrender President Al Bashir: South Africa escapes "sanctions"!' (2017) *African Yearbook of International Humanitarian Law* 37; N Dyani-Mhango 'South Africa's dilemma: Immunity laws, international obligations and the visit by Sudan's President Omar Al Bashir' (2017) 26 *Washington International Law Journal* 535; Tladi (n 58) 1027.

94 *Minister of Justice v Southern African Litigation Centre* (n 3) para 102.

4 Did Vally J go too far?

Vally's remark did not bear directly on the case and have far-reaching consequences for South Africa's foreign relations. I argue that the courts should exercise restraint and deal only with the question on the facts before them. In *Albutt v Centre for the Study of Violence and Reconciliation & Others* Ngcobo CJ cautioned the judiciary against going beyond questions brought before them as follows:⁹⁵

Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting ... to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted.

I submit that on the facts in this case it was not necessary for Vally J to extend his reasoning to include foreign heads of state.

I submit that it is possible to argue that in his remark Vally J breached the separation of powers and he encroached upon the domain of foreign relations attached to the executive branch of government.⁹⁶ The doctrine of separation of powers 'recognises the functional independence of branches of government'.⁹⁷ According to O'Regan J, '[t]he courts must remain sensible to the legitimate constitutional interests of the other arms of government and seek to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and legislature'.⁹⁸

I argue that in this case it was unnecessary for the Court to deal with an issue that should be left to the executive.⁹⁹ Recently, the executive has grappled with the issue of immunities as demonstrated

95 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) para 82.

96 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) para 104.

97 *In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 para 109.

98 K O'Regan 'Checks and balances: Reflections on the development of the doctrine of separation under the South African Constitution' (2005) 8 *Potchefstroom Electronic Law Journal* 120, 146.

99 See, eg, O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC) para 48 who remarked as follows: 'A court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.'

in the Al Bashir and the Rome Statute withdrawal cases¹⁰⁰ and via its representatives at the ICC Assembly of States Parties has been at pains to explain its difficulty participating in peace-making missions in the African region when the issue arises of the personal immunity of foreign heads of state exercised in relation to the prosecution of international crimes.¹⁰¹ The Deputy Minister of Justice and Constitutional Development reminded the Assembly:¹⁰²

At the Fifteenth Session of the Assembly South Africa announced its intention to withdraw from the Rome Statute as it was argued that South Africa's continued membership to the Rome Statute carries with it the potential risk of undermining its ability to carry out its peace-making mission efforts in Africa, and elsewhere.

The executive introduced the International Crimes Bill, 2017 in Parliament in terms of the Constitution¹⁰³ in order to legislate its withdrawing from the Rome Statute and retain heads of state personal immunities even when they are accused of international crimes.¹⁰⁴ These examples support the doctrine of the separation of powers indicating the branch of government that deals with certain issues. The issue of personal immunity is controversial, but it is submitted that it is the responsibility of the executive branch. It is only when there is a breach of the Constitution or a rule of law that the judiciary becomes involved.

Additionally, I submit that by his remark Vally J encroaches upon the power of the legislature to enact law in regulation of foreign relations. I submit that these remarks by Vally J have the effect of nullifying the DIPA's provision to grant personal immunities to foreign incumbent of states, at least the provision that recognises absolute personal immunity of foreign heads of state in order to bar criminal

100 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1; *Minister of Justice v Southern African Litigation Centre* (n 3); *Democratic Alliance v Minister of International Relations and Cooperation* (n 3).

101 ICC, statement by Mr John Jeffrey MP, Deputy Minister of Justice and Constitutional Development, Republic of South Africa, General Debate: 18th session of the Assembly of States Parties of the International Criminal Court, The Hague, 2-7 December 2019.

102 ICC (n 101) 3.

103 See sec 85(2)(d) of the Constitution, which stipulates that the executive branch of government 'exercises the executive authority ... by preparing and initiating legislation', read with sec 73(2) which states that a member of the cabinet or a deputy minister 'may introduce a Bill in [Parliament]'.¹⁰⁴

104 Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill [Bill 23-2016] published on 3 November 2016. For a discussion of this Bill, see N Dyani-Mhango 'Reflecting on South Africa's attempt to withdraw from the Rome Statute in favour of immunities for sitting heads of state: An analysis of the International Crimes Bill 2017' (2020) 28 *African Journal of International and Comparative Law* 319.

jurisdiction of the national courts in contradiction of the intent of the legislature.¹⁰⁵ *Doctors for Life international* makes it clear that

[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.¹⁰⁶

I do not maintain that the courts are barred from exercising jurisdiction when it comes to foreign relations.¹⁰⁷ Ngcobo CJ explains that courts must wait for the right occasion to deal with such matters and an issue of this kind cannot be dealt with as an ancillary matter.¹⁰⁸ Foreign relations notoriously are complex and deal with sensitive issues that I consider should be dealt with by the other branches of government.¹⁰⁹ Once the law is enacted¹¹⁰ a court intervention may be required in response to an issue affecting the personal immunities of foreign heads of state.

5 Conclusion

This article examined the remark attached to the *Mugabe* decision by Vally J and focused on the following issues: First, it explored the status of heads of state personal immunities in general; second, it explored the status of foreign heads of state personal immunities for criminal jurisdiction in South Africa by looking at the three pieces of legislation; and, lastly, it raised the question that Vally J exceeded his competencies. It was argued that the piece of legislation applicable in the *Mugabe* decision is the DIPA as the FSIA deals with civil proceedings and the ICC Act is specific to international crimes. The article further argued that Vally J misconstrued the application in FSIA

105 See, eg, *Director of Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 39, per Ngcobo CJ, stating that '[c]ourts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the legislature.'

106 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 37.

107 Eg, *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) para 78, per Chaskalson CJ, remarking that '[t]his does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. The exercise of all public power is subject to constitutional control.'

108 *Albutt* (n 95) para 82. See also *Director of Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 39.

109 See Woolaver (n 8) 453.

110 However, see *Doctors for Life International* (n 106) para 67, where Ngcobo J observes that '[t]here is no express constitutional provision that precludes the Constitutional Court from doing so'. See also *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC) para 47, explaining that such cases that may require intervention 'will be extremely rare'.

and by his remark breached the doctrine of separation of powers. I submit that South African courts are barred from exercising criminal jurisdiction (other than in terms of the ICC) over incumbent foreign heads of state. Vally J's judgment has not been appealed as the facts of the case did not deal with personal immunities of incumbent heads of state and I determine it remains bad law. Vally J's approach in the remark attached to the *Mugabe* decision is contrary to the recommendation by Mogoeng CJ in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*.¹¹¹

I hasten to state that there is merit in the approach that recognises that prolixity must be avoided where that can be achieved without watering down the quality of reasoning or the soundness of a judgment. Where one or more key constitutional rights or principles could help to properly dispose of an issue, very little purpose is hardly ever served by the long-windedness that takes the form of trolling down all the rights, principles or issues implicated or raised in order to arrive at the same conclusion.

111 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* 2020 (1) SA 1 (CC), para 30.

The rationality test in lockdown litigation in South Africa

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Summary: *The COVID-19 pandemic that commenced in 2020 confronted South African courts with questions regarding the rationality of decision making during exigent times. South African administrative law has seen continuous development since the negotiated adoption of South Africa's constitutional dispensation. This article examines the effect of the COVID-19 pandemic on the interpretation and application of the test for rationality by examining three particular 'lockdown' cases and how the test was subsequently applied, in all three cases under expedited circumstances and with truncated times in terms of procedure. The three cases discussed dealt with the rationality of decisions made through executive action aimed at protecting the public against the spread of COVID-19 through restrictive measures that limited an array of constitutional rights. The article concludes that the consistent application of the rationality test and, more importantly, the supremacy of the Constitution and its guaranteed rights, do not change with the onset of a pandemic. Moreover, the scrutiny applied over governmental decision making should not waiver.*

Key words: *rationality test; administrative law; COVID-19; pandemic; lockdown litigation; Disaster Management Act; PAJA; just administrative action; review*

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1 Introduction

After the first case of COVID-19 was identified in Wuhan, China, in December 2019, the virus has caused challenging and exigent times due to the rapid spread of the then novel virus. In response to the rapid spread of the virus the South Africa government, as most governments across the globe, enacted a series of regulations aimed at combating the spread of the virus. These regulations were enacted and promulgated in terms of section 27 of the Disaster Management Act 57 of 2002 (DMA). Section 27 of the Act provides that the responsible member of cabinet, in this case and at the time the Minister of Cooperative Governance and Traditional Affairs, may in the event of a national disaster declare a national state of disaster if, first, existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster, or, second, other special circumstances warrant the declaration of a national state of disaster.¹ These regulations are to be found in numerous *Government Gazettes* that were published from time to time as the South African government adjusted its response to the COVID-19 pandemic. The disjointed body of regulations are not considered in this article, although they are likely to warrant further analysis, as they have fundamentally shaped the way in which the entire South Africa was governed during the pandemic.

These regulations that encompass the national government's response to the pandemic as well as the polycentric nature of the pandemic have resulted in a litany of litigation. The South African judiciary was frequently approached by various litigants regarding the South African national government's response and implementation of regulations to combat the spread of COVID-19. The resultant litigation that we have seen has accelerated the further development of South African administrative law. It must be pointed out that the development of South African administrative law has, broadly speaking, been vibrant and active throughout South Africa's democratic constitutional dispensation, both through the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as the constitutional principle of legality, which have both been well developed by our perceptive judiciary.

During the course of 2020, while our courts were functioning on a limited basis without its usual overburdened court rolls, a number of salient legal precedents were created. The pandemic and subsequent governmental reaction, which undoubtedly has limited

¹ Secs 27(1)(a) & (b) of the Disaster Management Act 27 of 2002 (DMA).

numerous rights and freedoms, have been challenged through various cases, colloquially referred to as 'lockdown' litigation. This article will analyse three particular judgments that were delivered during 2020, in the midst of the COVID-19 pandemic, and examine the influence that these cases had on the rationality test in South African administrative law.

I first discuss the history and origins of the rationality test in the South African legal framework. I then proceed to discuss how the rationality test has been understood and applied in more recent case law. Second, I turn to how the test for rationality was applied in three particular so-called 'lockdown' cases during the course of 2020. These cases deal, among others, with the closure of early childhood development centres; restrictions placed on exercising; and the sale of various grocery items; as well as the declaration of a national state of disaster in its entirety. Third, I discuss the influence that these cases might have on future interpretation of the rationality test and consider whether the trying times of the COVID-19 pandemic have created or influenced good or bad administrative law in South Africa.

2 Hard cases make bad law

The famous old legal maxim goes that hard cases make bad law. As the American jurist and former Supreme Court Justice, Oliver Wendell Holmes Jr noted in his judgment in *Northern Securities Co v United States*, '[g]reat cases like hard cases make bad law. For great cases are called great, not by reason of their importance ... but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.'²

The maxim describes the notion that certain cases muddy the judicial waters due to their complexity. It is argued that they create exceptions to general law and that interpretations are contorted in order to achieve justice in a particular case.³ More simply put and, as Justice Holmes wrote, the pressures of a case of great importance often distorts the judgment of the judiciary in their efforts to seek equitable remedies while dealing with complex legal questions. This often becomes necessary in so-called 'hard cases' because general law is drafted for common circumstances to create social order and not necessarily for unexpected and uncertain circumstances.⁴

2 *Northern Securities Co v United States* 193 US 197 (1904).

3 P Heath 'Hard cases and bad law' (2008) 16 *Waikato Law Review* 12.

4 F Hayek *Studies on the abuse and decline of reason: Text and documents* (2010) 69.

This well-known legal adage has resulted in a variety of similar sayings, for example, its converse, namely, that 'bad law makes hard cases'. During exigencies such as the COVID-19 pandemic the question arises of whether bad times make for bad law. Unprecedented times have always served as a litmus test for the judiciary but these bad times have not always and necessarily resulted in rushed and judicially-unsound precedent. As Lord Aitkin famously remarked in his dissenting judgment in the landmark British case of *Liversidge v Anderson*,⁵ 'the laws are not silent' that 'they may be changed, but they speak the same language in war as in peace'.

It has been argued that tumultuous times have in the past resulted in derogations from the rule of law and violations of human rights around the world.⁶ In South Africa the state of emergency was infamously used during the 1980s to ban and restrict certain organisations and to rampantly detain opponents to the apartheid regime.⁷ Moreover, as Austrian-British philosopher Friedrich Hayek famously writes, "[e]mergencies" have always been the pretext on which the safeguards of individual liberty have been eroded'.⁸

The article argues that when it comes to the judicial review of governmental action during times of crisis, as has been the case during the COVID-19 pandemic, our courts should err on the side of constitutional freedoms and liberties. This can be achieved by adopting a tiered judicial review process similarly to that of the US, where a more stringent review standard is adopted when it comes to questions relating to fundamental constitutional rights.

3 History of the rationality test

South Africa finds its administrative law roots in English law.⁹ Although its administrative law has been influenced by Roman-Dutch law, which forms the general historical foundation of our law, this influence is limited in our administrative law.¹⁰ As Hoexter writes, '[t]he influence of English constitutional doctrines and grounds of review was enormous. Indeed, this influence is still apparent throughout South African administrative law.' As such, the administrative law

⁵ *Liversidge v Anderson* 1942 AC 206 (HL).

⁶ EJ Criddle & E Fox-Decent 'Human rights, emergencies, and the rule of law' (2012) 34 *Human Rights Quarterly* 39.

⁷ J-A Stemmet "'In case of emergency. South African states of emergency ca 1985-1988: Synopsis and chronology' (2015) 40 *Journal for Contemporary History* 60.

⁸ F Hayek *Law, legislation and liberty, volume 3: The political order of a free people* (2011) 124.

⁹ C Hoexter *Administrative law in South Africa* (2012) 14.

¹⁰ M Wiechers *Administratiefreg* (1973) 19 34-36.

that South Africa inherited from the English is intertwined with a Westminster style constitutionalism and, consequently, our early administrative law was underpinned by parliamentary sovereignty.

The English constitutional law scholar Dicey had a significant influence on the early development of South African administrative law. His influence contributed to the prevailing approach that administrative law was mainly concerned with formal or procedural fairness.¹¹ Dicey argued that the rule of law which, *inter alia*, consists of the legality principle, comprises three predominant principles:¹² first, the principle of the supremacy of the law; second, equality before the law; and, third, that fundamental rights are protected through existing institutional remedies and what he referred to as 'ordinary' courts.¹³ For Dicey the central characteristic of the rule of law was legal equality before the law. Dicey strongly opposed the abstract guarantees contained in written constitutions, yet despite this fact, he has left a lasting influence on South African administrative law even after the adoption of its constitutional dispensation.¹⁴

However, subsequently South African administrative law has deviated, arguably positively, from its English law roots. One clear example of this divergence is the ability under South African administrative law to challenge the constitutionality of legislation through judicial review, unlike the United Kingdom where English law does not permit judicial review of primary legislation passed by Parliament.¹⁵ English law to a great extent has maintained its strict standard as set out in the case of *Associated Provincial Picture Houses v Wednesbury Corporation*¹⁶ in favour of parliamentary sovereignty.¹⁷ However, since the adoption of the South African Constitution and the subsequent rights-based jurisprudential framework that was ushered in, our courts, particularly the Constitutional Court, have been tasked with gradually refining how the test for rationality is applied. This process is highlighted through a number of impactful cases, which are briefly discussed below.¹⁸

11 Hoexter (n 9) 139-140.

12 AV Dicey *Introduction to the study of the law of the Constitution* (1885) 188.

13 As above.

14 Hoexter (n 9) 21.

15 C Forsyth & W Wade *Administrative law* (2009) 30.

16 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

17 A Street *Judicial review and the rule of law* (2013) 18.

18 The listed cases are by no means exhaustive.

3.1 Rationality as part of legality

In *New National Party*¹⁹ the Constitutional Court was called upon to decide whether sections of the Electoral Act²⁰ were constitutional. The impugned sections provided that South Africans who wanted to register as voters on the national common voters' roll and to vote in an election had to be in possession of a valid identity document.²¹ The majority judgment of the Constitutional Court held that the standard of review was whether there was a 'rational relationship' between the scheme (in this case the section that required voters to have a valid identity document) and the achievement of a legitimate governmental purpose.²² This decision by the Constitutional Court has been relatively universally repudiated.²³ During the juvenescent years of the apex court, the Court dealt with this particular challenge which related to the electoral requirement that voters had to hold an identification document that contained a barcode in order to be allowed to cast their vote. The majority decision, which followed Yacoob J's reasoning, held:²⁴

There must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.

Yacoob J argued that 'reasonableness will only become relevant if it is established that the scheme [or reviewed decision], though rational, has the effect of infringing the right of citizens to vote.'²⁵ Reasonableness as a consideration, therefore, is added when it is clear that the impugned decision which is subject to review infringes upon a constitutional right.

In her dissenting judgment O'Regan J criticised the approach followed by the majority of the Court while arguing for a reasonableness standard to be included in the rationality test. O'Regan J was critical of the narrow interpretation of 'rationality',

19 *New National Party v Government of the Republic of South Africa & Others* (CCT9/99) 1999 (5) BCLR 489 (*New National Party*).

20 Act 73 of 1998.

21 *New National Party* (n 19) paras 15-18.

22 *New National Party* (n 19) para 19.

23 J Fowkes 'Right after all: Reconsidering *New National Party* in the South African canon' (2015) 31 *South African Journal on Human Rights* 151.

24 *New National Party* (n 19) para 19.

25 As above.

arguing that it should be viewed as more than a mere connection between a legitimate state purpose and the means to achieve the said state purpose. O'Regan J went further by arguing that *equitable considerations* should be permissible when considering these types of rationality questions. The addition of reasonableness as a consideration in rationality reviews pushed the boundaries of the functions of the judiciary but it arguably maintained the entrenched separation between the judiciary and the executive.²⁶

The test for rationality was formalised early on by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa (PMA case)*.²⁷ This case has become widely referenced in cases involving the rationality of actions exercised through public power. The *PMA* case dealt with the question of whether the President of South Africa can bring an Act of Parliament into force. In concurring with the findings of *New National Party* Chaskalson J held:

Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

In addition, the Constitutional Court held that in order to determine whether the exercising of a decision is rationally related to the purpose that empowers the action, that an objective test should be followed.²⁸ The Court found that, regardless of whether the President acted in good faith, the Constitution requires that public powers be exercised in an objectively rational manner and that the empowering provision enabling the decision has to exist and be in place. Consequently, the Constitutional Court confirmed the decision and judgment by the lower court.

For a number of years the Constitutional Court maintained a limited reading and bounded approach to the test for rationality. In *Law Society of South Africa v Minister of Transport*²⁹ the Court had the opportunity to extend the rationality test beyond the traditional approach followed in *PMA*. However, the Court persisted in the

26 PJH Maree 'Investigating an alternative administrative law system in South Africa' LLD thesis, University of Stellenbosch, 2013 80.

27 *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (3) BCLR 241.

28 *Pharmaceutical Manufacturers* (n 27) para 86.

29 *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) para 29.

approach of merely looking at the rational connection between the purpose and the ends of the decision.³⁰

The sequence of development regarding the test for rationality and its current prevailing reading perhaps has been most succinctly summarised in the case of *Booyesen v Acting National Director of Public Prosecutions* wherein it is stated:³¹

The test [for rationality] is therefore twofold. Firstly, the [decision maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.

The development of the rationality test is encapsulated and legislated in terms of the Promotion of Administrative Justice Act (PAJA),³² which flows from the right to just administrative action guaranteed in section 33 of the Constitution.³³ Some academic authors have argued that the current interpretation of PAJA is an unconstitutional reading that unduly infringes upon the separation of powers.³⁴ Whether PAJA's extended interpretation of the test for rationality is constitutionally valid, however interesting, is a question for another day and discussion. For purposes of this article a brief analysis of PAJA is provided.

3.2 Test for rationality

The test for rationality undoubtedly is a central pillar of South African administrative law. Section 33(1) of the Constitution provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'.³⁵ Moreover, section 33(3) requires the following:³⁶

³⁰ As above.

³¹ *Booyesen v Acting National Director of Public Prosecutions* 2014 (9) BCLR 1064 (KZD) para 15.

³² Promotion of Administrative Justice Act 3 of 2000.

³³ Sec 33 of the Constitution provides: '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.'

³⁴ L Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' (2013) 130 *South African Law Journal* 812.

³⁵ Sec 33(1) Constitution.

³⁶ Sec 33(3) Constitution.

National legislation must be enacted to give effect to these rights, and must –

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an efficient administration.

Pursuant to section 33(3) of the Constitution, the PAJA was enacted to give effect to the constitutionally-protected right to just administrative action.³⁷ Section 6(2)(f)(ii) of PAJA provides for a rationality test and section 6(2)(h) provides for the general reasonableness test. The rationality test in PAJA provides that a court or tribunal has the power to judicially review an administrative action if

the action itself is not rationally connected to –

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator.³⁸

Depending on the interpretation and application of section 6(2)(f)(ii) of PAJA, the rationality test either accords with section 33 of the Constitution or it broadens the scope.³⁹ However, the gap between the limited interpretation *vis-à-vis* the broadened interpretation of the rationality test has been somewhat aligned through the case of *SA Predator Breeders' Association*.⁴⁰ This case concerned the validity of particular regulations issued by the Minister of Environmental Affairs and Tourism regarding the hunting of lions in a small confined area, such as in a fenced-in area.⁴¹ Although PAJA was not referred to in the *SA Predator Breeders' Association* case, the Supreme Court of Appeal essentially applied the test for rationality as set out in PAJA.⁴² Hoexter argues that in light of the continuous development of the standard of rationality and how it is applied, the difference between the limited and broader interpretations of the rationality test is narrowed.⁴³

37 J Klaaren & G Penfold 'Just administrative action' in S Woolman et al (eds) *Constitutional law of South Africa* (2006) 63-65.

38 Sec 6(2)(f)(ii) PAJA.

39 C Hoexter 'A rainbow of one colour? Judicial review on substantive grounds in South African law' in H Wilberg & M Elliot *The scope and intensity of substantive review* (2015) 178.

40 *SA Predator Breeders' Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA).

41 Hoexter (n 39) 178.

42 As above.

43 Hoexter (n 39) 180.

The four requirements listed in section 6(2)(f)(ii) of PAJA form the contemporary rationality test. All four hurdles have to be overcome in order for a decision to pass the rationality test. In this article three cases are analysed to determine how the Court dealt with the four hurdles of the rationality test in the midst of a global pandemic.

South Africa, however, has not developed tiered review standards for judicial review as other jurisdictions have.⁴⁴ Regardless of the social, economic and constitutional impact of the impugned decision, our courts have maintained and applied this sole unvarying review standard. The author would argue that the rationality test in South Africa should be developed similarly to the way in which the rational basis review in American administrative law has developed. There are three judicial review tests in American administrative law, namely, the rational basis test, the intermediate scrutiny test and the strict scrutiny test.⁴⁵ These three tiers of review tests range in stringency depending on the impact of the impugned decision on the liberties and constitutional freedoms at play.⁴⁶ The strict scrutiny test of review requires a 'compelling governmental interest' and the enabling legislation must be narrowly tailored to achieve that interest.⁴⁷

As will be discussed below, despite the fact that South African courts apply our unvarying rationality test in judicial review, they have indirectly acknowledged the societal, economic and constitutional impact of the impugned decisions and as will be shown this has influenced the decision making and judicial reasoning in applying our rationality test.

4 'Lockdown' litigation

The COVID-19 pandemic has undoubtedly been strenuous on governments that have to navigate a treacherous path. Due to the extreme interventions by the government aimed at curbing the spread of COVID-19 there has unexpectedly been a litany of litigation regarding government's response and policies to the pandemic. For purposes of this article the focus is placed on three particular and insightful cases that dealt with the question of rationality. How South African courts dealt with the element of rationality during exigent times and, moreover, in these three cases with considerable urgency

44 RR Kelso 'The structure of strict scrutiny review' 17 August 2020 1, <https://ssrn.com/abstract=3675841> (accessed 11 November 2021).

45 As above.

46 Kelso (n 44) 2.

47 Kelso (n 44) 5.

has provided conflicting precedent which is discussed in more detail below.

4.1 *Skole-Ondersteuningsentrum*⁴⁸

Shortly after South Africa exited its so-called five weeks of ‘hard lockdown’⁴⁹ the non-profit organisation Skole-Ondersteuningsentrum went to court seeking an order reopening private early childhood development centres (which include pre-school and day care centres). In South Africa there are two sets of early childhood development centres, namely, those under the auspices of the Minister of Basic Education in terms of the South African Schools Act⁵⁰ and, second, those that fall under the ambit of the Children’s Act⁵¹ and consequently under the portfolio of the Minister of Social Development. In essence, the difference between the two categories is that early childhood development centres that are guided by the South African Schools Act are associated with primary schools and fall under the definition of a *school* as defined in the Act to mean ‘public or independent schools which enrol learners in one or more grades from grade R to grade twelve’.

At the heart of the relief sought was a declaratory order that all private pre-school institutions not affiliated with public schools and offering early childhood development services (Grade R and lower) were entitled to re-open immediately. The relief sought was based on the fact that the South African government had relaxed certain restrictions enacted through the state of disaster in terms of the alert level 3 lockdown, coupled with the directions issued by the Minister of Basic Education on 29 May 2020 as amended on 1 June 2020, providing, among others, that learners were able and allowed to return to schools across South Africa on a phased-in basis. In terms of the Minister of Basic Education’s directions early childhood development centres affiliated with public schools were allowed to reopen. However, early childhood development centres that were not affiliated with any public school (that is, private early childhood development centres) and that consequently

48 *Skole-Ondersteuningsentrum NPC & Others v Minister of Social Development & Others* [2020] 4 All SA 285 (GP) (*Skole-Ondersteuningsentrum*). (The author was the attorney of record acting on behalf of the applicants in this matter.)

49 On 15 March 2020 the Minister of Cooperative Governance and Traditional Affairs declared a national disaster in terms of sec 27(1) of the Disaster Management Act 57 of 2002 (DMA). The purpose of the declaration was to augment the existing measures undertaken by organs of state to deal with the COVID-19 pandemic. Initially it was stated that the state of disaster would last three weeks, which was later extended to five weeks in total.

50 South African Schools Act 84 of 1996.

51 Children’s Act 38 of 2005.

fell under the jurisdiction of the Minister of Social Development were left in the dark. Despite requests for clarity sent by the Skole-Ondersteuningsentrum to the Minister of Social Development, the letters remained unanswered. On 4 June 2020 the Minister of Social Development issued a statement requiring all early childhood development centres under her auspices to remain closed, despite the fact that their public school counterparts were allowed to return to school subject to the necessary safety and health precautions. This conflicting situation compelled the parties to approach the court for urgent relief.⁵²

The uncertainty surrounding the reopening of early childhood development centres, both those affiliated with public schools and those that were not, was compounded by the fact that various peremptory circular letters were sent by both the Minister of Basic Education and the Minister of Social Development after the initial decision was taken to reopen all public early childhood development centres. The Court was critical of the manner in which the government in effect governed by diktat in a disjointed and consequently unconstitutional manner. The Court held as follows: 'I have yet to hear of a case in which a Minister may make law, by the mere production, to a confined group of persons and without consulting interested parties, of a letter expressing an opinion or an intent to do something unexplained in the future.'⁵³ The Court was critical of the insouciant manner in which the Minister of Social Development initially failed to act and later was critical of the arbitrary and irrational manner in which regulations keeping early childhood development centres closed were 'enacted' through ministerial diktat.⁵⁴ The Court held that it was entirely irrational for a member of the executive to make regulations through the issuing of a press statement. The fact that the Minister of Social Development failed to allow for any public participation in her decision-making process and due to the conflicting regimes that arose between public and private early childhood development centres, the Court held that the decision communicated by the Minister in her media statement was unlawful, irrational and unconstitutional. The Court succinctly described the situation as an 'unfair and unlawful discriminatory and irrational vacuum' between the two sets of early childhood development centres. The Court stated:⁵⁵

I also agree with the submissions of counsel for the applicants that there can be no rational and justifiable ground, when interpreting

52 *Skole-Ondersteuningsentrum* (n 48) para 23.

53 *Skole-Ondersteuningsentrum* para 38.

54 *Skole-Ondersteuningsentrum* para 39.

55 *Skole-Ondersteuningsentrum* para 15.

the Regulations, upon which it was envisaged that schools offering ECD programmes including Grade R and lower which forms part of schools as defined in the Schools Act (which include both public and independent schools), are permitted to re-open from 6 July 2020 in terms of the directions, but that other private pre-schools offering ECD education for children, in Grade R or lower are not permitted to open or simply left in a vacuum.

The Court held further that the irrationality of the decision to keep early childhood development centres closed was linked to the failure by the Minister of Social Development to consider the best interests of the child in a holistic manner, despite being required to do so in terms of section 28(2) of the Constitution as well as section 9 of the Children's Act.⁵⁶ Despite the constitutional obligation placed on the Minister of Social Development to consider the best interests of a child in every matter concerning the child, the Minister simply failed to act at all. The Minister failed to consider the various factors that play into the best interests of the thousands of children who were unable to return to the ECDs and, moreover, in no way engaged with how the rights of the children were weighed up against the duty to protect against the spread of COVID-19.

The doctrine of vagueness entails that executive decision making is required to be certain. Although vagueness is not listed in PAJA as a ground for review our courts have held that the requirement of decision making to be certain and clear flows from the rule of law as a foundational constitutional value.⁵⁷ In the *SA Hunters* case the Constitutional Court held that '[t]he doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives'.⁵⁸

The courts, therefore, have acknowledged that perfect clarity is not a requirement for rational decision making and that the role of government is to further legitimate social and economic goals. This arguably includes protecting against the spread of COVID-19. However, turning back to *Skole-Ondersteuningsentrum* the Court was critical of the vagueness of the decision making. The Court, per Fabricius J, held:⁵⁹

⁵⁶ *Skole-Ondersteuningsentrum* para 17.

⁵⁷ *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* (CCT 59/2004) [2005] ZACC 14 para 249.

⁵⁸ *Minister of Safety and Security v South African Hunters and Game Conservation Association* (CCT177/17) [2018] ZACC 14 para 13.

⁵⁹ *Skole-Ondersteuningsentrum* (n 48) para 43.

I interpose to say that the doctrine of vagueness is founded on the rule of law. It requires that laws (and I would say directions as well) be written in a clear and accessible manner. Reasonable certainty is required, so that those who are bound by them know what is required so that they may regulate their conduct accordingly.

Despite the exigent circumstances created by the COVID-19 pandemic, the Court held that the directions by the Minister of Social Development should have allowed members of the public to 'glean, with a degree of clarity what the purpose' was of the decision to differentiate between the two sets of early childhood development centres.⁶⁰ There is an added responsibility placed on the decision maker to ensure that the decision making is rational and clear because the decision limits a constitutional right and, moreover, it affects the rights of children in particular.⁶¹

Taking the four hurdles of the rationality test into account, although the judgment did not advertently list these requirements as set out in section 6(2)(f)(ii) of PAJA, it is evident that they were all duly considered. Regarding the purpose for which the decision was taken, the Court held:⁶²

It is simply impossible to recognise the rationality in a decision, allowing pre-school learners who are admitted and phased into school systems prior to 23 June 2020 to continue to attend school, but to prohibit pre-school learners (of the exact same age) that have not yet been admitted as of 23 June 2020 from attending schools for the total period of the pandemic.

While cognisant of the above-mentioned fact, the Court furthermore held, per Fabricius J, that the Minister of Social Development acted outside of her mandated powers. The judgment held that the Minister of Social Development had acted without legal authority and violated the rule of law through the issuing of a media statement and then enforcing the statement as a legally-binding and lawful regulation.⁶³ The Court found that the Minister of Social Development had taken the decision to keep pre-schools under her auspices closed without taking any supporting information into account. The Court highlighted the fact that not a 'single reason or motivation for the refusal to re-open ECD's and Partial-Care facilities whilst the underlying basis and rationale' was given.⁶⁴

60 *Skole-Ondersteuningsentrum* para 45.

61 *Skole-Ondersteuningsentrum* para 46.

62 *Skole-Ondersteuningsentrum* para 44.

63 *Skole-Ondersteuningsentrum* para 46.

64 *Skole-Ondersteuningsentrum* para 25.

Given the polycentric nature of the COVID-19 pandemic, the Minister of Social Development and all decision makers in the South African executive tasked with making decisions in terms of the declared national state of disaster undoubtedly were faced with a difficult task. However, in the *Skole-Ordersteuningsentrum* case the Minister's initial failure to make a decision at all and the disjointed decision that followed failed to pass the test for rationality despite the exigent surrounding circumstances. This early 'lockdown' case quite firmly held that despite the trying circumstances, decision makers should be held to the same, if not more stringent, scrutiny regarding the rationality of their decision making. The test for rationality arguably should be applied stringently, and with due cognisance of section 36 of the Constitution, during dire national challenges.⁶⁵

What made the decision in the *Skole-Ordersteuningsentrum* case unique and in the end judicious was the fact that two similar decisions, namely, the one to reopen early childhood development centres associated with the Minister of Basic Education while the Minister of Social Development kept schools in terms of the Children's Act closed, were juxtaposed. Review applications often take place in the absence of a comparable and similar decision. The *Skole-Ordersteuningsentrum* case provided the opportunity to measure the rationality of a decision by one decision maker, namely, the Minister of Social Development, with that of another, namely, the Minister of Basic Education, in nearly identical circumstances, both in nature and in time.

4.2 *Esau*

The *Esau* case⁶⁶ was heard on appeal from the Western Cape Division of the High Court, Cape Town by the Supreme Court of Appeal. The applicants in the matter in the court *a quo* were private citizens who challenged the proper functioning of the branches of government when a state of national disaster is declared.⁶⁷ The application argued that it was irrational for the state in the exigent circumstances created by the COVID-19 pandemic to make overly broad and irrational regulations affecting the lives of millions of South Africans.⁶⁸ Moreover, the applicants in the court *a quo* argued that

65 M van Staden 'Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa' (2020) 20 *African Human Rights Law Journal* 501.

66 *Esau & Others v Minister of Co-Operative Governance and Traditional Affairs & Others* (611/2020) [2021] ZASCA 9 (*Esau*).

67 *Esau* (n 66) paras 1-4.

68 As above.

the court had to hold the executive arm of government to account for breaches of the rule of law.

In summary, the applicants challenged, first, the existence of the so-called National Coronavirus Command Council (NCCC), an entity purportedly set up by the national government to coordinate the response to COVID-19; second, the declaration of the national state of disaster; third, the prohibition on the sale of certain foods and clothing; and, finally, the restrictions placed on outdoor exercising during the national state of disaster.⁶⁹ Retrospectively some of these regulations to supposedly 'curb the spread of the COVID-19 pandemic' on the face of it seem entirely irrational. However, at the time and amidst a crisis caused by a then novel virus many people initially indifferently accepted the many seemingly irrational regulations. As the German philosopher Friedrich Schlegel stated, 'the historian is a prophet looking backwards'.

The court *a quo* rejected the contention and found that the disaster regulations were made in a procedurally rational manner because the Minister of Cooperative Governance and Traditional Affairs undertook consultations with various stakeholders, state entities and institutions before making the disaster regulations.⁷⁰ Because the COVID-19 pandemic required an 'urgent' and 'exigent' government response, so the court *a quo* reasoned, an effective public participation process was not necessary.⁷¹ The basis for this finding was that the impugned regulations were necessary to 'deal with the effects of a novel global pandemic'.⁷² The Court held that should a narrow interpretation have been followed it would have limited the government's ability to contain COVID-19.⁷³ The applicants were granted leave to appeal to the Supreme Court of Appeal.

The *Esau* judgment pronounced on the rationality of four of the impugned regulations, namely, the National Coronavirus Command Council; the declaration of the state of disaster itself; the prohibition on outdoor exercise; and the restrictions imposed on the sale of certain foods and clothing. Each regulation is briefly discussed below.

69 *Esau & Others v Minister of Co-operative Governance and Traditional Affairs & Others* 2020 (11) BCLR 1371 (*Esau High Court*) para 1.

70 *Esau High Court* (n 69) para 160.

71 *Esau High Court* para 166.

72 *Esau High Court* para 251.

73 Van Staden (n 65) 498.

On appeal the Supreme Court of Appeal dismissed the case, save to the limited extent set out in paragraph 2 of the order, which read:⁷⁴

- (a) [T]he regulations ... is invalid to the extent that it limited: the taking of exercise to three means, namely walking, running and cycling; the time during which exercise could be taken to the hours between 06h00 and 09h00; and the location for taking exercise to a radius of five kilometres from a person's residence; and
- (b) the level 4 regulations are invalid to the extent that they prohibited the sale of hot cooked food, otherwise than for delivery to a person's home.

The appeal was dismissed, save for the revision of the order to declare that restrictions placed on outdoor exercise and the prohibition placed on the sale of certain food should be allowed. Regarding the restrictions on outdoor exercising the Court held that they were 'not capable of justification because it was not rational or proportional' and 'that no rational connection has been established between the restrictions and their ostensible purpose'.⁷⁵ Interestingly, on the question of a general infringement on the liberty of all South Africans, the Supreme Court of Appeal held:⁷⁶

It is clear that regulation 16 infringed this right by confining everyone to their residences, albeit with exceptions and conditions. At the same time, by placing such a fundamental restriction on peoples' autonomy and freedom of choice, regulation 16 also infringes the right of everyone to human dignity in terms of section 10 of the Constitution.

The Court held that no rational link exists between the restriction placed on outdoor exercise and the purpose that it purportedly aimed to achieve.⁷⁷ Moreover, the Court found that the restriction was arbitrary as the 'necessity has not been demonstrated, and nor is it obvious or explained'.⁷⁸

Similarly, the Court struck down the prohibition placed on the sale of certain foods and clothing which was enacted through directions by the Minister of Trade and Industry. Regarding this particular prohibition, the Court still pronounced on this issue despite the fact that the prohibition had been lifted long before the case was heard before the Supreme Court of Appeal after pressure from civil society

⁷⁴ *Esau* (n 66) para 2 of the order granted.

⁷⁵ *Esau* (n 66) paras 144 & 146.

⁷⁶ *Esau* para 117.

⁷⁷ *Esau* paras 144-147.

⁷⁸ *Esau* para 146.

ensured that the decision was reversed.⁷⁹ The Court found that the decision to determine that certain items of clothing and hot food may not be sold during the state of disaster was 'clouded with a good measure of irrationality'.⁸⁰ The prohibition consequently was reviewed and set aside as it had 'no connection with the purpose of that regulation, namely the dissemination of information in order to 'prevent and combat the spread of COVID-19'.⁸¹

The Supreme Court of Appeal viewed the establishment of the National Coronavirus Command Council as rational finding that 'the NCCC is a cabinet committee' and that 'the cabinet may function through committees and that decisions taken by cabinet committees bind the entire cabinet as much as decisions taken by the entire cabinet in a cabinet meeting'. However, what the Court failed to appreciate was the encroaching *de facto* legislative power that the Disaster Management Act gave to the Minister of Cooperative Governance and Traditional Affairs and, by proxy, to the National Coronavirus Command Council, which resulted in nearly all of South African life being coordinated and legislated through an array of published *Government Gazettes* without any parliamentary supervision throughout the entire national state of disaster.⁸² Moreover, the purpose of section 27 of the Disaster Management Act, which was the empowering provision used to enact the national state of disaster and to control South African life through the various issued regulations, was largely ignored. Section 27(1) of the Disaster Management Act clearly states that a national state of disaster may be declared if and only when 'existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster'.⁸³ The Court could have and, arguably, should have *mero motu* considered the fact that the Minister was acting beyond the empowering provision of section 27(1) of the Disaster Management Act by not reverting to existing legislation to deal with the spread of COVID-19. Given the magnitude of the case, this would not have been judicially indecorous. As Van Staden argues, it is accepted that the court may consider provisions regarding constitutionality without it being expressly placed before court.⁸⁴ Despite the slight deviation by the Supreme Court of Appeal

79 S Bega 'Dear SA applies for some bans to be lifted' *IOL News* 9 May 2020, <https://www.iol.co.za/saturday-star/news/dear-sa-applies-for-some-bans-to-be-lifted-47765806> (accessed 11 March 2021).

80 *Esau* (n 66) para 156.

81 *Esau* para 155.

82 Van Staden (n 65) 509.

83 Sec 27(1)(a) DMA.

84 Van Staden (n 65) 501.

in the *Esau* case, the Court missed an opportunity to find in favour of freedom and the protection of constitutionally protected rights.⁸⁵

The regulations promulgated in terms of the Disaster Management Act undoubtedly affect a vast array of constitutional rights and freedoms. Rather than erring on the side of freedom, the Supreme Court of Appeal in *Esau* missed the opportunity to develop the rationality test to include the fact that any governmental decision, especially of this magnitude, must have compelling governmental interest and not a mere rational connection between the decision and the enabling provision.

4.3 *De Beer*

Among the most notable lockdown litigation cases, the *De Beer* case⁸⁶ arguably was the most far-reaching judgment, at least on paper, without it being correspondingly effectual in practice. In order to properly frame the analysis of the *De Beer* judgment, it is prudent to provide a brief background to the declaration of the national state of disaster which, by and large, governed the entire country for the course of the COVID-19 pandemic. The President of the Republic of South Africa declared the national state of disaster in March 2020 in terms of the Disaster Management Act (DMA).⁸⁷ In terms of section 27 of the DMA:⁸⁸

- (1) In the event of a national disaster, the Minister may, by notice in the Gazette, declare a national state of disaster if –
 - (a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or
 - (b) other special circumstances warrant the declaration of a national state of disaster.

and

- (3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of –
 - (a) assisting and protecting the public;
 - (b) providing relief to the public;
 - (c) protecting property;
 - (d) preventing or combating disruption; or
 - (e) dealing with the destructive and other effects of the disaster.

⁸⁵ Van Staden (n 65) 502.

⁸⁶ *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 (*De Beer*).

⁸⁷ DMA (n 1).

⁸⁸ As above.

After the declaration of a state of disaster, the responsible member of cabinet, being the Minister of Cooperative Governance and Traditional Affairs, was tasked with issuing regulations pursuant to the declaration of the state of disaster to manage the disaster and protect the South African public against the spread of COVID-19. Early on during the pandemic it was announced by the national government that the state of disaster was necessary in order to prepare the South African public health system for the inevitable rise in COVID-19 cases. South African life as we knew it was 'locked down' to provide time to prepare for the pandemic. When the state of disaster was announced in March 2020, South Africa only had 62 active COVID-19 cases.⁸⁹ The state of disaster, therefore, doubtlessly was announced as a precautionary and pre-emptive measure. The Disaster Management Act allows for a state of disaster to be enacted for three months after which it may only be extended on a month-to-month basis.⁹⁰

The *De Beer* case sought to challenge the validity of the declaration of the state of disaster and consequently challenge the ancillary prohibitions on gatherings and commerce which were enacted through the regulations that followed the declaration of the state of disaster.⁹¹ It should be noted that the *De Beer* case was marred by numerous interlocutory applications, *amicus curiae* admissions and withdrawals by attorneys of record on behalf of the applicants and *amici curiae*. The case was also followed by an appeal and cross-appeal as well as an application for contempt of court. All these procedural oxbows undoubtedly played a part in the manner in which the case was heard and consequently adjudicated upon.

The test for rationality was central to the adjudication of the *De Beer* case.⁹² The Court, per Davis J, pertinently dealt with the question of the empowering provision, namely, section 27 of the DMA and the regulations that flowed therefrom and the rational purpose of the regulations. The Minister of Cooperative Governance and Traditional Affairs submitted that the declaration of the national state of disaster and the appurtenant regulations were necessary for the government to protect South African citizens and to curb the spread of COVID-19. Moreover, the government argued that 'there

89 'Coronavirus: African states impose strict restrictions' *BBC* 16 March 2020, <https://www.bbc.com/news/world-africa-51906053>? (accessed 14 March 2021).

90 Secs 27(5)(a) & 27(5)(c) DMA.

91 *De Beer* (n 86) para 3.

92 *De Beer* paras 3.5-3.6.

exists no existing legislation by which the national executive could deal with the disaster'.⁹³

However, the Court, per Davis J, held that 'the mere say-so that there exists no existing legislation by which the national executive could deal with the disaster is disputed by the applicants and they contend that any such determination by the Minister was both misplaced and irrational'.⁹⁴ When the national state of disaster was initially declared, it was justified by the government by arguing that the state of disaster and ancillary lockdown were necessary in order to allow for the South African public health system to prepare for the imminent surge of COVID-19 cases.⁹⁵ The Court was critical of the fact that the national government later on changed the purported purpose for the declaration of the state of disaster.

One of the most interesting aspects of the *De Beer* case is that the Court, per Davis J, held that the rationality of a decision was pliant and susceptible to change over time. The Court stated that 'the rationality of this policy direction [initially declaring a state of disaster] taken by the national executive then appeared readily apparent to virtually all South Africans'.⁹⁶ The Court was of the view that the decision taken at the time was rational and, consequently, constitutional. However, the Court questioned the rationality of the regime of regulations in its totality as well as in light of the numerous extensions of the national state of disaster. In this regard it is prudent to consider two noteworthy paragraphs contained in the judgment:

Despite these failures of the rationality test in so many instances, there are regulations which pass muster. The cautionary regulations relating to education, prohibitions against evictions, initiation practices and the closures of night clubs and fitness centres, for example as well as the closure of borders. (Regulations 36, 38, 39(2)(d) and (e) and 41) all appear to be rationally connected to the stated objectives.

So too, are there ameliorations to the rationality deficiencies in the declarations by other cabinet members in respect of the functional areas of their departments promulgated since Alert Level 3 having been declared, but these have neither been placed before me nor have the parties addressed me on them. This does not detract from the constitutional crisis occasioned by the various instances of irrationality, being the impact on the limitation issue foreshadowed in section 36 of the Constitution referred to in paragraph 6.1 above.

93 *De Beer* para 4.9.

94 *As above*.

95 *De Beer* (n 86) para 4.12.

96 *De Beer* para 5.1.

The fact that the Court correctly stepped in to protect the liberty and freedom of South Africans should be celebrated. Given the country's history of institutional injustice caused by unchecked law making, the *De Beer* case is an important judgment in ensuring that the checks and balances and separation of powers in its constitutional framework function well and in accordance with their constitutional obligations, even during a pandemic. However, the judgment was not without its faults. As Brickhill correctly noted, the *De Beer* judgment seemed to have conflated the rationality requirement with the requirement of reasonableness.⁹⁷ Nevertheless, the Court dealt thoroughly with the requirements of rationality. Regarding the purported purpose for which the lockdown regulations were enacted, the Court held that 'this paternalistic approach, rather than a constitutionally justifiable approach' and 'in an overwhelming number of instances the Minister has not demonstrated that the limitation of the constitutional rights already mentioned, have been justified in the context of section 36 of the Constitution'.

Moreover, the Court dealt with the question regarding the information before the decision maker as well as the reasons provided for the decision. The Court, per Davis J, held:

The clear inference I draw from the evidence is that once the Minister had declared a national state of disaster and once the goal was to 'flatten the curve' by way of retarding or limiting the spread of the virus (all very commendable and necessary objectives), little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was justifiable or not. The starting point was not 'how can we as government limit constitutional rights in the least possible fashion whilst still protecting the inhabitants of South Africa?' but rather 'We will seek to achieve our goal by whatever means, irrespective of the costs and we will determine, albeit incrementally, which constitutional rights you as the people of South Africa may exercise.'

The Court directed that the regulations promulgated by the Minister of Cooperation and Traditional Affairs in terms of section 27(2) of the Disaster Management Act 57 of 2002 were declared unconstitutional and invalid. Moreover, the declaration of invalidity was suspended until the Minister had reconsidered the regulations to comply with the order made. Arguably due to the urgent manner in which the *De*

⁹⁷ J Brickhill 'Constitutional implications of COVID-19: The striking down of the lockdown regulations' *ResearchGate* (2020), https://www.researchgate.net/publication/341931946_Constitutional_implications_of_COVID-19_The_striking_down_of_the_lockdown_regulations_De_Beer_v_Minister_of_Cooperative_Governance (accessed 14 March 2021).

Beer case was heard but, more importantly, due to the fact that the lockdown regulations were ever-changing, uncertainty regarding the status of the lockdown regulations remained. Moreover, the case has been rendered largely moot due to the South African relaxing of the regulations. The case, however, remains noteworthy given its prominence and given the particular precedent that it has created for reviews of decisions taken during pandemics. Lastly, this case, as well as the others discussed above, was crucially important during these unprecedented times. When the separation of powers was significantly blurred, the courts stepped in during these cases to solidify South Africa's constitutional and rights-based dispensation. Often under extreme pressure and singlehandedly faced with decisions of great magnitude, the Court in all three cases erred on the side of freedom and caution against governmental overreach.

5 Conclusion

The three cases discussed in this article have delivered somewhat conflicting judgments. Moreover, these three cases are but a handful among dozens of other prominent lockdown-related cases heard by various courts in South Africa during the course of the state of disaster. Given the polycentric nature of the COVID-19 pandemic, the incongruous outcomes of the various cases perhaps is understandable. As Davis J noted in the *De Beer* judgment, 'the possibility of conflicting judgments due to a multiplicity of applications in different courts at different times' and 'lack of cohesion and coordination is unsatisfactory but the multitude of regulatory instruments issued by different role-players over a short space of time is the most probable cause thereof'.⁹⁸ These cases, however, have provided interesting approaches to the determination of rationality of administrative and executive decision making during times of crisis. COVID-19 is not the first pandemic that South Africa and the world have faced and it certainly will not be the last. It therefore is imperative to learn from the COVID-19 pandemic. We are called upon to critically evaluate how our legal system held up during these exigent times.

It has been held in other jurisdictions that the rule of law disciplines the conduct of the executive even when a state of disaster arises. In the New Zealand case dealing with the limitation of rights *vis-à-vis* the protection against the COVID-19 pandemic, *Borrowdale v Director General of Health*,⁹⁹ the foreign Court held that 'even in times of emergency, however, and even when the merits of the government's

98 *De Beer* (n 86) para 3.4.

99 *Borrowdale v Director General of Health* [2020] NZHC 2090.

response are not widely contested, the rule of law matters'. Similarly, in the British case of *(FC) & Others v Secretary of State for the Home Department*¹⁰⁰ per Lord Hoffman the Court held that 'of course the government has a duty to protect the lives and property of its citizens. But that is a duty it owes all the time and which it must discharge without destroying constitutional freedoms.'

Initially when the national state of disaster was declared, it is evident that the South African government did not offer a clear and coherent explanation that shed light on the rational connection between the litany of regulations that limited various constitutional rights and prohibited various aspects of ordinary life. Likely due to the rapid onset of the COVID-19 pandemic, the government had to act swiftly and to justify their decision making *ex post facto*. The posterior policy justification took place not only in respect of each individual aspect, that is, school closures, the limitation of certain commerce, and so forth, but justification was needed for the state of disaster in its entirety. The courts, therefore, were called upon, in fulfilment of their constitutional obligations, to ensure that the approach followed by the executive accorded with our rights-based dispensation. The COVID-19 pandemic was a strenuous challenge for South Africa's *trias politica*. Not only were its courts called upon to check executive action, but they were called upon to evaluate executive action that had vast legislative effect. As the Constitutional Court noted in *Economic Freedom Fighters v Speaker of the National Assembly*: 'The judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.'¹⁰¹

In this regard these three judgments commendably walked the precarious fine line of the separation of powers in favour of the freedoms contained in the South African Bill of Rights. It is submitted that the test for rationality and, more importantly, the Constitution does not change with the onset of a pandemic. Moreover, the scrutiny applied over governmental decision making should not waiver. Although the current COVID-19 pandemic as well as other future pandemics does and may likely in the future provide justification for temporary governmental conduct, the foundational principles of our administrative law and, indeed, the rule of law must remain intact.

100 *(FC) & Others v Secretary of State for the Home Department* [2004] UKHL 56 [95].

101 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC) paras 92-93.

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The right to 'unlove': The constitutional case for no-fault divorce in Uganda

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Summary: *This article examines the constitutionality of the requirement to establish certain grounds – adultery, cruelty, desertion, bigamy and others – as a condition for the grant of divorce in Uganda. It begins with an examination of the existing legal framework, including reforms already achieved through public interest litigation, and certain changes sought to be effected via judicial activism. The article then proceeds to an analysis of the human rights issues implicated by a fault-based framework, and a consideration as to whether the public interest-based limitations in this regard pass constitutional muster. Ultimately, it is proposed that the only means of aligning this area of domestic relations law with the Constitution is through the elimination of fault as a requirement for dissolving marital bonds. Such reform would also be consistent with critical public policy concerns, including the welfare of children and the sanctity of marriage itself.*

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Key words: *no-fault divorce; right to unlove; constitutionality; legislative reform; judicial activism; law and society*

1 Introduction

(M)aybe we too busy being flowers or fairies or strawberries instead of something honest and worthy of respect ... you know ... like being people.

Toni Cade Bambara, *Raymond's run*

Love is a beautiful thing. In its purest form, it brings out the best in us and smoothens our rougher edges. Its importance in human relations is self-evident. If this needed any demonstration, it would be found in the sheer volume of artistic and other work dedicated to the exploration of love's various forms and expressions.

Yet, it seems that this powerful emotion finds scant attention in legal imagination. The 1995 Constitution of Uganda, for instance, does not even mention it once,¹ and one would be hard-pressed to locate serious legal work dealing with the subject.² In this neglected landscape, therefore, the articulation by Oloka-Onyango of a 'right to love' is a most welcome exception. As he rightly notes:³

While the 'right' to love appears in no known legal document – national, regional or global – there is no doubt that it is a universal human sentiment. If one was to perform a dissection of the right to love, it would be found implicit in several human rights principles – freedom of association and expression, the right to health, the right to privacy and especially in the right to human dignity. Despite the absence of the right in a normative form, it is a central feature of human existence, especially within the context of sexual expression. To deny its existence is to deny the very essence of our humanity.

To the 'building blocks' of the right to love identified by Oloka-Onyango, we would add another: the right to marry and to found a family. While love need not culminate in marriage, and while,

1 The 1995 Constitution of Uganda acknowledges, in art 45, that the enumeration of rights under ch four (the Bill of Rights) is not exhaustive. This critical provision logically follows from the recognition, under art 20(1) of the same document, that human rights are inherent and not granted by the state.

2 The law, in the main, seems to be drawn towards addressing or solving 'big' and 'public' questions: war, peace, security and others. However, as Herring has intimated, this comes at the cost of attention to some of the more critical aspects of human existence: love, death, bereavement and others. In describing his own work, he identifies a 'focus on how the law interacts with the important things in life: not money, companies or insurance; but love, friendship and intimacy' – see <https://www.law.ox.ac.uk/people/jonathan-herring> (accessed 25 June 2021).

3 J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 29.

indeed, several great loves historically chose not to commit formally in that regard, for many, marriage indeed is an expression of love and affection. At the same time, we would suggest that just as the right to love is inextricably linked to the fact of being human, the right to 'unlove' is similarly tightly woven into the tapestry of the human experience.

This article seeks to outline the contours of the right to 'unlove' in the context of the legal framework for undoing matrimonial bonds. It starts with an analysis of current Ugandan law relating to divorce, before continuing on to a consideration of the constitutionality of the predominantly fault-based legal regime. Ultimately, the article contends that the recognition of the right to 'unlove' – as manifested through providing for a 'no-fault' divorce regime – is the only means by which the legal framework for divorce in Uganda can be made consistent with the letter and spirit of the 1995 Constitution.

2 The largely fault-based Ugandan divorce regime

There are five kinds of marriage that can be contracted in Uganda, namely, (i) civil; (ii) Christian; (iii) Hindu; (iv) customary; and (v) Islamic. The divorce regime under the first three and, to an extent, the fourth, is mainly governed by the Divorce Act,⁴ while Islamic divorce is largely informed by the tenets of Shari'a law. In this part I briefly outline the grounds for divorce under each of these marriages.

2.1 Civil, Christian and Hindu marriage

Section 4 of the Divorce Act originally provided that a husband could petition for divorce on the single ground of adultery.⁵ A wife, however, had to couple adultery with another ground such as incest; bigamy; 'marriage with another woman'; rape, 'sodomy' or bestiality; cruelty; and desertion 'without reasonable excuse' for two years or more.⁶ A wife could also obtain a divorce where the husband had changed religion from Christianity to another, or where he had 'gone through a form of marriage with another woman'.⁷

4 Ch 249 Laws of Uganda. This Act was first enacted in 1904 under British colonial rule.

5 Sec 4(1) Divorce Act.

6 Sec 4(2) Divorce Act.

7 As above.

These provisions were successfully challenged in *Uganda Association of women Lawyers (FIDA) & 5 Others v Attorney-General*,⁸ the Constitutional Court finding the provisions to constitute sex-based discrimination, contrary to article 21 of the Constitution.⁹ Some confusion followed the *FIDA* case, that is to say, whether both parties were now required to couple adultery with a second ground, or whether adultery on its own would suffice for either party. In the end, case law appears to have settled on the position that either spouse is entitled to invoke any one ground under section 4 for the purposes of a divorce petition.¹⁰ These grounds must be established to a relatively high standard,¹¹ and the Court must also satisfy itself that there has been no connivance, collusion or condonation (the so-called 3 Cs).¹²

⁸ Constitutional Petition 2 of 2003.

⁹ Incidentally, this position had already received judicial disapprobation by the time the *FIDA* case was filed. In *Annette Nakalema Kironde v Apollo Kaddu Mukasa Kironde & Another* Divorce Cause 6 of 2001, eg, Rwamisazi-Kagaba J had noted that secs 5 and 6 of the Divorce Act were inconsistent with arts 2(1) and (2), 31(1), 33(1)(4) and (6) of the Constitution, in so far as they created 'different sets of rights, opportunities and treatment for men and women to the same institution of marriage'; and that the provision, under sec 23 of the Divorce Act, for payment of damages for adultery to a husband by a co-respondent was archaic, discriminatory and inconsistent with the Constitution. Similarly, in *Thakkar v Thakkar* (Divorce Cause 3 of 2002), Kibuuka-Musoke J, citing *Nakalema Kironde*, found sec 5 of the Divorce Act to be inconsistent with arts 21, 31(1) and 33 of the Constitution, and observed that it had to be read with necessary modification, as required by art 273 of the Constitution.

¹⁰ See, eg, *Dr Specioza Wandira Naigaga Kazibwe v Eng Charles Nsubuga Kazibwe* Divorce Cause 3 of 2003; *Sarah Kiyemba v Robert Batte* Divorce Cause 127 of 2018 and *Namuyimbwa Proscovia v David Ralph Pace* Divorce Cause 14 of 2017.

¹¹ Eg, in *Habyarimana v Habyarimana* Divorce Cause 1 of 1974, HCB [1980] 139 Odoki J (as he then was) noted that an allegation of adultery had to be proved to the satisfaction of the court, which required proof 'beyond reasonable doubt', especially given that adultery was also a criminal offence. However, since this *dictum* the criminal offence of adultery has been declared unconstitutional, in *Law and Advocacy for Women in Uganda v Attorney-General* Constitutional Petitions 13 of 2005 and 5 of 2006. According to Nassali, this development means that adultery should now be established on a 'balance of probabilities' standard rather than on the basis of proof 'to the satisfaction of the court'. See M Nassali 'Unfaithful love: A critical analysis of adultery and divorce law in Uganda' in M Nassali (ed) *The politics of putting asunder: The family, law and divorce in Uganda* (2017) 82. Nonetheless, where certain grounds for divorce are admitted, no additional proof appears to be required – *Lub v Lub* Divorce Cause 47 of 1997; *Musisi v Musisi* Divorce Cause 14 of 2007; *Kazibwe v Kazibwe* Divorce Cause 3 of 2003; and *Doreen Kirungi v Ronald Mugabe* Divorce Cause 48 of 2013.

¹² Secs 6 and 7 Divorce Act. Under sec 9 adultery may not be deemed to have been condoned unless 'conjugal cohabitation' has been continued or subsequently resumed. In practice, however, courts do not appear to seriously enquire into the 3 Cs. In *Annette Nakalema Kironde v Apollo Kaddu Mukasa Kironde & Another* Divorce Cause 6 of 2001, eg, notwithstanding the admissions of adultery by both the petitioner and respondent, Rwamisazi-Kagaba J found, in a brief and perfunctory paragraph, that none of the 3 Cs were present. Similarly, in *Susan Annet Kayegi v Innocent Martin Wadamba* Divorce Cause 19 of 2010, despite remarking upon various agreements reached by the parties regarding both the divorce and related matters as to custody and maintenance of the children, Kainamura J felt that, from the evidence on record, there had been no connivance, collusion or condonation.

Under section 8(1) of the Hindu Marriage and Divorce Act,¹³ subject to that section, the Divorce Act is applicable to Hindu marriages.¹⁴

2.2 Islamic marriage

Under section 2 of the Marriage and Divorce of Mohammedans Act (MDMA),¹⁵ all divorces from marriages between Muslims, which are given according to the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the divorce takes place, shall be valid and registered as provided in that Act.¹⁶

There are four main types of divorce under Islamic law, namely, (i) divorce at the instance of the husband (*Talaq*); (ii) divorce by the consent of the spouses (*Khula*); (iii) divorce by judicial order at the instance of either spouse (*Fask*); and (iv) divorce through oath (*Lian*).¹⁷ Of these, the *Talaq* and *Khula* divorces are essentially based on the no-fault principle.¹⁸

In terms of section 18 of the MDMA, nothing in the Divorce Act shall authorise the grant of any relief under that Act where the

¹³ Cap 250, Laws of Uganda.

¹⁴ Under sec 8(2) of the Act, in addition to the grounds for divorce mentioned in the Divorce Act, a petition for divorce may be presented by either party to the marriage on the ground that the respondent has ceased to be a Hindu by reason of conversion to another religion; or that they have 'renounced the world by entering a religious order and [have] remained in that order apart from the world for at least three years immediately preceding the presentation of the petition'. A wife may also present a divorce, in the case of a marriage contracted before the commencement of the Act, on the ground that the husband was already married at the time of the marriage; or that he married again before the commencement of the Act, the other wife in either case being alive at the time the petition is presented.

¹⁵ Cap 252, Laws of Uganda. As Sewaya has noted, the term 'Mohammedan' is 'now obsolete' – M Sewaya 'State of Muslim family justice: A critical examination of the law governing Muslim marriages and divorce in Uganda' in Nassali (n 11) 288.

¹⁶ Islamic law in Uganda generally follows the *Sunni* rather than the *Shia* school. Of the four orthodox schools under the *Sunni* group – *Malik*, *Hanbali*, *Hanafi* and *Shafi* – the Ugandan Muslim community largely adopts the tenets of the *Shafi* school; Sewaya (n 15) 292-293.

¹⁷ Sewaya (n 15) 316.

¹⁸ See *The King v The Superintendent Registrar of Marriages, Hammersmith (Ex Parte Mir-ariwaruda)* (1917) 1 KB 634 636 ('Under Mohammedan law, a Mohammedan ... can dissolve any of his marriages by a mere declaration of his will and pleasure, to that effect. This declaration is called "Talaq" ... [I]t may be made verbally and in the absence of the wife and without any reason being assigned. It does not require the intervention of a court of law, it takes effect from the moment of pronouncement') and *Salum v Asuman* (1969) EA 255 257 (Seaton J observing that 'from the authorities of Mohammedan law the Khula divorce is obtainable at the initiation of the wife. It is accomplished at once by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering and the husband accepting compensation out of her property for the release of his marital obligations').

marriage of the parties has been declared valid under the MDMA; but nothing in that section shall prevent any competent court from granting relief under Mohammedan law, and the High Court and any court to which jurisdiction is specially given by the minister by statutory instrument shall have jurisdiction for granting that relief.¹⁹

2.3 Customary marriage

The Customary Marriage (Registration) Act²⁰ is silent both as to the applicability of the Divorce Act to such marriages, and with respect to the broader question as to how divorce under customary law may be effected.²¹

Nonetheless, the formal courts have jurisdiction to dissolve customary marriages²² and it appears that, in this regard, the parties are entitled to invoke any of the grounds under the Divorce Act. In addition, the parties may rely upon any other grounds applicable under the relevant custom.²³

3 Tentative movements from a fault-based regime

It is clear from the preceding part that, with the limited exception of the *Talaq* and *Khula* divorces under Islamic law, the Ugandan divorce regime predominantly is fault-based. However, an analysis of case law reveals that there are some windows for obtaining no-fault divorces, based on certain judicial interpretations of the current legal framework.

19 The Constitution envisaged, under art 129(1)(d), that Parliament would establish Qadhis' courts to handle, among others, Islamic divorce. Unfortunately, this provision is yet to be implemented, more than 25 years since the promulgation of the Constitution. The above position notwithstanding, in *Sumaya Nabawanuka v Med Makumbi* Divorce Cause 39 of 2011 Kainamura J noted that while the Qadhis' courts had not yet been established, Shari'a courts such as that of the Uganda Muslim Supreme Council, were not extra-legal, given the provisions of sec 2 of the MDMA, and were competent to handle divorce cases. He also found the instant petition to be incompetent, under sec 18 of the MDMA, in so far as it sought relief under the Divorce Act even though the marriage in question had been conducted in accordance with Islamic law. See also *Jamila Kinawa & Another v Asuman Bakali* (Miscellaneous Application 427 of 2014), in which Luswata J granted an order allowing the execution of the judgment and orders of a Shari'a court at Iganga, finding, arguably *per incuriam*, that a Shari'a court was 'one recognised under Article 129(1)(d) of the Constitution'.

20 Cap 248, Laws of Uganda.

21 Nassali (n 11) 63.

22 See *Dr Josephine Nakakande v Joseph Balikuddembe* Divorce Cause 60 of 2017 per Tuhaise J, citing *Aiyya v Aiyya* Divorce Cause 8/1973 and *Negulu Milly Eva v Dr Seruga Solomon* Civil Appeal 103/2013.

23 In *Josephine Nakakande*, eg, Tuhaise J noted that 'the dissolution of a customary marriage is negotiable in accordance with the customs and rites observed among the ethnic group of one of both parties to the marriage'.

The possibility of a judicial route to a no-fault divorce seems to have first been raised in the 2004 appellate case of *Mbabazi v Bazira*.²⁴ In those proceedings counsel faulted the trial judge for having failed to find that the requirement for fault-based divorce was unconstitutional. She argued that where two adults had entered into a marriage union by free will, they ought also by free will to be able to dissolve the same without requiring proof of guilt of either party. Although the Court of Appeal noted that this was ‘probably ... a valid argument which could be properly referred to the Constitutional Court’, no such reference was made on that occasion.

3.1 Emergence of ‘irretrievable breakdown’ as a basis for divorce

Since *Mbabazi*, however, some judges have innovated the ‘irretrievable breakdown’ of marriage principle as a basis for divorce, premised on a particular interpretation of the implications of the *FIDA* case. In *Julius Chama v Specioza Rwalinda Mbabazi*,²⁵ for instance, Kainamura J noted that following *FIDA*, where several provisions of the Divorce Act had been nullified, and in view of the failure of legislative intervention following that case, a gap in the law was evident. To bridge this gap, courts had opted to ‘look at the totality of the facts’ before them in each case and to ‘determine whether the facts [led] to the finding that the marriage [had] irretrievably broken down’.²⁶

At the same time, it appears that this basis for divorce still requires the establishment of some fault on the part of either party – although not strictly confined to the traditional grounds envisaged under the Divorce Act. In *Julius Rwabinumi v Hope Bahimbisomwe*,²⁷ for example, Twinomujuni J observed that marriage was taken as having irretrievably broken down when the conduct of a party to the marriage toward the other made it intolerable for the parties to live together. He noted that from an observation of the two parties in that case, the two could ‘hardly reconcile’, each one’s feelings towards the other being ‘antagonistic and deep rooted’. This seems

24 Civil Appeal 44 of 2004.

25 Divorce Cause 25 of 2011.

26 Citing *Gershom Masiko v Florence Masiko* Civil Appeal 8 of 2011. Similarly, in *Joweria Namukasa v Livingstone Kakondere* Divorce Cause 30 of 2010 Eva Luswata J observed that absent legislative reform following the *FIDA* case, the practice of courts had been to adopt either the view that all grounds were equally available to spouses who sought divorce, or that the provisions of sec 4 had been expunged altogether. In support of this view, she also cited *Gershom Masiko v Florence Masiko*.

27 Civil Appeal Divorce Cause 30 of 2007.

to suggest a requirement for blameworthy conduct on the part of at least one of the parties to the marriage.

Similarly, in *Susan Annet Kayegi v Innocent Martin Wadamba*²⁸ Kainamura J observed that one of the agreed facts was that the union was 'strained and had irretrievably broken down' and that 'both parties wanted the marriage dissolved'. However, he also noted that the Court '[did] not have to look far to satisfy itself on this matter' since the petitioner admitted to having a four months-old baby who was 'clearly not an issue of the marriage'. According to the judge, this meant that both parties had chosen to move on, and he thus was convinced that the marriage had 'irretrievably broken down' and had to be dissolved.

A slight variation in this regard is presented by *Anne Musisi v Herbert Musisi and Another*.²⁹ In this case the fact of adultery had been admitted by both the respondent and the co-respondent. Mwangusya J (as he then was) noted that while this ground was 'sufficient for dissolution of the marriage' in terms of section 4 of the Divorce Act, the parties were also 'agreed that their marriage had irretrievably broken down because of the long separation and the fact that all attempts to reconcile them had failed'. In consideration of these 'two factors', the judge proceeded to dissolve the marriage. It appears that Mwangusya J viewed 'irretrievable breakdown' as not necessarily requiring fault, but rather being premised on the actual prospects for meaningful reconciliation. However, this seems to be a minority – even if persuasive – judicial interpretation of the concept.

3.2 Judicially-sanctioned divorce-by-consent

In addition to the rather nebulous 'irretrievable breakdown' principle as a foundation for dissolution, there are instances where judges have granted divorce based on no other reason than the *consent* of the parties to the marriages. In *Jane Basheija v Geoffrey Basheija & Another*,³⁰ for instance, Kainamura J noted that 'instead of pursuing a lengthy litigation' the parties had reached a 'partial consent' upon which basis the court had entered a decree *nisi* dissolving the marriage. Under the terms of the consent, the sharing of property was to be determined by Court, which necessitated the present proceedings.

28 Divorce Cause 19 of 2010.

29 Divorce Cause 14 of 2007.

30 Divorce Cause 12 of 2005.

Similarly, in *Chris Bakiza v Esther Nafuna*³¹ Tuhaise J noted that the marriage had been dissolved in a ‘consent judgment’, in which the parties agreed to place the issue of distribution of the matrimonial home before an arbitrator. However, the arbitrator had not determined the substantive issue of the distribution of the matrimonial home, hence the subsequent litigation.

Likewise, in *Julian Galton Fenzi v Natasha Marie Nabbosa*³² the applicant sought orders for maintenance of the parties’ two children or, in the alternative, a redistribution of certain properties. In dismissing the application, Kainamura J observed that when the substantive case first came up for hearing, the parties had ‘opted not to pursue a lengthy litigation’ and, based on mutual consent, a decree *nisi* had been entered and subsequently made absolute. The applicant ought to have exercised due diligence to litigate on all issues pertaining to the divorce, including maintenance of the children. In the circumstances, the consent judgment between the parties represented a resolution of disputes as between the parties and was final and binding on all parties.

In addition to these explicit examples of judicially-sanctioned divorce-by-consent, a reading of Ugandan case law suggests that there are many more instances where parties have effectively been granted such divorces without this being expressly stipulated. This is strongly implied by the large number of ‘uncontested’ petitions in which dissolution has been granted after only the most cursory reference to the grounds under the Divorce Act and, in particular, scant inquiry into the existence of connivance, collusion or condonation.³³ While these are not, strictly speaking, no-fault divorces, they present further indications of socio-legal responses to a decidedly antiquated divorce regime.

3.3 Re-assertions of the fault-based regime

The trends highlighted above – of divorce based on ‘irretrievable breakdown’ of marriage or the consent of the parties (including ‘uncontested’ petitions) – perhaps predictably, have been strongly resisted in certain judicial quarters.

31 Divorce Cause 22 of 2011.

32 Miscellaneous Cause 6 of 2012.

33 See, eg, *Dr Joseph Erume v Deborah Kyomugisha* Divorce Cause 9 of 2014; *Proscovia Namuyimbwa v David Ralph Pace* Divorce Cause 14 of 2017; and *Bishop David Kiganda v Hadija Naseje Kiganda* Divorce Cause 42 of 2011.

A good example of this pushback is presented by the *dictum* in *Ayiko Mawa Solomon v Lekuru Annet Ayiko*.³⁴ In that 2015 case Mubiru J noted that marriage continued to ‘serve valuable social, legal, economic, and institutional functions’ and that, as such, ‘the underlying public policy’ continued to ‘promote marriage and discourage divorce’ except where the parties strictly complied with the set statutory requirements for the grant of divorce. He further observed that although there were attitudes expressed in modern times ‘that divorce should not be based solely on traditional fault grounds such as adultery, cruelty, and desertion’ and that divorce should also be permitted in circumstances such as ‘parties’ incompatibility and irreconcilable differences’, this was not permissible in view of the prevailing statutory regime. He added that even where the respondent did not oppose the petition for divorce, that was not in itself sufficient to justify its grant by the court.

Mubiru J’s commitment to this strict reading and application of the provisions of the Divorce Act would be further demonstrated in the 2016 case of *Richard Kana v Agnes Ezatiru*.³⁵ In 2012 the applicant had petitioned for divorce before the chief magistrate’s court in Arua, citing desertion and cruelty. The chief magistrate did not take any formal evidence from the parties regarding the grounds alleged. However, he did grant a decree *nisi*, noting that ‘sentiments [were] high’ and that ‘there [was] no opposition to the dissolution of the marriage’. On appeal to the High Court – on a question of division of property rather than the divorce itself – the resident judge criticised the procedure adopted by the chief magistrate, but nevertheless upheld the divorce decree and proceeded to resolve the residual property dispute. In the present matter, the applicant now alleged that the respondent had not rendered a fair account of the rental proceeds, as required by the resident judge’s order. Significantly, neither of the parties challenged the grant of divorce. Nonetheless, invoking the inherent power of the court under section 98 of the Civil Procedure Act, Mubiru J stressed that evidence in civil trials had to be taken upon oath or affirmation. The failure to do this at the chief magistrate’s court had rendered the proceedings in question so flawed as not to in fact constitute a trial. In the event, he set aside the decrees *nisi* and absolute as well as the orders regarding the allocation of the matrimonial property; and ordered that the file be remitted to the chief magistrate’s court with directions that the entire petition be heard afresh. The effect of Mubiru J’s 2016 decision was to basically return the parties to the position in which they had

34 Divorce Cause 1 of 2015.

35 Miscellaneous Cause 59 of 2016, arising from High Court Civil Appeal 22 of 2013.

been back in 2012, when the divorce petition was initially filed. The parties who went to the court believing themselves to be divorced – and no doubt living their separate and individual lives as free individuals – now suddenly found themselves essentially declared to, legally, remain husband and wife.³⁶

A similarly emphatic defence of the *status quo* – above any wishes of the parties in question, over any attempts at judicial activism, and in spite of any developments in other parts of the world³⁷ – is presented by the 2020 appellate case of *Rebecca Nagidde v Charles Mwasa*.³⁸ The appellant petitioned for divorce before the High Court in 2017, on grounds of adultery and cruelty. At the hearing, Matovu J concluded that the marriage had irretrievably broken down and asked counsel for the parties to prepare a decree *nisi* for his signature. He then proceeded to determine the issues relating to custody and the distribution of property. The appellant challenged the determinations relating to custody and property but, notably, not the divorce itself. On appeal, however, Egonda-Ntende JA (with Musota and Kasule JJA concurring) concluded that the decree *nisi* had been wrongly entered, and emphasised that before granting such decree, the Court had to be satisfied that the petitioner's grounds as presented had been proven; that there was no connivance or condonation or collusion between the parties in presenting the petition; and that the petitioner had not themselves been guilty of adultery, or of an unreasonable delay in presenting the petition, or cruelty to the respondent, or desertion or separation or other misconduct. He went

36 The parallels between the *Kana* case and the (in)famous *Rex v Amkeyo* (1917) 7 EALR 14 case are rather striking. In the former, the parties believed themselves to be divorced and had presumably conducted their lives as such for close to four years, before receiving a judicial decision to the contrary. In the latter, the parties believed themselves to be married before being informed otherwise by judicial decision. In both cases, however, the disconnect between the judicial decision, on the one hand, and the lived reality – and evident wishes – of the parties, on the other, is apparent.

37 A number of jurisdictions now permit some version of a no-fault divorce. These include South Africa (1979 Divorce Act); Tanzania (sec 99 of the Law of Marriage Act); Sweden (1973 Marriage Code); Spain (Law 15 of 2005, amending the Civil Code and the Civil Procedural Act); France (Law 75-617 of 11 July 1975); Australia (1975 Family Law Act); China (1980 Marriage Law); Canada (1968 Divorce Act); Venezuela (decision by the constitutional chamber of the Supreme Tribunal of Justice 6 June 2015); Ireland (sec 5 of the Family Law (Divorce) Act); and the United Kingdom (Divorce, Dissolution and Separation Act of 2020, scheduled to enter into force on 6 April 2022; itself partly informed by the long-standing litigation in *Owens v Owens* [2018] UKSC 41 in which, although the Supreme Court noted that the marriage in question was 'unhappy' and 'wretched', it nevertheless denied the petitioner's request for a divorce). Additionally, in the USA, each of the individual states now offers some kind of no-fault divorce – See E Horowitz 'The "holey" bonds of matrimony: A constitutional challenge to burdensome divorce laws' (2006) *Journal of Constitutional Law* 887, citing M Butler 'Grounds for divorce: A survey' (1999) 11 *Journal of Contemporary Legal Issues* 164.

38 Civil Appeal 160 of 2018.

on to observe that while these conditions might 'be or appear to be archaic' they still represented the law on divorce as it stood, and courts were not permitted to ignore them and establish their own grounds for divorce such as 'irreconcilable differences'. While this particular ground might exist in many other jurisdictions, absent an amendment to the Divorce Act or the passing of a new law providing for it, this ground 'however attractive it might be' was unavailable in Uganda.³⁹

It is important to note that none of the key decisions supporting the more conservative, fault-based approach to divorce – *Ayiko*, *Kana* and *Nagidde* – made any reference to the provisions of the 1995 Constitution in this regard. Although they emphasised the requirements of statutory law, in particular the Divorce Act, they did not address the compatibility of this regime with a number of relevant constitutional standards. Evidently, in light of article 2 of the Constitution (the supremacy clause) these positions require reconsideration. It is to this enquiry – the constitutionality of the fault-based regime – that we now turn.

4 Analysing the constitutionality of fault-based divorce

The 1995 Constitution is a strange document – one that holds both the promise of Uganda, and reflects its critical failings. As a path towards, and guarantor of, a truly democratic dispensation, it has failed so many times, and at such critical stages, as to be effectively comatose. However, as a basis for the articulation and realisation of, especially, 'non-political' human rights, it continues to show many signs of life.

39 At 7 of the decision. Notably, about a decade before his lead judgment in *Nagidde*, Egonda-Ntende J (as he then was) had resisted a rather desperate attempt at divorce-by-arbitration, in the 2009 case of *Emily Susanne Dyk Wissanja v Zahid Asafali Wissanja* HCT-00-FD-MC-0008-2009. The parties, who had been married in Ottawa in 1999, sought to dissolve their marriage in 2006 through the Centre for Arbitration and Dispute Resolution (CADER), a body established under the Arbitration and Conciliation Act (Cap 4, Laws of Uganda). The Director of CADER, Mr Jimmy Muyanja, in his capacity as arbitrator, purported to issue a decree *nisi* in August 2006 and a decree absolute in July 2007. The applicant attempted to register the decree absolute with the High Court as a court award in 2008, an effort that was rejected by the court registrar. The applicant then formally applied to the High Court seeking registration of the award. In dismissing the application, Egonda-Ntende J stressed that the parties had no scope for 'constituting their own tribunal for the grant of divorce', and that any ante or post-nuptial agreement to that effect would be void for illegality and on grounds of public policy.

There now is a wealth of largely progressive jurisprudence elaborating and re-affirming almost all the provisions of the Bill of Rights. In the sub-sections below I identify a number of constitutional rights implicated by the fault-based divorce regime before proceeding to consider whether the public policy imperatives underlying the current legal framework justify the significant restrictions of the human rights identified.

4.1 Constitutional rights implicated

4.1.1 *Right to privacy*

One of the rights most critically affected by the fault-based regime is that to privacy.⁴⁰ The requirement of proving fault opens up some of the most intimate aspects of people's lives to scrutiny by not only the judicial officer(s) involved with the case but the public at large. For instance, to prove adultery a petitioner is required to provide various lurid details relating to sexual intercourse between their spouse and the co-adulterer. In addition, the law requires that a co-respondent be named in instances of adultery and it is immaterial, in this regard, whether they were aware of the married state of the respondent. These breaches of privacy have implications not only for the individuals in question, but for a whole range of other persons: their children, parents, siblings, and other relatives, friends, and in-laws.⁴¹

40 Art 27 1995 Constitution. The right is also enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR) (art 17(1)) and the 1948 Universal Declaration of Human Rights (Universal Declaration) (art 12). The right to privacy is not expressly provided for under the 1986 African Charter on Human and Peoples' Rights (African Charter).

41 A good example in this regard is the *dictum* of the Court in *Emmanuel Kasingye v Genevieve Kasingye* Civil Appeal 96 of 2014, which dealt with proof of adultery. In discounting the respondent's testimony as uncorroborated, the Court felt that she should have adduced additional evidence or witnesses to validate her version of events. Although the Court acknowledged that she may have had 'good reason to protect her children from testifying', nevertheless the judge thought that she could have called officers from 'various police stations, church elders, and even her workmates' to corroborate her claims since the couple's long-term disagreements had allegedly been reported to these people.

4.1.2 *Rights to expression, association, liberty, freedom from torture and life*

The current legal regime also implicates the rights to expression,⁴² association,⁴³ liberty,⁴⁴ freedom from torture,⁴⁵ and life.⁴⁶ Given Uganda's history, these rights are often thought of in political terms, in the context of restraint or violation by the state and security agencies and in relation to the public sphere. However, they undoubtedly have powerful implications for, and resonance with, the ways in which individuals live and enjoy their private and intimate lives.⁴⁷

One of the ways in which love may be manifested and expressed is through marriage. At the same time, the end of love could also best be expressed through separation and divorce. Indeed, the right *to marry*⁴⁸ by necessary implication includes a right *to divorce*.⁴⁹ This right to divorce – implicit in the rights to expression, liberty and association – is diminished by a fault-based divorce regime, which

42 Art 29(1)(a) 1995 Constitution; art 19(2) ICCPR; art 19 Universal Declaration; and art 9(2) African Charter.

43 Art 29(1)(e) 1995 Constitution; art 22(1) ICCPR; art 20(1) Universal Declaration; and art 10(1) African Charter.

44 Art 23 1995 Constitution; art 9(1) ICCPR; art 3 Universal Declaration; and art 6 African Charter.

45 Art 24 1995 Constitution; art 7 ICCPR; art 5 Universal Declaration; and art 5 African Charter.

46 Art 22 1995 Constitution; art 6(1) ICCPR; art 3 Universal Declaration; and art 4 African Charter.

47 A good example in this respect is provided by the Kenyan case of *R V Kadhi, Kisumu, Ex Parte Nasreen* (1973) EA 153. The applicant had been married to the interested party under Islamic law. Her husband had applied to the Kadhi court for restitution of conjugal rights, which application had been granted. The applicant sought a writ of *certiorari* to set aside this order. In granting the writ, Harris J found that the order constituted a violation of the applicant's constitutional rights to personal liberty and to freedom of movement.

48 Art 31 1995 Constitution; art 23 ICCPR; and art 16 Universal Declaration. The African Charter does not contain an express provision guaranteeing the right to marry. Nonetheless, the Charter recognises the fundamental importance of the family, and obliges the state to support and protect it (art 18). *Cf* the US Supreme Court decisions in *Maynard v Hill* 125 US 190, 205 (1888) (marriage as 'creating the most important relation in life'); *Skinner v Oklahoma* 316 US 535, 541 (1942) (marriage and procreation as 'fundamental to the very existence and survival of the race'); *Loving v Virginia* 388 US 1 (1967) (the right to marry as having 'long been recognised as one of the vital personal rights essential to the orderly pursuit of happiness by free men' (12)); *Zablocki v Redhail* 434 US 374, 386 (1978) (the right to marry as being 'of fundamental importance' (383)).

49 As Katunguka J noted in *Sarah Kiyemba v Robert Batte Divorce Cause 127 of 2018*, 'a marriage without companionship and intimacy unless by consent of parties ... does not exist'. Similarly, Horowitz has observed that 'it is only logical that the decision to end a marriage is every bit as personal and intimate as the decision to enter one. To marry is to choose a person with whom to spend your life ... To divorce is to choose not to remain a life partner with that person.' Horowitz (n 37) 885. For additional work in this regard, see T Bosworth 'The federal constitutional right to divorce' (2004) 14 *Journal of Contemporary Legal Issues* 103; CJ Jones 'The rights to marry and divorce: A new look at some unanswered questions' (1985) 63 *Washington University Law Review* 577; and R Rivlin 'The right to divorce: Its direction, and why it matters' (2013) 4 *International Journal of the Jurisprudence of the Family* 133.

places unreasonable fetters in the path of adult persons who wish to consensually dissolve the bonds into which they in the first place consensually entered.

In addition, legal barriers to divorce might trap human beings in deeply toxic environments, inevitably endangering their right to freedom from torture and, in some instances, even to life. On the other hand, there appears to be a strong correlation between liberal divorce regimes and more positive welfare outcomes. For instance, studies conducted in the United States found statistically significant declines both in domestic violence and wives' suicides following the no-fault divorce reform in that jurisdiction.⁵⁰

4.1.3 Freedom of (and from) religion, and the constitutional guarantee of a secular state

The fault-based regime also has implications for the right to freedom of religion,⁵¹ as well as the constitutional guarantee of a secular state.⁵² The requirement for fault as a condition for the grant of divorce is rooted in the Judeo-Christian notion of the sanctity of marriage. The Divorce Act which was received in Uganda in 1904 reflected only a temporal phase in the secularisation of divorce law in the United Kingdom⁵³ – one which has since continued in that country,⁵⁴ but which seems to have been stultified in Uganda. The

50 Stanford Graduate School of Business 'No fault divorce laws may have improved women's well-being', <https://www.newswise.com/articles/no-fault-divorce-laws-may-have-improved-womens-well-being> (accessed 13 June 2021).

51 Art 29(1)(c) 1995 Constitution; art 18(1) ICCPR; art 18 Universal Declaration; and art 8 African Charter.

52 Art 7 1995 Constitution; art 27 ICCPR.

53 It is noteworthy that the very foundation of the Church of England in 1534 was triggered by the refusal by Pope Clement VII to sanction the annulment of King Henry VIII's marriage to Catherine of Aragon, which would have paved the way for his marriage to Anne Boleyn. Nonetheless, the new Church of England maintained such strict barriers to divorce that for a long time the only route to ending a marriage was either through an annulment (itself severely proscribed) or through divorce obtained by an Act of Parliament. Inevitably, the latter option was one open only to those with significant financial resources. Questions as to annulment were determined by Ecclesiastical courts, which administered canon law. Under this regime, marriage was considered to be a sacrament – sacred and indissoluble. Substantial reform to this framework only came by means of the Matrimonial Causes Act of 1857, which allowed divorce to be obtained through civil courts. The law leaned in favour of men who were allowed to obtain divorce on the single ground of adultery, while women had to prove both adultery and another ground such as incest or cruelty. See, generally, A Foreman 'The heartbreaking history of divorce' *Smithsonian Magazine* February 2014, <https://www.smithsonianmag.com/history/heartbreaking-history-of-divorce-180949439/> (accessed 27 June 2021) and GL Savage 'The operation of the 1857 Divorce Act, 1860-1910: A research note' (1983) 16 *Journal of Social History* 103.

54 The position under the 1857 Matrimonial Causes Act was reformed by the Matrimonial Causes Act of 1923, which allowed both men and women to petition for divorce on the ground of adultery, and further by the Matrimonial

result is that the current version of the Ugandan Divorce Act – and the fault-based regime in particular – continues to reflect the traditional Christian view of marriage as a sacrament,⁵⁵ sanctity and integrity of which must be preserved and protected almost at all costs.

For its part, the Constitution places primacy on the notion of the free and full consent of the parties to the union and lays emphasis on the equality of parties, in this and in all other aspects, at the start of the marriage, during its subsistence and at dissolution. The Constitution centres, foregrounds and protects the individual(s) contracting the marriage, rather than the institution of marriage *per se*. Marriage, as envisaged under the Constitution, therefore is primarily a contractual arrangement, founded upon individual consent and to be treated as such regardless of the kind of union – Christian, Islamic, Hindu or customary – into which one enters.⁵⁶

Indeed, as the 2009 *Rwabinumi* case emphasised, the choice to contract a religious marriage does not deprive parties of the ultimate protection of the Constitution.⁵⁷ One reflection of this fundamental

Causes Act of 1937, which allowed divorces to be obtained on the additional grounds of cruelty, desertion and ‘incurable insanity’. The law was additionally reformed by the Divorce Reform Act of 1969 (now consolidated under the Matrimonial Causes Act 1973), which allowed either spouse to obtain a divorce on the ground of the ‘irretrievable breakdown’ of the marriage provided that such breakdown was demonstrated by evidence of adultery, unreasonable behaviour, desertion, two years’ separation with the consent of the other spouse; or five years’ separation without such consent. An additional step was attempted by the Family Law Act of 1996 which would have allowed for an even simpler process to obtain a no-fault divorce. However, the Act’s provisions on divorce were never implemented and were eventually repealed. See, generally, AS Holmes ‘The double standard in the English divorce laws, 1857-1923’ (1995) 20 *Law and Social Inquiry* 601; R Probert ‘The controversy of equality and the Matrimonial Causes Act 1923’ (1999) 11 *Child and Family Law Quarterly* 33; J Levin ‘The Divorce Reform Act 1969’ (1970) 33 *Modern Law Review* 632 and E Hasson ‘Setting a standard or reflecting reality? The “role” of divorce law, and the case of the Family Law Act, 1996’ (2003) 17 *International Journal of Law, Policy and the Family* 338.

- 55 This is in some contrast to the position under Islamic law. As Sir Clement De Lestang J noted in *Ayoob v Ayoob* [1968] EA 72, ‘[u]nder Islamic law, marriage is a civil contract, not a sacrament’ (77).
- 56 Art 31 1995 Constitution. In *Julius Rwabinumi v Hope Bahimbisomwe* Supreme Court Civil Appeal 10 of 2009, eg, Kisaakye JSC referred to ‘persons who contract religious marriages under the Marriage Act’.
- 57 Kisaakye JSC emphasised the secular nature of the Ugandan state, noting that Uganda was not governed by Canon law, but by the Constitution, statutory law, case law and customary law. It had thus been improper for the justices of appeal to found their decision on religious marital vows to hold that those who contracted church marriages thereby entered into a communion of property. In so holding, Kisaakye JSC upheld Kavuma JA’s dissent in the Court of Appeal, in which he had observed that given the nature of Uganda as a secular state, as envisaged by art 7 of the Constitution, any questions relating to marital property rights had to be handled under the applicable law of the land ‘without resorting to invoking the holy scriptures’. To him, art 31(1) of the Constitution had been sufficient to settle the question before the Court, and did not ‘require any reinforcement from invoking divine authority’. Kisaakye JSC’s views also affirm the position reached by Tuhaise J in *Emmanuel Nyabayango v Margaret*

principle is to be found in the 2003 case of *Dr Specioza Wandira Naigaga Kazibwe v Eng Charles Nsubuga Kazibwe*,⁵⁸ which involved the judicial termination of a Catholic marriage – one ostensibly indissoluble under the doctrine of that church. In such a situation, the church might well be within its rights to continue to consider the individuals in question to be married and, for instance, to deny them the benefit of being remarried to other persons in church. However, for the purposes of the secular state, such individuals would be legally divorced, and would be at liberty to remarry, or remain single, as they deemed fit.

It is this very co-existence – even in the face of opposed world views and beliefs – that is contemplated in and facilitated by articles 7 and 29 of the Constitution. It is this same co-existence, and the supremacy of the Constitution in a secular state, that mandate a movement away from the fault-based regime rooted in the Judeo-Christian conception of marriage.

4.1.4 Rights of women and children, and the freedom from discrimination

A fault-based regime has a particularly negative impact on the rights and welfare of women⁵⁹ and children,⁶⁰ and also contravenes the freedom from discrimination.⁶¹ Although facially neutral, the barriers to divorce continue to disproportionately affect women, and especially poor women.⁶² In effect, at a broader level, the requirement to prove fault as a condition for divorce constitutes class-based discrimination in so far as it might not effectively deter persons of means from dissolving their marriages when they so desire.⁶³ In fact, this troubling aspect of the fault-based framework resonates with more explicitly

Kabasinguzi and Prof Gilbert Bukenya High Court Civil Suit 121 of 2012 to the effect that one cannot contract out of certain rights.

58 Divorce Cause 3 of 2003.

59 Arts 31(1)(b), 32(2) and 33 1995 Constitution; art 16(1), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and arts 6 & 7 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).

60 Arts 31(4) & (5) and 34 1995 Constitution; arts 3(1), 9 & 18 Convention on the Rights of the Child (CRC); arts 1(2), 4(1), 19 & 20 African Charter on the Rights and Welfare of the Child (African Children's Charter); and arts 14(1) & 23(4) ICCPR.

61 Art 21 1995 Constitution; art 26 ICCPR; art 7 Universal Declaration; and arts 18(3), 19 & 28 African Charter.

62 According to a 2020 HIIIL study, eg, '[p]oor, uneducated and rural women and their children are the most vulnerable when the family relationship is falling apart. As such, they are in greatest need for just and fair resolutions'; HIIIL 'Deep dive into divorce and separation in Uganda' 26, https://www.hiil.org/wp-content/uploads/2020/10/Hiil-Uganda-Deep-Dive-Divorce-and-separation_Online.pdf (accessed 23 April 2021).

63 See the discussion in part 3.

discriminatory parts of Ugandan divorce law as established in the racist colonial state.⁶⁴

Relatedly, the current legal framework for divorce treats children in a deeply problematic manner, often leaving them psychologically bruised for life. For instance, court documents usually refer to them not even as 'children' but 'issues of the marriage'. On the other hand, studies have shown that where provision is made for no-fault divorce, children are better shielded from the more challenging aspects of what is an intrinsically difficult proceeding. It also provides a stronger basis for the continuation and promotion of wholesome family relations, the divorce notwithstanding. Indeed, in many situations the cohesion enjoyed by such family units – for they do remain as such – might be much stronger, and the bonds more genuine, than those subsisting in many marriages being sustained, or endured, for no other reason than the difficulty of the legal framework for divorce.

4.2 Between the state and the individual: Applying the article 43 test to fault-based divorce

Although a number of rights are affected by the fault-based divorce regime, it could be argued that the restrictions on these rights are reasonable and necessary, as envisaged under article 43(1) of the Constitution.⁶⁵ Indeed, no doubt there are many good reasons why, as a matter of public policy, the state might promote and perhaps even protect the institution of marriage. These include public morality and public health. That said, article 43(2) of the Constitution emphasises that 'public interest' shall not permit, among other things, 'any limitation of the enjoyment of the rights and freedoms prescribed by

64 Eg, under sec 3 of the Divorce Act, while divorces by 'non-Africans' were to be handled by the High Court, 'Africans' could only access magistrate's courts for this purpose. Strangely, this ancient injustice appears to have only been relatively recently brought to judicial attention, in *Frederick Kato v Anne Njoki Divorce Cause 10 of 2007*. In that case a question arose as to whether sec 3 was consistent with art 21 of the Constitution, which prohibits discrimination based on, among other things, race. Egonda-Ntende J (as he then was) noted that although the Divorce Act came into force on 1 October 1904, it had unfortunately never been reformed over a century later. He found that the differential racial treatment under sec 3 was inconsistent with the clear words of the Constitution and that, as required by art 292, it had to be read with such modifications, adaptations and qualifications as to bring it into conformity with the Constitution. He thus concluded that Africans could file their divorce petitions in the High Court, on the same basis with people of all other races. Nonetheless, pending legislative reform, he felt it prudent for all cases to ordinarily be filed in the magistrate's court, with only those with matrimonial assets in excess of that court's pecuniary jurisdiction (UGX 50 000 000) being filed in the High Court.

65 Art 43(1) of the Constitution stipulates that the rights expressed under this chapter may not 'prejudice the fundamental or other human rights and freedoms of others or the public interest'.

this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society'.⁶⁶

A key element of the article 43 test is whether the restrictions in question constitute the least restrictive means of achieving the relevant public objectives. In my view it would be difficult to argue that the requirement to prove fault as a basis for the grant of divorce is the *least restrictive* means of promoting public morality or even public health. In the first place, there is little evidence to suggest that a fault-based divorce regime promotes public morality or public health. Indeed, all indications are there that forcing adult human beings to remain in a union in which they no longer are interested has exactly the opposite outcome. For instance, an increasing number of people might either opt not to marry in the first place or, if already married, choose to 'divorce in fact' without bothering to do so in law.⁶⁷

Second, even if the state were minded to promote the institution of marriage, there are a whole range of approaches that it could employ which might achieve the same objective, with less problematic implications for the range of human rights at issue. Indeed, it is worth noting that in many instances the state already extends a range of privileges and protections to married people. Under the Evidence Act, for instance, in criminal proceedings the spouse of an accused person may not be compelled to testify for the prosecution without the consent of the accused person.⁶⁸ Married people are also generally preferred in the context of adoption, are protected under land law and mortgage law, and enjoy certain advantages in the arena of contract law.⁶⁹

Third, and related to the second point above, any relief or protection that might be obtained through a fault-based divorce

66 In addition, under art 44 certain rights may not be derogated from under any circumstances. These are freedom from torture, cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair hearing; and the right to an order of *habeas corpus*.

67 As Naggita-Musoke has noted, the absence of legislative reform of the law has led to 'walk away' divorces, 'which arise in instances where society cannot run to the formal law for assistance, but instead devises its own law in action'; D Naggita-Musoke 'Time for family law to step into the 21st century' in Nassali (n 11) 375.

68 Sec 120(1)(a) Evidence Act, Cap 6. Indeed, it was this provision that was in issue in the *Amkeyo* case (n 36).

69 Under certain circumstances a spouse is permitted to pledge the credit of the other. See, eg, *David Oryem v Phillip Omony* High Court Civil Appeal 100 of 2018 in which Mubiru J observed that '[a] married woman living with her husband has implied authority to pledge his credit for necessities suitable to his degree and station in life' (para 33 of the decision, citing *Miss Gray Ltd v Earl of Cathcart* (1922) 38 TLR 562).

system is available to the parties through a number of other legal courses of action that do not have the deleterious effect of forcing adult human beings into toxic factual and legal proximity. These include court-based or mediated disputed resolution over property;⁷⁰ general civil proceedings, such as constitutional and tortious claims, for any wrongs or harm;⁷¹ and even criminal proceedings in the context of physical or sexual assault.

It may also be noted that, as a matter of public policy, providing for no-fault divorce does not constitute an attack on the sanctity of marriage. Indeed, in many ways it is a *defence* of it. The current legal system encourages discord rather than harmony, and disincentivises reconciliation and forgiveness.⁷² If spouses are not forced into an acrimonious duel performed before a humourless court and a scavenging public, often to the profit of no one other than the lawyers involved, it might very well be the case that they could find a way back to that most solid of human engagements – friendship – or even, in certain cases, back to the love that they once experienced. In any case, two adults who might now wish to amicably dissolve their union cannot be said to be intuitively against the institution of marriage, otherwise they would not have opted to join it in the first place. It is unreasonable, unfair and unjust to in effect punish such

70 See, eg, *Olive Kigongo v Mosa Courts Apartments Ltd* Company Cause 1 of 2015. In this case the petitioner sought an order for the winding up of the respondent company, which she had incorporated with her husband, Hajji Moses Kigongo, in November 1997. At the time of the incorporation the petitioner had been allotted 15% shares, while her husband held the other 85%. They had both been involved in the running of the company until 2011, when Hajji Kigongo systematically excluded her from any involvement in the company's affairs. Musota J found that the petitioner had indeed been unfairly treated and that she was entitled to adequate compensation (in terms of the real value of the shares, and a 15% share of profits made since her exclusion in 2011) – although he declined to order the winding up of the company. Similarly, in *Robert Katuramu v Elizabeth Katuramu* High Court Miscellaneous Application 26 of 2017 the parties had been married in 1990, and had separated in 2000. In 2015, following suits filed by the respondent in 2011 and 2014, the parties reached a consent judgment in which particular property was designated as family land. The applicant now sought to have that judgment reviewed on the ground, among others, that land could not be deemed matrimonial property except in a divorce matrimonial cause. Masalu Musene J dismissed this argument, and upheld the validity of the consent.

71 In *Emmanuel Nyabayango v Margaret Kabasinguzi and Prof Gilbert Bukunya* High Court Civil Suit 121 of 2012, eg, the plaintiff sued claiming that the second defendant had had an extramarital affair with his wife (the first defendant) which had resulted in the birth of a child. The plaintiff alleged that these actions infringed several of his constitutional rights, including to family life as stipulated under art 31. At the hearing, counsel for the second defendant argued, among other things, that the claims alleging adultery should have been brought by way of divorce proceedings. Tuhaise J disagreed, noting that the fact that the petitioner could have initiated divorce proceedings did not limit his option to utilise other available forms of legal process such as the instant one.

72 Eg, as noted in part 2, the law does not allow a party to rely on adultery where such has been condoned, that is to say, forgiven. Similarly, the establishment of adultery requires a level of specificity and a kind of record keeping which is inconsistent with love and reconciliation.

persons to a life sentence – and in some cases even a death sentence – in such circumstances.

In sum, fault-based divorce, in my view, does not pass the article 43 test for the restriction of human rights based on public interest. In so far as it is not the least restrictive means for achieving any of the public policy ends that might inform it, it cannot be said to be acceptable or demonstrably justifiable in a free and democratic society, which is the high threshold set under the Constitution.

5 Conclusion

The right to ‘unlove’ is as critical as the right to love. It is a composite of, and a necessary corollary to, several rights stipulated under the Constitution. It is imperative to decisively reform the current legal system which traps adult human beings into a situation of forced proximity, thereby exacerbating and amplifying tensions that otherwise might have been alternatively resolved. Indeed, there can be no greater demonstration of the urgency for legislative reform in this regard than the fact that *all* efforts at amending the divorce regime since 1904 have included proposals for a no-fault divorce.⁷³

It also bears noting that the right to ‘unlove’ is not a licence to hate. If anything, it is an invitation – and a permission – towards the transformation of love from one form (*eros*) to another (*philia*). As Lomas has observed:⁷⁴

Few experiences are as cherished as love, with surveys consistently reporting it to be among the most sought-after and valorised of human emotions ... At the same time though, few concepts are as contested, with the label encompassing a vast range of phenomena – spanning

⁷³ Eg, the Report of the Commission on Marriage, Divorce and the Status of Women (established in 1964) recommended that ‘[n]o specific grounds for divorce should be laid down’. See HF Morris ‘Uganda: Report of the Commission on Marriage, Divorce and the Status of Women’ (1966) 10 *Journal of African Law* 3-7. Similarly, clause 5 of the Memorandum to the 2003 version of the Domestic Relations Bill (DRB) provided that the Bill sought, among other things, to deal with ‘divorce prescribing no fault divorce otherwise known as irretrievable break down of marriage, to apply to all forms of marriage’; Government of Uganda *Domestic Relations Bill* (2003), <https://mifumi.org/wp-content/uploads/2017/01/Domestic-Relations-Bill-2003.pdf> (accessed 15 March 2021). Sec 145 of the 2009 Marriage and Divorce Bill also provided for ‘irretrievable breakdown’ of marriage as the only ground for divorce, <https://landwise.resourceequity.org/documents/1362> (accessed 27 June 2021). This position (irretrievable breakdown as sole ground for divorce) was reiterated in sec 26 of the 2017 Marriage Bill; see <https://www.ulrc.go.ug/content/marriage-bill-2017> (accessed 27 June 2021).

⁷⁴ T Lomas ‘The flavours of love: A cross-cultural lexical analysis’ (2018) 48 *Journal for the Theory of Social Behaviour* 134.

diverse spectra of intensity, valence, and temporal duration, and being used in relation to a panoply of relationships, objects and experiences.

Love, marriage, family, intimacy are things far too important to be subjected to pretence or compulsion. The law should allow human beings to live, and let live – to love, and to unlove. Simply said, the law should let human beings be human.

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Securing legal reforms to the use of force in the context of police militarisation in Uganda: The role of public interest litigation and structural interdict

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Summary: *This article argues that the failure by the Ugandan government to put in place clear regulations governing the use of force and firearms by the police and armed security forces, particularly during joint police and military operations, as part of arrest and crowd control operations, threatens to violate the right to life, the right to freedom from inhumane treatment, the right to assemble and the right to a remedy under the Ugandan Constitution. It argues that the constitutional, statutory law and case law framework in Uganda can facilitate public interest litigation in order to secure the adoption by the Ugandan government of comprehensive and internationally-accepted standards on the use of force and firearms by police and armed security forces. The article draws on a recent progressive decision of the High Court in James Muhindo & 3 Others v Attorney-General, and the Human Rights Enforcement Act of 2019 to expound on the proactive potential of article 50 of Uganda's Constitution to deliver expedited institutional and human rights-oriented reforms and to afford the courts oversight functions in the implementation of these reforms through structural*

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interdict. These aspects of the public interest litigation framework in Uganda offer a pathway to civilian-led reform in a highly state-controlled, politicised and militarised police and security sector over which Ugandans otherwise have no civilian oversight. Thus, the article explores the potential of public interest litigation as an empowering tool in competing approaches to state formation in transitional contexts and positions public interest litigation as a transformative response to militarisation in a fragile state.

Key words: *use of force; militarisation; police powers; Uganda; James Muhindo & 3 Others v Attorney-General; Human Rights Enforcement Act of 2019*

1 Introduction

Militarisation is defined variably by different scholars but essentially involves ‘the enlargement of the role of the military establishment in society’.¹ Some indicators of militarisation include the proportion of a country’s gross domestic product (GDP) allocated to the military; the frequency with which the military is used to suppress civil disorder; the frequency of military *coups*; and the size of the domestic arms industry.² Some scholars define it to include the prevalent use of force as an instrument of political power, the growing influence of the military over civilian affairs and its growing influence in social and economic affairs.³ This article focuses on the manifestation of militarisation within the framework of use of force by the police and army as instruments of political power and control of civilian affairs. It posits that the permissible legal framework for the use of force by the police in Uganda entrenches a colonial legacy of violence as a means of regime survival and control as opposed to a policy of the protection of citizens. This legacy has facilitated a steady militarisation process within the institutional and normative framework governing the police forces. The effect has been a vicious cycle of human rights violations on a mass scale at the hands of the police and the armed forces, usually against political opposition rallies or protests or against political opposition figures, and with no accountability.⁴ This cycle of

1 PA Agbese ‘The political economy of militarisation in Nigeria’ (1990) 25 *Africa Spectrum* 293.

2 Agbese (n 1) 294.

3 As above.

4 Human Rights Watch ‘Uganda: Ensure independent investigation into Kasese killings’ 15 March 2017, <https://www.hrw.org/news/2017/03/15/uganda-ensure-independent-investigation-kasese-killings>; Human Rights Watch ‘Uganda: Investigate 2009 Kampala riot killings’ 10 September 2010, <https://www.hrw.org/news/2010/09/10/uganda-investigate-2009-kampala-riot-killings>.

political violence historically contributed to the country's instability under each successive regime, and is cited as a cause in fomenting ethnic animosities and instating a cycle of vengeance.⁵ To date there has been no systematic legal and policy intervention to disrupt it despite numerous calls for and attempts at reform.⁶

The article argues that the state's interest in monopolising the means and ends of violence for political dominance accounts for its recalcitrance in opposing fundamental reform of the use of force by the police. Thus, a citizen-led initiative provides the most viable avenue for a chance at introducing such reforms, which can best be achieved and facilitated through public interest litigation and court supervision under structural interdict. Uganda's constitutional and statutory landscape provide both these tools. The aim of the article is to demonstrate these arguments in four parts. Part 1 is the introduction; part 2 explores the nature and extent of militarisation under the use of force framework of the Ugandan police force as well as the human rights implications. Part 3 discusses the role of public interest litigation in securing fundamental reforms to the use of force framework to seal the human rights protection gaps. Part 4 highlights the limits of public interest litigation and amplifies the case for structural interdict and court supervision of use of force reforms under the Human Rights Enforcement Act. Part 5 concludes with some reflections on the implications of such reforms for peacebuilding in Uganda.

2 Militarisation of the police, human rights and use of force standards

The Ugandan police was instituted in 1899 as a colonial paramilitary force charged with protecting British colonial interests.⁷ Although purportedly a civilian force, it executed many military duties.⁸ As a police force during colonial rule it was answerable to the regime and the political executive's will and not to the people. It was highly

www.hrw.org/news/2010/09/10/uganda-investigate-2009-kampala-riot-killings (accessed 24 July 2018).

5 YK Museveni *Sowing the mustard seed* (1997); AB Kasozi *The social origins of violence in Uganda* (1994).

6 HURINET-Uganda *Towards a democratic and accountable police service: The public perception on the state of policing in Uganda* (2017); M Nankinga 'Uganda police launches human rights policy' 13 February 2019, <https://www.upf.go.ug/uganda-police-force-launches-human-rights-policy/> (accessed 24 July 2018).

7 Commonwealth Human Rights Initiative (CWHRI) *The police, the people, the politics: Police accountability in Uganda* (2006) 12, http://www.humanrightsinitiative.org/publications/police/uganda_country_report_2006.pdf (accessed 24 July 2018).

8 As above. These included patrolling of borders, suppressing cattle raids, putting down violent boundary disputes and actual service in army units.

militarised and authoritarian and emphasised law and order at the expense of human rights.⁹ The post-independence character of the police force did not change for the better. Instead, the same blueprint for its practice as used by the colonial government was adopted by successive regimes post-independence for political and military clout to secure power and to violently suppress political opposition.¹⁰ The independence regimes adopted a strategy of undermining and neglecting the police force in favour of the army as it had become apparent that whoever controlled military power also had the most assured control of political power.¹¹ When the current regime under President Museveni took power in 1986 following armed rebellion, its leadership promised a fundamental change in Uganda's political landscape.¹² Unfortunately, it too perpetuated the very ills it sought to eradicate regarding state violence.¹³ It inherited a poorly-trained, underpaid and ideologically non-aligned police force which it has neglected to professionalise as a civilian institution.¹⁴ Instead, the regime set about militarising the police to close the ideological gap by recruiting army officers to staff it at all levels, introducing military training for the police and equipping it with heavy weaponry which it deploys in joint operations with the Uganda Peoples' Defence Forces (UPDF).¹⁵ Notable events include the appointment in 2001 of Major General Katumba Wamala as the Inspector-General of Police (IGP) and the 2005 takeover by Major General Kale Kayihura, which events are viewed as significant indicators of the police militarisation process.¹⁶

While some changes in 2018 ushered in a civilian IGP, the deputy IGP is an army officer.¹⁷ Moreover, the country is witnessing a steady recruitment of army personnel into more high-ranking positions in the police under a context to which the current IGP has referred as 'an increasing convergence of policing and military doctrine'.¹⁸ In

9 As above.

10 Kasozi (n 5). See also B Kabumba et al *Militarism and the dilemma of post-colonial statehood: The case of Museveni's Uganda* (2017).

11 As above. See also Commonwealth Initiative (n 7) 3 4.

12 J Oloka-Onyango 'Governance, democracy and development in Uganda today: A socio-legal examination' *African* (1992) 13 *Study Monographs* 91.

13 As above. See also JD Barkan *Uganda: Assessing risks to stability* (2011) 9-10.

14 Commonwealth Initiative (n 7).

15 J Kagoro & S Biecker 'For whom do the police work? The Ugandan police between militarisation and everyday duties' (2014) *Institute for Intercultural and International Studies Working paper*, http://paperroom.ipsa.org/papers/paper_32619.pdf (accessed 24 July 2018); Commonwealth Initiative (n 7).

16 Commonwealth Initiative (n 7).

17 Business Focus 'Military police boss is new deputy IGP' 4 March 2018, <https://businessfocus.co.ug/military-police-boss-new-deputy-igp/> (accessed 24 July 2018).

18 K Kazibwe 'IGP Ochola welcomes army officers deployed to police as directors' *Nile Post (Kampala)* 3 July 2019, <https://nilepost.co.ug/2019/07/03/igp-ochola-welcomes-army-officers-deployed-to-police-as-directors/> (accessed 24 July 2019).

the run-up to and after the 2021 presidential elections, President Museveni appointed as Deputy IGP Major-General Paul Lokech, who went by the title of 'The Lion of Mogadishu' for his outstanding role in the fight against Al-Shabaab in Somalia.¹⁹ The President justified the deployment of Lokech as necessary to counter the leading political opposition candidate, Robert Kyagulanyi, whose protesters he perceived as 'an 'insurrection' of 'traitors' who were being backed by foreigners and 'homosexuals, who do not want to see peace and stability in Uganda'.²⁰ By referring to the election period protesters as 'an insurrection' and deploying Major-General Lokech due to, among other qualities, his proven experience in combating urban warfare while in Somalia,²¹ it was clear that President Museveni, also the commander-in-chief of the UPDF, perceived of the election protests as an armed conflict scenario requiring a militarised response and not a law enforcement approach. This attitude meant that policing standards retreated in favour of military force and military tactics.

Salter identifies the influence of paramilitary appearances and tactics in the police as examples of police militarisation. These manifest through the use by the police of military weaponry to respond to crime; the indiscriminate use of teargas, rubber bullets and pepper spray to disperse crowds; police mimicking of military uniform such as combat boots and utility belts to carry military technology; the dissemination of paramilitary tactics in normal police work; and the transfer of military and war technology to law enforcement.²² The Uganda Police Force (UPF) has manifested these attributes including through amassing military weaponry such as assault rifles, machine guns and military tanks, the mimicking of military uniform, training in military tactics among other manifestations, all allegedly to professionalise the police and equip it to respond to the modern challenges of terrorism and law enforcement.²³ However, this trend instead has escalated violence and facilitated police brutality.²⁴

Militarisation of the UPF also has manifested through the increased joint deployment of the UPF and UPDF in law enforcement missions

2018); see also DM Alier 'Will Maj Gen Paul Lokech be the lion or the lamb of Kampala?' 23 December 2020.

19 J Kamoga 'Military takes charge in Uganda as tensions rise ahead of polls' *The East African* 11 January 2021.

20 J Burke & S Okiror 'Bobi Wine likens Uganda's election to a war and battlefield' *The Guardian* 1 July 2021.

21 L Taylor 'They came in plain clothes with guns: Abducted by Uganda's army' *Aljazeera* 3 March 2021.

22 M Salter 'Toys for the boys? Drones, pleasure and popular culture in the militarisation of policing' (2014) 22 *Critical Criminology* 168.

23 HURINET-U 'Towards a democratic and accountable police service: The public perception on the state of policing in Uganda' 2017 68-69.

24 As above.

under which the regulatory framework and the leadership role of the UPF is ambiguous.²⁵ In such contexts the militant approach has proven dominant and has resulted in indiscriminate killings and loss of life. Such killings manifested during the November 2020 pre-election riots in which over 50 civilians, including children, were killed in a joint UPF and UPFD deployment within a span of two days.²⁶ The protests had erupted in response to the arrest and detention of Robert Kyagulanyi, the major political opponent of President Yoweri Museveni referenced above.²⁷ It later emerged in a leaked report into the said November riots that of all the 50 people killed only 11 were rioters. The rest of the victims were killed by indiscriminate 'stray bullets'.²⁸ Other such killings following joint operations are discussed further below.

It is argued here that the permissiveness of Uganda's statutory legal framework regulating police use of force standards deviates from its constitutional and international obligations, thereby facilitating the 'convergence of police and military doctrine' on the use of force particularly during joint operations to the detriment of human rights. Thus, Ugandan law on the use of force enables and facilitates a militarised approach to law enforcement, as discussed below.

2.1 Legal framework on the use of force in Uganda

It is important to distinguish the ordinary context of and standards for the use of force by the army and the use of force by the police. The army ordinarily uses force for defensive or offensive purposes during armed conflict. Under the rules of international humanitarian law that apply during armed conflict active enemy combatants are lawful military targets and soldiers may do all things necessary to achieve military advantage during hostilities, including shooting to kill.²⁹ The principles of distinction, proportionality and necessity of force all hinge on ensuring that there are minimal or no civilian casualties in the course of armed conflict as long as such civilians take no active part in hostilities.³⁰

25 S Namwase 'The roots of pre-election carnage by Uganda security forces' *The Conversation* 10 January 2021.

26 Human Rights Watch 'Uganda: Elections marred by violence' 21 January 2021.

27 As above.

28 T Butagira 'Government probe report on November riots leaks' *Daily Monitor* 17 May 2021.

29 M Sassoli & LM Olson 'The relationship between international humanitarian and human rights law where it matters: Admissible killing and internment of fighters in non-international armed conflicts' (2008) 90 *International Review of the Red Cross* 559.

30 As above.

For their part, police officers ordinarily exercise their powers during peace time, which is the focus of this article. In these contexts the use of force must be deployed in a manner that respects human rights, particularly the right to life, with their official main prerogative being to arrest a suspect as opposed to shooting to kill. As law enforcement officials the police may use firearms only in self-defence or in defence of others against imminent threats of death or serious injury; to prevent the perpetration of a serious crime involving a threat to life; to arrest a person presenting such a danger or to prevent their escape; but only when less extreme means are insufficient to meet these objectives. Moreover, the intentional use of lethal force should be applied only when strictly unavoidable in order to protect life and in case of an *imminent threat* to life.³¹ When the army exercises police functions during peace time, it is bound by this strict standard on the use of force to protect the right to life.³² This limitation on the use of force is reflected under Uganda's constitutional framework as well as the international human rights conventions which Uganda has ratified.

Unfortunately, this standard is not readily evident under Uganda's statutory laws, which disregard the right to life and contribute to the blurring of police and military standards and doctrines on the use of force.

2.1.1 Use of force under the 1995 Constitution

Uganda's Constitution lays the foundation for the use of force by the police and armed forces. It recognises the Uganda Police Force (UPF) and the Uganda Peoples' Defence Forces (UPDF) as central institutions of defence and national security as well as for the maintenance of law and order.³³ The police force is charged specifically with the protection of life and property alongside its function of maintaining law and order,³⁴ whereas the UPDF is mandated, among other functions, to foster harmony and understanding between the defence forces and civilians.³⁵ In direct relation to the limits on the use of force and firearms, the Constitution provides a high threshold for the protection of the right to life under article 22 as follows:

31 Sassoli & Olson (n 29) 611. See also the UN Basic Guidelines on the Use of Force and Firearms by Law Enforcement Officials (emphasis added), <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx> (accessed 24 July 2018).

32 As above. See also General Comment 3 on the African Charter on Human and Peoples' Rights (The right to life) art 4 para 29.

33 Arts 208 & 211 1995 Constitution.

34 Art 212(a) 1995 Constitution.

35 Art 209(c) 1995 Constitution.

- (1) No person shall be deprived of life intentionally *except in execution of a sentence passed in a fair trial by a court of competent jurisdiction* in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

Uganda also ratified the International Covenant on Civil and Political Rights (ICCPR)³⁶ which protects the right to life under article 6 by providing that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

The same protection on the right to life is accorded under the African Charter on Human and Peoples' Rights (African Charter) in similar terms.³⁷

The right to life is not listed among the non-derogable rights under article 44 of the Ugandan Constitution, but it is submitted that the high threshold for its protection under article 22 and its non-derogability under article 4(2) of ICCPR binds Uganda to uphold it even in situations of emergency. Moreover, the right to life is recognised as a rule of international customary law and as part of *jus cogens*.³⁸

The United Nations Basic Principles on the Use of Force and Firearms by law enforcement officers (UN Basic Principles) also provide practical guidelines on the limits on law enforcement officers when deploying force and firearms by, among others, calling for the respecting and preserving of human life. On the use of firearms in particular, as highlighted above, the guidelines provide as follows:³⁹

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the *imminent* threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

36 16 December 1966, 999 UNTS 171, 6 ILM (entered into force 23 March 1976) (ICCPR).

37 Art 4 African Charter on Human and Peoples' Rights.

38 C Heyns 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2014) UN Doc A/HRC/26/36 para 42.

39 Basic Principles on the use of force and fire arms for law enforcement officials, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Although the UN Basic Principles are considered soft law and are not legally binding, they are ‘widely accepted as authoritative statements of the law’.⁴⁰

In contrast to the foregoing constitutional and international limits, the domestic statutes regulating the UPF and UPDF mandates contain highly-permissive standards and vague frameworks for the use of force which undermine a range of human rights identified below and facilitate the blurring of functions and doctrines on thresholds of force applicable in war and law enforcement contexts, as listed below.

2.1.2 Use of force to disperse assemblies or riots

Sections 65, 68 and 69 of Uganda’s Penal Code Act⁴¹ grant powers to police officers or any commissioned officer in the armed forces or other officers empowered by law to make a proclamation as to an unlawful assembly or riot and to disperse it after the proclamation. In particular section 69 provides as follows:

If upon the expiration of a reasonable time after the proclamation is made, or after the making of the proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorised to make the proclamation, or any police officer or any other person acting in aid of that person or police officer, *may do all things necessary* for dispersing the persons so continuing assembled or for apprehending them or any of them, and if any person makes resistance, *may use all such force as is reasonably necessary for overcoming such resistance and shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person.*

A similar provision is contained in section 36 of the Police Act.⁴² Although this provision in the Police Act has since been declared unconstitutional,⁴³ the continued existence of its equivalent under the Penal Code Act as seen above renders its nullification redundant.

2.1.3 Use of force in arrest and custodial contexts

In situations of arrest, the Criminal Procedure Code Act under section 2 permits the use of *all means necessary* to effect an arrest,

⁴⁰ Heyns (n 38) para 44.

⁴¹ Penal Code Act, Cap 120.

⁴² Police Act Cap 303 (as amended).

⁴³ *Moses Mwandha v Attorney-General* Constitutional Petition 5 of 2007, <https://ulii.org/ug/judgment/constitutional-court-uganda/2019/5> (accessed 24 July 2018).

although it cautions that this does not justify the use of more force than was reasonable in the specific circumstances under which it was applied or than was necessary to apprehend the offender. However, it is submitted that this precaution is equivocal when juxtaposed with the overtly 'enabling provision' which permits the use of 'all means necessary' to effect an arrest. This equivocation stands in stark contrast to the unequivocal protection afforded the right to life under Uganda's Constitution, as seen above.

The Prisons Act contains a slightly more restrictive standard on the use of force in custodial contexts compared to the foregoing provisions. Sections 40(2), (3) and (4) of the Act restrain the use of firearms without first resorting to non-violent means and, where unavoidable, to use firearms with restraint and 'in proportion to the seriousness of the threat and the legitimate objective to be achieved while minimising injury and preserving the prisoner's life'. However, even with this seemingly restrictive standard, the justification for the use of firearms has a low threshold of 'ensuring compliance with lawful orders and to maintain discipline in the prison'.⁴⁴ Further in custodial contexts, the Police Act under section 28 imposes restrictions on the use of firearms by police officers although it also permits a low threshold for their use in order to 'prevent persons attempting to escape from custody'. This low level is in stark contrast to the high threshold under the UN Basic Principles of self-defence or defence of others against an imminent threat to life or grievous harm.⁴⁵ 'An imminent threat is one that is expected to materialise in actual harm in a split second or at most a matter of seconds.'⁴⁶ More succinctly, the Special Rapporteur on Extra-Judicial or Summary Executions notes the following with respect to the right to life and the use of firearms:⁴⁷

The 'protect life' principle demands that lethal force may not be used intentionally merely to protect law and order or to serve other similar interests (for example, it may not be used only to disperse protests, to arrest a suspected criminal, or to safeguard other interests such as property). The primary aim must be to save life. In practice, this means that only the protection of life can meet the proportionality requirement where lethal force is used intentionally, and the protection of life can be the only legitimate objective for the use of such force. A fleeing thief who poses no immediate danger may not be killed, even if it means that the thief will escape.

44 Sec 40(1) Criminal Procedure Code Act Cap 116.

45 Art 9 UN Basic Principles (n 39).

46 <https://www.policinglaw.info/international-standards> (accessed 24 July 2018).

47 Heyns (n 38) para 72.

All the foregoing statutory provisions under Ugandan law deviate from the high constitutional and international human rights thresholds on the right to life. The laws also omit clear limitations on the use of force mandates of the UPF and the UPDF in peace time contexts. Applied to a vague legal framework regulating joint police and military deployments, these permissive statutory provisions facilitate a dominant militarised approach to the use of force in law enforcement and, through it, enable and entrench a cycle of human rights violations.

2.2 Joint deployment of the armed and police forces and human rights violations

Under article 209 of the Constitution and section 42 of the UPDF Act army officers are liable to be called on to assist the civilian authority in case of an emergency, a riot or a disturbance of the peace which it is beyond that authority's powers to suppress or prevent. Here it must be noted that under General Comment 3 on the right to life under the African Charter:⁴⁸

Members of the armed forces can only be used for law enforcement in exceptional circumstances and where strictly necessary. Where this takes place all such personnel must receive appropriate instructions, equipment and thorough training on the human rights legal framework that applies in such circumstances.

Similar restrictions on and regulation of the armed forces prior to joint deployments in law enforcement contexts exist in the laws of progressive African countries such as South Africa, but are absent under Ugandan law.⁴⁹ Moreover, under South African law it is unequivocally provided that joint deployments do not automatically confer command and control powers to the South African Defence Forces over the South African Police Service and *vice versa*. By comparison, under Uganda's law the military personnel called upon in joint deployments and without further appointment or oath have and may exercise powers and duties of a police officer while retaining their powers and duties as military officers.⁵⁰ The army officer thus deployed acts only as a military force and is obliged to obey the orders of his or her superior who exercises power in collaboration with the officer in charge of the civil power,⁵¹ but there is no similar

48 General Comment 3 on the African Charter on Human and Peoples' Rights (The right to life) art 4 para 29.

49 Sec 20(11) South Africa Defence Act 42 of 2002.

50 Sec 43(1) Uganda Peoples' Defence Forces Act (UPDF Act).

51 Sec 43(2) UPDF Act.

unequivocal protection of lines of authority for the police officers in terms of chain of command.

It has been observed that '[a]n army may kill in the execution of its normal functions but the function of the police is fulfilled by apprehending and bringing to account. An armed policeman is not a soldier, and a soldier is not an armed policeman.'⁵²

The foregoing provisions of the UPDF Act combined with Uganda's permissive use of force powers for police officers serve to blur this distinction during joint military and police operations. They also effectively subordinate the civilian police authority to the military authority by emphasising the military chain of command without declaring a similar pronouncement in respect of the command and control structures of the police forces during joint deployment. Given Uganda's historical and political context considered above, it is unlikely that a joint police and military deployment would result in the genuinely collaborative relationship envisaged under the UPDF Act. Indeed, some findings from inquiries into previous joint deployments indicate that the UPDF dominates and intimidates the UPF and disregards civilian laws and procedures.⁵³

The various human rights violations that have been perpetrated by the use of excessive force during joint UPF and UPDF operations in peace time must be understood in this context. Thus, riots in support of a traditional ruler in 2009 resulted in the police and army killing more than 40 people as they protested the state's blockade on their king's movements,⁵⁴ while a raid on another traditional leader's premises by the Ugandan army and the police force, purportedly to quell an uprising late in 2016, resulted in the death of more than 100 people in the Rwenzori region.⁵⁵

It should be observed in this context that joint police and military deployments are weaponised to suppress political opposition. In 2005 an unconstitutional raid on the High Court was orchestrated by unidentified men dressed in black to re-arrest a key political opposition figure, Dr Kizza Besigye, and other co-accused persons after they had been granted bail on charges of terrorism. The men were later identified as members of the Joint Anti-Terrorism Task Force

52 JR Thackrah 'Army-police collaboration against terrorism' (1983) 56 *Police Journal* 46.

53 Commonwealth Initiative (n 7) 12 13.

54 Human Rights Watch 2010 (n 4).

55 'Uganda admits security forces killed over 100 people in palace raid in November', <http://www.africanews.com/2017/03/16/uganda-admits-security-forces-killed-over-100-people-in-a-palace-raid-in/> (accessed 10 August 2017).

(JATT), a special joint force from the army, police and anti-terrorism teams.⁵⁶ The explanation offered later by the UPDF spokesperson at the time was that the team had been deployed to re-arrest the accused persons so that they could be tried under the General Court Martial as they were subject to military and not civilian law.⁵⁷ The analysis made by some scholars was that the re-arrest in fact was meant to prevent Dr Besigye from running against the incumbent Museveni in the 2006 presidential elections.⁵⁸

In yet another violation of the separation of powers principle, the Special Forces Command (SFC), which is part of the UPDF believed to be presidential guards, was deployed in force at the Ugandan Parliament on 27 September 2017, allegedly at the request of the inspector-general of police, violently evicted opposition legislators during the tabling of a Bill aimed at lifting the presidential age limit. The Bill as well as the SFC deployment have been condemned as unconstitutional and as serving the interests of a life presidency for President Museveni.⁵⁹

From the foregoing discussion it emerges that the laxity of the legal framework on the use of force during peace time in Uganda, coupled with gaps in the law regulating joint police and military operations, facilitates militarised responses to law enforcement and perpetuates a disregard for human rights. It lays the basis for the argument that real reform in such contexts cannot come from the state's initiative but from a vigilant civilian-led intervention using the tools of public interest litigation and structural interdict.

3 Use of force laws and the reform potential of public interest litigation

Public interest litigation (PIL) has been defined as 'a court action seeking remedies aimed at a broader public good, as opposed to the specific interests of the individual litigant(s)'.⁶⁰ The action impacts

56 International Bar Association 'Judicial independence undermined: A report on Uganda' (2007) 26, file:///C:/Users/user/Downloads/Uganda_Judicial_independence_undermined%20(2).pdf (accessed 24 July 2018).

57 As above.

58 GB Asiimwe 'Of fundamental change and no change: Pitfalls of constitutionalism and political transformation in Uganda, 1995-2005' (2014) 39 *Africa Development* 37.

59 The Observer 'Makerere law dons slam age limit Bill' (2017), <http://observer.ug/news/headlines/55249-makerere-law-dons-slam-age-limit-bill.html> (accessed 24 July 2018).

60 J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' 5 January 2015 3, <https://ssrn.com/abstract=2606120> or <http://dx.doi.org/10.2139/ssrn.2606120> (accessed 24 July 2018).

the public at large even if instituted by an individual.⁶¹ PIL cases may result in the alteration of laws and the declaration of some laws as unconstitutional with the effect of enhancing human rights protections for the wider public.⁶²

According to Oloka Uganda's 1995 Constitution opens up various avenues for accessing justice by the public against a history of instability and political turmoil where justice has been limited.⁶³ He identifies a wealth of court decisions arising out of PIL that have expanded the human rights and political freedoms in the country spanning free speech, gender equality, multiparty democracy and dignity, among others.⁶⁴ He also points to four key articles of the Constitution as responsible for the rise in PIL cases, namely, article 50 which opens up *locus standi*; article 126 which enables the circumventing of technicalities; article 137 which grants interpretative jurisdiction to the Court of Appeal; and article 43 which excludes from 'public interest' political persecution, detention without trial, limitation of the enjoyment of the rights and freedoms beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided for in this Constitution. This latter article was especially included as a move away from the historical misuse of 'public interest' in perpetuation of an oppressive agenda in the state's interests.⁶⁵ Oloka predicts that Uganda and the rest of East Africa are bound to witness more PIL cases in the future, given the continuing existence of colonial era laws on their statute books which require reform, the increase in state impunity and the need for accountability for state actions in order to protect vulnerable groups.⁶⁶

In Uganda this prediction is already proving accurate and it can further be predicted that the colonial era 'use of force' laws discussed above will be the subject of PIL in the not too distant future. A range of cases brought under a liberal article 50 and article 137 above have laid the ground for future prospects relying on this action, as discussed further below.

3.1 Article 50: Rights infringed or 'threatened'

The 1995 Constitution provides a liberal basis for PIL as it permits a court action based on a right that has been infringed or that is

61 As above.

62 As above.

63 Oloka-Onyango (n 60) 14 17.

64 Oloka-Onyango (n 60) 25.

65 Oloka-Onyango 14.

66 Oloka-Onyango 42.

threatened. Article 50(1) specifically provides that '[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or *threatened*, is entitled to apply to a competent court for redress which may include compensation'.

In the true spirit of PIL this provision allows any individual Ugandan to initiate a court action which will not directly benefit him or her but enhance the human rights protections of the Ugandan public at large. Thus, in *James Muhindo & 3 Others versus Attorney-General*⁶⁷ the applicants filed an application under article 50 seeking declaratory orders that the absence of an adequate procedure governing evictions from land was a violation of the rights to life, dignity and property under articles 22, 24 and 26 of the Constitution. They also petitioned the Court for an order compelling the government of Uganda to develop comprehensive guidelines governing land evictions before, during and after the process of evictions. They argued that the mere absence of the guidelines amounted to a breach by the state of its article 20(2) constitutional obligations to respect, protect and promote the human rights of Ugandans enumerated above.⁶⁸

In keeping with the liberal nature of article 50, Ssekaana J ruled that although the petitioners had produced no evidence to prove the claims of alleged human rights violations during land eviction processes, the Court took judicial notice of the fact that evictions have always resulted in various human rights violations in Uganda. Moreover, the Court noted that the state had itself acknowledged this fact through its Ministry of Lands. The justice noted the broad wording of article 50(1) of the Constitution which 'allows for a human rights case to be brought where one alleges that a right has been infringed or *threatened*' in order to partly allow the order. On this basis, the Court declared that the absence of adequate procedures governing evictions was a threat to and could lead to the violation of the rights to life, to dignity and to property under articles 22, 24 and 26 of the 1995 Constitution of Uganda.⁶⁹ The Court granted the order compelling the government to develop comprehensive guidelines governing evictions before, during and after the fact.⁷⁰ However, as will be further discussed below, such orders that require extensive reform and which target government institutions are likely

67 *James Muhindo & 3 Others v AG* Miscellaneous Cause 127 of 2018 (before Justice Ssekaana Musa), <https://ulii.org/ug/judgment/hc-civil-division-uganda/2019/2> (accessed 24 July 2018).

68 *Muhindo* (n 67) 9.

69 *Muhindo* 17.

70 As above.

to be disregarded by the state unless the court retains jurisdiction to supervise their implementation.

The *Muhindo* decision serves as a good indicator that public interest litigation regarding use of force laws need not suffer the evidential burden of actual human rights violations accruing from excessive use of force by the state in order to succeed. The petition need only indicate the rights that are *threatened* by the continuing existence on Uganda's statute books of laws with highly-permissive standards on the use of force coupled with no accountability for abuse by the police and armed forces. Further, a lack of regulations on the standards governing the use of force, particularly during joint UPF and UPDF missions, perpetuates the violation of these rights. On demonstrating the rights violated or threatened under present conditions that relate to the use of force, there already is a court precedent that can lend support to the success of this cause.

3.2 Use of force: Threats to the rights to life, dignity, association and remedy

The decision of *Moses Mwandha v Attorney-General*⁷¹ was instituted under article 137 of the Constitution challenging the constitutionality of, among other provisions, section 36 of the Police Act. Although this petition was lodged by an individual, the final outcome had ramifications for the enjoyment of rights by the general public and as such could be categorised as part of the body of public interest litigation.⁷² Briefly, the facts of the case are that the petitioner, a coordinator of the Busoga Pressure Group for Development, applied to the inspector-general of police (IGP) for a permit to allow his group to stage a peaceful demonstration against the failure of the Uganda Investment Authority to distribute investment opportunities equally between the capital city and his city of Jinja. The IGP declined to grant the permit and directed the group instead to voice their grievances before Parliament. The IGP referred to various sections of the Police Act, including section 36, in denying the permit.

Section 36 of the Police Act, which is similar in terms to section 69 of the Penal Code Act, has already been discussed in part 2 of this article, but is reproduced here for purposes of the discussion in this part of the article. It provides:⁷³

71 *Mwandha* (n 43).

72 *Oloka-Onyango* (n 60) 14.

73 Sec 36 Police Act (n 42) (my emphasis).

If upon the expiration of a reasonable time after a senior police officer has ordered an assembly to disperse ... the assembly has continued in being, any police officer, or any other person acting in aid of the police officer, may do *all things necessary* for dispersing the persons so continuing assembled, or for apprehending them or any of them, and, if any person makes resistance, may *use all such force as is reasonably necessary for overcoming that resistance, and shall not be liable in any criminal or civil proceedings for having by the use of that force caused harm or death to any person.*

The Court in *Mwandha* found that the power of the police officer to do 'all things necessary' for dispersing the persons assembled or to disperse them was '*nothing but a licence to shoot and kill citizens who are peacefully assembled to express their views as guaranteed under the Constitution*' and went beyond the powers of Parliament to enact.⁷⁴ The Court further noted that by granting immunity to the police from harm caused the law not only condoned but authorised and legitimised police brutality.⁷⁵

In a similar fashion to the *Muhindo* decision above, the Court took judicial notice of the report by the Human Rights Commission of 15 July 2016 on police brutality which detailed human rights violations by the police. It also noted an August 2018 statement by the Uganda Law Society on excessive use of force by the police and army as well as a report by the Human Rights and Peace Centre at Makerere University detailing the human rights violations perpetrated through excessive use of force by the police and army. The Court also recognised that the head of state had himself noted the use of excessive force by police and had even issued use of force guidelines on 28 October 2018 regarding the arrest and detention of arrested persons.⁷⁶

Kakuru J observed that if section 36 of the Police Act was meant to protect citizens, on the basis of the evidence it was instead *doing the reverse of protecting their right to freedom of assembly*.⁷⁷ It would indeed follow that if the state has a permissible mandate on the use of force to disperse assemblies, groups with political agendas opposed to those of the government would be deterred from associating or assembling for fear of losing their lives or facing grievous harm by the state forces and in response to which they would receive no justice. Kakuru J further castigated the state for complaining about

⁷⁴ *Mwandha* (n 43) 20.

⁷⁵ As above.

⁷⁶ *Mwandha* (n 43) 21-25.

⁷⁷ *Mwandha* 25.

the police brutalising its people, yet it retained section 36 on the statute books.⁷⁸

In the final analysis the Court declared that section 36, among other sections of the Police Act, was in violation of article 20 on obligations of the state to respect and protect human rights, article 22 on the right to life, article 24 on the right to dignity and article 29 on freedom of assembly under the 1995 Constitution.⁷⁹

Based on the discussion of use of force laws under part 2 above, the *Mwandha* decision provides a strong precedent on which to base the claim that all subsisting and similarly-worded statutory provisions granting permissive use of force standards violate the same range of human rights noted in *Mwandha*. In particular, the decision is a blueprint for the nullification of section 69 of the Penal Code which mirrors the impugned section 36 of the Police Act.

3.2.1 *Police immunity and the right to a remedy*

It should be observed that the *Mwahdha* decision neglects the fact that police immunity under section 36 of the Police Act (and, by necessary implication, section 69 of the Penal Code Act) violates the right to a remedy, which is another aspect that would strengthen the case for PIL. By providing that a police or army official who uses excessive force 'shall not be liable in any criminal or civil proceedings for having by the use of that force caused harm or death to any person', both the Police Act (section 36) and the Penal Code Act (section 69) not only legitimise brutality, as Kakuru J points out in *Mwandha*, but also infringe on the right to a remedy which is provided for under articles 50 and 20 of the Constitution and violates Uganda's obligations under international law.

As explored above, article 50(1) of the Constitution entitles any aggrieved person to apply to court for redress where any right has been infringed or threatened, while article 20 obliges all agencies of government to uphold, protect and promote the human rights enshrined in the Constitution.

These obligations are fundamental under the International Covenant on Civil and Political Rights (ICCPR) to which Uganda has

⁷⁸ As above.

⁷⁹ As above.

acceded.⁸⁰ Article 2(3) of ICCPR provides that each state party to the Covenant undertakes:

- (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) to ensure that the competent authorities shall enforce such remedies when granted.

In addition, the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁸¹ detail in article 3 that the scope of the obligation on state parties to respect, ensure respect for and implement international human rights law under the respective bodies of law, includes the duty to:

- (a) take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) provide effective remedies to victims, including reparation, as described below.

The Guidelines further provide in article 4:

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.

80 Uganda acceded to ICCPR on 21 June 1995. See https://treaties.un.org/Pages/CTCTreaties.aspx?id=4&subid=A&clang=_en (accessed 24 July 2018).

81 Adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (accessed 24 July 2018).

The foregoing provisions are also in line with Uganda's Human Rights Enforcement Act which suspends the defence of immunity for proceedings instituted under it.⁸²

The impugned provisions of the Penal Code Act and Police Act granting police civil and criminal immunity are in stark contrast to the foregoing obligations on Uganda to grant a remedy to victims of human rights violations even where these are perpetrated by its state officials acting in an official capacity under its permissive use of force laws. These provisions in themselves provide a strong basis for PIL to inject human rights standards on the right to a remedy into Uganda's use of force laws.

It should be noted, however, that despite the foregoing precedents and progressive PIL jurisprudence in Uganda they are yet to have a significant impact on the state of the country's politics and human rights as far as law enforcement, political freedoms to assemble and express political dissent are concerned. As Oloka rightly observes:⁸³

The results of PIL litigation in Uganda can be considered mixed at best – and problematic at worst. Although the voice of the judiciary over this period grew in confidence, some of its decisions did not have a marked impact on the body politik, either because the state defied them and reintroduced legislation to thwart the decision, or because the courts themselves were not very clear in terms of the remedies they stipulated.

As argued earlier and elsewhere,⁸⁴ court orders that imply extensive legal and institutional reforms on control of the use of force are likely to be evaded or deliberately subverted to preserve the regime's political interests. They require additional vigilance from civil society and the courts if real transformation is to be achieved.⁸⁵ This observation foregrounds the basis for the ensuing analysis of the limits of declaratory PIL court orders and the potential of structural interdicts as far as reforms on use of force laws in Uganda are concerned.

82 Secs 10 & 14 Human Rights Enforcement Act 2019.

83 Oloka-Onyango (n 60) 26.

84 S Namwase 'Why Uganda needs new laws to hold police in check, accountable' *The Conversation* 25 July 2019, <https://theconversation.com/why-uganda-needs-new-laws-to-hold-police-in-check-and-accountable-120900> (accessed 24 July 2018).

85 As above.

4 Limits of public interest litigation, the Human Rights Enforcement Act and the case for structural interdict

Structural interdict has been defined as 'a remedy to deter violations of a similar nature in the future'.⁸⁶ The remedy is 'a response to the inadequacy of traditional remedies in responding to systemic violations of a complex organisational nature'.⁸⁷ It is preferred in 'structural or institutional suits that challenge large-scale government organisational or administrative deficiencies and failures arising from the misuse of discretion, negligence, misunderstanding the law, red tape and deliberate disregard for human rights, among other factors'.⁸⁸ According to Mbazira, courts usually issue a mandatory structural interdict where 'there is evidence of likely non-compliance with the court's declaratory orders'.⁸⁹ The nature of the interdict differs from a mere declaratory order in so far as it enables judges to go beyond being mere umpires to becoming active participants in the disputes before them, granting them continued participation in the implementation of their orders.⁹⁰ The structural interdict's most prominent feature is that it 'provides for a complex ongoing requirement of performance and is not a one-shot way approach to providing relief'.⁹¹

Mbazira critically observes:⁹²

The interdict has also been inspired by recognition that some constitutional values cannot be fully secured without effecting changes in the structures of complex organisations especially in government bureaucracy settings. In a setting of systemic violations, what would be most appropriate are those remedies that aim at achieving structural reforms and tackling the systemic problems at their root rather than redressing their impact. This may require the development of ongoing measures designed to eliminate the identified mischief.

Thus, for instance, in the landmark school desegregation case in the United States of *Brown v Board of Education* which was aimed at transforming an entrenched one hundred year-old racial segregation system, 'structural interdict had to be applied for reforms to

86 C Mbazira *Litigating social economic rights in South Africa: A choice between corrective and distributive justice* (2009) 166.

87 C Mbazira 'From ambivalence to certainty: Norms and principles for the structural interdict in social economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights* 5.

88 As above.

89 Mbazira (n 86) 171.

90 Mbazira 176.

91 As above.

92 Mbazira 177.

be implemented which included new procedures for student assignments; a revision of school transport routes; re-assignment of faculty; reallocation of resources; curricular modifications which would not have been achieved through a 'conventional one stance traditional litigation and remedial procedure'.⁹³

In relation to reforming use of force laws in Uganda, courts are faced with similar entrenched legacies of state violence and repression, hence the recalcitrance of the state towards legal and institutional reforms that might upset the *status quo*. Courts may issue structural interdicts where they anticipate that their declaratory orders will not be complied with, or where it is unsafe to assume that they will be complied with.⁹⁴ Past failures to comply or any other reason to assume that court orders will not be complied with are justifiable triggers for structural interdict.⁹⁵ Where political interests are at stake, structural interdicts certainly are a worthwhile risk for courts to take.⁹⁶

Thus, in *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others*⁹⁷ the Supreme Court of Uganda noted the failure by the executive and legislative branches to implement reforms relating to electoral laws and presidential elections as it had recommended in two previous electoral petitions. On this basis the Court issued structural interdicts relating to electoral law reforms on increasing the number of days required to file and decide election disputes; ensuring equal airtime on state-owned media for presidential candidates during campaign seasons; among others. The Court gave the Attorney-General two years from the date of the judgment to report back to it on the steps it had taken towards implementing the recommendations. The structural interdict three years later gave scope to two concerned citizens and a civil society organisation, Kituo Cha Katiba, to sue the Attorney-General for contempt of court, on the grounds that two years had lapsed since the court order without significant progress on the electoral reforms or a report back to the court as had been ordered.⁹⁸ The Court found that the Attorney-General was not in contempt, but used the suit to issue further and more specific supervisory orders for the electoral reforms. The reforms were eventually secured in 2020,

93 Mbazira 179.

94 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* 333.

95 As above.

96 D Hausman 'When and why the South African government disobeys Constitutional Court orders' (2012) 48 *Stanford Journal of International Law* 453.

97 *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others* Presidential Election Petition 1 of 2016.

98 *Prof Frederick Ssempebwa & 2 Others v Attorney-General* Civil Application 5 of 2019 arising out of Presidential Election Petition 1 of 2016.

four years after the 2016 court order,⁹⁹ thanks in part to PIL, but in particular, to the application of structural interdict.

In relation to reforms on use of force laws and regulating joint police and army deployments for law enforcement, a survey of past court decisions suggests that the Ugandan government is likely to ignore or subvert court orders that would require it to give up its control of political spaces and respect the freedoms to assembly and speech, the right to life and dignity, the right to a remedy and freedom from inhumane treatment, through the restrictions on its use of force mandate. Thus, even though in 2008 the Constitutional Court in the case of *Muwanga Kivumbi v Attorney-General*¹⁰⁰ nullified a provision of the Police Act which granted powers to the inspector-general of police (IGP) to disperse public assemblies if he or she believed they might cause a breach of the peace, in 2013 the Ugandan Parliament passed the Public Order Management Act reinstalling the same powers.¹⁰¹ The Act gives the IGP powers to regulate the conduct of all public gatherings and to require all conveners to notify him or her of planned public meetings in advance.¹⁰² It also grants the IGP powers to bar the convening of a meeting at any venue if it is in the interests of 'crowd and traffic control'.¹⁰³ The Act thus effectively revives the IGP's powers to limit freedom of assembly which the Court in *Muwanga Kivumbi* had earlier declared unconstitutional.¹⁰⁴

To further reflect the entrenched nature of repressive laws on the use of force in the context of political rights on assembly and association, it is little wonder that more than ten years after *Muwanga Kivumbi* the courts found themselves deciding in the *Moses Mwandha* decision above similar questions relating to the constitutionality of the IGP's powers under the Police Act and whether the subsisting sections 33 and 34 of the Police Act were still law in relation to the *Muwanga Kivumbi* decision.¹⁰⁵

The foregoing recalcitrance by the state forms the basis for a strong case for adopting structural interdict in relation to PIL geared towards reforms on use of force laws.

⁹⁹ See Electoral Commission (Amendment) Act 2020; the Political Parties and Organizations (Amendment) Act 2020; the Parliamentary Elections (Amendment) Act 2020; and the Presidential Elections (Amendment) Act 2020.

¹⁰⁰ *Muwanga Kivumbi v Attorney-General* Constitutional Petition 9 of 2005, <https://ulii.org/ug/judgment/supreme-court-uganda/2008/4-0> (accessed 24 July 2018).

¹⁰¹ Public Order Management Act 2013 (POMA), <https://ulii.org/ug/legislation/act/2015/1-6> (accessed 24 July 2018).

¹⁰² Secs 5, 7 & 8 POMA (n 101).

¹⁰³ Secs 7, 8 & 9 POMA (n 101).

¹⁰⁴ Namwase (n 84).

¹⁰⁵ *Mwandah* (n 43) 2.

4.1 Structural interdict under the Human Rights Enforcement Act

Fortunately for Ugandans, the Human Rights Enforcement Act provides a statutory framework for structural interdict which has already been tested in the *James Muhindo* decision discussed above. The Act, which is made under article 50 of the Constitution, grants courts powers to issue orders they consider appropriate where they determine that fundamental human rights have been violated or ought to be enforced.¹⁰⁶ It further provides that all orders made by the courts must be enforced within six months from the date of the judgment unless appealed against.¹⁰⁷ It is here argued that the power of the court to issue 'orders it deems appropriate' grants courts powers to issue a wide range of remedies including those they would consider most effective to address the specific issues in cases before them. Such power extends to the realm of structural interdicts, which impose complex legal and institutional reforms.

Thus, in the *James Muhindo* case, after finding that the absence of regulations to guide the eviction process in Uganda violated human rights under the 1995 Constitution, the Court ordered the state to expedite work on the process of formulating eviction guidelines and noted that due to the gravity of the consequences of their absence a further order ensued for the government to embark on the process and report back to the Court within seven months from the date of handing down the judgment. The Court also specified that the process of developing the guidelines should be consultative, participatory and should draw on the UN Basic Principles and Guidelines on Development Based Evictions and Displacement for guidance on best practices.¹⁰⁸

In the foregoing order the Court adopted what Mbazira refers to as the 'report back to court model' of structural interdict.¹⁰⁹ This model requires the respondent, usually the government, to report back to the Court on how it intends to remedy the violations that have been the subject of a court petition.¹¹⁰ An example of a successful application of the order was highlighted in the *Mbabazi v Museveni* case above. One of the advantages of this 'report back to court' model is that it addresses concerns about separation of powers and competence which are common push-backs against courts when they

106 Sec 9 Human Rights Enforcement Act (n 82).

107 Sec 9(4) Human Rights Enforcement Act.

108 *Muhindo* (n 67) 13.

109 Mbazira (n 86) 189.

110 As above.

deploy structural interdict as a remedy.¹¹¹ This order allows the court to appear to defer to the executive or legislative arm of government, and is also the most effective way to remedy the violation as it creates an avenue for a self-imposed remedy from the government.¹¹² This way the court is able to harness the expertise of the government on specific technical solutions.¹¹³ Through this deference to the executive the court also ensures that the government itself comes up with a plan that caters to its budgetary capacities and needs.¹¹⁴ The court thereby minimises specific separation of power concerns that courts should not be making policy and financial decisions as these are the preserve of the executive and legislative branches.¹¹⁵

It should be noted, however, that with 'report back to court orders', even if the court defers to the executive it retains jurisdiction over the case and may reject the plan if it considers it inadequate for purposes of meeting the constitutional and human rights standards the state is obligated to fulfil.¹¹⁶

Systemic human rights violations, such as those that frequently occur in Uganda due to excessive use of force by state security forces, can most effectively be remedied through structural reforms that tackle their causes at the root rather than simply address their impact.¹¹⁷ This approach requires ongoing legal and possibly institutional reforms designed to address the mischief of excessive force, including the likelihood of restricting the role of the army in the police and law enforcement contexts. Such a process may require the participation of not only the parties to a court petition but all other relevant third parties in the search for the most appropriate solution.¹¹⁸ This will provide an opening for greater public and civil society consultations and input in a context where there is no civilian police oversight.

Reforming use of force laws might require technical expertise regarding appropriate weapons, crowd control and means of deploying force, and the courts can defer these questions to experts in the police and the government while retaining jurisdiction over the constitutionality of their proposed amendments. Moreover, there

111 See generally Mbazira (n 86) and (n 87).

112 Mbazira (n 86) 190.

113 Mbazira (n 86) 189.

114 Mbazira (n 86) 190.

115 Mbazira (n 86) 192-195. See also *CEHURD & 3 Others v AG Constitutional Petition* 16 of 2011 [2012] UGCC 4, <http://www.ulii.org/ug/judgment/constitutional-court/2012/4> (accessed 24 July 2018).

116 Mbazira (n 86) 190.

117 Mbazira (n 86) 177-178.

118 As above.

are in existence a wealth of international and regional standards against which the court can make a human rights assessment of the government's reform proposals. These include the 1979 Code of Conduct for law enforcement officials;¹¹⁹ the 1990 United Nations Basic Principles on the Use of force and Firearms for Law Enforcement Officials;¹²⁰ the 2020 UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement; and the African Union Guidelines for Policing of Assemblies by Law Enforcement Officials in Africa.¹²¹

Based on the arguments made earlier about police and military control, Ugandan courts can expect resistance and subversion from the state in pursuing meaningful reform of use of force laws and the law regulating joint police and military deployments in law enforcement contexts. In order effectively to manoeuvre against likely state recalcitrance, the courts cannot depend on ordinary traditional PIL declaratory remedies. They can fully exploit the liberal avenues of structural interdict to be availed under the Constitution as well as the Human Rights Enforcement Act, as demonstrated above. For civil society and other concerned Ugandan citizens there already is in the country's 1995 Constitution, the regional and international instruments Uganda has ratified and in the various court precedents discussed above a legal basis for a successful public interest challenge to the permissive statutory laws on the use of force that enable a militarised approach to law enforcement and the attendant human rights violations they facilitate.

5 Conclusion

Uganda's history indicates that successive regimes have deployed the police and army to secure and maintain political control and domination. This has fed a cycle of violence characterised by civil wars and military *coups*. The continuing existence of permissive colonial era laws on the use of force coupled with the militarisation of the police force in Uganda has reinforced the continuation of such violence. This article has demonstrated that the failure by the Ugandan government to implement comprehensive legal and institutional reforms governing the use of force and firearms in Uganda threatens the rights to life, freedom from torture, freedom of assembly and the right to a remedy protected under the Ugandan Constitution. Further, the lack of a robust regulatory framework

119 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx> (accessed 24 July 2018).

120 Basic Principles (n 39).

121 <https://www.saferespaces.org.za/resources/entry/guidelines-for-the-policing-of-assemblies-by-law-enforcement-officials-in-a> (accessed 24 July 2018).

for joint police and military deployment in the context of such permissive laws facilitates a militarised approach to law enforcement which in turn perpetuates said human rights violations. Also, it has demonstrated that Ugandan citizens and courts have a wide range of tools under the Constitution, including court precedents, public interest litigation and structural interdict remedies by which they can overcome the state's recalcitrance and secure effective reforms regarding the use of force in a context of police militarisation. These tools also provide a process of reform which can be initiated and sustained through civilian initiative and oversight. They promote dialogue between the state, security forces and citizens, thereby providing a pathway to sustainable solutions for peace and prospects for breaking the cycle of state violence in the country.

Recent developments

Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and lessons

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Summary: *The African Court on Human and Peoples' Rights has made considerable progress in its jurisprudential activities in the year 2020. Between January and December 2020 the African Court delivered 55 decisions and received 40 new cases and one request for an advisory opinion. The swift response the African Court adopted to the challenges posed by the COVID-19 pandemic in holding three out of four sessions virtually has enabled the Court to reduce the backlog of cases. This article examines the main features of decisions the African Court adopted in 2020. It analyses trends emerging from them and draws possible lessons. The Court's 2020 decisions give an opportunity to critically review the jurisprudential direction of the Court, the number and types of decisions rendered, the quality of the protection of human and peoples' rights it offered as well as its normative contribution to the human rights corpus. While the Court has boldly and uncompromisingly asserted its authority over sensitive domestic issues – prompting four states so far to*

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withdraw their declarations allowing individuals and non-governmental organisations to approach it directly – the Court’s 2020 decisions persuasively demonstrate that it has not shied away from its mandate to hold states and their organs to the obligations to which they have committed under international human rights law.

Key words: *African Court on Human and Peoples’ Rights; fair trial; provisional measures; judgment in default; separate opinion; Rules of the Court; Court Protocol; article 34(6) declaration; African Commission*

1 Introduction

The African Court on Human and Peoples’ Rights (African Court) held four sessions in the year 2020 and adopted 55 decisions. The Court delivered 24 judgments on jurisdiction, admissibility, review, merits and reparations; 19 rulings on provisional measures; one advisory opinion; five orders for reopening pleadings; two orders on striking out applications; two orders on request for intervention; and one order for joinder.¹ The number of decisions the Court adopted in 2020 is slightly higher than what was obtained in 2019 during the four ordinary sessions and one extraordinary session.² Due to the unforeseen outbreak of the COVID-19 pandemic, the Court organised three virtual sessions which enhanced its ability to swiftly perform its judicial functions and reduce the backlog of cases. Indeed, 80 per cent of the 2020 decisions were delivered during these virtual sessions. The Court received 40 new contentious cases and one request for an advisory opinion.³

This article examines the main features of decisions the African Court adopted in 2020. It analyses trends emerging from them

¹ Activity Report of the African Court on Human and Peoples’ Rights (1 January–31 December 2020) para 13. The Court’s Activity Report contains a number of discrepancies. Eg, judgments on jurisdiction, admissibility, review, merits and reparations are 24 on the Court website and not 20 as indicated in the report. There was one advisory opinion delivered in 2020 and not two as indicated in the report. The table in the report indicates 19 rulings on provisional measures but the summary of the report indicates 22. A close review of what appears on the African Court website reveals that the African Court delivered more than 55 decisions in 2020. The following decisions do not appear in the Court’s Activity Report: *Christopher Jonas v Tanzania* (Reparations) Appl 11/2015 (25 September 2020); *Babarou Boucoum v Mali* (Provisional Measures) Appl 23/2020 (23 October 2020); and *Ghati Mwita v Tanzania* (Provisional Measures) Appl 12/2019 (9 April 2020).

² Activity Report (n 1) para 12. These decisions are available in the *African Court Law Report* Volume 4 (2019).

³ Activity Report (n 1) para 10. However, statistics on the African Court website indicate that the Court received 48 new cases in 2020. By December 2020 the Court has received a total of 300 cases since its operationalisation.

and draws possible lessons. The article dissects the peculiarity of cases brought before and decided by the Court, the singularity of the Court's approach, and its position on major human rights and democracy questions that frequently arise in African countries.⁴ Examining the 2020 decisions of the Court offers an opportunity to appraise the level of engagement the Court had with countries that withdrew their declarations made pursuant to article 34(6) 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) (article 34(6) declaration) during proceedings against them. Overall, cases against countries that have withdrawn article 34(6) declarations make up 76,8 per cent of cases submitted to the Court.⁵ The Court has generally held that the withdrawal of the article 34(6) declaration must take effect after one year.⁶ However, this position could not guarantee that states would continue to participate in proceedings after they had withdrawn their declaration. Besides, the obligation to participate in such proceedings after withdrawal is not explicitly imposed on states by the treaty (African Court Protocol) that they have ratified. The risk of states not participating thus was greater.

Furthermore, the Court in 2020 adopted new Rules of Procedure (Rules of the Court) which had the potential to affect cases already submitted or pending before the Court. While the Rules of the Court safeguard the rights of individuals whose applications were filed before its entry into force,⁷ it is only by looking at how the Court has applied the new Rules in concrete cases that one can understand their effects.⁸ Lastly, two states applied in 2020 to intervene in

4 See generally SB Traoré & PA-A Leta 'La marge nationale d'appréciation dans la jurisprudence de la Cour africaine des droits de l'homme et des peuples: Entre effleurements et remise en cause' (2021) 31 *Revue suisse de droit international et droit européen* 438-444; AK Abebe 'Taming regressive constitutional amendments: The African Court as a continental (super) Constitutional Court' (2019) 17 *International Journal of Constitutional Law* 106-112; TG Dally & M Wiebusch 'The African Court on Human and Peoples' Rights: Mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* 294-313; T Ondo 'La jurisprudence de la Cour africaine des droits de l'homme et des peuples: Entre particularisme et universalité' (2017) 1 *Annuaire africain des droits de l'homme* 244-262.

5 Rwanda, Tanzania, Côte d'Ivoire and Benin. See African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).

6 *Ingabire Victoire Umuhoza v Rwanda* (Jurisdiction) (2016) 1 AfCLR 562 paras 67-68. See MG Nyarko & AO Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 307-308. By contrast, art 127(1) of the Rome Statute of the International Criminal Court enables states to withdraw from the Statute and the withdrawal takes effect after one year.

7 2020 Rules of the Court Rule 93.

8 In 2020 some cases were decided and delivered based on the 2010 Rules of Procedure while others were adjudicated based on the 2020 Rules of Procedure. The first category of cases were delivered during the 56th and 57th ordinary

proceedings pending before the Court. As the second intervention of states before the Court in contentious matters,⁹ these applications and the Court order enable us to review the nature of interest states are likely to defend before the African Court and the types of states that can apply for intervention. Indeed, decisions of the Court have an impact beyond parties to the dispute and may influence future cases. For this reason, broad participation should be welcomed and encouraged to help the Court develop human rights solutions and principles grounded in the experience of individuals and the practice of African states.

The second part of this article reviews the trends in the African Court's 2020 jurisprudence by examining the nature of applicants and respondents, the variety of findings of the Court, judges' voting pattern, the duration of proceedings, issues arising from reparation and peculiarities of orders for provisional measures. The third part analyses the main features of the 2020 jurisprudence both at the procedural and substantive levels. Procedurally, the article discusses issues arising from default judgments, the applications by states to intervene in proceedings pending before the Court and the standards the Court used when assessing the compliance of applications with the requirement for submissions within a reasonable time. Substantively, the article notes how the Court has either clarified or failed to clarify the normative content of certain rights and principles to strengthen the protection of fundamental rights.

2 Trends in the African Court's 2020 jurisprudence

2.1 Nature of applicants and respondents

The 54 decisions in contentious matters were adopted by the Court in litigation involving Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Rwanda, Tanzania and Tunisia.¹⁰ All these countries have before been involved in litigation before the Court; 156 applications have been lodged against Tanzania since the inception of the Court, 48,2 per cent of the total applications received by the Court. Tanzania

sessions (22 decisions) and the second were delivered during the 58th and 59th ordinary sessions (33 decisions).

9 The first was by Côte d'Ivoire in *Guehi v Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 para 12. See also *African Commission on Human and Peoples' Rights v Kenya* (Intervention) (2019) 3 AfCLR 411 and *African Commission on Human and Peoples' Rights v Kenya* (Intervention) (2019) 3 AfCLR 424.

10 In *Bernard Anbataayela Mornah v Benin & 7 Others* Tunisia was accused jointly with seven other states (Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi and Tanzania) that, as of 2018, have made the art 34(6) declaration.

is followed by Benin (43), Côte d'Ivoire (38), Mali (29), Rwanda (16) and Tunisia (nine).¹¹ More than half of the 2020 decisions concern cases filed against Tanzania (17 decisions)¹² and Benin (16 decisions),¹³ followed by Côte d'Ivoire¹⁴ and Rwanda¹⁵ with five cases each. Four decisions involve Mali¹⁶ while one decision each concerns Burkina Faso,¹⁷ Ghana¹⁸ and Malawi.¹⁹ Two applications against The Gambia were struck out by the registry of the Court on procedural grounds.²⁰ Two decisions were adopted in a case

- 11 African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).
- 12 *Nguza Vicking (Alias Babu Seya) and Johnson Nguza v Tanzania* (re-opening of pleadings) Appl 6/2015; *Nguza Vicking (Alias Babu Seya) and Johnson Nguza v Tanzania* (Reparations) Appl 6/2015; *Andrew Ambrose Cheusi v Tanzania* (Merits and Reparations) Appl 4/2015; *Kalebi Elisamehe v Tanzania* (Merits and Reparations) Appl 28/2015; *Ramadhani Issa Malengo v Tanzania* (Review) Appl 1/2019; *Jebra Kambole v Tanzania* (Merits and Reparations) Appl 18/2018; *Thobias Mang'ara & Another v Tanzania* (Re-opening of Pleadings) Appl 5/2015; *Anudo Ochieng Anudo v Tanzania* (Re-opening of Pleadings) Appl 12/2015; *James Wanjara & Others v Tanzania* (Merits and Reparations) Appl 35/2015; *Hamad Mohamed Lyambaka* (Admissibility) Appl 10/2016; *Job Mlama & Others v Tanzania* (Merits) Appl 19-2016; *Chananja Luchagula v Tanzania* (Merits) Appl 39/2016; *Benedicto Mallya* (Striking out Application) Appl 18/2015; *Abdallah Ally Kulukuni v Tanzania* (Striking out Application) Appl 7/2018; *John Lazaro v Tanzania* (Reopening of Pleadings) Appl 3/2016; *Masudi Said Selemani v Tanzania* (Re-opening of Pleadings) Appl 42/2019; and *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* (Provisional Measures) Appl 36/2020.
- 13 *Ghaby Kodeih v Benin* (Provisional Measures) Appl 6/2020; *Ghaby Kodeih and Naby Kodeih v Benin* (Provisional Measures) Appl 8/2020; *Sébastien Germain Marie Aikoué Ajavon v Benin* (Provisional Measures) Appl 62/2019; *Komi Koutché v Benin* (Provisional Measures) Appl 13/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures) Appl 3/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures) Appl 4/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures 2) Appl 3/2020; *Glory Cyriaque Houssou & Another v Benin* (Provisional Measures) Appl 16/2020; *Conaïde Togia Latondji Akouedenoudje v Benin* (Provisional Measures) Appl 24/2020; *Sébastien Germain Marie Aikoué Ajavon v Benin* (Provisional Measures) Appl 27/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures) Appl 28/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures) Appl 32/2020; *XYZ v Benin* (Merits and Reparations) Appl 59/2019; *XYZ v Benin* (Merits and Reparations) Appl 10/2020; *Sébastien Germain Marie Aikoué Ajavon v Benin* (Merits and Reparations) Appl 62/2019; and *Houngoue Eric Noudehouenou v Benin* (Merits and Reparations) Appl 3/2020.
- 14 *Guillaume Soro & Others v Côte d'Ivoire* (Provisional Measures) Appl 12/2020; *Konaté Kalilou and Doumbia Ibrahim v Côte d'Ivoire* (Provisional Measures) Appl 36/2019 and 37/2019; *Suy Bi Gohore Emile & 8 Others v Côte d'Ivoire* (Merits and Reparations) Appl 44/2019; and *Laurent Gbagbo v Côte d'Ivoire* (Provisional Measures) Appl 25/2020.
- 15 *Mulindahabi Fidèle v Rwanda* (Merits and Reparations) Appl 4/2017; *Mulindahabi Fidèle v Rwanda* (Admissibility) Appl 5/2017; *Mulindahabi Fidèle v Rwanda* (Admissibility) Appl 10/2017; *Mulindahabi Fidèle v Rwanda* (Admissibility) Appl 11/2017; *Léon Mugesera v Rwanda* (Merits and Reparations) Appl 12/2017.
- 16 *Boubacar Sissoko & 74 Others v Mali* (Merits and Reparations) Appl 37/2017; *Yacouba Traoré* (Admissibility) Appl 10/2018; *Babarou Bocoum v Mali* (Provisional Measures) Appl 23/2020; and *Collectif des anciens travailleurs de la Sémco Tabakoto v Mali* (Admissibility) Appl 9/2018.
- 17 *Harouna Dicko & Others v Burkina Faso* (Provisional Measures) Appl 37/2020.
- 18 *Akwasi Boateng & 351 Others v Ghana* (Jurisdiction) Appl 59/2016.
- 19 *Charles Kojoloweka v Malawi* (Provisional Measures) Appl 55/2019.
- 20 *Muhammed Bassirou Secka & 2 Others v The Gambia* (Striking out of Application) Appl 1/2020; and *Emil Touray & 6 Others v The Gambia* (Striking out of Application) Appl 2/2020. These cases are not included in the 2020 Court Activity Report. They are not part of the 55 decisions.

implicating eight countries²¹ and two others in a case involving four countries.²²

It is evident that the 2020 decisions were adopted in applications concerning states that have made the article 34(6) declaration.²³ Direct access remains the principal routes through which contentious cases have been brought before the African Court. It has been suggested several times, but the argument bears repeating, that African states are reluctant to challenge one another before regional human rights bodies.²⁴ If the haemorrhagic trend for states to withdraw their article 34(6) declarations continues, it is more likely that individuals will not have the opportunity to effectively engage the Court and that the ability of the latter to serve as a regional arbitrator of human rights violations will be significantly undermined. In 2020 two states withdrew their declarations, but this did not stop the Court from hearing cases lodged against them before the withdrawal took effect.²⁵ Benin, Côte d'Ivoire and Tanzania continued to engage with the Court regarding cases against them. They submitted arguments on admissibility, jurisdiction, merits and, sometimes, reparation. As discussed in part 3.1.1 below, the position Rwanda adopted was different.

Geographically, 49 per cent of the 2020 decisions were delivered in litigations involving West African states. In fact, before Rwanda, Tanzania, Benin and Côte d'Ivoire withdrew their article 34(6) declarations, 60 per cent of countries that made the declaration were from West Africa. With the ratification of the African Court Protocol and the making of the declaration by Guinea Bissau in November 2021 and by Niger (in late October 2021), West African states make up 75 per cent of states against which the Court can be approached directly.²⁶ Petitioners alleging human rights violations against these

21 *Sahrawi Arab Democratic in Application 028/2018 v Benin & 7 Other States* (Intervention) Appl 1/2020; and *Republic of Mauritius in Application 028/2018 v Benin & 7 Other States* (Intervention) Appl 2/2020.

22 *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso & 3 Others* (Provisional Measures) Appl 14/2020 and 17/2020; and *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso & 3 Others* (Joinder of Cases) Appl 14/2020 and 17/2020.

23 See generally F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 65.

24 F Viljoen 'A procedure likely to remain rare in the African system: An introduction to the inter-state communications under the African human rights system' 27 April 2021 *Völkerrechtsblog*, <https://voelkerrechtsblog.org/a-procedure-likely-to-remain-rare-in-the-african-system/> (accessed 26 November 2021).

25 Rwanda, Tanzania, Côte d'Ivoire and Benin; SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 5.

26 'The Republic of Guinea Bissau becomes the eighth country to deposit a declaration under article 34(6) of the Protocol establishing the Court'

West African states now have an additional avenue to hold their states to their human rights obligations since they can still approach – and most have not shied away from doing so – the Economic Community of West African States (ECOWAS) Court of Justice that equally adjudicates violations of the African Charter on Human and Peoples' Rights (African Charter). The work of the African Court, nonetheless, will have more impact if many non-West African states²⁷ equally make the declaration 34(6) to allow individuals – who cannot otherwise bring a case to a regional human rights body that issues binding decisions – to bring their grievances to a regional court.

Be that as it may, applicants in the 2020 decisions were mainly individuals. However, three cases were brought directly by non-governmental organisations (NGOs) – two in contentious procedures²⁸ and one as a request for advisory opinion.²⁹ Two states also requested to intervene in proceedings pending before the Court making these applications the second requests after the Côte d'Ivoire intervention in *Guehi v Tanzania*.³⁰ In general, individuals have brought before the Court a total of 299 applications while NGOs have submitted 21 cases.³¹ A paltry three cases have so far been referred to the Court by the African Commission on Human and Peoples' Rights (African Commission).³² No case decided by the African Court in 2020 emanated from the African Commission.

3 November 2021, <https://www.african-court.org/wpa/cf/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/> (accessed 23 November 2021).

27 Out of 32 states that have ratified the African Court Protocol, 21 are non-West African. Among these, individuals can only directly petition the Court against Malawi and Tunisia. They are bereft of direct access to regional human rights courts against 19 countries.

28 *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* (Provisional Measures) Appl 36/2020; and *Mouvement Burkinabè des droits de l'homme et des peuples (MBDHP) v Burkina Faso & 3 Others* Appl 17/2020. This latter case was joined with Application 14/2020. They are referred to as *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso & 3 Others* (Provisional Measures) Appl 14/2020 and 17/2020.

29 *Request for Advisory Opinion by the Pan-African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other Human Rights Instruments Applicable in Africa* (Advisory Opinion) Appl 1/2018.

30 (Merits and Reparations) (2018) 2 AfCLR 477. See also *African Commission on Human and Peoples' Rights v Kenya* (Intervention) (2019) 3 AfCLR 411; and *African Commission on Human and Peoples' Rights v Kenya* (Intervention) (2019) 3 AfCLR 424.

31 African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).

32 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153; *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9; and *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17 which was struck out by the Court 'as it had not received the submission it had requested from the Applicant, the African Commission on Human and Peoples' Rights'. See *African Commission on Human and Peoples' Rights v Libya* (Order) (2013) 1 AfCLR 21.

There was no *amicus curiae* participation in contentious cases dealt with by the Court in 2020. *Amicus* participation in contentious proceedings before the Court, in general, has not attracted much attention.³³ Nevertheless, NGOs have participated as *amici* in several requests for advisory opinion.³⁴ Six NGOs submitted their *amicus* briefs in the *Request for Advisory Opinion by the Pan-African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa (Vagrancy Opinion)*³⁵ delivered in December 2020. As advisory opinions clarify the meaning of human rights standards in non-contentious matters, the relevance of the participation of NGOs working daily on an array of human rights issues in Africa cannot be overemphasised. In the *Vagrancy Opinion* the Court approached NGOs to submit their *amicus* briefs on its own motion. States have not always been enthusiastic about submitting their briefs in advisory proceedings. Only Burkina Faso made its submissions in the *Vagrancy Opinion*.³⁶ The authoritative interpretation of human rights instruments the Court provides can impact the way states implement their human rights treaty obligations. Broader participation of NGOs, and particularly states, may thus be key in ensuring legitimacy of the interpretation provided. It can dispel some of the beliefs that many African Union (AU) member states may hold that AU human rights

33 See, however, Prof Christof Heyns (University of Pretoria) and Prof Sandra Babcock (Cornell University) admission as *amici curiae* in *Guehi v Tanzania* para 14; Centre for Human Rights, *Comité Pour la Protection des Journalistes*, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers' Union, Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone and Pen South Africa), Southern Africa Litigation Centre and World Association of Newspapers and News Publishers in *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, para 20; paras 141-144 as well as the National Commission for the Fight Against Genocide in *Ingabire Victoire Umuhoza v Rwanda* (procedure) (2016) 1 AfCLR 553, paras 38-39.

34 See generally TM Makunya & SZ Bitagirwa 'La compétence consultative de la Cour africaine des droits de l'homme et des peuples: Entre restrictions organiques et limitations matérielles' in EB Bope & M Mubiala (eds) *La République démocratique du Congo et le système africain de protection des droits de l'homme* (2021) 87; MS Sangbana 'Les organisations non gouvernementales dans le système africain des droits de l'homme: Essai de systématisation du rôle des ONG dans le contentieux régional des droits de l'homme en Afrique' (2022) 5 *Annuaire africain des droits de l'homme* (forthcoming).

35 *Vagrancy Opinion* (n 29) para 12.

36 In the *Request for Advisory Opinion by Rencontre Africain pour la défense des droits de l'homme* (2017) only Kenya submitted its observations (para 18) while no state submitted observations in the *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria & 4 Others* (2017) and the *Request for Advisory Opinion by l'Association africaine de défense des droits de l'homme* (2017). Two states submitted their observations to the Court in the *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians* (2017) (para 15). In the *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (2014) the Court received comments from three states (para 26) while six states submitted their observations (para 24) in the *Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (SERAP)* (2017).

bodies, in general, simply are being used by NGOs, especially those based outside Africa, to advance their own agendas.³⁷

2.2 Findings of the Court

The findings of the Court were diverse. One out of the four cases filed by *Mulindahabi Fidèle* against Rwanda (*Mulindahabi* cases) was declared admissible.³⁸ However, the Court concluded that there was no violation to be found.³⁹ The same occurred in *Boubacar Sissoko v Mali* where the Court found no violation.⁴⁰ In *Léon Mugesera v Rwanda* (*Mugesera* case) the Court established three violations out of six allegations of violations made by the complainant, while in *Suy Bi Gohore & Others v Côte d'Ivoire* (*Suy Bi Gohore* case), the Court decided that Côte d'Ivoire had violated five rights. In the same vein, cases against Tanzania alleging the violation of fair trial rights, as detailed in the following lines, were not always successful. In *Andrew Ambrose Cheusi v Tanzania* (*Cheusi* case) the applicant alleged that the state had violated his right to equality and equal protection and that he had been subjected to cruel, inhuman and degrading treatment. He also alleged that his right to fair trial was violated since he was not able to challenge evidence and that his alibi was not considered. He subsequently indicated that his rights to legal assistance and to be tried within a reasonable time had been violated by Tanzania. The Court found a violation of the latter two rights. In *Kalebi Elisamehe v Tanzania* (*Elisamehe* case) the applicant invoked six violations related to his trial including the violation of his right to defence and of the right to be heard, his right to be tried within a reasonable time and his right to legal assistance. Only the latter was found to have been violated. In *James Wanjara & 4 Others v Tanzania* (*Wanjara* case) the Court found a violation of the right to legal assistance. In most cases brought before the Court by Tanzanian prisoners, the right to legal assistance was generally found to have been violated.⁴¹ These cases against Tanzania and the findings of the Court demonstrate a continuous role played by the African Court in 'humanising' criminal law and procedures.

37 TA Zewudie 'Human rights in the African Union decision-making processes: An empirical analysis of states' reaction to the Activity Reports of the African Commission on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 318.

38 *Mulindahabi Fidèle v Rwanda* (Merits and Reparations) Appl 4/2017.

39 Para 115.

40 Para 140.

41 *Andrew Ambrose Cheusi v Tanzania* para 184(viii); *Kalebi Elisamehe v Tanzania* para 117(x); and *James Wanjara & 4 Others v Tanzania* para 112(g).

Of the Court's 54 decisions in contentious cases handed down in 2020, a significant number of human rights violations were found in cases involving Benin. While the state did not violate four out of the five rights invoked in the *XYZ (059) v Benin* (*XYZ (059)* case), in *XYZ (010) v Benin* the state was culpable of four out of the five allegations made by the complainant.⁴² These violations include the obligation to guarantee the independence of the courts; the amendment of the Constitution without observing the principle of national consensus; the right to information; the right to peace; the right to economic, social and cultural development; and the right to an impartial tribunal.⁴³ In *Houngoue Eric Noudehouenou v Benin* (*Houngoue* case) the Court equally found that Benin violated the principle of national consensus in relation to constitutional amendment and the right of access to public services and goods.⁴⁴ The Court found several violations in *Sébastien Germain Marie Aikoue Ajavon v Benin* (*Ajavon* case).⁴⁵ This petition was lodged by a Benin political refugee alleging the violation of his civil and political rights by laws that were promulgated in anticipation of elections.⁴⁶ The applicant argued in particular that the amendment of the country's Constitution was not consensual and that the law on the Supreme Council of the Judiciary (CSM) violated the independence of the judiciary. As in the *Houngoue* case, the Court ruled that Benin violated the African Charter on Democracy, Elections and Governance (African Democracy Charter) because the amendment to the Constitution violated the principle of national consensus. Benin also violated article 13(1) of the African Charter by preventing individuals who have not resided in the country one year prior to elections from running for office. The African Democracy Charter and the ECOWAS Protocol on Democracy and Good Governance were violated when Benin failed to establish an independent and impartial electoral management body.

An analysis of various decisions adopted in 2020 exposes the poor quality of argument by both states and litigants, and of the reasoning of the Court itself. First, a number of states endlessly rehash arguments that have already been rejected by the Court. This may indicate that states do not seek to systematically understand the main positions adopted by the Court over the years on relevant legal issues, even though they (the states) have before been involved in similar litigations. For example, Tanzania relied on the argument that the African Court cannot act as an appellate jurisdiction⁴⁷ and that

42 *XYZ (010) v Benin* para 159.

43 As above.

44 Para 123.

45 Para 368.

46 Para 1.

47 *Cheusi* paras 22-24.

of the possibility for litigants to introduce a constitutional petition as a domestic remedy before resorting to the African Court, while in previous cases the Court had made its position clear in relation to the two arguments.⁴⁸ Benin equally has not learned much from the Court's jurisprudence on limitations of rights and how important it is that a state must demonstrate that such limitations are necessary, proportionate and justified in particular circumstances.⁴⁹ Furthermore, states did not address some of the issues raised by complainants, prompting the Court to rely on a one-sided version of the story. Second, as in the case of states, some litigants have not mastered the contour of the Court's jurisprudence on issues related to reparation and the exhaustion of local remedies. In a time when the African human rights system has developed an extensive jurisprudence on local remedies,⁵⁰ it is also difficult to understand why and how the applicants in *Boubacar Sissoko & 74 Others v Mali* relied solely on the jurisprudence of the European Court of Human Rights.⁵¹ Third, although some of its judgments enhanced the protection of individuals' rights at the domestic level,⁵² the Court's reasoning in a number of cases was simplistic, not sufficiently motivated and unlikely to convince states against which they were made.⁵³ Taking all these aspects into account, states and litigants must take litigation before the African Court seriously; and the latter exercise its functions with rigour to increase its legitimacy and acceptability.

2.3 Judges' voting pattern

Most decisions in contentious and advisory procedures were adopted unanimously. Nonetheless, judges wrote a total of 11 separate (concurring or dissenting) opinions. Justice Tchikaya wrote a full dissenting opinion in the *Jebra Kambole v Tanzania (Kambole)* case, while Justice Ben Achour wrote a partial dissenting opinion in the *Mugesera* case. Out of the five joint opinions written by judges, Tchikaya and Ben Achour wrote four opinions together in the *Mulindahabi* cases; and Kioko and Matusse wrote one in the *Kambole* case. In addition, Tchikaya wrote an individual opinion in the *Vagrancy* Opinion and the two orders for intervention by Mauritius

48 *Alex Thomas v Tanzania* (Merits) (2015) 1 AfCLR 465 para 130; *Kennedy Ivan v Tanzania* (Merits and Reparations) (2019) 3 AfCLR 48 para 26; *Armand Guéhi v Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 para 33; *Mohamed Abubakari v Tanzania* (Merits) (2016) 1 AfCLR 599 para 25.

49 *Ajavon* paras 202-203, 208 & 219.

50 AK Diop 'La règle de l'épuisement des voies de recours internes devant les juridictions internationales: le cas de la Cour africaine des droits de l'homme et des peuples' (2021) 62 *Les Cahiers de Droit* 239.

51 Paras 38-39.

52 Discussed further in part 3.2.1 and 3.2.2 below.

53 Discussed further in part 3.2.3 below.

and the Sahrawi Arab Democratic Republic in Application 28/2018 *Bernard Anbataayela Mornah v Benin & 7 Other States* (Sahrawi intervention case and Mauritius intervention case). Bensaoula wrote two opinions in the *Cheusi* and *Boateng* cases respectively. Generally, judges who have been more prolific in writing opinions in the history of the Court are the former Judge Ouguergouz (24); current judges Bensaoula (17); Tchikaya (15); and Ben Achour (14).⁵⁴

Although only Tchikaya appended his dissenting judgment in the *Kambole* case clarifying the reasons why he thought the Court erred in its reasoning, other judges – Chizumila, Anukam, Oré and Mengue⁵⁵ – also dissented on several questions. However, no one – perhaps apart from the judges who sat with them – knows the reasons for their disagreement as they did not make their opinions public. Article 70(1) of the Rules of the Court does not make it compulsory for judges to ‘append’ the text of their separate or dissenting opinion to the main judgment.

The most disagreement in 2020 arose in the *Kambole* case.⁵⁶ The facts of this case are important to understand the nub of contention. Jebra Kambole challenged article 41(7) of the Constitution of Tanzania which bars courts from adjudicating contestation of presidential election results on grounds that it is discriminatory, that it violates citizens’ rights to equality and their right to appeal to competent national organs.⁵⁷ The Court ruled in favour of the applicant. It found that the impugned provision does not allow citizens to air their grievances related to elections before competent courts. For the Court, states have the duty to ensure access to courts and tribunals by citizens in all matters, including those related to elections.⁵⁸ The right to a fair hearing cannot be dissociated with the right of access to a court and to appeal against its decisions. By barring everyone from contesting presidential election results, the state deprives them of any remedies notwithstanding the nature of their grievances.⁵⁹ On the question of whether article 41(1) of the Constitution of Tanzania was inconsistent with the equality clause under the African Charter, there was a tied vote. It was resolved through the casting vote of the President pursuant to Rule 60(4) of the 2010 Rules of Procedure of the Court, now Rule 69(4). While the preference of the vote of the

54 African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).

55 This does not seem surprising since they are among the judges who have written the fewest opinions. See African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).

56 Para 127.

57 Para 4.

58 Para 97.

59 Para 99.

President in instances of tie vote disrupts the equality of vote among judges, examples from other regional human rights courts suggest that it is common practice among international courts. This is the case of article 16(4) of the Rules of Procedure of the Inter-American Court of Human Rights. Rule 23(1) of the Rules of Procedure of the European Court of Human Rights (European Court) slightly differs from the equivalent provision of the Rules of the Court and of the Inter-American Court. Rule 23(1) of the Rules of the European Court requires that 'a fresh vote' be taken in the 'event of a tie'. It is only when the tie vote persists that the President can use their casting vote privilege. This rule aims to seek consensus among judges and shows that the resort to the casting vote of the President should be a measure of last resort.

In any case, the disagreement in the *Kambole* case reveals the existence in the Court of two jurisprudential trends. Some judges are inclined to defer to states as the ideal forum for dealing with constitutional issues, particularly those related to the adjudication of presidential elections, while others believe that the African Court must do more, using the African Charter and other international human rights instruments to strengthen the protection of political rights.⁶⁰

2.4 Duration of proceedings

Certain judgments on merits and reparation take longer to be adopted than others. It took the Court four years and five months to adopt a judgment in the *Cheusi* case. In this case written proceedings were closed nine months before the adoption of the final decision. The period between the filing of the application and the closure of written proceedings was equally long in several other cases: two years and six months in the *Kambole* case; four years and nine months in the *Wanjara* (case); four years and six months in the *Job Mlama v Tanzania (Mlama)* case; three years and three months in *Fidèle Mulindahabi v Rwanda*; four years in *Akwesi Boateng v Ghana*; two years and nine months in *Boubacar Sisoko v Mali*; and three years

60 Tchikaya averred that 'even considering the established human rights provisions, it is not trivial to deprive a state of its sovereignty of domestic legal order, which international human rights law otherwise recognises' (para 39). Relying on the margin of appreciation theory, he believed in the existence of a 'diversity of internal laws' or 'plurality of constitutional systems' 'on issues such as the status of the elected President' which, arguably, the Court would have left to the discretion of the state (para 39). There are judges who also believed that the Court did not go far enough in protecting the rights of the complainants to equal treatment before domestic judicial bodies. Kioko & Matusse in *Kambole* (n 12) para 11.

and nine months in *Leon Mugesera v Rwanda*. These delays can be attributed to the Court's lack of diligence in organising the pleadings after having received the parties' submissions or in organising deliberations after closing pleadings as well as on the parties, especially some states that submit their responses after several reminders and postponements.⁶¹ However, other cases, such as *Suy Bi Gohore & Others v Côte d'Ivoire*, *Hongoue v Benin*, *Sebastien Ajavon v Benin* and the two *XYZ v Benin* cases were adjudicated in a relatively short period. A close examination of cases that took a long time to be adjudicated also reveals that the time between the closure of written proceedings and the adoption of the decision spans between 15 days and two years.

By contrast, orders for provisional measures in 2020, on average, were adopted within less than a year. It took 11 months for the Court to adopt its order for provisional measures in *Konaté and Doumbia v Côte d'Ivoire* (*Konaté and Doumbia* case); six and four months in the joint application *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso & 3 Other States*; five months and nine days in *Charles Kajoloweka v Malawi*; and six months in *Ghati Mwita v Tanzania*. In the *Konaté and Doumbia* case the state failed to submit its responses to the request for provisional measures. Five months after the complainants had lodged the request, the state requested an extension of the period for submission, but up to February 2020 it had not done so.⁶² It took the Court five additional months to issue its decision in this matter, only to dismiss the request.⁶³ Whether granted or not, an order for provisional measures will not serve its purpose – 'to avoid irreparable harm to persons' 'in case of extreme gravity and urgency' – if it is issued with delays such as those observed in 2020 for some cases. Conversely, the Court adopted its order in *Komi Koutché v Benin* in seven days. It adopted its order in the *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* and *Ghaby Kodeih v Benin* within 14 days and 18 days in *Laurent Gbagbo v Côte d'Ivoire*.

The above numbers demonstrate the difficulty the Court often faces in meeting legal requirements set by the Protocol in relation to the time within which decisions on merits must be delivered. According to article 28(1) of the Court Protocol, after the completion of deliberations in a case, the Court 'shall' render its judgment within 90 days. These deliberations have to be completed 'within two consecutive ordinary sessions of the Court following the close

61 *Cheusi* paras 11-15; *Wanjara* paras 10-15.

62 Paras 14-15.

63 Para 31.

of pleadings'.⁶⁴ Article 28(1) of the Protocol is replicated under Rule 69 of the Rules of Procedure of the Court.⁶⁵ The 90-day period aims to prevent unnecessary delays in the adoption of judgments.⁶⁶ The Protocol seems to make it an 'obligation' on the Court to render the judgment within 90 days after it has completed deliberations in a case. However, this obligation applies only to 'judgment' such as judgment on admissibility, merits and reparation, and advisory opinions; and excludes other forms of decisions such as the ruling on provisional measures, an order on re-opening of pleadings or an order on intervention. In a sense, there seems not to exist a timeframe within which an order for provisional measures must be delivered. Since article 28(1) of the Protocol specifically targets 'judgment' and not broadly decisions of the Court – understood as 'any pronouncement of the Court, in the exercise of its judicial powers, which is in the form of a judgment, ruling, opinion or order'⁶⁷ – it is hard to argue, based on the text of the Protocol, for the extension of the 90-days requirement to all decisions of the Court.⁶⁸ Rendering provisional measures promptly and without significant delay may thus remain a matter of justice and fairness considering the aim of provisional measures and the situation of the complainant, or else the procedure will lose its essence.

Furthermore, neither article 28(1) of the Protocol nor Rule 69 imposes a timeframe within which cases must be decided, from the period the application was filed before the Court to deliberations. As the *Cheusi* and *Mlama* cases illustrate, many cases are resolved on merits after a considerable time. As one commentator puts it, it is self-defeating and ironical for a regional court that condemns domestic courts that took an unreasonable time before deciding cases to find itself delivering decisions with significant delays.⁶⁹

2.5 Applicants' inability to adduce evidence of material damages

Applicants, especially those that are or were jailed in Tanzania and Rwanda, had difficulties adducing evidence of material damages for

64 Rule 67(3) of the 2020 Rules of the Court.

65 Rule 59(2) of the 2010 Rules of the Court.

66 J Kom 'Arrêt de la Cour' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme: Commentaire article par article* (2011) 1483.

67 Art 1(k) of the 2020 Rules of the Court.

68 I am indebted to an anonymous reviewer who drew my attention to this question.

69 SFM Dzesseu 'Le temps du procès et la sécurité juridique des requérants dans la procédure devant la Cour africaine des droits de l'homme et des peuples' (2019) 3 *Annuaire africain des droits de l'homme* 84.

the Court to order reparation. It is relevant to start by positing that there were two types of petitions for reparation brought before the Court, namely, petitions brought by individuals whose subjective rights were directly violated, and petitions of political activists and public interest lawyers challenging the conformity and compatibility of legislative and constitutional norms with the African Charter and other international human rights instruments. The first type is generally known as subjective human rights litigation, and the second as objective or public interest litigation.⁷⁰ The focus here is on issues of reparation arising from subjective litigation where the Court is likely to order material compensation.

Under article 27(1) of the Protocol, 'if the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.⁷¹ The Court's jurisprudence has clarified the normative content of article 27(1). The Court has ordered monetary compensation to applicants, who have been direct victims of human rights violations but also to indirect victims including family members – spouse, children, wife, siblings of the applicant.⁷² While material damages, including financial loss and loss of income, must be proven, the Court held that moral damages for the direct victim (the applicant in general) are accrued by the mere fact that a right has been violated. In this instance 'the causal link between the wrongful act and moral prejudice "can result from the human right violation, as a consequence thereof, without a need to establish causality as such"'.⁷³ The Court has determined the criteria for indirect victimhood – the relationship to the applicant – and the evidence required to attest to the nature of damages from which a spouse, a sister, child or mother has suffered.⁷⁴

In the cases where the Court ruled on reparation for the violation of subjective rights, only Leon Mugesera obtained compensation for his lawyer's fee and for indirect victims, the wife, the son and the

70 L. Hennebel & H. Tigroudja *Traité de droit international des droits de l'homme* (2018) 445–447.

71 See also R. Nemedeu 'Décisions de la Cour' in M. Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme: Commentaire article par article* (2011) 1466.

72 H. Adjolohoun & S. Oré 'Entre imperium illimité et decidendi timoré: La réparation devant la Cour africaine des droits de l'homme et des peuples' (2019) 3 *Annuaire africain des droits de l'homme* 330.

73 *Andrew Ambrose Cheusi v Tanzania* para 150; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (Reparations) (2015) 1 AfCLR 258 para 55; *Lohé Issa Konaté v Burkina Faso* (Reparations) (2016) 1 AfCLR 346 para 58.

74 *Zongo* (n 73) para 46.

daughter who received an amount of 5 000 000 Rwandan francs each.⁷⁵ His claim for material damage was rejected.⁷⁶ In *Cheusi* the Court held that 'the prejudice resulting from the lengthy judicial proceedings could also have been supported by proof of payment of lawyers' fees, as well as procedural and other related costs'.⁷⁷ It also held that the 'claim for compensation based on the disruption of his life plan, chronic illness and poor health ... is simply a general statement that is not supported by any evidence'.⁷⁸ For the Court, 'applicant's parentage should be proved with a birth certificate or any other equivalent proof; spouses must produce their marriage certificate or any other equivalent proof; the siblings must provide a birth certificate or any other equivalent document attesting to their filial link with the applicant'.⁷⁹ In the *Cheusi*,⁸⁰ *Nguza Viking*⁸¹ and *James Wanjara*⁸² cases the applicants failed to adduce such evidence. In *Mugesera* the Court indicated that it had the power to 'obtain all evidence it considers appropriate to enlighten itself the facts of the case',⁸³ including those in the public domain. This power was used to determine the link between the applicant and her daughter who had appeared before other jurisdictions as daughter of the applicant and did not as such have to prove her relationship to the applicant.⁸⁴

Nearly seven years since the Court delivered its first decision on reparation,⁸⁵ which was followed by other decisions that clarified the standard of proof in reparation petitions, one might have expected applicants to learn from this abundant jurisprudence to strengthen their claims. Most of them were assisted by lawyers from NGOs that are familiar with the Court and, arguably, its jurisprudence on merits and reparation.⁸⁶ The unsuccessful claims for reparation, however, may be a call for the Court to relax its standards of proof for material damages or the filial link between the indirect victim and the applicant. After several years behind bars, it may be impracticable to certain applicants to adduce documentary proof. The Court may resort to a case-by-case analysis of reparation claims in each case

75 *Mugesera* (n 15) paras 149-152; para 156.

76 Para 133.

77 Para 145.

78 Para 146.

79 *Cheusi* (n 12) para 157; *Mugesera* (n 15) para 148.

80 Paras 154-159.

81 Paras 43-57.

82 Paras 103-107.

83 Para 152.

84 As above.

85 *Reverend Christopher Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72.

86 Andrew Cheusi, Nguza Viking and Johnson Nguza were represented by Pan-African Lawyers Union; Leon Mugesera was represented by three lawyers – two academics and one legal practitioner; James Wanjara and four others and Kalebi Elisamehe were represented by the East Africa Law Society.

taking into account the particularities of the case and the situation of the complainant.

2.6 Provisional measures

The Court delivered 24 orders for provisional measures in 2020.⁸⁷ These orders can be grouped into four categories, namely, orders that were granted (10),⁸⁸ those partially granted (two),⁸⁹ dismissed applications for provisional measures (11),⁹⁰ and an application for provisional measures that became moot (one).⁹¹ By contrast, the Court delivered nine orders for provisional measures in 2019 among which two were successful,⁹² one partially granted⁹³ and six dismissed.⁹⁴ The likelihood of failure of a request for provisional measures, remains high. In 2020 and 2019, 45,8 and 66,6 per cent of provisional measures requests were denied compared to 41,6 and 22,2 per cent success rates in those two years, respectively. Benin remained the country against which most orders for provisional measures were directed in 2020 and 2019: 12 out of 24 in 2020 as against five out of nine in 2019. Four orders were made against Côte d'Ivoire in 2020 as against one in 2019. Some of these applications were linked to the political and electoral crisis that resulted in the exclusion of opposition leaders' elections in Benin and Côte d'Ivoire.⁹⁵ The remaining orders delivered in 2020 are shared as follows per country: Tanzania (three) as against three in 2019; Mali

87 However, the Court's Activity Report indicates that the Court delivered 22 orders for provisional measures.

88 *Ghaby Kodeih v Benin*; *Charles Kajoloweka v Malawi*; *Guillaume Soro & 19 Others v Côte d'Ivoire* (1); *Guillaume Soro & 19 Others v Côte d'Ivoire* (2); *Sébastien Germain Marie Ajavon v Bénin* Appl 62/2019; *Masudi Said Selemani v Tanzania*; *Laurent Gbagbo v Côte d'Ivoire*; *Houngoue Eric Noudehouenou v Benin* (1); *Ghati Mwita v Tanzania*; *Ghaby Kodeih & Nabih Kodeih v Benin*.

89 *Houngoue Eric Noudehouenou v Benin* Appl 4/2020; *Houngoue Eric Noudehouenou v Benin* Appl 3/2020.

90 *Komi Koutché v Bénin*, *Konaté and Doumbia v Côte d'Ivoire*; *Glory Cyriaque Houssou & Another v Benin*; *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme v Burkina & 3 Others*; *Conaïde Togia Latondji Akouedénoudje v Benin*; *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania*; *Sébastien Germain Marie Ajavon v Bénin* Appl 27/2020; *Houngoue Eric Noudehouenou v Benin* Appl 32/2020; *Houngoue Eric Noudehouenou v Benin* Appl 28/2020; *Harouna Dicko & Others v Burkina Faso*; *XYZ v Benin*.

91 *Babarou Bocoum v Mali*.

92 *Tembo Hussein v Tanzania* (Provisional Measures) Appl 1/2018; and *Chalula v Tanzania* (Provisional Measures) (2019) 3 AfCLR 232.

93 *Koutché v Benin* (Provisional Measures) (2019) 3 AfCLR 725.

94 *Thomas Boni Yayi v Benin* (Provisional Measures) Appl 23/2019; *Ndajigimana v Tanzania* (Provisional Measures) (2019) 3 AfCLR 522; *Suy Bi & Others v Côte d'Ivoire* (Provisional Measures) (2019) 3 AfCLR 732; *XYZ v Benin* (Provisional Measures) (2019) 3 AfCLR 745; *XYZ v Benin* (Provisional Measures) (2019) 3 AfCLR 750; *XYZ v Benin* (Provisional Measures) (2019) 3 AfCLR 754.

95 *S Dabiré 'Les ordonnances de la Cour africaine des droits de l'homme et des peuples en indication de mesures provisoires dans les affaires Sébastien Ajavon c Bénin et Guillaume Soro et autres c Côte d'Ivoire: Souplesse ou aventure?' (2020) 4 Annuaire africain des droits de l'homme 477-480.*

(one); Malawi (one); and Burkina Faso (one). One order is directed at four countries: Burkina Faso, Benin, Côte d'Ivoire and Mali.

The foregoing indicates that, contrary to what some authors may hold, the African Court is not always lenient towards applicants when it comes to the issuance of provisional measures.⁹⁶ The Court seems to remain conscious of the effects provisional measures can have on pending cases including those that are politically sensitive. By clarifying that its rulings do not 'prejudge in any way the decisions that the Court may take on its jurisdiction, on admissibility of the application and on the merits',⁹⁷ the Court reminds parties to the litigation of the temporary and non-final nature of its orders. Successful orders for provisional measures, especially in those politically-charged cases, should in my view serve as an incentive for parties to diligently engage with the Court on the remaining aspects of the procedures (admissibility/merits) – and possibly request that the matter be considered on an urgent basis – so that the orders for provisional measures do not remain indefinitely in force.

3 Features of the African Court's 2020 jurisprudence

This part reviews two types of features of the African Court's 2020 jurisprudence. It first examines features related to procedural aspects of cases dealt with by the Court before analysing their substantive features.

3.1 Procedural features

Three procedural features of the Court jurisprudence are discussed in this part, namely, default judgment, the applications for intervention by two states and the examination of the rule on submission of petitions within a reasonable time.

3.1.1 Default judgment

Five default judgments were delivered against Rwanda in 2020 given that the state had failed to make submissions on admissibility, merits and reparation. The failure to make submissions is a result of

⁹⁶ Traoré & Leta (n 4) 443.

⁹⁷ *Laurent Gbagbo v Côte d'Ivoire* (Provisional Measures) Appl 25/2020 para 36. For the International Court of Justice, see *Lagrand case (Germany v United States of America)* Request for the Indication of Provisional Measures 3 March 1999 para 13.

Rwanda's 2016 withdrawal of its article 34(6) declaration.⁹⁸ In the five cases Rwanda repeatedly 'informed the Court it will not take part in any proceedings before the Court and consequently, requested the Court to desist from transmitting any information on cases concerning Rwanda'.⁹⁹ Rwanda's stance differs from those of Benin, Tanzania and Côte d'Ivoire which, despite having withdrawn their article 34(6) declarations, continued to make submissions before the Court in cases against them. The stance taken by the three countries as opposed to Rwanda indirectly legitimises the African Court's ruling in *Ingabire* regarding states' obligation to engage the Court on cases that are pending when the declaration is withdrawn or those submitted within the one-year time line.¹⁰⁰ This legitimising position is crucial also given that the obligation to engage the Court after withdrawal was not overtly contemplated by the Protocol and the Court's Rules of Procedure.

Be that as it may, what criteria does the Court apply to render a judgment by default against a party to proceedings and on which legal basis? To begin with, the legal basis for a default judgment is not treaty-based, that is, the procedure is not contemplated under the Protocol. It is rather regulated by the Rules of Court. Rule 55 of the 2010 Rules¹⁰¹ was the first to clarify possible conditions for the application of a default procedure. It was applied for the first time in *African Commission on Human and Peoples' Rights v Libya (Kadhafi case)*.¹⁰² However, the revision of the Court Rules in 2020, while retaining the fundamentals of Rule 55, explicitly empowered the Court to enter a default judgment on 'its own motion'. By so doing, the Court seems to have learned from the dissenting opinion of Judge Bensaoula in *Mulindahabi v Rwanda* (2019) where she argued that the Court lacked the power to render a judgment by default

98 'Report: Rwanda withdrawal of its acceptance of direct individual access to the African Human Rights Court' 22 March 2016, <https://www.chr.up.ac.za/news-archive/2016/1241-report-rwanda-s-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court> (accessed 26 November 2021). The withdrawal notice reads: 'NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court on Human and Peoples' Rights to receive cases under article 5(3) of the Protocol and shall make it afresh after a comprehensive review.'

99 *Mugesera* (n 12) para 6.

100 *Ingabire* (n 6) paras 67-68.

101 '1 Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings. 2 Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law.'

102 O Windridge 'In default: *African Commission on Human and Peoples' Rights v Libya*' (2018) 18 *African Human Rights Law Journal* 758.

against a party in the absence of an application by the other party to proceedings.¹⁰³

The Court applied a three-fold test to render a judgment by default in the five decisions against Rwanda. There must be default by one of the parties; the request for default must be made by the other party or of the Court's own volition; and the defaulting party must be notified.¹⁰⁴ These requirements are cumulative. The Court started by noting that by clearly indicating its intention not to appear before it or to receive transmission of documents from the Court, Rwanda 'voluntarily refrained from exercising its defence'.¹⁰⁵ The situation is slightly different from that of Libya in the *Kadhafi* case.¹⁰⁶ Libya was served with all the documentation but did not bother to respond. In both situations states failed to engage with the Court. As Ouguegouz noted, 'non-appearance of one of the parties to a case necessarily has a negative impact on the proper administration of justice and that it substantially complicates the task of the Court in the exercise of its mission'.¹⁰⁷

Subsequently, the Court noted that there was no application for default judgment lodged by any of the parties in the four *Mulindahabi* cases. However, it ruled that it was within its judicial discretion to decide whether or not a judgment by default could be delivered.¹⁰⁸ It indicated that it 'shall have jurisdiction to render judgment in default *suo motu* if the conditions laid down in Rule 55(2) of the Rules are fulfilled'.¹⁰⁹ The *Mugesera* case was decided after the adoption of the 2020 Rules. As such, the power of the Court to deliver a judgment by default was not in contention since the new Rule 63(1) is explicit to that effect. The last condition on notification is fulfilled by verifying whether the state duly and regularly received documentation relating to the case. The Court examined this by recalling different letters and correspondences served on the state and the lack of engagement therewith. The fulfilment of this condition was beyond any doubt since Rwanda effectively responded to different documentations implying that it had received these.

103 *Mulindahabi v Rwanda* (Jurisdiction and Admissibility) (2019) 3 AfCLR 389, dissenting opinion: Bensaoula para 4.

104 *Mugesera* (n 12) para 14.

105 *Mugesera* para 15.

106 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153 para 41.

107 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153, separate opinion: Ouguegouz para 26.

108 *Mulindahabi* Appl 10/2017 para 30.

109 As above.

3.1.2 *Applications that opened the 'road' not always 'taken': Intervention by state parties*

The Court granted requests from Sahrawi Arab Democratic Republic (Sahrawi) and Mauritius to intervene in an application submitted by Bernard Anbataayela Mornah. In November 2019 Mornah filed a case against eight member states to the Court Protocol that had made article 34(6) declarations for their failure to protect the 'sovereignty, territorial integrity and independence of the Sahrawi Democratic Republic'.¹¹⁰ In his application Mornah alleged that this failure constituted a violation of the African Union Constitutive Act, the African Charter, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹¹ Both Sahrawi and Mauritius claimed to have an interest in Mornah's application based on the occupation of Sahrawi's territory by Morocco.

These two applications raised questions related to the nature of states that can be allowed to intervene in proceedings pending before the Court, conditions under which they may do so and the nature of interest states may seek to defend before the Court. As this procedure has been rarely utilised – only three applications for intervention have been made before – these two applications provided the Court with an opportunity to clarify conditions for intervention under the Protocol and its Rules. When the Court first considered a state application to intervene in a matter concerning its citizen, it had barely developed applicable standards for the admission of such applications.¹¹² Article 5(2) of the Protocol allows 'the state party' that has an 'interest in a case' to voluntarily apply for intervention, thereby excluding instances of forced intervention.¹¹³ This provision is clarified under the Rules of Court. In 2020 the Court granted itself the discretionary power to allow, in the interests of justice, 'any other person' to intervene in proceedings before the Court.¹¹⁴

In relation to the Sahrawi and Mauritius interventions, the main question to resolve was the nature of 'legal interest' the two countries

110 *Bernard Anbataayela Mornah v Benin & 7 Others* (Case Summary) Appl 28/2018 para 3.

111 Para 10.

112 *Guehi v Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 para 12. See opinion by Bensaoula 519 para 13.

113 PE Kenfack 'Saisine de la Cour' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme: Commentaire article par article* (2011) 1275-1276.

114 See Tchikaya opinion in *Sahrawi and Mauritius Intervention* cases para 23, questioning whether this possibility was envisaged by the Court Protocol.

sought to protect. The assessment of this interest depended on 'the nature of issues involved in the case, the identity of the intervenor and the potential impact of any of the decisions of the Court on the intervenor and third parties'.¹¹⁵ Based on this, the Court found that Sahrawi had a legal interest to protect because the main application sought to safeguard Sahrawi's sovereignty and to protect several rights of individuals living on its territory.¹¹⁶ The interest of the Sahrawi to intervene in this case thus was straightforward, unlike that of Mauritius.

Mauritius justified its interest on the idea that its own decolonisation process was yet to finish and that the right to self-determination under international law was *erga omnes* and, as such, it should be protected by any member of the international community.¹¹⁷ To permit intervention by Mauritius, the Court relied on the ICJ Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.¹¹⁸ It demonstrated that the decision that may be adopted in Mornah's application can have implications on Mauritius and its people, some of whom remain under colonial domination.¹¹⁹ Mauritius's membership of the AU was the second basis for its legal interest to intervene in this application. In fact, the Court argued that the main application contests the decision by the AU to re-admit the Kingdom of Morocco as member despite it continuing to 'colonise' the Sahrawi Republic; a stance which is contrary to AU principles and values. On this basis, any member state of the AU can arguably have a legal interest to intervene in cases such as this.

The Court supported this assertion by noting that the protection of the Sahrawi sovereignty and of its peoples' right to self-determination goes beyond the interests of Sahrawi. It is a matter of continental concern for which each state must stand and defend. As the Court pointed out, certain rights in the African Charter are linked to the continent's colonial past and must be duly protected. These include

115 *Republic of Mauritius in Application 028/2018 v Benin & 7 Other States* (Intervention) Appl 2/2020 para 16.

116 ICJ Advisory Opinion *Western Sahara* 1975 para 55; C Anyangwe 'The normative power of the right to self-determination under the African Charter and the principle of territorial integrity: Competing values of human dignity and system stability' (2018) 2 *African Human Rights Yearbook* 50, 70-71.

117 ICJ Advisory Opinion *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* 25 February 2019 para 180.

118 Discussed in R Mahadew & S Aukhajah 'The advisory opinion of the International Court of Justice on Chagos: A critical overview' (2019) 3 *African Human Rights Yearbook* 414-434; R Ben Achour 'Le droit à l'autodétermination en tant que droit fondamental de l'homme et des peuples à la lumière de l'avis de la Cour internationale de Justice sur l'archipel des Chagos' (2019) 3 *Annuaire africain des droits de l'homme* 344-354.

119 Para 20.

‘the right to self-determination and freedom from colonisation and oppression, the right of people to freely dispose of their wealth and natural resources, and the right to national and international peace and security’. Already at the global level, the obligation of states to realise equality of rights among peoples and peoples’ rights to self-determination is enshrined in UN General Assembly Resolution 2625 (XXV). The analysis of legal interest in intervention petitions must thus be conducted on a case-by-case basis.

One question that may be raised is whether Morocco, which is accused of illegally occupying Sahrawi and violating Sahrawi’s peoples’ rights to self-determination and development, can be allowed to intervene in the main case. The question becomes more interesting when one adds another variable: Of all the AU member states, Morocco is the only state that has not ratified the African Charter. A literal reading of article 5(2) of the Court Protocol bars Morocco from seeking to intervene in proceedings launched by Mornah. Intervention is simply open to state parties. This clearly suggests that article 5(2) is aimed at a ‘state party’ to the Protocol which Morocco is not, let alone to the African Charter. If drafters of the Protocol had intended to allow states that are not party to the Protocol to intervene, they would have made it explicit through the use of the term ‘member state of the OAU/AU’ as is the case under articles 4(1) and 13(2) of the Protocol.

3.1.3 Two routes taken to assess submission within reasonable time rule

The Court took two different routes in defining the criteria for assessing what constitutes submission within a reasonable time under article 56(6) of the African Charter. This resulted in the Court admitting the *Kambole* case but rejecting the three *Mulindahabi* cases. Applicants in the *Kambole* and *Mulindahabi* cases submitted their applications within a relatively long period: eight years and four months and two years and nine months respectively. The Court had to (re)define the normative content of article 56(6) of the Charter and Rule 40(6), both of which are couched in value-laden terms. In its jurisprudence the Court has generally relied on two tests to define the reasonability of time within which it is to be approached by applicants, one of which derives from article 56(6) of the African Charter and applies to cases where local remedies to exhaust exist at the domestic level. In the absence of local remedies, this test does not apply. Its Rules added a second limb to the test, namely, that the

computation of the time limit from which to assess reasonability may be determined by the Court itself.¹²⁰

This second test generally applies when no local remedies exist for particular litigation. In the *Kambole* case the Court reiterated that the date when the defendant state deposited its article 34(6) declaration was the starting point for the computation of time limit.¹²¹ Since *Kambole* challenged the normative validity of a constitutional provision that entered into force in 1977, the Court considered that violations caused by the constitutional provision were of a continuous character because they renewed themselves ‘every day as long as the state fails to take steps to remedy’ them.¹²² The eight-year period between the declaration and the submission of the application were deemed reasonable. Judge Tchikaya challenged the assessment of the reasonableness requirement conducted by the majority.¹²³ He argued that the Court erred in its reasoning and contradicted its own jurisprudence on the reasonability test.¹²⁴ I will come back to Tchikaya’s position later.

The route the Court took in the *Mulindahabi* cases was different. In these cases local remedies were available and the applicant exhausted them. The Court used its case-by-case analysis to assess reasonableness. This approach is based on an objective examination of the situation of the applicant, whether they were in prison, lay, indigent and illiterate or were provided with legal assistance for them to be aware of the existence of the Court.¹²⁵ The *Mulindahabi* cases did not pass this test. For the Court, *Mulindahabi* was not in prison and his movements were not restricted. He was not indigent and was educated, a situation that enabled him to defend himself before the Court.¹²⁶ Finally, Rwanda deposited the article 34(6) declaration

¹²⁰ Rule 40(6) of the 2010 Rules of the Court.

¹²¹ Para 51.

¹²² Para 52. In *Boateng* the Court took a different approach in defining the continuing nature of violations. It distinguished ‘continuous’ violations from ‘instantaneous acts’. The latter ‘are those which are occasioned by an identifiable incident that occurred and is completed at an identifiable point in time’. These acts occurred before the state became part of the Protocol and deprived the Court of its temporal jurisdiction (para 55). This approach is based on the ‘nature’ of the acts and not their ‘impact’ and ‘effects’. However, an instantaneous act may have lasting impact. This point was raised by Judge Bensaoula in her dissenting opinion. She argued that the Court failed to consider the specific aspects of the case, the fact that the case pertains to the rights of the most marginalised peoples in African communities who are at the centre of the legal regime established by the Charter to protect people and that the acts had an enduring impact on land rights and right to development of applicants even after impugned legislation were abrogated (para 39 of the opinion).

¹²³ Dissenting opinion of Judge Tchikaya para 24.

¹²⁴ Para 25.

¹²⁵ *Mulindahabi* para 42; *Jonas v Tanzania* (Merits) (2017) 2 AfCLR 101 para 54; *Anudo v Tanzania* (Merits) (2018) 2 AfCLR 248 para 57.

¹²⁶ Para 45.

four years and three months before it had exhausted local remedies and, as such, Mulindahabi should have known of the existence of the Court.

The Court applied these objective criteria of assessment in the *Mulindahabi* cases and did not do so in the *Kambole* case. This is one of the many reasons why Tchikaya dissented in this decision. As stated earlier, the main difference between the two cases in relation to local remedies is that the latter did not exist and, therefore, could not be exhausted in the *Kambole* case contrary to the *Mulindahabi* case. For Tchikaya, Kambole's status as lawyer and member of the Tanganyika Law Society indicated that he was 'very familiar with the laws of his country'. As such, the applicant was intellectually equipped to be aware of the existence of a constitutional provision barring citizens from challenging presidential election results. He should also have known about the existence of the African Court and its ability to decide over the compatibility of article 41(7) of the Constitution of Tanzania with the African Charter. These objective facts point to the idea that a delay of eight years simply was unreasonable.¹²⁷ Tchikaya reasoned that reasonableness within the meaning of article 56(6) of the Charter must not be equated to 'excessive' time.¹²⁸

The position of the Court in the two cases renders its jurisprudential approach to article 56(6) unstable and unpredictable. A rigorous approach to such a provision can contribute to strengthening the legitimacy of a Court already facing a backlash from states accusing it of not following the subsidiarity and exhaustion of local remedies principles.

3.2 Selected substantive features

This part discusses three substantive features of the 2020 African Court jurisprudence, namely, the continuous trend towards the judicialisation of domestic politics; the review of amnesty laws; and the clarification of normative content of human rights and principles.

3.2.1 *Continuous judicialisation of domestic politics*

Several decisions adopted in 2020 continue to reaffirm the African Court's key role in adjudicating election-related human rights

¹²⁷ Para 27.

¹²⁸ Para 25.

violations.¹²⁹ This was done through orders for provisional measures and judgments on merits. Provisional measures were aimed at protecting applicants' rights to participate in elections in Benin and Côte d'Ivoire specifically. Orders of the Court were far-reaching as states were requested to suspend the holding of elections in Benin,¹³⁰ to stay the conviction of applicants or to ensure that obstacles to their participation in elections are removed.¹³¹ Some merits decisions had equally wide-ranging findings. For example, in the *Ajavon* and *XYZ (010)* cases the Court found that Benin had violated the principle of national consensus inscribed under article 10(2) of the African Democracy Charter by amending the Constitution without seeking consensus among citizens and political stakeholders.¹³² In reaching this conclusion, the African Court relied on certain decisions of the Benin Constitutional Court which were instrumental in demonstrating that the state had an obligation to consult citizens more broadly given that the way in which Benin's 1990 Constitution was adopted favoured consensus and dialogue. National consensus was an unwritten constitutional rule in Benin constitutionalism, also recognised by the African Democracy Charter, which Benin has ratified.¹³³

In *Suy Bi Gohore & Others* and *Ajavon* cases the African Court decision strengthened the independence of electoral management bodies in Côte d'Ivoire and Benin. The *Gohore* case is important in underscoring how the Court reviewed the extent of the implementation of orders made in *Actions pour la protection des droits de l'homme (APDH) v Côte d'Ivoire (APDH case)*¹³⁴ when for the first

129 GW Kakai 'The role of continental and regional courts in peace-building through the judicial resolution of election-related disputes' (2020) 4 *African Human Rights Yearbook* 352-357.

130 Sébastien Germain Marie Aikoue *Ajavon v Benin* Appl 62/2020 para 69.

131 Laurent Gbagbo *v Côte d'Ivoire* para 37; Guillaume Kigbafori Soro & Others *v Côte d'Ivoire* Appl 12/2020 para 36.

132 Sébastien Germain Marie Aikoue *Ajavon v Benin* (Merits and Reparations) Appl 62/2020 paras 336-344 and *XYZ v Benin* (Merits and Reparations) Appl 10/2020 paras 88-106.

133 11 July 2012. See ratification table, <https://au.int/sites/default/files/treaties/36384-sl-AFRICAN%20CHARTER%20ON%20DEMOCRACY%2C%20ELECTIONS%20AND%20GOVERNANCE.PDF> (accessed 27 September 2021). See Decision DCC 06-074 of 8 July 2006. Nonetheless, by the time the Court adopted its decisions in 2020, the Benin Constitutional Court had already reversed its earlier decisions which recognised 'national consensus' as an unwritten constitutional rule through Decision DCC 18-126 of 21 June 2018. Expressed differently, 'national consensus' no longer existed as a constitutional imperative under Benin constitutionalism. The African Court thus was expected to draw inspirations from recent Benin Constitutional Court decisions which contradicted the Court's approach. See L Gamai 'Constitution béninoise: Salami contre-attaque les 3 arguments de la Cour africaine' 3 December 2020 in *Banouto*, <https://www.banouto.bj/article/politique/20201203-constitution-beninoise-salami-contre-attaque-les-03-arguments-de-la-cour-africaine> (accessed 29 September 2021).

134 (2016) 1 AfCLR 668.

time it delineated conditions for the independence of an electoral management body.¹³⁵ In the *Suy Bi Gohore & Others* case the petitioners argued that although the state had modified the Act on the Independent Electoral Commission as requested by the African Court in *APDH*, it still failed to meet its obligation to establish an independent and impartial electoral management body pursuant to article 17 of the African Democracy Charter.¹³⁶ The Court ruled that the applicants had failed to demonstrate how procedures leading to the adoption of the law reforming the electoral management body were inappropriate for one to consider that an electoral management body established through that process lacked the confidence of relevant stakeholders.¹³⁷ The Court, however, found that electoral management bodies at the local level were unequally composed in favour of the ruling party.¹³⁸ The process of appointing members of opposition political parties and those from civil society organisations (CSOs) to the electoral management bodies, moreover, was not driven by these entities but by the government, thus hindering citizens' participation in the management of public affairs.¹³⁹ In the *Kambole* case the African Court reiterated the relevance in a democratic society of the ability of citizens to challenge presidential election results in line with article 7 of the African Charter.

The Court was also involved in deciding over the independence of the Benin judiciary and of the Constitutional Court, in particular. In the *Ajavon* case the petitioner alleged that the amendment of the law on the Supreme Council of Magistracy (CSM) in 2018 violated the independence of the judiciary. He questioned the rationale for including the President of the Republic, the Minister of Justice, the Minister of Economy and the Minister of Public Service as members of the CSM.¹⁴⁰ Early in January 2018 the Constitutional Court ruled that these amendments were partially in contradiction with the Constitution. However, the Constitutional Court reversed its position in June 2018¹⁴¹ and ruled that the amendments were consistent with the Constitution.¹⁴² The African Court ruled that the Constitutional Court could not overturn its earlier ruling through an interpretation

135 Paras 116-118.

136 Para 12(i).

137 Paras 226 & 227.

138 Para 228.

139 Para 229.

140 Para 302.

141 Para 318; RM Owona 'L'autorité de la chose jugée des décisions du juge constitutionnel en Afrique francophone' in O Narey (ed) *La justice constitutionnelle* (2016) 425.

142 Para 316. See the discussion in TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen et al (eds) *A life interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2022) 484-485.

procedure, as the decisions of the Constitutional Court are final and binding on all.¹⁴³

The African Court further reiterated the prohibition of executive interference in matters concerning the judiciary.¹⁴⁴ It found that the membership of the President of the Republic and other executive officials deprived the CSM of its independence.¹⁴⁵ The Court further ruled in the *XYZ (010)* case that the lack of clarity on criteria used by the President of the Republic and National Assembly to renew the term of office of judges of the Constitutional Court violated the Constitutional Court's independence according to article 26 of the African Charter.¹⁴⁶ The constitutional context must be understood here, in particular the unchecked power most Presidents of the Republic and National Assemblies wield in appointing, and sometimes removing, judges of constitutional jurisdictions in African civil law countries.¹⁴⁷

It is clear from these cases that the African Court has gone the extra mile to protect the independence of the judiciary and the rights of opposition leaders and candidates who could hardly rely on domestic courts to hold the executive and the legislature accountable to democratic principles and international human rights treaties ratified by states. As the organisation of the judiciary and election-related questions are matters of national sovereignty *par excellence*, some scholars have argued for the observance of the margin of appreciation doctrine by the African Court. This can prevent the erosion of the Court's already waning legitimacy and 'restore confidence' of states.¹⁴⁸ The withdrawal of states such as Rwanda, Tanzania, Benin and Côte d'Ivoire would thus have been pre-empted¹⁴⁹ had the Court been mindful of African states' absolute attachment to their sovereignty and provided them an opportunity to settle domestic matters through their own judicial mechanisms. Similar concerns were voiced in the Court by Tchikaya in the *Kambole* case.¹⁵⁰ These concerns are genuine. However, they must be contextualised. If the Court is to allow some degree of discretion to national authority, as it has done, this should continue to be done on a case-by-case basis. Some withdrawals arguably

143 Para 318.

144 Para 312.

145 Paras 320-323.

146 *XYZ (010)* paras 69-72.

147 CM Fombad 'Constitutional adjudication and constitutional justice in Africa's uncertain transition: Mapping the way forward' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 354.

148 Traoré & Leta (n 4) 421.

149 Adjolohoun (n 25) 39-40.

150 *Kambole* (n 12), dissenting opinion of Judge Tchikaya paras 34-40.

were sparked by the fact that the Court gave a forum for opposition leaders and political dissidents,¹⁵¹ who otherwise could not use domestic courts against 'repressive national governments',¹⁵² to air their grievances, for example, against the remaking of electoral and constitutional norms.¹⁵³ The 2019 constitutional amendments that instituted the principle of sponsorship for presidential candidates in Benin hampered the participation of several candidates who could not secure 16 supports from a ruling party-controlled parliament in Benin's 2021 presidential elections.¹⁵⁴ Besides, the President of Côte d'Ivoire maintained his grip on power by running for a third presidential term and ensuring that some opposition candidates are not allowed to compete.¹⁵⁵ These examples may suggest that a non-strategic application of the margin of appreciation doctrine, especially one that is oblivious to the repressive and unaccountable nature of certain African governments, can undermine the protection of human rights at the regional level and weaken the ability of the African Court to protect individuals' rights. Human rights litigation before the African Court and the Court's willingness to 'chop the ugly head of impunity off its stiffened neck' can serve to expose the hypocrisy of rulers who undertake to protect human rights yet make little effort to 'translate these sentiments into practice'.¹⁵⁶

3.2.2 *Determining conditions of validity of amnesty laws*

For the first time the African Court ruled on the validity of amnesty laws under the African Charter in the *Ajavon* case. The applicant challenged the enactment of a parliamentary Act that prevented the prosecution of perpetrators of 2019 post-election violence on account that the Act deprived victims of their right to an effective remedy. The Benin government passed legislation to pardon perpetrators of post-election violence and took no measures to ensure accountability for such acts.

151 Viljoen (n 23) 66.

152 OD Akinkugbe 'International decision commentary: *Houngue Eric Noudehouenou v Republic of Benin*' (2021) 115 *American Journal of International Law* 285.

153 The reason invoked by Rwanda was difficult to understand. It indicated that 'the Republic of Rwanda, in making the 22nd January 2013 Declaration never envisaged that the kind of person described above [genocide convict who is a fugitive from justice] would ever seek and be granted a platform on the basis of the said Declaration'. Viljoen rightly qualifies this argument as being 'disingenuous'. See Viljoen (n 23) 66.

154 See *Decision DCC 21-067* of 4 March 2021; *Decision EP 21-008* of 17 February 2021 2; *Decision DCC 21-011* of 7 January 2021 3 (Constitutional Court of Benin).

155 D Zounmenou 'Côte d'Ivoire should learn lessons from past election crises' *ISS Today* 29 October 2020, <https://issafrica.org/iss-today/cote-divoire-should-learn-lessons-from-past-election-crises> (accessed 26 November 2021).

156 C Heyns (ed) *Human rights law in Africa* (1996) viii; C Heyns (ed) *Human rights law in Africa* (1998) vii-viii.

The question of validity of amnesty legislation, in particular those adopted in the context of transitional justice, remains unsettled under international law.¹⁵⁷ Most scholars and international tribunals tend to favour conditional amnesties because blanket amnesties exclude any form of accountability.¹⁵⁸ This is the approach the African Commission recently adopted.¹⁵⁹ In the *Ajavon* case the African Court held that only an amnesty law accompanied 'by restorative measures for the benefit of the victims' can be said to be compatible with states' obligations under the African Charter. In *Thomas Kwoyelo v Uganda* the African Commission was of the view that 'amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations'.¹⁶⁰ The absence of these remedies in the Benin context rendered the enjoyment of article 7 rights illusory and gave the impression that the adoption of the amnesty law aimed to entrench impunity for post-election violence.

The Court's position emphasises the need to implement different forms of accountability, whether punitive or non-punitive, to ensure respect for the rights of victims and survivors of human rights violations.¹⁶¹ The power of states to grant amnesty to perpetrators of various violations of international (human rights) law is constrained by, among others, states' obligations to investigate and prosecute human rights violations and to ensure that victims have their cases heard before competent tribunals. In the context of an increasing adoption of amnesty laws as part of transitional justice processes in certain African countries that ratified the African Charter, the Court's position thus is pre-emptive of complete disregard of accountability in peace processes.¹⁶²

157 SA Dersso 'Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: Review of the recent jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 3 *African Human Rights Yearbook* 382.

158 Dersso (n 157) 383.

159 *Thomas Kwoyelo v Uganda* (25 April-9 July 2018) Communication 431/12 para 293.

160 Dersso (n 157) 387.

161 SP Tunamsifu 'The right to justice: A challenge for survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo' (2015) 15 *African Human Rights Law Journal* 473; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005.

162 See also FF Taffo 'Amnesties and human rights within the framework of the African Charter on Human and Peoples' Rights' (2019) 3 *Current Trends* 30.

3.2.3 *Clarifying normative content of fundamental rights and guarantees*

Right to peace and security

Linked to the electoral process and constitutional reforms, the applicant in the *XYZ (010)* case argued that the amendment of the Benin Constitution in the absence of 'national consensus' jeopardised peace for the Benin people.¹⁶³ The Court started by defining the concept of 'peace'. It considered that peace means 'the absence of worry, turmoil, conflict or violence'. This notion generally is considered 'negative' peace which must be distinguished from positive peace.¹⁶⁴ The Court captures positive peace by noting that citizens must live 'without danger, without risk of being affected in its physical integrity and its heritage' as this can positively impact on national stability.¹⁶⁵

Human rights violations directly affect peace and stability. For example, a constitutional amendment without the participation of certain citizens constitutes a threat to peace and stability.¹⁶⁶ The Court reiterates that the observance of human rights is essential to the maintenance of peace and security in Africa and can prevent conflicts that are ravaging the continent. This connection is of utmost importance in the African context given that the mismanagement of electoral processes leads to deadly skirmishes, instability and result in the loss of public confidence in democratic institutions.¹⁶⁷

Right to economic, social and cultural development

The Court also demonstrates that non-consensual amendment of constitutional rules negatively impacts on economic, social and cultural development of people. This follows allegations by the applicant in the *XYZ (010)* case that the amendment of the Benin Constitution, the stability of which rested on the consensus prevailing during its adoption, disrupted the development of the country and its people.¹⁶⁸

¹⁶³ Para 129.

¹⁶⁴ M Kassa & D Mallow 'Evaluating the nature of peace in post-1991 Ethiopia in light of Johan Galtung's typology of positive and negative peace' (2017) 3 *International Journal of Humanities and Social Science Research* 85-86.

¹⁶⁵ Para 133. See also Kakai (n 129) 350.

¹⁶⁶ *XYZ (010)* para 136.

¹⁶⁷ D Bere 'Pre-electoral period: Election environment law and practice for restoring the promise of African elections' in C Mbazira (ed) *Budding democracy or judicialisation: Lessons from Africa's emerging electoral jurisprudence* (2021) 50-52.

¹⁶⁸ Para 122.

However, the analysis of the Court was laconic. In a single sentence-paragraph, it indicated that non-consensual amendment of the Constitution 'may constitute a major disruption of the economic, social and cultural development in Benin'¹⁶⁹ and concluded that there was a violation of article 22(1) of the African Charter. Little effort was made to demonstrate the clear link between constitutional amendment and development, what the negative effects of such amendments were and the extent to which they affected the country's development.

The Court did not engage with the jurisprudence of the African Commission in emphasising the utmost importance of and developing the right to development. In *Institute for Human Rights and Development in Africa v Democratic Republic of Congo* the Commission considered that the right to development under article 22 of the African Charter was both an individual and a collective right.¹⁷⁰ In *Endorois* it held that the right to development was 'both *constitutive* and *instrumental*, or useful as both a means and an end'.¹⁷¹ These normative standards could have helped the Court to make a robust and convincing finding on the right to development in the context of non-consensual constitutional changes, clarifying which aspects of the right to development are most likely to be endangered by such constitutional amendments and how the free, meaningful and active participation of citizens, which is at the heart of the right to development, can help diffuse the negative effects of such reforms.

Principle of non-retrogression

In *Ajavon* the applicant challenged the enactment of several laws that deprived certain individuals of their rights to strike guaranteed under article 31 of the Constitution of Benin. The Court held that states should not renege on a socio-economic right already guaranteed in their constitutions. The Court argued that the principle of non-retrogression prevents member states to ICESCR from adopting 'any measure which directly or indirectly marks a step backwards with regards to the rights recognised in the ICESCR'.¹⁷² According to the Court, states simply are empowered to provide a framework to realise socio-economic rights.¹⁷³

¹⁶⁹ Para 127.

¹⁷⁰ *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 277.

¹⁷¹ Para 277.

¹⁷² *Sébastien Germain Marie Aïkoue Ajavon v Benin* (Merits and Reparations) Appl 62/2020 para 137.

¹⁷³ Para 138.

This principle has been recognised by the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) and the African Commission as key in safeguarding the protection of socio-economic rights.¹⁷⁴ The African Court, therefore, did not hesitate to subject strict scrutiny on Benin to enhance the protection of a right provided both in ICESCR and its Constitution. The ESCR Committee interpreted article 2(1) of ICESCR to mean that it prohibits retrogressive measures.¹⁷⁵ The principle of non-retrogression works hand in hand with the principle of proportionality which the Court has regularly used to assess the validity of restrictive measures. The principle requires that retrogressive measures to socio-economic rights be properly justified taking consideration of other socio-economic rights and the maximum available resources requirement.¹⁷⁶ The African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, although not referred to in the *Ajavon* case, provides a detailed check-list of requirements states must meet for their measures not to violate the principle of non-retrogression.¹⁷⁷

4 Conclusion

The African Court has made progress in reducing its backlog of cases in 2020. It delivered decisions on admissibility, jurisdiction, merits and reparation as well as orders for provisional measures which not only strengthened the quality of fair trial rights of prisoners but, significantly, that of political rights in Benin and Côte d'Ivoire. Both individuals and civil society organisations have come to realise the tremendous role the Court can play in ensuring that states and their organs, particularly the judiciary, do not hide behind frivolous technical grounds to deprive their citizens of basic rights they must enjoy and which states have committed to realise. Clearly, claims of the violation of fair trial rights by individuals facing trials in Tanzania and Rwanda and election-related human rights violations remained the most adjudicated issues in 2020. Apart from Tanzania, allegations of the violation of article 7 of the African Charter were also raised in applications against Rwanda, Ghana, Côte d'Ivoire, Mali, Benin and Burkina Faso. Allegations of the violation of article 7 of the African Charter remain common before the African Court. These were made

174 S Liebenberg 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37 *South African Journal on Human Rights* 10.

175 UN ESCR Committee General Comment 13: The Right to Education para 45.

176 Liebenberg (n 174) 8.

177 (2004) para 20.

in 24 cases decided in 2019,¹⁷⁸ 26 cases decided in 2017 and 2018¹⁷⁹ and 27 cases decided between 2006 and 2016.¹⁸⁰

The cases decided by the Court also reveal that some citizens and political activists increasingly lose confidence in the ability of their leaders to establish independent and neutral electoral management bodies and justice mechanisms. The independence of the judiciary and the principle of separation of powers are some of the most important features of democracy and constitutionalism and their observance in times of election may help in preventing violence and instability which generally mar electoral processes in Africa. By hearing the numerous claims raised by Beninese citizens, even though some of them were ill-founded, and by adopting provisional measures to safeguard political rights of individuals such as Laurent Gbagbo and Guillaume Soro, the Court seems to send out an unequivocal warning that the legal regime established under the African Charter and other human rights instruments will not tolerate manipulations of electoral and constitutional norms to consolidate personal rule. This is true for the Court goes on to ascertain that states' obligation to establish an independent judiciary is anathema to the establishment of a supreme council of the judiciary controlled by political actors. Given the repressive and unaccountable nature of some African governments, the African Court's 2020 jurisprudence in cases related to elections, presidential election dispute resolution and independence of the judiciary, undoubtedly gives great hope to all those whose effective exercise of their political rights depends on the goodwill of institutions and leaders whose only ambition is the consolidation of personal power.

178 African Court Law Report Vol 3 (2019) xxi & xxii.

179 African Court Law Report Vol 2 (2017-2018).

180 African Court Law Report Vol 1 (2006-2016).

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2
3.1
3.2.1
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- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
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Position as at 31 July 2021

Compiled by: I de Meyer

Source: <http://www.au.int> (accessed 9 December 2021)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	20/11/16	10/01/17
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02		18/07/18	05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99*	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			23/02/17
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03	16/06/17	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	24/04/18
Namibia	30/07/92		23/07/04		11/08/04	23/08/16
Niger	15/07/86	16/09/71	11/12/99	17/05/04		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13		27/11/13
São Tomé and Príncipe	23/05/86		18/04/19		18/04/19	18/04/19
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	12/08/16
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan		04/12/13				13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07	23/08/18	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	54	46	49	30	42	34

Ratifications after 31 July 2021 are indicated in bold

* State parties to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights that have made a declaration under article 34(6) of this Protocol, which is still valid.