Pretoria University Law Press
PULP

ISSN: 1609-073X

AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 22 No 2 2022

PULP

AFRICAN HUMAN RIGHTS LAW JOURNAL

THIS JOURNAL SHOULD BE CITED AS (2022) 22 AHRLJ

The *African Human Rights Law Journal* publishes contributions dealing with human rights, with a special focus on topics of relevance to Africa, Africans and scholars of Africa. The *Journal* appears twice a year, in June and December.

The *Journal* is an open access online publication; see www.ahrlj.up.ac.za

The *African Human Rights Journal* is indexed in SCOPUS, the International Bibliography of Social Sciences (IBSS), the Directory of Open Access Journals (DOAJ), the Scientific Electronic Library Online (SCIELO), and is accredited by the South African Department of Higher Education and Training (DHET).

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African Human Rights Law Journal **Volume 22 No 2 2022**

Published by:

Pretoria University Law Press (PULP)

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

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Printed and bound by:

Pinetown Printers, Durban

Cover design:

Lizette Hermann, Centre for Human Rights, University of Pretoria

ISSN: 1609-073X
EISSN: 1996-2096

The financial assistance of the European Union is gratefully acknowledged.

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AFRICAN HUMAN RIGHTS LAW JOURNAL

http://dx.doi.org/10.17159/1996-2096/2022/v22n2a12

Editorial

As is customary, this issue of the Journal straddles developments in both the regional and national dimensions of human rights protection. The first four articles deal with aspects of the African regional human rights system. The next five articles focus on four countries: Kenya, Nigeria, South Africa and Uganda.

The first article draws attention to one of the African Union (AU) human rights bodies, namely, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). It explores the role of this AU body in relation to climate change, an abiding concern of our time. This edition of the *Journal* appears in the immediate aftermath of the 27th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC). In their contribution, Boshoff and Damtew explore the potential for successful climate change litigation before the African Children's Committee. They conclude that the Children's Committee has the potential to serve as a forum for child rights-based climate litigation, based on the solid substantive rights protection in the African Charter on the Rights and Welfare of the Child (African Children's Charter), the broad and flexible standing requirements, and its transformative remedial practice.

The second and third articles in this edition touch on decisions of one of the other AU human rights bodies, the African Commission on Human and Peoples' Rights (African Commission).

Seizure of communications is an important stage in litigating before the African Commission. Jimoh takes a close look at the African Commission's 2020 Rules of Procedure which introduced some significant procedural changes. A pertinent change is that the admissibility criteria contained in the seizure criteria under the 2010 Rules are no longer required for the Commission to become seized of a communication. The author compares the Commission's practice before and subsequent to the entry into force of the 2020 Rules.

While both the African Court on Human and Peoples' Rights (African Court) and the African Commission have been drawn into election-related disputes, this issue focuses on the role of the Commission in this context. Using the Commission's decision in *Ngandu v Democratic Republic of Congo* as a starting point, Makunya reflects on the challenges faced by a regional body when it adjudicates disputes related to national elections. By its very nature, a regional body may have to be more attuned to ascertaining the correct legal position. As well, because of the delays that are likely to ensue in the process of obtaining regional justice, a regional body may be more constrained in awarding meaningful restitution. These, and other factors, may impede the prospects of effective implementation of regional decisions related to electoral disputes.

One of the distinguishing features of the African Charter on Human and Peoples' Rights (African Charter) is that it provides for a justiciable right to development. For an initial discussion of the distinguishing features of the African Charter, see the two volumes published in the *Journal*'s inaugural year, 2001, 20 years after the adoption of the African Charter. For some stock taking 20 years later, see OC Okafor & GEK Dzah 'The African human rights system as "norm leader": Three case studies' (2021) 21 *African Human Rights Law Journal* 669-698. Ashukem and Ngang examine the implications for the right to development in Africa of an issue that has become more pronounced in the last decade or so, namely, land grabbing. The authors conclude that African states should re-think their right to development obligations and the land ownership and land use policy prerogatives relevant to protecting the livelihood sustainability interests of their peoples.

Two articles deal with aspects of domestic human rights protection in Kenya. One article concerns children's rights, and the other refugees' rights in the context of COVID-19.

The Bill of Rights in the Constitution of Kenya, 2010 provides in detail for children's rights. Article 53(1) provides that every child has the right

(a) to a name and nationality from birth;
(b) to free and compulsory basic education;
(c) to basic nutrition, shelter and health care;
(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and

(f) not to be detained, except as a measure of last resort, and when detained, to be held –
  (i) for the shortest appropriate period of time; and
  (ii) separate from adults and in conditions that take account of the child's sex and age.

Article 53(2) stipulates that a 'child's best interests are of paramount importance in every matter concerning the child'.

Odongo scrutinises the interpretation of these children's rights provisions by the Kenyan judiciary. He concludes that the courts have largely recognised children's vulnerability and their need for protection, and affirmed children's autonomy and agency. He also notes that, based on its expansive approach, the courts adopted systematic remedial measures such as recommendations for the reform of the legal framework.

The other contribution on Kenya deals with an aspect that became pronounced during the COVID-19 pandemic. Haldimann and Biedermann discuss the legal obligations and responsibilities to distribute face masks in a very specific setting, the Kakuma refugee camp in Kenya, during a particular period, the COVID-19 pandemic. They argue that under these territorial and temporal conditions, the state owes an increased duty of care towards refugees. This increased duty of care entails a positive obligation to provide face masks to the inhabitants to protect them from COVID-19, based on the right to the best attainable standard of health and the right to life. The article also identifies a shift in responsibility from the host state to the United Nations (UN) Refugee Agency.

The last decades have seen an increase in the adoption of access to information laws by African states. This process was informed by one of the soft law instruments developed by the African Commission, the Model Law on Access to Information in Africa (see https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/model_law_on_ati_in_africa/model_law_on_access_to_infomation_en.pdf). In a contribution discussing two such laws, Osawe compares the right of access to information under the Nigerian Freedom of Information Act 2011 (FOIA) and the South African Promotion of Access to Information Act 2001 (PAIA). The article evaluates the strengths and weaknesses of these two pieces of open-access legislation. It finds that the PAIA is a more robust law in respect of, for example, ensuring access to public information, restricted exemptions to access information, extensive measures to promote the right of access and a broader scope of the right of access. The

author concludes that inspiration should be drawn from the PAIA so as to strengthen the Nigerian FOIA.

In another contribution Sogunro shines a spotlight on homophobia in Nigeria. He analyses the social and political context surrounding the evolution of criminalising laws during the colonial phase of Nigeria's history. The article illustrates that political homophobia, by way of laws that criminalised same-sex relationships during the colonial administration, served to protect colonial interests and maintain the legitimacy of colonisation. Sogunro highlights the linkages between political homophobia, elitism and social exclusion in the colonial origins of anti-gay laws in Nigeria. He argues that an understanding of the rationale behind the colonial evolution of anti-gay laws can provide an insight into the entrenchment of political homophobia in Nigeria and similar legal systems in Africa, and he challenges the rhetoric that these laws reflect African values.

The issue of 'African values' came up in November 2022 when the African Commission was called upon to decide on the application for observer status by three non-governmental organisations (NGOs) that include advancing the rights of sexual and gender minorities in their activities. Contradicting its position of granting observer status to the Coalition of African Lesbians (CAL) in 2015, the Commission rejected these applications on the basis that 'sexual orientation' is not an 'expressly recognised right' in the African Charter and that it is 'contrary to the virtues of African values' espoused in the Charter (Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights, para 58).

It should be recalled that in 2015 the AU Executive Council, in response to the African Commission's CAL decision, directed the Commission to 'withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values' (Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights EX.CL/Dec.887(XXVII) para 7). After some prevarication and delay, and an ultimatum from the Executive Council, the African Commission in 2018 relented and withdrew CAL's observer status.

One must have some sympathy for the African Commission's predicament when faced with these three new applications in 2022. Either it grants observer status and in the process invites the wrath of the AU policy organs, or it denies observer status, thereby reinforcing the impression that its independence and autonomy have been undermined, and that it has accepted that state of affairs. However, the way in which the Commission has now unapologetically, and as

a matter of Charter interpretation, adopted the Executive Council's instructions and mindset, is deeply disconcerting. The most recent rejection of observer status, therefore, is a more serious erosion of its independence and autonomy than the previous instance, since the Commission appears to have 'appropriated' the Executive Council's position.

The last article deals with Uganda's transition into a human rights-based constitutional dispensation. In his discussion of article 274 of the 1995 Ugandan Constitution, Mujuzi interrogates the role of the courts in dealing with laws that contradict the Constitution. While only the Constitutional Court has the mandate to declare legislation unconstitutional, the author notes that other courts also use article 274 to protect the rights of the most vulnerable. He suggests that the Constitution be amended to allow all courts to declare legislation unconstitutional, but with the caveat that declarations of unconstitutionality be confirmed by the Constitutional Court before they become effective.

Two recent publications are also reviewed. The first, reviewed by Rotberg, is D Kuwali (ed) *Palgrave handbook on sustainable peace and security in Africa*. The second, reviewed by Dada, is KM Clarke *Affective justice: The International Criminal Court and the pan-Africanist pushback*.

We extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights for this particular issue: Deji Adekunle; Deborah Adeyumo; Abiy Ashenafi; Annelie de Man; Cristiano D'Orsi; Dayo Fagbemi; Charles Fombad; Mosunmola Imasogie; Brian Kibirango; Trésor Makunya; Christopher Mbazira; Rachel Murray; David Ngira; Vivian Nyaata; Anita Nyanjong; Dejo Olowu; and Stijn Smet.

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To cite: E Boshoff & SG Damtew 'The potential of litigating children's rights in the climate crisis before the African Committee of Experts on the Rights and Welfare of the Child' (2022) 22 *African Human Rights Law Journal* 328-361
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a1

The potential of litigating children's rights in the climate crisis before the African Committee of Experts on the Rights and Welfare of the Child

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Summary: *While human rights-based climate litigation has globally increased exponentially in the past few years, no cases related to the climate crisis have been filed before the regional African human rights bodies. The aim of this article is to systematically review the requirements for successful litigation before one of the African human rights bodies, namely, the African Committee of Experts on the Rights and Welfare of the Child. The article considers the potential for successful climate change litigation before the African Children's Committee based on the possible substantive rights arguments, the procedural challenges that may have to be overcome, and the potential remedies that may be granted by the African Children's Committee. It concludes that the*

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Children's Committee is an important potential forum for child rights-based climate litigation, given that it provides strong substantive rights protection, including for the rights of future generations, broad and adaptable provisions on standing, and has a record of granting strong and transformative remedies.

Key words: *child rights; climate change; litigation; African Children's Committee; jurisprudence*

1 Introduction

While human rights-based climate litigation has globally increased exponentially in the past few years,[1] no cases related to the climate crisis have been filed before the regional African human rights bodies, namely, 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). This is correlated to a trend where scant climate litigation has been brought against African states in general, including at the national level. On the one hand, this is not surprising, given that the vast majority of climate-related cases globally concern climate change mitigation (which concerns the contribution of defendants to causing climate change),[2] whereas African countries account for only about 3 per cent of global carbon dioxide (CO2) and other greenhouse gas (GHG) emissions.[3] On a cost-benefit analysis, those wanting to hold states accountable for the impacts of climate change would thus be better off pursuing cases against the historic and currently highest polluters, none of which are to be found on the African continent.

On the other hand, there are at least three considerations for why cases may be brought against African states. First, not all African countries contribute equally to GHG emissions, and there thus is a possibility that claims could arise between African countries *inter se*. For example, in 2017 South Africa accounted for approximately

1 J Setzer & C Higham 'Global trends in climate change litigation: 2021 snapshot' (2021) 5.

2 Sabin Centre for Climate Change Law 'Global climate change litigation database', Global Climate Change Litigation - Climate Change Litigation (climatecasechart.com) (accessed 10 October 2022).

3 United Nations 'United Nations Fact Sheet on Climate Change: Africa is particularly vulnerable to the expected impacts of global warming' (2006), United Nations Fact Sheet on Climate Change - Africa is particularly vulnerable to the expected impacts of global warming (unfccc.int) (accessed 5 August 2022).

1,3 per cent of global CO2 emissions, whereas Kenya accounted for 0,05 per cent and Liberia for only 0,003 per cent.[4] There is a possibility that this inequality could give rise to interstate litigation before African regional bodies. Second, under climate change obligations, states not only have duties to mitigate climate change, but also to adapt to climate change, something which is particularly pertinent in Africa, given that the consequences of climate change have already started to manifest. Most parts of the continent are experiencing some of the consequences of human-induced climate change, including more erratic weather patterns. For example, the Horn of Africa experienced extreme droughts through most of 2018 and 2019, followed by acute flooding at the end of 2019.[5] Residents of these countries could turn to human rights bodies to argue that the state failed in their obligations to put in place sufficient safety nets or, for example, to build sea walls to keep salination from affecting agriculture and food sources.[6] Third, states have obligations not only to respect human rights but also to protect their citizens against third party violations, and to fulfil or realise human rights. Thus, while they may not be the direct cause of the negative consequences of climate change, to the extent that it impacts negatively on the human rights of people in their territories, states have obligations to mitigate such consequences, including, as will be discussed below, through cooperation with developed states for the transfer of aid and technology.[7]

Given the potential for litigating climate change from a human rights-based approach in the Global South and Africa specifically, the aim of this article is to systematically review the requirements for successful litigation before one of the African human rights bodies, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The focus on children is based on three considerations: First, children are more likely to suffer human rights impacts as a result of climate change. Second, they have less say in political processes regarding protection against

4 H Ritchie & M Roser 'CO_2 and greenhouse gas emissions' (2020), Emissions from food alone could use up all of our budget for 1.5°C or 2°C – but we have a range of opportunities to avoid this - Our World in Data (accessed 20 April 2021).

5 World Meteorological Organisation 'State of the Climate in Africa' (2020) 3.

6 See, eg, Communication 3624/2019 *Billy & Others v Australia* United Nations Human Rights Committee (2022).

7 African Union 'Common Africa Position (CAP) on the post-2015 development agenda' (2014) 19-20, 32848-doc-common_african_position.pdf (au.int) (accessed 13 June 2022). The Common Africa Position recognises that Africa stands to suffer the most from climate change, takes the stand that the continent is not responsible for the factors causing climate change, and calls upon developed nations to reduce emissions and provide financial support and technology transfer to developing countries to increase capacity to respond to climate change.

climate change and, therefore, are potentially more likely to turn to the courts for vindication of their rights. Third, there is a close link between the rights of children and that of future generations, which is of particular concern in the context of climate change litigation, given the need for preventative action for future harm. The article considers the potential for successful child rights-based climate change litigation before the African Children's Committee on the basis of its record of substantive rights protection, its procedural safeguards, and potential remedies, and draws some conclusions regarding the types of cases that could succeed before the African Children's Committee.

Following this introduction, the second part of the article provides a brief overview linking children's rights with the climate crisis, whereafter part 3 delves into the potential for substantive rights protection by the African Children's Committee, based on the jurisprudence, soft law instruments and statements of the Children's Committee in which it elaborates its approach to climate change and environmental considerations more broadly. Part 4 is concerned with procedural considerations, including standing and jurisdiction, as well as the admissibility and content requirements for bringing a case before the African Children's Committee, as well as potential remedies related to current and future climate harms before the Children's Committee. While the jurisprudence of the African Children's Committee is limited,[8] the article draws on the relevant provisions of the African Charter on the Rights and Welfare of the Child (African Children's Charter)[9] and existing jurisprudence, soft law instruments and other sources from the African Children's Committee to distil existing principles of substance and procedure that may be relevant in climate litigation.

2 Children's rights and the climate crisis

Children are considered one of the groups that is most vulnerable to the negative impacts of climate change.[10] They bear the brunt of the impact of anthropogenic GHG emissions, and pollution of air, water

8 At the time of writing only nine cases before the African Children's Committee had been finalised. See African Children's Committee Table of Communications, https://www.acerwc.africa/table-of-communications/ (accessed 10 December 2022).

9 At present all but five African states, namely, Morocco, Sahrawi Arab Democratic Republic, Somalia, South Sudan and Tunisia, have ratified the African Children's Charter; African Children's Committee - African Committee of Experts on the Rights and Welfare of the Child (accessed 10 October 2022).

10 A WHO-UNICEF-Lancet Commission 'A future for the world's children?' (2020) 5.

and land linked to industry activities.[11] Climate change can have a range of impacts on a child's well-being, including through impacts on their mental and physical health, by inducing forced migration, which disrupts stable environments for growing up, as well as impacts on the right to education, for example where food security is disrupted and children are required to help produce food or work to supply an additional stream of income, which in turn in some cases might result in the economic exploitation of children.[12] Living in an environment with these stressors could also negatively impact on children's rights to leisure and recreation.[13] As is clear from this exposition, the various child rights concerns resulting from climate change are also highly interlinked with one another. Furthermore, girl children have a 'particular vulnerability to the effects of climate change [resulting] from the intersectionality of their vulnerabilities based on sex, age and in the African context, often also religious and socio-economic circumstances'.[14] Intersectional conditions can also increase the burden on other categories of children, such as children with disabilities, children living in poverty or in single parent or even child-headed households, or for children belonging to indigenous and rural communities that depend directly on the land for their livelihoods. In Africa, the United Nations Children's Fund (UNICEF) has projected that around 125 million children could be subjected to the consequences of climate change by 2030, including through displacement, water scarcity and malnutrition.[15]

Because of its impacts in particular on malnutrition and water scarcity, one of the greatest risks of climate change to children's rights involves their rights to health and life. For example, it is estimated that globally 88 per cent of the total burden of climate change-related diseases occurs in children under the age of five years.[16] The impact of climate change on children's health can either be immediate, thus manifesting during childhood, or can take the form of long-term damage that manifests much later in adulthood.[17] The immediate impacts of climate change include physical injuries caused by

11 As above.
12 E Boshoff 'Protecting the African child in a changing climate: Are our existing safeguards adequate?' (2017) 1 *African Human Rights Yearbook* 23 27-28.
13 K Arts 'Children's rights and climate change' in C Fenton-Glynn (ed) *Children's rights and sustainable development: Interpreting the UNCRC for future generations* (2019) 216-220.
14 Arts (n 13) 27.
15 J Guillemot & J Burgess 'Children's rights at risk' in UNICEF *The challenges of climate change: Children on the front-line* (2014) 47.
16 S Adhoot et al 'Global climate change and children's health' (2015) 136 *Paediatrics* 3.
17 Y Akachi et al 'Global climate change and child health: A review of pathways, impacts and measures to improve the evidence base' (2009) UNICEF Discussion Paper 2.

floods, heat waves, respiratory diseases and trauma. Extremely high temperatures that result in heatwaves could cause heat exhaustion, heat stroke, and even permanent neurological damage and death.[18] The impact of heatwaves on pregnant women and their foetuses is particularly negative, including delayed brain development in unborn children, which affects educational attainment and work outcomes later in life.[19]

Climate change further threatens access to potable water and affects crop yields, thereby prejudicing food production.[20] These in turn induce malnutrition which has a short and long-term adverse impact on children's health, development and well-being. Malnutrition, in addition to being a challenge on its own, exacerbates diseases that affect children. Furthermore, climate change affects the spread of vector-borne diseases such as malaria, dengue and schistosomiasis. Children are more vulnerable to these diseases and are more likely to experience adverse health outcomes than the rest of the population.[21]

The African Children's Committee has taken note of this range of negative consequences arising from climate change on the rights and welfare of African children. While no child rights climate cases have been brought before its communications procedure, the Committee has recently embarked on a rights-based approach to tackling challenges faced by children in relation to climate change through other avenues at its disposal.

3 Child rights-based approach of the African Children's Committee and its engagement with climate change

3.1 Child rights-based approach

The legal basis for the protection of children's rights on the African continent is the African Children's Charter,[22] which establishes not only a range of rights, but also four principles that have to be taken into account in every decision affecting a child. The African Children's Committee is an African Union (AU) organ established by the African

18 JG Zivin & J Shrader 'Temperature extremes, health, and human capital' (2016) 26 *Children and Climate Change* 39.
19 Zivin & Shrader (n 18) 37 39.
20 Akachi et al (n 17) 2.
21 As above.
22 African Charter on the Rights and Welfare of the Child.

Children's Charter, composed of 11 members serving in their individual capacity and with the mandate to promote and protect children's rights as enshrined in the Children's Charter.[23] It became operational in 2002. Its mandate includes receiving communications (complaints) from 'any person, group or non-governmental organisation recognised by the Organisation of African Unity [now AU], by a member state or the United Nations relating to any matter covered by this Charter'.[24]

In addition, the African Children's Committee receives state reports and adopts Concluding Observations, undertakes follow-up missions and investigations, holds regular sessions, undertakes studies and makes declarations and adopts General Comments.[25] Article 46 of the African Children's Charter further empowers the African Children's Committee to draw inspiration from other international instruments in interpreting the provisions of the African Children's Charter.

Unlike the other African human rights instruments, such as 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), the African Children's Charter does not provide for the right to a healthy and clean environment. Nevertheless, there are provisions in the African Children's Charter that would be of particular relevance in the context of climate change. As noted before, many different rights of children can be affected by climate change, and the African Children's Charter makes provision for a right to survival and development (article 5), which also includes a right to life; a right to education (article 11) which includes 'the development of respect for the environment and natural resources'; the right to leisure and recreational activities (article 12); the right to health and health services (article 14); and protection against child labour (article 15). The African Children's Charter also makes specific provision for the protection of children in specific categories of vulnerability, including children with disabilities (article 13) and child refugees (article 23). These rights taken together provide strong protection for African children against a range of rights violations that may result from the impacts of climate change.

Without necessarily mentioning climate change, the African Children's Committee through previous engagements with states has dealt with issues such as drought, malnutrition, access to

23 Arts 32, 33 & 42 African Children's Charter.
24 Art 44 African Children's Charter.
25 https://www.acerwc.africa/ (accessed 20 March 2021).

drinking water and the like, that are closely linked with climate change, and interpreted the provisions of the African Children's Charter in a way that supports strong protection against climate impacts.[26] In one of its communications, the *Talibés* case, on the plight of Talibés in Senegal, the Children's Committee found that the right to survival and development in the African Children's Charter encompasses 'protection of children's rights to access … clean water, the right to live in a safe and clean environment'.[27] Additionally, the African Children's Committee in its Concluding Observations and recommendations to the state report of Lesotho stressed the importance of ensuring 'the supply of clean drinking water to all children, under the right to survival and development', and it is noted elsewhere that this recognition is crucial in a climate change context which in future will result in increased water-distressed areas on the continent.[28]

Where there is not a specific right provided for in the African Children's Charter, or where there are only these indirect protections, such as in the context of climate change, the four principles set out in the African Children's Charter are crucial in ensuring a child rights-based approach in relation to all government action. The four principles are the best interests of the child; the principle of non-discrimination; the right to life, survival and development; and the principle of participation. The importance of these principles lies in the fact that they are an embodiment of the interrelatedness and interdependence of children's rights and place a wide obligation on state parties to take 'all possible positive measures towards the realisation of the rights of the child'.[29] While limited space prohibits an in-depth discussion of these principles, the principle of the best interests of the child may be used as an illustration of how these principles could be applied to ensure a child rights-based approach to climate impacts. While the best interests of the child is a well-established principle in the area of children's rights, the African Children's Charter elevates this principle to a central position. The

26 Concluding Observations and Recommendations of the African Children's Committee on Republic of the Sudan (2013) 4; Republic of Malawi (2018) 6; Kingdom of Lesotho (2015) 8; and Republic of Benin (2019) 6. See further E Boshoff & SG Damtew 'Children's right to sustainable development under the African human rights framework' (2019) 3 *African Human Rights Yearbook* 119.

27 *Centre for Human Rights (University of Pretoria) & La Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) (on behalf of the Talibés) v Senegal* (2012) para 42.

28 Boshoff & Damtew (n 26) 134.

29 General Comment 5 'State Party Obligations Under the African Charter on the Rights and Welfare of the Child (Article 1) And Systems Strengthening For Child Protection' ACERWC (2018) 6, https://www.acerwc.africa/wp-content/uploads/2019/09/African Children's Committee%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf (accessed 11 March 2021).

United Nations (UN) Convention on the Rights of the Child (CRC) protects the best interests as '*a* primary consideration' in all decisions concerning a child, whereas the African Children's Charter requires it to be *the* primary consideration in *all actions* concerning children.[30] As *the* primary consideration, no other consideration, such as economic or political interest, can be given greater weight than what would be in the best interests of children. It should further be noted that the best interests of the child applies to decisions that concern children both directly as well as indirectly, and would therefore have to be complied with even in decisions such as those related to development of fossil fuel sources or green energy sources, which do not directly concern children.

A further illustration of the strength of the best interests of the child principle in the climate change context is to be found in the African Children's Committee General Comment 5 (GC5) on state obligations.[31] Under GC5, an important provision regarding state obligations under the African Children's Charter provides:

> The child's best interests include short term, medium term and long term best interests. For this reason, State actions which imperil the enjoyment of the rights of future generations of children (eg allowing environmental degradation to take place, or inappropriate exploitation of natural resources) are regarded as violating the best interests of the child standard.

While climate change is not directly mentioned here, it clearly is included under environmental degradation which 'imperil[s] the enjoyment of the rights of future generations'. The explicit linking by the African Children's Committee of the best interests of the child with environmental considerations would also be an important building block in future litigation on climate change. The GC5 also requires states to monitor and prevent business activities that might 'cause environmental degradation to the prejudice of children's rights'. This places a strong duty on states, which can be enforced by the African Children's Committee, in relation to their obligation to protect children against third party actions.

The GC5 further also demonstrates the relevance of the principle of participation, and requires states to 'consult children in the formulation of plans, policies and laws that have a bearing on their interests, and to ensure that child participation in governance is devolved to regional and district level'.[32] This need for the recognition

30 Art 4 African Children's Charter.
31 African Children's Committee General Comment 5 para 4.2.
32 African Children's Committee General Comment 5 para 6.8.

of children's rights to participation would be relevant in relation to responses to erratic weather events and disasters as a result of climate change (adaptation), as well as development policies and longer-term plans around national energy generation, and the necessity to limit GHG emissions during these activities (mitigation).

In relation to the principle on the right to life, survival and development, under the African Children's Charter the state has a duty to ensure the realisation of these rights 'to the maximum extent possible'.[33] The reference to 'maximum extent possible' places a strong obligation on states, which means that in cases of climate litigation there is a high burden of proof on states to show that they have been ensuring (or fulfilling) these rights to the maximum extent through their climate policies and practices.

The African Children's Committee has adopted a child rights-based approach and made the link between the various rights and principles contained in the African Children's Charter, such as the right to health and the principle of the best interests of the child, and other rights with a healthy environment, and now also explicitly with climate change.[34]

3.2 Engagement of the African Children's Committee on climate change and child rights

The African Children's Committee has arguably been the African human rights body that has been the most proactive in expressing concern about the human rights implications of climate change. While the African Commission has through the years adopted a range of resolutions and statements on climate change, and made mention of the impacts of climate change on various vulnerable groups, its proposed study on climate change, the first real work that it would have undertaken on climate change and its impacts on human rights realisation in Africa, has been pending since 2009.[35] The African Children's Committee, on the other hand, took a proactive step

33 Art 5(2) African Children's Charter.

34 Resolution 18/2022 of the African Children's Committee Working Group on Children's Rights and Climate Change to Integrate a Child Rights-Based Approach into Climate Change Action, March 2022.

35 Resolution 153 on Climate Change and Human Rights and the Need to Study its Impact in Africa – ACHPR/Res.153(XLVI)09; Resolution 271 on Climate Change in Africa – ACHPR/Res.271(LV)2014; 342 Resolution on Climate Change and Human Rights in Africa – ACHPR/Res.342(LVIII)2016; Resolution 417 on the Human Rights Impacts of Extreme Weather in Eastern and Southern Africa due to Climate Change – ACHPR / Res 417 (LXIV) 2019; Resolution 491 on Climate Change and Forced Displacement in Africa – ACHPR/Res. 491 (LXIX)2021.

through the establishment in September 2020 of a Working Group on Children's Rights and Climate Change, discussed below.[36]

In 2016 the Children's Committee established a 25-year action plan entitled 'Agenda 2040: Fostering an Africa fit for children', which guides its work on the continent.[37] The concept of 'climate change' is referred to only a single time in Agenda 2040, in relation to Aspiration 9, 'Every child is free from the impact of armed conflicts and other disasters or emergency situations'.[38] This aspiration, nevertheless, in its action steps requires that states take steps to ensure that '[c]hildren are equipped to be resilient in the face of disasters or other emergency situations'. While the Action Plan is not a binding document, this demonstrates the recognition by the African Children's Committee of the obligations on states to build resilience which, in relation to climate change, would require taking steps to adapt to a changing climate. Aspiration 9 further recognises that '[d]espite their precarious position, children are often overlooked in states' disaster management and response', not only reaffirming the link between disasters and internal displacement and flow of refugees, but also obligating states to take steps to include children's rights concerns in climate responses. Agenda 2040 also engages indirectly with climate change through the engagement of the document with issues such as survival, health, issues of malnutrition, quality education, and providing that the views of the African child matter.

The more explicit and extensive engagement of the African Children's Committee with the issue of climate change commenced with its study on children on the move in Africa. This study, adopted in 2018, found, among others, that climate change is one of the key drivers of children's movement on the continent.[39] The study found that extreme weather disasters, floods and droughts are responsible for the displacement of millions of children across the continent. It further found that climate change-induced drought and resource scarcity lead to conflict, exploitation and violence against children and child marriage where girls are exchanged for livestock for the survival of the family.[40] However, as the main focus of the study is

36 African Children's Committee 'African Children's Committee Establishes Working Groups under its Special Mechanisms' (2020), African Children's Committee - African Committee of Experts on the Rights and Welfare of the Child (accessed 12 February 2021).
37 African Children's Committee *Agenda 2040: Fostering an Africa fit for children* (2016).
38 African Children's Committee (n 37) 45.
39 African Children's Committee 'Mapping children on the move within Africa' (2018) 53.
40 African Children's Committee (n 39) 54.

on children on the move, it only captures some of the impacts of climate change on various rights and welfare of children in Africa.

In 2020 the African Children's Committee embarked on a more direct initiative to tackle the issue of climate change from a child rights perspective, by establishing a Working Group on Children's Rights and Climate Change.[41] The resolution establishing the Working Group cites many reasons for the need to focus on this thematic area, including the alarming and overarching negative impact of climate change on the ecosystem in general, and the disproportionate impact on least-developed and developing countries.[42] The resolution stresses that climate change has a disproportionate negative impact on Africa due to limited capacity to respond to the phenomenon and the high reliance on water and land resources for survival.[43] However, the main justification for the establishment of the Working Group under the African Children's Committee is the special vulnerability of African children to the impacts of climate change.[44] The resolution notes that due to their growing bodies and developing minds, children are most vulnerable to the risks of climate change and that climate change exacerbates the already-existing vulnerabilities of children.[45] The resolution draws a direct link between the impact of climate change and various rights enshrined in the African Children's Charter, including its impact on the rights to survival and development, health and welfare, education, protection from harmful practices, non-discrimination and protection from violence.[46] As the wording used in the resolution indicates, this is not an exhaustive list of rights affected, but merely an illustrative list indicating the rights that are most at stake. The explicit recognition, in an important soft law instrument such as a resolution, of the link between climate change and specific child rights as well as the principles in the Children's Charter is an important development that envelopes a child rights-based approach to climate change, particularly given the relevance of the principles as discussed above in strengthening the application of the rights protected.

The Working Group is expected to undertake several activities to tackle the impact of climate change on the rights and welfare of children in Africa. It can also receive information regarding

41 African Children's Committee 'Working Groups', https://www.acerwc.africa/working-groups/ (accessed 17 February 2021).
42 African Children's Committee 'Resolution on the Establishment of Working Group on Children's Rights and Climate Change' (2020) 1.
43 As above.
44 As above.
45 African Children's Committee (n 41) 2.
46 As above.

climate change and children's rights violations on the continent. The Working Group, with the wide mandate given to it, has the potential to spearhead the child rights-based approach to climate change in Africa and galvanise various stakeholders towards this approach. Moreover, as the membership of the Group is composed of members of the African Children's Committee as well as external experts, the discussions and inclusion of new external expertise in the Working Group will likely influence and strengthen the wider work of the African Children's Committee on climate change, such as in the consideration of state party reports, the consideration of communications and the undertaking of on-site investigations.[47]

Apart from the important fact that the African Children's Committee has been open to acknowledging the links between environmental degradation, climate change and children's human rights, there are further strategic considerations for why litigants may want to bring cases before it, rather than before other international tribunals or courts. The first is the very important link made between the African Children's Committee between children's rights and the rights of future generations. As we noted earlier, '[s]ome scholars have argued that this concern with future generations means that issues of the environment and sustainability cannot be dealt with within a human rights framework, as they concern generations who are not yet alive, and thus have no entitlement to human rights (yet)'.[48]

Clearly, the recognition by the African Children's Committee that the best interests of the child requires that the rights of future generations (of children) also be taken into account, puts this debate at rest insofar as the African Children's Committee is concerned, and litigants would not have to convince it on this ground. Furthermore, while climate change was previously understood to be limited to future generations, current research, as indicated above, shows that the consequences are already manifesting, which means that arguments about climate change impacts do not have to rely on future impacts only. Nevertheless, future harm remains relevant, since climate change is a form of slow violence that manifests over time, with the cause and effect dispersed over space and time.[49]

47 It is particularly crucial for the issue to be raised during consideration of state party reports on the implementation of the Charter as this mechanism enables the holistic monitoring of all the rights in the Charter and has the potential to prevent violations by proactively monitoring steps taken by state parties.
48 Boshoff & Damtew (n 26) 130.
49 R Nixon *Slow violence and the environmentalism of the poor* (2011).

4 Procedural considerations in bringing climate cases before the African Children's Committee

The previous part demonstrates that there are clear protections in the African Children's Charter of children's rights that may be impacted by climate change. It further demonstrates the far-reaching contribution of the principles of the child rights-based approach, as well as the engagement of the African Children's Committee with the issue of climate change to date. Taken together, these considerations allow us to state with high confidence that it is likely that a case brought before the African Children's Committee would have a strong substantive basis in the African Children's Charter, and would have a high likelihood of succeeding on the merits. Nevertheless, there are several procedural matters that should also be in place for a case to succeed which, in the case of international tribunals such as the African Children's Committee, are contained in content and admissibility requirements that must be complied with before a case can be considered on the merits.

While the African Children's Charter and the African Children's Committee's Rules of Procedure do not extensively provide for the procedures around communications, the African Children's Committee adopted Guidelines for the Consideration of Communications, and revised these Guidelines in 2014.[50] These Guidelines draw on the procedures before the African Commission,[51] and set out six conditions[52] that must be satisfied for communications to be considered on the merits, along with requirements on the form

50 African Children's Committee 'Revised Guidelines for the Consideration of Communications' (2014), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjjz_urt8v6AhUM6CoKHQzlCS4QFnoECAkQAQ&url=https%3A%2F%2Facerwc.africa%2Fwp-content%2Fuploads%2F2018%2F07%2FRevised_Communications_Guidelines_Final-1.pdf&usg=AOvVaw0Xka9fmaaAw8z7bFipSwGN (accessed 6 October 2022).

51 J Sloth-Nielsen 'Children's rights litigation in the African region: Lessons from the communications procedure under the ACRWC' in T Liefaard & JE Doek (eds) *Litigating the rights of the child* (2014) 249.

52 The African Children's Committee Revised Guidelines for Consideration of Communications outline the conditions for admissibility of a communication under secs II and IX. Under sec two the general principle is laid down as follows: 'The Committee shall consider a communication against a State Party alleging violations of the rights and welfare of the child enshrined in the African Children's Charter only if the communication fulfils the requirements set forth in the African Children's Charter and these Guidelines,' after which the requirements of form and content are laid down. Under sec IX(1) the guidelines list six additional conditions for admissibility. Hence, combining these six requirements and merging the requirements of form and content to add the seventh one, it can be considered that there are broadly speaking seven requirements for admissibility. The practice of the Committee further strengthens this understanding; see Communication 006/Com/002/2015 *The Institute for Human Right and Development In Africa and Finders Group Initiative on Behalf of TFA (A Minor) v Government of the Republic of Cameroon* (2018) paras 21 & 22-33.

and content.[53] The six main admissibility requirements are that the communication (i) must be compatible with the provisions of the Constitutive Act of the African Union (AU) and the African Children's Charter; (ii) is not exclusively based on information circulated by the media or is manifestly groundless; (iii) does not raise matters pending settlement or previously settled by another international body or procedure in accordance with any legal instruments of the AU and principles of the United Nations Charter; (iv) is submitted after having exhausted available and accessible local remedies, unless it is obvious that this procedure is unduly prolonged or ineffective; (v) is presented within a reasonable period after exhaustion of local remedies at the national level; and (vi) does not contain any disparaging or insulting language. Some of these, such as (ii), (iii) and (vi) above, arguably do not raise any particular issues in the context of climate change that differentiate it from other cases. In terms of content requirements, the Guidelines further require information regarding '(w)here possible, the name of the victim or victims, in case they are not the complainant or complainants, and of any public official or authority who has taken cognisance of the fact or situation alleged', and '(t)he state the complainant considers responsible, by act or omission, for the violation of any of the rights and welfare of the child recognised by the African Children's Charter'.

The first requirement, namely, that the communication must be compatible with the provisions of the Constitutive Act of the AU and the African Children's Charter requires in the first place that there must be a *prima facie* violation of the provisions of one of these two treaties, that is, that the Committee must have material jurisdiction over the case. Given the wide range of children's rights that may be impacted by climate change, a communication could be submitted on *prima facie* proof of violation of any of a number of provisions, such as the right to life, survival and development and health, among others. The first requirement has also been interpreted to contain requirements in relation to other forms of jurisdiction, such as territorial, temporal and personal jurisdiction. In order to simplify the discussion, and focus on the different content and admissibility requirements in the context of climate change cases, this part discusses the requirements that have not yet been disposed of under the following headings below: identifying the victims of climate harms; African states as duty bearers in relation to climate claims;

53 African Children's Committee Revised Guidelines for the Consideration of Communications (2014) sec II(1); African Children's Committee Communication 002/Com/002/2009 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya* (2009) para 15 (*Nubian* case).

the material jurisdiction of the Committee; harm suffered versus (potential) future harm; and exhaustion of local remedies. This part concludes with a discussion of the potential remedies that may be granted by the Children's Committee, as a further consideration on whether a climate case should be brought before the African Children's Committee.

4.1 Identifying the victims

The nature of climate change is such that its impact is generally collective, with a large number of victims who may or, much more likely, may not all be individually identified. Some jurisdictions allow for broad standing, and do not have too many limitations on who may bring cases on behalf of themselves or in the public interest. In other jurisdictions the matter of standing has often been the reason why climate cases have not proceeded, in that the persons instituting the claim must (a) be the victims (directly or indirectly) and (b) may claim only on their own behalf and not in the public interest more generally. This is an argument that was advanced by the government of The Netherlands in the case of *Urgenda v Netherlands,* that the complainants were not direct or indirect victims and hence cannot institute the proceedings. This is because in the case the alleged violations were based on the European Convention on Human Rights (European Convention), and article 34 of the Convention allows only complaints from victims.[54] However, the ruling of lower courts in The Netherlands, which were later upheld by the Constitutional Court, took the position that Dutch law allows the complainant to institute proceedings on behalf of residents of the country who are victims of the alleged violations of the right to life and the right to family life due to the impact of climate change.[55] Thus, the limitation on standing was overcome, and it was not necessary to identify every individual that was affected.

Recently, climate litigation on behalf of large groups of children has come before domestic and international judicial and quasi-judicial bodies. One of the latest cases is one that is brought before the UN Committee on the Rights of the Child (CRC Committee) on climate change, by 16 children from various countries, including

54 Supreme Court of The Netherlands *The State of The Netherlands and Stichting Urgenda* (2020) para 2.3.1.
55 *Urgenda* (n 54) para 5.9.3.

African countries (South Africa and Tunisia) against five defendant states.[56] This case presented no challenges to the requirement of identification of victims, as noted by the CRC Committee in the admissibility decision: 'The authors have *prima facie* established that they have *personally experienced* a real and significant harm in order to justify their victim status'.[57] Hence, victim identification was not an issue as the complainants elaborated on how they were personally affected by the climate change impact of the acts and omissions of the respondent states.[58]

The question that thus arises is to what extent the African Children's Committee requires that victims bringing cases before it have to be individually identified and to what extent they may bring cases only on their own behalf. The African Children's Charter provides that any person, group or non-governmental organisation recognised by the AU, a member state, or the UN can bring a communication before the African Children's Committee.[59] The Revised Communication Guidelines further elaborate on this by stating that individuals, groups or legal persons can bring communications before the African Children's Committee on their own behalf or on behalf of third parties, alleging violations of one or more of the provisions of the Charter.[60] Hence, communications can directly be brought by a child or group of children or a third party on behalf of a child or group of children. The African Children's Committee thus has very wide provisions on standing.

In fact, in most of the communications considered by the African Children's Committee, the case was instituted not by the direct or indirect victims, but by someone else on their behalf. In the *Talibés* case[61] the complainants, an academic institution and a non-governmental organisation (NGO), brought the communication on behalf of approximately 10 000 children in Senegal, known as Talibés, who are forced to work as street beggars.[62] The alleged victims were not listed individually, but all those belonging to the Talibés group allegedly were direct victims, with the case focusing

56 Table of pending cases before the Committee on the Rights of the Child, https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf (accessed 19 February 2021).
57 UNCRC *Chiara Sacchi & Others v Argentina* (2021) 14 (our emphasis).
58 Communication to the UNCRC *Chiara Sacchi & Others v Argentina & Others* (2019) paras 253-274.
59 Art 44(1) African Children's Charter.
60 African Children's Committee 'Revised Guidelines for the Consideration of Communications Section' (2014) (1).
61 *Talibés* case (n 27).
62 *Talibés* case para 2.

on the nature and pattern of violations suffered by a clearly definable but not individually identified group.

In the *Nubian* case the applicants brought the communication on behalf of the children of one ethnic group called Nubians who reside in Kenya. All Nubian children were said to have been denied their right to citizenship in Kenya as a result of discrimination.[63] Finally, in *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania*, a case against the government of Tanzania regarding the expulsion of pregnant girls from school, the complainants brought the communication on behalf of Tanzanian 'pregnant and married schoolgirls'.[64] While the facts in the communication make it clear that only certain adolescent Tanzanian girls were directly victimised by the alleged violations, the communication nevertheless is concerned with all Tanzanian girls who may potentially be impacted should they become pregnant. All these communications and other similar ones were declared admissible by the African Children's Committee. Hence, it is safe to assume that the rules and the practice of the Children's Committee are very flexible when it comes to allowing litigation on behalf of a large group of children, in that not only may a case be brought by someone other than the victims on their behalf, but the individual victims also do not have to be specifically identified, as long as the group to which they belong is well defined (even if very large).

4.2 African states as duty bearers in relation to climate claims

A controversial matter when it comes to responsibility for climate change in Africa may be holding African state parties to the Charter accountable for human rights violations for which they are not directly responsible, given that the contribution of African states to climate change currently is minor. In the AU Common African Position on the post-2015 development agenda, member states unanimously agreed that while Africa stands to suffer most from climate change, it is not responsible for the factors causing climate change.[65] As noted in the introduction regarding the contribution of Africa to total global GHG emissions, this position is not far from reality. Nevertheless, African countries have willingly entered into various commitments to take measures to tackle climate change, both on the side of mitigating impacts of climate change, and also

63 *Nubian* case (n 53) para 5.
64 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* (2020) para 1.
65 African Union 'Common Africa Position (CAP) on the post-2015 development agenda' (2014) 19-20.

to adapt to the consequences.[66] One indication of that is the high level of ratification of the Paris Agreement to the United Nations Framework Convention on Climate Change,[67] which over 90 per cent of African countries have ratified.[68] Furthermore, 52 African countries have submitted their first nationally-determined contributions (NDCs) to the Paris Agreement.[69] In their NDCs African countries have committed to take various steps to reduce their greenhouse gas emissions and to build resilience to adapt to the impact of climate change.[70] NDCs, as targeted and measurable tools, currently are the most important global policy frameworks to tackle climate change, hence it is important to leverage on them in ensuring accountability for child rights violations.

The African Children's Charter in article 46 explicitly mandates the African Children's Committee to 'draw inspiration from international law on human rights and other instruments adopted by the United Nations and by African countries in the field of human rights'. Furthermore, article 1(2) of the Children's Charter provides that '[n]othing in this Charter shall affect any provisions that are more conducive to the realisation of the rights and welfare of the child contained in the law of a state party or in any other international convention or agreement in force in that state'. Therefore, one possibility for determining what the standards are that are required of African states in upholding human rights in the context of climate change, is to look at the commitments that they made in other instruments. Thus, the African Children's Committee could hold African countries responsible for violating the African Children's Charter by connecting the various rights in the Charter with NDC commitments. NDCs can be used as a tool to identify what measures should be taken by states to protect the rights of children under the Charter. Hence, when states fail to meet their self-determined NDC

66 See, eg, the draft African Climate Change Strategy (2020-2030), https://archive.uneca.org/sites/default/files/uploaded-documents/ACPC/2020/africa_climate_change_strategy_-_revised_draft_16.10.2020.pdf (accessed 10 October 2022) as well as strategies on Disaster Risk Reduction, Weather and Climate services, biodiversity and ecosystem-based solutions, in which the member states pledge to undertake a range of measures to mitigate and reduce the impact of climate change.

67 UN General Assembly United Nations Framework Convention on Climate Change: Resolution/adopted by the General Assembly 20 January 1994, A/RES/48/189.

68 United Nations Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_ no=XXVII-7-d&chapter=27&clang=_en (accessed 23 February 2021). All African countries, except Eritrea, Libya and South Sudan, have ratified the agreement.

69 United Nations Climate Change 'Climate change is an increasing threat to Africa', https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa (accessed 21 February 2021).

70 As above.

commitments, it may result in the violation of the rights protected in the Charter.

There are several examples of where the application of standards set in another area has led to findings of human rights violations. One example is the *Urgenda* case, where in the Dutch Supreme Court judgment the Court relied on article 2 of the Paris Agreement, which sets 2°C as the highest level of increased global temperatures that can be allowed. The Court then referred to the best available science under the 2007 report of the Intergovernmental Panel on Climate Change (IPCC), which states that in order to meet the 2°C, industrialised states have to reduce their GHG emissions by 25 to 40 per cent by 2020. The Court's decision thus is based on the argument that in order to protect the human rights under the European Charter of Human Rights (article 2 on the right to life and article 8 on the right to respect for private and family life), the Paris Agreement standard of reduction in GHG emission is the applicable standard that would determine whether there was compliance with human rights obligations. Similarly, in *AS, DI, OI and GD (represented by counsel, Mr Andrea Saccucci) v Italy*,[71] the UN Human Rights Committee found a violation by Italy of the human rights of migrants on a sinking boat in the Mediterranean who were under the 'effective control' of Italy, by reference to the 'relevant legal obligations incurred by Italy under the international law of the sea, including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations'.[72] The African Children's Committee also already in the *Northern Uganda* case showed that instruments unrelated to human rights, such as those related to international humanitarian law, may be relevant in this regard.[73]

For these reasons, the commitments of African states in NDCs under the Paris Agreement to the extent that they contain provisions more conducive to the realisation of child rights, could be linked to the rights contained in the African Children's Charter and aid in establishing the standards that should be applied in finding violations of the relevant provisions of the Children's Charter. Even though NDCs vary in level of commitment, most of them contain elements of food

71 UNHRC *AS, DI, OI and GD (represented by counsel, Mr Andrea Saccucci) v Italy* CCPR/C/130/D/3042/2017.
72 *AS, DI, OI and GD* (n 71) para 7.8.
73 *Michelo Hunsungule & Others (on behalf of children in Northern Uganda) v The Government of Uganda* (2005) para 39.

security, non-discrimination, participation and the like that are linked to human rights norms.[74] The duty to fulfil children's rights obliges states to take all necessary measures to facilitate their realisation.[75] In the context of climate change, African countries can take measures to mitigate it by protecting natural carbon sinks and increasing the adaptation capacity of children to the impacts of climate change.[76] In determining adaptation measures, states should, among others, assess how climate change affects specific rights and identify actions that can be taken to lessen the impact on children.[77] However, the commitments entered into by African countries under their NDCs have high financial implications. The African Development Bank estimates that Africa will need US $3 trillion to implement its NDCs by 2030.[78] Accordingly, many of the commitments entered into by African countries are conditional upon receiving technical and financial support.[79]

Hence, when litigating climate change-related child rights violations, it is important to factor in the need to take steps to foster international cooperation to meet mitigation and adaptation targets. The Paris Agreement itself stresses the need for cooperation and specifically calls on developed countries to provide financial resources to developing countries for mitigation and adaptation measures to implement obligations under the agreement.[80] However, there is a large gap between climate finance needs and the current level of domestic and international climate financing.[81] Hence, African countries should, in fulfilling their human rights obligations in relation to climate change, take a proactive role in seeking financial and technical cooperation from developed countries in meeting their commitments.

Furthermore, based on the positive obligations to protect their citizens against human rights harms perpetrated by third parties, African states have duties towards African children to limit the

74 S Duyck et al 'Human rights and the Paris Agreement's implementation guidelines: Opportunities to develop a rights-based approach' (2018) 12 *Carbon and Climate Law Review* 7.
75 Art 1 African Children's Charter.
76 OHCHR 'Understanding human rights and climate change' (2015) 2.
77 As above.
78 African Development Bank 'Climate change in Africa', https://www.afdb.org/en/cop25/climate-change-africa (accessed 23 February 2021).
79 As above.
80 Art 9 United Nations Paris Agreement.
81 'Africa's USD 2,5 trillion of climate finance needed between 2020 and 2030 requires, on average, USD 250 billion each year. Total annual climate finance flows in Africa for 2020, domestic and international, were only USD 30 billion, about 12% of the amount needed.' Climate Policy Initiative, Climate Finance Needs of African Countries, Climate Finance Needs of African Countries – CPI (climatepolicyinitiative.org) (accessed 7 October 2022).

impact of climate change on their human rights. The third parties from whom African countries have an obligation to protect children include private sector actors and developed states that take the lead in GHG emissions. This is one of the added values of the human rights-based approach to climate change, in that human rights provide a higher threshold of responsibility on states by ensuring that they are responsible not only for their own actions but also for the actions of third parties that result in human rights violations.

In the *Northern Uganda* case cited above, the Ugandan government argued that while they recognise that the actions of private persons may be imputed to the government for purposes of finding a violation, they in fact had 'undertaken various measures in addressing the alleged violations'.[82] This very likely is a line of arguments that would also be followed by governments in relation to climate change adaptation and mitigation. While the African Children's Committee in the *Northern Uganda* case did not address this under the admissibility requirements where it was raised, in the substantive consideration of the matter, it found substantive gaps in the government systems that allowed violations to continue, and found some of the steps taken by the government to be inadequate.[83] The African Children's Committee held that 'protection of rights should lead to the well-being and welfare of children. In other words, the recognition of rights should be able to promote and improve the lived reality of children on the ground', and further held that the rights in the African Children's Charter are not subject to progressive realisation or available resources. These holdings place a considerable burden on states that intend to show that the steps they have taken are sufficient and also impose an obligation of result rather than obligation of conduct. Furthermore, in the *Talibés* case the African Children's Committee made a 'bold condemnation of acts of third parties against children for which states may be held accountable'.[84] This willingness of the African Children's Committee not to shy away from state responsibility for third party actions will be an important characteristic in relation to climate change litigation as well.

As discussed below, the duty to protect children from climate change-related rights violations also entails that states take proactive steps to prevent foreseeable future harm from occurring.[85] Such steps include the regulation of business activities and ensuring

82 *Northern Uganda* case (n 73) para 29.
83 *Northern Uganda case;* see eg para 48.
84 MG Nyarko & HM Ekefre 'Recent advances in children's rights in the African human rights system' (2016) 15 *The Law and Practice of International Courts and Tribunals* 385 390.
85 OHCHR (n 76) 2.

accountability and remedies for violations of human rights.[86] However, African countries may only be able to regulate business activities within their jurisdictions. Even though this remains an important measure to mitigate climate change, it is highly inadequate to combat the phenomenon when one considers the low contribution of Africa to climate change. Hence, there is a need to look into how African countries can ensure accountability of businesses (and possibly even developed states, while being cognisant of the power imbalances in the international system), for GHG emissions that are resulting in human rights violations on the continent. A failure to take measures to do this could be regarded as a failure of African countries to meet their duty to protect their citizens, specifically children, from violations of human rights as a result of climate change.

4.3 Material jurisdiction of the African Children's Committee: Harm suffered versus (potential) future harm

As noted above, one of the challenges that arise in the context of climate change is that while some of the consequences are already being felt today, many of the impacts will only worsen, and climate litigation should thus be able to hold states accountable not only for the human rights violations that have already taken place, but also to prevent and mitigate future harm. However, future harm is a contested issue in human rights law, which generally only makes a finding of human rights violations that had already taken place. In this regard, in bringing a case before the African Children's Committee, a complaint must, among others, contain an 'account of the act or situation that is the subject matter of the complaint, specifying the place and date of the alleged violations'.[87] In relation to climate change, it may at times be difficult to give such an account of the 'place and date' of the violation, where the cause and effect often cannot be directly correlated, and where the most severe consequences are likely to manifest many years from now in the future.

One way in which future harms may be brought under the remit of the courts is through environmental impact assessments (EIAs), as well as the more recently-developed social impact assessments and climate change impact assessments. EIAs are not only tools used at the national level to determine whether to go ahead with a project

86 S Duyck et al 'Human rights and the Paris Agreement's implementation guidelines" (2018) 12 *Carbon and Climate Law Review* 4.

87 African Children's Committee Revised Guidelines for the Consideration of Communications (2014) sec II art 3(e).

based on the potential environmental impacts that may result from such a project, but it is also a principle of international environmental law as one of the procedural obligations on all states to ensure the protection of the environment.[88] The conducting of social and climate change impact assessments also is a further requirement in some national jurisdictions, and its use in setting aside or requiring a review of a decision based on the climate impacts could also be transferred to the international level. For example, in the *ANAW* case before the East African Court of Justice (EACJ) the Court concluded that the state would maintain the 'right to undertake such other programmes or initiate policies in the future *which would not have a negative impact on the environment and ecosystem* in the Serengeti National Park',[89] thereby in effect requiring that future harm should be assessed before any projects are undertaken. While this case is not directly related to climate change, it shows the role of EIAs in putting scientific evidence of future harm before the courts, and in giving 'effect to both the precautionary and preventive principles'.[90] These are principles that originally arose in the context of environmental law, but are becoming more and more relevant also in a human rights context through their association with the right to a clean and healthy environment, and human rights-based climate litigation. A similar decision was reached in the *SERAC* case[91] before the African Commission, which held that there is a need to conduct EIAs before any future petroleum development projects are undertaken in the Ogoniland region of Nigeria.

In a climate litigation case before the South African High Court, the Court determined that in the decision to build a new coal power station, given the nature of the activity, a climate change impact assessment should have been carried out, and be considered as part of the review process by the minister of the decision to grant an EIA.[92] While in this case the initial decision to authorise the plant was not overturned, EIAs allow all foreseeable impacts of a project, including its contribution to GHG emissions, to be part of the decision-making process. Similar to these cases, the African Children's Committee should be able to rely on evidence from EIAs and climate change and human rights impact assessments to require governments to

88 N Craik *The international law of environmental impact assessment: Process, substance and integration'* (2008) 23.
89 EACJ *ANAW v the Attorney General of the United Republic of Tanzania* para 86.
90 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* 660.
91 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case).
92 *Earthlife Africa Johannesburg v The Minister for Environmental Affairs & Others*, Unreported Case 65662/16 (Gauteng High Court Pretoria, 8 March 2017) (*Thabametsi*), referred to in Kotzé & Du Plessis (n 90) 636.

set aside projects that are likely to cause extensive future harm to the climate and, therefore, to human rights, or to require EIAs to be undertaken in future, before projects with serious climate implications commence.

A further approach to taking into account future harm is an assessment of future risk, and is illustrated by the *Urgenda* case, introduced above. In this case the Court held that states have a duty to take 'appropriate steps if there is a real and immediate risk to persons and the state … is aware of that risk'.[93] The Court held that this would include 'risks that may only materialise in the longer term', such as that resulting from climate change, as long as 'the risk in question is directly threatening the persons involved'.[94] The Court also referred to the precautionary principle in this regard. Similarly, in their submissions to the CRC Committee in the *Sacchi* case discussed above, the 16 petitioners referred to a joint statement by the CRC Committee with other UN bodies, in which it confirmed that state human rights obligations 'include a duty "to prevent foreseeable human rights harm caused by climate change, [and] to regulate activities contributing to such harm"'.[95] They further refer to the view of the Inter-American Court on Human Rights which, similar to the *ANAW* case above, held that because 'it is often impossible to restore the *status quo* that existed before the environmental damage has occurred, prevention must be the main policy regarding the protection of the environment'.[96] Therefore, states have to take proactive steps to prevent foreseeable harm from occurring.[97] What harm is foreseeable depends on the best available models based on the most up-to-date scientific knowledge on the consequences of climate change, particularly where it pertains to the specific national context. In the *Urgenda* case, for example, the Court relied on the Fifth Assessment Report of the IPCC in making its assessments.

Litigants before African courts and tribunals, including the African Children's Committee, would have to ensure that the scientific basis

93 J Spier 'The "strongest' climate ruling" yet: The Dutch Supreme Court's *Urgenda* Judgment' (2020) 67 *Netherlands International Law Review* 319.
94 Legal ground 5.2.2.
95 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 'Joint Statement on Human Rights and Climate Change' 16 September 2019, https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and?LangID=E&NewsID=24998 (accessed 10 October 2022).
96 American Convention of Human Rights, Advisory Opinion OC-23/17 Inter-Am Ct HR, Human Rights and the Environment, 130 (15 November 2017).
97 OHCHR (n 76) 2.

of the current as well as future harm is firmly founded and supported by the necessary evidence and models. A lack of such sufficient basis can cause courts to dismiss cases or, as with the *Mbabazi* case in Uganda, the lack of sufficiently-supported arguments arguably is part of the reason why this case has been pending before the national courts since it was filed in 2012 and no action has been taken on it since 2017.[98] The lack of scientific grounding was criticised by Kotzé and Du Plessis in this case, as follows:[99]

> The prayers cited … are so wide and virtually all-encompassing that it would arguably require considerable effort and evidentiary proof to convince a court that the government has been neglecting its duties in this respect. Moreover, the vague framing of the prayers might signal a lack of information on, or knowledge of, climate change law, policy, and science by the plaintiffs.

4.4 Exhaustion of local remedies

A further admissibility requirement for complaints before the African Children's Committee is that complainants must show '[a]ny steps taken to exhaust domestic remedies, or the impossibility or ineffectiveness of doing so'. The African Children's Committee in this regard has followed the jurisprudence of the African Commission, which states that[100]

> the requirement of exhaustion of local remedies is only applicable if the remedies are available, effective, accessible and not unduly prolonged. The Committee reiterates the jurisprudence of the Commission in this matter and notes that a remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the complaint.

One factor hindering the exhaustion of domestic remedies, and which may trigger the exception where domestic remedies are not available or effective, is provisions around standing. For example, in the *Nubian* case before the African Children's Committee against Kenya, national level litigation was excessively delayed, among others, because a 'justice of the High Court declined to transmit the file to the Chief Justice on the ground that it was necessary to ascertain the identity of the 100 000 applicants'.[101] The African

98 High Court in Uganda *Mbabazi & Others v The Attorney General and National Environmental Management Authority* Civil Suit 283 of 2012.
99 Kotzé & du Plessis (n 90) 656.
100 *Project Expedite Justice & Others v the Republic of the Sudan* (2019) Admissibility Decision (*Project Expedite Justice* case) para 44.
101 *Nubian* case (n 53) para 19. See the next part regarding the approach of the African Children's Committee regarding identification of victims.

Children's Committee found that the 'legal limbo for such a long period of time in order to fulfil formalistic legal procedures' was not in the best interests of the child and thus allowed the case. This means that even cases that are filed before national courts, but where the procedure is unduly prolonged, may be brought before the African Children's Committee. In the case of the Tanzanian school girls discussed above, the Committee found that the case had been unduly prolonged because the 'domestic remedy has taken over 7 years in total and the appeal has taken 2 years without the Court fixing a date for a hearing of the case'.[102]

The African Children's Committee, drawing inspiration from the African Commission, further gives a purposive reading to the provision on exhaustion of local remedies, in that the 'lack of awareness of an alleged violation by the state deprives it the opportunity to address such a violation', finding that where cases are pending before national courts for excessive time periods or where reports are available, the state cannot claim that it is not aware.[103] A further instance where states are assumed to be aware of the situation and to have had the opportunity to remedy it, is instances of 'violations of rights on a large scale that were well documented over a long period of time in the international community'.[104] In such cases of massive or large-scale violations of rights, an exception to the exhaustion of domestic remedies requirement is applied, in that it would '*ipso facto* make local remedies unavailable, ineffective and insufficient',[105] and cases before the African Children's Committee are allowed without recourse to the national courts being required. In its *Talibés* case the African Children's Committee held that 'when a remedy is impractical due to the number of victims and the practically challenging process of exhausting it, then it is considered unavailable'.[106]

Thus, while the African Children's Committee has a requirement for the exhaustion of domestic remedies, there are different exceptions where this requirement does not have to be complied with, and which could be applied in climate cases as well. This could consequently mean that if the authors of climate change cases brought before the African Children's Committee can show that the violation resulting from a lack of action by a state on climate change amounts to 'serious or massive violations' or where there are a large

102 *Legal and Human Rights Centre & Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* (2020) paras 19 & 21.
103 *Nubian* case (n 53) para 27.
104 *Northern Uganda* case (n 73) para 27.
105 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 100.
106 *Project Expedite Justice* case (n 100) para 45.

number of victims, as would usually be the case in relation to climate effects, or that domestic procedures are unduly prolonged, then domestic remedies in such cases would not have to be exhausted. In the *Project Expedite Justice* case the African Children's Committee held that the 'large number of victims and the complexities of the violations raise concerns of efficiency; it is wishful thinking to expect local courts to try the cases of millions of children in a reasonable time in keeping with the best interest of the child'.[107] Similarly, climate change with its 'myriad societal impacts' and 'wide range of complex disputes'[108] is likely to fall under the category of cases exempt from the domestic remedies requirement.

4.5 Remedies and provisional measures

This final sub-section is concerned with the remedies and provisional measures that the African Children's Committee has granted in its previous cases as well as, more broadly, the remedies that human rights bodies could grant in climate change cases, to determine the kinds of remedies that may be available to climate litigants before the African Children's Committee. Sloth-Nielsen notes that 'injunctions that require states to amend their laws or policies, to adopt new laws, to include the excluded, and to end practices which violate the Charter' easily fall within the mandate of the African Children's Committee in relation to remedies it can provide.[109] The Children's Committee has not shied away from giving pointed and extensive remedies, including some that 'hinge on resource mobilisation and the progressive implementation of socioeconomic rights' and 'considerable human, technical and financial capacity'.[110] Nevertheless, the relatively small contribution of African states to overall global climate change does limit the possibility of comprehensive remedies, especially when it comes to mitigation. In issuing remedies, African courts also have to balance the development needs and prerogatives of states with the climate risk. This is set out clearly by the East African Court of Justice in the *ANAW* case cited above, where the EACJ held that it aims to 'stop future degradation without taking away the respondent's mandate towards economic development of its people'.[111]

The remedies issued by the African Commission in relation to environmental matters may also be instructive. In the *SERAC* case[112]

107 *Project Expedite Justice* para 46.
108 Kotzé & Du Plessis (n 90) 621.
109 Sloth-Nielsen (n 51) 264.
110 As above.
111 *ANAW* case (n 89) para 82.
112 *SERAC* case (n 91).

the Commission required the state to 'ensure protection of the environment, health and livelihood of the people of Ogoniland' through, among others, compensation to victims, 'a comprehensive clean-up of lands and rivers', conducting of EIAs before any future project and the establishment of a 'effective and independent oversight bodies for the petroleum industry'.[113] In its more recent *IHRDA v DRC* (*Kilwa* decision) the African Commission ordered the state 'to take the necessary steps to prosecute and punish state employees and personnel of the Anvil Mining Company involved in the said violations',[114] thus 'explicitly calling for the government to hold the company accountable and provide redress for violations suffered as a result of the actions of the state, as well as the company'.[115] This is one demonstration of how remedies can be applied to hold African states accountable for the actions of third party actors, also in the context of contribution to climate change, where the activities of such actors take place within the jurisdiction of the state.

Under its Communications Guidelines,[116]

> [w]here the Committee considers that one or more Communications submitted to it or pending before it reveal a situation of urgency, serious or massive violations of the African Children's Charter and the likelihood of irreparable harm to a child or children in violation of the African Children's Charter may, either on its own initiative or at the request of a party to the proceedings, request the State Party concerned to adopt Provisional Measures to prevent grave or irreparable harm to the victim or victims of the violations as urgent as possible.

While this is a procedure regularly used by the African Commission and the African Court, particularly in cases where alleged victims are on death row, the African Children's Committee to date has not yet granted provisional measures. One of the determinants on whether the African Children's Committee would grant provisional measures is the 'imminence' of the harm. While not in the context of provisional measures, the *Urgenda* case dealt with this matter of imminent threat within the European human rights system, and held that climate change does pose 'real and imminent threats' and that 'a dangerous situation is imminent', and consequently that states have to take 'precautionary measures to prevent infringement as far as possible'.[117] The African Court has repeatedly held that it will issue provisional measures only where 'irreparable and imminent risk

113 *SERAC* case, Holding.
114 ACHPR Communication 373/10 *IHRDA v DRC*.
115 African Commission Working Group on Extractive Industries, Environment and Human Rights in Africa 'The *Kilwa* case: The importance of Communication 373/10: *IHRDA v DRC*' *WGEI Newsletter* (2018) 10.
116 African Children's Committee Revised Communications Guidelines, sec VII(1)(i).
117 *Urgenda* case (n 54) paras 46 & 71.

will be caused before it renders its final judgement';[118] furthermore, that '[t]he risk in question must be real, which excludes the purely hypothetical risk'.[119]

A second determinant for granting provisional measures is the concept of 'irreparable harm'. In the context of climate change there is a need to define what would constitute irreparable harm. While it is clear that loss of life in a climate disaster, such as flood or heatwave, may constitute a grave violation resulting in irreparable harm, issues such as loss of homes or loss of livelihood due to similar extreme weather events may not give rise to provisional measures unless the Children's Committee expands its interpretation. Additionally, many of the harms caused by climate change are said to have lifelong irreversible impacts on children. For instance, famine-induced undernutrition in the first two years of life can lead to irreversible stunting.[120]

Whether a request for provisional measures will be necessary, of course, will depend on the kind of climate case that is brought before the African Children's Committee, and the most likely cases where it would be relevant would be to prevent the state or a third party from taking actions that will have an irreparable effect in the short term, such as for example building a new coal power station. However, there will be a high burden of proof on the applicants to prove that the specific harm from the actions taken would be irreparable and real and manifest before the final decision would be issued, and thus it is not likely that provisional measures requests in climate cases will succeed. This is evidenced in a communication against Egypt, where the applicants' request for provisional measure was denied, where the Committee applied the requirements strictly and reiterated the need for the request to prove grave violation of a right recognised in the Charter and the likelihood of irreparable harm resulting from the violation.[121] Nevertheless, the urgency of climate cases has resulted in expedited procedures for hearing climate change cases before the European Court of Human Rights,[122] and a similar reasoning could

118 African Court Application 062/2019 *Sébastien Ajavon v Republic of Benin* Order of 17 April 2020 (provisional measures) para 61.
119 African Court (n 118) para 62.
120 OHCHR 'The global climate crisis: A child rights crisis' (2019) 3, WorldVisionInputs2.pdf (ohchr.org) (accessed 10 October 2022).
121 African Children's Committee *Dalia Lotfy and Samar Emad on behalf of Sohaib Emad v the Arab Republic of Egypt* Communication 9/Com/002/2016 para 10.
122 Garden Court Chambers 'European Court of Human Rights is fast-tracking a climate case against 33 European states brought by 6 Portuguese youth', https://www.gardencourtchambers.co.uk/news/european-court-of-human-rights-is-fast-tracking-a-climate-case-against-33-european-states-brought-by-6-portuguese-youth (accessed 10 October 2022).

also be applied to expedite the hearing of climate cases before the African Children's Committee.

One of the limitations in litigating at the regional level in Africa is the lack of strong enforcement mechanisms, which affects all judicial and quasi-judicial bodies. While a 'win' before a regional body such as the African Children's Committee may be important in clarifying the state obligations in relation to climate change, it is not a given that this will necessarily result in changes on the ground. Nevertheless, through using its other competencies, such as Concluding Observations on state party reports and follow-up country visits in conjunction with decisions on communications, the African Children's Committee, through regular engagement, 'moral persuasion, diplomacy, or political embarrassment' may be able to engender some change.[123] Given that to date only very few cases have been brought before the African Children's Committee, it is able to do extensive monitoring and follow up on its decisions unlike, for example, the African Commission or the African Court. This may contribute to making it a more attractive forum.

Other reasons why the African Children's Committee would be an attractive forum for litigants include the broad standing, which allows anyone to bring a case on behalf of different categories of children affected by climate change. As noted above, despite African states having a lesser role in causing climate change, they have voluntarily, but within the framework of a binding international agreement, the Paris Agreement, agreed to reduce activities that contribute to climate change, and to take steps to adapt to the negative consequences of climate change. These obligations, when read together with state obligations to respect, protect and fulfil human rights, provide standards against which state conduct to protect child rights against climate change impacts can be measured, and against which states can be held accountable. Another strength of the African Children's Committee that may be an incentive for bringing cases before it is the relative flexibility that it has shown in relation to the often stringent requirement of exhaustion of domestic remedies. As noted, the African Children's Committee has been lenient in allowing access where domestic remedies are unnecessarily delayed, where there are too many applicants to realistically be able to exhaust domestic remedies (in cases where domestic jurisdictions do not allow for public interest litigation, for example) or where there are cases against multiple states. One or more of these exceptions

123 E Durojaye 'The potential of the Expert Committee of the African Children's Charter in advancing adolescent sexual health and rights in Africa' (2013) 46 *Comparative and International Law Journal of Southern Africa* 385 408.

are likely to apply in climate change cases, and exhaustion of domestic remedies would thus in most cases not present a barrier to accessing the African Children's Committee. The consideration of future harms is also not excluded by the practice of the Children's Committee so far, despite the requirement that the account of the violations should specify when and where the violation took place. We can consider in this regard the fact that the African Children's Committee takes account of the rights of future generations and, thus, where scientific evidence is clear that there will be future harm, as proven, for example, through EIAs or risk analyses based on best scientific evidence, then the African Children's Committee would be likely to follow the global trend in allowing such a case to proceed. Additionally, with the impact of climate change starting to manifest all over the world, climate litigation would usually be brought not only in relation to future harm, but usually would combine arguments related to future harm with harm that is already manifesting. Given the child rights-based approach developed by the African Children's Committee and, in particular, the best interests of the child principle, it is likely that the long-term implications of climate change would be seriously considered by the African Children's Committee.

5 Conclusion

The growing global trend of human rights (and child rights) litigation in climate change action has opened new horizons to accelerate the urgent action needed in responding to the climate crisis, both preventatively and in relation to already-experienced impacts. In light of the link between children's rights and the climate crisis, the normative and jurisprudential approach of the African Children's Committee, and procedural requirements before the Children's Committee, this article argues that there is a strong basis for bringing climate-based child rights cases before the African Children's Committee, and a high likelihood of complying with the relatively flexible admissibility requirements.

Taking a child rights approach to climate change ensures the prioritisation of the rights to survival and development of children in measures taken to combat climate change. The jurisprudence of the African Children's Committee reveals a very progressive and integrated approach to the rights of children, and it has not shied away from dealing with complex matters involving conflict, socio-economic rights and long-term impacts. Furthermore, it has adopted an expansive approach to the obligations on states in relation to children's rights on the continent, and has extensively used its prerogative to draw inspiration from other sources of international law

in the interpretation of provisions of the African Children's Charter. Through drawing specifically on the jurisprudence of the African Commission, it has contributed to the coherence of the regional human rights system. As alluded to in this article, the Children's Committee has clearly stipulated the obligations of governments in taking into consideration the long-term best interests of children in actions and decisions.[124] This can be used to easily build a case for climate change-related violations that are yet to occur in addition to those that are already taking place, thus ensuring that litigating before the Children's Committee will address not only the rights of African children, but also future generations. Furthermore, the admissibility requirements before the African Children's Committee are interpreted flexibly in order to ensure the protection of the best interests of the child. It allows for wide access, not only in *locus standi* but in its flexibility to the identification of the victims. Furthermore, in relation to the exhaustion of domestic remedies, the African Children's Committee has been willing, in the best interests of the child, to allow for this requirement to be dispensed with, under certain justified circumstances, which are also likely to apply in climate cases. Furthermore, the Children's Committee gives specific and far-reaching remedies, and takes concrete steps to ensure monitoring and follow-up.

According to best available science, '[s]ignificant climate impacts are already occurring at the current level of global warming and additional magnitudes of warming will only increase the risk of severe, pervasive and irreversible impacts'.[125] Not only are the effects of climate change already being felt, but Africa as a continent is highly vulnerable to climate change and, in Africa, African children bear the brunt of the impact. Various national, continental and global hard and soft law and policy instruments form the basis of human rights and environmental obligations of African countries. It is argued that the commitments of African states in NDCs under the Paris Agreement have human rights implications that could and should inform the enforcement of human rights treaties, including the African Children's Charter. It is further argued that, based on the positive obligations to protect their citizens against human rights harms perpetrated by third parties, African states also have duties towards African children to limit the impact of climate change on children's rights through comprehensive adaptation measures.

124 African Children's Committee General Comment 5 para 4.2.

125 UNFCCC 'Report on the Structured Expert Dialogue on the 2013-2015 Review: Note by the co-facilitators of the Structured Expert Dialogue' UN Doc FCCC/SB/2015/INF.1 4 May 2015 15.

The increasing inter-reliance on environmental law principles and human rights law is evident in the recently-adopted resolution by the UN General Assembly recognising the right to a healthy environment. There also is a trend towards relying on environmental science such as IPCC reports, and the (environmental) legal standards set in climate change agreements, to inform findings of human rights violations. The proposal for reliance on NDCs and EIAs as part of making assessments of human rights violations of current and future generations of children, therefore, is just an extension of this trend, and would give the African Children's Committee the necessary standards and indicators in determining whether state action is compliant with children's rights.

Outside of the communications procedure, the African Children's Committee, with its recent focus on climate change and children's rights, including the establishment of a working group on climate, has already signalled the significance that it attaches to this topic. The inclusion of external climate change experts in its working group presents to the Children's Committee an opportunity to further familiarise itself with the challenges and the possible remedies that it may recommend to state parties.

For these reasons, the African Children's Committee arguably is the best-placed organ for bringing the first climate change cases from a rights-based approach to the continental level. However, it should be noted that the communications mechanism of the Children's Committee cannot be initiated by the Committee itself. Hence it is crucial for individuals, civil society organisations and governments to take a proactive role and bring climate change cases before the African Children's Committee.

Finally, in order to protect the rights of all people from the consequences of the climate crisis, it would be necessary to use all available fora to seek remedies and to build a strong human rights and child rights-based climate jurisprudence, not only through the African Children's Committee, but also in the other bodies at the African regional level, at the national level, and in global level fora.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: MA Jimoh 'A critique of the seizure criteria of the African Commission on Human and Peoples' Rights' (2022) 22
African Human Rights Law Journal 362-378
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a2

A critique of the seizure criteria of the African Commission on Human and Peoples' Rights

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Summary: *Seizure of communication is an important stage in litigating before the African Commission on Human and Peoples' Rights. At this stage a complainant is required to disclose a* prima facie *case, in the absence of which the communication will be refused. The seizure criteria are contained in the African Commission's Rules of Procedure. However, the procedural rules are as important as the substantive rules. Where there are burdensome procedural rules in human rights litigation, it becomes more difficult to gain access to justice. The African Commission's Rules of Procedure 2020 guide the communication proceedings of the Commission. The 2020 Rules have introduced some salient provisions that hitherto were not contained in the Rules. Under the 2020 Rules the Secretary can seize a communication during inter-session on behalf of the African Commission. Efforts have also been made to fully separate admissibility criteria from seizure criteria by deleting the admissibility criteria contained under the seizure criteria in the previous Rules. Consequently, it no longer is a requirement for a communication to pass a preliminary test of the admissibility criteria at the seizure stage. Notwithstanding these changes, the African Commission still applied the jurisprudence of the previous Rules in* African Freedom of Expression Exchange & 15 Others (represented by FOI Attorneys) v Algeria & 27 Others (FOI)*, where the Commission also set a higher* prima facie *standard.*

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This article critiques the Commission's seizure criteria and procedure. It argues that the 2020 Rules have introduced novel provisions that would necessitate the Africn Commission to change its seizure jurisprudence. It recommends that the Commission should adopt the 'might' test at the seizure stage rather than the wide prima facie *standard it adopted in* FOI. *In this way the African Commission would have the opportunity to receive more compelling evidence of violation of the African Charter at the merit stage, rather than shutting out communications at a stage where compelling proof is not required.*

Key words: *seizure criteria; communication; Rules of Procedure; African Commission;* prima facie *standard*

1 Introduction

Full 'litigation' before the African Commission on Human and Peoples' Rights (African Commission) generally involves five basic stages, namely, bringing a communication; seizure; admissibility; consideration on merit; and recommendation.[1] Yet, the litigation could be truncated at the seizure stage, where a communication does not fulfil the seizure criteria.[2] The African Commission in its jurisprudence has espoused the position that the purpose of the seizure procedure is to determine whether a communication discloses a *prima facie* case.[3] The seizure procedure enables the Commission to summarily analyse if a communication points 'to the likelihood that a right protected in the African Charter has been violated' and if there is 'a preliminary evidence indicative of a violation'.[4] At this stage, the respondent state is not informed of the existence of the communication.[5] Thus, while the seizure stage does not involve the consideration of a communication on its merit, the communication,

1 Media Defence 'Litigating at the African Commission on Human and Peoples' Rights', https://www.mediadefence.org/ereader/publications/advanced-modules-on-digital-rights-and-freedom-of-expression-online/module-6-litigating-digital-rights-cases-in-africa/litigating-at-the-african-commission-on-human-and-peoples-rights/ (accessed 10 December 2021); S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.

2 Communication 742/20 *African Freedom of Expression Exchange & 15 Others (Represented by FOI Attorneys) v Algeria & 27 Others* (*FOI*)**;** Communication 661/17 *Amir Fam & 141 Others v Egypt* (*Amir*)*;* Communication 464/14 *Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v Republic of Kenya (Uhuru).*

3 The African Commission on Human and Peoples' Rights Information Sheet 3 Communication Procedure 4; *FOI* (n 2) para 42.

4 *FOI* (n 2) para 42.

5 A state is only informed of the communication after the seizure procedure. See Gumedze (n 1) 126-127.

at least, is expected to raise a rebuttable presumption that a violation has occurred. This article critiques the decisions of the African Commission on what facts disclose a *prima facie* case.

The seizure criteria are provided by the Rules of Procedure of the African Commission.[6] Although in some decisions of the Commission, for instance, in *Uhuru*,[7] the Commission 'decided not to be seized of the communication because it does not comply with article 56 of the African Charter and does not fulfil the criteria for seizure provided under Rule 93(2) of the Commission's Rules of Procedure',[8] article 56 of the African Charter on Human and Peoples' Rights (African Charter) deals with the admissibility requirement, rather than the seizure criteria.[9] Since its inauguration on 2 November 1987, the African Commission has had four Rules of Procedure. The first was adopted in 1988 during the Commission's second ordinary session. The second was adopted after the eighteenth ordinary session in 1995. The third Rules were adopted at the forty-seventh ordinary session of the Commission in 2010, while the fourth and current Rules were adopted at the twenty-seventh extraordinary session of the Commission held from 19 February to 4 March 2020.[10]

Rule 115(2) of the Rules of Procedure 2020 deals with the seizure criteria.[11] It provides that 'the Secretary shall ensure that communications addressed to the Commission contain the following information'. The information subsequently listed in sub-paragraphs (a) to (g) then represents the seizure criteria that must be fulfilled before the African Commission is seized of a communication. However, who has the duty to fulfil these criteria under Rule 115(2)? Whereas the Rule states the Secretary, in *FOI*,[12] the African Commission decided not to be seized of the communication as the

6 The African Commission is empowered to make the Rules as per art 42(2) of the African Charter.
7 *Uhuru* (n 2).
8 *Uhuru* (n 2) para 22.
9 Gumedze (n 1) 128-135.
10 'African Commission on Human and Peoples' Rights Rules of Procedure', https://www.achpr.org/rulesofprocedure (accessed 10 December 2021).
11 Rule 109 deals with communications between state parties, while Rule 115(2) deals with 'other communications submitted by any natural or legal person'. However, this article focuses on the latter. Only three communications have been received by the African Commission with respect to communications between state parties. These communications are *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004); Communication 422/12 *Sudan v South Sudan*; and Communication 487/14 *Djibouti v Eritrea*. For the Rules of Procedure 2020, see 'African Commission on Human and Peoples' Rights Rules of Procedure', https://www.achpr.org/rulesofprocedure (accessed 10 December 2021).
12 *FOI* (n 2).

complainant did not fulfil these seizure criteria in the Rule.[13] This raises some fundamental questions: If the duty is on the secretary as per Rule 115(2), can the African Commission make a finding of the non-fulfilment of the seizure criteria by the complainant under that Rule as the basis for refusing a communication? Also, does this Rule presuppose that, before submitting a communication to the Commission, the Secretary should, if necessary, work with the complainant to ensure that the communication fulfils the criteria, and that the secretary could, as a matter of inference, and to fulfil their duty under the Rule, reject the communication until it fulfils those conditions? This article critically analyses the provisions of Rule 115 and critiques the case law of the African Commission on the seizure criteria.

2 The African Commission and its communication procedure

The African Commission and the African Court on Human and Peoples' Rights (African Court) represent the two continent-wide platforms for the enforcement of rights contained in the African Charter.[14] Article 30 of the Charter establishes the African Commission as follows: '[A]n African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.' The African Charter mandates the African Commission to perform four basic functions: to promote human and peoples' rights; to protect human and peoples' rights; to interpret the provisions of the African Charter; and to perform any other tasks that may be entrusted to it by the Assembly of Heads of State and Government.[15]

The promotional role of the African Commission may be achieved in different ways. It may be achieved by undertaking research in the field of human rights or identifying human rights problems;[16]

13 *FOI* (n 2) para 44. The African Commission held that '[c]onsidering that the complainants have failed to substantiate and adduce evidence in support of the allegations raised against the respondent states, it therefore follows that the complainant does not meet the criteria provided under Rule 93(2) of the Commission's Rules of Procedure (2010)'. However, the African Commission meant Rule 115(2) of the African Commission's Rules of Procedure 2020.

14 IJCR *African Commission on Human and Peoples' Rights*, https://ijrcenter.org/wp-content/uploads/2020/05/ACHPR-one-pager-2020.pdf (accessed 13 December 2021).

15 Art 45 African Charter; S Dersso 'The role of the African Commission' Institute for Security Studies, June 2008, https://issafrica.org/chapter-4-role-of-the-african-commission (accessed 17 December 2021).

16 See eg Resolution 473 where the African Commission recently identified the threat of technology to human rights. To access the Resolution, see https://

making recommendations to governments; or lay down principles on human rights upon which African governments may base their legislation.[17] The Commission has promoted human rights on the continent through its 'soft law' instruments, Guidelines, Principles and Declarations, Resolutions and 'other publications'.[18]

In its protectional role the African Commission utilises the communication procedure to achieve this mandate.[19] Under the communication procedure a communication may be submitted either by a state party to the African Charter against another state party to the Charter,[20] or under the 'other communication' procedure[21] by 'any natural or legal person'.[22] Prior to the African Commission's Rules of Procedure 2010, there were arguments about who might be a complainant under the 'other communication' procedure, with the liberalists arguing that non-governmental organisations (NGOs) without observers status, in addition to individuals, could bring a communication.[23] This is because the text of article 56 of the African Charter mentions the 'author', while the African Commission's earlier Rules of Procedure were not clear: 'The Commission, through the Secretary, may request *the author* of a communication to furnish clarifications on the applicability of the Charter to his/her communication.'[24] This was resolved by the African Commission's Rules of Procedure 2010,[25] and the extant Rules of Procedure 2020.[26] The Rules now are clear that a communication may be submitted by 'any natural or legal person'.

Before considering a communication on its merits, the African Commission has to be seized of and admit such communication. In this regard, such communication must fulfil 14 conditions:[27] seven requirements in accordance with Rule 115(2) of the African

www.achpr.org/sessions/resolutions?id=504 (accessed 17 December 2021).

17 African Commission on Human and Peoples' Rights (African Lii 10 November 2020), https://africanlii.org/catalog/52 (accessed 12 December 2021).

18 African Commission on Human and Peoples' Rights Resources, https://www.achpr.org/resources (accessed 12 December 2021).

19 African Commission on Human and Peoples' Rights' Mandate of the Commission, https://www.achpr.org/mandateofthecommission (accessed 12 December 2021).

20 Arts 47-54 African Charter. There have only been three communications (n 11).

21 See arts 55-59 African Charter.

22 See Rule 93(1) Rules of Procedure 2010; Rule 115(1) Rules of Procedure 2020.

23 Gumedze (n 1) 121.

24 Rules of Procedure 1995. To access the Rules, see http://hrlibrary.umn.edu/africa/rules.htm (accessed 15 December 2021).

25 See Rule 93(1) Rules of Procedure 2010.

26 See Rule 115(1) Rules of Procedure 2020.

27 See *FOI* (n 2) para 38 where the African Commission held that a communication must fulfil Rule 115(2) of the Rules of Procedure 2020 and art 56 of the African Charter. Both contain seven conditions each.

Commission's Rules of Procedure 2020 for seizure criteria;[28] and seven conditions under article 56 of the African Charter for admissibility.[29] This article focuses on the seizure criteria for 'other communication' brought by individuals and/or NGOs.[30] Although it may seem in some decisions of the African Commission that the seizure criteria and admissibility criteria are interwoven,[31] the Commission usually considers a communication for seizure criteria and admissibility criteria at different sessions, which may point to the fact that they indeed are different.[32] In *Article 19 v Eritrea* the African Commission was seized of the communication at its thirty-third ordinary session,[33] but admitted it at its thirty-sixth ordinary session.[34] However, considering the seizure criteria and admissibility criteria at different sessions does not necessarily mean that the Commission solely considers the seizure criteria at the seizure stage. In *Uhuru,* one of the African Commission's *raisons d'être* for refusing seizure was because the 'Commission finds that the complaint contains disparaging and insulting language, in contravention of article 56(3) of the African Charter'.[35] Yet, the applicable Rules of Procedure 2010 contain no such requirement.

To be seized of a communication, all that is required by the African Commission is *prima facie* evidence of violation.[36] Disclosure of 'a series of serious or massive violations' is not required. It is not even required for the Commission to consider the communication on its merits. The provision of article 58, which had been thought to require 'a series of serious or massive violations' before the Commission, could be seized and admit a communication is erroneous.[37] The text itself does not suggest such inference. It reads:

> When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

28 As argued below, the seven requirements under Rule 115(2) Rules of Procedure 2020, in fact, should be fulfilled by the Secretary after consultation with the complainant, except where a doubt exists, which would then be resolved by the African Commission. See Rule 115(7) Rules of Procedure 2020.
29 See *Amir* (n 2) para 24. See also *Open Society Justice Initiative (on behalf of Njawe Noumeni) v Cameroon* (2006) AHRLR 75 (ACHPR 2006) para 45.
30 For the criteria relating to communications brought by states, see Rules 109-114 Rules of Procedure 2020.
31 See *Uhuru* (n 2).
32 Gumedze (n 1) 127.
33 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) (*Eritrea*) para 11.
34 *Eritrea* (n 33) para 23.
35 *Uhuru* (n 2) para 17.
36 FIDH *Admissibility of complaints before the African Court: Practical guide* (2016), https://www.refworld.org/pdfid/577cd89d4.pdf (accessed 15 December 2021).
37 Gumedze (n 1) 124.

This provision merely requires the African Commission to inform the Assembly if a communication discloses 'a series of serious or massive violations'.[38] It does not make it a condition precedent to consider *all* communications, and does not even make it a condition precedent to consider any communication disclosing 'a series of serious or massive violations'. Thus, the African Commission was in order in *Jawara v The Gambia*[39] where it observed:[40]

> The position of the Commission has always been that a communication must establish a *prima facie* evidence of violation. It must specify the provisions of the Charter alleged to have been violated. The State also claims that the Commission is allowed under the Charter to take action only on cases which reveal a series of serious or massive violations of human rights. *This is an erroneous proposition*. Apart from Articles 47 and 49 of the Charter, which empower the Commission to consider inter-state complaints, Article 55 of the Charter provides for the consideration of 'communications other than those of States Parties'. Further to this, Article 56 of the Charter stipulates the conditions for consideration of such communications ... *In any event, the practice of the Commission has been to consider communications even if they do not reveal a series of serious or massive violations. It is out of such useful exercise that the Commission has, over the years, been able to build up its case law and jurisprudence.*

Despite its apparent functions in promoting and protecting human rights in Africa, the African Commission, is faced with certain impediments in the exercise of its mandate. Samb divides these into 'practical and political matters'.[41] The practical problems relate to funding and support from state parties,[42] and the Commission has had to institute a resolution on the establishment of a voluntary contributory fund for the African human rights system.[43] Dersso sees the problems as 'legal' and compliance issues. He states that

> according to the African Charter, it [the Commission] is empowered to make only those recommendations it deems useful. From a legal perspective, these recommendations are not binding in the way court

38 DC Turack 'The African Charter on Human and Peoples' Rights: Some preliminary thoughts' (1984) 17 *Akron Law Review* 377.
39 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) (*Jawara).*
40 *Jawara* (n 39) paras 41 & 42 (my emphasis).
41 M Samb 'Fundamental issues and practical challenges of human rights in the context of the African Union' (2009) 15 *Annual Survey of International and Comparative Law* 61 68.
42 Some of the African Commission's projects are being funded by the European Union. See 'The African Commission on Human and Peoples' Rights Information Sheet 2 Guidelines for the submission of communications', https://www.achpr.org/public/Document/file/English/achpr_infosheet_communications_eng.pdf (accessed 20 December 2021).
43 See 96 Resolution on the Establishment of a Voluntary Contribution Fund for the African Human Rights System – ACHPR/Res.96(XXXX)06, https://www.achpr.org/sessions/resolutions?id=112 (accessed 20 December 2021).

judgments are. Consequently, States comply with its recommendations essentially out of good will, not legal obligation.[44]

These problems still subsist, and while they impede the exercise of the mandate of the African Commission, the Commission has significantly promoted human rights on the continent.[45]

3 Seizure criteria of the African Commission

The extant seizure criteria of the African Commission are contained in Rule 115 of the Commission's Rules of Procedure 2020. The African Charter empowers the Commission to lay down its own rules of procedure.[46] Pursuant to this, the Commission has had four rules of procedure: in 1988, 1995,[47] 2010[48] and 2020.[49] Rule 115(1) of the 2020 Rules stipulates that any natural or legal person may submit a communication under article 55 to the Chairperson of the African Commission through the Secretary.[50] When such communication is submitted, the Secretary is mandatorily required to ensure that the communication contains the following:

(a) the name, nationality and signature of the person or persons filing it or, in cases where the complainant is a non-governmental entity, the name and signature of its legal representative(s);
(b) whether the complainant wishes that his or her identity be withheld;
(c) the address for receiving correspondence from the African Commission and, if available, a telephone number, facsimile number and e-mail address;
(d) an account of the act or situation complained of, specifying the place, date and nature of the alleged violations;
(e) the name of the victim, in a case where he or she is not the complainant, together with sufficient proof that the victim consents to being represented by the complainant or justification why proof of representation cannot be obtained;
(f) any public authority that has taken cognisance of the fact or situation alleged; and
(g) the name of the state(s) alleged to be responsible for the violation of the African Charter, even if no specific reference is made to the article(s) alleged to have been violated.

44 Dersso (n 15).
45 As above.
46 Art 42(2) African Charter.
47 To access the 1995 Rules, see n 24.
48 To access the 2010 Rules, see https://www.achpr.org/public/Document/file/English/Rules_of_Procedure_of_the_African_Commission_on_Human_and_PeoplesRightsof2010_%20Legal%20Instruments%20_%20ACHPR.pdf (accessed 10 December 2021).
49 To access the 2020 Rules, see n 10.
50 The secretary is provided for in Rule 20 Rules of Procedure 2020.

In order to ensure that the Secretary is able to perform their obligation under sub-rule (2), the Rules further mandatorily require the Secretary to request from the complainant information listed in (a) to (g) if the communication does not contain this information[51] or where it is 'manifestly lacking'.[52] The Rule then empowers the Secretary to seize a communication on behalf of the African Commission where the communication contains the information listed in (a) to (g).[53] Thus, whereas only the African Commission hitherto had the power to seize a communication in accordance with the rules of seizure,[54] the Secretary now can do so, and at each session the Secretary shall inform the Commission of all new communications of which it was seized during the inter-session period.[55] Under the 2020 Rules, the African Commission only has power to seize a communication in two situations: first, where the communication is declined by the Secretary during the inter-session[56] (for instance, where the Secretary doubts whether the criteria have been met);[57] and, second, where the Secretary decides to refer any communication to the African Commission.[58] It seems that the power given to the Secretary to seize of communications during inter-session is for purposes of quicker dispensation of communications by the African Commission.

4 Seizure criteria of the African Commission: *FOI* as a case study

The African Commission applied its extant Rules of Procedure in *FOI*. Although the Commission frequently referred to its Rules of Procedure 2010 in the decision,[59] it is apparent that the Commission meant to apply the Rules of Procedure 2020.[60] In *FOI* the complainants submitted a communication in February 2020 against 28 African states, alleging that each of the respondent states, at least on one occasion, has intentionally disrupted or limited access to telecommunication services, including the internet, for unjustifiable reasons under the African Charter.[61] The complainants

51 Rule 115(4) Rules of Procedure 2020.
52 Rule 115(6) Rules of Procedure 2020.
53 Rule 115(5) Rules of Procedure 2020.
54 See Rule 93(5) Rules of Procedure 2010.
55 Rule 115(9) Rules of Procedure 2020.
56 Rule 115(10) Rules of Procedure 2020.
57 Rule 115(7) Rules of Procedure 2020.
58 Rule 115(10) Rules of Procedure 2020.
59 *FOI* (n 2) paras 42, 44 & 45.
60 The Rules of Procedure 2020 were already in force when the African Commission adopted its decision in *FOI*. The Rules were adopted at the 27th extraordinary session of the Commission held from 19 February to 4 March 2020, whereas the Commission adopted its decision in *FOI* at its 66th ordinary session held between 13 July and 7 August 2020.
61 *FOI* (n 2) para 3.

gave specifics of the disruptions in each of the respondent states.[62] The complainants requested the African Commission to find that (i) the respondents had violated articles 9, 10 and 11 of the African Charter; and (ii) the shutting down of the internet in the respondent states amounted to unlawful and unjustifiable interference with the rights of the citizens of the affected countries as it was incompatible with the African Charter, and requested the Commission to bring the matter to the attention of the African Union (AU) Assembly.[63]

Before deciding whether to be seized of the communication, the African Commission rightly considered whether it had jurisdiction to proceed against all the respondents.[64] The Commission found that two of the respondents were not parties to the African Charter.[65] The Commission proceeded with its decision on seizure against 26 states. In its decision on seizure the Commission proceeded by espousing that 'Rule 115(2) of the African Commission's Rules of Procedure, 2020 lists requirement to be met prior to seizure of a complaint, *including a preliminary assessment of the requirements under Article 56 of the African Charter*'.[66] The Commission then decided not to be seized of the communication as 'it does not fulfil the criteria for seizure provided under Rule 93(2) of the Commission's Rules of Procedure (2010)'.[67] The reasoning of the Commission is as follows:[68]

> The Commission notes the vagueness of the complainants' submissions on the nature of the alleged violations. The complainants contend that the alleged internet disruptions are in violation of Articles 9, 10 and 11 of the African Charter, as they unjustifiably restrict the rights to freedom of expression, access to information and association in the online environment. However, a cursory review of the facts surrounding the complaint reveals that the assertions therein are largely vague, as the submissions reference general allegations attributed to 'the government' of the respondent states without information or evidence on the specific incidents of the alleged violations. A clear example can be seen in the narrative contained in paragraph 18 to 23 above, which excludes information on the authorities/bodies responsible or the consequences and effect of the alleged disruption in each of the respondent states.

62 *FOI* (n 2) paras 4-31.
63 *FOI* (n 2) para 36.
64 *FOI* (n 2) paras 39 & 40.
65 The African Commission found that Somaliland Republic was neither a member of the AU nor a state party to the African Charter; Morocco is not a state party to the African Charter and has neither signed nor ratified the Charter. *FOI* (n 2) paras 39, 40 & 41.
66 *FOI* (n 2) para 38.
67 *FOI* (n 2) para 45. The Commission apparently meant Rule 115(2) of the African Commission's Rules of Procedure 2020. The Commission had earlier cited the Rules of Procedure 2020 in para 38 of the Report. Rule 93(2) of the 2010 rules is the same as Rule 115(2) of the 2020 rules.
68 *FOI* (n 2) para 43.

However, in another part of the decision the Commission observed:[69]

> Rule 93(2) of the Commission's Rules of Procedure (2010)[70] empowers the Commission to seize complaints alleging *prima facie* violations of the African Charter by a state party. The Commission has held in its jurisprudence that *prima facie* is a decision or conclusion that could be reached from preliminary observation of an issue or a case without *deeply* scrutinising or investigating into its validity or *soundness.* In order for the Commission to arrive at a finding of a *prima facie* violation, the complainant is required to submit facts which point to the *likelihood* that a right protected in the African Charter has been violated. In this sense, facts submitted should at least raise a rebuttable presumption that a violation has occurred.

4.1 Is a preliminary assessment of article 56 required for seizure?

In *FOI* the African Commission held that Rule 115(2) of the Commission's Rules of Procedure 2020 lists the requirements to be met prior to seizure of a communication and that the requirements included a preliminary assessment of the requirements under article 56 of the African Charter.[71] The African Commission cited its decision in *Amir*[72] to buttress this point.[73] However, this cannot be correct. Rule 115(2) of the Rules of Procedure 2020 seems to have dispensed with the requirement for a communication to pass a preliminary test of the criteria for admissibility in article 56 of the Charter.

The idea that a preliminary assessment of article 56 is required for seizure was borne out of some of the seizure requirements contained in both the 1995 and 2010 Rules, which required certain criteria contained in article 56 of the African Charter. Under the 1995 Rules, as conditions for seizure, the communication should, among other things, state the measures taken by the author to exhaust local remedies, or provide an explanation of why local remedies will be futile,[74] and the extent to which the same issue has been settled by another international investigation or settlement body.[75] Likewise, under the 2010 Rules, in addition to other criteria, the communication should fulfil the following for the African Commission to be seized: (i) compliance with the period prescribed in the African Charter for

69 *FOI* (n 2) para 42.
70 Again, the African Commission meant Rule 115(2) of the Rules of Procedure 2020.
71 *FOI* (n 2) para 38.
72 See *Amir* (n 2) para 24.
73 *FOI* (n 2) para 38.
74 Rule 104(1)(f) Rules of Procedure 1995.
75 Rule 104(1)(g) Rules of Procedure 1995.

submission of the communication;[76] (ii) any steps taken to exhaust domestic remedies or, if the applicant alleges the impossibility or unavailability of domestic remedies, the grounds in support of such allegation;[77] and (iii) an indication that the complaint has not been submitted to another international settlement proceeding as provided in article 56(7) of the African Charter.[78] These requirements are part of the admissibility criteria under article 56 of the African Charter.

The 2020 Rules do not contain the foregoing requirements. The 2020 Rules appear to separate seizure, which had always been interwoven with admissibility, from admissibility. This makes sense because at the seizure stage, the communication is expected to disclose only a *prima facie* case. Requiring an assessment of the article 56 criteria, even though preliminary, at the seizure stage, would stretch the purpose of the seizure stage, which should only be to consider whether a communication reveals a *prima facie* violation. Thus, the 2020 Rules have removed all elements of admissibility in the consideration of whether the African Commission should be seized of a communication.

4.2 Who is to fulfil the seizure criteria in Rule 115(2)?

In *FOI* the African Commission decided not to be seized of the communication as the seizure criteria in Rule 115(2) of the Rules of Procedure 2020 had not been met by the complainant, whereas the Rule explicitly requires the Secretary to fulfil those conditions. The Rule provides that 'the *Secretary* shall ensure that communications addressed to the Commission contain the following information …" This provision itself presupposes certain points. First, it presupposes that if the Secretary is to have the duty of ensuring that a communication addressed to the African Commission fulfils the seizure criteria, they should have certain power – the power to require the complainant to ensure that the communication meets those criteria – and the Rules accordingly give the Secretary this power. Sub-rule (4) gives the Secretary the power to 'request' the information if the communication does not contain the seizure criteria; while sub-rule (6) empowers the Secretary to 'invite' the complainant to comply if the information on the seizure criteria is manifestly lacking. Although ultimately it is the duty of the complainant to fulfil the seizure criteria, this duty is at the stage before the Secretary decides to the seized of

76 Rule 93(2)(h) Rules of Procedure 2010.
77 Rule 93(2)(i) Rules of Procedure 2010.
78 Rule 93(2)(j) Rules of Procedure 2010.

the communication on behalf of the African Commission.[79] Where the communication has been considered seized by the Secretary, the Commission cannot reject a complainant's communication under Rule 115(2) because the Secretary fails to ensure compliance.

In the second place, the Rules foresee a situation of doubt as to whether the seizure criteria have been met, in which case the Commission will decide.[80] Thus, only when a doubt exists, which led to the rejection of the communication by the Secretary during the inter-session or where the Secretary decides not to be seized of a communication, but rather prefers to refer it to the African Commission, can the Commission utilise the seizure criteria in Rule 115(2) as the basis to be seized or otherwise of a communication.

4.3 What *prima facie* standard is required?

The jurisprudence of the African Commission suggests that where a communication meets the seizure criteria, such communication would also have met the *prima facie* standard required.[81] However, in *FOI* the Commission set a higher *prima facie* standard in paragraph 43 of the decision to the extent that a complainant who merely fulfils the seizure criteria in Rule 115(2) of the Rules of Procedure 2020 would not have met the *prima facie* standard. While the African Commission required '*information* or *evidence* on the specific incidents of the alleged violations' such as 'information on the authorities/ bodies responsible or the *consequences* and *effect* of the alleged disruption in each of the respondent states'[82] to meet the *prima facie* standard, Rule 115(2) of the Rules of Procedure 2020 merely requires a communication to contain 'the name, nationality and signature of the person or persons filing it; or in cases where the complainant is a non-governmental entity, the name and signature of its legal representative(s)'; 'an *account* of the act or situation complained of, specifying the place, date and nature of the alleged violations' to meet the seizure criteria.[83]

From the report of *FOI*, the African Commission at paragraphs 4 to 31 had stated the account of the acts complained of, the place, date and nature of the acts complained of. Yet, the Commission had required more, namely, 'evidence on the specific incidents of the

79 Rule 115(5) Rules of Procedure 2020.
80 Rule 115(7) Rules of Procedure 2020.
81 See n 3.
82 *FOI* (n 2) para 43.
83 See 9-10 above for other criteria.

alleged violations' such as 'information on the authorities/bodies responsible or *the consequences* and *effect* of the alleged disruption in each of the respondent states'. It is submitted that this might be going too far for the *prima facie* standard under international law.[84] Different approaches are taken in different fields of law on the *prima facie* standard. Under refugee law a *wider* approach usually is taken. At the *prima facie* stage, a burden has already been placed on the claimant:[85]

> '*Prima facie'* evidence in its usual sense [means] *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. By providing *prima facie* evidence, the burden of proof 'switches … from the party who has made the *prima facie* showing to his opponent'.

Rutinwa agrees with this proposition and states that 'the view that *prima facie* recognition *is presumptive but conclusive*, unless the presumption is disproved, more accurately reflects the law'.[86] The African Commission appears to tilt towards this line of thought in *FOI* by requiring evidence at the seizure stage:[87]

> Considering that the *complainants* have failed to substantiate and adduce evidence in support of the allegations raised against the respondent states, it therefore follows that the complainant does not meet the criteria provided under Rule 93(2) of the Commission's Rules of Procedure (2010).

On the other hand, arbitral tribunals have taken a *narrow* approach. They have declined to place any burden on the claimant at the *prima facie* stage. According to Choudhary and Sharpe,

> owing to the nature of the '*prima facie'* test, arbitral tribunals generally refrain from imposing the burden of proof on the claimant, considering that the claimant is not required to produce specific evidence at this stage of the procedure. All that the claimant must demonstrate at this stage is that the facts alleged by it are capable of constituting treaty breaches.[88]

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84 For a comprehensive discussion, see A Sheppard 'The jurisdictional threshold of a *prima facie* case' in P Muchlinski, F Ortino & C Schreuer (eds) *The Oxford handbook of international investment law* (2008) 932; for meaning under refugee law, see B Rutinwa '*Prima facie* status and refugee protection', https://www.unhcr.org/3db9636c4.pdf (accessed 12 December 2021); M Albert '*Prima facie* determination of refugee status: An overview and its legal foundation' Master's thesis, University of Oxford, 2010, https://www.rsc.ox.ac.uk/files/files-1/wp55-prima-facie-determination-refugee-status-2010.pdf (accessed 12 December 2022).

85 Albert (n 84) 32.

86 Rutinwa (n 84) 6.

87 *FOI* (n 2) para 44.

88 V Choudhary & J Sharpe 'The jurisdictional threshold of a *prima facie* case', https://jusmundi.com/en/document/wiki/en-the-jurisdictional-threshold-of-a-prima-facie-case (accessed 18 December 2021).

This narrow approach accords with the opinion of Higgins J in the *Oil Platform* case of the International Court of Justice.[89] The Judge reasoned:

> 'Plausibility' was not the test to warrant a conclusion that the claim might be based on the treaty. The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 treaty *is to accept pro tem the facts as alleged by Iran to be true and in that light to interpret Articles 1, IV and X for jurisdictional purposes – that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.*[90]

> In the *Ambatielos* case (1953) the Court rejected the United Kingdom claim that the Court should provisionally accept the facts as asserted by the applicant and establish whether they would constitute a violation of the treaty said to provide the Court with jurisdiction. The Court did this for two reasons: *first, to find that the facts* would *constitute a violation was to step into the merits;*[91] and, second, the merits in this case had been reserved to a different body, the Commission of Arbitration established under the Protocol of 1886. This constraint does not operate in the present case. It is interesting to note that in the *Mavrommatis* case the Permanent Court stated that, to establish its jurisdiction, it was necessary to see if the Greek claims 'would' involve a breach of the provisions of the article. This would seem to go too far. Only at the merits, after deployment of evidence, and possible defences, may 'could' be converted to 'would'. The Court should thus determine if, on the facts as alleged by Iran, the United States actions complained of *might*[92] violate the treaty articles.

It is submitted that it is safer to adopt the '*might* test' espoused by Higgins J.[93] The African Commission itself agreed in *FOI* that 'the Commission has held in its jurisprudence that *prima facie* is a decision or conclusion that could be reached from preliminary observation of an issue or a case without *deeply* scrutinising or investigating into its validity or *soundness*'.[94] Yet, in the same sentence the African Commission dug deeper by requiring *evidence on the specific incidents of the alleged violations*, *consequences* and *effect* of the alleged disruption.[95] The seizure procedure is to enable the Commission determine whether it *appears* from the facts alleged that a violation has occurred.[96] Since the Commission still has to determine the merit

89 See ICJ (6 November 2003) Higgins J's separate opinion https://www.icj-cij.org/public/files/case-related/90/090-19961212-JUD-01-03-EN.pdf (accessed 18 December 2021), paras 32 & 33.
90 My emphasis.
91 My emphasis.
92 My emphasis.
93 It would not be out of place to adopt this principle. See arts 60 & 61 African Charter.
94 *FOI* (n 2) para 42.
95 *FOI* (n 2) para 43.
96 n 89 70.

of a communication after the seizure stage, nothing is put at risk, as Higgins J indicated,[97] if the Commission limits the communication, during the seizure stage, to a test of whether the facts disclosed *might* reveal a violation of the African Charter.

5 Conclusion and recommendation

The African Commission's extant Rules of Procedure 2020 have introduced novel provisions to the Commission's communication procedure. Under the Rules, the seizure of a communication can now be undertaken by Secretary on behalf of the Commission during inter-session. This is advantageous as it may save the time used in considering communications whereby parties had to wait for the Commission's session to know whether or not a communication would be seized by the Commission. Another notable provision of the 2020 Rules is that they dispense with the requirement for communications to meet certain admissibility criteria, which hitherto were contained in the previous Rules of Procedure of the African Commission. Nevertheless, the 2020 Rules have limited the power of the Commission to seize a communication to two situations, namely, where there is a doubt regarding whether the seizure criteria have been met; or where the Secretary decides not to seize a communication and prefers to refer it to the Commission.

The African Commission did not reflect these new provisions in its decision in *FOI*. Thus, it is recommended that the Commission in its subsequent decisions should reflect the changes in the Rules. First, a preliminary assessment of the admissibility criteria is no longer required for seizure and, as such, the African Commission should not make it a criterion to be seized of a communication. Second, the Commission should not make a finding of non-fulfilment by the complainant of the seizure criteria under Rule 115(2) of the 2020 Rules, except where a doubt exists, in the sense of a difference in the assessment of a communication by the Secretary and an assessment by the complainant on whether the criteria have been met, or where the Secretary refers the communication to the African Commission to decide whether it meets the seizure criteria. Lastly, it is recommended that the Commission should adopt the *might* test at the seizure stage rather than the wide *prima facie* standard it adopted in *FOI*. In this way the African Commission would have the opportunity to receive more compelling evidence of violations of the African Charter at the

97 n 89 para 34 57.

merit stage, rather than shutting out communications at a stage where compelling proof is not required.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: TM Makunya 'Overcoming challenges to the adjudication of election-related disputes at the African Commission on Human and Peoples' Rights: Perspectives from the *Ngandu* case' (2022) 22
African Human Rights Law Journal 379-402
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a3

Overcoming challenges to the adjudication of election-related disputes at the African Commission on Human and Peoples' Rights: Perspectives from the *Ngandu* case

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Summary: *The African Commission on Human and Peoples' Rights is increasingly taking on the role of a regional electoral adjudication body in resolving election-related human rights violations. While this role is essential because of the contested nature of elections in Africa and the inability of many national election resolution mechanisms to sanction election irregularities, the African Commission must master the intricacies of election dispute resolution in member states for its recommendations to be based on sound legal principles. Its decision in the* Ngandu *case provides an opportunity to assess the nature of some of the challenges faced by the Commission when adjudicating election-related disputes and how to overcome these. In this decision, the African Commission found that the Democratic Republic of the Congo had violated the complainant's right to defence, to political participation and to work following the annulment of his election as a member of the National Assembly by the country's interim Constitutional Court (the Supreme Court of Justice). The analysis of the case suggests that, despite the*

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African Commission's ability to re-affirm the relevance of the right to political participation for the consolidation of democracy in Africa and protecting the right to a fair trial and to work, it must address three types of challenges in its role as election-adjudication body using the procedural mechanisms provided for in both the African Charter and the Rules of Procedure. These challenges are the knowledge of electoral justice systems operating in the DRC and Africa at large; the impossibility of restitution as a form of reparation; and the state's participation in proceedings and the implementation of recommendations.

Key words: *African Commission on Human and Peoples' Rights; Ngandu case; election-related disputes; exhaustion of local remedies; restitution; electoral justice systems*

1 Introduction

This article examines some of the challenges to the adjudication of election-related disputes at the African Commission on Human and Peoples' Rights (African Commission) through the lens of its decision in *Albert Bialufu Ngandu v Democratic Republic of Congo* (*Ngandu* case)[1] where it found that the Democratic Republic of the Congo (DRC) had violated the rights of Albert Bialufu Ngandu (the complainant) to defence, to political participation and to work as a result of the unlawful and unfair invalidation of his election. This communication forms part of a body of African Commission decisions where it has decided on different aspects of electoral-related disputes in Africa using its human rights protection mandate.[2] It exemplifies the increasing 'regionalisation' of electoral justice or electoral dispute settlement which has seen regional human rights bodies play a significant role in diffusing violence and tension arising from contested elections at the domestic level.[3]

Of late, scholars have been interested in exploring the ability and appropriateness of and the extent to which regional and sub-

1 Communication 433/12 *Albert Bialufu Ngandu v République démocratique du Congo* (February 2016) para 86, https://www.achpr.org/fr_sessions/descions?id=258 (accessed 20 July 2021) (*Ngandu* case).

2 These decisions include *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1994); *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire (II)* (2008) AHRLR 75 (ACHPR 2008); *Constitutional Rights Project & Another v Nigeria* AHRLR 191 (ACHPR 1998); *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005); *Legal Resource Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

3 G 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* 343; S Adjolohoun & E Youmbi 'L'émergence d'un juge électoral régional africain' (2019) 3 *Annuaire africain des droits de l'homme* 22.

regional human rights bodies can serve as forums to settle domestic elections-related disputes.[4] These bodies are believed to be insulated from domestic politics and pressures, the more so in countries where ruling regimes have managed to establish election dispute-resolution mechanisms that are beholden to them.[5] Regional human rights bodies pay close attention to human rights violations that occur during elections. This stands in sharp contrast to many national courts that, for the most part, approach electoral disputes from a technical standpoint[6] and give less or no consideration to human rights violations.[7] In several cases, national courts and tribunals are institutionally weak, corrupt[8] and fearful of the powers that incumbents wield.[9] While domestic courts in two African countries – Kenya and Malawi – have recently nullified results of presidential elections marred by irregularities,[10] this has tended to remain the exception. This attitude is evidenced by the remarks of the then president of the Supreme Court of Ghana, who suggested that the 'judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest to sustain it'.[11] Most judges appear to be ready to err on the

4 See broadly J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal and social change* (2020); A Olinga 'La promotion de la démocratie et d'un ordre constitutionnel de qualité par le système africain des droits fondamentaux: entre acquis et défis' (2017) 1 *Annuaire africain des droits de l'homme* 234-236; C Heyns et al 'The right to political participation in sub-Saharan Africa' (2019) *Global Journal of Comparative Law* 143-146; Kakai (n 3) 345-351; Adjolohoun & Youmbi (n 3) 24.

5 O Kabaa 'The challenge of adjudicating presidential election disputes in Africa: Exploring the viability of establishment an African supranational elections tribunal' LLD thesis, University of South Africa, 2015 172 (on file with the author); Kakai (n 3) 369. See also CM Fombad 'The Cameroonian Constitutional Council: Faithful servant of an accountable system' in CM Fombad (ed) *Constitutional adjudication in Africa* 80.

6 O Kabaa 'The challenges of adjudicating presidential election disputes in domestic courts in Africa' (2015) 15 *African Human Rights Law Journal* 338-343; C Fombad 'Democracy, elections, and constitutionalism in Africa: Setting the scene' in C Fombad & N Steytler (eds) *Democracy, elections, and constitutionalism in Africa* (2021) 29; D Meledje 'Le contentieux électoral en Afrique (2009) 129 *Pouvoirs* 140.

7 D Asha 'Note juridique sur l'opinion dissidente du juge Corneille Wasenda en marge de l'arrêt *RCE 001/PR.CR* rendu en réponse à la requête contre la décision portant publication des résultats provisoires de l'élection présidentielle du 30 décembre 2018' (2018) 3 *Annuaire congolais de justice constitutionnelle* 592.

8 B Kahombo 'La Cour constitutionnelle et la rectification d'erreurs matérielles contenues dans ses arrêts relatifs au contentieux des résultats des élections législatives du 30 décembre 2018' (2019) 4 *Annuaire congolais de justice constitutionnelle* 197-198.

9 O Kabaa & CM Fombad 'Adjudication of disputed presidential elections in Africa' in Fombad & Steytler (n 6) 361-362.

10 See *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & Others* Presidential Petition 1 of 2017 (Kenya) and *Saulos Klaus Chilima & Another v Arthur Peter Mutharika & Others* Constitutional Reference 1 of 2019; *Arthur Peter Mutharika & Another v Saulos Klaus Chilima & Another* MSCA Constitutional Appeal 1 of 2020 (Malawi).

11 M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 162; MG Nyarko &

side of caution to help the ruling coalition maintain its grip on power. Sadly, this attitude has led to a situation where, in many cases, the decisions of the courts in electoral disputes have created havoc and plunged countries into violence and deadly skirmishes.[12]

However, there are legitimacy issues surrounding the exercise by regional bodies, such as the African Commission, of certain adjudicative functions related to elections, which may lead them to be more deferential to the state's preference.[13] No African constitution or (human rights) treaty stipulates that regional bodies will play a role in electoral justice.[14] As such, this places the African Commission, particularly, in a tricky position since the power to validate candidacies to various types of elections or to validate election results lies with domestic courts.[15] International law ensures that states determine the constitutional system – including rules governing electoral dispute resolution – that better suits their needs and aspirations.[16] Although states have the obligations to comply with basic international (human rights) principles and standards,[17] and regional human rights bodies are established to oversee the implementation of the African Charter on Human and Peoples' Rights (African Charter), the involvement of these bodies in what states could consider political matters *par excellence* could erode their legitimacy and lead to the contestation of their jurisdiction.[18] These contestations at times are unavoidable and are mainly guided by political motives especially when regional bodies adopt judgments and decisions that do not match the political preference of governments.[19] The least regional

T Makunya 'Selected developments in human rights and democratisation during 2017: Sub-Saharan Africa' (2018) 2 *Global Campus Human Rights Journal* 149.

12 Meledje (n 6) 143.

13 For the African Court, see 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* 439-444.

14 Kakai (n 3) 367-368; Kabaa (n 5). See generally the ECOWAS Court of Justice in *Dr Jerry Ugokwe v Nigeria and Dr Christian Okeke* (2005).

15 Meledje (n 6) 139.

16 See in particular art 2(2) of the International Covenant on Civil and Political Rights; CCPR General Comment 25: Article 25 (Participation in public affairs and the right to vote) adopted at the 57th session of the Human Rights Committee (12 July 1996) para 1; art 20(1) of the African Charter. See broadly C Anyangwe 'The normative power of the right to self-determination under the African Charter and the principal of territorial integrity: Competing values of human dignity and system stability' (2018) 2 *African Human Rights Yearbook* 49.

17 *Mouvement Ivoirien des Droits Humains* (n 2) paras 72 & 77. See Olinga (n 4) 226; Communication 320/06 *Pierre Mamboundou v Gabon* (2014) para 45.

18 TM Makunya et al 'Selected developments in human rights and democratisation in Africa during 2020' (2021) 5 *Global Campus Human Rights Journal* 204-206.

19 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and lessons' (2021) 21 *African Human Rights Law Journal* 1258-1259; 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* 7.

bodies could do is to ensure that their decisions or judgments are irreproachable at law.

In the next part the article presents a summary of the *Ngandu* case, the arguments of the parties and the African Commission's findings on admissibility, merits and remedies. In part 3 it reviews the challenges posed by the resolution of electoral disputes, while in part 4 the article offers some reflections on how these challenges could be overcome to enhance the legitimacy and acceptability of the African Commission's involvement in electoral disputes. In part 5, the article concludes that given the central role of the African Commission in safeguarding political rights at the regional level, its understanding and rigorous assessment of the election-related issues that arise in the adjudication of election petitions at the national level will improve the lot of those whose election-related rights are continually being infringed.

2 Ruling in the *Ngandu* case

This part reviews the facts and alleged violations, the consideration of admissibility requirements by the African Commission, the merits and reparation.

2.1 Facts and alleged violations

Following the 2011 national legislative elections in DRC, the National Independent Electoral Commission (CENI) provisionally declared the complainant elected. He was then sworn in as a member of parliament (MP) in the National Assembly pending the publication of final results by the Supreme Court of Justice (CSJ)[20] acting as the interim Constitutional Court.[21] The 2006 DRC Constitution (Constitution) and the General Electoral Law vest the Constitutional Court with the power to proclaim final presidential and national legislative election results and to adjudicate election petitions within seven days and two months for presidential and legislative elections respectively.[22] A total of 519 petitions alleging irregularities in the 2011 legislative elections were then filed in the CSJ, 32 of which were successful, resulting in the invalidation of the mandate of 32

20 *Ngandu* (n 1) para 3.
21 Art 223 Constitution of DRC.
22 Art 161(2) of the Constitution of DRC and art 72 of Act 06/006 of 9 March 2006 Governing the Organisation of Elections as modified by Act 11/003 of 25 June 2011, Act 15/001 of 12 February 2015 and Act 17/013 of 24 December 2017. On 29 June 2022, Act 22/029 Amending the General Electoral Act was enacted.

provisionally-elected MPs, including the complainant,[23] and their replacement with other MPs.

According to the complainant, the nullification of his election by the CSJ on 25 April 2012 was unlawful as the Court relied on results that were incorrect and not published by the CENI.[24] There was a significant discrepancy between the number of voters in the presidential and national parliamentary elections in the same district.[25] He further noted that, on the basis of article 75 of the Electoral Act, the CSJ had limited competences under national law in this regard, which do not include the power to replace elected candidates with other candidates.[26] After the 'unlawful' nullification of his election, he approached the CSJ twice (in May and June 2012) urging it to correct clerical errors in the hope that the correction of these errors would prompt the CSJ to overturn its 25 April 2012 ruling. The result of these two requests was predictable since the Supreme Court decisions are final and not subject to appeal.[27] Another appeal lodged with the CSJ in February 2012 was rejected two months later.[28] The National Assembly then stopped paying his monthly salary, and on 4 May 2012 validated the mandate of the candidate by whom he had been replaced by the CSJ.[29]

Before the African Commission, the complainant alleged the violation of the following rights protected under the African Charter. First, he argued that the lack of appeals against decisions of the Supreme Court violated his right to equality and equal treatment as petitioners appearing before courts other than the Supreme Court enjoy the right to appeal.[30] Second, the complainant argued that his right to political participation under article 13 of the African Charter had been violated as the Court had confirmed a candidate who had not been elected by the people. Third, the unlawful invalidation of his mandate consequently deprived him of work, a right protected under article 15 of the African Charter.

This petition was aimed at remedying the harm suffered by the complainant as a result of an apparently flawed electoral adjudication

23 M Wetsh'Okonda & B Kahombo *Le pari du respect de la vérité des urnes en Afrique: Analyse des élections présidentielles et législatives du 28 novembre 2011 en République démocraitque du Congo* (2014) 202-203.
24 *Ngandu* (n 1) para 5.
25 *Ngandu* para 4. To illustrate the discrepancy, he demonstrated that 279 763 persons voted in presidential elections (807 polling stations) while 307 417 voted in legislative elections but based on 748 polling stations.
26 *Ngandu* (n 1) para 5.
27 Art 168(1) Constitution of DRC.
28 *Ngandu* (n 1) para 6.
29 *Ngandu* para 7.
30 *Ngandu* para 38.

system. Prospectively, the application was to address what has become an endemic scourge of 'unjust' invalidation of mandates of elected parliamentarians by the DRC Constitutional Court.[31] Not only did the Court annul the election of 32 MPs in 2011, but a similar situation also occurred in 2007 when 18 MPs were invalidated. In 2018, 31 MPs lost their seats following controversial and contested judgments by the Constitutional Court.[32] This curse of invalidation has clearly cast a spell over the progress of the country's electoral justice system. It has given the impression that the national electoral dispute mechanism is no more than a sham,[33] leaving petitioners with no choice other than to resort to regional human rights bodies such as the African Commission which, they believe, provide some guarantees of independence.

2.2 Admissibility

The African Commission relied exclusively on factual elements provided by the complainant, given that DRC did not submit its arguments on admissibility and merits.[34] The decision is silent as to what prompted DRC not to engage the Commission, and it is unclear so far why the country has not engaged the Commission in several other communications.[35] The Commission started by analysing whether every condition laid down under article 56 of the African Charter had been met. As is often the case, the requirement of exhaustion of local remedies and the submission of the petition within a reasonable time were discussed at length. The African Commission started by noting how the complainant's attempts to overturn the Supreme Court's judgment of 25 April 2012 which invalidated him had failed. The Supreme Court was the court of first and last instance in national legislative and presidential elections and its decisions were final and not subject to appeal. Having invalidated the complainant and rejected his two applications to correct material errors, no other local remedy was available.[36] In its reasoning, the African Commission conceived the procedure to rectify material

31 See generally Kahombo (n 8) 203-205.
32 Kahombo (n 8) 203-204.
33 Kahombo (n 8) 205.
34 *Ngandu* (1) para 24.
35 The pattern of the absence of state submissions, effective engagement with the African Commission and compliance with its recommendations may be observed in other cases, including *Institute for Human Rights and Development in Africa & Others v Democratic Republic of Congo* (2017); *Marcel Wetsh'Okonda Koso & Others v Democratic Republic of Congo* (2008); *Mr Kizila Watumbulwa v Democratic Republic of Congo* (2012); *Dino Noca v Democratic Republic of Congo* (2012); and *Maître Mamboleo M. Itundamilamba v Democratic Republic of Congo* (2013 in relation to admissibility).
36 *Ngandu* (n 1) para 30.

or clerical errors to be a 'remedy' in the sense envisaged by article 56(5) of the African Charter. This conception impacted on the way in which the Commission examined the rule of submission within a reasonable time. The Commission considered that the date of the Supreme Court's judgment (5 September 2012) rejecting the complainant's applications to correct clerical errors was the starting point to assess the compliance with article 56(5). It did not consider the date of the earlier judgment (25 April 2012) which invalidated the complainant. The Commission assumed that the two applications to correct material errors indeed were 'appeals' against the judgment of 25 April 2012, and that the judgment of 5 September 2012 was a response to the 'appeals'. The Commission's Secretariat was seized on 13 December 2012, four months from the moment the Supreme Court rejected the applications to correct clerical errors. The Commission thus concluded that the application complied with article 56(5).

2.3 Merits

The African Commission concluded that the following rights had been violated: the right to defence (article 7(1)(c));[37] the right to political participation (article 13) owing to the complainant's unlawful invalidation and replacement;[38] his right to work (article 15) as the 'unlawful' invalidation prevented him from holding his paid position in the National Assembly[39] while there were no sufficient elements to prove the violation of the petitioner's right to be tried within a reasonable time;[40] the right to an impartial tribunal;[41] and the obligation to institute courts.[42] In what follows, the article discusses the African Commission's ruling in relation to the alleged violations of articles 3, 7, 13 and 15.

The applicant claimed that he had been discriminated against due to the lack of appeal to decisions by the CSJ in electoral matters, as the CSJ sits as a court of first and last instance in such matters. The African Commission framed the complainant's claim to be one related to the right to equality, the assessment of which requires

37 In the decision's operative part, the African Commission notes that it found a violation of art 7(1)(a) while this right in para 57 was found not to have been violated. Instead, the Commission found that the respondent state had violated the right to defence (art 7(1)(c)).
38 *Ngandu* (n 1) paras 75-76.
39 *Ngandu* para 78.
40 *Ngandu* para 68.
41 *Ngandu* para 69.
42 *Ngandu* para 81.

one to 'identify a reference in a similar or comparable situation'.[43] It proceeded to assess whether the complainant was in a similar situation as individuals who appear before courts other than the CSJ and whether the decision of the latter violated the right to equality. With regard to the first question, the Commission noted that the complainant could not claim to be in a similar situation as other litigants before the ordinary courts given that the subject matter of their respective claims differs (electoral disputes versus non-electoral disputes) and that the Constitution and the electoral law specifically empower the CSJ to deal with these disputes in the first and last resort.[44] Regarding the second question, the Commission found that the lack of appeals against Supreme Court decisions would have been discriminatory had there been sufficient evidence that other candidates had been allowed to appeal Supreme Court decisions.[45]

The African Commission subsequently considered whether the complainant's right to appeal had been violated due to the lack of appeal mechanisms against judgments of the CSJ. Before doing so, the Commission first distinguished the centralised from the decentralised constitutional or electoral justice systems. According to the Commission, DRC is a civil law country that adopts a centralised model of constitutional review. Unlike common law countries, the centralised model confers on a specialised jurisdiction the power to review the constitutionality of laws and adjudicate electoral petitions.[46] The Commission subsequently examined the justifications for the appeal procedure[47] before reviewing the reasons behind the choice of the centralised constitutional review model and whether or not that prevented petitioners from appealing against decisions. According to the Commission, the centralised constitutional review model is 'often preferred to the decentralised system which brings about low rigidity of the Constitution, mistrust of judges, duality of the courts and a separation of the legal order'.[48] It added, in a manner that is difficult to understand, that the two situations must be distinguished: 'the one in which the highest court endowed with exclusive centralised power gives judgments which cannot be appealed against; and the one in which the same court gives

43 *Ngandu* para 47.
44 *Ngandu* para 49.
45 *Ngandu* para 51.
46 *Ngandu* paras 50 & 53.
47 The African Commission notes three functions of appeals, namely, (i) to avoid or correct miscarriages of justice and to protect parties from arbitrary decisions by the judge; (ii) to ensure legal and judicial certainty through harmonisation of the law; and (iii) to enhance the legitimacy of the judicial system in the eyes of the public through the consistent and controlled application of the law that harmonisation provides.
48 *Ngandu* (n 1) para 55.

provisional judgments which can subsequently be appealed in the event of a dispute'.[49]

The Commission averred that

> even in the centralised constitutional or electoral justice delivery system, the definitive nature of the judgment delivered is only relative, since there is almost always a remedy such as rectification of material error and an action for the annulment of the previous court judgment, among others.[50]

As it did in the case of admissibility of the petition, the Commission concluded that the complainant enjoyed the right to appeal as he had submitted two applications for the correction of clerical errors.

The African Commission further reached the conclusion that the way in which the CSJ dealt with the complainant's case violated his right to defence (equality of arms between parties). It indicated that the Supreme Court judgment of 25 April 2012 was sufficiently motivated but procedurally unfair and substantively illegal.[51] The Commission noted that the said judgment lacked reasonable legal ground as it was based on minutes not transmitted by the electoral commission as provided by the law but by parties.[52] Relying on the Congolese electoral law, the Commission also averred that the Supreme Court should simply have annulled the electoral results and ordered a re-run instead of unlawfully replacing the complainant with another MP.[53] The procedure followed by the Supreme Court was deemed 'unfair' given that it recounted the votes in the absence of the candidates whose election had been invalidated and did not allow him to challenge the count and the documents used in it.[54]

Political participation and the right to work are intimately linked when one's mandate is arbitrarily invalidated. The African Commission confirmed that the right to political participation had been violated due to the lack of reasonable grounds in the Supreme Court's decision to replace the complainant with another candidate.[55] As the results on which it relied did not emanate from the electoral commission and were not confirmed by witnesses, its judgment lacked any legal foundation.[56] The complainant did not have the opportunity to verify the substance of the recount that led to the said decision

49 As above.
50 *Ngandu* para 56.
51 *Ngandu* para 62.
52 *Ngandu* para 63.
53 *Ngandu* paras 64-65.
54 *Ngandu* para 67.
55 *Ngandu* para 75.
56 As above.

and he was not fully informed about the judgment.[57] In the end, the Commission found that the judgment of the Supreme Court of Justice, for the replacement of the complainant with another when a re-run was the legal option in case of irregularities in the election results, violated Congolese electoral laws.[58] The Commission's findings reinforced the position of African Union (AU) member states and its own jurisprudence on how fair and equitable elections are essential to strengthening a democratic culture in Africa.[59] Over the years, the Commission has developed aspects of the right to political participation in its soft law instruments and case law.[60] Consequently, state (in)actions that arbitrarily annul election results must not be tolerated, in part because they deprive lawfully-elected individuals of the work for which they were elected.

The right to work was the last right that the African Commission found to have been violated.[61] It considered that this right included 'access to employment, security of employment and reintegration unless appropriate compensation is paid'.[62] The Commission argued that MPs have a permanent but fixed-term position, with remuneration and related benefits. For the Commission, it is 'an employment, the loss of which, in many countries, if one is not re-elected, it gives room to the right to enjoy unemployment benefits'.[63]

2.4 Remedies

The complainant sought to move the African Commission to order DRC to effect three types of prayers. First, DRC should redress the alleged violations by reinstating him in the National Assembly. Second, the DRC should compensate him for the damage caused with all other benefits of the office, including parliamentary immunities. Finally, DRC should ratify 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 make the declaration pursuant to its article 34(6).[64] The first prayer was

57 Ad above.
58 *Ngandu* para 76.
59 African Charter on Democracy, Elections and Governance (2007/2012) chs 2 & 3.
60 See cases cited in n 2. See, among others, Resolution on Elections in Africa – ACHPR/Res 174 (XLVIII)10 African Commission on Human and Peoples' Rights (24 November 2010).
61 *Ngandu* (n 1), para 78. See generally 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 paras 56-59.
62 *Ngandu* (n 1) para 77.
63 *Ngandu* para 78.
64 *Ngandu* para 10.

rejected as it had become difficult to reinstate the complainant. The Commission enjoined the state to pay the complainant's salaries and benefits due for the time of the mandate during which he was unable to perform the duties. It refrained from ordering the state to ratify the African Court Protocol and making the declaration given the discretionary nature of such a decision and the absence of the Commission's power to do so.[65]

3 Some challenges to the adjudication of election-related disputes at the African Commission

The *Ngandu* case provides an opportunity to evaluate some of the challenges the African Commission faces in pursuing its role as a regional electoral adjudicator. Legally, understanding these challenges could help the Commission to develop, in future similar cases against state parties to the African Charter, legal principles based on accurate information about domestic election disputes mechanisms. Politically, it can spare the Commission from additional backlashes with member states that have over the past two decades demonstrated their determination to protect and defend their human rights records,[66] all the more when the African Commission employs inaccurate domestic legal standards or information.[67] Moreover, the experience of the African Court on Human and Peoples' Rights (African Court) and the Southern African Development Community (SADC) tribunals shows how, when regional adjudication bodies are too assertive of their authorities in politically controversial matters,[68] several states tend to react in a manner that undermines courts' ability to decide over individual complaints.[69] Three main

65 *Ngandu* para 84.

66 J Biegon 'Diffusing tension, building trust: Proposals on guiding principles applicable during consideration of the Activity Reports of the African Commission on Human and Peoples' Rights' (2018) *Global Campus Africa Policy Briefs* 7.

67 In its response on information on state reporting contained in the African Commission's combined 48th and 49th Activity Report, Egypt vehemently reacted that it was 'factually incorrect to list Egypt as having an overdue periodic report submitted under Article 62 of the African Charter on Human and Peoples' Rights'. On the 47th report, it called on the African Commission to 'base itself on verified information, and commit to impartiality'. Responding to the Commission 47th Activity Report, Malawi noted that 'the allegation contained in paragraph 46(xvii) … is unfounded since there was simply not such shutdown; neither was there even an attempt by the authorities to shut down any communication platform'. Zimbabwe for its part argued that 'the [African Commission] reports should focus on facts, not allegations and respect procedures of the [African Charter] itself that only facts are published. Zimbabwe objects the inclusion of unproven allegations under a section that focuses on areas of concern.'

68 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* 301.

69 Kabaa (n 5) 216. See generally Adjolohoun (n 19) 1-40.

challenges arise from the consideration of the *Ngandu* case: the knowledge of electoral justice systems operating in DRC and Africa at large; the impossibility of restitution as a form of reparation; and the state's participation in proceedings and the implementation of recommendations.

3.1 Knowledge of electoral justice systems

Two problems arise from the knowledge of electoral justice systems operating in DRC and Africa at large. The first relates to how the African Commission understands legal remedies that exist in election-related disputes in DRC and, relatedly, how it considers the violation or not of the right to appeal under the African Charter. The first is a procedural question while the second is a substantive one. These two issues are considered at length in what follows.

It is fair, however, to start by positing that constitutional review differs from the electoral justice system even when the same judicial organ (the Constitutional Court) performs the two procedures. Constitutional review aims to safeguard the supremacy of the Constitution by reviewing the constitutional validity of norms that are hierarchically inferior to the Constitution, also known as infra-constitutional norms irrespective of where they originate from. In DRC, these norms are international treaties and agreements; laws; acts having the force of law; edicts; internal regulations of the parliamentary chambers, the Congress and the institutions supporting democracy; as well as the regulatory acts of the administrative authorities.[70] Acts of deliberative assemblies and judicial decisions can be added to these norms.[71] By contrast, the electoral justice system aims to settle disputes broadly arising from elections (the validity of candidacies, presidential, legislative and local elections and referendums). Favoreu and others consider that both procedures are part of constitutional adjudication given that they aim to ensure that 'the constitutional order is respected in all its aspects'.[72] In the *Ngandu* case the African Commission from time to time refers to constitutional review to distinguish how the electoral

70 Art 160 of the 2006 DRC Constitution; art 43 of Act 13/026 of 15 October 2013 Regulating the Organisation and Functioning of the Constitutional Court.

71 See DRC Constitutional Court *Decision R.Const.1800* of 22 July 2022.

72 L Favoreu and others *Droit constitutionnel* (2019) 282. A centralised constitutional review system is one where the review of the constitutionality of legislation, administrative actions and conduct can be challenged before specialised bodies, generally known as the Constitutional Court, the Constitutional Council or the Constitutional Tribunal, some of which are situated outside the ordinary hierarchy of the judiciary while the decentralised constitutional review system is one that empowers other courts in the judiciary, generally started from high courts, to entertain constitutional matters. Broadly speaking, the centralised

justice system is regulated under the two major legal traditions – common law and civil law – operating in Africa.

Be that as it may, one of the questions arising in the *Ngandu* case was whether the procedure to rectify clerical errors was a 'legal remedy' and whether by initiating it before the CSJ, the complainant had exercised an appeal and could thus not claim the violation of his right to appeal under article 7(1)(a) of the African Charter. This difficulty arose as the CSJ is a court of first and last instance in presidential and national legislative elections disputes, its judgments being final and not subject to appeal.[73] Parties may approach the CSJ simply to correct material errors found in decisions.

The African Commission seems to have characterised the procedure to correct material errors as a 'legal remedy' by stating that its existence 'is the manifestation of an option for appeal of the judgments of the Supreme Court'.[74] The procedure to correct material errors is neither an appeal nor a legal remedy strictly speaking. The rectification of clerical errors does not in essence aim to reverse, to withdraw, to replace or to annul the decision adopted by a court which a legal remedy normally seeks to achieve.[75] It cannot question the authority of the decision and, based on the doctrine of *res judicata*, the matter cannot be adjudicated any further.[76] A clerical error is generally defined as 'an inaccuracy that inadvertently slips into the execution of an operation (a calculation error, for example) or the drafting of a document (in the case of the omission of a name)'.[77] In electoral disputes, clerical errors encompass

> typing error resulting in a discrepancy between the number of votes cast in the motivation of the judgment and those declared in its operative part; the indication of an erroneous date on the day of counting or the posting of results at the level of the electoral district.[78]

The rectification of clerical errors is not unique to electoral disputes. Other domestic courts and tribunals as well as regional and sub-

model is applicable in French, Arabic, Hispanic and Portuguese-speaking Africa and the decentralised model is mainly applied in Anglophone Africa.

73 Art 168(1) Constitution of DRC.

74 *Ngandu* para 57.

75 G Cornu *Vocabulaire juridique* (2018) 2270; J Kimpele 'L'erreur matérielle dans le scrutin du 28 novembre 2011' (2014) *Bulletin des Arrêts de la Cour Suprême de Justice 2011-2012* 283.

76 Kahombo (n 8) 189; B Wa Lwenga 'Tribune du Prof Blaise Eca Wa Lwenga sur la rectification des erreurs matérielles par la Cour constitutionnelle', https://www.7sur7.cd/2019/06/21/tribune-du-prof-blaise-eca-wa-lengwa-sur-la-rectification-des-erreurs-materielles-par-la (accessed 11 August 2022).

77 Kimpele (n 75) 281.

78 Kimpele (n 75) 291.

regional human rights bodies are empowered to do so with regard to their decisions.[79]

Conflating the rectification of clerical errors with an appeal had two main consequences. First, the African Commission considered that domestic remedies had been exhausted at the time the Supreme Court rejected the complainant's requests for rectification of clerical errors (September 2012) and not when the first judgment annulling his election and replacing him with another candidate had been adopted (April 2012).[80] Concretely, the Commission should have considered that local remedies had been exhausted eight months before approaching it[81] and not four.[82] The absence of a clear definition of what constitutes 'reasonable period' under the African Charter warrants a justification of the Commission's decision to admit this case.[83] Given that the Commission has had to declare inadmissible applications introduced after six months of having exhausted local remedies,[84] the Commission and the complainant were expected to justify, whether on grounds of fairness and justice or the peculiarity of the case,[85] why an eight-month period was reasonable within the meaning of article 56(6) of the African Charter[86] for the petition to be declared admissible.[87]

Second, since there clearly does not exist an appeal against Constitutional Court decisions, the African Commission's failure to address a critical issue related to the violation of the complainant's right to appeal against Supreme Court decisions can be inconsistent with the African Charter's promise to protect fair trial rights. While there is no unqualified right to a second hearing under international law, the African Commission has interpreted the right to appeal as a fundamental aspect of fair trial.[88] Its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa are even more generous because an 'entitlement to an appeal to a higher judicial

79 African Court on Human and Peoples' Rights, Rules of Procedure, Rule 79; Economic Community of West African States Court of Justice, Rules of Procedure, art 63(1); East African Community Court of Justice, Rules of Procedure, Rule 81; European Court on Human Rights, Rules of Procedure, Rule 81; Inter-American Court of Human Rights, Rules of Procedure, art 76.
80 *Ngandu* (n 1) para 31.
81 The last decision of the Supreme Court of Justice; 5 September 2012.
82 On 13 December 2012.
83 *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008) para 108.
84 *Majuru* (n 83) paras 109-110.
85 *Majuru* para 109.
86 *Ngandu* (n 1) para 31.
87 See S 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* 77-78.
88 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 221.

body' is seen as a significant component of a fair hearing under the African Charter in all kinds of proceedings.[89] In *Jebra Kambole v Tanzania* the African Court was emphatic in observing that 'among the key elements of the right to a fair hearing, as guaranteed under article 7 of the Charter, is the right of access to a court for adjudication of one's grievances and the right to appeal against *any* decision rendered in the process'.[90]

The question, therefore, is whether the absence of appeal against judgments of constitutional courts in presidential and national legislative elections can be considered compatible with the need to establish 'effective' electoral jurisdictional bodies,[91] and how the existence of appeals, where they are absent, can help countries to defuse the tensions and discontent that arise from elections. The absence of appeal against Constitutional Court judgments in presidential and national legislative election-related disputes stems from the nature of judgments of the Constitutional Court, as they are not susceptible to appeal, and the choice made by the DRC constituent power to follow the model adopted in fellow civil law African jurisdictions by not instituting appeal procedures against judgments of the Constitutional Court. However, the chaotic management of electoral disputes generally results in the loss of public confidence in the judiciary and creates a sense of the illegitimacy of the judiciary as an instrument to ensure the truthfulness of the ballot. An appeal would have allowed the litigant's matter to be heard by another judge and would have offered an opportunity to the losing party to challenge the reasoning of the previous court, a process which could potentially restore confidence in domestic courts as independent and effective electoral adjudicators and perhaps reduce the likelihood of seeking restitution as a form of redress before regional (human rights) bodies.

3.2 The impossibility of restitution as a form of reparation

The period within which the African Commission adopts its recommendations in election-related communications is relatively long. By the time recommendations are adopted, the complainants

89 African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003 2(j).

90 My emphasis. *Jebra Kambole v United Republic of Tanzania* (Judgment) (2020) 4 AfCLR 430 para 99.

91 Art III(c) of the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa (AHG/Decl.1(XXXVIII); art 17(2) of the African Charter on Democracy, Elections and Governance (2007/2012) in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 130.

can no longer be placed in the situation in which they were prior to the occurrence of the 'internationally wrongful act'. In the *Ngandu* case it took the African Commission three years and two months to make its final pronouncement (13 December 2012 to 25 February 2016), 10 months before the new legislative elections. Restitution as a form of reparation that aims to withdraw the wrongful measure,[92] in this case, for example, reintegrating the complainant in the National Assembly, could not be contemplated.

One might, therefore, assume that whenever litigants approach the African Commission in election-related human rights violations, they will hardly obtain the measure of restitution that the complainant sought.[93] The delay in issuing its recommendations seems to be a general problem before the African Commission if one examines other election-related communications it adjudicated. The *Constitutional Rights Project* case was adjudicated in a period of five years and three months (July 1993 to October 1998) while the outcome in *Pierre Mamboundou v Gabon* came after eight years and three months of adjudication (March 2006 to July 2014). Supposing that the Commission had ruled in favour of Pierre Mamboundou, by the time the decision was adopted in 2014, Gabon had already, in 2009, held anticipated elections following the death of President Omar Bongo – against whom Mamboundou had approached the Commission – and was two years into the organisation of other presidential elections in 2016. Worse still, the complainant passed away in 2011, three years before the Commission settled the matter.[94] A similar consequence may be drawn from the *Constitutional Rights Project* where the time of the African Commission's ruling colluded with the organisation of the 1999 presidential elections in Nigeria. In relation to presidential elections petitions, there is also the risk that the government tasked to defend the case before the African Commission is the very same government whose election is being contested. The now pending *Communication 721/19 Martin Fayulu Madidi v Democratic Republic of Congo* for which the Commission decided to be seized in 2019 is an illustration. Besides, this petition may be resolved while DRC will have moved on to another electoral cycle starting in 2023. While the Commission can be partly blamed for delays in decision making on its communications, the participation of the respondent state

92 M Forteau, A Miron & A Pellet *Droit international public* (2022) 1131; J Crawford *Brownlie's principles of public international law* (2012) 567.
93 *Ngandu* (n 1) para 10.
94 G Dougueli 'Gabon: décès de l'opposant Pierre Mamboundou' 16 October 2011 *Jeune Afrique*, https://www.jeuneafrique.com/178975/politique/gabon-d-c-s-de-l-opposant-pierre-mamboundou/ (accessed 15 July 2021).

in proceedings and its willingness to implement the decision are equally vital.

3.3 State's participation in proceedings and the question of implementation

The African Commission's involvement in electoral disputes must demonstrate any prospect that its findings will most likely solve the predicament applicants submit to it and possibly ensure that its ruling will prevent similar wrongs in the respondent state. However, the *Ngandu* case was not complied with and the Constitutional Court once again nullified the election of 31 members of parliament through the rectification of clerical errors in 2018. The state clearly failed to learn from the 2007 and 2011 experience, the African Commission's findings in the *Ngandu* case and the Inter-Parliamentary Union's Human Rights Commission recommendation that the country 'carry out appropriate legislative and constitutional reforms to end the recurrence of these violations and to improve the mechanisms for resolving electoral disputes'.[95]

The lack of engagement between the African Commission and DRC in this case may have meant that the state was not willing to reform its constitutional and regulatory frameworks to implement the African Commission's decision and probably to prevent what has become a pandemic of annulment of the election of MPs. Judging by previous communications submitted against it before the African Commission, DRC hardly presents its arguments on admissibility and merits. Examples include the following cases: *Institute for Human Rights and Development in Africa & Others v Democratic Republic of Congo* (2017);[96] *Marcel Wetsh'Okonda Koso & Others v DRC* (2008); *Mr Kizila Watumbulwa v Democratic Republic of Congo* (2012);[97] *Dino Noca v Democratic Republic of Congo* (2012);[98] *Maître Mamboleo M Itundamilamba v Democratic Republic of Congo* (2013 in relation to admissibility).[99] This reduces the prospects of meaningful

95 Inter-Parliamentary Union's Human Rights Commission, Décision adoptée par le Comité des droits de l'homme des parlementaires à sa 161e session, DH/2020/161-R.2 (Geneva 20-30 January 2020) 3.
96 Communication 393/10 *Institute for Human Rights and Development in Africa & Others v Democratic Republic of Congo* (2017).
97 Communication 285/04 *Mr Kizila Watumbulwa v Democratic Republic of the Congo* (2013).
98 Communication 286/04 *Dino Noca v Democratic Republic of the Congo* (2012).
99 I Derek et al 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: Revisiting the *Endorois* and the *Mamboleo* decisions' (2018) 2 *Annuaire africain des droits de l'homme* 418.

engagement and 'positive dialogue' among the African Commission, the state and complainants.[100]

Some litigants whose rights have been infringed during electoral adjudication processes attempt to seek solace before the African Commission, later to realise that this remedy clearly is not 'capable of redressing'[101] their complaint. The Commission's recommendations are adopted long after the wrong has been overtaken by events,[102] and the state against which they approach the Commission seems not to bother about regional human rights litigation against it. What then will be the relevance of a regionalised electoral justice if recommendations are hardly complied with and states are unwilling to engage with the regional body? Conversely, how beneficial will such a mechanism be if its recommendations are issued after too much water has flowed under the bridge?

It is generally believed that the non-binding nature of the African Commission recommendations adversely affects their implementation as states are not bound to comply with 'recommendations'. This position should be nuanced given that examples of the non-compliance with the African Court orders and judgments, although binding in nature, may reveal that the problem can also lie in the attitude of states towards regional human rights bodies. It takes some actions by the African Commission to ensure that its recommendations are complied with. Available information does not indicate whether DRC has taken steps to implement the *Ngandu* ruling[103] or that Mr Ngandu received the payment of his salaries and benefits. Yet, DRC was requested, as it usually is the practice of the African Commission pursuant to Rule 125(1),[104] to indicate within 180 days the type of measures it adopted to give effect to the Commission's recommendations.[105] Considering that DRC did not participate in the proceedings before the Commission and that it generally is not responsive to urgent appeals,[106] the African Commission may be called upon to assume a more proactive role, as discussed below.

100 *Free Legal Assistance Group & Others v Zaïre* (2000) AHRLR 74 (ACHPR 1995) 39.
101 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 32.
102 This is likely to be the situation in Communication 721/19 *Martin Fayulu Madidi v Democratic Republic of Congo*.
103 Nothing transpires from the African Commission's 44th, 45th and 46th Activity Reports.
104 Rule 125(1) of the 2020 Rules of Procedure of the African Commission.
105 *Ngandu* (n 1) para 86(iii).
106 Combined 48th and 49th Activity Reports of the African Commission on Human and Peoples' Rights (11 November-3 December 2020) 17-20.

4 Overcoming challenges to the adjudication of election-related disputes

One way of addressing the challenges discussed under part 3 of this article is for the African Commission to be proactive with regard to grasping the intricacies and vagaries of domestic systems. The lack of state submissions to enlighten the Commission, notably on issues such as domestic remedies, cannot be used as an excuse for a regional human rights body not to seek to understand issues related to local remedies and obtain a state's cooperation. The African Commission could, among other approaches, have explored two ways to fill in this gap.

First, it could have approached knowledgeable research institutions in Africa or DRC to appear as *amici curiae* and provide specific responses to questions such as those raised by the *Ngandu* case. In fact, both the 2010 Rules of Procedure based on which the *Ngandu* case was decided and the current 2020 Rules of Procedure empower the Commission 'to invite or grant leave to an *amicus curiae* to intervene in the case by making written or oral submissions in order to assist the Commission in determining a factual or legal issue'.[107]

It is clear in practice that the African Commission has been reluctant to request *amicus* submissions while, for example, the African Court has not hesitated to take a proactive approach and notify institutions to submit *amicus* briefs.[108]

Second, the African Commission could undertake studies on domestic remedies in the various legal systems of its member states in order to understand the ins and outs of domestic processes including electoral adjudication mechanisms. Article 45 of the African Charter enables the Commission to 'undertake studies and research on African problems in the field of human and peoples' rights', while Rule 7 of the Commission's Rules of Procedure allows commissioners to 'propose … studies, research and resolutions on human rights issues on the continent or in a state party'. The pluralism of legal traditions and systems in Africa and the existence of differences within legal systems that belong to similar legal traditions warrant against generalisation on models of constitutional review operating

107 Rules 104 and 105 of the 2020 Rules of Procedure.

108 See eg *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* 1/2018 (4 December 2008) para 9.

in Africa. Such studies will not be novel in the practice of African regional human rights bodies that have often conducted them. The partnership that the African Commission has over the years maintained with African human rights organisations can be used as the starting point for conducting such studies. In fact, most General Comments the African Commission has adopted have been drafted with the help of African civil society organisations.[109]

Besides, the expeditious settlement of electoral disputes is of paramount importance both at the domestic and regional level given that complainants generally expect restitution as a form of reparation. Two mechanisms – amicable settlement and provisional measures – could be explored by the African Commission. An amicable settlement would, perhaps, have been ideal in the *Ngandu* case considering that most often, when the Supreme Court invalidates the mandate of parliamentarians, the latter are given salaries, relevant benefits and employment in parastatal institutions. There is no other avenue for settling the matter through domestic judicial means.[110] A commissioner could thus be sent to DRC to 'find an amicable solution to the dispute'[111] and emphasise the importance of adopting a holistic approach so that similar mischiefs do not occur.[112] However, an amicable settlement requires 'good faith of the parties concerned',[113] and the lack of responses from the state could probably have warned the African Commission that an active approach and constructive dialogue with the state were needed. This approach could manifest in various ways. The Commission could engage in constructive dialogue on broader issues related to political participation and the 'unjust' invalidation of MPs when considering countries' state reports. The Commission might also resort to promotional missions to countries that generally

109 R Adeola, F Viljoen & TM Makunya 'A commentary on the African Commission's General Comment on the right to freedom of movement and residence under article 12(1) of the African Charter on Human and Peoples' Rights' (2021) 65 *Journal of African Law* 138-141.

110 The Inter-Parliamentary Union's Human Rights Commission equally averred that a political settlement of the matter can be envisaged by the National Assembly and the executive in such instances. See Inter-Parliamentary Union's Human Rights Commission, Décision adoptée par le Comité des droits de l'homme des parlementaires à sa 161e session, DH/2020/161-R.2 (Geneve 20-30 January 2020) 3.

111 See *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000) para 10; *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996) 24.

112 On amicable settlement and its critics before the African Commission, see BD Mezmur 'No second chance for the first impressions: The first amicable settlement under the African Children's Charter' (2019) 19 *African Human Rights Law Journal* 65-68.

113 *Free Legal Assistance Group & Others v Zaïre* (2000) AHRLR 74 (ACHPR 1995) paras 39-40; *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) para 19.

fail to appear before it.[114] These two approaches may, at least, reduce the confrontation that the consideration of communications may tend to be characterised with and establish a dialogue between the Commission and the state.

Furthermore, the issuance of provisional measures could also be an antidote to safeguard the rights and interests of complainants. The 2020 Rules of Procedure of the African Commission, and the 2010 Rules of Procedure before it, allow the latter to issue provisional measures 'to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands'.[115] The Commission can act on its own volition or at the request of 'a party to the communication' and, once issued, it does not 'constitute a prejudgment on the merits of a communication'.[116] However, the complainant's request for provisional measures was rejected by the Commission for reasons not elucidated.[117]

The African Commission and the African Court should collaborate in the future on urgent matters, including in cases related to electoral justice, notably through the referral of cases by the Commission to the Court which can issue binding provisional measures. The Court has since its inception rendered 77 orders for provisional measures.[118] This can be done only against states that have ratified the African Court Protocol. At the time the African Commission was adjudicating the *Ngandu* case, DRC had not yet done so. Despite glaring evidence that states are increasingly disregarding African Commission[119] and African Court[120] orders for provisional measures, their (provisional measures) ability to hold states to their international obligations is undisputed. As with an amicable settlement, provisional measures as

114 Centre for Human Rights *Guide to the African human rights system: Celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981-2021* (2021) 48.
115 Rule 100(1) 2020 Rules of Procedure; Rule 98(1) 2010 Rules of Procedure.
116 Rule 100(6) 2020 Rules of Procedure; Rule 98(5) 2010 Rules of Procedure.
117 *Ngandu* (n 1) para 16.
118 By 14 December 2022; see https://www.african-court.org/cpmt/provisional-measures (accessed 14 December 2022). One of the early provisional measures of the Court resulted from *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2013) 1 AfCLR 145 referred to it by the African Commission.
119 African Commission Combined 48th & 49th Activity Reports (11 November 2019-3 December 2020) paras 42-44; African Commission 47th Activity Report (14 May-10 November 2019) paras 32 & 34; African Commission 46th Activity Report (14 November 2018-14 May 2019) paras 30-32. See also F Viljoen *International human rights law in Africa* (2012) 417.
120 For illustration, see Activity Report of the African Court on Human and Peoples' Rights (1 January-31 December 2020) 30-32; Activity Report of the African Court on Human and Peoples' Rights (1 January-31 December 2019) 18-24; Activity Report of the African Court on Human and Peoples' Rights (AfCHPR) (1 January-31 December 2019) 45-55; Activity Report of the African Court on Human and Peoples' Rights (1 January-31 December 2018) 12-33.

well as any other approaches to improve the enjoyment of human rights at the domestic level will require strong engagement with states by the Commission.

While acknowledging inherent limitations some of the proposed mechanisms may have in addressing the challenges discussed in part 3, especially towards 'reluctant or outright uncooperative states',[121] most of them aim to ensure that the Commission takes an active stance in fulfilling its mandate under the African Charter.[122] International law already attaches legal consequences to behaviours of states that constitute 'a breach' of their international (human rights) obligations.[123] Active efforts by the African Commission can be a way of exposing the hypocrisy of states that pledge to protect human rights, yet make little effort to 'translate these sentiments into practice'.[124]

5 Conclusion

The African Commission remains pivotal in addressing election-related disputes using its conventional powers to 'promote human and peoples' rights'.[125] The ease with which it can be accessed as compared, for example, to the African Court where direct access is simply possible with respect to eight states, gives some hope to litigants that a body exists that can still hear their matters and possibly resolve them. During the chaotic adjudication of the 2018 elections in DRC, the losing presidential candidate and political parties whose members of parliament were 'arbitrarily' invalidated by the Constitutional Court indicated with assurance that they would approach the African Commission and submit their complaints.[126]

121 One reviewer used these words to characterise limitations some proposed mechanisms in this article may have toward states that have clearly demonstrated their reluctance to engage with the African Commission. While agreeing with them, it is important that the Commission do what is within its control, which is, to adopt a proactive and constructive stance *vis-à-vis* states in accordance with its mandate.

122 Art 45 African Charter.

123 International Law Commission *Responsibility of states for internationally wrongful acts* (2001) arts 1-3. See Forteau et al (n 92) 1086.

124 C Heyns (ed) *Human rights law in Africa* (1996) viii; C Heyns *Human rights law in Africa* (1998) vii-viii.

125 Art 45 African Charter.

126 'Le MLC va saisir la Commission africaine des droits de l'homme pour le rétablissement de 5 députés invalidés définitivement' 5 July 2019 *Politico.cd*, https://www.politico.cd/encontinu/2019/07/05/le-mlc-va-saisir-la-commission-africaine-des-droits-de-lhomme-pour-le-retablissement-de-5-deputes-invalides-definitivement.html/44499/ (accessed 20 July 2021); 'La Cour africaine de droits de l'homme saisi par Martin Fayulu sur le contentieux électoral n'est pas compétente' 8 February 2019 *Politico.cd*, https://www.politico.cd/encontinu/2019/02/08/la-cour-africaine-de-droits-de-lhomme-saisi-par-

The Commission has argued that democratic regimes, those where people directly vote for their representative and where their will is respected, are indeed poised to protect human rights more effectively. Article 13 of the African Charter, despite its deficiency,[127] was informed 'by the desire to wrest political power and governmental authority from the hands of the emerging post-colonial despots and vest in citizens'.[128] The Commission has thus given solace to aggrieved individuals who possibly could not obtain justice in member states owing to the lack of independence of domestic courts, corruption, judges' inability to courageously sanction electoral malpractices – some of the evils that have bedevilled elections.

However, it is relevant and timely for the African Commission to resolve challenges that arise in the way in which it approaches and decides in relation to petitions submitted to it for it to gain much acceptance and respectability from both states and litigants. Its involvement should provide complainants some form of assurance that the decision will be adopted in a period when it will still be useful to obtain the remedy sought, for example, reinstatement in the National Assembly as Albert Ngandu demanded. The Commission should also show a command of knowledge of domestic legislation and procedure in electoral dispute mechanisms. As the Commission is increasingly working in an environment where states are closely scrutinising its activities and are ready to come after it when inaccurate or ill-founded allegations are made, circumspection is much needed.

martin-fayulu-sur-le-contentieux-electoral-nest-pas-competente.html/34773/ (accessed 20 July 2021).

127 M Mbondenyi 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* 187.

128 As above.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: JN Ashukem & CC Ngang 'Land grabbing and the implications for the right to development in Africa' (2022) 22
African Human Rights Law Journal 403-425
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a4

Land grabbing and the implications for the right to development in Africa

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Summary: *The indispensability of land for agriculture and the extraction of the natural resources thereon to sustain industrialisation and economic growth processes across the world have orchestrated a significant change in patterns of land ownership and use in Africa where evictions and displacement of local communities from their ancestral lands have become legion as a result of persistent land grabbing. This situation has had a concomitant negative implication for the potential of local communities in Africa to develop socio-economically and culturally, with a corresponding negative impact on their right to development. It is not clear whether the right to development enshrined in the African Charter could be relied upon to achieve Africa's development prospects, particularly with the prevalence of land grabbing across the continent. Taking land as a major contributing factor to socio-economic and cultural development, we argue that land grabbing not only contravenes but also bars prospects of making the right to development a reality for*

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the peoples of Africa. Based on the doctrinal research methodology, we critically review the normative contents of the right to development in conjunction with other relevant provisions under the African Charter. We question whether the right to development affords prospects for socio-economic and cultural advancement in the face of land grabbing in Africa. Concerning the adverse impact of land grabbing, the article concludes that it is crucial for African states to re-think their right to development obligations and the land ownership and land use policy prerogatives relevant to protecting the livelihood sustainability interests of their peoples.

Key words: *land grabbing; right to development; livelihood sustainability; local communities; human rights; natural resources; African Charter*

1 Introduction

One of the contemporary problems with which the African peoples have had to grapple in addition to other developmental challenges is the growing phenomenon of land grabbing for which we posit recourse to the law for pragmatic ways of redressing the problem. However, land grabbing is not novel to Africa. The practice dates back to the colonial era, sanctioned (albeit wrongly) by the European 'scramble for Africa' adopted at the Berlin Conference of 1885.[1] In *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*[2] the African Commission on Human and Peoples' Rights (African Commission) noted the tragedy for the peoples of Africa who were alienated from their ancestral lands. Local and indigenous communities in South Africa, Zimbabwe and Kenya, among others, that accommodated a heavy white settler population remain dispossessed of their lands, which were forcibly taken away during the colonial era.[3] It can thus be said that contemporary patterns of land grabbing are a colonial legacy.[4]

This article focuses on transnational land grabs following the 2007/2008 global financial crisis with its dire implications for local communities' rights and interests in Africa. Over the last decade,

1 R Home 'Land, law and African land governance: introduction' in R Home (ed) *Land issues for urban governance in sub-Saharan Africa* (2021) 2.
2 (2001) AHRLR 60 (ACHPR 2001) para 56.
3 A de Man & CC Ngang 'Colonial extraction of natural resources and the impact on the right to development in Africa' in CC Ngang & SD Kamga (eds) *Natural resource sovereignty and the right to development in Africa* (2021) 109.
4 C Zambakari 'Land grab and institutional legacy of colonialism: The case of Sudan' (2017) 18 *Consilience: The Journal of Sustainable Development* 193.

extensive land grabbing has occurred across Africa, in response to the global food and energy security crises. Evidence from the wanton manner in which most of these investment ventures are executed suggests that they are principally tailored to benefit the home countries of investor companies, while considerably undermining Africa's development prerogatives. Land grabbing in Africa (also in other parts of the world) impacts adversely and obfuscates the right to development (RtD) and the ability of local communities to advance socio-economically and culturally. It generally orchestrates forcible evictions and displacement of local communities from their traditionally-owned and occupied lands in favour of large-scale agricultural projects by foreign multinational corporations.

The persistent displacement of local communities from their lands is antithetical to the ability to develop socially, economically and culturally, with simultaneous negative implications on development prospects for subsequent generations. The starting point to this argumentation is that land grabbing does not promote progress but rather perpetuates poverty and under-development. In this article we posit that land grabbing has the potential to blur and limit the relevant protections envisaged in the corollary rights provided for under articles 14, 21 and 22 of the 1981 African Charter on Human and Peoples' Rights (African Charter). Africa is referred to in this article as a unified entity, particularly with regard to the African Charter obligation contained in article 22(2) to collectively create the conditions and the enabling environment to achieve the RtD.

The article examines the implications of land grabbing for the RtD in Africa to illustrate that land constitutes an indispensable integral part of the common African heritage, which the peoples of Africa inherently are entitled to own, have control over and productively utilise or disposed of to the exclusive collective benefit of the peoples to whom it legitimately belongs as implicitly guaranteed under articles 21 and 22 of the African Charter. Land grabbing contravenes the land ownership rights and, thus, is counter-intuitive to the broader entitlement to socio-economic and cultural development guaranteed to the peoples of Africa.

Faced with the threat posed by land grabbing, we critically analyse the normative contents of article 22 in conjunction with articles 14 and 21 of the African Charter and, accordingly, question whether and to what extent it affords prospects for socio-economic and cultural advancement. First, a reading of article 22 suggests that its realisation and enjoyment are contingent on the equal enjoyment of the common heritage of mankind, which encompasses the wealth of natural resources, including land, which is essential for enabling

African peoples to develop socially, economically and culturally.[5] Second, there is a normative substantive gap under international human rights law relating to the protection of land as a human right, which largely has been advanced only in the context of indigenous peoples under the United Nations (UN) Declaration on the Rights of Indigenous People. This normative gap leaves apparent confusion with respect to the protection of vulnerable non-indigenous local communities whose land rights are severely affected by land grabbing.

The article is the product of doctrinal research involving a review of existing literature, legal instruments and case law on the subject in advancing the argument that land grabbing has a negative implication for the RtD. The arguments are corroborated with actual examples of land grabbing to illustrate how the phenomenon adversely impacts livelihood sustainability for the peoples of Africa, necessitating their state governments to re-think their obligations relating to the RtD. This obligation essentially relates to how they handle land ownership and land use policy prerogatives.

We begin the analysis by situating land rights within the broader framework of sovereign ownership over natural resources in Africa. We further examine land grabbing and how it impacts the RtD in Africa. We then debunk the win-win narrative in land grabbing and propose an RtD governance framework as a suitable catalyst to promote and ensure the win-win advocacy narrative. The last part sums up the arguments into a logical conclusion and suggestions on the ways forward.

2 Land rights in the context of sovereign ownership over natural resources

2.1 The intrinsic value of land as a natural resource

Land essentially is portrayed under international human rights law as a natural resource with intrinsic value particularly because it constitutes the primary means of subsistence around which development activities revolve. Home advances the argument for good land governance on the basis that '[l]and is the single greatest resource in most countries. Access to land, security of tenure as well as models for land management have significant implications for

5 CC Ngang 'The right to development in Africa and the common heritage factor in ensuring its realisation' (2020) 45 *Journal for Juridical Sciences* 29.

development and touch all aspects of how people live and earn a living'.[6] International human rights instruments (including the African Charter) only cursorily guarantee land rights and, more so, do not define the normative contents of the right to land. Article 19 of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (Declaration on the Rights of Peasants) incorporates the right to natural resources as including all lands, among others, on which local communities depend for their advancement and socio-economic and cultural development. It suggests that the right to land and other natural resources must be understood in a holistic manner as inextricably interconnected and interrelated.[7]

The right to land presupposes freedom and entitlement which, on the one hand, guarantee the liberty to retain pre-existing access to, maintenance and use of land as a means of ensuring adequate standards of living. It also guarantees entitlement to dignity and identity, which in most African societies defines and qualifies participation in cultural life. Freedom also guarantees the right not to be unlawfully evicted from one's land, as this often happens when land grabbing takes place, resulting in displacements that disrupt the livelihood of local communities. The entitlement aspect guarantees tenure and a management system that promotes equitable access to and the sustainable governance of land in a manner that is consistent with aspirations for socio-economic and cultural development.

Article 17 of the Declaration on the Rights of Peasants reinforces the right to land, which embodies equitable access that must be achieved without discrimination and which, accordingly, forbids states from interfering either directly or indirectly with the individual or collective enjoyment of land rights. In the event of an unlawful dispossession, the right to restitution would apply.[8]

In Africa, land symbolises a source of income, wealth and prestige, a source of livelihood security, capital wealth and a primary factor of production. In a sense, land ownership constitutes a leeway out of poverty given that access to it is instrumental in enabling rural households to generate a sustainable income. This can be either by freely disposing of the land or utilising it as a means of production such as farming. The Declaration underscores the relevance of natural resources as a constitutive source of subsistence to the extent of these

6 Home (n 1) 2.
7 SM Suarez 'The right to land and other natural resources in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (FIAN 2015), https://www.fian.org/fileadmin/media/Publications/Peasants_Rights/PeasantsRights_right_to_land.pdf (accessed 15 February 2022).
8 As above.

forming a major factor in socio-economic and cultural development. The Declaration provides in article 12:

> The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The notion of sovereignty over natural resources is captured in article 21 of the African Charter, which guarantees the right to permanent ownership, control, use and free disposal of natural wealth and resources. Article 21(1) stipulates that '[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.' The right to natural wealth and resources and, by implication, the right to land under article 21(1) of the African Charter, is a collective entitlement and an indispensable means of sustenance, from which the peoples of Africa are entitled to jointly reap exclusive benefits. Natural wealth and resources are construed as incorporating land and its appurtenant resources. It implies that the peoples of Africa are entitled to the exclusive ownership of their lands, of which they may under no circumstances be deprived of.

The African Charter further provides in article 21(3) that '[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'. The cited provision obtains from the spoliation remedy (*mandament van spolie*) principle in Roman-Dutch law, which guarantees the corporeal right to property and, therefore, forbids any unlawful dispossession of anyone's property in contravention of which a court order may be issued in the form of a restitutory interdict obligating the dispossessor to return the property.[9] By this, article 21(2) lays down the rule that in the event of land dispossession without due legal process, the dispossessed peoples are entitled to either the lawful recovery of their land or the payment of adequate compensation or to both forms of redress. In applying article 21, the African Commission and the African Court on Human and Peoples' Rights (African Court) respectively ordered the Kenyan government in the *Endorois* and *Ogiek* cases (involving the dispossession of the indigenous communities of their ancestral lands) to restitute the land and to pay adequate compensation to the dispossessed peoples (*Centre for Minority Rights Development (Kenya) & Others v Kenya*;[10]

9 V Mhungu 'Dispossessed and unimpressed: The *mandament van spolie* remedy' (2015) *De Rebus* 36-38.
10 (2009) AHRLR 75 (ACHPR 2009) para 298.

African Commission on Human and Peoples' Rights (Ogiek Community) v Republic of Kenya).[11]

Any derogation from the right to land ownership, as often occurs in the event of land grabbing, triggers a simultaneous negative impact on the RtD of the peoples of Africa. Despite the glaring commitment of African states to the African Charter, to protect fundamental rights and freedoms, in tandem with the African Commission jurisprudence on land rights, and the question of ownership of natural resources, the prevailing realities on the ground across the continent, particularly in the context of land grabbing, are contradictory and very concerning. This growing concern requires a thorough investigation into whether and to what extent the peoples of Africa can legitimately assert their right to socio-economic and cultural development when land grabbing occurs.

The Preamble to the Revised African Convention on Nature and Natural Resources (Revised African Convention) provides that 'the natural environment of Africa and the natural resources with which Africa is endowed are an irreplaceable part of the African heritage and (therefore) constitute a capital of vital importance to the continent and humankind as a whole'. It adds that the duty and responsibility repose on state parties to 'harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour'. The Convention enshrines the duty of African states to either individually or collectively ensure the enjoyment of the RtD. Ensuring that developmental and environmental needs are met in a sustainable and equitable manner underpinned by articles III(2) and (3) of the Revised African Convention suggests the need to give significant attention to the protection of land rights with the hope of striking a balance between developmental and socio-environmental needs.

2.2 Component entitlements of the right to development

At the international level the normative nature and contents of the RtD remain controversial,[12] despite being recognised universally and construed as imposing an obligation (albeit non-binding) for its realisation. In spite of the controversy, which is premised on the

11 Appl 6/2017 para 226.

12 S Jha 'A critique of right to development' (2012) 4 *Journal of Politics and Governance* 17-22; S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 137; A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 837.

lack of interpretational precision or political consensus on the exact nature, meaning and status of the right,[13] the RtD is predicated on certain core elements that inform an understanding of its normative purpose. This includes the fact that the human person is the subject of development and is entitled to a certain material possession of proprietary rights necessary for facilitating participation in and contribution to the processes for development. The proprietary right includes entitlement to land ownership, which African states are obligated to protect through appropriate national development policies that aim at the constant improvement in human well-being.[14]

For Sengupta,[15] the conceptual value of the RtD is premised not only on its inalienability as a human right but essentially as a composite vector entitlement. Through this approach, all other human rights and fundamental freedoms can be realised in their entirety through a particular process of development that is rights-based and focuses on maximising the human productive potential. Clearly, the RtD postulates as a foundational right for the realisation of other rights in the development context[16] and, thus, provides the regulatory framework that allows African peoples to utilise their material possession of land among other natural resources in pursuit of their socio-economic and cultural development and livelihood sustainability entitlements.

The Declaration on the Right to Development (DRtD) of 1986 outlines its usefulness and relevance to the extent that any derogation thereof must be seen as and considered a violation not only of the right but also other associated entitlements. Realisation of the RtD in its universal, indivisible, interdependent and mutually-reinforcing nature is predicated on the sovereign ownership, control and use of natural wealth and resources as well as the equitable distribution of the benefits thereof, for collective well-being. It implies that a contravention of the component right to land would constitute a violation of the RtD. Similar to the Declaration on the Rights of Peasants, article 1 of the DRtD stipulates:[17]

13 Marks (n 12); Sengupta 2002 (n 12) 837.
14 Declaration on the Right to Development Resolution A/RES/41/128 adopted by the UN General Assembly on 4 December 1986, art 2(3).
15 A Sengupta 'The human right to development' (2004) 32 *Oxford Development Studies*180-184; Sengupta (n 12) 846-852.
16 SAD Kamga 'The right to development in the African human rights system: The *Endorois* case' (2011) 44 *De Jure* 383.
17 Our emphasis.

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental rights can be fully realized … [it] implies the full realization of the right of peoples to self-determination … the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The emphasis on the right of peoples to self-determination and full sovereignty over their natural wealth and resources is of primary importance to the discussion here in the sense that without the qualifying entitlement to natural wealth and resources, the RtD would not be achieved. While the DRtD considers the human person in their individual capacity and peoples in their collective capacity as subjects of the RtD with the mandate to benefit from it (article 2(1)), it equally foregrounds the normative duty of states to protect and to promote the RtD such that a duty would strengthen states' national development policy strategies, while also obligating states to remove unnecessary obstacles to development (articles 5 and 6(3)) such as land grabbing.

It is worth reiterating that in the African context, the RtD poses no controversy in its reading and understanding as a legally-binding collective right on account on its recognition and protection in the African Charter which guarantees protection of the African common heritage as a prerequisite for its realisation.[18] Because colonial rule authorised dispossession of the peoples of Africa of their land and natural wealth and resources, as the African Commission observed in the *SERAC* case,[19] it became necessary under the post-colonial dispensation to guarantee legal protection of the common heritage, which is considered indispensable for the realisation of the RtD. For Kamga and Fombad the drivers of the RtD in Africa are diverse.[20] These include the practices of powerful actors such as nations, multinational corporations and institutions that impact on human rights; factors that are external to developing countries, which advance the rules that govern world markets generally criticised as being inequitable; the pervasive influence of international economic organisations that continue to espouse the agenda of neo-liberalism; and the corresponding decline in domestic autonomy, which limits the ability and potential of African states to independently decide

18 African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity in Nairobi, Kenya on 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5; 1520 UNTS 217 art 22(1).
19 *SERAC* (n 10) para 56.
20 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* 3.

their own economic, social and cultural development policies, particularly with regard to sovereignty over natural resources.

The African Charter remains the pioneer treaty instrument that enshrines a legally-binding and enforceable provision on the RtD.[21] The next part discusses the relevant provisions of the African Charter that embody the implicit right to land.

3 Implied right to land and the right to development in the African Charter

3.1 Article 14 on the right to property

Although the African Charter does not provide for the right to land, the property right in article 14 extends to and includes land. Article 14 guarantees the right to property but with the proviso that it may be 'encroached upon in the interest of public need or the general interest of the community and in accordance with the provisions of appropriate laws'. Problematically, the African Charter makes no mention of compensation; whether prompt, effective or adequate, the absence of which has an adverse implication on the right to property. Even in instances where a private property is encroached upon in the public interest and in accordance with applicable laws, the owner of the property, in principle, is entitled to at least some form of compensation. Notwithstanding the conceptual shortcoming of article 14, in Africa there is an implicit right to land, which can accurately be read into article 21 of the African Charter, discussed above.

3.2 Article 22 on the right to development

Consistent with the African vision to promote fundamental human rights, and sustainable development, article 22 of the African Charter guarantees to the peoples of Africa the right to economic, social and cultural development that takes into account their freedom and identity and equality in the enjoyment of the common heritage. The common heritage principle is linked to the human rights framework,

21 W Scholtz 'Human rights and the environment in the African Union context' in A Grear & LJ Kotze (eds) *Research handbook on human rights and the environment* (2015) 407.

particularly within the framing of the RtD[22] in article 22, which stipulates:

> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
> (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The RtD obtains from the understanding that its realisation is predicated on the equal enjoyment of the common heritage. While the common heritage may be understood to incorporate all natural resources, it is logical to admit that land is the principal heritage that is commonly shared among the peoples of Africa and, therefore, epitomises an inevitable determinant for the realisation of the RtD,[23] more so because both entitlements are of the same nature, guaranteed to be enjoyed collectively by the peoples of Africa. Article 22 highlights the multifaceted character of the RtD in terms of it being a composite entitlement comprising economic, social and cultural rights and a vehicle for the realisation of civil and political rights as stipulated in the Preamble to the African Charter.

Unlike the DRtD, which defines the RtD as an entitlement allocated both to individuals and to groups of peoples, article 22 of the African Charter provides that the RtD can only be claimed by a collective and not by individuals. The nature of the RtD as a collective entitlement correlates with the common heritage principle, which grants to the peoples of Africa communal ownership of their lands. With the understanding that only peoples can assert the RtD in Africa, it is imperative that development decision making relating to the disposal of land inevitably involves the peoples whose RtD would be affected in the process.[24] Given the value of land as a factor of production for development, it is appropriate that its ownership and the resources thereon are attributed to the collective of African peoples as the ultimate beneficiaries. They must be equipped with the potential to utilise the same in a way that improves their socio-economic and cultural circumstances. Hence, the peoples of Africa are entitled to own, control and determine the kind of development undertaken on their lands.

22 K Balsar *The concept of the common heritage of mankind in international law* (1998) 323; Ngang (n 5) 28-50.
23 Ngang (n 5) 29.
24 A Sengupta 'Right to development as a human right' (2001) 36 *Economic and Political Weekly* 2528.

The understanding of land as a common heritage implies that it is an inalienable entitlement that will for all times be available to successive generations and, thus, necessitates recognition and protection under the law. By implication, if and when the right is contravened, redress may be sought in a court of law on the basis of which matters relating to land claim as a component of the RtD have been the subject of focus in a number of cases both before the African Commission and the African Court.[25] Although the African Commission did not uphold the RtD in the *SERAC* case, for example, it nevertheless, as Kamga and Fombad note, reiterated its normative content in conjunction with the concomitant obligation on the African states to individually or collectively protect the RtD of their peoples.[26]

Article 22 also embodies the right to ensure that development is undertaken freely, without foreign interference or constraints, and with the ability of the peoples of Africa to define their own development models in a manner that is consistent with their livelihood priorities and socio-economic and cultural development exigencies. Despite the associated legal guarantees and protection, with the increasing phenomenon of land grabbing across Africa, the unanswered fundamental question is how the RtD could be explored to sustain prospects for development on the continent. In other words, it entails examining how and to what extent land grabbing impacts on the realisation of the RtD in Africa.

4 The contemporary problem of land grabbing in Africa

Although Africa may have seen a whirlwind of development models since the 1980s, including the World Bank's Structural Adjustment Programme[27] and the New Partnership for African Development,[28] they have had considerable mixed outcomes with none that has sufficiently addressed the issues of poverty and misery that characterised the rationale for adherence to the RtD.[29] With the increasing pressure exerted by contemporary forms of land grabbing

25 Kamga (n 16) 381-391.
26 Kamga & Fombad (n 20) 2.
27 M Thomson et al 'Structural adjustment programmes adversely affect vulnerable populations: A systematic-narrative review of their effect on child and mental health' (2017) 38 *Public Health Review* 3.
28 NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in Lusaka, Zambia, in 2001.
29 PB Matondi et al 'Introduction: Biofuels, food security and land grabbing in Africa' in PB Matondi et al (eds) *Biofuels, land grabbing and food security in Africa* (2011) xi.

(either for food, biofuel, climate change or green grabbing) African states have the legal obligation, as stated in article 22(2) of the African Charter, to ensure the realisation of the right to socio-economic and cultural development. Accordingly, states are obligated to adopt adequate national development policies, including land policies that guarantee exclusive collective benefits and constant improvement in the living standards of their peoples.[30]

Despite no unanimous definition of land grabbing, a generally-accepted view is that the practice involves the appropriation of large swathes of land in Africa, often by transnational companies with the aim of securing benefits in food supply and energy security.[31] The phenomenon needs to be understood in the context of competing power relations – the desire to capture or control land and its associated resources in order to control the benefits of its use. As to whose benefit and for what purposes land grabbing takes place, it usually is the acquirers who decide and generally not in the interests or to the benefit of the dispossessed.

Land grabbing occurs in two ways. On the one hand, it occurs when host governments solicit foreign investors to boost agricultural productivity, eco-tourism and increase economic growth and development needs; also, when governments forcefully appropriate land from local communities and lease them to foreign investors under the pretext of creating opportunities for development.[32] In either of these cases, the state assumes the role of land broker, which has raised significant governance and regulatory concerns.[33]

Since the outbreak of the 2007-008 global financial crisis, there has been an increase in the demand for land in Africa by foreign corporations, including multinational corporations either for the production of food or biofuel crops.[34] It is reported that as of 2012,

30 Art 2(3) Declaration on the Right to Development Resolution (n 14).

31 O de Schutter 'The green rush: The global race for farmland and the right of land users' (2011) 52 *Harvard International Law Journal* 504; L Cotula et al 'Land grab or development opportunity? Agricultural investment and international land deals in Africa' (FAO 2009) 17.

32 Friends of the Earth International 'Land, life and justice: How land grabbing in Uganda is affecting the environment. Livelihoods and food sovereignty of communities' (2012) 5, https://www.foei.org/resources/publications/publications-by-subject/food-sovereignty-publications/land-life-and-justice (accessed 13 February 2022).

33 W Wolford et al 'Governing global land deals: The role of the state in the rush for land' (2013) 44 *Development and Change* 180.

34 For details, see B Yang & J He 'Global land grabbing: A critical review of case studies across the world' (2021) 10 *Land* 1; JCN Ashukem 'A rights-based approach to foreign agro-investment governance in Cameroon, Uganda and South Africa' LLD thesis, North-West University, 2016 66; Land Matrix 2022, https://landmatrix.org/list/deals (accessed 17 September 2022).

over US $14 billion has been invested in agribusiness in Africa.[35] Although we acknowledge that these investment ventures are not of the same scale as some have been abandoned or failed and others heavily criticised, there is a common understanding that these investments have occupied and are occupying vast portions of customary land previously used by rural communities to sustain themselves economically, socially and otherwise. The World Bank reports that out of the 56 million hectares of land under negotiations globally in 2009, 32 million hectares were in Africa.[36] According to the Land Matrix,[37] there are 774 land deals on 306162556,35 hectares of land in Africa. Out of this number, 542 deals have effectively been concluded for 12171039 hectares of land.[38] There are also some 63 pending land deals, while 169 of the deals are reported to have failed.[39] The land grabbing trend and the extent to which the phenomenon is being perpetuated across Africa is raising increasing concerns, including, in particular, the negative impact it has on the RtD in Africa

4.1 How land grabbing impacts on the right to development

Land grabbing is a contemporary practice of the twenty-first century that has fundamentally changed the power dynamics in the land ownership patterns, which has increasingly become detrimental to the rights, freedoms and livelihood of local, peasant and indigenous populations in Africa. It defines the changing patterns of access to, ownership of, control over and use of land and the products generated from it.[40] The phenomenon of land grabbing, thus, is explained and should be understood in the context of the unsettled land governance regimes in most, if not all, of Africa, which regimes are characterised as weak and affording little or no protection to the land rights of local communities. Axiomatically, land grabbing affects customary land tenure systems and peoples' possession of the land as a natural resource and a means of livelihood[41] and, consequently, impacts the RtD. It is considered in this regard as inimical to human

35 A Buxton, M Campanale & L Cotula 'Farms and funds: Investment funds in the global land rush' (IIED 2012), https://pubs.iied.org/sites/default/files/pdfs/migrate/17121IIED.pdf (accessed 17 September 2022); S Narula 'The global land rush: Markets, rights, and the politics of food' (2013) 49 *Stanford Journal of International Law* 110.

36 K Deininger et al 'Rising global interest in farmland: Can it yield sustainable and equitable benefits' (World Bank 2009) xiv.

37 This is an independent land-monitoring initiative that promotes transparency and accountability in decisions over large-scale land acquisitions.

38 Land Matrix (n 34).

39 As above.

40 Matondi et al (n 29).

41 De Schutter (n 31).

rights, in general, and the RtD, in particular, and, accordingly, necessitates a re-thinking of land ownership rights as fundamental to the equal enjoyment of the African common heritage.

It may be necessary to applaud the urge to revamp and strengthen Africa's agricultural expansion as epitomised and facilitated by the Comprehensive Africa Agriculture Development Programme (CAADP). The practice of land grabbing associated to agriculture-led development dispossesses and simultaneously plunges large proportions of the African populations into hunger and excruciating poverty.[42] While it is important to acknowledge the underlying rationale of the CAADP, it has instead contributed to hindering the actualisation of the RtD insofar as land and land rights are concerned. This is done through the CAADP's failure in regulating the processes to prevent land grabbing or in safeguarding local communities that eventually become evicted, displaced and dispossessed of their customary lands in favour of large-scale agro-business ventures or through their complicity in many instances of land grab as the host states of these investments.[43]

In the Tana Delta region of Kenya, for example, more than 25 000 people were evicted from their ancestral land for the Mumias sugar cane project,[44] thereby subjecting the local community to destitution, deprived of the means of subsistence. Generally, land grabbing results in the destruction of natural ecosystems and systematic displacements of local communities, despite the economic justification attributed to it and, accordingly, it raises ethical, human rights and environmental concerns especially as they are often shrouded in shady deals owing to the power imbalances involved in the negotiation processes. Evidence from the practice suggests that land deals usually are not transparent and inclusive, as local communities often do not participate in the negotiation processes and vital information between the parties often remains undisclosed.[45] This practice constrains the participatory approach that underpins the RtD.

42 AF Odusola 'Land grabs in Africa: A review of emerging issues and implications for policy options' International Policy Centre for Inclusive Growth Working Paper 124 (2014) 2.
43 For details, see Ashukem (n 34).
44 FIAN 'Land grabbing in Kenya and Mozambique: A report on two research missions and a human rights analysis of land grabbing' (2014), https://www.fian.org/fileadmin/media/publications_2015/2010_4_Landgrabbing_Kenya_Mozambique_e.pdf. (accessed 5 February 2022).
45 Wolford et al (n 33).

Because land grabbing is facilitated by the misconception of underutilised or unoccupied arable agricultural lands in Africa,[46] 'the very notion of reserve (land) more or less automatically renders such land, by definition, available, amendable to, and appropriate for (social) transformation into global granaries or new oil wells'.[47] This qualification makes it possible for African states and governments, in their territorial sovereignty capacity as the principal legal authorities and administrators of land, to appropriate vast tracts of land belonging to local communities for state purposes or to lease these out to foreign investors. Prioritising global market demands for land and its appurtenant resources has significantly shifted the development paradigm in Africa to one that is premised on satisfying foreign corporate interests over the socio-economic and cultural development exigencies of local communities.

Given the centrality of land both as a natural resource and a human right entitlement, while considering its indispensability for the RtD, it is argued that the existing legal framework that is supposed to regulate land grabbing in Africa is premised on exceptionally weak land governance systems and, thus, raises fundamental concerns about the land question on the continent. Coupled with the dire consequences for local communities, the land question is whether Africa, in most instances, is compromised by the inability to conceptualise sustainable alternatives for development other than merely depending on the land for sustenance. Although African state governments generally impose the requirement for land certification as a way of ensuring the security of tenure, it is important to point out that a deed of title can only be obtained with respect to prior ownership of land.

Ownership of land does not cease to exist, even where the land is not registered in the sense that local communities generally have established systems for recognising legitimate and rightful ownership. Any deprivation of land rights premised on the lack of a registered land title amounts to a violation of the human right to property. Kagwanja is of the view that land rights on the continent have traditionally been protected through customary laws and community management systems that recognise the land rights of

46 K Deininger 'Challenges posed by the new wave of farmland investment' (2011) 38 *Journal of Peasant Studies* 217.

47 T Kachika 'Land grabbing in Africa: A review of the impacts and the possible policy responses (2010), http://www.oxfamblogs.org/eastafrica/wp-content/uploads/2010/11/Land-Grabbing-in-Africa.-Final.pdf (accessed 13 January 2022).

members of the community, especially the vulnerable.[48] As stated earlier, although not explicitly enshrined in the African Charter or ancillary treaty instruments, there indeed is an inherent right to land for the peoples of Africa, which needs to be harnessed and explored for the realisation of socio-economic and cultural development.[49]

The protection of land rights in Africa, however, remains a subject of controversy particularly with the compounding problem of land grabbing that has increasingly deprived and displaced local communities from their traditionally-owned and occupied lands. As established above, land ownership is relevant in determining sovereignty over land, and the resultant developmental exigencies of local communities for whose exclusive benefit the disposal of land is envisaged. Land ownership, thus, is central to the realisation of the RtD, and secured land rights are pivotal to and play a catalytic role in enhancing economic growth, ensuring poverty alleviation and promoting inclusive socio-cultural development. Yet, the indispensability of land for developmental purposes, owing to the practice of land grabbing, has led to a significant drift in land ownership and land use patterns, raising genuine concerns with regard to the impact on the RtD guaranteed to the peoples of Africa.

The change in ownership and use of land is characterised by and predicated on the notion of statutory land rights which, as indicated above, threatens the protection of customary land rights leading to unlawful evictions and displacement of local communities in favour of large-scale agricultural investments, in contravention of articles 14, 21 and 22 of the African Charter. Although the dispossession and displacement of local communities from their ancestral lands could be analogous to the colonial and post-independence eras, contemporary forms and practices of land grabbing have increasingly exacerbated and amplified the suffering of rural communities and altered prospects and the extent to which the peoples of Africa could be expected to pursue their socio-economic and cultural development objectives. Over the years, issues of security of (customary) land rights and other related rights-based interests have come to the fore in Africa through the intrusion of foreign agricultural investments that have systematically deprived the poor and vulnerable people of

48 J Kagwanja 'Land tenure, land reform, and the management of land and natural resources in Africa: Examining benefits and costs of alternative land rights regimes is vital to a successful land rights reform agenda' in E Ngwani (ed) *Land rights for African development: From knowledge to action* (2006) 3-5.

49 T Ngaido 'Reforming land rights in Africa' (2020) 15 *International Food Policy Research Institute – AfricaConference Briefs* 1-6; Ngang (n 5); C Lund 'Land rights and citizenship in Africa' (2011) 65 Nordiska Afrikainstitutet, Uppsala – Discussion Paper 9-12.

their rights to own and use land under diverse customary practices. In Cameroon, for example, the Herakles palm oil project evicted 14 000 locals, while in Ethiopia the Saudi Star rice project displaced over 70 000 locals from their land.[50]

Similar large-scale displacements also took place in Uganda, involving the Kalangala palm oil project that caused the eviction and displacement of some 20 000 people from their lands in the Amuru district for sugar cane production.[51] According to a 2003 report by the Food and Agricultural Organisation (FAO), an additional 120 million hectares of arable farmland would be needed to produce more food crops to feed the world's growing population by 2030.[52] This estimation is supported by a 2009 World Bank report, which indicates that two-thirds of the land will have to be sourced from Africa. The fact that the Guinea Savannah region of Africa constitutes 'one of the world's largest underused land reserves'[53] suggests that land grabbing is not likely to decline any time in the foreseeable future. Admittedly, Africa will continue to serve for an undetermined period as the production base of the much-needed food supply to meet the dietary needs of the fast-growing global population, which is projected to increase to 9 billion by 2050.[54] By this is meant that Africa's socio-economic and cultural development as well as livelihood exigencies would stagnate as local communities increasingly face violent and forcible evictions from their lands in favour of large-scale agricultural developments, which generally do not benefit them, but rather the foreign investors and their home countries.

While land grabbing often is seen from the viewpoint of the perpetrator as a means to promote economic development in terms of opening up avenues for mega projects and, by justification, job prospects, we argue on the contrary that it rather is a vehicle for underdevelopment in Africa. Land grabbing constitutes, in part, a huge impediment to the socio-economic development and advancement of African peoples. In effect, practices of land grabbing

50 S Narula 'The global land rush: Markets, rights, and the politics of food' Paper presented at the International Conference on Global Land Grabbing II, 17-19 October 2012, Cornell University, Ithaca, New York.

51 G Martinielo 'The accumulation of dispossession and resistance in Northern Uganda' Paper presented at the International Conference on Global Land Grabbing II, 17-19 October 2012, Cornell University, Ithaca, New York (2012) 4; NAPE 2012: 11.

52 FAO 'World agriculture towards 2015/2030: An FAO perspective' (Rome 2003); N Alexandratos & J Bruinsma 'World agriculture towards 2015/2030: The 2012 revision' ESA Working Paper 12-03 (Rome), http://large.stanford.edu/courses/2014/ph240/yuan2/docs/ap106e.pdf (accessed 16 January 2022).

53 K Deininger et al *Rising global interest in farmland: Can it yield sustainable and equitable benefits?* (2011) 2.

54 Deininger et al (n 53) xiv.

neither improve livelihood for local communities, nor contribute to eradicating poverty, nor provide equal opportunities for the use and ownership of land and its resources, nor enhance their freedoms in land grabbing decision-making processes, nor maximise the potential for the protection of human rights, generally, and the RtD, in particular.

Taking Sen's conception of development as freedom,[55] it is plausible to argue that land grabbing not only disinherits the peoples of Africa of invaluable material possession for sustenance and a means of production in creating development, but also deprives them of the liberty to own, control and gainfully utilise their lands. Even though the African Charter states that the RtD is only attainable with due regard to the freedom and identity of the peoples of Africa and their collective enjoyment of the common African heritage, which incorporates land and all the appurtenant resources thereon, its effective realisation seems to be illusory in the face of the increasing threat of land grabbing. While the peoples of Africa are yet to be fully educated on the relevance of maximising their common heritage to accelerate socio-economic and cultural development, the land is shrewdly being taken away from them, often with the complicity of their governments, which paradoxically are obligated, as enshrined in article 22(2) of the African Charter, to provide the requisite protection and the means to ensure that the RtD is fulfilled.

Based on empirical studies conducted in 14 African countries, Deininger et al present the extent to which land grabbing constraints realisation of the RtD:[56]

> It was surprising that in many cases the nature and location of lands transferred and the ways such transfers are implemented are rather *ad hoc*-based more on investor demands than on strategic consideration. Rarely are efforts linked to broader development strategies (of the African people), careful consideration of the alternatives, or how such transfers might positively or negatively affect broader social and economic goals.

The fact cannot be ignored that the tacit pressure by foreign investors on African state governments to accept foreign agricultural investments is creating more development prospects for the investors' countries than for African countries that harbour investment projects. For example, investors in biofuel crops in Africa are more intent on meeting the energy security needs in the United States and European markets than in African markets. The scramble to grab as much land

55 A Sen *Development as freedom* (1999).
56 Deininger et al (n 53).

in Africa through shady, non-transparent and exclusionary deals concluded without the effective participation of local communities in the decision-making processes, is increasingly transforming the patterns of socio-economic and cultural entitlements that the peoples of Africa are legitimately guaranteed to enjoy. This creates a scenario of asymmetrical friction and tension, wherein foreign investors and local communities have to compete over land ownership, control and use.

Besides the deprivation of land rights, land grabbing also exacerbates the socio-economic conditions of rural Africans. It leads to food insecurity where land previously used to produce food crops are diverted to the production of agrofuel crops such as palm oil and sugar cane.[57] Indeed, Africa is facing another and more sinister scramble for its resources, this time from multinationals and the Chinese, with devastating implications for the ability and potential of the peoples of Africa to develop themselves socially, economically and culturally.

4.2 Win-win advocacy in transnational land deals?

Although some commentators such as Von Braun and Meinzen-Dick, and the 2010 Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (PRAI) of the FAO, the International Fund for Agricultural Development (IFAD), the United Nations Conference on Trade and Development (UNCTAD) and the World Bank have advocated a win-win in transnational land deals,[58] others posit that the power imbalance and divergent interests underpinning these deals rule out the possibility of a win-win situation.[59] Prevailing realities illustrate that one of the lingering effects of land grabbing is the increasing dispossession of local communities of their land and the benefits that accrue therefrom. PRAI has been criticised for orchestrating transnational land deals that under certain conditions would lead to *de facto* alienation of permanent sovereignty over natural resources in Africa.[60] PRAI, therefore, cannot be a useful regulatory guide for safeguarding a win-win situation in transnational land deals for the following reasons:

57 SPJ Batterbury & F Ndi 'Land grabbing in Africa' in JA Binns et al (eds) *The Routledge handbook of African development* (2018) 575. Also see Ashukem (n 34).
58 C von Braun & R Meinzen-Dick 'Land grabbing by foreign investors in developing countries: Risks and opportunities' (2009) 13 *IFPRI Policy Brief* 1-9.
59 D Teklemarian 'Transnational land deals: Towards an inclusive land governance framework' *(*2015) 42 *Land Use Policy* 782.
60 O de Schutter 'How not to think of land-grabbing: Three critique of large-scale investments in farmland' (2011) 38 *Journal of Peasant Studies* 249.

First, it is underpinned by Western ideologies of land rights and, therefore, does not reflect existing African land governance realities wherein for some communities, such as indigenous peoples, the land is revered as a communal heritage to which their livelihood and lifestyles are inseparably connected. It is noted that PRAI indeed is a 'neo-colonial theft of poor peasants' livelihoods'[61] meant to syphon Africa's natural resources through practices that legitimise what is unacceptable, that is, foreign companies seeking to take control over vast portions of lands in Africa. Second, PRAI is only principles, which cannot replace or be used in place of existing human rights instruments. As principles, they confer no obligations or rights on the parties to the often non-inclusive and non-transparent land deals. Third, PRAI is biased in its approach to transnational investment, which targets fragile African countries with insufficiently developed legal institutions and enforcement mechanisms.[62]

Accordingly, we argue that land ownership rights, particularly for local communities in Africa, can only most effectively be accomplished within the RtD governance framework. A proposed rights-based model on how development and the processes thereof ought to be pursued across Africa in accordance with the normative prescriptions enshrined in the African Charter and ancillary instruments.[63] The RtD governance is defined as an integrated rights-based model, grounded in popular participation, liberty of action in making development choices, the advancement of human capabilities for the sustainable management of Africa's resources, and upholding the African identity and value systems within a legal framework that guarantees genuine accountability and equitable redistribution for improved collective well-being.[64] The model provides a suitable framework wherein land governance could be framed in an equitable, responsive and accountable manner that safeguards ownership rights and assurance of substantive benefits in the event that the peoples of Africa freely dispose of their land.

61 CA Castellanelli 'A critique of the principles for responsible agricultural investment' (2017) 16 *Mercator-Revista de Geografia da UFC* 1-11.
62 Von Braun & Meinzen-Dick (n 58) 9.
63 CC Ngang *The right to development in Africa* (2021) 266-289; CC Ngang 'Towards a right-to-development governance in Africa' (2018) 17 *Journal of Human Rights* 107.
64 Ngang (n 63) 115.

5 Conclusion

Article 22(2) of the African Charter obligates states and governments to create the conditions and enabling environment for the exercise of the RtD. With the imperative to redress the problem of endemic poverty in Africa, there is a need to explore various means aimed at building development support systems that take into account the needs and aspirations of the peoples of Africa. However, if doing so entails taking away extensive portions of land from the peoples of Africa, it contravenes the fundamental purpose of their RtD. Land grabbing, despite its economic justification, is of the nature to dispossess the peoples of Africa of their lands, which is an indispensable component of the common African heritage and under no circumstances should be taken away as prohibited by law. We have argued that land grabbing is inimical to the RtD and, thus, constitutes an obstacle to its realisation. The prevalence of land grabbing across Africa undermines prospects for sustainable livelihood and a better standard of living for the peoples of Africa.

Even as article 21 of the African Charter guarantees sovereignty over natural resources, the caveat contained therein cannot be overlooked, which allows the peoples of Africa to freely dispose of land in the instance where, in doing so, they will reap exclusive benefits. Consequently, where the peoples of Africa choose to freely dispose of their land, the requirements of effective participation in the decision-making processes and prior informed consent obtained through a comprehensive consultation that reflects the views and aspirations of the entire community concerned must be satisfied. In the absence of this, the taking of land from the peoples would amount to land grabbing and, therefore, contravene their RtD. We have demonstrated that the prevalence of land grabbing in Africa is facilitated and sustained by complex governance difficulties and the lack of a functional model for development that protects the interests of the peoples of Africa.

Given the context of the human-dominated phenomenon of land grabbing that adversely implicates the RtD, we have demonstrated and argued that the RtD governance framework constitutes a suitable remedy for redressing the range of development challenges currently confronting Africa, which is exacerbated by land grabbing. The framework in our view would provide the envisaged win-win scenario that PRAI has failed to achieve. Of significance is the requirement to advance the productive capabilities of the peoples of Africa and equip them with the capacity and the potential to sustainably manage their lands for socio-economic and cultural development purposes.

This obligates African state governments to vigorously move beyond political rhetoric and genuinely commit to protecting land rights. A crucial factor in realising the RtD is integral to the common African heritage entitlement but, unfortunately, remains an unfulfilled promise to the peoples of Africa. As land grabbing has proven to be detrimental to the socio-economic development and advancement of the peoples of Africa, therefore, it is crucial in our view for African states to re-think their right to development obligations and the land ownership and land use policy prerogatives relevant to protecting the livelihood sustainability interests of their peoples.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: GO Odongo 'The post-2010 jurisprudence on children's rights under the Kenyan Constitution' (2022) 22
African Human Rights Law Journal 426-450
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a5

The post-2010 jurisprudence on children's rights under the Kenyan Constitution

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Summary: *The Constitution of Kenya, 2010 provides for a comprehensive Bill of Rights that seeks to ensure the protection of rights with an emphasis on 'marginalised' and 'vulnerable' persons. A dedicated clause and other specific provisions in the Bill of Rights detail the rights for children. Since 2010 the Kenyan judiciary has adopted a progressive stance by interpreting these provisions in ways that affirm children's autonomy and agency while recognising the reality of children's vulnerability and their need for protection. The expansive provisions of the Constitution have also enabled Kenyan courts to more readily embrace systematic remedial measures, such as judicial recommendations for the reform of the applicable legal framework and implementation of new policies to give effect to rights.*

Key words: *African Children's Charter; children's rights; Constitution of Kenya, 2010; Convention on the Rights of the Child; judicial enforcement*

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1 Introduction

The promulgation, in August 2010, of a new Constitution (2010 Constitution) has been termed 'the most significant achievement' in Kenya's governance since independence in 1963.[1] This in part is because the previous Constitution did not contain a comprehensive and enforceable Bill of Rights. The 2010 Constitution also ushered in a new legal and political dispensation in several respects.[2] The Constitution proposed a far-reaching restructuring of Kenya's governance structure – from a purely centralised governance system to devolved regional governance units, it provided a roadmap for the reform of the judiciary, legislature and executive and enunciated national values and principles, including ethos for leadership and integrity.[3] It also provided for a comprehensive Bill of Rights that seeks to ensure the protection of rights with an emphasis on 'marginalised' and 'vulnerable' persons.[4]

In its Bill of Rights the Constitution provides that state organs and public officers have the duty to address the needs of vulnerable groups in society, including women, older members of society, persons with disabilities, children, the youth, members of minority or marginalised communities, and members of ethnic, religious or cultural communities.[5]

There is a dedicated clause in the Bill of Rights providing for enhanced protection of children's rights (article 53). This is in keeping with Kenya's obligation under the 1989 UN Convention on the Rights of the Child (CRC) and the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter), to put in place legislative and other measures for the implementation of children's rights.[6]

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1 B Shihanya 'Constitutional Implementation in Kenya, 2010-2015: Challenges and prospects' (2012) Friedrich Ebert Stiftung, Occasional Paper 5 ISBN 9966-957-20-01, http://www.katibainstitute.org/Archives/images/banners/Sihanya-Constitutional%20implementation%20in%20Kenya,%202010-2015--Challenges%20and%20Prospects.pdf (accessed 20 September 2022) citing Commission for the Implementation of the Constitution (CIC), Quarterly Report January-March 2011.

2 As above.

3 2010 Constitution, ch 11 (devolved governments); chs 8-10 (on the legislature, executive and judiciary) and ch 6 (leadership and integrity).

4 Art 21(3) 2010 Constitution. See also G Odongo & G Musila 'Direct constitutional protection of economic, social and cultural rights under Kenya's 2010 Constitution' in DM Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 346.

5 Art 24(3).

6 Art 4 CRC; art 1 African Children's Charter. Kenya ratified CRC in July 1990 and the Children's Charter in July 2000.

This article discusses the emerging post-2010 court jurisprudence on an array of children's rights. The selected cases are precedent setting and touch on a range of violations of children's rights in both the private sphere (such as children's rights to parental care) and the public sphere (such as state obligations to address children's lack of economic and social rights). While analysing these decisions the article examines some of the key implications of the entrenchment, for the first time, of children's rights in Kenya's supreme law.

2 Contextual background

The technical committee that was responsible for birthing the final text of the 2010 Constitution documented that, throughout the process of constitutional review, Kenyans had demanded an expanded Bill of Rights that explicitly guarantees the specific rights of women, children, the youth and persons with disabilities.[7] The inclusion of children's rights in the 2010 Constitution also resonated with the pre-existence of the Children's Act, 2001 that had explicitly sought to give domestic legal effect to CRC and the African Children's Charter.[8] The Children's Act, 2001 has since been repealed and replaced by a new and more expansive Children's Act, 2022 that came into legal force on 26 July 2022. The 2022 Act was specifically informed by the need to give better legal effect to the provisions of the 2010 Constitution.[9]

Pre-dating the adoption of the 2010 Constitution, there was, in general, a peripheral legal recognition of human rights in Kenya.[10] Thus, while it had several flaws,[11] the now repealed Children's Act,

7 Committee of Experts on Constitutional Review 'Final report of the Committee of Experts on Constitutional Review' 11 October 2010 108, https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf (accessed 20 September 2022).

8 The Preamble to the Children's Act, 2001 stated: 'An Act of Parliament to make provision for parental responsibility … to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes'.

9 According to the Preamble to the Children's Act, 2022 the purpose of this new law, among others, is 'to give effect to Article 53 of the Constitution, to make provisions for children's rights'.

10 Odongo & Musila (n 4) 339-340, discussing the exclusive and limited focus by Kenya 's previous Bill of Rights on 'individualistic civil and political rights' which were largely not enforceable or justiciable in the courts.

11 Noting a lack of harmonisation of the Children's Act, 2001 and regulations with CRC, the UN Committee on the Rights of the Child, upon review of Kenya's record, in 2016 recommended that Kenya should expedite the process for the harmonisation of its domestic law with the Convention, including the adoption of new legislation to replace the Children's Act, 2001. See UN Committee on the Rights of the Child Concluding Observations on the combined 3rd to 5th periodic reports of Kenya, CRC/C/KEN/CO/3-5 para 8. The enactment in July of 2022 of the Children's Act, 2022 goes some way towards addressing this recommendation for harmonisation.

2001 was unique in its comprehensive legal recognition of children's rights, including rights of an economic and social nature such as children's rights to education and health.[12] The 2001 law also made provision for rights that traditionally had been included in general child protection laws, such as the right to protection, and the rights to name and nationality and privacy.[13] Overall, however, the reality was that without a corresponding expansive protection of children's rights in Kenya's pre-2010 Constitution, children's rights in the 2001 Act stood on tenuous legal grounds. This was because the Act and the expansive children's rights in it were subject to potential repeal on a simple majority vote in the legislature. With a supreme legal status and a higher threshold for legal amendments than ordinary statutes,[14] the 2010 Kenyan Constitution provided a more legally-secure bolster to the protection of children's rights. The newly-enacted Children's Act, 2022 addresses many of the flaws of the 2001 law and provides for more consistency with the 2010 Constitution. This includes the new law's inclusion of provisions that were absent from the 2001 law regarding children's rights to parental care without discrimination[15] and a wider range of options for guardianship, foster placement and adoption as alternative forms of care.[16] The new law also enacts a novel set of options, including a diversion from the formal justice system, for courts and justice officials to resort to when handling children accused of committing crimes.[17]

3 Role of international law in the domestic legal system[18]

Article 2(6) of the 2010 Constitution provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya'. This provision was first interpreted in a few cases, such as the Kenyan

12 Secs 7 & 9 Children's Act, 2001.
13 Secs 3-22 Children's Act, 2001 Part II.
14 Ch 16 Constitution of Kenya (arts 255-257) detailing the need for super legislative majority votes and majority support in public referenda for certain constitutional amendments, including changes to the Bill of Rights.
15 Children's Act, 2022 Part III. Sec 32(1) of the Act in particular addresses the 2001 Act's flaw in not providing for the equal rights and obligation of parents to provide care for children born out of marriage. It states: 'Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.'
16 Children's Act, 2022 Parts X, XIII & XIV.
17 Children's Act, 2022 Part XV.
18 The views build on my earlier thoughts in G Odongo 'The role of international law in the judicial interpretation of new African children's laws: The Kenyan example' in T Liefaard & and J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (2017) 209-210.

Court of Appeal's decision in *David Njoroge Macharia v Republic*,[19] where the Court asserted that under the Constitution, the provisions of treaties ratified by Kenya are by default deemed to be part of Kenyan law.[20] The three-judge bench held:[21]

> Kenya is traditionally a dualist system; thus, treaty provisions do not have immediate effect in domestic law, nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, this position may have changed after the coming into force of our new Constitution.

Writing on other human rights issues, some scholars have adopted the same approach as the Court of Appeal by asserting that 'the African Charter [on Human and Peoples' Rights] and the Women's Protocol [to the African Charter] are now part of Kenyan law under the 2010 Constitution'.[22] In an earlier contribution the author expressed the view that article 2(6) of the Constitution appears to 'transform Kenya, traditionally a dualist state (requiring domestication through statute of international law), into a monist one (in which international law is considered as part of municipal law)'.[23] In reality, however, a more guarded or nuanced interpretation is warranted because of the reality that many of the provisions of CRC and the African Children's Charter, like most other treaty provisions, are not self-executing. They require further corresponding national law, policy or judicial interpretation for there to be full domestic legal effect of international children's rights norms.

4 Status of CRC and the African Children's Charter in the domestic legal system

From the foregoing, CRC and the African Children's Charter may generally be considered part of Kenyan law by virtue of article 2(6)

19 [2011] *eKLR*.

20 For an exhaustive analysis of the case, see MK Wasilczuk 'Substantial injustice: Why Kenyan children are entitled to counsel at state expense' (2012) 45 *NYU Journal of International Law and Politics* 291-333.

21 *Macharia* case (n 19) 12, with the judges stating that in an earlier case, *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR, 'the superior court held that by virtue of the provisions of Section [*sic*] 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, were imported as part of the sources of the Kenyan Law and thus the provisions of the International Covenant on Civil and Political Rights (ICCPR) which Kenya ratified on 1st May 1972 were part of the Kenyan law. The court went on to hold that the provisions of the ICCPR superseded those contained in the Banking Act.'

22 C Bosire, V Lando & W Kaguongo 'The impact of the African Charter and Women's Protocol in Kenya' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2012) 66.

23 Odongo (n 18) 210.

of the Constitution. Indeed, in most cases where a CRC or African Children's Charter provision is self-executing (and not needing further statutory enactment or clarity) Kenyan judges tend to directly rely on the international children's rights norm as if it were part of the Kenyan Constitution or statutory laws. This was the case in a petition decided by the High Court in August 2017. In this case the child petitioner (referred to in the case as a 'minor' and by his initials POO) alleged a violation of rights, including the right, under article 53 of the Constitution, detailing that upon arrest by the police, children must be detained separately from adults. The High Court explicitly relied on both article 37(c) of CRC and article 53(1)(f)(ii) of the Constitution requiring the separation of children from adults during any detention.[24] This approach stating that the respective provisions of CRC should be considered part of Kenyan law is illustrated in other cases.[25]

However, the post-2010 legal jurisprudence also demonstrates that further legislative, policy and judicial measures to fully guarantee children's rights are much needed in Kenya. The next parts of this article turn first to a discussion of the nature and scope of the child rights clause, proceeding to an analysis of court decisions that illuminate this need on issues ranging from children's rights to a nationality, implications of the best interests of the child principle to children's economic, social and cultural rights and rights in the justice system.

5 Reach and scope of the children's rights clause in the Constitution

Children's rights are included in many provisions of the 2010 Constitution but provided for in specific greater detail in article 53 which falls under Part 3 of the Bill of Rights. The children's rights clause (article 53) complements the general rights of all persons to the civil and political and economic, cultural and social rights in Part 2 of the Bill of Rights.[26] Thus, non-child-specific or general provisions, such as the Constitution's article 27 on the right to equality and non-

24 *POO (a Minor) v The Director of Public Prosecutions & Another* [2017] *eKLR*, para 41, http://kenyalaw.org/caselaw/cases/view/140634/ (accessed 20 September 2022).

25 Eg, *Gabriel Nyabola v The Attorney General & 2 Others* [2014] *eKLR* para 30, http://kenyalaw.org/caselaw/cases/view/102170/ (accessed 20 September 2022) where the Court states: 'Article 28 of the United Nations Convention on the Rights of the Child, which is incorporated in the Children Act, provides as follows …'

26 Arts 26-51 Constitution of Kenya.

discrimination,[27] have proven integral to the way in which Kenyan courts interpret children's rights. Moreover, all the rights in the Constitution are to be interpreted, as required under Part 1 of the Bill of Rights, purposively and in a manner that enables the guarantee of human rights.[28]

Article 53 – the children's rights clause – provides:

(1) Every child has the right –
  (a) to a name and nationality from birth;
  (b) to free and compulsory basic education;
  (c) to basic nutrition, shelter and health care;
  (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
  (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
  (f) not to be detained, except as a measure of last resort, and when detained, to be held –
    (i) for the shortest appropriate period of time; and
    (ii) separate from adults and in conditions that take account of the child's sex and age.
(2) A child's best interests are of paramount importance in every matter concerning the child.

Implementation mechanisms are envisaged in the primary children's law, the Children's Act, 2022 (such as the National Council for Children's Services)[29] and under the Constitution (for example, the national human rights commission).[30] However, the Constitution vests judicial authority in courts to adjudicate human rights. The Constitution recognises the right to pursue a judicial remedy if any rights have been or may be violated, and provides courts, particularly the High Court, with a wide range of potential options for judicial review and remedy.[31]

27 Art 27 partly provides: 'Every person is equal before the law and has the right to equal protection and equal benefit of the law. 2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.'
28 Arts 19-25 Constitution of Kenya.
29 Sec 42 Children's Act, 2022.
30 Art 59 Constitution of Kenya.
31 Art 23 of the Constitution provides for the authority of courts to 'uphold and enforce the Bill of Rights'. Art 165(3) provides the High Court with 'jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'.

6 Key thematic children's rights issues litigated post-2010

6.1 Enforcing children's rights to a name and nationality through a right to non-discrimination lens

Beyond the Constitution's provision of a right to a name and nationality, two laws primarily anchor the process and procedures by which children can acquire a name and nationality in Kenya. The Citizenship and Immigration Act of 2011 is the primary law on nationality, guaranteeing nationality for all children born in Kenya. It particularly resolves a long-standing historical discrimination by recognising the equal right of women and men to transmit nationality to their children. In its most recent review of Kenya's record of implementing CRC, the UN Committee on the Rights of the Child found that specific categories of vulnerable children, such as children born out of wedlock, refugee and asylum-seeking children and children from minority communities, are likely to face significant discrimination, which means that their right to a name and nationality is not realised.[32] A much older law, the Registration of Births and Deaths Act of 1928,[33] makes provision for a birth and death registry. Enacted decades before a child rights-oriented era, a few of its key provision have been found to be in conflict with the Constitution. An example is section 12 which provides:

> No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognised custom.

In the case of *LNW v AG & 3 Others* (*LNW* case)[34] the petitioner, suing on her and her four year-old child's behalf, contended before the High Court that this section was unconstitutional not only in light of article 53 of the Constitution but also because it violates the right to equality and the prohibition of discrimination of any person under article 27 of the Constitution.[35] The correlation between the right to a name and nationality with the right to non-discrimination is in keeping with the latter's right being part of the four 'core rights' that

32 UN Committee on the Rights of the Child (n 11) para 29.
33 Ch 149 Laws of Kenya.
34 Petition 484 of 2014, in the High of Kenya at Nairobi [2016] eKLR, http://kenyalaw.org/caselaw/cases/view/122371/ (accessed 20 September 2022).
35 Art 2(6) of the Constitution provides: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

underpin all other children's rights.[36] These are, namely, the right to non-discrimination; the best interests of the child; children's rights to life, survival and development; and their right to participation.[37] In particular, the right to non-discrimination, together with equality before the law and equal protection of the law without any discrimination, is basic and general to the protection of all human rights.[38]

Anchoring its findings on the right to non-discrimination and the right to a name, the Court found section 12 of the Registration of Births and Deaths Act to be discriminatory against children born outside marriage.[39] It rejected the government's main assertion that this provision was meant to ascertain the authenticity and truth of paternity and to 'prevent unscrupulous mothers from vindicating any man of their choice for personal reasons'.[40] The judge relied on comparative jurisprudence from South Africa's Constitutional Court[41] and cited the Constitution's article 27 (equality clause); article 8(1)[42] of CRC; and article 25(2)[43] of the UN Declaration of Human Rights, to make the point that children's rights guaranteed under article 53, including the right to a name and nationality, as well as other rights must be accorded to all children, whether born within or outside a marriage.[44]

The Court proceeded to direct that the impugned section 12 of the Registration of Births and Deaths Act be construed with necessary alterations, adaptations, qualifications and exceptions to bring it into conformity with the Constitution.[45] Beyond the right to a name, the Court observed that this unlawful discrimination would have a

36 UN Committee on the Rights of the Child General Comment 5 *General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 para 12, https://www.refworld.org/docid/4538834f11.html (accessed 20 September 2022).
37 As above.
38 UN Human Rights Committee, General Comment 18: *Non-discrimination*, adopted at the 37th session of the Human Rights Committee, 10 November 1989 para 1, citing arts 2(1) and 26 of the UN International Covenant on Civil and Political Rights, which are analogous to art 27 of the Constitution of Kenya, that obligates state parties to ensure the recognition of rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
39 *LNW* case (n 34) paras 69-75.
40 *LNW* case (n 34) paras 38, 85 & 89.
41 *Bhe & Others v Khayelitsha Magistrate & Others* CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).
42 Art 8(1) of CRC provides: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.'
43 Art 25(2) of the Universal Declaration of Human Rights provides: 'Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'
44 *LNW* case (n 34) paras 71-79.
45 *LNW* case para 117.

'deleterious effect' on other children's rights, such as the right to parental care and protection and the right to health.[46]

Thus, the inclusion of the right to a name and nationality as part of the Constitution's Bill of Rights has provided the High Court with a basis to examine the relevant legislation's alignment with this right and, where necessary, as in the *LNW* case, declare specific legal provisions unconstitutional. The denial of a right to nationality to certain categories of children in Kenya and the related need for a comprehensive legal review or reform remain a significant issue. A yet to be implemented decision of the African Committee of Experts on the Rights and Welfare of Children (African Children's Committee), *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*,[47] is illustrative. This case concerned a complaint regarding an official system-wide discrimination of children from a minority (the Nubian) community in ways that led the state system to deny them registration at birth, leading to a denial of citizenship. The African Children's Committee found that the non-registration of a significant number of Nubian children at birth coupled with an unduly bureaucratic and complicated vetting process for Nubian youth to access Kenyan national identification status constituted violations of the African Children's Charter's obligations. Specifically, the non-registration and subsequent denial of services abrogated the affected children's right to a name and nationality (article 6)[48] and violated their right to be protected from discrimination (contrary to article 3).[49] The Children's Committee found that the affected Nubian children would effectively be left stateless or potentially stateless with the consequence that they had inadequate access to public services such as education and health care in violation of articles 12(2) and 11(3)

46 *LNW* case paras 80 & 81.

47 The African Committee of Experts on the Rights and Welfare of the Child *Decision on the Communication submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) against the Government of Kenya,* 22 March 2011, Communication Com/002/2009, https://www.refworld.org/cases,ACERWC,4f5f04492.html (accessed 20 September 2022). See also E Fokala & L Chenwi 'Stateless and rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee' (2014) 6 *African Journal of Legal Studies* 357; E Durojaye & EA Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' (2012) 2 *African Human Rights Law Journal* 564; E Fokala 'Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians' (2021) *De Jure* 476.

48 African Children's Committee (n 47) para 54.

49 African Children's Committee (n 47) para 57.

of the African Charter which provides for all children's rights to the highest attainable standard of health and education.[50]

The African Children's Committee's decision and the High Court's *LNW* decision showcase how there is a need for further statutory reform and administrative and policy steps that Kenya should take in order to make it practical, especially for certain categories of children with regard to the right to a name and nationality.

6.2 Protection: The right to be protected from abuse and violence

Article 53(1)(d) of the Constitution provides for children's rights to be protected from abuse, neglect and harmful cultural practices. Building on this provision Kenyan courts have adopted a comprehensive interpretation of children's rights in a way that establishes these rights as part of the broader human rights scheme. The courts are also able, drawing from the elaborate inclusion of the nature and scope of children's rights, to flesh out the full spectrum of the obligations of duty bearers, particularly the state.

The case of *LJ & Another v Astarikoh Henry Amkoah*,[51] decided by the High Court in 2015, sets a benchmark on the nature and scope of the state's obligation to protect children from abuse. This case involved the issue of sexual abuse of children, particularly girls, in Kenyan schools – a form of abuse that the Court considered a 'general serious problem'.[52] The case was brought by and on behalf of two girls who sought civil remedies for alleged defilement and sexual assault perpetrated by a male teacher.[53]

Exercising its jurisdiction to enforce the Bill of Rights, the High Court found that the teacher, the Teachers Service Commission (TSC) and the government jointly, directly and vicariously were legally responsible for failing to protect the girls from abuse. This finding was despite the judge's recognition that the TSC had already dismissed the teacher for his conduct following the TSC's internal disciplinary

50 African Children's Committee (n 47) paras 62-63.
51 Petition 331 of 2011 [2015] eKLR, http://kenyalaw.org/caselaw/cases/view/109721/ (accessed 20 September 2022).
52 *LJ* (n 51) para 131, noting: 'It is its evidence that in the period 2009-2011 [the Teachers' Services Commission] has punished by way of dismissal and de-registration a total of 175 teachers, on account of sexual-related offences. Coupled with the statistics adduced by the interested parties and the Amicus … [the] problem of defilement and sexual abuse of children generally is a serious problem, that needs to be addressed with all the tools and means that are in the 3rd and 4th respondents' control.'
53 *LJ* (n 51) para 111.

process. To the Court, protecting children from abuse went beyond individual accountability of abusive teachers. It established that the TSC enforcement procedure for abusive conduct prioritised teacher discipline at the expense of psychological, medical and other forms of support.[54] The state's constitutional obligation to uphold the rights of children to be protected from violence had to be viewed in a comprehensive fashion beyond disciplinary procedure.[55]

The Court's overall finding of liability was premised on the inadequacy of the content and implementation of the relevant TSC circular and code of ethics that the TSC had put in place to address teacher misconduct. For example, the Court found that this code of ethics, which barred teacher-student contact outside school hours (which rule was routinely violated)[56] had not been adequately disseminated and was not properly understood by children.[57] Drawing from comparative decisions in other jurisdictions such as that of Zambia,[58] which had held the teachers' regulatory authority and the government responsible for individual teachers' conduct, the Court found that the TSC and the state were civilly liable for the teacher's conduct.[59] It ordered the state to pay the two petitioners monetary damages in the amount of KES 5 million (US $50 000) and recommended the establishment of a zero-tolerance mechanism for sexual abuse in schools.[60]

This case demonstrates how Kenyan judges have reinforced the interconnected nature of children's rights in the post-2010 period. Thus, in the Court's analysis, sexual assault suffered by the girls and the consequences of such violence constituted a violation of their constitutionally-guaranteed rights to dignity (article 28 of the Constitution); negatively impacted their right to education (article 43); and their right to health (article 43).[61] However, it is also noticeable in this case that in its conclusion of findings the Court went with the petitioners' citation of a violation of general rights to health and education under article 43 and did not include a consideration of similar children-specific rights to education and

54 *LJ* (n 51) para 135.
55 *LJ* (n 51) para 111 and para 135, the judge stating: 'I did not hear the state or the TSC refer to any policy or process for ensuring counselling or other psychological support for victims of sexual violence. It appears that the state views its role as limited only to punishing offenders …'
56 *LJ* (n 51) para 133.
57 *LJ* (n 51) para 134.
58 *LJ* (n 51) para 147, citing the case of *RMK v Edward Hakasenke & Others* 2006/HP/032, decided by the High Court in Zambia.
59 *LJ* (n 51) para 154.
60 *LJ* (n 51) paras 164-165.
61 *LJ* (n 51) paras 119-123.

protection from abuse under article 53.[62] This approach of defaulting to the Constitution's general human rights, as opposed to child-specific rights, did not hamper the Court in providing bold remedial measures to the petitioners. However, by failing to enunciate the specific corresponding legal obligations in the Constitution's article 53 child-specific rights, the Court risks failing to unpack the normative obligations that define the specific and, in some cases, enhanced legal guarantees of children's rights under the Constitution.

6.3 Reinforcing children's rights to non-discrimination and their best interests in the context of parental care and responsibility

In keeping with the phrasing of CRC and the African Children's Charter,[63] both the Kenyan Constitution, the previous 2001 and current Children's Act, 2022 have legislated for the primacy of the child's best interests.[64] Article 53(2) of the Constitution provides that a 'child's best interests are of paramount importance in every matter concerning the child'. Section 8(1)(a) of the Children's Act, 2022 also provides that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

Thus far in the post-2010 period, Kenyan courts have invoked the best interests principle mostly in disputes in the realm of parental care and obligations. The first in a line of cases is an illustrative 2013 case, *ZAK & Another v MA and the Attorney General* (*ZAK* case).[65] The petition was brought by the petitioner, a man known in the case by the abbreviation ZAK, who sought to assert parental responsibility for his two biological children. He sought to refute such responsibility for two other children who had been born before his cohabitation with the mother of the children, from whom he was separated at the time the case was heard. He made the argument that section 24(3) of the

62 *LJ* (n 51) para 158. This is more surprising considering how the Court initially notes in paras 115-116 how the rights of children are not to be subjected to any form of sexual or physical violence, and their rights to education, non-discrimination and dignity that were provided for in the then Children's Act, 2001, art 53 of the Constitution and art 19 of CRC were relevant to the case.

63 Art 4(1) of the African Children's Charter provides: 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.' Art 3(1) of CRC is similar albeit requiring the child's best interests to be made 'a' rather than 'the' primary consideration.

64 Sec 8(1) Children's Act, 2022. The new Act includes a First Schedule list of factors to be considered in adjudging children's best interests.

65 [2013] *eKLR*, http://kenyalaw.org/caselaw/cases/view/89114/ (accessed 21 September 2022).

then Children's Act, 2001 and section 25 of that Act, by which a father of a child born outside a marriage could either acquire or be implied to have acquired parental responsibility,[66] were unconstitutional. The petitioner further argued that these provisions of the Children's Act, 2001 were discriminatory to fathers in his situation in view of article 27 (the equality clause) of the Constitution, which provides in part that '[e]very person is equal before the law and has the right to equal protection and equal benefit of the law'. In dealing with the matter, the Court first unequivocally stated that, while the petition had been brought by the father of the children seeking to assert his rights, the determination of the case involved the welfare of the children.[67] Hence, the Court was to bear in mind the principle that the child's best interests are of paramount importance in every matter concerning the child.[68] Following an analysis primarily based on the clear language of the Constitution (article 53(1)(e)) providing for the right of all children to parental care as the duty of both parents, Ngugi J categorically stated:[69]

> The Children['s] Act [2001] must be read as imposing parental responsibility for children on both of their biological parents, whether they were married to each other or not at the time of the child's birth. The 2nd respondent [the Attorney General] has the responsibility, which I note, from its written submissions in this matter, it is fully alive to, to present the necessary amendments to Section 24(3) and 25 for enactment by Parliament … to ensure conformity with the Constitution.

The *ZAK* decision was subsequently affirmed by a line of decisions of the High Court. In a case decided in February 2019, *NSA & Another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & Another* (*NSA* case)[70] the High Court considered that the provisions of the Children's Act, 2001 and the Law of Succession Act,[71] which gave a father the discretion to choose explicitly or impliedly (through care and maintenance) whether a child is to be considered his 'relative' for purposes of inheritance,[72] contravened article 53(1)(e) of the Constitution which requires parents to provide for their children whether they are married or not.[73] Speaking to the

66 The mother of the children, the first respondent, argued that, because of their cohabitation and his provision of maintenance for the children for more than two years, the petitioner could be implied, under sec 25(2) of the Act, to have acquired parental responsibility for the two children born to another father.
67 *ZAK* case (n 65) para 19.
68 As above.
69 *ZAK* case (n 65) para 29.
70 [2019] *eKLR*, http://kenyalaw.org/caselaw/cases/view/170405/ (accessed 1 October 2020).
71 Ch 160 Laws of Kenya.
72 Children's Act, 2001 sec 2(b); Law of Succession Act, secs 3(2) & 3(3).
73 *NSA* case (n 70) paras 44-45.

child rights ethos of the Constitution, the Court explicitly stated in this case:[74]

> Article 53(2) [of the Constitution] provides that a child's best interests are of paramount importance in every matter concerning the child. Article 53 is the reference point as far as the rights of children are concerned. It is the yardstick by which laws relating to children are to be measured. The plain meaning of the article is that fathers and mothers have equal responsibility to a child they bear, and this responsibility is not left to the volition of the man or woman. The bottom line is that both ... must take responsibility.

This legal position established by the Constitution and affirmed by courts shone a light on how an otherwise progressive children's rights statute (the Children's Act, 2001) was at odds with the guarantee of rights under the Constitution. Section 32(1) of the new Children's Act, 2022 has since removed this inconsistency by specifically making provision for children's rights to parental care regardless of the marital status of the parents or guardians.

6.4 Children's economic, social and cultural rights

For the first time in Kenya's legal and constitutional history, the 2010 Constitution in article 43 guarantees every person, including children, the rights to health, housing, food, water, social security and education. Articles 20, 21 and 24 of the Constitution lay down general principles that apply regarding the interpretation and limitation of rights. These include the principle that rights cannot be limited except by law and that such law must be reasonable and justifiable in an open and democratic society based on human dignity, equality, equity and freedom (article 24); that the state bears the burden to prove that it lacks resources to implement economic, social and cultural rights (article 20(5)); and the obligation to take legislative, policy and other measures to progressively realise economic, social and cultural rights (article 21(2)). Specifically, for children, article 53 further provides:

> Every child has the right –
> …
> (b) to free and compulsory basic education;
> (c) to basic nutrition, shelter and health care.

The Constitution does not explicitly extend the qualifications with regard to the progressive nature of the realisation of general economic, social and cultural rights (article 43) to these children's

74 *NSA* case (n 70) para 45.

rights under article 53. It has been observed in previous academic literature discussing economic, social and cultural rights under the 2010 Constitution that this non-qualification implies that the children-specific economic, social and cultural rights, under article 53, are of an immediate nature.[75] However, the starting point for children's rights is the legal recognition of the primary responsibility of parents or guardians for the upbringing and development of their children.[76] The state's role as a provider of rights, in contrast to its role of ensuring that parents provide for children, is secondary to the primary obligation or parental responsibility of parents. The exception would be situations involving children without parental or guardian care. For this reason, the evolving Kenyan jurisprudence on children's economic, social and cultural rights is distinguishable from the adjudication of general economic, social and cultural rights under article 43 of the Constitution. In the determination of general economic, social and cultural rights issues, Kenyan courts have appeared to adopt a standard that probes whether the state has put in place 'reasonable measures' involving laws, policies and administrative measures to implement a given right.[77] This approach contrasts with a potential alternative approach that would seek to probe whether the state's approach ensures the enjoyment of the 'minimum core obligation' of these rights.[78] In light of the parental or guardian primary responsibility starting point discussed earlier in this paragraph, the adjudication of children's economic, social and cultural rights before Kenyan courts appears to follow neither the reasonableness standard nor the minimum core obligation consideration. In this regard, Kenyan judges have mostly looked to South Africa for comparison.

Kenya's context is analogous to South Africa's in the sense that the South African Constitution similarly provides for unqualified children's economic, social and cultural rights alongside general economic, social and cultural rights.[79] In interpreting this inclusion of

75 Odongo & Musila (n 4) 348.
76 Eg, art 18(1) of CRC provides: 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.' Art 19(1) of the African Children's Charter similarly provides that '[e]very child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents'.
77 See generally Odongo & Musila (n 4).
78 Odongo & Musila (n 4) 367.
79 Constitution of the Republic of South Africa, 1996, sec 28(1)(c) which states that '[e]very child has the right to basic nutrition, shelter, basic health care services and social services'.

economic, social and cultural rights as part of the child rights clause, the South African Constitutional Court has held:[80]

> Where children are being cared for by their parents and family, the state did not incur a primary obligation to provide shelter to parents and their children on demand. The obligation of the state to provide shelter directly was only triggered when children lacked family care because, for example, they were orphaned or abandoned.

Liebenberg and Sloth-Nielsen have argued that this stance has the effect of minimising the state's role in ensuring children's economic, social and cultural rights in family or parental contexts of indigence or poverty.[81] The South African Constitutional Court has more recently appeared to depart from this reasoning. In a case involving an imminent threat of eviction of a public school from a private property, which would have meant that the affected children's rights to education would have been violated, the South African Constitutional Court seemed to change track towards a consideration of the state's primary role as provider for certain economic, social and cultural rights.[82] The Court held that the South African Constitution's provision for the right to basic education (section 29(1)(a)) meant that this right was not limited in the manner of general economic, social and cultural rights in sections 26 and 27 of the South African Constitution. Therefore, the state education authorities were obliged to put in place immediate alternative arrangements which would mean that the children's education were not disrupted.

The Kenyan courts' jurisprudence on children's economic, social and cultural rights is still nascent. There have been no reported cases that adjudicate great depth questions of children's rights to basic nutrition and health care. However, there already is a line of cases that are illustrative of how Kenyan courts are interpreting aspects of children's rights to education and housing. A select few examples are addressed in the parts that follow.

80 S Liebenberg 'Direct protection of economic, social and cultural rights in South Africa' in Chirwa & Chenwi (n 4) 322, discussing the case of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

81 Liebenberg (n 80) citing J Sloth Nielen 'The child's right to social services, the right to social security and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 *South African Journal on Human Rights* 210.

82 The case *Juma Musjid Primary School v Essay NO* (8) BCLR (CC), as discussed in Liebenberg (n 80) 323-324.

6.5.1 Right to basic education

The case of *Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others* (*Githunguri* case)[83] revolved around the concern that many Kenyan family households have had with user and monetary costs at a time post-2003 when the government had put in place a policy of free primary education.[84] Apart from seeking to interpret article 53 of the Constitution on the right to basic education, the case sought clarity on the legal implications of sections 29(1) and (2)(b) of the Basic Education Act of 2013.[85] The Act was enacted to give effect to the right to basic education in the aftermath of the adoption of the Constitution. Sections 29(1) and (2)(b) of the Act prohibit public schools from imposing the payment of tuition fees for any pupils while allowing for other monetary levies and charges (other than tuition fees) but only with the approval of the Cabinet Secretary in consultation with the local County Education Board. Section 29(2) provides unequivocally that '[n]o child shall be refused to attend school because of failure to pay such charges'. In this case the Court found that the school district had unlawfully and irregularly imposed several monetary costs, charges and levies, including 'activity fees', which some parents and pupils were unable to pay. As a result, several students were not allowed to attend school. Citing international law obligations, including CRC and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and comparative case law from, among others, the South African and regional West African (ECOWAS) Court,[86] the High Court concluded that the imposition of these monetary fees, levies and costs were illegal. According to Lenaola J:[87]

> '*Free*' means '*free*' and not subject to attendant costs in the name of activity fund, building fund, lunch and transport costs, etc. It is not surprising for example that in Githunguri Township Primary School these extra-curricular activity costs and specifically '*the lunch programme*' was estimated in 2013 to cost Kshs12 million all to be paid by parents. How can that be the case when fees are not supposed to be paid but parents still labour to raise that kind of money?

83 Petition 464 of 2013 [2015] eKLR, http://kenyalaw.org/caselaw/cases/view/109726/ (accessed 21 September 2022).
84 *Githunguri* (n 83) para 1.
85 Act 14 of 2013, Laws of Kenya.
86 *Githunguri* case (n 83) para 46, citing the ECOWAS case *SERAC v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/07/10, Judgment of 6 December 2010, for the legal assertion that 'a right to primary education is universal and not subject to any resource limitations'.
87 *Githunguri* case (n 83) para 57.

On the immediate nature of the legal obligation to guarantee the right to basic education, the Court added:[88]

> It is … the conviction and strong view of this Court that the right to basic education is not to be progressively realised as seems to be the expectation of school management bodies. That right is to be enjoyed now and to argue otherwise would be to cheapen the Constitution.

In contrast to the right to basic education which it considers to be immediate in line with the Constitution, the High Court has had occasion to interpret the obligation of the state to progressively realise the general right to education (article 43). In *MMM v Permanent Secretary, Ministry of Education & Others*,[89] the Court considered the issue of a parent's inability to pay school fees required at post-primary or secondary school. It held that the state was obliged to provide access to bursaries for qualifying indigent children and families. The Court also held that it was important for the government to demonstrate its commitment and 'actions taken towards the progressive realisation of the right to education in a holistic manner'.[90] The Court noted that while this was not the proper case for it to make a more detailed elaboration on the nature of the right to education under article 43(f) of the Constitution, the Court needed to bring certain issues to the attention of the state.[91] These included its view that progressive realisation need not be contingent on increased resources to implement the right; policies must be designed and resources applied in a meaningful, practical and result-based formula rather than an approach based on political and other motivations; and that realising the right to education in Kenya will require an 'incremental approach' which must be within 'a structured and publicised framework'.[92]

6.5.2 Right to housing

The High Court and the Court of Appeal have had occasion to adjudicate the content of the general right to housing under article 43 of the Constitution, particularly in the context of forced evictions of families and households. In fact, the right to housing has been the most litigated of all socio-economic rights under the 2010 Constitution.[93]

88 *Githunguri* case (n 83) para 58.
89 Petition 133 of 2013 [2013] ekLR, http://kenyalaw.org/caselaw/cases/view/91830/ (accessed 20 September 2022).
90 *MMM* (n 89) para 18.
91 As above.
92 *MMM* (n 89) para 20, citing the South African example of *Section 27 & 2 Others v Minister for Education* Case 24565 of 2012.
93 See Odongo & Musila (n 4) 350.

Thus far, litigation on housing has mainly been on the general right to housing (article 43) as opposed to the specific provision in article 53(1)(c) of the Constitution on children's rights to shelter. The case of *Satrose Ayuma & 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others*[94] is emblematic of the adjudication on the issue of forced evictions and its impact on children. This dispute concerned a public corporation's eviction of over 300 long-term tenant residents from blocks of houses that it had owned. The corporation provided tenants with a 90-day notice period to vacate the property to make way for a commercial development project. The respondents contended, among others, that this notice period was inadequate and that without further procedural safeguards the eviction would violate several of their rights, including their right to housing and the rights of children to a shelter and basic education.

The Court found a violation of the general right to housing under article 43 on the basis that the way in which some of the petitioners were eventually evicted from the property was 'reckless' and that the evictions did not follow the due minimum process safeguards required by the UN guidelines on evictions.[95] The Court held that even if the right to housing was subject to progressive realisation, the state must take incremental steps, including the adoption of laws and policies, towards such realisation.[96] The Court did not consider – and it is not clear why not – the fact that children's rights to a shelter under article 53(1)(c) were not framed as contingent on the state taking such incremental progressive steps. It noted, however, that children were among members of society that would be 'disproportionately' impacted by forced evictions, which may hinder the enjoyment of children's rights. The Court explained that forced evictions carried out in the middle of a school calendar hampered children's rights to education.[97]

94 Constitutional Petition 65 of 2010 [2013] eKLR, http://kenyalaw.org/caselaw/cases/view/90359/ (accessed 22 September 2022).

95 *Ayuma* (n 94) para 92. The Court arrived at this conclusion having adopted international and South African comparative case law in determining the content of the right to housing. The Court specifically adopted the due process safeguards in the 'UN Basic Principles and Guidelines on Development Based Evictions and Displacement, Annex 1 of the Special Rapporteur on adequate housing as a component of the right to adequate living', A/HRC/4/18, https://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf (accessed 15 September 2020).

96 *Ayuma* (n 94) para 110.

97 According to Lenaola J, '[c]hildren are among the most vulnerable of the vulnerable members of the society alongside the elderly … The petitioners aver that the eviction in this case took place in the middle of a school term. That would obviously affect the petitioners' children's right to education as the same would be disrupted unnecessarily …' paras 104-105, citing the UN Committee on Economic, Social and Cultural Rights General Comment 7: Right to adequate

6.6 Children's rights in the justice system

The High Court has had occasion to give meaning to the provision in article 53(1)(f) of the Constitution, which provides that for children alleged to have, accused of or recognised as having committed a crime, detention, at any point of criminal justice process, should be used as a last resort, and when resorted to by law enforcement officials or the courts, be imposed for the shortest period possible. In *MWK and the CRADLE – Children's Foundation v The Attorney General & 4 Others*[98] a teenage girl sought judicial remedy partly alleging that the manner of her arrest by the police, for alleged public nuisance and the crime of possession of cannabis, did not consider the facts of her childhood and that the police had effectively resorted to her arrest and one-day detention in police custody, as a first, rather than last, resort. The Court premised its determination on several provisions of the Bill of Rights, including the rights to dignity, privacy and protection from cruel, inhuman and degrading treatment and the child rights-specific provisions of article 53(1)(f). It also emphasized the fact that the child's best interests were the key factor in adjudging the propriety of police conduct.[99] Of the specific ethos that guides the child rights-orientated nature of article 53(1), the Court explained:[100]

> The need for our society to be sensitive to a child's inherent vulnerability is behind the provisions of Article 53 of the Constitution … The interests of children are multifarious. However, in the context of arrests of children, Article 53 seeks to insulate them from the trauma of an arrest by demanding in peremptory terms that, even when a child has to be arrested, his or her best interests must be accorded paramount importance ... All that the Constitution requires is that, unlike pre-2010, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them.

The Court concluded that the rights of the child, including the right not to be detained except as a last resort, had been violated

housing (art 11.1) forced evictions, adopted at the 6th session of the Committee, 13 December 1991, contained in document E/1992/23).

98 [2017] eKLR, http://kenyalaw.org/caselaw/cases/view/145769/ (accessed 15 October 2020).

99 *MWK* (n 98) para 58: 'This Court is constitutionally obliged to consider the facts complained of in this case through the lens of Article 53(d), (f) and (2) of the Constitution to determine if the police officers considered the first Petitioners' best interests, and if they did, whether they accorded the best interests paramount importance.'

100 *MWK* (n 98) paras 67-69.

and awarded monetary damages of KES 4 000 000 (US $40 000). This court decision aligns with the views of the UN Committee on the Rights of the Child. The CRC Committee has explained the import of articles 37(a) and 40(3)(b) of CRC considering restrictions on children's detention as a key core principle of the requisite comprehensive juvenile justice policy required as a legal obligation of state parties.[101] In particular, the Committee has recommended that to ensure compliance with this principle at all stages of the justice process – pre, during and post-trial – states should consider programmes, processes and systems, including diversion and other measures that would ensure that children in conflict with the law are not primarily handled through a formal justice process of arrest and arraignment in a court of law.[102] Prior to the newly-enacted Children's Act, 2022 there had been broad non-compliance with the Children's Act, 2001 with regard to the obligations related to the rights of children not to be detained except as a last resort and for the shortest period possible. Consistent with the Constitution's provisions that limit children's pre-trial detention, the recently-adopted Children's Act, 2022 reiterates that 'institutionalisation and detention of children in conflict with the law, pending trial, shall be used as a means of last resort'.[103] The new Act's introduction, for the first time in Kenyan law, of the option for diversion[104] – policies, procedures and programmes to channel children away from the formal justice system – is anchored in objectives of the Constitution as articulated in this High Court judgment. These include the goals of minimising stigma, the rehabilitation of the child offender as well as potential restitution for victims of crimes and the potential reconciliation between the parties.[105]

Under the Children's Act, 2022,[106] CRC[107] and the African Children's Charter,[108] children alleged to have, accused of or recognised as having committed capital offences may not be subjected to the death penalty in Kenya. However, by virtue of the Penal Code[109] – Kenya's pre-independence 1930s-era primary code of criminal law – children who may otherwise be subjected to the death penalty would upon conviction be imprisoned on the 'President's pleasure',

101 See UN Committee on the Rights of the Child, General Comment 24: Children's Rights in Juvenile Justice – to replace General Comment 10 on Juvenile Justice (2007), CRC/C/GC/24, 18 September 2019 paras 13-19.
102 UN Committee on the Rights of the Child (n 101) paras 13-19 & 72.
103 Sec 223(1) Children's Act, 2022.
104 Secs 227-232 Children's Act, 2022.
105 Sec 226 Children's Act, 2022.
106 Section 238(2) which mirrors sec 191(2) of the repealed Children's Act, 2001.
107 Art 37(a).
108 Art 5(1).
109 Penal Code, ch 63 Laws of Kenya.

a principle drawn from Kenya's British colonial heritage under which the Penal Code was promulgated.[110] In the 2015 case of *AOO & 6 Others v The Attorney General and the Office of the Director of Public Prosecutions*[111] the Court considered this provision unconstitutional, reasoning as follows:[112]

> In addition to the 'so-called traditional approach' (the crime, the offender and the interests of society), child offenders should be sentenced with due regard to article 53(1) of the Constitution. In particular, every child has the right 'not to be detained except as a measure of last resort' and then 'the child may be detained only for the shortest appropriate period of time'... If detained, child offenders have the right to be kept separate from adult prisoners and to be treated and accommodated in 'conditions that take account of the child's age'. The international instruments that affect the sentencing of child offenders emphasise the reintegration of the child into society. The principle that imprisonment should be used as a last resort and then for the shortest period possible, are expressly included in the Constitution.

The Court ordered that the six children in this case, who had been convicted of capital offences and who were at risk of being in indefinite detention 'at the pleasure of the President', to be immediately released from custody. Since July 2022 the newly-enacted Children's Act, 2022 has codified this legal position providing that no court shall impose the death penalty on a child 'notwithstanding the nature of any offence.[113]

7 Children's legal standing in litigation

In a radical departure from a pre-2010 restricted jurisprudential posture on standing, the Constitution has widely expanded the consideration of who has a right to sue or bring claims for judicial adjudication for alleged human rights violations. Articles 22 and 258 both confer legal standing not only on a person acting in their 'own interest' but also a person acting in the 'interest of a group or class of persons' or 'in the public interest'.[114] The Children's Act, 2022

110 Penal Code, secs 25(2) & (3).
111 [2017] eKLR, http://kenyalaw.org/caselaw/cases/view/135588/#_ftn2 (accessed 20 September 2022).
112 *AOO* (n 111) 5.
113 Sec 238(2) Children's Act, 2022.
114 Art 22 provides: '1 Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. 2 In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members.' Art 258 is similarly worded in

unequivocally legislates for children's voice and agency by providing in section 8(3) that '[i]n any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity'.

In totality, these provisions make it clear that children have legal standing to adjudicate issues of rights violations bringing claims where their own interests may be affected or claims that adjudicate the interests of others – children and adults alike. In the words of a High Court judge, in Kenya's new constitutional dispensation 'a person who commences action to challenge an administrative decision or to enforce constitutional rights is not required to demonstrate by way of affidavits or other documentation that he is representing the public interest'.[115]

In practice, however, there are formidable obstacles to access justice before Kenyan courts. These include onerous court procedures and high legal costs which are unaffordable by many children and families in a country where most have no access to a dedicated public legal aid scheme.[116] These make it difficult for children to bring cases, except with the intervention of adult parents and caregivers or non-governmental organisations (NGOs), acting in their or the public interest. Besides, despite the progressive and expansive legal framework in support of children's rights, paternalism remains a dominant theme in Kenya's legal tradition. This has the effect that the adjudication of children's rights before Kenyan courts by and large is exercised through the prism and perspective of adults in their capacity as parents or parties interested in a case, rather than in recognition of children's agency and capacity to act.

reference to 'the violation of the Constitution' in contrast to art 22's reference to the violation of rights.

115 *Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited Ex parte Cradle – Children Foundation (suing through Geoffrey Maganya)* [2012] eKLR 4, http://kenyalaw.org/caselaw/cases/view/118504/ (accessed 22 September 2022).

116 As of 2017 it was estimated that only 4% of Kenyans use courts as a mechanism for dispute resolution, with the rest (96%) relying on informal justice systems. See International Development Law Organisation (IDLO) 'Kenya: Justice sector reforms to enhance access to justice', IDLO quarterly report, January-March 2017, https://aidstream.org/files/documents/01_KEN---Justice-Sector-Reforms---The-Netherlands---Progress-Report-and-Summary-of-Results-2017-QTR-I-20170531020537.pdf (accessed 22 September 2022).

8 Conclusion

The Constitution of Kenya, 2010 provides an elevated legal recognition of children rights. The Constitution's framers recognised that previous laws, including the relatively progressive but now repealed Children's Act, 2001 contained inconsistencies and gray areas, for example, regarding the legal status of children born out of marriage. The recent enactment of the Children's Act, 2022 brings Kenyan statutory law in better conformity with both the Constitution and relevant international law. The Constitution's specific inclusion of rights and principles drawn from CRC has enabled Kenyan courts to be proactive in enforcing children's rights against the reality of existing legal frameworks, some of which are or were at odds with international law. In cases where existing statutes undercut children's rights, the Constitution's status as the supreme domestic law has provided judges with a legal basis for the invalidation of these laws.

The expansive and comprehensive nature of the Constitution's Bill of Rights has also enabled courts to consider the mutually-reinforcing and integrated nature of all rights in the Constitution, children's rights included. However, it is imperative that, given the Constitution's specific inclusion of a children's rights clause and child-specific rights, Kenyan courts must not fail to clarify the elevated nature of child-specific rights which the Constitution provides in addition to general human rights. This suggestion finds resonance in the relatively nascent adjudication of economic, social and cultural rights claims. Here Kenyan judges, relying on international and comparative law, have demonstrated an appreciation for the normative implications of children rights, but there is a need for courts to provide further judicial clarity and policy guidance on the nature and scope of economic, social and cultural rights.

In addition to the clarity on the nature and scope of rights, the 2010 Constitution empowers Kenyan courts with a wide range of remedies that they can impose when adjudicating rights claims. Thus, compared to the pre-2010 period, the courts are now more willing to embrace systematic remedial measures, such as judicial recommendations for the reform of the applicable legal framework and implementation of new policies that give effect to children's rights.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: O Haldimann & L Biedermann 'Distribution of face masks in Kakuma refugee camp during a pandemic: Legal obligations and responsibilities' (2022) 22 *African Human Rights Law Journal* 451-475
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a6

Distribution of face masks in Kakuma refugee camp during a pandemic: Legal obligations and responsibilities

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Summary: *This article argues that the inhabitants of the Kakuma refugee camp are in a special relationship with the state, resulting in an increased duty of care of the latter towards the former. The effect of this increased duty of care ultimately results in a positive obligation to provide face masks to the inhabitants to protect them from COVID-19, based on the right to the best attainable standard of health and the right to life. The article then turns to the question of who is responsible to provide such face masks in the camp. After first analysing the situation on site, the article argues that a shift of responsibility of the host state to the UN Refugee Agency took place.*

Key words: *refugee; Kakuma refugee camp; COVID-19; health; life; face masks; UN Refugee Agency; UNHCR*

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1 Introduction

The COVID-19 virus reached the Kakuma camp and Kalobeyei settlement[1] in Kenya in the beginning of 2020. In response, the United Nations High Commissioner for Refugees (UNHCR) in collaboration with the Kenyan state issued a series of notices 'to all refugees and asylum-seekers living in Urban area in light of coronavirus (Covid-19)'.[2] These notices required the inhabitants of the Kakuma refugee camp to wear face masks, threatening them with a fine of up to 20 000 KES (approximately €150) or six months' imprisonment should they fail to comply with the regulation.[3]

Neither the Kenyan state nor international aid agencies present in the camp provided sufficient face masks[4] for the whole population. As the refugees living in the camp nevertheless had to move around for food distribution, to fetch water, and so forth, many private initiatives emerged in order to sell or distribute masks to the camp's inhabitants.[5] A face mask emanating from such a private initiative in general costs a small amount of money.[6] However, almost 94 per cent of Kakuma's inhabitants usually do not manage to cover all their food expenses.[7] Consequently, only a few inhabitants have the financial means to buy face masks themselves.

This situation seems unsatisfactory. On the one hand, inhabitants are required by law to wear masks and risk extremely high and likely unproportionate penalties if they break the law. On the other hand, most inhabitants do not have the financial means to buy a mask and neither the state nor international agencies provide help in this regard. This article attempts to raise awareness about this situation

1 UNHCR 'Kakuma camp and Kalobeyei settlement', https://www.unhcr.org/ke/kakuma-refugee-camp (accessed 22 January 2022).
2 See the entire list of documents at https://www.unhcr.org/ke/coronavirus-covid-19-update (accessed 22 January 2022).
3 Joint statement by UNHCR, Kenyan government 'Important notice to all refugees and asylum seekers living in urban areas in light of Coronavirus (COVID-19)' 19 May 2020, https://www.unhcr.org/ke/wp-content/uploads/sites/2/2020/05/IMPORTANT-NOTICE-COVID-19May-v2_English.pdf (accessed 22 January 2022).
4 The term 'face mask' generally refers to surgical masks (also known as 'procedure masks' or 'medical masks').
5 See, eg, activities of the African Initiative for Human Development, https://www.facebook.com/AIHD2; individual crowdfunding initiatives; and coverage of local news, https://kanere.org/local-solutions-for-global-problems/#more-2471 (accessed 22 January 2022).
6 Information from sources in the camp seems to indicate that face masks cost 50 KES, approximately €0,40.
7 UNHCR/Kimentrica/WFP 'Refugees vulnerability study Kakuma, Kenya, 2016' 2, https://reliefweb.int/sites/reliefweb.int/files/resources/Refugee_HH_Vulnerability_Study_Kakuma_Refugee_Camp_Final_Report_2016_05_06.pdf (accessed 22 January 2022).

and help define the legal framework of refugee camp inhabitants' rights to the best attainable standard of health and right to live, as well as answer the question of who bears thw responsibility for the protection of these rights in a refugee camp.

In order to do so, the article first analyses, through a comparative analysis of the jurisprudence of international and regional courts and institutions, the potential requirement of providing face masks to Kakuma's inhabitants based on a special relationship with the state. Second, the article discusses who might bear the responsibility for the provision of such face masks in Kakuma. The analysis focuses on the months following the COVID-19 outbreak in 2020.

2 Does human rights law require the provision of masks to populations in a special relationship with the state?

2.1 Kakuma inhabitants' special relationship with the state

2.1.1 A special relation due to vulnerability?

Human rights institutions around the world acknowledge some form of 'special relationship' between individuals and the state in particular settings. As will be shown, this special relationship results in an increased legal duty of care on the state towards an individual or a group because of perceived or actual vulnerability of the latter.

United Nations (UN) human rights institutions and actors have expressed themselves on the question of increased duties of care. As far as the right to life is concerned, the UN Human Rights Committee (HRC) considers that the state has a 'heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the state'.[8] The HRC deduces the vulnerability of prisoners from the deprivation of liberty.[9] By depriving individuals of their liberty, the state takes responsibility to care for their lives.[10] Persons in 'liberty restricting state-run facilities', such as refugee camps or camps for internally-displaced persons, benefit from the same increased duty of care.[11] In fact, the HRC seems to regularly

8 HRC General Comment 36 para 25.
9 HRC General Comment 21 para 3.
10 HRC *Zhumbaeva v Kyrgyzstan* (CCPR/C/102/D/1756/2008) para 8.6; *HRC Lantsov v the Russian Federation* (CCPR/C/74/D/763/1997) para 9.2.
11 HRC General Comment 36 para 25.

treat classical prisons and people otherwise deprived of their liberty in a similar way.[12] Similarly, the UN Committee on Migrant Workers (CMW) opposes all forms of detention for migrants and reminds member states of their 'increased duty of care' should they deprive individuals of their liberty.[13] The CMW regards certain groups as vulnerable and as 'particularly at risk', among them refugees, asylum seekers and stateless persons, and reminds states that for these groups their duty 'to effectively protect is greater than in other cases'.[14] Also, the Vienna Declaration and Programme of Action (VDPA) follows the same direction, since the promotion and protection of human rights of persons with vulnerabilities need to be considered as a matter of 'great importance', and need to be addressed with adequate measures.[15] In addition, the UN Office of the High Commissioner for Human Rights (OHCHR) defines vulnerable migrants as individuals who 'are unable … to enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer's heightened duty of care'.[16]

The African Commission on Human and Peoples' Rights (African Commission) regards groups facing 'significant impediments to their enjoyment of economic, social and cultural rights' as vulnerable.[17] Refugees and asylum seekers, internally-displaced persons, as well as persons living in informal settlements are involved.[18] The legal consequences of vulnerability seem not immediately clear. The African Commission mentions that to ensure the physical and economic accessibility of social rights, especially for vulnerable and disadvantaged groups, 'special measures' might be necessary,[19] and requests member states to 'prioritise' and to pay 'particular attention to' the rights of vulnerable groups.[20] While the minimum core obligation of economic and social rights must be fulfilled for everyone, it is 'particularly' relevant for vulnerable groups, who should be 'prioritised in all interventions'.[21]

12 See eg HRC General Comment 21 para 2.
13 HRC General Comment 36 para 25.
See eg HRC General Comment 21 para 2.
CMW Draft General Comment 5 on migrants' rights to liberty and freedom from arbitrary detention, 2020 para 33.
14 CMW (n 13) para 52.
15 Vienna Declaration and Programme of Action, 25 June 1993 para 24.
16 OHCHR Differentiation between migrants and refugees, https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf (accessed 22 January 2022).
17 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 para 1(e).
18 As above.
19 African Commission (n 17) para 3(c).
20 African Commission (n 17) para 12.
21 African Commission (n 17) para 17.

As far as the right to health is concerned, the African Commission mentions the need to 'ensure access to … facilities, goods and services on a non-discriminatory basis, especially for vulnerable … groups'.[22] Vulnerable groups should further be prioritised in national health plans.[23] States have a 'particular responsibility to protect the human rights … of individuals or groups who are frequently targeted or particularly at risk'.[24] As in the case of refugees and asylum seekers, prisoners might be especially vulnerable and in need of increased protection because of their particularly close relationship with the state. The African Commission indeed requires that states 'take measures to ensure that special protections … are provided in relation to persons with special needs' in prison,[25] and includes refugees in the group of potentially-vulnerable individuals,[26] but does not seem to consider prisoners *per se* as vulnerable. Especially concerning the right to life, states must extend a 'heightened responsibility … to persons detained in prisons, in other places of detention (official and otherwise), and to persons in other facilities where the state exercises heightened control over their lives'.[27] Summarising the above terminology, the African Commission seems to require an increased duty of care towards vulnerable groups.

Similarly, in a comparative perspective, the European Court of Human Rights (European Court) *literally* demands a 'special protection' for people belonging to disadvantaged and vulnerable groups.[28] This opinion does not apply in Kakuma, but it can be a tool to define the content of the obligations flowing from the status of vulnerability. The Court has considered that asylum seekers[29] and people in prison[30] categorically belong to this category. The case law of the European Court seems to base vulnerability on two key components, namely, discrimination and dependency, and sometimes associates dependency with a person's defencelessness.[31] As persons being

22 African Commission (n 17) para 67(a).
23 African Commission (n 17) para 67(x).
24 African Commission General Comment 3 para 11.
25 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa para 29(b).
26 Guidelines (n 25) para 34(a).
27 African Commission General Comment 3 para 37.
28 ECtHR *DH & Others v The Czech Republic* App 57325/00 13 November 2007 para 182; *Sampanis v Greece* App 32526/05, 5 June 2008; ECtHR *Orsus & Others v Croatia* (GC) App 15766/03 16 March 2010 para 147; ECtHR *Horvdth and Kiss v Hungary* App 11146/11, 29 January 2013 para 102.
29 ECtHR *MSS v Belgium and Greece* (GC) App 30969/09 21 November 2011 para 251.
30 ECtHR *De Donder and De Clippel v Belgium* App 8595/06 6 December 2011 paras 70-75.
31 N Zimmermann 'Legislating for the vulnerable? Special duties under the European Convention on Human Rights' (2015) 25 *Swiss Review of International and European Law* 541.

dependent, the Court has also considered people in prison.[32] The European Court considers that inherent elements of a prison, namely 'arbitrary restrictive measures applied to vulnerable individuals like prisoners inevitably contribute to the feeling of subordination, total dependence, powerlessness and, consequently, humiliation'.[33] This results in a duty to protect vulnerable individuals.[34] Consequently, a 'special protection' to vulnerable individuals should be afforded by states.

It can be summarised that most international human rights treaties and institutions consider vulnerability as a source for a special relationship between the individual and the state. It seems that the vulnerability can be caused by several factors, including dependency, discrimination and defencelessness. Such a special relation results in an increased duty of care. All the above examined human rights treaties and institutions consider refugees and migrants *per se* as vulnerable and in need of special protection. The conviction that the same is true for individuals in prison-like settings is widely accepted, yet not universal.

In what follows, the question will be discussed as to whether refugees in a closed camp can be considered to live in such a prison-like setting, which would result in a separate increased duty of care on the state towards them, apart from one based merely on their refugee or migrant status.

2.1.2 Similarities between a prison and a refugee camp

To determine whether the inhabitants of Kakuma live in a prison-like setting, it is possible to argue by analogy, meaning to apply an existing rule to an unregulated issue to the extent of the similarities between the two issues on legally-relevant points.[35]

The limitation of certain rights in Kakuma camp, especially the right to freedom of movement, is one of the first factors suggesting similarities. This right is guaranteed by article 13 of the Universal Declaration of Human Rights (Universal Declaration); article 12 of the International Covenant on Civil and Political Rights (ICCPR);

32 ECtHR *De Donder and De Clippel* (n 30) paras 70-75.
33 Guide on the case law of the European Convention on Human Rights para 219.
34 For individuals in prison, see ECtHR *Salman v Turkey* 21986/93, 27 June 2000 para. 99; ECtHR *Younger v Royaume-Uni* 57420/00, 7 January 2003. For asylum seekers, see ECtHR *MSS v Belgium and Greece* (GC) App 30969/09, 21 November 2011 para 251.
35 M Sassoli *International humanitarian law* (2019) 224, referring to LL Weinreb *Legal reasoning: The use of analogy in legal argument* (2016) para 124.

article 26 of the Convention Relating to the Status of Refugees (CSR); and article 12 of the African Charter on Human and Peoples' Rights (African Charter), among others. Generally, refugees and asylum seekers in Kenya are subject to the Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention) which, however, does not contain any specific provision related to the right to freedom of movement, and all the laws in force in Kenya (section 28(1) of the Kenyan Refugee Act, 2021). Indeed, the Kenyan state follows an encampment policy for refugees (sections 24(3)(a)) and 28(3)).[36] Inhabitants of refugee camps in general are only allowed to leave the camp for specific circumstances ('exempt asylum seekers and refugees from residing in designated areas where there are compelling reasons to do so'; section 8(2) of the Kenyan Refugee Act, 2021).[37] Travelling is only possible with a movement pass, issued for a maximum duration of 30 days.[38] A curfew has for several years been in place in Kakuma due to security considerations, restricting the freedom of movement in the camp itself.[39] The general encampment policy is considered by UNHCR as potentially limiting several rights contained in CSR.[40] Apart from these limitations, a nationwide curfew due to the COVID-19 pandemic was added for a certain period of time.[41] Even though the movements of the camp's inhabitants are not restricted because they committed a criminal offence – as in the case of prisoners – the effects on them are the same: To a significant extent they are deprived of their right to freedom of movement.

Another argument is the dependence of the inhabitants on the state and/or international aid organisations. Around 70 per cent

36 Office of the Attorney-General and Department of Justice, National Policy and Action Plan on Human Rights, Session Paper 3 of 2014 33, https://academia-ke.org/library/download/oatg-sessional-paper-no-3-of-2014-on-national-policy-and-action-plan-on-human-rights/?wpdmdl=7392&refresh=6325c9a5565b61663420837 (accessed 17 September 2022).

37 UNHCR Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Kenya, 2014, https://www.refworld.org/docid/54c0f47f4.html (accessed 22 January 2022).

38 UNHCR/Kimentrica/WFP Refugees Vulnerability Study, Kakuma, Kenya 2016 5.

39 C Djemila & P O'Keeffe 'Potemkin villages and refugees camps during the Coronavirus crisis' *The Geneva Observer* 20 April 2020, https://medium.com/@thegenevaobserver/potemkin-villages-and-refugee-camps-during-the-coronavirus-crisis-5e15d46471c7 (accessed 22 January 2022).

40 UNHCR Comprehensive Refugee Programme 2019-2020 5, https://globalcompactrefugees.org/sites/default/files/2019-12/Kenya%20Comprehensive%20Refugee%20Programme%20%282019%29.pdf (accessed 22 January 2022).

41 Joint statement UNHCR, Kenyan government 'Important notice to all refugees and asylum seekers living in urban areas in light of Coronavirus (COVID-19)' issued 25 March 2020, https://www.unhcr.org/ke/wp-content/uploads/sites/2/2020/03/English-25-March-2020-IMPORTANT-NOTICE.pdf (accessed 22 January 2022).

of households in Kakuma camp indicate that they do not have an independent income source.[42] Almost 94 per cent of Kakuma's inhabitants usually do not manage to cover all their food expenses.[43] These households rely almost entirely on the camp administration. The encampment policy mainly contributes to the fact that inhabitants are not allowed to find other resources to live independently, making them largely dependent on assistance.[44] UNHCR has acknowledged this reality by stating that because of 'harsh environment and tight restrictions on refugee movement and employment, the population at Kakuma camp is almost entirely dependent upon outside assistance, which is provided principally by the UN and some international and Kenyan NGOs'.[45]

A further reason for making an analogy to a prison-like setting in Kakuma camp is the structural similarity due to an imposed boundary between the inhabitants and the outside world. The imposition of a boundary between the camp space and the world beyond seems inherent to the concept of a refugee camp.[46] Logically, this divide is amplified the tighter the border control between the camp space and the world beyond it is. Kakuma is placed in a remote and poor region of Kenya.[47] Together with the encampment policy, this results in an almost complete division between the camp and the world outside. Because of such a boundary, refugee camps have already been described as 'total institutions',[48] 'occupied enclave',[49] a 'practice of "parking" refugees in camps when there are no permanent solutions available'.[50] Because of these inherent injustices and the containment effect, descriptions of such camps as 'legal anomaly'[51] and 'prisons of the stateless' for whom UNHCR would be the 'patron'[52] are common.

A further similarity is the reason why the institution is depriving the individuals of certain rights. Any deprivation of liberty must be justified

42 UNHCR/Kimentrica/WFP (n 38) 17.
43 UNHCR/Kimentrica/WFP (n 38) 2.
44 UNHCR, Kenya Comprehensive Refugee Programme 2019-2020 5.
45 UNHCR 'Minimum standards and essential needs in a protracted refugee situation: A review of the UNHCR programme in Kakuma, Kenya' Annex 1 37, https://www.unhcr.org/3ae6bd4c0.pdf (accessed 22 January 2022).
46 K McConnachie 'Camps of containment: A genealogy of the refugee camp' (2016) 7 *Humanity: An International Journal of Human Rights, Humanitarianism and Development* 398.
47 World Bank/UNHCR/University of Notre Dame 'Refugee impacts on Turkana hosts – A social impact analysis for Kakuma Town and Refugee Camp' 21; UNHCR (n 45) para 50.
48 McConnachie (n 46) 398.
49 H Brankamp 'Occupied enclave: Policing and the underbelly of humanitarian governance in Kakuma refugee camp, Kenya' (2019) 71 *Political Geography* 67.
50 UNHCR (n 45) 8 fn 5.
51 S Jacobs 'Prisons of the stateless: The derelictions of the UN High Commission for Refugees and the Japanese role' (2007) 5 *The Asia Pacific Journal* 11.
52 Jacobs (n 51) 2.

by legitimate state objectives.[53] The idea behind the deprivation of liberty, among others, is to protect society from a person. It suffices to say that the Kenyan state names security concerns as the main reason for the encampment policy, following a series of terrorist attacks,[54] making a general assumption that all inhabitants pose a danger to society. In addition to these objective reasons suggesting an analogy between a prison and a refugee camp, the opinion of the person living in the camp should also receive attention and, indeed, inhabitants have described themselves as 'voluntary prisoners'.[55]

Because of the similarities in the situation analysed above, Kakuma camp can be considered a prison or a prison-like setting. As seen from the discussion,[56] this fact leads to a special relationship, resulting in an increased duty of care on the state towards the individuals. Bearing in mind that refugees and migrants per se are considered vulnerable and should have their needs prioritised, the fact that refugees in closed camps can also be considered living in a prison-like setting even increases the urgency to address their needs.

In what follows, legal duties arising from the right to the best attainable standard of health and right to live are analysed. These obligations should now be seen under the lens of the special relationship and the increased duty of care the state has towards Kakuma's inhabitants.

2.2 Legal basis of face mask provision due to a special relationship in the context of the COVID-19 pandemic

2.2.1 Right to best attainable standard of health

The right to the best attainable standard of health is guaranteed by article 12 of ICESCR and article 16 of the African Charter, which require states to take protective measures, particularly in the context of epidemic diseases in order to respect, protect and fulfil this right.[57]

53 CMW Draft General Comment 5 'On migrants' rights to liberty and freedom from arbitrary detention' 2020 para 23 and its references; OHCHR Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1985.
54 UNHCR (n 44) 8.
55 *Kakuma News* Reflector's Twitter Account, https://twitter.com/KanereNews/status/1182505692319625216 (accessed 22 January 2022).
56 As above.
57 HRC General Comment 31 paras 5-7.

Whether the right to the best attainable standard of health requires the state to provide face masks to individuals in a special relationship with the state has not yet received attention in the literature. Several arguments can be found in favour of this. This right entitles every human being to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health conducive to living a life in dignity.[58] Functioning public health and healthcare facilities, goods and services, as well as programmes, have to be available in sufficient quantities provided by the state.[59] The precise nature of the facilities, goods and services will vary depending on numerous factors.[60] However, from a *prima facie* perspective, medical face masks can without further discussion be considered a medical good and might fall in the range of potential positive obligations on a state to provide in certain circumstances.

The prevention, treatment and control of diseases (article 12(2)(c) of ICESCR) requires governments to make immunisation programmes and other 'strategies of infectious diseases control' available to their population.[61] In the context of pandemics, access to medication and protective equipment is fundamental.[62] States are encouraged to rather invest in primary and preventive health care (such as masks that benefit large parts of the population) than in expensive curative health services.[63] Even though in itself not sufficient, according to the World Health Organisation (WHO), the use of face masks is part of a comprehensive prevention and control package to limit the spread of an airborne disease such as the COVID-19 virus,[64] but which entails their systematic use.[65] In this sense, the question arises as to whether the provision of face masks is an effective measure to prevent the spread of COVID-19, and one of the most cost-effective measures to ensure the right to the best attainable standard of health in times of a pandemic.

The right to the best attainable standard of health is subject to progressive realisation, meaning that certain constraints on the enjoyment of this right due to the limits of available resources are

58 ESCR Committee General Comment 14 para 9.
59 ESCR Committee General Comment 14 para 12(a).
60 ESCR Committee General Comment 14 para 9.
61 ESCR Committee General Comment 14 para 16.
62 UN General Assembly Declaration of Commitment on HIV/AIDS, Resolution S-26/2, 27 June 2001 paras 15, 23.
63 ESCR Committee, General Comment 14 para 19.
64 WHO 'Advice on the use of masks in the context of COVID-19' 2020 1, https://apps.who.int/iris/bitstream/handle/10665/331693/WHO-2019-nCov-IPC_Masks-2020.3-eng.pdf (accessed 22 January 2022).
65 WHO 'The reason why WHO recommends masks to be worn all the time', https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks (accessed 22 January 2022).

acknowledged.[66] On the other hand, core obligations of the right require the state to ensure the immediate satisfaction of, at the very least, the minimum level,[67] including essential primary health care.[68] The minimum core includes access to health facilities, goods and services especially for vulnerable or marginalised groups,[69] in order to prevent, treat and control epidemic diseases.[70] It requires states to ensure the availability of drugs and technologies, their adequacy, acceptability and, above all, their accessibility, whose economic side requires affordable prices.[71] Core obligations require states 'to ensure that no significant number of individuals is deprived of the essential elements of a particular right. This obligation exists regardless of the availability of resources and is non-derogable'.[72] This immediacy includes situations 'where the state does suffer from demonstrable resource constraints, caused by whatever reason, including economic adjustment, the state should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by prioritising them in all interventions'.[73] Especially at the beginning of the COVID-19 pandemic, face masks were very scarce and expensive.[74] Every state struggled to organise masks. While such a lack of availability should not immediately entail legal responsibility, over time,this assessment changes. With the increasing availability of face masks on the world markets at decreased prices, states find themselves in a position where the provision of masks becomes substantially easier.

Masks are health goods and during an airborne pandemic can be considered a core component of the right to health. Face masks are vital to suppress the transmission of COVID-19 and are considered an effective protective and preventive tool in the fight against the virus.[75] At this stage, it should be noted that the Kenyan government introduced a regulation making it mandatory to wear face masks

66 ESCR Committee General Comment 3 para 1.
67 ESCR Committee General Comment 3 para 10; African Commission Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights para 14.
68 ESCR Committee General Comment 14 para. 43; Africa Commission Principles and Guidelines (n 67) para 17.
69 Africa Commission Principles and Guidelines (n 67) para 67(a).
70 Africa Commission Principles and Guidelines (n 67) para 67(d).
71 Africa Commission Principles and Guidelines (n 67) paras 3 & para 67(z).
72 Africa Commission Principles and Guidelines (n 67) para 17.
73 As above.
74 OECD 'Policy responses to Coronavirus (COVID-19), The face mask global value chain in the COVID-19 outbreak: Evidence and policy lessons' 2020, https://www.oecd.org/coronavirus/policy-responses/the-face-mask-global-value-chain-in-the-covid-19-outbreak-evidence-and-policy-lessons-a4df866d/ (accessed 22 January 2022).
75 As above.

in the whole country,[76] including in Kakuma camp. By issuing such a compulsory face mask obligation, the state recognised masks as a *sine qua non* to prevent and control the pandemic. It reinforces the position that masks belong to the core element of the right to health during the COVID-19 outbreak. While this legislative effort of Kenya may be understood to be part of the state's duty to protect, the state simultaneously must ensure their availability[77] and economic accessibility for Kakuma's inhabitants.[78] This seems especially true if the state has an increased duty of care. Recalling the overwhelming economic dependency of Kakuma's population on the camp's authorities, their lack of financial means, the increased duty of care the state has towards the inhabitants based on their special relationship, and the serious penalties faced in case of non-compliance with the obligation of wearing face masks, the latter should be provided to them at no cost.

2.2.2 Right to life

At the time of writing, more than 6 500 000 people have died because of the COVID-19 virus worldwide.[79] The right to life is protected by article 3 of the Universal Declaration, article 6 of ICCPR and article 4 of the African Charter, and is considered the 'cornerstone on which the realisation of all other rights and freedoms depend'.[80]

All human rights impose a combination of negative and positive duties on states, which can be understood as the duty 'to respect, protect, promote and fulfil' these rights.[81] The duty to protect, in particular, includes an obligation on states to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats.[82] The legal obligation to wear face masks constitutes the authorities' acknowledgment that there is a need to protect the Kakuma inhabitants' lives from COVID-19 through legislation. However, apart from legislative measures, the state must also undertake concrete measures, *in casu*, access to essential goods, such as food and health care. Protection includes specific

76 'Kenya: Masks now mandatory in public places, Kenya declares' *AllAfrica News* 5 April 2020, https://allafrica.com/stories/202004060049.html (accessed 22 January 2022).
77 ECOSOC General Comment 14 para 12(a).
78 ECOSOC General Comment 14 para 12(b).
79 Johns Hopkins University of Medicine 'COVID-19 dashboard', https://coronavirus.jhu.edu/map.html (accessed 25 September 2022).
80 *African Commission v Kenya* Application 6/2012, Judgment 26 May 2017 para 152.
81 HRC General Comment 31 paras 5-7; African Commission Principles and Guidelines (n 67) para 4.
82 HRC General Comment 36 para 18.

actions, in particular systems to prevent epidemics.[83] As established above, face masks are a means to control the COVID-19 pandemic and, therefore, can constitute 'other measures' that states need to undertake to protect the right to life. These positive obligations seem to especially extend to vulnerable persons, including persons deprived of their liberty, towards whom states have a heightened duty of care to protect their right to life.[84] The African Commission sees in the right to life 'the inviolable nature and integrity of the human being'.[85] It is a non-derogable right regardless of the state of emergency a government is facing, with an *erga omnes* effect,[86] and belongs to *ius cogens*.[87] The obligation on the state is to protect the right to life of every person 'within its territory and under its jurisdiction'.[88]

As discussed above, Kakuma's inhabitants may be considered deprived of their liberty by the state, and are particularly vulnerable. In principle, towards individuals in such situations, states cannot simply rely on the argument of lacking financial resources to explain the lack of measures to protect the right to life.[89] If nevertheless the state were to lack adequate funds to distribute the necessary face masks, then the law should not require of individuals placed in a strong dependency relation to the state, as in Kakuma, to bear the costs of these masks by themselves, recalling the serious penalties in case of non-compliance with this obligation.

The next part focuses on the question of which entity should provide these face masks. It indeed is not always clear who should be responsible for which task in a refugee camp.

83 HRC General Comment 36 para 26 ; A Redelbach 'Protection of the right to life by law and by other means' in BG Ramcharan (ed) *The right to life in international law* (1985) 215.
84 HRC General Comment 36 para 25.
85 *African Commission v Kenya* Application 6/2012, Judgment 26 May 2017 para 152.
86 WP Gormley 'The right to life end the rule of non-derogability: Peremptory norms of *jus cogens* in Ramcharan (n 84) 137, 146, 147; HRC General Comment 6 para 1.
87 Redelbach (n 84) 186.
88 PM Taylor *A commentary on the International Covenant on Civil and Political Rights* (2020) 144.
89 HRC General Comment 36 para 25.

2.3 Whose responsibility?

2.3.1 Responsibilities in a refugee camp and the sovereignty concept in question

One of the key principles in public international law is the principle of state sovereignty. States have a central role in international public law, as they create the law and are the principal addressee of it (article 4(1) UN Charter). Every state that fulfils certain requirements[90] is considered sovereign and therefore is responsible to respect, protect and fulfil the human rights of all people in its territory and under its jurisdiction.[91]

UNHCR emphasises this responsibility, stating that 'sovereign states have the primary responsibility for respecting and ensuring the fundamental rights of everyone within their territory and subject to their jurisdiction'.[92] According to this 'traditional approach' to international law, Kenya, as a sovereign state, has overall responsibility for the inhabitants of Kakuma camp and would be responsible for the provision of face masks.

This traditional understanding of sovereignty poses several questions and might not reflect the realities and the overwhelming position UNHCR holds in certain refugee camps, including in Kakuma camp. Furthermore, the importance of absolute state sovereignty seems to be diminishing in general.[93] As UNHCR certainly is not a state, the organisation does assume a range of governmental functions in different settings.[94] This article will discuss a potential shift of responsibility for human rights protection and fulfilment from the state to UNHCR in certain areas.

2.3.2 The question of UNHCR as quasi-state

Before arguing about a potential shift of responsibilities, it is important to introduce the different actors and their main role in

90 Montevideo Convention on the Rights and Duties of States 1933.
91 Art 2 ICCPR; African Commission Principles and Guidelines (n 67) para 4.
92 UNHCR Note on International Protection, UN Doc A/AC.96/830, 7 September 1994 para 13.
93 K Niamh 'Implied human rights obligations of UNHCR' (2016) 28 *International Journal of Refugee Law* 251.
94 F Mégret & F Hoffmann 'The UN as a human rights violator? Some reflections on the United Nations changing human rights responsibilities' (2003) 25 *Human Rights Quarterly* 314 326; A Slaughter & J Crisp 'A surrogate state? The role of UNHCR in protracted refugee situations' (2009) 168 *New Issues in Refugee Research* 2.

Kakuma camp, namely, the government of Kenya, UN agencies, non-governmental organisations (NGOs) and the inhabitants. The latter will not be analysed in detail here, as they do not have a formal role. However, it must be noted that the inhabitants themselves are an extremely important provider of assistance and protection.[95]

The Kenyan government seems mainly to ensure the physical safety and security of refugees and provides land for their settlement.[96] As a party to the main international human rights treaties and refugee treaties,[97] the state is obligated to respect human rights law and the non-refoulement principle.[98] Since 2004 state courts have been permanently present in the camp and administer formal justice, but many of the state's judicial and legal responsibilities are handled by traditional systems of justice.[99] The provincial authorities are present in the camp and provide, with UNHCR support, additional security personnel.[100] The Commissioner for Refugee Affairs (CRA) registers new arrivals and conducts refugee status determinations.[101] Permissions to travel outside Kakuma – therefore, to be temporarily exempt from the encampment policy – are also issued by CRA.[102] Overall, the state seems mainly to be involved in activities relating to aspects of security and, to a certain extent, the administration of justice.[103] While Kenyan state agencies are involved in the provision of other services to inhabitants, such as health care, education, social security, and so forth, these do not seem to be the primary fields of intervention. UNHCR states that assistance to the camps population is 'provided principally by the UN and some international and Kenyan NGOs',[104] but nevertheless emphasises that 'the government is in the lead'.[105]

95 A Betts & K Pincock & E Easton-Calabria 'Research in Brief: Refugees as Providers of Protection and Assistance' (2018) *Oxford Refugee Studies Centre,* https://reliefweb.int/attachments/d911c586-38e6-3101-b520-7778038d63f3/RiB-10_global-governed_final.pdf (accessed 22 January 2022).
96 UNHCR (n 45) 38.
97 OHCHR UN treaty database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN (accessed 22 January 2022).
98 UNHCR (n 45) para 13.
99 I Griek 'Traditional systems of justice in refugee camps: The need for alternatives' (2006) 27 2.
100 UNHCR (n 45) 38.
101 Sec 8 paras 2(b) & (c) Kenyan Refugee Act 2021; Department of Refugee Services website, https://refugee.go.ke/?page_id=620 (accessed 22 January 2022); UNHCR Kenya website, https://www.unhcr.org/ke/refugee-status-determination (accessed 22 January 2022).
102 Sec 8 para 2(o) Kenyan Refugee Act 2021.
103 Griek (n 103) 2.
104 UNHCR (n 45) 37.
105 UNHCR (n 44) 4.

NGOs and UN agencies are involved in an wide range of activities, from health, nutrition, sport programmes and family reunification services, to reproductive healthcare programmes and camp management activities.[106] The health and nutrition sector, for example, is handled by various UN Agencies (the United Nations Children's Fund (UNICEF), WHO, the World Food Programme (WFP), UNHCR), the national and county government (Ministry of Health, Kakuma Mission Hospital, National Health Insurance Fund), diverse NGOs (International Rescue Committee, KRCS, AIC, Lutherian World Federation, Impact of Energy, EGPAF) and others (GIZ, World Bank, Refugees).[107] Water, sanitation and hygiene (WASH) are also handled by various UN Agencies (WFP, FAO, UNESCO, UNHCR), the government and county, the Ministry of Water and Irrigation and Ministry of Public Health), the private sectors (contractors not determined according to the source), several NGOs (NRC, PWJ, AAHI, WVI, KRCS, Team&Team, Lutherian World Federation, LOKADO, Sanivation) and others (GIZ, Refugees and host community).[108] Concerning health care, in particular, UNHCR aims to support equitable access to quality, comprehensive and cost-effective health and nutrition services for refugees and the host population in Turkana West and to have the health facility in Kakuma registered as a county facility.[109]

Of all the actors in the camp, UNHCR has a dominant position, because the organisation coordinates and administers the activities and camp life in collaboration with the government of Kenya, other UN agencies and NGOs.[110] UNHCR documents are in no way binding on the Kenyan state, but it is informative to understand the agency's perspective. In Kenya, the UNHCR itself writes that UN agencies 'play a central role in supporting coordination', by convening, facilitating and leveraging strategic engagement with various partners.[111] UNHCR elaborates the Comprehensive Refugees Programmes, which provide an overview 'of context and challenges, strategic priorities, achievements, planned responses and areas in need of attention and knowledge development across locations and sectors of the Kenyan refugee operation'.[112]

106 UNHCR (n 45) 38.
107 UNHCR (n 44) 51.
108 UNHCR (n 44) 52.
109 UNHCR (n 44) 29.
110 UNHCR (n 45) 38.
111 UNHCR (n 44) 12.
112 UNHCR (n 44) 4.

The administration of refugee camps should be considered an implied power of the UNHCR[113] because, even if this function is not explicitly mentioned in its statutes, the administration of camps has become essential to the fulfilment of its duties.[114] Especially in cases of mass influx of refugees or protracted refugee situation, states often are unwilling or incapable to assume the complete responsibility of the camp administration.[115] In Kenya, the 'traditional approach to assistance based on only humanitarian assistance does not constitute a long-term solution' and UNHCR considers that 'a more integrated and comprehensive approach' is needed.[116] The organisation to coordinate this 'comprehensive approach', WHICH has developed into a complex collaboration between many different entities, is UNHCR.

UNHCR seems to also have certain regulatory powers on the territory of Kakuma camp. Several authoritative regulations requiring a certain behaviour of the populations and threatening sanctions in the case of non-compliance promulgated during the pandemic were issued by UNHCR and the Kenyan Government.[117] UNHCR also can be considered to have certain executive powers, as the agency is responsible for the resettlement programme[118] and, therefore, to a certain extent is responsible for who leaves the territory. Similarly, UNHCR used to register new arrivals and conduct refugee status determinations.[119] Now, CRA is responsible for these activities, funded by UNHCR.[120] UNHCR also organises the elections of zone and block leaders in Kakuma,[121] as the Constitution of Kakuma requires (art 4 ff Constitution of Kakuma Refugee Camp). In doing so, UNHCR influences the procedures of how representatives of a small entity on the territory of Kenya are elected.

113 N Kinchin 'Implied Human Rights Obligation of UNHCR' (2016) 28,2 *International Journal of Refugee Law* 262.
114 Kinchin (n 113) 260; see also B Wilson 'UNHCR and access to justice: Mixed-method disputed resolution for encamped refugees' (2017) 11-12.
115 Kinchin (n 113) 262.
116 UNHCR (n 44) 5.
117 See the entire list of documents at https://www.unhcr.org/ke/coronavirus-covid-19-update (accessed 22 January 2022).
118 UNHCR 'Kenya', https://www.unhcr.org/ke/resettlement (accessed 22 January 2022).
119 For a criticism on this system, see Wilson (n 118) 12. This changed in the middle 2010s, and now UNHCR provides 'technical support to ensure that activities are harmonised, efficient and of quality, and transparent procedures are maintained at all times', whereas the CRA is officially in charge of the procedure; see also UNHCR (n 44) 26.
120 UNHCR 'Kenya', https://www.unhcr.org/ke/refugee-status-determination (accessed 22 January 2022); UNHCR 'Kenya' https://www.unhcr.org/ke/registration (accessed 22 January 2022).
121 The first election occurred in 2012 according to Kakuma News Reflector, https://kanere.org/refugee-election-in-kakuma/ (accessed 22 January 2022).

To summarise, UNHCR, through its mandate and the implied power doctrine, has the task to administer refugee camps, mainly by coordinating the activities of the state actors, UN agencies and international and national NGOs. UNHCR also enjoys some regulatory and executive functions in Kakuma. Several services essential for the survival of the inhabitants are furthermore directly implemented by UNHCR.[122] UNHCR consequently undertakes direct tasks of governance and is the primary administrator of daily life in the camp.

The next point to analyse is whether such quasi-state functions also entail a shift of responsibilities for the implementation of human rights to a certain extent, such as the right to the best attainable standard of health and the right to life, from the state to the quasi-state actor.

2.3.3 Shift of human rights responsibility from the state to UNHCR

The basis for a potential shift – International cooperation and legal personality of UNHCR

In principle, the management of refugee camps (also called 'designated areas') belongs to the CRA's functions (section 8(2)(k) of the Kenyan Refugee Act, 2021). Nevertheless, UNHCR was delegated the various above tasks in a sense of international cooperation.[123] UNHCR is a subsidiary organ of the UN, which has international personality,[124] perusing a mandate given by the UN General Assembly.[125] UNHCR, therefore, can be considered as having a international legal personality derivative from the UN,[126] as large international organisations may have subsidiary bodies that have considerable authority performing executive, advisory, rule-making and judicial functions.[127] With a distinct legal personality, there also comes legal responsibility.[128] The UN accepted that state responsibility is applicable to international organisations whenever

122 UNHCR (n 45) 38.
123 Art 56 UN Charter.
124 ICJ Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), ICJ Rep 1949 174.
125 Art 1 UNHCR Statutes.
126 Kinchin (n 113) 253; R Wilde '*Quis custodiet ipsos custodes*? Why and how UNHCR governance of "development" refugee camps should be subject to international human rights law' (1998) 1 *Yale Human Rights and Development Law Journal* 114.
127 LF Damrosch & SD Murphy *International law, cases and materials* (2019) 386.
128 Damrosch & Murphy (n 127) 115.

damage is caused by any violation of an international obligation attributable to said organisation.[129]

There are different opinions in the legal literature on whether the primary responsibility for human rights can shift from states to international organisations, in this case UNHCR, in certain circumstances. Farmer and Janmyr argue that the delegation of day-to-day operations of camp administration to UNHCR does not in general include a delegation or shift of legal responsibility.[130] Farmer argues that the government usually remains responsible for the security of the camps,[131] leaving the question of a responsibility shift in other areas open. However, Janmyr sustains that non-state actors increasingly have a *de facto* responsibility for protecting refugees in camps, for whom they could be held responsible.[132] Protection in this case means 'full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law',[133] including the right to the best attainable standard of health.

Several authors come to a similar conclusion and also seem to focus on the de facto situation on site. Kagan notes that the prevailing answer to this question is to re-focus on state responsibility,[134] but suggests an alternative by arguing that the institution best positioned to carry out the duty of protecting human rights should be responsible.[135] While by default this role falls to the state, there are situations where the state lacks capacity or will, and where the UN 'may be best able to promote the protection of refugees by taking on some of the responsibility for refugee protection'.[136] Kagan therefore also focuses on the de facto situation on site. Similarly, Mégret and Hoffmann argue with the 'degree to which actors can impact' human rights[137] and draw parallels between refugee camps and the administration of territory by the UN,[138] consequently also

129 Damrosch & Murphy (n 127) 408-409, quoting the UN Secretary General, see its references.
130 A Farmer 'Refugee responses, state-like behaviour, and accountability for human rights violations: A case study of sexual violence in Guinea's refugee camps' (2006) 9 *Yale Human Rights and Development Journal* 75; M Janmyr *Protecting civilians in refugee camps: Unable and unwilling states, UNHCR and international responsibility* (2012) 188.
131 Farmer (n 130) 75.
132 Janmyr (n 130) 357.
133 IASC 'Protection in humanitarian action' 2016 2, IASC Policy on Protection in Humanitarian Action, 2016.pdf (interagencystandingcommittee.org) (accessed 22 January 2022).
134 M Kagan 'We live in a country of UNHCR, the UN surrogate state and refugee policy in the Middle East' UNHCR: Policy Development and Evaluation Service Research Paper 201 21.
135 Kagan (n 134) 22.
136 As above.
137 Mégret & Hoffman (n 94) 321.
138 Mégret & Hoffman (n 94) 338.

relying for the responsibility question on the 'de facto control'.[139] Slaughter and Crisp follow the same route and suggest that with the all-encompassing scope of UNHCR's activities, the 'notion of state responsibility was weakened further',[140] and argue that UNHCR 'has been transformed from a humanitarian organisation to one that share certain features of a state'.[141] In fact, they argue that UNHCR, by having this overwhelming position as the key provider of aid in refugee camps, has widely been perceived as a 'surrogate state',[142] suggesting a responsibility shift.

Kinchin approaches the question differently. He suggests that a shift in responsibility to respect, protect and fulfil human rights from the state to international organisations takes place where the organisations administer refugee camps 'in lieu' of a state.[143] He argues that a subsidiary organ of the UN should have to respect international obligations of a territory the UN effectively controls.[144] The question of whether UNHCR controls Kakuma refugee camp is not straightforward but, as seen above, the agency definitely is a key player in fulfilling many of the social rights of the camp inhabitants. UNHCR's obligation in such situations amounts to 'fill[ing] the protection vacuum created'.[145] In an analogue manner, the European Commission of Human Rights recognised a transfer of responsibility for the protection of human rights from a state to an international organisation as valid if the latter offers the same standards as a state would have.[146] Finally, Mweded retains a shared responsibility between UNHCR and the host state, suggesting a multilayer and hierarchical ladder of responsibilities according to the effective control criteria,[147] therefore also relying on the de facto situation on site.

After this brief review of the literature, an analysis of the relevant *de facto* situation and the agreements to formalise said *de facto* situation is provided.

139 Mégret & Hoffman (n 94) 339.
140 Slaughter & Crisp (n 94) 8.
141 Slaughter & Crisp (n 94) 2.
142 Slaughter & Crisp (n 94) 8.
143 Kinchin (n 113) 268.
144 Kinchin (n 113) 255-256, leaning on the 'effective control' recognised to the UNMIK; see *Behrami and Behrami v France* App 71412/01 and *Seramati v France, Germany and Norway* App 78166/01 ECtHR 2 May 2007.
145 Kinchin (n 113) 257.
146 As above.
147 M Mengesha 'Human rights violations in refugee camps: Whose responsibility to protect? A case of Ethiopia' (2016) *Lund University Student Papers* 68.

De facto *situation on site and memoranda of understanding*

It seems as if most authors allow a responsibility shift and justify the shift by relying on the factual situation on site, but only to the extent that the realities on site give the international organisation a state-like, or *de facto*, state position. By taking over functions normally attributed to a modern government in refugee camps, UNHCR has already been described as a 'surrogate state',[148] a 'quasi-state'[149], or 'quasi-sovereign'.[150] Wilde argues that UNHCR is *de jure* an invited guest on the state's territory, but *de facto* the agency is exercising sovereignty.[151] The terminology '*de facto*' or '*quasi*' simply suggests that UNHCR does not have a formal mandate or treaty obligation to assume state-like functions.[152] In Kakuma, where UNHCR controls and administers a wide range of state-like activities and, therefore, has *de facto* control over the camp, a responsibility shift should consequently be an option. However, the extent of this shift is open to discussion, to a certain extent needs to be formalised, and should concern an area where UNHCR has the capacity to significantly impact human rights.

The cooperation between UNHCR and the host state usually is formalised by an agreement, which might allow a more precise identification of which activities UNHCR has taken, or was delegated responsibility for.[153] These agreements between UNHCR and host states usually are institutionalised with a memorandum of understanding (MoU), which codifies the division of labour, though on a general and abstract level that does not necessarily exclusively deal with the management of camps.[154] It should be noted that these agreements can differ in each region and, therefore, the tasks accorded to UNHCR and a possible responsibility shift might be different in each region.[155]

MoUs between UNHCR and host governments have emerged as an alternative legal instrument for regulating the status of refugees[156] and the administration of a refugee camps.[157] In Kenya, the MoU between the UNHCR and the Kenyan government unfortunately is inaccessible by the public. A comparison with MoUs that UNHCR

148 Kagan (n 134) 1.
149 Farmer (n 130) 76.
150 Kinchin (n 113) 252.
151 Wilde (n 126) 113.
152 G Verdirame *The UN and human rights – Who guards the guardians?* (2011) 230.
153 Wilde (n 126) 122.
154 Kagan (n 134) 15.
155 Slaughter & Crisp (n 94) 1.
156 Kagan (n 134) 15.
157 Kinchin (n 113) 263.

concluded with other states can give insights. In Guinea, for example, the government has ceded large portions of its day-to-day operations in the camps to UNHCR through a MoU.[158] The transfer of power from the government to UNHCR supports the assumption of state-like character of UNHCR's operations,[159] and allows the assumption that a responsibility shift took place in areas where UNHCR assumes state-like responsibilities.

Kagan took on this question as he analysed several MoUs between governments and UNHCR in the Middle East. He concluded that responsibility for most social and economic concerns was assigned to UNHCR.[160] When discussing responsibilities, Kagan suggests focusing on a positive/negative liberties distinction: If direct resources or active implementation are required, the UN would take primary responsibility.[161] For example, health care, schools and administrative services would fall under the responsibility of UNHCR. The state would mainly remain responsible for negative liberties, such as ensuring the safety of the person by providing critical security and refraining from refoulement,[162] because UNHCR simply could not take over such tasks.[163] The distinction Kagan proposes seems to reflect the realities in Kakuma camp: UNHCR seems to be the overall provider and coordinator of services, while the Kenyan state primarily assures the general security with a police force and courts for purposes of criminal proceedings. Following this approach would suggest that as UNHCR is the primary service coordinator and provider for, among others, health care, the agency would have human right responsibilities in these areas.

The shift of responsibility in a certain, quite precise area also is in line with recent developments in business and human rights. Corporations should bear human rights responsibilities.[164] The intergovernmental working group on transnational corporations and other business enterprises with respect to human rights recently proposed a revised draft treaty. The scope of said draft treaty is to elaborate an international legally-binding instrument to regulate activities of businesses in international human rights law. It recognises that even though states have the primary responsibility for human rights, businesses also 'have the responsibility to respect all human rights' by avoiding abuses, addressing them if they occur,

158 Farmer (n 130) 75.
159 Farmer (n 130) 76.
160 Kagan (n 134) 17.
161 Kagan (n 134) 23.
162 Kagan (n 134) 3.
163 Kagan (n 134) 23.
164 HRC Resolution 26/9, A/HRC/RES/26/9, 14 July 2014.

and preventing them.[165] This responsibility to fulfil human rights in areas where the state power has waned, such as conflict zones and areas where states in general are unable to govern,[166] suggests that the question of responsibility should be answered following a new criterion, namely, the impact on human rights. It is interesting to note that this is also in line with Mégret and Hoffman's argument.

In the context of Kakuma camp, this approach would suggest that because the lives and the rights of refugees living in the camp are overwhelmingly influenced by UNHCR, the agency should bear responsibilities. Considering that the host state intentionally delegated part of its ability to impact individuals' or groups' basic rights in refugee camps, it should be considered that the responsibility was assigned to the actor that has the ability to influence these rights, in this case UNHCR.[167]

UNHCR does not by itself directly provide health services. The health system is mainly operated by NGOs and institutions of the Kenyan state, whereas UNHCR coordinates and finances most of these activities. Such 'implementing partners' can be considered agents of UNHCR. Similarly, the UN acknowledges that whenever 'an organ of a state is placed at the disposal of an international organisation, the organ may be fully seconded to that organisation. In this case the organ's conduct would clearly be attributable only to the receiving organisation'.[168] This is also the case where the seconding state has concluded an agreement with the organisation over placing an organ or agent at the latter organisation's disposal.[169] The criterion for the attribution of conduct is the factual control over the specific conduct taken by the organ or agent placed at the organisation's disposal, depending on the factual circumstances and the particular context.[170] Flowing from the statement that host states have given UNHCR in refugee camps tasks and duties linked to the human rights obligations traditionally associated with states, authors advocate a shift from the concept of 'sovereignty' to the concept of

165 OEIGWG Chairmanship, Second Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Entreprises, Preamble, 2020, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (accessed 22 January 2022).

166 A Ramasastry 'Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability' (2015) 14 *Journal of Human Rights* 250-251.

167 Mégret & Hoffmann (n 94) 321.

168 UN General Assembly Report of the International Law Commission (2011) A/66/10 87.

169 As above.

170 UN General Assembly (n 168) 87-89 and its references.

'control' as a criterion to bear the human rights responsibility.[171] As discussed above, even if UNHCR might not be considered 'sovereign' in Kakuma camp, the agency certainly is 'in control' whereas agents from other implementing partners are at its disposal. With this control over the camp's activities, although sometimes delegated or executed by other NGOs or UN agencies, would also come the responsibility to protect, respect and fulfil human rights.

The concept of absolute state sovereignty is dwindling in international law and a shift of responsibility to certain other entities is possible. Through MoUs, Kenya and UNHCR have formalised their cooperation, institutionalising the *de facto* control UNHCR has over the camp and emphasising the agency's ability to influence the human rights of the population in certain areas. In Kakuma refugee camp, therefore, the responsibility to fulfil human rights seems to a certain extent to have shifted to UNHCR.

The authors of this article favour the view that a shift in human rights responsibility can and should take place given the situation in Kakuma camp. Indeed, Kagan argues convincingly that the entity that by default is responsible for the protection of the human rights of the camp's inhabitants is the state. However, this responsibility of protection can shift, especially according to the degree by which an actor influences the human rights of the camp's inhabitants. In the areas where UNHCR directly ensures that the basic needs of the population in Kakuma are met, and recalling the situation of vulnerability and dependency of the inhabitants, as well the increased duty of care, it leads to a convincing case of a, at least partial, shift of human rights responsibilities from the state to UNHCR. Returning especially to the right to the best attainable standard of health, this would suggest that UNHCR, within the limits consented to by the Kenyan government, has to ensure the fulfilment of the core content of this right, including the provision of face masks.

3 Conclusion

This article has established that the inhabitants of Kakuma refugee camp are in a special relationship with the state. Because of this special relationship, the state has an increased duty of care towards the inhabitants. This increased duty of care results in an obligation to provide face masks for the inhabitants, based on the core obligations

171 Mégret & Hoffmann (n 94) 341.

of their right to the best attainable standard of health and right to life.

However, it is questionable whether the state should indeed provide face masks to the inhabitants. While in the traditional understanding the sovereign state is the only responsible entity to ensure the human rights of the persons under its jurisdiction, this perception seems to be changing and does not reflect the realities on site in most refugee camps. The overwhelming position that UNHCR holds in certain refugee camps, a *de facto* and 'quasi state' position, combined with the overall control and administration UNHCR has over Kakuma camp, formalised by a MoU, results in UNHCR being able to significantly impact the human rights of the camp's population. This is especially true for the right to the best attainable standard of health during the COVID-19 pandemic. Therefore, the factual situation on site in Kakuma camp resulted in a shift of responsibilities for certain human rights to UNHCR, arguably also for the provision of face masks.

The authors attempted to raise awareness about the unsatisfactory human rights situation in Kakuma camp, exacerbated during the crisis time of COVID-19, and help define the legal framework of refugees' protection. By analysing the responsibility question, it is hoped that the factual situation on site in most refugee camps is increasingly acknowledged, and hopefully formalised in the future, allowing for a better understanding of the obligations of the different actors involved. The main goad of the article is to work with Kakuma camp's inhabitants towards the fulfilment of their human rights.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: OA Osawe 'A comparative analysis of the right of access to information under the Nigerian Freedom of Information Act 2011 and the South African Promotion of Access to Information Act 2001' (2022) 22
African Human Rights Law Journal 476-492
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a7

A comparative analysis of the right of access to information under the Nigerian Freedom of Information Act 2011 and the South African Promotion of Access to Information Act 2001

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Summary: *The right to information is a multi-faceted right that includes the right to express or disseminate, seek, receive and to impart information. This right of access to public information is crucial in order for citizens to be properly informed, as the greater part of public information is controlled by the state, formed, collected and processed using public resources, which makes it a public possession. Thus, the right not only is a requirement, but an inherent part of human existence. However, the efficacy of an access law is determined by the extent of access actually guaranteed without altering its form or content. This can be assured by adhering to the legal principles governing the right of access. This article adopts the doctrinal methodology in undertaking a comparative study of the Nigerian Freedom of Information Act (FOIA) and the South African Promotion of Access to Information Act (PAIA). The aim is to evaluate the strengths and weaknesses of both access laws, and the article finds that the PAIA is a more potent law in ensuring access to public information. Further, it canvasses that inspiration should be drawn from the robustness of the*

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PAIA in a bid to strengthen the FOIA to guarantee full access to information. The analysis reveals that the PAIA contains more innovative provisions, such as restricted exemptions to access information, measures to promote the right of access and a broader scope of the right of access, which are essential for effective access to public information.

Key words: *Freedom of Information Act; freedom/right of access to information; Promotion of Access to Information Act; public information; Nigeria, South Africa*

1 Introduction

The quintessential right of access to information is one that in actual fact provides access to information without modifying its form or content.[1] The right to information laws must conscientiously ensure optimal access to public information. Otherwise the law will be futile, as it is important to draft the access law in conformity with the laid-down guiding principles to ensure its efficacy. The effectiveness of an access law depends on a number of factors, such as the number of persons that actually make use of it; the number of requests attended to, within the stipulated time frame; the ability of interested persons to act on the information provided; how virile civil society and non-governmental organisations (NGOs) are; and its level of conformity with established principles and guidelines.[2] This article thus discusses the features of both the Nigerian Freedom of Information Act (FOIA) and the South African Promotion of Access to Information to Information Act (PAIA) with a view to demonstrating that although the PAIA falls short in certain areas, there are a number of innovation provisions that guarantee better access to public information from which the FOIA can draw in strengthening its capacity of assuring an effective access to public information.

2 Background study

A background study on the access laws of Nigeria and South Africa is necessary in order to demonstrate that an effectual access law is convoluted with a number of factors, including the motive for the adoption of such laws.

1 O Jorgensen (ed) *Access to information in the Nordic countries: A comparison of the law of Sweden, Finland, Denmark, Norway, Iceland and international rules* trans S Harris (2014) 38.

2 M Escaleras et al 'Freedom of information acts and public sector corruption' (2010) 145 *Public Choice* 455.

The Nigerian civil service adopted a colonial bureaucracy, a system in which secrecy was the conventional mode of handling government information.[3] This was heightened when the Nigerian government enacted the Official Secrets Act (OSA) in 1962,[4] which authorised government officials to swear oaths of secrecy relating to public information. This was most evident in the military dispensation, where ruthless treatments were meted out to those who pried into the activities of government or its officials. Several decrees were promulgated during the military era to punish those who investigated or commented on government activities.[5] For instance, Decree 2 State Security (Detention of Persons) of 1984, allowed indefinite detention on security grounds, and other decrees proscribed certain newspapers from publishing and circulating. It was not surprising that with the return of democracy, civil societies moved to lobby for access to government records and information.[6]

Historically, the journey of the Freedom of Information Bill in Nigeria commenced in 1993. This was during the rule of General Sani Abacha, when three organisations – Media Rights Agenda (MRA), Civil Liberties Organisation (CLO) and the Nigerian Union of Journalists (NUJ) – embarked on the agitation for the passage of the Freedom of Information Act.[7] The Bill was first presented to the National Assembly in 2000 but the Assembly refused to pass the Bill. It was again presented to the National Assembly in 2003 and thereafter to President Olusegun Obasanjo, who did not assent to the Bill. It was once again presented to his successor, Umaru Yar'Adua, who also withheld assent to the Bill. During this time, supporters of the Bill continued to press for its enactment and it was again presented to the National Assembly in 2007. Finally, the harmonised version as passed by both Houses of the National Assembly was handed to President Goodluck Jonathan on 24 May 2011, who signed the Freedom of Information Bill into law on 28 May 2011.[8] The Freedom of Information Act became law, nearly 12 years after it had first been

3 B Asogwa & I Ezema 'Freedom of access to government information in Africa: Trends, status and challenges' (2017) 27 *Records Management Journal* 328.
4 Cap O3, LFN 2010.
5 These decrees are the Concord Newspapers and African Concord Weekly Magazine (Proscription and Prohibition from Circulation) Decree 6; the Punch Newspapers (Proscription and Prohibition from Circulation) Decree 7; and the Guardian Newspaper and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree 8, all of 1994.
6 A Ojebode 'Nigeria's Freedom of Information Act: Provisions, strengths and challenges' 269, https://www.academia.edu/4253994/Nigeria-s-Freedom-of-Information (accessed 31 August 2019).
7 N Madubuike-Ekwe & J Mbadugha 'Obstacles to the implementation of Freedom of Information Act 2011 in Nigeria' (2018) 9 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 98.
8 Ojebode (n 6) 270 271.

presented to the legislature, earning it the longest legislative debate in the history of Nigeria.[9]

Before the enactment of the Freedom of Information Act, the Official Secrets Act 1962, modelled after the British Secrets Law of 1911, was widely recognised as one of the statutes obstructing free access to information in Nigeria and, thus, encouraging official secrecy.[10] The aim of the law was to protect state secrets and other official information mainly relating to national security. In *Abba v Joint Admission Matriculation Board & Another*[11] the Court stated that the spirit behind the promulgation of the Official Secrets Act evidently was to deal with persons in sensitive positions of state/government entrusted with sensitive top-secret documents and materials and who are in a position to divulge such sensitive information, otherwise referred to as classified information, which could undermine and endanger the security, defence or safety of Nigeria as a nation state.

The enactment of Freedom of Information Act in 2011 ushered in renewed hope of imminent conquest over the culture of secrecy that has plausibly characterised the Nigerian public service. Conceivably, Nigeria has a low threshold of accountability and transparency, as public servants are made to keep government information secret, besides other laws prohibiting access to information.[12] The Freedom of Information Act should ordinarily contain far-reaching provisions capable of transforming the culture of secrecy in governance that exists in Nigeria's public institutions. The fundamental purpose for which the Freedom of Information Act was passed is to license the public to access certain government information.

The aim of the Freedom of Information Act is to guarantee the availability of public records and information; to provide access to and protect public records and information to the extent compatible with the interests of the public and to safeguard privacy rights; to shield serving public officers from detrimental repercussions for disclosing certain kinds of official information without approval;

9 C Duru 'The relevance of Nigeria's Freedom of Information Act (2011) to the country's anti-corruption war' (2016) *Journalism and Mass Communication* 759.

10 T Ocheja 'Freedom of information versus the issue of the official secret' in E Azinge & F Waziri (eds) *Freedom of information law and regulation in Nigeria* (2012) 172.

11 (2014) LCN/7590(CA). The appellant in this case was a clerk in a tertiary institution and was not employed by an arm or agency of government where government secrets are classified. The Court held that divulging information in this case can neither be equated to nor elevated to the level of compromising the security of Nigeria as a country.

12 N Udombana 'Addressing the implementation challenges of institutional obligations and reporting requirements under the Nigerian Freedom of Information Act 2011' (2019) 10 *Beijing Law Review* 1306.

and to establish procedures for the attainment of those purposes.[13] The Act furnishes citizens and interested parties with the right to access documents held by the government without being compelled to prove any legal interest or standing. The rationale is that these documents are presumed to be public unless clearly exempted by law, and individuals can access these without stating reasons why they need them.[14]

Furthermore, the Act affirms the right of individuals to access unimpeded public information held by all federal, state and local government branches, and private bodies in which the government has a controlling interest or that perform government functions.[15] It denotes having access to government information in any form.

In South Africa the political and social structure of the apartheid system was framed on the basis of institutionalised violation of basic human rights.[16] Hence, one of the principal prerequisites of the post-apartheid period was to lay down a new foundation of an institutionalised affirmation of basic human rights – the adoption of the Constitution of the Republic of South Africa in 1996. The incorporation of a constitutional right of access to information was unquestionably galvanised by the ambition not to re-enact past mistakes.[17]

Prior to this time, the manner in which government interacted with its citizens in the performance of governmental duties and administration was a contentious issue in South Africa.[18] The control of information and enforced secrecy was the core of the anti-democratic character of the apartheid system.[19] That period was a dark space for the South African people, as the majority of the people were treated as subjects only and not as citizens. It was a pure regulatory relationship.[20] Not long after 1996, the Promotion of Access to Information Act (PAIA) came into being in 2001, and became the

13 See the Preamble to the FOIA Cap F43 LFN 2013.
14 Sec 1(2) of the FOIA; J Ackerman & I Sandoval-Ballesteros 'The global explosion of freedom of information laws' (2006) 58 *Administrative Law Review* 93.
15 Secs 2(7) & 30(3); Udombana (n 12) 1307.
16 DL Marais & M Quayle 'The role of access for information in enabling transparency and public participation in governance' (2017) 9 *African Journal of Public Affairs* 37.
17 Sec 32 of the South African Constitution, https://www.gov.za (accessed 7 May 2021).
18 Marais & Quayle (n 16) 37.
19 D Mckinley 'The access to information in South Africa', https://www.humanrightsinitiative.org (accessed 14 September 2021).
20 R Mathekoya 'Enforcement of anti-corruption agencies in Southern Africa, Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, Zimbabwe' 2017, https://www.corruptionwatch.org.za (accessed 4 September 2021).

follow-up action from affirmation to realisation. Not surprisingly, the PAIA was well received by most South Africans, especially in light of the possibilities that the law could be used in accessing information around apartheid era violations of human rights and corrupt acts.[21] The end of apartheid redefined the relationship between the state and the people. Citizenship entails that citizens are consulted regarding the management of public resources.

With the emergence of the democratic dispensation in South Africa arose the need for government to fully account to the people, and citizens were obliged to demand that accountability.[22] As in the case of the South African Constitution, the Promotion of Access to Information Act has been widely lauded as a revolutionary law.[23] The access law of South Africa assisted highly in exposing irregularities, especially regarding the actions of the past apartheid government. For instance, the Khulumani Support Group comprises persons who were victims of abuse and other related crimes at the hand of security agencies under the apartheid government. Information disclosure obtained through the access law led to some form of compensation to victims of abuse or those who lost loved ones.[24] The law is one of the most innovative access to information laws globally, and contains very robust procedural guarantees, with a carefully-couched set of exceptions.[25]

3 Comparative analysis of the right of access under the Nigerian Freedom of Information Act and the South African Promotion of Access to Information Act with respect to international rules

The comparative analysis will be undertaken under the nine sub-headings.

3.1 Right of access

The principle governing the right to access information requires that the law should be extensive and should apply to everyone and without

21 As above.
22 As above.
23 Transparency International 'Open data and the fight against corruption', www.transparency.org (accessed 10 May 2021).
24 M Dimba & R Calland 'Freedom of information laws in South Africa', www.humanrightsinitiative.org (accessed 11 May 2021).
25 T Mendel *Freedom of information: A comparative legal study* (2008) 94.

the need to demonstrate the use for the specific information.[26] The access legislation should make access as general as possible and it should not be dependent on a citizenship prerequisite. Disclosure should be made the rule and non-disclosure the exception.[27] The Freedom of Information Act establishes the right of persons to access public information and the applicant need not demonstrate any specific interest in the information applied for.[28] In the same vein, the right of access to public records is set out in section 11(1) of the Promotion of Access to Information Act, which provides that an applicant must be given access to a record if he or she complies with the procedural requirements set out in the law and the record is not covered by an exception. There is no need for the requester to give reasons for the request.[29] Any person (without the restriction of citizenship) can apply for information under the Freedom of Information Act and the Promotion of Access to Information Act.

3.2 Scope of the law

Generally, the class of bodies bound to disclose public information should be wide in scope.[30] The Freedom of Information Act covers all public bodies and private institutions where they utilise public funds, and perform public functions or services.[31] The law affirms the right of individuals to access unimpeded public information held by all federal, state and local government branches, private bodies in which the government has a controlling interest or that perform government functions or utilise public funds. The South African Promotion of Access to Information Act covers information/ records held by both public and private bodies (when it involves the protection and exercise of any right).[32] This provision makes the law distinct from the access laws of most countries, including that

26 Article 19 'The public's right to know: Principles on right to information legislation' 2016, www.article19.org>standards (accessed 2 May 2021) Article 19 is a human rights organisation with a special mandate and has its focal point on the safeguarding of freedom of information and expression globally. The organisation was established in 1987 and draws its name from art 19 of the Universal Declaration of Human Rights which authorises the right to freedom of opinion and expression.

27 I Venkat 'Freedom of information: The principles for legislation', https://unpan1.un.org/intradoc/groups/public/documents (accessed 14 April 2021).

28 Sec 1(2)(3).

29 Sec 11(3).

30 Article 19 (n 26) 4; A Paddephatt & R Zausmer 'Towards open and transparent government: International experiences and best practice' December 2011, www.gp.digital.org (accessed 18 May 2021).

31 Sec 2(7); sec 30(3); Udombana (n 12) 1306.

32 Secs 3, 11 & 50. Sec 50 provides for the right to access information held by private bodies. In *Claase v Information Officer of South African Airways* (2006) 39/2006 a retired pilot was entitled under the PAIA to records held by private airlines because he was able to establish that he needed the information to protect a right under sec 50(a).

of Nigeria, which often apply to public bodies. The right to access information held by private bodies is set out in section 50(1) of PAIA.[33] However, there is an inept exclusion of certain public bodies from its scope, such as the cabinet and its committees, judicial functions of a court and judicial officers or an individual member of parliament.[34]

3.3 Proactive disclosure

Public bodies should not only receive requests for information but they must of their own volition disclose and disseminate widely information of significant public interest, subject only to rational limits on the premise of availability of resources and capacity.[35] The various dissemination channels include printing hard copies and online channels, such as the internet.[36] A functional access to public information is determined by extensive publication and dissemination of key categories of information by public bodies, even in the absence of a request. The law should set both a general obligation to disclose and key classes of information that must be disclosed. Examples of specific information that should be disclosed by public bodies include operational information about how the public body functions, the type of information held by the body, and the form in which the information is held.[37] The Freedom of Information Act provides for proactive disclosure of information by public bodies and specifies the categories of information to be published and reviewed periodically.[38] Unfortunately, the South African Promotion of Access to Information Act did not include a duty to publish. This is a grave omission to fostering the right of access to public information.

3.4 Promotional measures

Promotional measures hinge on the fact that openness in government transactions must be promoted. Openness and transparency can be attained by a number of measures, which include public enlightenment and education on access to information matters, and the training of

33 www.justice.gov.za/legislation/acts/2000-002.pdf. The law covers both public and private bodies and the provisions are substantially identical, with the important difference that, with respect to private bodies, it is only engaged where the information is required for the exercise or protection of a right.
34 Sec 12.
35 Article 19 (n 26) 4.
36 Ch 1, Regulation1.4.2 of the Guidelines on the Implementation of the Freedom of Information Act 2011 (Revised Edition 2013), https://r2knigeria.org/index-php/publication/reports/guidelines-on-the-implementation-of-the-foia (accessed 20 October 2022).
37 Article 19 (n 26) 4.
38 An example of information to be published proactively includes a description of the responsibilities and functions of the public body; sec 2.

both public officers and citizens on how to administer an access to information regime.[39] The Freedom of Information Act contains a few promotional measures, as compared to the access law of South Africa. These measures include provisions for appropriate training for public officials on the public's right to access information or records and appropriate organisation and maintenance of all information in a way that promotes public access to such information.[40]

The South African Promotion of Access to Information Act contains an impressive array of promotional measures. These include the publication of a manual in at least three official languages which must be updated annually;[41] the publication of a user's guide in 11 official languages by the Human Rights Commission (section 10); the development and conducting of educational programmes to advance the understanding of the Act and of how to exercise the rights contemplated in the Act; and the promotion of timely and effective dissemination of accurate information by public bodies about their activities (section 83). The inclusion of more promotional measures in the Freedom of Information Act would address some of the implementation hurdles confronting the utilisation of the law in accessing public information. For instance, the provision for the simplification of the law for easy comprehension in the Act would guarantee a better understanding and utilisation of the law in accessing information in Nigeria.

3.5 Narrow scope of exceptions

Exceptions to the right to access information should be precise and clearly drawn and should be subject to the strict harm and public interest test.[42] The harm test means that exceptions should apply only where there is a threat of considerable damage to the protected interest and where that damage is greater than the general public interest in having access to the information. The public interest test presupposes that where there is an overwhelming public interest in the information, disclosure is mandated even when such disclosure could cause some damage to the legitimate aim.[43] A broad set of exceptions can severely compromise an access law.[44] Attempts at drawing a balance between access to information and protecting

39 Mendel (n 25) 33.
40 Secs 13 and 9 respectively.
41 Sec 14. The manual contains information such as the structure of the public body, how to make information requests, etc. Sec 51 contains a similar provision for private bodies.
42 Article 19 (n 26) 7; Paddephatt & Zauster (n 30) 12.
43 Mendel (n 25) 36.
44 As above.

legitimate exceptions remain a formidable challenge.[45] The access to information structure must strike a balance between promoting adequate access to quality information, while also protecting information that is considered privileged and sensitive. The focus should be on the content, rather than on the type of information.[46]

The exemptions contained in the Freedom of Information Act not only are numerous, but also broad.[47] It is laudable that all the exemptions are subject to the public interest test. A typical example is section 11 which protects national security. However, the section neglects to delineate what constitutes national security. Also, section 14 protects privacy in such a manner that no personal information can be released without the consent of the person. This is regardless of the public interest test contained in sub-section (3). Arguably, the exemption clauses contained in the Act overrides almost entirely what it permits.[48] In contrast, the Promotion of Access to Information Act provides for national defence and security and further specifies the categories of information that constitute national defence and security. Such categories include information relating to military tactics; the quantity, characteristics and capabilities of weapons used for the curtailment of hostile activities; and so forth.[49] Furthermore, the access law contains a very detailed, comprehensive and narrow regime of exceptions. Most exceptions in the law contain a form of harm test but all the exceptions are subject to public interest override.[50] Also, the Promotion of Access to Information Act is one of the few access laws in the world to apply both to public and private bodies, as well as to records regardless of when they came into existence.[51] These exceptions are carefully delineated in a clear attempt to ensure that only authorised privileged information is as a matter of fact kept secret.[52]

Section 45 contains a peculiar exemption which provides that information may not be disclosed if the request is manifestly frivolous or vexatious, or where the work involved in processing the request would substantially and unreasonably divert the resources of the public body. The inclusion of such a provision in the Freedom of

45 D Epps 'Mechanisms of secrecy' (2008) 121 *Harvard Law Review* 1556.
46 Article 19 (n 26) 8.
47 Secs 11-19.
48 U Nwoke 'Access to information under the Nigerian Freedom of Information Act, 2011: Challenges to implementation and rhetoric of radical change' (2019) 63 *Journal of African Law* 450.
49 Secs 41(2)(a)-(h) of PAIA, https://www.gov.za/documents/promotion-access-information-act (accessed 11 May 2021).
50 Exemptions are contained in ch 4 (secs 33-46).
51 Sec 3.
52 Mendel (n 25) 99.

Information Act would assist in examining unjustifiable requests for information, especially since the right of access is guaranteed without the need to show reasons for requesting information.[53]

3.6 Efficient dispute resolution process

The process for information requests should be expeditious with an independent review of any refusal.[54] The processes for resolving disputes arising from the right to access information should be, first, within the public institution; second, appeals to an independent administrative body; and, lastly, appeals to courts. The pertinence of having an efficient dispute resolution process is that it fosters access to public information. It is important that the dispute resolution procedure should be readily accessible, as excessive delays and costs could defeat the aim of requesting the information in the first place.[55] Unfortunately, the only mode of redress in the Freedom of Information Act is a direct recourse to court.[56] This is a clog to the right of access under the Act, considering the expenses and the amount of time consumed in litigation in Nigeria. In other words, the onerous and tedious process of resolving disputes arising from information requests has a potentially adverse impact on the utility of the information requested due to time sensitivity of information.[57] One advantage of resolving information disputes with an independent administrative body, such as an information commissioner or ombudsperson, is that the process is swift and does not depend upon the services of a professional lawyer.[58]

In the case of South Africa the Promotion of Access to Information Act initially made provision for two levels of appeal. The first is the internal appeal (appeal within the public body) and subsequently to court.[59] There was no provision for appeal to an independent administrative body, which posed a serious shortcoming, since court appeals are expensive and time consuming. Therefore, the amendment to the Act created the office of an information regulator – an independent appeal body. Section 77A provides that a requester or third party may submit a complaint to the information regulator only after the internal appeal procedure has been exhausted and if

53 Sec 1.
54 Article 19 (n 26) 9.
55 Article 19 (n 26) 10.
56 Sec 7.
57 F Omotayo 'The Nigeria freedom of information law: Progress, implementation challenges and prospects' (2015) 1 *Library, Philosophy and Practice* 10.
58 N Kocaoglu & A Figari *Using the right to information as an anti-corruption tool* (2006) 12.
59 Sec 74.

they are not satisfied with the decision of the information officer of a public body.[60] Appeal lies from the information regulator to the court.[61]

3.7 Time frame for response to information requests

The response time frame for information request should be specific and relatively short, due to the time-sensitive nature of information [62] However, most public bodies are unable to respond to information requests within the stipulated time frame, which varies from jurisdiction to jurisdiction.[63] The Freedom of Information Act provides a time limit of seven days and an extension of another seven days, if the application is for a large number of records, or where consultations are necessary to comply with the application.[64] My view is that the time frame of seven days is short, especially because of the deplorable state of record keeping in Nigeria.[65] Findings reveal that it takes an average of 32 to 40 days to get answers to information requested.[66] Moreover, jurisdictions with better access systems provide for longer time frames. For instance, the Electronic Freedom of Information Act of 1996 of the United States of America extended the time frame from 10 to 20 working days.[67] Also, the South African Promotion of Access to Information Act provides for a time limit not exceeding 30 days, which period may be extended for a further 30 days, under special circumstances.[68]

60 Secs 77(A)-(K) contain details of appeal procedure to the Information Regulator.
61 Sec 82.
62 Article 19 (n 26) 9.
63 FOIA compliance for annual reporting, https://www.opengovpatnership.org (accessed 30 May 2021).
64 Secs 4 & 6.
65 J Igbokwe-Ibeto 'Record management in the Nigerian public sector and Freedom of Information Act: The horn of dilemma' (2013) 8 *International Journal of Development and Management Review* 225.
66 FOIA compliance (n 63).
67 Sec 8(b) of the Electronic FOIA Amendments 1996 amended sec 552(a)(6)(A)(i) of title 5 US Code by striking out '10 days' and inserting '20 days'. The Act also made provision for multi-track processing of requests for records based on the amount of work or time (or both) involved in processing requests. This was introduced in a bid to ensure compliance with the time frame for responding to requests; see sec 7(a)(D)(i), https://www.govinfo.gov (accessed 7 December 2021).
68 Secs 25 & 26. An extension of response time frame is allowed in cases, such as where the request is for a large number of records and to comply within 30 days would unreasonably interfere with the activities of the body, or where a search must be conducted in a different city, or where inter-agency consultation is required, that cannot reasonably be completed within the original 30 days.

3.8 Costs of accessing information

The costs of accessing public information must be kept as minimal as possible, such that no person is precluded from requesting information due to excessive costs.[69] Generally, the cost of accessing information should be confined to the actual cost of duplication and delivery. Furthermore, cost should be waived or drastically reduced for personal information, public interest information and for indigent persons. Essentially, the issue of cost is vital in determining the efficacy of access laws, as excessive cost would dissuade users of the law from maximally utilising it in accessing vital public information. The issue of costs is catered for in section 8, which provides that fees shall be limited to the standard charges for document duplication and transcription where necessary. Nevertheless, the Act fails to acknowledge a special provision for circumstances that warrant a waiver or subsidisation of costs. This is a significant setback, as indigent persons are deterred from utilising the law in accessing public information, thereby deflating effective access under the Freedom of Information Act. However, it is noted that the Guidelines on the Implementation of the FOIA provides for a waiver of costs where the cost is negligible or where the cost of collecting or recovering the fees would be equal to or greater than the amount being collected, when the information may be provided at no cost.[70]

The South African Promotion of Access to Information Act empowers the minister to exempt any person from paying the fees for access; to set limits on fees; to determine the manner in which fees are to be calculated; to exempt certain categories of records from the fee; and to determine that where the cost of collecting the fee exceeds the value of the fee, it shall be waived.[71] This demonstrates the potency of the law on the provision for costs, thus guaranteeing better access to public information.

3.9 Enforcement of the right of access to information

Section 29 mandates all public bodies to submit to the Attorney-General of the Federation an annual report on or before 1 February of each year; covering their activities for the preceding fiscal

69 Article 19 (n 26) 10.
70 Ch 1, Regulation 1.11. Guidelines on Implementation (n 36).
71 Sec 22; Mendel (n 25) 96. Applicants under the PAIA (South Africa) may be charged fees for requests for reproduction, search and preparation of records. However, this provision has been amended by the Protection of Personal Information Act (2013), https://www.gov.za>files. The cost of access to information is now restricted to fees for reproduction in line with international standards.

year. These reports are to be made accessible to the public. The Attorney-General has the oversight responsibility of ensuring that all pubic bodies comply with the provisions of the Act in fulfilment of international standards. The Act neglects to impose penalties for non-compliance with this requirement. It is argued that, since Attorney-Generals are public officials, it may be arduous for them to exercise their power judiciously. Also, it would amount to being a judge in their own cause.[72] Thus, entrusting the Attorney-General of the Federation with the task of overseeing the enforcement of the Freedom of Information Act under section 29 is not pragmatic. There are doubts as to whether the Attorney-General will carry out this responsibility objectively. It arguably is for this reason that some other access laws assign the task to independent bodies. Under the Promotion of Access to Information Act such responsibility is carried out by the Human Rights Commission.[73]

4 Right of access to information under the Freedom of Information Act and the Promotion of Access to Information Act

From the foregoing it is deduced that the Promotion of Access to Information Act engenders better access to public information than the Freedom of Information Act on the following premises. First, while the FOIA applies only to public and to private bodies when utilising public funds or performing public services, the PAIA covers all public and private bodies where the information is necessary for the protection of human rights. It is rather unfortunate that the law omits certain bodies, such as the cabinet and the courts, from its purview.

Second, the promotional measures contained in the Freedom of Information Act are too scanty. These measures are indispensable for the effective implementation of any access law. A poorly-implemented law is as good as a defective law. On the other hand, the Promotion of Access to Information Act contains stirring promotional measures. This plausibly is why the Act has been widely lauded as a revolutionary law.[74]

72 Nwoke (n 48) 452. According to Media Rights Agenda, between 2011 to 2016 fewer than 10% of public bodies had submitted their annual reports to the Attorney-General, although the compliance level has since then slowly increased. In 2017 only 73 out of 900 public bodies submitted their FOI annual reports to the Attorney-General. Open Government Partnership: Amplifying access to information, https://www.opengovpatnership.org (accessed 3 May 2020).

73 Secs 83-85.

74 Transparency International (n 23).

Third, the broad and numerous exemptions in the Freedom of Information Act have made inane the essence of accessing public information. Unlike the Freedom of Information Act, the Promotion of Access to Information Act contains very robust procedural guarantees, with a carefully-couched set of exemptions to access information, and is generally considered as one of the most innovative access to information laws globally.[75]

Fourth, the resolution of dispute mechanism under the Freedom of Information Act is largely faulty. Litigation as the only option to resolving access to information matters is a clog to effective access as a result of the hurdles associated with court processes in Nigeria. The three-tier system provided for in the Promotion of Access to Information Act is a more efficient way of resolving issues arising from information access. The first level requires that any matter arising from information requests would be settled by the body to whom the application is made. The second level requires that where the dispute cannot be resolved by the public or private body, as the case may be, the matter is brought before an independent body, the information regulator, and, lastly, to the courts, where there is no resolution of the matter. Therefore, it is crucial to have an independent and neutral umpire, such as an information commissioner or tribunal or ombudsman, to resolve disputes arising from the interpretation of the Freedom of Information Act. These independent bodies would speedily resolve issues and the courts should always be the last resort.

Fifth, providing for minimal or no cost at all for the indigent persons is indispensable to guaranteeing effective access to information. The Freedom of Information Act neglects to take into consideration economically-disadvantaged persons for the purpose of accessing public information. This is a setback as these persons are disenfranchised from exercising their right of access to information. The Promotion of Access to Information Act gives the Minister a discretion in dealing with the issue of costs for accessing information. For instance, the minister can exempt certain persons from paying for public information or reduce the costs or even exclude certain records from the fee regime.[76] In this way, better access to public information is guaranteed for all persons regardless of social standing.

Finally, the independence of the oversight body for access law is of the utmost importance. In the long run, effective access to public information is fostered when autonomy is established. It was earlier

75 Mendel (n 25) 94.
76 Sec 22; Mendel (n 25) 96.

contended that the Attorney-General of the Nigerian Federation saddled with this task may not be as autonomous as neutral bodies. For instance, it is noted that the Promotion of Access to Information Act entrusts its oversight responsibility on the South African Human Rights Commission.

5 Recommendations

For effective access to public information under the Freedom of Information Act, the following are recommended:

First, the scope of the Freedom of Information Act should be expanded to include private bodies where the information sought is for the purposes of protecting the rights and safety of persons.

Second, measures necessary to promote access to information should be increased to ensure the effective implementation of the Freedom of Information Act. It is a fact that the best law can be rendered inane, when the numerous implementation hurdles are not managed.

Third, the broad scope of exceptions contained in the Freedom of Information Act should be addressed as a matter of urgency. The Freedom of Information Act and the courts should, through judicial pronouncements, elucidate on nebulous concepts in the Act, such as national security, the harm test and public interest, in furtherance of effectual access.

Fourth, the time limit of seven days to respond to a request by the public institution, in my opinion, is too short especially considering the outlook of poor record keeping and bottleneck bureaucracy of the public service. A time frame of at least ten working days is recommended.

Fifth, the defective dispute resolution system should be redressed. The enforcement of the Freedom of Information Act rests solely on litigation and only a few organisations and individuals have the means to seek legal redress. Consequently, public bodies are seldom perturbed over the remote risk of legal action when they decide to withhold information. The indifference of some public bodies towards the implementation of the Act, and the frustrations experienced by the few requesters who have the temerity to pursue law suits, compel the demand for an independent appeal system. The independence of the appeal system must be guaranteed for effective access. Hence, the multi-tiered mechanism is recommended.

Sixth, the regime guiding costs for accessing public information should be reviewed to include protection for economically-disadvantaged persons.

Lastly, the Attorney-General is an agent of government and may not be able to act independently in carrying out its oversight functions. The Freedom of Information Act should be amended to empower an independent body to exercise this power, such as the National Human Rights Commission, as is the case of some more progressive information regimes such as that of South Africa.

6 Conclusion

The relevance of access laws that as a matter of fact guarantee unimpeded access to public information without alterations and manipulations cannot be overemphasised. For this reason, several attempts have been made by international bodies, such as the United Nations, to formulate rules. The reason for these fundamental rules is that public bodies usually are more inclined to release public information that they can control and manipulate.[77] However, access to information is concerned with publishing information without altering its form or content. An ideal access to information is predicated on rules that require public bodies to allow access to authentic documents and data upon request, or at the initiative of the public body.

Access to public information is a right to which every citizen of Nigeria is entitled. This access is secured only when the law is properly drafted in accordance with guiding rules and effective implementation. Thus, the Freedom of Information Act would guarantee effectual access to all persons when it is reviewed in line with some of the merits noted in the Promotion of Access to Information Act and, further, conforms to established rules guiding access to public information. These include the incorporation of a narrower scope of exceptions to access; more promotional measures to assure effectual implementation; an operative resolution system; and an independent oversight body to ensure speedy dispute resolution arising from access to information matters.

77 Jorgensen (n 1) 38.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A Sogunro 'An analysis of political homophobia, elitism and social exclusion in the colonial origins of anti-gay laws in Nigeria' (2022) 22 *African Human Rights Law Journal* 493-519
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a8

An analysis of political homophobia, elitism and social exclusion in the colonial origins of anti-gay laws in Nigeria

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Summary: *Critical Legal Studies suggests that any serious legal advocacy must critically engage with the social and political subtext of the law in order to yield positive outcomes. This suggestion is equally applicable to advocacy for sexual and gender minorities in contexts such as Nigeria. Based on this premise, this article employs theories of political homophobia, elite power and social exclusion to analyse the social and political context surrounding the evolution of criminalising laws during the colonial phase of Nigeria's history. The article proceeds to show that political homophobia, through laws that criminalised same-sex relationships, was a strategic tool utilised under the colonial administration to protect colonial interests and maintain the legitimacy of colonisation. This strategy was a colonial imperative regardless of whether or not the local population may have agreed to or participated in the process. The outcome of, and incentive for, this process of political homophobia included the social exclusion of a large majority of the population for the benefit of an elite class. It is argued that an understanding of the rationale behind the colonial evolution of*

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anti-gay laws can provide an insight into the entrenchment of political homophobia in Nigeria and similar legal systems in Africa and challenge the rhetoric that these laws reflect African values.

Key words: *colonial laws; LGBT advocacy; political homophobia; sexual orientation and gender identity; social exclusion*

1 Introduction

Advocacy for the protection of sexual and gender minorities in Nigeria must understand and critically engage with the social and political context of laws criminalising or discriminating against same-sex relationships and non-heteronormative sexuality and gender identity (the criminalising laws) if it is to yield positive outcomes of non-discrimination and equal protection under law for sexual and gender minorities. Such an engagement requires an awareness of the dominant power dynamics and relations underlying the evolution and enforcement of the criminalising laws in Nigeria, with the understanding that these power dynamics are part of wider social control aimed at perpetuating hegemonic power for the benefit of a political elite.

This article adopts a Critical Legal Studies (CLS) perspective that situates legal discourse as discourses of power. Accordingly, *power* in the article refers to the ability of an individual or individuals to authoritatively utilise legal discourse or to pay others to do so on their behalf. Likewise, *hegemonic power*, to borrow a Gramscian approach, is the directing of dominant legal discourse through social consent or coercion.

On this premise, the article employs contemporary theories of power dynamics in society and, based on an understanding of these theories, examines the evolution and enactment of the laws criminalising same-sex relationships in Nigeria during the colonial period. Accordingly, this article serves two broad purposes. First, within a unifying theme of hegemonic power, it reviews the relevant theories of political homophobia, elite power and social exclusion in the context of the colonial criminalisation of same-sex relationships. Second, the article analyses the hegemonic contexts surrounding the colonial enactment of the laws criminalising same-sex relationships in Nigeria, highlighting the overt and subtle deployment of the colonial legal system for the benefit of a structurally-evolving but ideologically-consistent political elite.

Apart from this introductory part, the article is divided into four other parts. In part 2, using doctrinal research methods, I review theories of political homophobia, elite power and social exclusion as hegemonic values in the evolution of criminalising laws in Nigeria. However, this part does not attempt an exhaustive analysis of these theories but instead identifies their relevance to the article, particularly as a precursor to the historical analysis that will be discussed in part 4. In part 3 I provide a broad overview of the growth and nature of the Nigerian legal system, tracing its history from the application of colonial laws in the original colonies and protectorates to the development of a modern legal system. In part 4 I provide some historical/archival document analysis from a research visit I conducted in February 2019 at the National Archives of Nigeria located at the University of Ibadan campus, Ibadan where I was able to access colonial documents and records, including dispatches and letters from the years 1890s onwards. Part 4 provides a substantive analysis of the evolution of the laws criminalising same-sex relationships in Nigeria during the colonial period, roughly from 1914 to 1960, covering the political formation of the Nigerian identity as a colonial state, and the introduction of homophobic colonial laws and values to enhance the political interests of the British Empire. It also discusses the contexts of political homophobia, elite control and social exclusion that shaped the enactment of these laws.

2 General foundations and review of theories

In the following paragraphs I build up on the theories of political homophobia, elite power and social exclusion as these relate to the perpetuation of hegemonic power in Nigeria.

2.1 Understanding political homophobia

The concept of political homophobia has only begun to receive serious attention as a distinct theory and subject of study, and the scope and dimension of this theory is best exemplified in the works of Weiss and Bosia, and Serrano-Amaya.[1] For the purpose of this article I borrow from their work to define political homophobia as the conscious use

1 MJ Bosia & ML Weiss 'Political homophobia in comparative perspective' in ML Weiss & MJ Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 1; JF Serrano-Amaya *Homophobic violence in armed conflict and political transition* (2017). 'Bosia and Weiss … pioneered the study of homophobia as a modular and deliberate political strategy that has taken place in different parts of the world' (N Sleptcov 'Political homophobia as a state strategy in Russia' (2018) 12 *Journal of Global Initiatives: Policy, Pedagogy, Perspective* 140 143).

of homophobia as 'a political strategy, often unrelated to substantial local demands for political rights'.[2] It can also be viewed as 'the use of homosexuality to produce fear for political purposes'.[3] Political homophobia is the theoretical engagement of how

> homophobia is deliberately fomented by political actors (often presidents and ministers – and not only in Africa) as soon as they get into a legitimacy crisis. In particular in economic crises, in which public criticism of abuses of power, excessive corruption, patronage and clientism by a small ruling elite begins to increase, heads of state and high-ranking politicians reach for the cudgel of homophobia and use it to attack people of different sexual orientation and/or gender identity vociferously in the regime-friendly media.[4]

Bosia and Weiss suggest that political homophobia is utilised as a tool: for constructing or reinforcing authoritative notions of 'national collective identity'; for preventing alternative identities that may oppose this national collective identity, whether or not such other identities related to sexuality; for mobilising around contentious issues and empowered actors; and as 'a metric of transnational institutional and ideological flows'.[5] Bosia goes further, by suggesting three interconnecting frameworks for researching homophobia as a tool by state actors for reconstituting belonging in periods of transition; a tool for affirming political rule when state actors are threatened by competition; and a tool for organising strategic alliances to build state capacity and scapegoat lesbian, gay, bi-sexual and transgender (LGBT) people within a Western sexual binary.[6] Similarly, following up on research by Conway and others, Currier identifies three ways in which political homophobia may be useful to state leaders:[7] It can be used as a way to silence dissent, from including both gender and sexual-diversity activists and political opponents; it allows leaders to deflect attention away from critical and sensitive issues; and it allows the rewriting of history from the perspective of the ruling party.[8]

2.1.1 Homophobia as a political tool

A key argument in this article is that the enactment and enforcement of laws criminalising same-sex relationships or regulating sexuality broadly in Nigeria are not merely random instances of discrimination

2 Bosia & Weiss (n 1) 2.
3 Serrano-Amaya (n 1) 1.
4 R Schäfer & E Range 'The political use of homophobia: Human rights and the persecution of LGBTI activists in Africa' (2014) *International Policy Analysis* 1.
5 Bosia & Weiss (n 1) 3.
6 MJ Bosia 'Why states act: Homophobia and crisis' in Weiss & Bosia (n 1) 31 32.
7 A Currier 'Political homophobia in post-colonial Namibia' (2010) 24 *Gender and Society* 110 115.
8 Currier (n 7) 116.

but are part of systemic social control with the purpose of consolidating state power for the benefit of elite interests. For Bosia and Weiss, the traditional understanding of homophobia as 'some deep-rooted, perhaps religiously inflected sentiment' was not a sufficient method of analysing the incidents of homophobia in public discourse.[9] Instead, homophobia has to be understood as a 'conscious political strategy often unrelated to substantial local demands for political rights'[10] and as 'a state strategy, social movement, and transnational phenomenon, powerful enough to structure the experiences of sexual minorities and expressions of sexuality'.[11] Bosia further conceives of political homophobia as 'the totality of strategies and tools, both in policy and in mobilisations, through which holders of and contenders over state authority invoke sexual minorities as objects of opprobrium and targets of persecution'.[12]

This understanding of political homophobia (i) challenges the rhetoric often used by state actors that laws regulating sexuality in general or criminalising same-sex relationships are merely an expression of popular will; (ii) shifts focus from the merely legal aspects of criminalisation to the underlying political subtext; and (iii) identifies the linkages between homophobia and the political goal of controlling 'state authority'. This last feature – the need to secure state power from ideas that could lead to more freedoms – is the most pervasive, if unspoken, theme in arguments by political leaders justifying the persecution of sexual and gender minorities. However, the political nature of homophobia is often masked by vague and imprecise arguments focusing on culture, religion, neo-colonialism, and even appeals to pseudo-science.[13] As will be discussed in part 4 below, while the laws that criminalise same-sex relationships in Nigeria may seem to have been products of clinical and disinterested legislative processes, they in fact are political products, shaped both by 'the politics and legacy of colonialism'[14] and the need by elite groups to control state power through the course of Nigeria's history.

9 Bosia & Weiss (n 1) 2.
10 As above.
11 As above.
12 Bosia (n 6) 31.
13 T McKay & N Angotti 'Ready rhetorics: Political homophobia and activist discourses in Malawi, Nigeria, and Uganda' (2016) 39 *Qualitative Sociology* 397; A Sogunro 'One more nation bound in freedom' (2014) 114 *Transition: An International Review* 54-57; Bosia (n 6) 43-44.
14 Sleptcov (n 1) 142.

2.1.2 Homophobia as a strategic tool

The use of political homophobia is strategic, and often deployed with a deliberate purpose, particularly when there is a legitimacy crisis in the state. Wiess and Bosia (2013) explain this use as

> purposeful [strategy], especially as practiced by state actors; as embedded in the scapegoating of an 'other' that drives processes of state building and retrenchment; as the product of transnational influence-peddling and alliances; and as integrated into questions of collective identity and the complicated legacies of colonialism.[15]

A typical strategy of political homophobia is in the creation of moral panics, that is, 'a societal response to beliefs about a threat from moral deviants'.[16] Cohen, who defined and popularised the term, conceives of a moral panic as when '[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests'.[17] As a strategy, political homophobia creates, encourages or magnifies widespread thinking in society that sexual and gender minorities constitute a threat to social values and interests. To create these panics, homosexuality may be typified as an aberration to universal human nature, or as an erosion of African values through the invasion of Western culture, or even as a public health concern. This strategy can be executed using several tactics and policies, including media propaganda, teachings in organised religions, and whipping up sentiments in public debates.

However, this article is concerned principally with the political use of laws to repress sexual and gender minorities and serve the interests of hegemonic power in Nigeria. As Sleptcov argues, the examination of legislation is an important aspect of engaging political homophobia as legislation 'denotes both the will of the legislator and demonstrates the perpetuation of political homophobia in the law'.[18] In the case of Russia, for instance, Sleptcov explains how laws that criminalise same-sex acts produce 'a notion of the correct sexual behaviour that transcends into the political realm, reinforcing the heteronationalistic nature of the nation-building'.[19] This allows Russian legislators to set up homosexuality as an ideology ('homosexualism') and exclude

15 Bosia & Weiss (n 1) 14.
16 JS Victor 'Moral panics and the social construction of deviant behaviour: A theory and application to the case of ritual child abuse' (1998) 41 *Sociological Perspectives* 541 542.
17 S Cohen *Folk devils and moral panics: The creation of the mods and rockers* (2011) 1.
18 Sleptcov (n 1) 145.
19 Sleptcov 146.

from political representation those whose ideology do not fit into the portrayal of Russia as 'purely heterosexual':[20]

> The language utilised by the legislators aims at restructuring sexuality on a political scale, subjugating homosexuality to heterosexuality. It allows for deployment of political homophobia in order to create a sense of national unity based on sexuality. Conservative heteronationalism reflected in the legislation portrays the Russian nation as purely heterosexual. Russians who do not fit the category are deprived of recognition and representation.

As will be discussed later in the article, the same idea of using political homophobia to pursue a nation-building rhetoric, as described by Sleptcov above, is present in the Nigerian context. In such a context where homophobia is used by the political elite as a political strategy, it then is necessary for activists and scholars to rethink social mobilisation by understanding who benefits from political homophobia and how its use is organised and deployed.[21]

2.1.3 Homophobia is modular

The issue of modularity engages political homophobia as a similarly recurring phenomenon that is 'imposed in a consistent way' across different political contexts.[22] Although local context is important in the analysis of criminalising laws, the geographical spread of these laws at nearly the same moments in history, [23] and the existence of similar language in legislation and political rhetoric in different social and political contexts[24] contribute to the idea that political homophobia exhibits 'similar characteristic across cases where present'.[25] This aspect of political homophobia is crucial for understanding that, while the Nigerian historical and contemporary context matters, there also is an overarching theme of social control for elite interests in the deployment of political homophobia that transcends historical time and geographical space.

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20 As above.
21 Bosia & Weiss (n 1) 1-24.
22 Bosia & Weiss (n 1) 6.
23 A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 263-265.
24 As above.
25 Sleptcov (n 1) 141; Gloppen and Rakner also outline the similarity of patterns in the politicising of the rights of sexual and gender minorities in Africa. S Gloppen & L Rakner 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and the law* (2020) 194 199.

2.2 Elite power and hegemony

The term 'elite' is used to describe 'persons who … are able to affect political outcomes regularly and substantially'. [26] Another definition considers it to mean 'individuals and small, relatively cohesive, and stable groups with disproportionate power to affect national and supranational political outcomes on a continuing basis'.[27] In particular, the 'political elite' wield or control 'hierarchically structured institutions' including government, top industries and the media, with the capacity to significantly affect political decisions.[28] However, the structures and characteristics of a group that can be recognised as the political elite will vary from country to country and, as such, this diversity means that there is no generally-accepted theory on what constitutes the typology of the elite and their relationship to political effects.[29] This argument is particularly true in the case of Nigeria where, at different periods of its colonial, military and civilian history of governments, different groups of individuals have constituted the nucleus of the political elite.

Nevertheless, an understanding of elite theory is traceable from the work of European thinkers such as Vilfredo Pareto and Gaetano Mosca all the way to writers such as C Wright Mills in more recent times. [30] Their ideas concretised the understanding of the existence of an elite versus the non-elite and the importance of the elite in shaping political outcomes and influencing, directing, or manipulating social values. The diversity of elite structures implies that a political elite can emerge in different ways in different contexts. In the Nigerian context, for instance, a type of elite political emerged, as Higley theorises, 'through colonial home rule and independence struggles where local elites had already received or obtained in the course of their struggles experience in political bargaining and restrained competitions'.[31] According to Sklar, the elites that emerged in post-colonial times are characterised by high-status occupation, high income, superior education and the ownership or control of business enterprises.[32] The idea of a political elite did not solidify in Nigeria until its 'first republic' in the 1960s.[33] Prior to this period, the

26 J Higley 'Elite theory and elites' in KT Leicht & JC Jenkins (eds) *Handbook of politics: State and society in global perspective* (2009) 163.
27 H Best & J Higley 'The Palgrave handbook of political elites: Introduction' in H Best et al (eds) *The Palgrave handbook of political elites* (2017) 4-5.
28 As above.
29 As above.
30 As above.
31 Higley (n 26) 167.
32 RL Sklar 'The nature of class domination in Africa' (1979) 17 *Journal of Modern African Studies* 531 533.
33 L Diamond *Class, ethnicity and democracy in Nigeria* (2015) 31.

colonial system had weakened the traditional systems of communal governance and substituted this with a hierarchical social and economic system that utilised and institutionalised political power as a factor of social interaction.[34] It was under these circumstances that a new elite inherited power from the British and became the foundation of a new political class. As noted by Sklar:[35]

> Political parties in Nigeria … were conspicuous agents of class formation. They created elaborate systems of administrative and commercial patronage, involving the 'liberal use of public funds to promote indigenous private enterprise, while many of their leading members entered upon a comparatively grand manner of life in parliamentary office'… In cases of conflict between newly dominant class-interest groups and communal-interest groups, the former would nominally prevail.

This new elite kept the lifestyle and social habits of the colonial administrators and also 'the social distance they had maintained'.[36] Ultimately, the approach to governance by the post-colonial elite resulted in the limited political participation of the majority of the population and the consequent social exclusion.

The protection of elite interests often requires the utilisation of hegemonic power. Gramsci conceptualised the word 'hegemony' to describe the domination of bourgeoise cultural values over other social classes to become the 'common sense' values for all.[37] Gramsci also reconceptualised class domination beyond the Marxist perspective of economic relations, and included ideological, political and cultural relations in the perpetuation of existing dominant systems.[38] Thus, within the scope of these multiple relations, hegemonic values are usually recognised 'spontaneously' as such by popular consensus and often voluntarily complied with by the majority of the population as they are perceived as the proper or 'common sense' thing to do. That is, the hegemony is 'secured by the consent given by the mass of the population' [39] even where this majority of the population, in reality, are socially excluded from participating in social goods under the practical reality of these values.

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34 Diamond (n 33) 30. The new elite also included families of freed slaves returning from Brazil and Sierra Leone and who also strengthened Victorian values and gender norms in the indigenous societies.

35 Sklar (n 32) 534.

36 Diamond (n 33) 32.

37 J Schwarzmantel *The Routledge guidebook to Gramsci's prison notebooks* (2014) 72-79.

38 A Gramsci *Selections from prison notebooks* trans Q Hoare & GN Smith (1971) 12; A Gramsci *Prison notebooks: Vol 2* trans JA Buttigieg (1996) 201; MDA Freeman *Lloyd's introduction to jurisprudence* (2008) 1157.

39 Gramsci *Selections from prison notebooks* (n 38) 198-199; Schwarzmantel (n 37) 74.

This kind of dominant hegemonic process – that is, the imposition of the norms and values of the colonisers as universal 'common sense' values – was critical to the colonial project in Africa – and Nigeria – and, afterwards, in the post-colonial 'nation-building' project of successive African leaders.[40] As Ngwena points out, the hegemonic process is inherent in the use of 'culture' and arguments of 'African culture' to 'build a state-sanctioned politically correct discourse', including the exclusion of groups 'whose sexualities are outside the domain of majoritarian and hegemonic culture'.[41]

The colonial hegemonic process in Africa was not merely an accident of history. Instead, it was driven by economic and political interests in securing control over the resources required for the growth of the European nations. This project was executed, among other things, through the introduction of a European-style education and legal system that made a claim to having an intrinsic validity outside the socio-cultural contexts.[42] Those members of the colonised society who conformed to these colonial values were rewarded through the ability to participate in the colonial project as educators, missionaries, administrators and industry professionals.[43] In this way, the dominant colonial values became transferred from the colonisers to a new set of local elite.

The need to preserve the hegemonic values necessitates the elite creating what Higley describes as political institutions based on 'a highly restricted suffrage'.[44] Such institutions have limited receptiveness to reform and generally are incompatible with the ideals of liberal democracy. Threats to the stability of these institutions provoke a reaction by the elite to 'distort, partially suppress, or simply confuse the issues',[45] usually through the spread of moral panics and, in the case of sexual and gender minorities, reliance on political homophobia. In similar vein, Tamale points to the use of these moral panics as critical to the perpetuation of elitism in post-colonial African countries.[46] By institutionalising hegemonic values and focusing the attention of the public on threats to those values,

40 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018).
41 Ngwena (n 40) 242. See also S Osha 'Unravelling the silences of black sexualities' (2004) 18 *Agenda: Empowering Women for Gender Equity* 92.
42 M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and resistance* (2013) 118-128.
43 Epprecht (n 42) 124.
44 Higley (n 26) 169.
45 As above.
46 S Tamale 'Confronting the politics of non-conforming sexualities in Africa' (2013) 56 *African Studies Review* 31.

the political elite can 'distract attention from the more significant socio-economic and political crises afflicting society'.[47]

The relationships between political homophobia and hegemonic elite power are described in Nyanzi's analysis of governmentality – a term first conceptualised by Michel Foucault as 'technologies and procedures for directing human behaviour' – in African cultural settings.[48] According to Nyanzi, the process of producing 'governable citizens' is interwoven with how 'citizens think about and respond through organised practices shaping behaviour'.[49] Ultimately, 'acceptable behaviour' is determined not by the inherent value or harm of the individual's behaviour, but by the extent to which it conforms to 'socially acceptable standards' and, through this process of socialisation, people govern their own conduct as well as the conduct of others.[50]

2.3 Social exclusion

Walker defines social exclusion as involving a process of 'being shut out, fully or partially, from any of the social, economic, political, or cultural systems, which determine the social integration of a person in society'.[51] Similarly, social exclusion is considered an integrated and multi-dimensional process, including exclusion from decision making and the political process.[52] The consideration of social exclusion in this article focuses on two levels, namely, (i) a primary level where it specifically affects vulnerable sexual and gender minorities who are excluded from socio-cultural participation through political homophobia; and (ii) the secondary level where it generally affects the majority of society who are excluded from political participation and access to social goods through the manipulation of dominant values.

Byrne's understanding of social exclusion as an outcome of power dynamics between competing interests in society[53] is relevant to both these levels. On the one hand, the exclusion of sexual and gender minorities in Nigeria through criminalisation helps to perpetuate the idea that the dominant hegemony is working to

47 Tamale (n 46) 33.
48 S Nyanzi 'Unpacking the [govern]mentality of African sexualities' in S Tamale (ed) *African sexualities: A reader* (2011) 477.
49 Nyanzi (n 48) 481.
50 As above.
51 R Walker 'Poverty and social exclusion in Europe' in A Walker & C Walker (eds) *Britain divided: The growth of social exclusion in the 1980s and 1990s* (1997) 8.
52 J Allen, G Cars & A Madanipour 'Introduction' in A Madanipour, G Cars & J Allen (eds) *Social exclusion in European cities* (1998) 22.
53 D Byrne *Social exclusion* (2005) 2.

preserve the cultural and religious values of the majority, in the fabricated struggle between the interests of sexual and gender minorities and the interests of the rest of society. On the other hand, the exclusion of the majority of society through the manipulation of perceptions of social values helps to secure hegemonic power favouring elite interests against that of the majority. By focusing on sexual and gender minorities (and other vulnerable groups) through the legal system, the political elite are able to keep the majority of the population out of meaningful discourse relating to the control of the political system. This manipulation of social values and interests through legislation focusing on issues of sexual conformity subsumes, diminishes and distracts from other values that are able to lead to anti-hegemonic debates on social justice and equality. In essence, the focus on excluding sexual and gender minorities from socio-cultural participation is linked to the exclusion of the majority of the population from political participation.

However, this is merely one aspect of the issue. Beyond examining the deployment of political homophobia in the enactment of laws targeting sexual and gender minorities as a means of social control, it is also important to consider the actual enforcement of those laws and how enforcement sustains hegemonic power. It is in this consideration of the enforcement practice that Gore's analysis of social exclusion as an 'interrelationship between poverty and social identity'[54] becomes relevant. This means that the enforcement of exclusionary laws is not uniform across one identity. Instead, enforcement is determined by an aggregate of identities 'based on multiple and overlapping criteria'.[55] This is what Berry describes as 'multiple channels of access' which, in turn, create 'multiple and relatively fluid lines of social conflict'.[56] As such, social exclusion is not uniform across one strand of identity and, in the case of sexuality, other factors of identity such as age, educational level, employment status, economic and social status are likely to play a significant role in the extent to which criminalising laws have a negative impact on an individual.

In this interplay of identities, an issue that often comes up in literature is the issue of respectability and how individuals often use this as a means of achieving social inclusion and protecting themselves

54 C Gore 'Social exclusion and Africa south of the Sahara: A review of the literature' (1994) A report by the International Labour Organisation (Labour Institution and Development Programme DP/62/1994A) para 1.2, http://agris.fao.org/agris-search/search.do?recordID=GB2013200767 (accessed 8 May 2020).
55 Gore (n 54) para 1.4.
56 S Berry 'Social institutions and access to resources' (1989) 59 *Africa* 50.

from threats of social exclusion.[57] Respectability has been defined as 'acceptance of the norm' by following 'a normative standard of behaviour in public, while being aware of continual evaluations against that standard'.[58] This requires the individual to engage in what Johshi describes as 'repetitive performance of social norms based on the behaviours society deems respectable'.[59] However, because there is an inherent conflict between the individual's sense of self and the performance they have to undergo, there is continuous social and self-evaluation of this process.[60]

This means that a person neither is nor can become respectable, since this connotes a kind of stability and permanency that can only be illusory; rather, she is only ever in the process of being and becoming respectable by doing respectability.

3 Setting the stage: The growth and nature of the Nigerian legal system

The application of theories of political homophobia, elite power and social exclusion to the evolution of laws criminalising same-sex relationships in Nigeria is more effectively accomplished through an awareness of the historical growth of Nigerian law.[61] The sovereign entity now known as the Federal Republic of Nigeria originated as an administrative amalgamation of several communities first by the trading entity known as the Royal Niger Company, and later by the British government, which then administered the territories as separate colonies and protectorates and, ultimately, as one country.[62] Accordingly, what is now the Nigerian legal system and its criminal laws originally developed along different trajectories in the different British-controlled territories until these separate systems were integrated as one national legal system under the guidance of British colonial administrators. Today, the original variations are embodied in provincial (state) laws across the country. Nevertheless, there is a general uniformity in the socio-political context of their

57 Y Johshi 'Respectable queerness' (2012) 43 *Columbia Human Rights Law Review* 415; DZ Strolovitch & CY Crowder 'Respectability, anti-respectability, and intersectionally responsible representation' (2018) 51 *Politics Symposium, Political Science and Politics* 340.
58 Johshi (n 57) 418.
59 Johshi (n 57) 419.
60 As above.
61 TO Elias *The Nigerian legal system* (1963); AEW Park *The sources of Nigerian law* (1963); AO Obilade *The Nigerian legal system* (1979); CO Okonkwo (ed) *Introduction to Nigerian law* (1980).
62 The historical references in this part rely on the comprehensive narrative of Nigerian history in M Crowder *The story of Nigeria* (1962) and R Bourne *Nigeria: A new history of a turbulent century* (2015).

evolution over time. Thus, they can be studied as one broad Nigerian legal system.[63]

The societies and communities that would later become known as 'Nigeria' had their own legal systems, including their criminal laws, and these remained unaltered for a while after the British arrived in the early 1800s.[64] However, in 1863 a newly-established colonial government introduced English common law into the southern coastal kingdom of Eko, by then referred to and eventually renamed 'Lagos'.[65] The British also established 'a legislature and a system of courts of the English type', while still allowing 'continued administration of customary law' in the coastal colony of Lagos for a smoother administrative process.[66] These legal developments came in the wake of several political upheavals, including a British naval bombardment of the Eko kingdom in 1851; a consular treaty between Eko and Britain in 1852; and, finally, a forced treaty in 1861 ceding Eko to Britain as a colony. The legal system introduced into Lagos (formerly Eko) would eventually form the kernel of Nigeria's legal system as the administration and legal system evolved over the next 100 years until Nigeria's independence in 1960.

Meanwhile, in interior parts of the south 'customary laws' in their various forms continued to be prevalent, while north of the river Niger – towards the trans-Sahara – Islamic law (which had been introduced from 1804 to 1808, nearly 60 years previously) was practised.[67] These other interior communities were not under British control although they traded with British adventurers who continued their attempts to gain control of the coastal kingdoms in the south. These attempts were granted European international legitimacy when, in 1885, the Berlin Conference recognised the claim of the British and their trading companies to all the territorial areas and seaports that would later be known as Nigeria. In 1900 the British Crown formally purchased these territories from the Royal Niger Company as 'the Southern Nigeria Protectorate' and 'the Northern Nigeria Protectorate'. Under the command of Frederick Lugard, the British then began a series of both diplomatic and violent tactical campaigns against the original

63 Presently, the Nigerian legal system is inclusive of the received English law (which includes the common law of England, principles of equity, and English 'statutes of general application' enacted before 1900), colonial *ad hoc* legislation (called ordinances) and 'proper' Nigerian law (which includes parliament and military-enacted legislation, judicial decisions, customary laws, and domesticated international law). For more on these, see Park (n 61); Obilade (n 61); Okonkwo (n 61).

64 CO Okonkwo *Okonkwo and Naish on criminal law in Nigeria* (1990) 4.

65 Ordinance 3 of 1863 cited in Park (n 61) 1.

66 As above.

67 SL Sanusi 'Politics and Shari'a in Northern Nigeria' in B Soares & R Otayek (eds) *Islam and Muslim politics in Africa* (2007) 179.

ruling houses in both the coastal and interior territories.[68] In 1904, having secured British control north of the Niger, Lugard proclaimed a Criminal Code to aid British administration over all of what would later become Nigeria. This Code was modelled on an 1899 version that was then in use in the Queensland colony, Australia. Curiously, this Queensland code was itself based on a draft code that had been rejected in 1878 in Britain, creating a situation where 'the Codes that the English denied themselves, they gave it with largesse to their colonies and dependencies'.[69]

In 1914 the coastal and other territories in the Southern Nigeria protectorate were merged under one administration with the territories in the Northern Nigerian protectorate to become the Colony and Protectorate of Nigeria. This political amalgamation meant that the Northern Criminal Code was extended to the whole country.[70] This legal union would not last long. Very soon, it became clear to the British that it was easier to displace the various traditional legal systems in the southern territories than it was to displace the Islamic legal system in the northern territories. The Muslim population – under the guidance of their scholars and traditional emirates – agitated for a criminal law system that reflected their values and 'in the political situation of the time' they could not be ignored by the colonial government.[71] However, the British resisted these demands long enough until they were ready to leave the country. In 1959, a year before Nigeria's independence, a separate Penal Code was enacted for Northern Nigeria, modelled on the code in use in Sudan, which in turn was based on an 1860 Penal Code drafted by Lord Macaulay for India. This Code was a 'compromise between the reformers and the traditionalists' and ensured that 'traditional Moslem crimes … are preserved'.[72]

After Nigeria's independence from the British in 1960, the two Codes – the Penal Code in the north and the Criminal Code in the south – continued to govern criminal justice administration across the country. When the two regions were fragmented into three and then four regions, and ultimately into 36 states, the succeeding

68 Crowder (n 62); Bourne (n 62).
69 J Michael & H Wechsler *Criminal law and its administration: Cases, statutes, and commentaries* (1940) cited in AG Karibi-Whyte *History and sources of Nigerian criminal law* (1993) 3.
70 Okonkwo (n 64) 4-5. This Criminal Code would become the basis for the codes in British-controlled East and Central Africa. However, the desire by the British not to undermine Islamic law (by exempting native tribunals from the operation of the Code) meant a simultaneous practice of both British law and Islamic law and it was a matter of chance before which court an accused was tried.
71 Okonkwo (n 64) 9.
72 Okonkwo (n 64) 9-10.

jurisdictions in each region inherited the respective codes with local amendments and alterations over time. Despite these variations across the country, it is important to emphasise that 'both the Criminal Code and the Penal Code have a common origin, employ the same concepts, and are governed by the same philosophical considerations'.[73] This understanding also applies to the broader legal system and, as such, despite the current federal nature of Nigeria's legal system, the evolution of the 36 states from two regions means that there is a uniformity in the context of these laws.[74]

4 Political homophobia, social exclusion and elite power in the criminalisation of same-sex relationships in Nigeria during the colonial period (1914-1960)

In the previous part I discussed the evolution of the Nigerian legal system as a direct product of Nigeria's colonial history. In this part I turn to a more in-depth analysis of the laws criminalising same-sex relationships at the colonial stage of Nigerian history, first by setting out the text of the criminalising provisions, then by examining the contexts of political homophobia, social exclusion and elite power surrounding the enactment of the laws in the period.

4.1 Criminalising laws

The legal framework criminalising[75] same-sex relationships in Nigeria were first introduced across Nigeria in 1914, following the amalgamation of Nigeria as one administrative territory. Today, those colonial provisions criminalising same-sex relationships are (generally) set out in sections 214 to 217 of the Criminal Code and sections 284 and 405 of the Penal Code. The Criminal Code states:[76]

> 214 Unnatural offences
> Any person who:
> (1) has carnal knowledge of any person against the order of nature; or
> …

73 Karibi-Whyte (n 69) ix.
74 As above.
75 Criminal Code Act Chapter C38 Laws of the Federation of Nigeria 2004 (Criminal Code) applicable across Nigeria except in the northern states, and the Penal Code (Northern States) Federal Provisions Act Chapter P3 Laws of the Federation of Nigeria 2004 (Penal Code) applicable in the northern states of Nigeria.
76 Secs 214-217 Criminal Code (n 75).

(3) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

215 Attempt to commit unnatural offences

Any person who attempts to commit any of the offences defined in section 214 of this Code, is guilty of a felony and is liable to imprisonment for seven years

...

217 Indecent practices between males

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for three years.

Similarly, the Penal Code states:[77]

284 Whoever has carnal intercourse against the order of nature with a man, woman or an animal, shall be punished with imprisonment for a term of which may extend to fourteen years and shall also be liable to fine.

Section 405(2) of the Penal Code defines 'vagabond' as

(e) any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession;

(f) any female person who dresses or is attired in the fashion of a man in a public place.[78]

4.2 Context of political homophobia in the colonial phase

The deliberate and unilateral inclusion of provisions criminalising same-sex acts in the colonial criminal laws by the British colonial government is a demonstration of Bosia and Weiss's conceptualisation of political homophobia as a 'conscious political strategy' often unrelated to substantial local demands for political rights.'[79] Still, it is important to critically examine the ways in which these laws constituted a philosophy of political homophobia and how this philosophy strategically favoured the political and economic interests of the colonial project across all of the British Empire. In view of this goal, I will examine the context of political homophobia in the colonial

77 Sec 284 Penal Code (n 75).
78 Not all the Penal Code states have retained this sub-section (f).
79 Bosia & Weiss (n 1) 2.

laws from two perspectives, namely, (i) the origins of homophobic laws in England and their codification in the Queensland Code and its offshoots; and (ii) the process and *raison d'être* for introducing these codes in Nigeria.

Regarding the first perspective, it is useful for understanding the analysis in this section to trace the origins of homophobia from the hegemonic politics of England to the colonial Queensland Code. The first occurrence of a law criminalising same-sex relationships in England was in 1533, under the reign of King Henry VIII, when the offence of 'buggery' – punishable by hanging – was legislated by Parliament.[80] The year that this legislation was passed was not happenstance. In 1533 King Henry VIII married Anne Boleyn against the directives of the Pope and in 1534 he declared himself the head of the Church of England. Thus, the direct criminalisation of homosexuality by the English Parliament coincided with the political struggles between the English monarch and the papacy, with the English Parliament limiting the jurisdiction of the ecclesiastical church,[81] in this way demonstrating the political motivation behind the use of homophobia. Strategically, the English monarch was also able to make accusations of homosexuality against the monks in the papal monasteries as a pretext for seizing their lands and assets.[82] 'Within a few years the monasteries were dissolved and their wealth transferred to Henry and those nobles and lawyers who had supported his policies.'[83] These actions were carried out without criminal trial and, in fact, the only documented criminal trial on the issue of homosexuality was 'brought to bolster a case that was primarily political'.[84]

Thus, the introduction of laws criminalising same-sex relationships in England was deeply connected to a morality intended to sustain the political and economic interests of the English monarchy. The theological question of whether or not priests should be able marry – a key issue between the Protestants and the Catholics – was framed around homosexuality through political propaganda, with Catholic monks constantly accused of being 'sodomites'.[85] When the Catholics were temporarily restored to political favour in 1553 under the reign of Queen Mary, the buggery law was repealed, but was

80 L Crompton *Homosexuality and civilisation* (2003) 362.
81 Crompton (n 80) 363.
82 As above.
83 Crompton (n 80) 364. Interestingly, as Crompton notes, these seizures were simply based on a report commissioned by the monarch. The law itself was never used directly to prosecute and convict the monks.
84 As above.
85 Crompton (n 80) 365.

reinstated in 1564 after Queen Elizabeth I – a Protestant – came to power. This reinstated statute, with an amendment of the sentence from death to life imprisonment, would go on stay in the English statute books until eventually repealed in 1967. More importantly, this 1564 statute influenced the codification of homophobia into the criminal laws of British colonies starting with the Queensland Code in Australia and, ultimately, the Criminal and Penal Codes of colonised societies such as Nigeria.[86]

The use of legislation to enforce political homophobia in England reinforced the 'protestant' Christian values that secured the political interests of the monarchy, creating a hegemonic ideal that guided the notion of a dutiful citizen of the English Crown.[87] Thus, under this ideal, there was a 'natural' order of things and acts that did not fit into this so-called natural order were to be frowned upon. The language of the codified homophobic legislation emphasised that same-sex relationships were 'against the order of nature' or 'unnatural offences'. As Gupta notes:[88]

> Edward Coke, in his seventeenth-century compilation of English law, wrote that 'Buggery is a detestable, and abominable sin, amongst Christians not to be named'. He stressed the foreign derivation of the term – 'an Italian word' – as well as the act itself: 'It was complained of in Parliament, that the Lumbards had brought into the realm the shameful sin of sodomy, that is not to be named.'

This understanding of a hegemonic ideal or 'an order of nature' guided the beliefs and acts of the traders, explorers, missionaries and administrators of the British Empire. It informed their attitudes to other cultures and societies – termed 'savage', 'primitive' and 'barbaric' – that did not fit into this world view and it justified the imposition of colonialism. This brings me to the second perspective of political homophobia in the colonising laws: the process and *raison d'être* for introducing these codes in Nigeria.

Much like the use of political homophobia in the conflict between the English monarchy and the papacy, the use of political homophobia served British interests in the colonial project through three interlocking processes, namely, (i) the undermining and erasure of existing norms and values; (ii) the introduction of British hegemonic ideals to justify British political control; and (iii) the

86 A Gupta *This alien legacy: The origins of 'sodomy' laws in British colonialism* (2008) 4-8.

87 In 1701 the English Parliament passed the Act of Settlement forbidding Roman Catholics or their spouses from ascending to the English throne.

88 Gupta (n 86) 14-15.

establishment of British political control to secure British commercial interests.

After the British administration took control of Lagos in 1862, the English common law and native law were initially implemented simultaneously. However, the colonial authorities gradually imported the body of English law, including the common law and doctrines of equity, for use in the colony. Park,[89] commenting on the process, justifies this decision on the grounds that (i) large numbers of Europeans had arrived in the colony following the acquisition of political power by Britain; (ii) local laws were unsuitable for large-scale commercial activities; and (iii) Europeans were unwilling to be bound by unwritten and seemingly unascertainable 'tribal' laws. These reasons, while convenient for the colonial administrators, did not consider the values and ideals of the indigenes nor did they accommodate the disapproval of the indigenes. Instead, the colonial government actively undermined the population, particularly in its attempt to codify the criminal law, a decision that met with strong resistance from the inhabitants of Lagos. In 1899 members of the colony petitioned the Colonial Office on the issue of codification and, among other points, insisted that

> the Bill is inconsistent with its ostensible object; and its obtrusiveness and elasticity are so great as to defeat that object. It has created new crimes and punishments which had never been in existence in the Laws of the Colony either by Statute, Ordinance or Common Law. (b) Some of the provisions of the Bill have a tendency to subvert such manners and customs of the people of this Colony as are common with them and which are not repugnant to humanity, equity and good conscience; to disturb certain rights and immunities hitherto enjoyed by the natives of the Colony; and to import a foreign system which is not beneficial to the people.[90]

However, in a dispatch by Denton, the acting governor of the Colony, he dismisses the dissatisfaction of the people of Lagos (noting that they are 'obstinate to a degree in a dogged unreasoning way') with the content of the proposed Criminal Code:[91]

> That the natives, ie the uneducated element, have been imposed upon is clear to me from the questions they ask with regard to the measure, but unfortunately the idea has got into their heads that the Bill creates new offences, that the punishments under it are far more severe than under the existing law and that some of the officers entrusted with the

89 Park (n 61) 16.
90 HF Morris 'How Nigeria got its criminal code' (1970) 14 *Journal of African Law* 141.
91 As above.

> administration of justice would be only too glad to take advantage of the increased powers of punishment which they allege it gives.

Denton's language here is patronising and paternalistic. For him, the public opinions of the people of Lagos who are to be governed by the proposed Criminal Code are merely a case of obstinacy. He refuses to engage with the issues, secure in the confidence that the values embedded in the Criminal Code were inherently superior to any objections that could be raised by the colonised population. Yet, neither Denton nor the other administrators consider that the English people had previously rejected similar attempts at a code for England. The arguments that were considered legitimate by the English were now considered unreasonable by the Lagosians. As Gupta notes, '[t]he colonial environment was the perfect field for experiments in rationalising and systematising law. The colonies were passive laboratories.'[92] The attempt to introduce the Queensland Code failed in Lagos in 1899, but in 1916 Frederick Lugard – without the hindrance of public debate – introduced the Code across all of Nigeria.

The introduction of the Criminal Code assisted in substituting English values with the existing values of the indigenous people in the colonial state. For the local administrator, there was political mileage to be gained, such that 'if a colonial chief justice or attorney-general wishes to gain the favour of the Colonial Office, he offers to codify the laws he helps to administer'.[93] For the British Empire, the imposition of English values guaranteed the security of the colonial project. Frederick Lugard, in the now infamous essay 'The white man's task in tropical Africa'[94] summarises this project as 'a dual mandate' for the colonists to act

> as trustees on the one hand for the development of the resources of these lands, on behalf of the congested populations [of Europe] whose lives and industries depend on a share of the bounties with which nature has so abundantly endowed the tropics. On the other hand they exercise 'a sacred trust' on behalf of the peoples who inhabit the tropics and who are so pathetically dependent on their guidance.[95]

Thus, the first object of the colonial project was to extract resources of the colonies for the benefit of Europe, while the second object was to 'guide' the people in the colonies in paternalistic fashion. To the extent that modern African societies and governments have almost

92 Gupta (n 86) 15.
93 HL Stephen 'A model criminal code for the colonies' (1899) 1 *Journal of the Society of Comparative Legislation* 439.
94 FD Lugard 'The white man's task in Africa' (1926) 5 *Foreign Affairs* 57. See also FD Lugard *The dual mandate in British tropical Africa* (1922).
95 Lugard (1926) (n 94) 58.

wholly accepted and adopted this 'guidance', this objective of the colonial project has been successful. As Gupta notes:[96]

> Despite the claims of modern political leaders that anti-sodomy laws represent the values of their independent nations, the Queensland Penal Code spread across Africa indifferently to the will of Africans. The whims, preferences, and power struggles of bureaucrats drove it. After the Criminal Code of Nigeria was imposed, colonial officials in East Africa – modern Kenya, Uganda, and Tanzania – moved gradually to imitate it. A legal historian observes that the 'personal views and prejudices' of colonial officials, rather than any logic or respect for indigenous customs, led to replacing IPC-based codes with QPC-based codes in much of the continent.

4.3 Context of elite power in the colonial phase

Lugard's theory of 'the dual mandate' as the responsibility of colonisers points to the fact that the British colonial government considered itself a naturally-privileged elite tasked with the duty of guiding the colonised people. Lugard himself considered the populations he governed as societies in need of his intervention:[97]

> The Fulani Emirates formed a series of separate despotisms, marked by the worst forms of wholesale slave raiding, spoliation of the peasantry, inhuman cruelty and debased justice … The South was, for the most part, held in thrall by Fetish worship and the hideous ordeals of witchcraft, human sacrifice and twin murder. The great Ibo race to the East of the Niger, numbering some 3 millions, and their cognate tribes had not developed beyond the stage of primitive savagery.

In the Lagos Colony, and then across the Nigerian Protectorate, the relationship between the colonial government and the population was a hierarchical one, with the white colonial officers sitting at the top of the hierarchy. In December 1897 a colonial officer in Lagos, WT Thiselton-Dyer, remarked on his understanding of the colonial work:[98]

> I am entirely of the opinion of the Governor General that the natives of this and indeed of all the West Africa Colonies 'require close parental control and guidance on the part of the Government'. Its work, in point of fact, must for a long time to come be quite as much missionary as administrative.

96 Gupta (n 86) 23.
97 Bourne (n 62) 15.
98 Dispatch from WT Thiselton-Dyer, 31 December 1897 to Edward Wingfield at the Colonial Office, London. This and other dispatches cited in this part are archived at (and were retrieved from) the National Archives of Nigeria, University of Ibadan campus, Ibadan.

The elitism in the statement above is buttressed by Lugard's own analysis of colonial administration where he explains administrative powers:[99]

> The Resident is the backbone of the administration. He is Judge of the Provincial Court, of which his staff are commissioners. Through them he supervises and guides the native rulers – as I shall describe in chapter x. In the provinces with the most advanced native organisation he is counsellor and adviser, while among primitive tribes he must necessarily accept a larger measure of direct administration. His advice when given must be followed, and his authority is supported by the weight of the British Administration.

However, elite privilege was not limited to the colonial administrators, but also encompassed all other Europeans in the territory, particularly missionaries, educators and entrepreneurs. Because of this expanded racially-based elitist context, the inclusion of homophobic laws in the Criminal Codes became even more urgent for the colonial administrators. This colonial anxiety is described by Gupta as 'fears of moral infection from the "native" environment'.[100] The introduction of vagrancy laws into the colonial criminal laws effectively criminalised poverty in the local population, thus perpetuating the distinction between the (mostly white) political elite and the rest of the people.

4.4 Context of social exclusion in the colonial phase

As the 'dual mandate' conceptualised by Lugard implies, the British colonial project and its accompanying legal system were principally directed at securing British political and economic domination through British access to and control of local resources disguised as moral and political guidance. From the outset, resistance (both violent and non-violent) by the communities to the colonial project was suppressed through the unleashing of British military might.[101] Regarding the seemingly 'beneficial' outcomes of colonial rule, Njoku explains that any seeming development under colonial rule was directed towards exclusionary rather than inclusive social and political participation:[102]

> Nigeria as a colonial entity enjoyed boom in the agricultural production and the mining of mineral resources such as iron ore, tin and coal. Foreign exchange was earned from the above resources. Each region

99 Lugard (1922) (n 94) 128.
100 Gupta (n 86) 16. See also S Aderinto *When sex threatened the state: Illicit sexuality, nationalism, and politics in colonial Nigeria, 1900-1958* (2015) 10.
101 Crowder (n 62); Bourne (n 62).
102 A Osita-Njoku 'The political economy of development in Nigeria: From the colonial to post-colonial eras' (2016) 21 *IOSR Journal of Humanities and Social Science* 9.

> had a comparative advantage through which it made its contributions to the centre. The North, for instance, was known for groundnut production, the West for her cocoa while the East produced palm oil … the British political economy in Nigeria was along the line of economic exploitation of the colonised by foisting it into the orbit of the European capitalist economic system. The operations and activities of the colonial authorities had no potential for stimulating economic development … the overall subordination of colonised nations by dominating foreign power is to 'keep the colonised people in complete political subjection, and to maximise local human and natural resources'.[103]

This focus on resources also meant that the colonial state concentrated any development agenda only in urban centres that enhanced the commercial production and distribution process. In the words of one colonial administrator:[104]

> It seems clear that if Lagos could be reduced to a mere place of business, by eliminating all the poor population, which is unable to pay for sanitary improvement, if there were only business establishments and buildings of high class, with the dwellings of a few labourers that will be required for work, in connection with the port and various mercantile establishments, the difficulty of sanitation would be greatly diminished so much so that it might be possible to carry out some serious sanitary works.

In a bit of self-awareness, the official acknowledges that '[t]his procedure [of eliminating all the poor population] would be somewhat drastic', but he then justifies it on the basis of public health.[105] As Ake explains, the colonial investment in Nigeria was only to the extent needed to yield profits:[106]

> Following the capitalist rationality of maximum output, they invested only in what [they?] had to and where they had to. Not surprising, the places in which colonialism fostered some development were in places which were convenient collecting centres for commodities, such as Kano; places from where the commodities could be shipped abroad, such as Lagos; places where climate was to the taste of Europeans and which could be used as administrative headquarters.

If we understand this colonial project as an exploitative one, it necessarily follows that the legal system that was built around it was principally meant to cater to this goal, and not targeted social inclusivity or political participation. This is evidenced not only in the introduction of homophobic laws to exclude a subset of the

103 Osita-Njoku (n 102) 9-15.
104 1898 letter 'Re: Sanitation of Lagos' from Osbert Chadwick to the Crown Agents for the Colonies stored in the National Archives of Nigeria collection.
105 As above.
106 C Ake *A political economy of Africa* (1981) 43.

community and alienate more tolerant perspectives on sexuality, but also demonstrated by the wider exclusion of poorer members of the colonised population through the use of vagrancy and other laws that criminalised the person rather than any harmful act. Gupta notes:[107]

> In the colonies, these laws both served the 'civilising mission' and gave police enough power to punish almost any behaviour, or people, they wanted. Sexual conduct – or sexualised identities – were among those singled out. The 1899 Sudanese Penal Code [the basis for Nigeria's Penal Code] is an instructive instance. As noted earlier, this code, unique among British colonial laws, did not punish consensual sodomy. It compensated, however, by creating a new identity within the 'habitual vagabond': the 'catamite.' (The Northern Nigeria code also followed this example.) The code listed seven types of 'vagabonds', one of them the 'catamite', defined as a 'any male person who (1) dresses or is attired in the fashion of a woman in a public place or (2) practises sodomy as a means of livelihood or as a profession.

Although the term 'catamite' is not used in the Penal Code, the substance of the definitions of vagabond are retained by the law.[108] Similarly, the Criminal Code criminalises 'idle and disorderly persons'[109] with the same intent of criminalising a type of identity that does not fit into the hegemonic values of the colonising powers.[110] To be clear, the colonial administrators did not think that only a subset of the population fell into these categories. Instead, the colonial perception of the majority of the population – including the traditional chiefs – suggests that anyone could be criminalised on the basis of their identity alone. For example, an administrator described an encounter with two uncooperative traditional chiefs as follows:[111]

> On my recent visit to the Mahin community, the Amapetu or 'king of Mahin' complained of the conduct of two of his chiefs (both stipendiary) the Bales [chiefs] of Ipetu and Atijere. The first named was at the time in the town of Mahin so I sent for him: the man behaved very insolently in my presence and I ordered him to be taken to Epe

107 Gupta (n 86) 28.
108 Sec 405(e) Penal Code.
109 Sec 249 Criminal Code.
110 The hegemonic construct of these laws continues to have an effect into modern times. Eg, according to media reports, over a hundred women, allegedly strip club dancers, were arrested from different locations in Abuja in April 2019 for prostitution and being 'nuisances': 'Nigerian court rules against arrest of sex workers', https://pettyoffences.org/nigerian-court-rules-against-arrest-of-sex-workers/ (accessed 8 May 2020); 'Officials raid Abuja night club, arrest 34 strippers' (19 April 2019), https://www.premiumtimesng.com/regional/north-central/326152-officials-raid-abuja-night-club-arrest-34-strippers.html (accessed 8 May 2020); 'Again, police raid Abuja clubs, arrest 70 women' (28 April 2019), https://www.premiumtimesng.com/news/headlines/327355-again-police-raid-abuja-clubs-arrest-70-women.html (accessed 8 May 2020).
111 Letter dated 10 January 1809 from the District Commissioner to the Colonial Secretary, *Epe letter book* (1908-09) 188.

> there to be dealt with: on the following day he was sorry for himself and apologised … Of the Bale of Atijere I have little to write. He is a very useless individual and should never have been appointed as Bale.

The summary of the foregoing discussion is to situate the colonial project in Nigeria – just as elsewhere – as one that intentionally sought to establish the power of a racial elite with a clearly-defined hegemony that used criminal laws to control, repress and socially exclude a majority of the population from the imposed systems of governance. Within this machinery of elitism and social exclusion, sexuality, in general, and homosexuality, in particular, were weaponised as areas to perpetuate the 'savour versus savage' narrative. Tamale provides an insightful analysis of the social psychology involved in this regulation of African sexuality:[112]

> African sexuality was depicted as primitive, exotic and bordering on nymphomania. Perceived as immoral, bestial and lascivious, Africans were caricatured as having lustful dispositions. Their sexuality was read directly into their physical attributes; and the attributes were believed to reflect the culture and morality of Africans. By constructing Africans as bestial, the colonialists could easily justify and legitimise the fundamental objectives of colonialism: it was a 'civilising mission' to the barbarian and savage natives of the 'dark continent'. The imperialists executed this mission with force, brutality, paternalism, arrogance, insensitivity and humiliation. The body was a focal target of this assault.

This process of demonising African sexuality, while simultaneously hegemonising European values in Africa, is what Ngwena[113] notes as the power relationships inherent in the normative process of regulating sexuality, where a hegemonic culture is imposed by the dominant political elite – in this case the colonial government – and then political power is used to exclude groups 'whose sexualities are outside the domain of majoritarian and hegemonic culture'.[114]

5 Conclusion

This article is premised on the CLS perspective that any serious legal advocacy for sexual and gender minorities in Nigeria must critically engage with the social subtext of the law in order to yield positive outcomes. By employing relevant theories of political homophobia,

112 S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 53.

113 Ngwena (n 40) 242.

114 As above. See also Currier (n 7) 113, where the author observes that European colonisers in Southern Africa developed discourses that emphasised Africans' gender, sexual and racial difference from white Europeans, often through 'signifiers of perversity'.

elite power and social exclusion, the article has set out the social and political context surrounding the evolution of criminalising laws during the colonial phase of Nigeria's history.

Elite theory suggests that a stable, cohesive group of individuals who are able to affect political outcomes or control hierarchical institutions in government and society will try to make use of hegemonic values to maintain their interests, including the use of political homophobia in appropriate contexts. In the Nigerian context, the article demonstrates that political homophobia was a strategic tool to protect colonial interests and maintain the legitimacy of colonisation by creating laws that criminalised same-sex relationships. The outcome of – and also incentive for – this process of elitist hegemony includes the social exclusion of a large majority of the population: On the one hand, the preservation of elite interests has resulted in the continuing social exclusion of the majority of Nigerians. On the other hand, the pervasiveness of social exclusion has led to the continued use of political homophobia as a tool for justifying elite hegemony and preserving elite legitimacy. However, these subtle interactions between history, hegemony and governance do not feature in the rhetoric of contemporary promoters of the criminalisation of same-sex relationships. Instead, they base their arguments on a historically-false argument of preserving 'African' cultural or religious values, while preserving an elite hegemonic project that began with the colonial conquest of Africa.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: JD Mujuzi 'Construing pre-1995 laws to bring them in conformity with the Constitution of Uganda: Courts' reliance on article 274 of the Constitution to protect human rights' (2022) 22
African Human Rights Law Journal 520-547
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a9

Construing pre-1995 laws to bring them in conformity with the Constitution of Uganda: Courts' reliance on article 274 of the Constitution to protect human rights

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Summary: *Article 274 of the Ugandan Constitution (1995) provides that laws that existed at the time of the entry into force of the Constitution 'shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with this Constitution'. The jurisprudence from Ugandan courts shows that they have adopted three approaches to give effect to article 274 and, as a result, protected human rights such as the right to equality (freedom from discrimination), property, human dignity, liberty and the right to bail. The first approach is for the court to read word(s) into the impugned legislative provision without any deletions. This is done in one of the two ways: by either reading these words expressly into the impugned legislation, or by doing so impliedly. The second approach is for the court to strike out words from the impugned provision and replace these with new words. According to this approach, the court either adds a few words or overhauls the entire provision. It is argued that overhauling a legislative provision is beyond the mandate of the court's power under*

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article 274 and it ignores the principle of separation of powers in terms of which Parliament has the role to make laws. The third approach is for the court to 'strike out' or 'read out' words from the impugned legislation without replacing them. Although the Constitutional Court is the only court with the mandate to declare legislation inconsistent with the Constitution (under article 137), other courts have invoked article 274 to declare legislation unconstitutional, thus usurping the powers of the Constitutional Court. Is it argued that the Constitution may have to be amended so that other courts, other than the Constitutional Court, are also empowered to declare legislation unconstitutional on condition that such declaration takes effect after it has been confirmed by the Constitutional Court. A similar approach has been followed in other African countries such as South Africa.

Key words: *Uganda; article 274; Constitution; human rights; constitutional law; modification*

1 Introduction

In 1995 Uganda adopted a new Constitution. Article 2(1) of the Constitution provides that the Constitution is the supreme law of the land.[1] Article 2(2) is to the effect that '[i]f any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void'. Notably, the entry into force of the 1995 Constitution found in place a number of existing pieces of legislation, some of which included provisions that were contrary to the Constitution, generally, and the Bill of Rights, in particular. Therefore, some of these pieces of legislation had to be repealed or amended. The Constitution provided for ways in which the pre-Constitution laws that have not been repealed or amended can be dealt with. The first approach was to empower the Constitutional Court to declare such legislation unconstitutional under article 137 of the Constitution.[2] There indeed are many cases in which the Constitutional Court has declared legislation enacted before or after

1 This means, among others, that no person, arm of government or state organ is above the Constitution and the Constitution is the yardstick against which all other laws are judged. See, generally, *Severino Twinobusingye v Attorney General* Constitutional Petition 47 of 2011 [2012] UGCC 1 (20 February 2012); *Arnold Brooklyn & Company v Kampala Capital City Authority & Another* Constitutional Petition 23 of 2013 [2014] UGCC 9 (4 April 2014).

2 The Constitutional Court can also invoke art 137 to declare unconstitutional pieces of legislation enacted after the entry into force of the Constitution.

the entry into force of the 1995 Constitution unconstitutional.[3] It is beyond the scope of this article to discuss this approach.

The second approach, which is the focus of this article, is to empower courts to interpret the laws that existed before the entry into force of the Constitution for the purpose of bringing them in conformity with the Constitution. Through this approach, courts have protected human rights such as the right to equality (freedom from discrimination), property, human dignity, liberty and the right to bail. Thus, article 274 was included in the Constitution and it provides:

> (1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.
> (2) For the purposes of this article, the expression 'existing law' means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or statute or statutory instrument enacted or made before that date which is to come into force on or after that date.

In *Bukenya v Attorney General*[4] the Supreme Court held that article 274 saves laws that were enacted before the promulgation of the Constitution but that those laws have to be interpreted to bring them in conformity with the Constitution.[5] Article 274 can be invoked by any court or authority.[6] The purpose of this article is to ensure that '[c]ourts in Uganda cannot enforce a law which is inconsistent with the Constitution'.[7] It is also meant to 'empower courts to move away from obsolete to progressive jurisprudence'.[8] Indeed, this was the intention of the drafters of article 274.[9] The laws in question

3 See, generally, JD Mujuzi 'The Constitutional Court of Uganda: Blurring/misunderstanding its jurisdiction?' (2022) 9 *Journal of Comparative Law in Africa* 24.

4 *Bukenya v Attorney General* Constitutional Appeal 3 of 2011 [2017] UGSC 18 (22 May 2017).

5 *Bukenya* (n 4) 14-15. See also *Balaba & 2 Others v Kagaba & 2 Others* Civil Suit 1417 of 1999 [2015] UGHCLD 25 (20 August 2015); *Andrew Mujuni Mwenda & Another v Attorney General* Constitutional Petition 12 of 2005 [2010] UGSC 5 (25 August 2010).

6 *Unwanted Witness Uganda and Another v Attorney General* Constitutional Petition 16 of 2017) [2021] UGCC 40 (27 April 2021) 23 (Justice Madrama); *Nobert Mao & Another v Attorney General and Another* Constitutional Petition 4 of 2016 [2021] UGCC 36 (27 April 2021) 26.

7 *Attorney General v Salvatory Abuki* Constitutional Appeal 1 of 1998 [1999] UGSC 7 (25 May 1999) 64.

8 *Nampongo & Another v Attorney General* Constitutional Petition 43 of 2012 [2021] UGCC 37 (9 February 2021) 50.

9 Proceedings of the Constituent Assembly (1994-1995) 2493, 3134, 4139.

include Acts of Parliament (both substantive and procedural,[10]) subsidiary legislation[11] and, as the discussion below demonstrates, customary law. Notably, article 274 does not apply to legislation that was enacted after the coming into force of the Constitution.[12] Such pieces of legislation must comply with the Constitution at the time of their enactment because the Constitution is the Supreme law of the land.[13] In *Nalumansi v Kasande*[14] the Supreme Court held that[15] '[t]he essence of article 2 and article 274 of the Constitution is to enable a court faced with a partially unconstitutional law to sever and excise the unconstitutional provisions so that the remainder which complies with the Constitution can be enforced'.[16]

Both the Constitutional Court and the Supreme Court[17] have held that they would declare a legislative provision unconstitutional if it 'cannot be modified as required' by article 274.

On the basis of article 274 any court can interpret any law to bring it in conformity with the Constitution. Article 137 of the Constitution provides that only the Constitutional Court can interpret the Constitution[18] and declare any law or conduct inconsistent with the Constitution.[19] Although only the Constitutional Court has the mandate to declare legislation unconstitutional, in practice other courts have invoked article 274 to declare some legislative provisions void or inconsistent with the Constitution – albeit without using the

10 *Bukenya Church Ambrose v Attorney General* Constitutional Petition 26 of 2010 [2011] UGCC 5 (20 March 2011).

11 See, eg, the case of *Kikonda Butema Farm Ltd v Attorney General* Constitutional Petition 10 of 2012 [2013] UGCC 11 (8 November 2013) where the Court dealt with the standing orders issued on the basis of the Public Service Act.

12 *Murisho & 5 Others v Attorney General & Another* Constitutional Application 2 of 2017 [2017] UGCC 1 (23 February 2017); *East African Development Bank v Eden International School Ltd & Another* Miscellaneous Application 630 of 2017 [2017] UGCOMMC 121 (2 October 2017).

13 *Goodman Agencies Ltd v Attorney General & Another* Constitutional Application 1 of 2012 [2014] UGSC 14 (3 July 2014) 32.

14 *Nalumansi v Kasande & 2 Others* Civil Appeal 10 of 2015 [2017] UGSC 21 (10 July 2017).

15 *Charles Onyango Obbo & Another v Attorney General* Constitutional Petition 15 of 1997 [2000] UGCC 4 (21 July 2000) 40.

16 *Nalumansi v Kasande* (n 14) 25.

17 *Charles Onyango Obbo and Another v Attorney General* Constitutional Appeal 2 of 2002 [2004] UGSC 1 (10 February 2004) 49.

18 In *Nathan Nandala Mafabi & 3 Others v Attorney General* Constitutional Petition 46 of 2012 [2021] UGCC 3 (1 April 2021) 87, the Constitutional Court held that '[a] question as to interpretation of the Constitution must necessarily be a dispute, or substantial question in which the court will be engaged in determining or resolving a doubt or dispute as to the meaning or application of an article of the Constitution so as to give directions to a competent court about how to apply the law'.

19 However, one of the justices of the Constitutional Court is of the view that all courts can interpret the Constitution. See *Foundation for Human Rights Initiative v Attorney General* Constitutional Petition 53 of 2011 [2020] UGCC 7 (3 July 2020) 34-35 (Madrama J). However, this approach is not supported by the drafting history of art 137 of the Constitution. See generally Mujuzi (n 3).

term 'unconstitutional' – before construing them with modification or adaptation.

The purpose of this article is to demonstrate how courts have invoked article 274 of the Constitution and to show the various approaches that have been adopted in this regard. It demonstrates that in some cases courts have gone beyond their mandate under article 274 and have usurped the power of legislators. The article illustrates the differences between construing legislation to bring it in conformity with the Constitution, on the one hand, and declaring such legislation unconstitutional, on the other. Although in some African countries, such as Sierra Leone,[20] Lesotho,[21] Nigeria[22] and Kenya,[23] courts are empowered to interpret legislation and develop the common law and bring it in conformity with the Constitution, it is beyond the scope of this article to deal with these countries. The discussion starts with what is required of a court under article 274.

2 Article 274 in practice: The task of the court

As mentioned above, article 274(1) provides, that 'existing law *shall* be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution'. The task of a court that has invoked article 274 is to interpret legislation with modification to bring it in conformity with the Constitution. Its task is not to interpret the Constitution.[24] An important question is whether a court that concludes that the existing law is contrary to the Constitution has the discretion whether or not to construe such legislation to bring it in conformity with the Constitution. The use of the word 'shall' implies that whenever a court comes to the conclusion that the existing law is contrary to the Constitution, it must be construed with such modifications, adaptations and qualifications as to bring it in conformity with the

20 Art 170(5) of the Constitution of Sierra Leone (1991). See, eg, *S v Jah* SC Misc App 1 of 1994 [1995] SLSC 3 (1 January 1995); *All People's Congress v Nasmos & Another* SC Misc App 4 of 1996 [1999] SLSC 3 (26 October 1999).

21 Sec 156(1) of the Constitution of Lesotho (1993). See, eg, *Basotho National Party v Principal Secretary of Ministry of Law, Parliamentary and Constitutional Affairs & Others* CIV/APN/240/93 [1993] LSCA 69 (2 June 1993).

22 Sec 315 of the Constitution of Nigeria (1999). See, generally, *Attorney-General of Abia State & 35 Others v Attorney-General of the Federation* SC 227/2002 [2003] 3 (31 January 2003).

23 Sec 7(1) of the Sixth Schedule to the Constitution of Kenya (2010). See, eg, *Francis Karongo Wagana v National Union of Water & Sewerage Employees (NUWASE); Nyeri Water & Sanitation Company Ltd & 4 Others* (Garnishee) [2020) eKLR paras 5 & 6; *Philemon Koech v Republic* [2021] eKLR para 57; *In re Estate of Simion Robi Maroa (Deceased)* [2019] eKLR paras 10-11; *Republic v Hannah Ndung'u, CM Chief Magistrate's Court, Nairobi Law Courts & Another Ex-Parte Nicholas Chege Mwangi & 3 Others* [2015] KLR paras 19-21.

24 *Nalumansi v Kasande* (n 14) 7-8.

Constitution. In *Foundation for Human Rights Initiatives v Attorney General*[25] the Constitutional Court held that existing law that is contrary to the Constitution 'may be construed with modification and adoption [*sic*] to bring it into conformity with the Constitution' and that such existing law 'would, therefore, be null and void to the extent it contravenes the Constitution'.[26]

Two observations should be made about this holding. First, the use of the word 'may' creates the impression that a court has the discretion whether or not to construe such law to bring it in conformity with the Constitution. This approach would be contrary to article 274. Second, although existing law that is contrary to the Constitution is 'null and void to the extent it contravenes the Constitution', only the Constitutional Court or the Supreme Court, when dealing with an appeal from the Constitutional Court, can declare such law unconstitutional. This is so because article 137(3) of the Constitution provides that the Constitutional Court is the only court that has the mandate to declare any law or conduct unconstitutional. Therefore, any court relying on article 274 is limited to interpreting existing legislation to bring it in conformity with the Constitution. This explains why, for example, the High Court has labelled such existing law as 'inappropriate or out-dated'[27] but has not declared it unconstitutional.

When the Constitutional Court is called upon to declare a legislative provision unconstitutional, it will do so only if 'it cannot be adapted or modified in any way so as to be consistent with' the Constitution.[28] In other words, when the constitutionality of a legislative provision is challenged, the Constitutional Court will declare it unconstitutional only if it cannot invoke article 274 to interpret it and bring it in conformity with the Constitution. This means that declaring it unconstitutional is a measure of last resort.[29]

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25 *Foundation for Human Rights Initiatives v Attorney General* Constitutional Petition 20 of 2006 [2008] UGCC 1 (26 March 2008).

26 *Foundation for Human Rights Initiatives* (n 25) 28.

27 See, eg, *Bushoborozi v Uganda* HCT-01-CV-MC-0011 of 2015 [2015] UGHCCRD 14 (10 July 2015) 6 (dealing with the powers of the Minister to release mentally-ill prisoners).

28 *Zachary Olum & Another v Attorney General* (Ruling) Constitutional Petition 6 of 1999 [1999] UGCC 7 (2 December 1999) 33.

29 In *Mwesigye v Attorney General & Another* Constitutional Petition 31 of 2011 [2015] UGCC 14 (23 November 2015) the constitutionality of sec 5 of the Parliamentary (Remuneration of Members) Act was challenged and the Constitutional Court invoked article 274 to interpret it and bring it in conformity with the Constitution. See also *Major General David Tinyefuza v Attorney General* (Ruling) Constitutional Petition 1 of 1996 [1997] UGCC 2 (5 March 1997) 8, where the Court held that '[i]n applying any law in existence at the time of the promulgation of this Constitution, it has to be tested against the provisions of the Constitution under Articles 2(2) and 273 [which later became art 274] in order to ensure that it conforms to the Constitution'.

3 Declaring the law void or inconsistent with the Constitution and the effect of interpreting legislation under article 274

Article 137(3) of the Constitution provides:

> A person who alleges that –
>
> (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
>
> (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution
>
> may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

Article 137(3) illustrates that only the Constitutional Court has the jurisdiction to declare any law 'inconsistent with or in contravention of a provision of' the Constitution. It can do so only on the basis of a petition. However, the jurisprudence shows that courts other than the Constitutional Court have relied on article 274 to declare legislation inconsistent with the Constitution before interpreting it to bring it in conformity with the Constitution. This demonstrates that courts are of the view that on the basis of article 274 they can declare laws inconsistent with or in contravention of a constitutional provision and, based on that declaration, construe such laws to bring them in conformity with the Constitution. This approach is justified by the fact that under article 2(2) the Constitution is the supreme law of the land and courts cannot enforce laws that are contrary to the Constitution. For example, in *Salvatory Abuki*[30] it was held:[31]

> The impugned law is not to be declared void merely because one aspect of its application offends a provision of the Constitution. Otherwise the words 'shall be void to the extent of the inconsistency' are meaningless. Indeed, this will be in conformity with article 273(1) [which later became article 274] of the Constitution which provides that …

In the same judgment another judge held:[32]

> Article 273(1) of our Constitution requires that all existing laws conform to the spirit and letter of 1995 Constitution. This means that laws … which are inconsistent with the constitutional provisions must give way to the new Constitutional order. In my view, therefore, the exclusion provisions sub-sections (1) and (2) [of the Witchcraft Act] are unconstitutional in that they are inconsistent with article 24.

30 *Salvatory Abuki* (n 7).
31 *Salvatory Abuki* (n 7) 29.
32 *Salvatory Abuki* (n 7) 66.

In *National Security Fund v Makerere University Guest House*[33] the issue before court was whether the sections of the National Security Fund Act that compelled the respondent to contribute to the Fund contravened the right to property under article 26 of the Constitution. The High Court invoked article 274 to hold:[34]

> The NSSF Act came into force on 1st December, 1985, before the promulgation of the 1995 Constitution of the Republic of Uganda. Accordingly, the NSSF Act is void to the extent of its inconsistency with the Constitution. The NSSF Act, specifically section[s] 7, 11, 12, 13 & 14 is [are] inconsistent with article 26 of the Constitution and is void to the extent of its inconsistency. Article 274 (1) of the Constitution provides ... The power to deprive any person of property has to be enshrined in the Constitution.

Similarly, in *Kironde v Kironde*[35] the High Court held that some provisions of the Divorce Act[36] were discriminatory against women and, therefore, contrary to the constitutional provisions on equality and those outlawing customary practices that undermine the dignity of women.[37] The Court of Appeal distinguished between the power of any court to modify the existing law and that of the Constitutional Court to declare legislation unconstitutional. In *Attorney General v Osotraco Ltd*[38] the Court of Appeal held that article 274[39]

> empowers all courts to modify existing unjust laws without necessarily having to refer all such cases to the constitutional court. This provision enables the court to expedite justice by construing unjust and archaic laws and bringing them in conformity with the Constitution, so that they do not exist and are void. This article does not oust the jurisdiction of the Constitutional Court under article 137 where it can later declare these laws unconstitutional.

This holding emphasises the fact that only the Constitutional Court has the mandate to declare legislation unconstitutional. The fact that legislation has been interpreted by a court to bring it in conformity with the Constitution does not necessarily mean that it will pass constitutional scrutiny. The Constitutional Court can still declare it unconstitutional. However, this has to be done through the petition procedure under article 137(3)(a) of the Constitution.

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33 *National Security Fund v Makerere University Guest House* Civil Suit 525 of 2015 [2017] UGCOMMC 27 (6 September 2017).
34 *Makerere University Guest House* (n 33) 11.
35 *Kironde v Kironde & Another* Civil Divorce Cause 6/2001 [2002] UGHCFD 2 (12 December 2002) (some provisions of the Divorce Act were discriminatory against women).
36 Divorce Act (ch 249) (1904).
37 This decision was followed in *Ajanta Kethan Thakkar v Kethan Thakkar* Divorce Cause 3 of 2002 [2003] UGHC 45 (26 June 2003).
38 *Attorney General v Osotraco Ltd* Civil Appeal 32 of 2002 [2005] UGCA 1 (30 June 2005).
39 *Osotraco* (n 38) 6.

4 Effect of interpreting legislation under article 274

As mentioned earlier, interpreting legislation on the basis of article 274 only saves that legislation from becoming null and void.[40] In other words, it has the effect of 'sanitising' such laws.[41] However, its constitutionality can still be challenged before the Constitutional Court. A higher court's interpretation of the existing law under article 274 binds lower courts.[42] The High Court held that construing existing legislation to bring it in conformity with the Constitution on the basis of article 274 'has an amending effect on' the modified legislation.[43] This should not be understood to mean that the court has assumed the legislative powers to amend legislation. The Constitutional Court held that once it has interpreted legislation to bring it in conformity with the Constitution, the executive has to initiate an amendment in Parliament to ensure that such laws comply with the Constitution.[44] This implies the fact that the Court is aware that its mandate under article 274 is not to make laws. Its mandate is to interpret existing law to bring it in conformity with the Constitution. After that interpretation, Parliament can amend the law in any way it deems fit as long as it complies with the Constitution.

Therefore, it is preferable that as soon as a court invokes article 274 to modify legislation, Parliament should amend the law. This is so because Parliament has law-making powers and consults widely before making legislation, hence coming up with a better alternative than that suggested by a judicial officer. A failure by Parliament to amend a law that has been modified under article 274 means that some judicial officers may not be aware of the judgment in which such a law was interpreted to comply with the Constitution and may still follow the 'unmodified' law. For example, as will be discussed below, in *Hon Sam Kuteesa*[45] the Constitutional Court held that section 168(4) of the Magistrate's Courts Act, which provided that bail automatically lapsed when an accused was committed to the High Court for trial, was inconsistent with the Constitution and invoked article 274 to interpret it and bring it in conformity with

40 *Pyrali Abdul Rasul Esmail v Adrian Sibo* Constitutional Petition 9 of 1997 [1998] UGCC 7 (23 June 1998).
41 *Kiiza Besigye v Uganda* Criminal Misc Application 228 of 2005 [2005] UGHC130 (25 November 2005) 4.
42 *Remo v Midia Sub-County Local Government* Civil Appeal 8 of 2014 [2017] UGHCLD 6 (20 July 2017).
43 *Uganda v Yiga Hamidu & Others* Criminal Session Case 5 of 2002 [2004] UGHCCRD 5 (9 February 2004) 9.
44 *Rubaramira Ruranca v Electoral Commission & Another* Constitutional Petition 21 of 2006 [2007] UGCC 3 (3 April 2007) 32.
45 *Hon Sam Kuteesa & 2 Others v Attorney General* Constitutional Reference 54 of 2011 [2012] UGCC 02 (4 April 2012).

the Constitution. However, almost four years after the Constitutional Court's interpretation, a magistrate relied on section 168(4) to revoke an accused's bail and the accused was only able to regain his freedom when the High Court referred to article 274 and to the Constitutional Court's decision which interpreted section 168(4).[46] The principle of precedent requires that in a case where a higher court modifies law on the basis of article 274, its interpretation binds lower courts.[47] Any subsequent decision by such lower court has to follow the higher court's interpretation, otherwise it will have no legal force.

The High Court is reluctant to invoke article 274 in cases where the impugned legislation has been relied on by several courts since the coming into force of the Constitution. For example, in *Karuhanga*[48] the applicants wanted the Court to order the respondents to hand over some documents to them in preparation for a suit. However, the legislation on which the applicants based their application provides that a court can only make that order if there is a pending suit and the documents are needed for the purpose of that suit. The applicant argued that this legislation was 'outdated and ancient history' and violated the applicants' constitutional right to access information and should be interpreted to conform to the Constitution.[49] In dismissing the application, the Court held:[50]

> This court is mindful of the provisions of Article 274 referred to by learned counsel for the applicant which provides that … The fact that this application has been brought under provisions of Order 10 rules 12, 14 and 24, Sections 98 and 64 (e) of the Civil Procedure Act and Section 33 of the Judicature Act which have been severally interpreted many years after the promulgation of the 1995 Constitution suggests that the said interpretations have had Article 274 in mind. For example requirement that for one to seek discovery must have a suit before the court in which the application is made cannot be said to be against the Constitution.

46 *Yali v Uganda* Miscellaneous Criminal Application 4 of 2017 [2017] UGHCCRD 107 (15 June 2017); *Asea v Uganda* Miscellaneous Criminal Application 29 of 2016 [2016] UGHCCRD 125 (1 December 2016).

47 See art 132(4) of the Constitution which provides that 'all other courts shall be bound to follow the decisions of the Supreme Court on questions of law'. One is the issue of precedent; see, eg, *Habre International Trading Co Ltd v Francis Rutagarama Bantariza* Civil Application 7 of 2003 [2004] UGSC 16 (26 May 2004); *Abelle v Uganda* [2018] UGSC 10 (19 April 2018).

48 *Karuhanga & Another v Attorney General & 2 Others* Misc Cause 60 of 2015 [2015] UGHCCD 39 (28 May 2015).

49 *Karuhanga* (n 48) 5.

50 *Karuhanga* 9.

Although on facts of the case the Court was justified in not invoking article 274 to modify the relevant laws,[51] it is argued that the mere fact that other courts have not found it necessary to interpret legislation to conform to the Constitution should not be the basis upon which a court in a subsequent matter fails to explain why the impugned legislation is not contrary to the Constitution. The language used in article 274 is imperative and, therefore, a court should use any available opportunity to interpret legislation and bring it in conformity with the Constitution.

5 Approaches taken by courts to construe legislation under article 274

Courts have adopted different approaches in their effort to construe legislation to bring it in conformity with the Constitution. In *Salvatory Abuki*[52] Mulenga J relied on Canadian jurisprudence and suggested two ways in which a court could approach the question of an impugned legislation:[53]

> This court has to interpret the statutory provisions in the Witchcraft Act, in accordance with article 273 [later article 274] of Constitution with a view to promote the values expressed in the 1995 Constitution … As I see it I have two options. The first option is to construe section 7 of the Witchcraft Act as if it does not authorise the making of an exclusion order, which would contravene any provision of the Constitution. That is the approach …call[ed] 'reading down' a statute on the presumption that the legislature cannot intend to make a law that contravenes the Constitution. Under that option only Court orders of exclusion which contravene the Constitution would from time to time be declared invalid. The second option is to construe the provision to its full extent and hold that in as much as, and to the extent that, it authorises contravention of the Constitution, it is void under article 2(2) of the Constitution.

In the above judgment Mulenga J held that a court has a choice whether to save the existing legislation (by modifying it) or to declare it void (if it cannot modify it). Case law shows that courts have generally followed three different approaches to modify existing legislation and bring it in conformity with Constitution. These approaches will be discussed below.

51 The relevant Civil Procedure Orders had not been followed to institute the case and the Court referred to the application as a 'fishing expedition'.
52 *Salvatory Abuki* (n 7).
53 *Salvatory Abuki* (n 7) 95-96.

5.1 Reading words into the impugned legislation

The first approach is for the court to read word(s) into the impugned legislative provision without any deletion. This is done in one of the two ways, namely, by either reading these words expressly into the impugned legislation, or by doing so impliedly. For example, in *Advocates for Natural Resources*[54] the petitioner invoked article 137 of the Constitution and argued that section 7(1) of the 1965 Land Acquisition Act was contrary to article 26 of the Constitution. Article 26 of the Constitution provides:

> (1) Every person has a right to own property either individually or in association with others.
> (2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied –
> (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and
> (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for –
> (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and
> (ii) a right of access to a court of law by any person who has an interest or right over the property.

Section 7(1) of the Land Acquisition Act provided:

> Where a declaration has been published in respect of any land, the assessment officer shall take possession of the land as soon as he or she has made his or her award under section 6; except that he or she may take possession at any time after the publication of the declaration if the Minister certifies that it is in the public interest for him or her to do so.

On the basis of section 7(1) of the Land Acquisition Act, the government, without prior compensation, acquired the petitioners' land for the purpose of upgrading a road.[55] The petitioners argued that section 7(1) of the Land Acquisition Act was contrary to article 26 of the Constitution and null and void as it allowed the government to acquire people's land without prior compensation.[56] The government argued that the right to property was not absolute and that section 7(1) of the Land Acquisition Act had a legitimate objective to serve – to enable the government to acquire land

54 *Advocates for Natural Resources & 2 Others v Attorney General & Another* Constitutional Petition 40 of 2013 [2013] UGCC 10 (8 November 2013).
55 *Advocates for Natural Resources* (n 54) 5.
56 *Advocates for Natural Resources* 6.

in case of an emergency.[57] The Court outlined the principles of constitutional interpretation and held that the Land Acquisition Act had to be interpreted in conformity with the Constitution.[58] The Court referred to article 26 of the Constitution and to section 7(1) of the Land Acquisition Act and held that the Constitution 'specifically provides for *prior payment* of compensation before taking possession or acquisition'.[59] The Court gave numerous examples to show that the history of Uganda 'was characterised by compulsory acquisition of property without prior payment of compensation' and that 'in article 26(2), the Constitution intended to put that history to rest and to firmly assert the people's rights to property'.[60] The Court held that section 7(1) of the Land Acquisition Act 'does not provide anywhere for prior payment of compensation before government takes possession or before it acquires any person's property' and that '[t]o that extent therefore … section 7(1) of Land Acquisition Act Cap 226 is inconsistent with and contravenes article 26(2)(b) of the Constitution'.[61] The Court added that its conclusion above does not mean that section 7(1) 'ceases to exist'.[62] The Court observed that section 7(1) 'is saved as an existing law under article 274 of the Constitution'.[63] The Court referred to article 274 and added:[64]

> The Constitution clearly envisages that existing laws would in one way or the other be inconsistent with its provisions. It is therefore not necessary that every time a law is found to be inconsistent with the Constitution, recourse is made to this court. Some of the inconsistencies such as the impugned section 7(1) of the Land Acquisition Act are too obvious and require no interpretation by this court. The purpose of article 274 of the Constitution was to avoid a situation where each and every provision of the old laws, those that pre-date the 1995 Constitution, found to be inconsistent with the Constitution had to end up in this court, for interpretation and for declarations to that effect. All courts of law have the power to do that. To enforce and put into effect article 274 of the Constitution.

The Court added that 'every court, tribunal or administrative body is required to apply and enforce the provisions of article 274'.[65] The Court further held:[66]

> The petitioner in this matter should have filed a suit in any competent court and requested that court to construe section 7(1) of the Land

57 As above.
58 *Advocates for Natural Resources* 6-9.
59 *Advocates for Natural Resources* 11 (emphasis in original).
60 *Advocates for Natural Resources* 12.
61 *Advocates for Natural Resources* 13.
62 As above.
63 As above.
64 As above.
65 *Advocates for Natural Resources* 15.
66 *Advocates for Natural Resources* 16 (emphasis in original).

> Acquisition Act in such a way as to bring it into conformity with the Constitution as provided for under article 274. This would have simply required court to read into that section, the phrase '*prior payment*'.

Against that background, the Court concluded that the government violated the petitioner's right to property, and that

> [s]ection 7(1) of the Land Acquisition Act is hereby nullified to the extent of its inconsistency with article 26(2) of the Constitution. That is to say, to the extent that it does not provide for prior payment of compensation, before government compulsorily acquires or takes possession of any person's property.[67]

In this case the Constitutional Court read words into section 7(1) of the Land Acquisition Act. The Constitutional Court has adopted a similar approach when dealing with other pre-Constitution legislation.[68] In this case the words were expressly read into section 7(1). Second, there are cases in which a court does not read the words expressly into the Act but leaves it open to accommodate future developments. For example, section 5(1) of the 1962 Oaths Act provides:

> Whenever any oath is required to be taken under the provisions of this or any other Act, or in order to comply with the requirements of any law in force for the time being in Uganda or any other country, the following provisions shall apply, that is to say, the person taking the oath may do so in the following form and manner:
>
> (a) He or she shall hold, if a Christian, a copy of the gospels of the four evangelists or of the New Testament, or if a Jew, a copy of the Old Testament, or if a Moslem, a copy of the Koran, in his or her uplifted hand, and shall say or repeat after the person administering the oath the words prescribed by law or by the practice of the court, as the case may be;
>
> (b) in any other manner which is lawful according to any law, customary or otherwise, in force in Uganda.

Section 5 recognises three religions for the purposes of taking an oath, namely, Christians, Jews and Moslems. In other words, for a person to take an oath, he or she must profess one of the above faiths. In *Butime Tom v Muhumuza David*[69] one of the issues before the

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67 *Advocates for Natural Resources* 21. See also *Uganda National Roads Authority v Irumba & Another* Constitutional Appeal 2 of 2014 [2015] UGSC 22 (29 October 2015).

68 See, eg, *Hon Sam Kuteesa & 2 Others v Attorney General* Constitutional Reference 54 of 2011 [2012] UGCC 2 (4 April 2012) where the Court held that a provision of the Magistrate's Court Act, which provided for the automatic expiration of the bail of an accused who was committed to the High Court for trial, was contrary to the Constitution.

69 *Butime Tom v Muhumuza David & Another* Election Petition Appeal 11 of 2011 [2012] UGCA 12 (21 May 2012).

Court of Appeal was whether a person could take an oath without holding the Bible or the Koran.[70] The Court of Appeal held that a person who professes another faith other than the three mentioned in section 5(1) of the Act should be asked if he could use his religious book for the purpose of taking an oath.[71] The Court held further:[72]

> The Oaths Act, Cap 19 is a 1962 enactment. It is therefore an 'existing law' under article 274 of the Constitution, and as such it must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the 1995 Constitution … Section 5(1)(a) of the Oaths Act restricts one taking the oath, if a Christian to use a copy of the gospels of the four evangelists or of the New Testament, or if a Jew, a copy of the Old Testament, or if a muslim [sic] a copy of the Koran. Given the non-restrictive language, spirit and intent of article 29(1)(b) and (c) of the Constitution, section 5(1)(a) of the Oaths Act must be interpreted in such a way that the holy books enumerated therein are not exhaustive, so that, depending on one's faith, another appropriate holy book or artifice can be used for taking an oath or affirmation as one's religion may require.

The Court added that section 5 was consistent with the constitutional right to practise one's religion.[73] In some cases a court does not hold that the impugned legislation is inconsistent with the Constitution but invokes article 274 to explain how the impugned legislation should be read to bring it in line with the Constitution. For example, in *Akayo*[74] the appellant, a district education officer (DEO), was dismissed from office by the chief administrative officer (CAO) based on a pre-1995 public service regulations and standing orders. He argued that under the 1995 regulations, the CAO did not have the power to dismiss him and that only the District Service Commission (DSC) could legally dismiss a DEO.[75] On the other hand, the CAO argued that he had those powers based on both the pre-1995 public service regulations and the Constitution.[76] The Court held that the regulations and orders had to be read in the light of article 274.[77] Against that background, the Court held:[78]

70 *Butime Tom* (n 69) 7.
71 *Butime Tom* 21.
72 *Butime Tom* 23.
73 *Butime Tom* 24. See also *Tusingwire v Attorney General* Constitutional Petition 2 of 2013 [2013] UGSC 15 (20 December 2013) (the Court read words into the Interpretation Act, ch 3 (1976)).
74 *Akayo v Kamuli District Local Council* Civil Appeal 8 of 2011 [2014] UGCA 97 (23 July 2014).
75 *Akayo* (n 74) 4-6.
76 *Akayo* 6-7.
77 *Akayo* 11.
78 *Akayo* 12.

> The Public Service Act and the Regulations/Standing Orders made thereunder, as the law existing before the 1995 Constitution was promulgated, must be interpreted and applied in matters of exercising disciplinary control over officers, like the appellant, employed in local governments with such modifications, adaptations, qualifications and exceptions as mandated by article 274. Bearing the above legal principles in mind … we find that the CAO adamantly assumed powers he did not have to interdict and eventually to make submissions to the DSC to dismiss the appellant.

In this case the Court explained how the regulations and standing orders should be read to bring them in conformity with the Constitution. The Court did not expressly find these regulations or standing orders to be inconsistent with the Constitution.

5.2 Striking out words from the impugned legislation

The second approach is for courts to strike out words from the impugned provision and replace these with new words. According to this approach a court either adds a few words or overhauls the entire provision. For example, in *Karokora*[79] the petitioner argued that section 13(1) of the Pensions Act was contrary to article 254(1) of the Constitution. Article 254(1) provides that '[a] public officer shall on retirement receive such pension as is commensurate with his rank, salary and length of service'. Section 13(1) of the Pensions Act provides that '[e]xcept in cases provided for by sub-section (2), a pension granted to an officer under this Act shall not exceed 87 percent of the highest pensionable emoluments drawn by him or her at any time in the course of his or her service under the government'. Upon retirement the government invoked section 13(1) of the Pensions Act to pay out the petitioner's pension. He argued that according to article 254(1) of the Constitution, he was entitled to pension that was commensurate with his rank, salary and length of service. The Court found that section 13(1) of the Pensions Act was inconsistent with article 254(1) of the Constitution and held:[80]

> We should observe that pension can only be appropriate if it takes into proper consideration all the factors based on to calculate one's pension without any form of limitation. In that regard, we would allow this Petition and declare that section 13(1) of the Pensions Act contravenes article 254(1) in as far as it bases calculation of pension of a pensioner to only 87% of the length of service, instead of the whole period of service of that pensioner and so did the action of the Commissioner for

79 *Karokora v Attorney General* Constitutional Petition 45 of 2012 [2014] UGCC 16 (20 December 2013).
80 *Karokora* (n 79) 24-25.

> Pensions in refusing to consider the petitioner's entire length of service when computing his pension.

Although the Court does not expressly state so, the inevitable outcome of its decision is that it replaced the relevant part of section 13(1) of the Pensions Act with the relevant part of article 254(1) of the Constitution. Similarly, in *Centre for Health, Human Rights and Development*[81] the applicants challenged the constitutionality of, among others, section 130 of the Penal Code Act[82] on the ground that it uses derogatory terms with respect to persons with mental disabilities and, therefore, is discriminatory and contrary to article 21 of the Constitution. Section 130 of the Penal Code Act provides:

> Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, commits a felony and is liable to imprisonment for fourteen years.

The Court agreed with the petitioners that the words 'idiot' and 'imbecile' were dehumanising and derogatory and, therefore, contrary to the Constitution and Uganda's international human rights obligations.[83] The Court added:[84]

> The words 'idiot' and 'imbecile' that appear in section 130 of the Penal Code Act, are declared to contravene articles 20, 21(1), (2), and (3), 23, 24 and 35 of the Constitution by reason of their being derogatory, dehumanising and degrading. They are accordingly struck out from section 130 of the Penal Code Act. The section is modified in accordance with article 274 of the Constitution to read as follows: Any person who, knowing a woman or girl to be mentally ill or mentally impaired, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was mentally disabled or mentally handicapped, commits a felony and is liable to imprisonment for fourteen years.

The Court added that it chose to invoke article 274 because 'striking out the section would leave mentally handicapped/disabled women and girls unprotected'.[85]

The right to freedom from discrimination was also dealt with in another case. Section 82(6) of the Trial on Indictments Act provided

81 *Centre for Health, Human Rights & Development & Another v Attorney General* Constitutional Petition 64 of 2011 [2015] UGCC 14 (30 October 2015).
82 Penal Code Act (PCA) Cap 120.
83 *Centre for Health* (n 81) 25-27.
84 *Centre for Health* (n 81) 29.
85 *Centre for Health* (n 81) 27.

that 'if the accused is acquitted, he or she shall be immediately discharged from custody unless he or she is acquitted by reason of insanity'. In *Centre for Health, Human Rights and Development*[86] the applicants also challenged the constitutionality of, among others, section 82(6) of Trial on Indictments Act on the ground that it discriminated against accused with mental illnesses and could lead to their indefinite detention. The Court held:[87]

> We consider that the reason such person is detained is because he/she is found to have committed the act that would amount to an offence if he/she was of sound mind, but is only acquitted because he/she is deemed not to have known what he/she was doing or that it was wrong. This is different from someone acquitted, for example, for lack of evidence. It is therefore not discrimination to detain such a person, as the purpose for the detention is not punishment for any offence but it is for the person's security, safety and health care as well as the security of the community. What needs to be put in place is a process of review of the detention of such a person so that he/she is not detained indefinitely. We are therefore, constrained to construe section 82(6) of the Trial on Indictments Act in accordance with article 274 of the Constitution.

Against that background the Court held:[88]

> Section 82(6) of the Trial on Indictments Act is modified in accordance with article 274 of the Constitution to read as follows: (a) The trial Court is to order for the detention of such a person for a specific period, for purposes of care or treatment of that person by a qualified psychiatrist or other qualified medical officer, in accordance with article 23(1) of the Constitution. (b) The period of detention is to be specified in the order of detention and is to be periodically reviewed by Court to ascertain the mental status of the detained person based on medical evidence from a psychiatrist or other qualified medical officer. (c) When the court is satisfied that such a detained person is mentally fit and is no longer a danger to him/herself and/or to the community, it may order for his/her release.

The effect of this approach is for the court to practically rewrite the impugned provision. In *Hon Sam Kuteesa*[89] the Court dealt with the constitutionality of section 168(4) of the Magistrate's Courts Act which provided:

> If a person committed for trial by the High Court is on bail granted by any court, without prejudice to his or her right to apply to the High

86 *Centre for Health* (n 81).
87 *Centre for Health* (n 81) 24.
88 *Centre for Health* (n 81) 28-29.
89 *Hon Sam Kuteesa & 2 Others v Attorney General* Constitutional Reference 54 of 2011 [2012] UGCC 2 (4 April 2012).

> Court for bail, the bail shall lapse, and the Magistrate shall remand him or her in custody pending his or her trial.

The petitioners argued that the above provision was contrary to article 23 of the Constitution which provides for the right to personal liberty and, in particular, the right to apply for bail, and article 139 (which deals with the jurisdiction of the High Court). The Court held:[90]

> An examination of section 168(4) of the Magistrate's Courts Act, shows that it commands lapse of bail granted by any court to a person who is being committed for trial by the High Court. The lapse is solely based on the single fact that the person is being committed to the High Court for trial. It is irrelevant whether the committing court is inferior in hierarchy and jurisdiction to the court that granted the bail to the person being committed. It is also inconsequential that neither the person being committed nor the prosecutor is afforded any opportunity to be heard as to the issue of bail. It would appear there is no provision of law for appeal, Revision or Review of the Order of cancellation of bail made under the section. To the extent that section 168(4) allows an inferior court to cancel the bail granted to an accused by a superior court, such as the High Court, which has unlimited original jurisdiction in all matters and to which decisions of inferior courts go by way of appeal under article 139, is in our view, inconsistent with the said article 139. It is also in contradiction with section (4) of the Judicature Act, cap 13.

The Court added that the impugned provision was also inconsistent with article 23 of the Constitution.[91] Against that background, the Court held:[92]

> Section 168(4) of the Magistrate's Courts Act must be construed in such a way as to provide that: (1) Bail granted, by a court of competent jurisdiction, to a person arrested in connection of a criminal case does not automatically lapse by reason only of the fact of that person being committed to the High Court for trial. (2) Subject to being competently seized of jurisdiction under the law, the court committing an accused person to the High Court for trial, has power derived from article 23(6)(a) of the Constitution to maintain bail already granted or to grant bail to an accused person, or to cancel bail for sufficient reason, after hearing the parties concerned on the matter.

In this case the Court 'deleted' the part of the section that provided for the lapse of the bail and added sentences that not only provided that the bail does not lapse, but also provided for the right of the accused and guided courts on how they should deal with the bail application. The High Court followed a similar approach when

90 *Kuteesa* (n 89) 34.
91 *Kuteesa* 31-33.
92 *Kuteesa* 38.

dealing with the law that empowers the minister responsible for justice to release mentally-ill prisoners. In *Bushoborozi*[93] the applicant had murdered his child and the trial court found that he was insane at the time of the offence and acquitted him but ordered that he should be detained (as a 'criminal lunatic'). Section 48 of the Trial on Indictment Act provides that a person who has been detained under such circumstances can be released only on the order of the minister responsible for justice. It is to the following effect:

> (2) When a special finding is made under subsection (1), the court shall report the case for the order of the Minister, and shall meanwhile order the accused to be kept in custody as a criminal lunatic in such place and in such manner as the court shall direct.
> (3) The Minister may order a person in respect of whom a special finding has been made to be confined in a mental hospital, prison or other suitable place of safe custody.
> (4) The superintendent of a mental hospital, prison or other place which any criminal lunatic is detained by an order of the Minister under subsection (3) shall make a report to the Minister of the condition, history and circumstances of every such lunatic at the expiration of a period of three years from the date of the Minister's order and thereafter at the expiration of periods of two years from the date of the last report.
> (5) On the consideration of any such report, the Minister may order that the criminal lunatic be discharged or otherwise dealt with.
> (6) Notwithstanding subsections (4) and (5), the Commissioner of Prisons or the chief medical officer may, at any time after a criminal lunatic has been detained in any place by an order of the Minister, make a special report to the Minister on the condition, circumstances and history of any such criminal lunatic, and the Minister, on consideration of any such report, may order that the criminal lunatic be discharged or otherwise dealt with.
> (7) The Minister may at any time order that a criminal lunatic be transferred from a mental hospital to a prison, or from a prison to a mental hospital, or from any place in which he or she is detained to either a prison or a mental hospital.

While in prison, the applicant received treatment and recovered from his mental condition. However, all his attempts to be released were unsuccessful and as a result he spent 14 years in prison. The Court found that the release of a person from prison was a judicial function and that the applicant's constitutional rights had been violated by the continued imprisonment.[94] The Court added that a trial court retained the powers to make special orders relating to a person's

93 *Bushoborozi* (n 27).
94 *Bushoborozi* 7.

liberty.[95] Against that background the Court proposed the following procedure:[96]

> (a) Where the trial court makes a special finding that the criminal lunatic is not guilty by reason of being insane, the judge must make special orders as to the discharge or continued incarceration of the prisoner in an appropriate place.
> (b) The trial court must order, in line with subsection (4) of section 48 of the TIA that the superintendent of the mental hospital, prison or other place detaining the prisoner makes periodic reports to the court which may issue appropriate special orders for the discharge of the criminal lunatic or otherwise deal with him or her.
> (c) The Registrar of the Court shall periodically, and in any case not later than three years from the date of the last court order or report from the institution keeping the prisoner, make a production warrant for the prisoner and present the case file before the High Court or any other Court of competent jurisdiction for appropriate special orders.
> (d) The Registrar may appoint Counsel on State briefs to assist court in revisiting the cases pending the judge's special orders.

The effect of the above holding is to transfer the powers of the minister under section 48 of the Act to the High Court. The Court held that its approach was informed not only by article 274 of the Constitution but also by 'judicial activism'.[97] The Court's bold step in this case could be explained by the fact that the judiciary on more than one occasion had highlighted the need for section 48 to be amended but its recommendations had been ignored by the law makers. As the Court put it:[98]

> The need for law reform in the law relating to criminal lunatics remanded pending the Minister's orders has been made by so many judges in their reports on criminal sessions and decisions. We need not lament more than that. The Deputy Registrar sitting at Fort Portal is hereby directed to serve a copy of my ruling to the Rules Committee and the Principal Judge with a view of prompting the development of some rules and or Practice Directions along what I have recommended in this ruling.

It thus is evident that article 274 could be used by judges as one of the ways to achieve what Parliament has failed to – amending legislation to bring it in conformity with the Constitution. In my

95 *Bushoborozi* 8.
96 *Bushoborozi* 9.
97 *Bushoborozi* 5-6.
98 *Bushoborozi* 9.

view, the Court went beyond what is permissible under article 274. The alternative approach would have been for the Court not to completely usurp the powers of the minister. For example, the Court could have held that the above powers should only be exercised by a court when there is evidence that an applicant had made at least two applications to the minister and the Minister has failed to act. In other words, the Minister should be given the first opportunity to exercise his powers and courts should only intervene when the minister has been unwilling or unable to exercise such powers. This is so because although courts can make special orders with regard to people in detention, the executive also has a stake in the administration of justice. In any case, it is the latter that is responsible for the well-being of the detainees and prisoners through the police or prison authorities.

Likewise, in *Uganda v Kamuhanda*[99] the High Court relied on article 274, as Parliament had not attempted to amend section 193(2) of the Penal Code Act to bring it in line with the Constitution. Section 192 of the Penal Code Act provides that a person who unlawfully kills another in circumstances that amount to provocation will be convicted of manslaughter. Section 193 defines provocation to include the following:[100]

> When such an act or insult is done or offered by one person –
>
> (a) to another; or
> (b) in the presence of another to a person –
> (i) who is under the immediate care of that other; or
> (ii) to whom that other stands in any such relation as aforesaid, the former is said to give to that other provocation for an assault.

The Court held that although section 193(2) is gender neutral, in reality it perpetuates domestic violence, especially violence against women and children. This is so because in Uganda most families are headed by men.[101] The Court emphasised the fact that domestic violence was criminalised in Uganda and that the Constitution prohibits inhuman or degrading treatment and provides for gender equality.[102] The Court added that experience in Uganda shows that 'the law makers are reluctant to amend the laws governing domestic relations'.[103] Against that background, the Court held:[104]

99 *Uganda v Kamuhanda* HCT-01-CR-SC-0024 of 2012 [2014] UGHCCRD 21 (13 February 2014).
100 Sec 193(2).
101 *Kamuhanda* (n 99) 6.
102 As above.
103 As above.
104 *Kamuhanda* (n 99) 6-7.

> The courts of law should take it as their duty to harmonise the old law on provocation with the Domestic [V]iolence [A]ct and construe the [P]enal [C]ode provisions with such modifications as to bring it in conformity with the 1995 Constitution. This is legal and constitutional under article 274(2) of the Constitution. I am now setting a precedent by considering accumulated anger arising from repeated acts of domestic violence, and more so when they are committed with impunity, as a partial defence to murder in a domestic setting. It is also, in my opinion, a very serious mitigating factor for sentences in homicides and other crimes committed in a domestic sphere.

The effect of this holding is to indirectly amend section 193 of the Penal Code Act by providing for what is commonly known as 'the battered women/wives/partners syndrome' as a partial defence for murder in domestic settings. This partial defence has been recognised by courts in some African countries such as Zimbabwe,[105] South Africa[106] and Seychelles.[107] It is argued that overhauling a legislative provision is beyond the mandate of the court's power under article 274. That is the mandate of the legislature. What article 274 requires a court to do is to interpret legislation and not to rewrite it. This can also be inferred from the drafting history of article 274 where it was stated that the existing law shall 'continue until Parliament provides otherwise'.[108] If a court concludes that the impugned legislation requires an overhaul, it should declare it unconstitutional (if it is a Constitutional Court) or advise one of the parties to invoke article 137(3) and refer it to the Constitutional Court. The inability of other courts to declare legislation unconstitutional means that the Constitution may have to be amended to address this *lacuna*. This would mean, for example, that the High Court is empowered to declare legislation unconstitutional but the declaration only takes effect after it has been confirmed by the Constitutional Court. This approach has been followed in some countries, such as South Africa.[109]

5.3 'Striking out' and 'reading out'

The third approach is for a court to 'strike out' or 'read out' words from the impugned legislation without replacing them. For example,

105 See, eg, *S v Sweswe* HB 184/18, HC (CRB) 67/18 [2018] ZWBHC 184 (5 July 2018).
106 *S v Marais* 2010 (2) SACR 606 (CC) 2011 (1); SA 502 (CC).
107 *Labiche v R* [2006] SCCA 9 (28 November 2006).
108 *Proceedings of the Constituent Assembly* (n 9) (submission by Mr Mulenga) (25 March 1995) 3466.
109 See sec 167(5) of the Constitution of the Republic of South Africa 1996.

in *Kabandize*[110] the Court of Appeal dealt with the constitutionality of section 2 of Civil Procedure and Limitations (Miscellaneous Provisions) Act (1969).[111] Section 2 provided:

> (1) After the coming into force of this Act, notwithstanding the provisions of any other written law, no suit shall lie or be instituted against –
>
> (a) the Government;
>
> (b) a local authority; or
>
> (c) a scheduled corporation, until the expiration of forty-five days after written notice has been delivered to or left at the office of the person specified in the First Schedule to this Act, stating the name, description and place of residence of the intending plaintiff, the name of the Court in which it is intended the suit be instituted, the facts constituting the cause of action and when it arose, the relief that will be claimed and, so far as the circumstances admit, the value of the subject matter of the intended suit.
>
> (2) The written notice required by this section shall be in the form set out in the Second Schedule to this Act, and every plaint subsequently filed shall contain a statement that such notice has been delivered or left in accordance with the provisions of this section.

The Court held that section 2 should be interpreted in light of article 274 of the Constitution and article 21 of the Constitution – which provides for the right to equality before the law. The Court reasoned that a combined reading of articles 21 and 274 'requires that parties appearing before Courts of law must be treated equally and must enjoy equal protection of the law'.[112] Against that background, the Court held:[113]

> Section 2 above is a law that gives preferential treatment to one party to a suit by requiring the other party to first serve it with a 45 days mandatory notice of intention to sue. The section is also discriminatory in that it requires one party to issue statutory notice to the other without a reciprocal requirement on the other. None compliance renders a suit subsequently filed by one party incompetent. Government and all scheduled corporations are under no obligation to serve statutory notice of intention to sue to intended defendants. On the other hand, ordinary litigants are required to first issue and serve a 45 days mandatory notice upon Government and scheduled corporations. We find that in view of Article 20(1) of the Constitution a law cannot impose a condition on one party to the suit and exempt the other from

110 *Kabandize & 20 Others v Kampala Capital City Authority* Civil Appeal 28 of 2011 [2014] UGCA 26 (4 March 2014).
111 Civil Procedure and Limitations (Miscellaneous Provisions) Act Cap 72.
112 *Kabandize* (n 110) 11.
113 *Kabandize* (n 110) 11-12.

> the same condition and still be in conformity with Article 20(1) of the Constitution.

The Court held that 'the requirement to serve a statutory notice of intention to sue against the government, a local authority or a scheduled corporation is no longer a mandatory requirement in view of articles 274 and 20(1) of the Constitution' and that 'non-compliance with that impugned section 2 does not render a suit subsequently filed incompetent'.[114] In this case the Court removed the 45-day notice period without replacing it with another period. This would ensure that both parties have the same period within which to file the notice. This approach has been followed in other cases.[115]

6 Article 274 and unwritten laws

Although in most of the cases courts have invoked article 274 when dealing with written laws, there have also been cases where the article has been invoked to construe unwritten law and bring it in conformity with the Constitution. For example, in *Uganda v Nakoupuet*[116] the accused wished to marry the complainant who objected to the proposed marriage. He approached her parents and paid dowry, and her brothers forcibly took her to the accused's house and held her, and the accused raped her in their presence. This was so because according to their cultural practice, once a man had paid dowry to the parents of the woman, she became his 'wife'.[117] The Court observed:[118]

> This court condemns the culture of forcefully chasing, abducting and raping girls and woman to make them wives. It is a brutal and backward culture promoting violence against women. Nobody and no one's daughter, sister or mother deserves being raped in the name of marriage. This vice of cultural rape is a resilient, pervasive and persistent culture promoting gender stereotypes.

The Court referred to the relevant provisions of the Constitution and international human rights instruments that prohibit harmful cultural practices against women,[119] and held:[120]

114 *Kabandize* (n 110) 12.
115 See, eg, *Kawuki v Semaganyi* Civil Appeal 19 of 2014 [2017] UGHCLD 48 (2 May 2017).
116 *Uganda v Nakoupuet* Criminal Case 109 of 2016 [2019] UGHCCRD 14 (25 January 2019).
117 *Nakoupuet* (n 116) para 7.
118 *Nakoupuet* para 13.
119 *Nakoupuet* para 14.
120 *Nakoupuet* para 16.

> Article 274 of our Constitution provides for judicial activism to fight such backward customs and traditions found in the existing customary law. We are empowered by law to construe the existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. We have the legal mandate to, and so must, question the rape culture. This is the time to break the culture of silence and condemn this negative culture in the strongest terms possible. The conviction and sentence must send a clear message to the accused person and anyone intending to abduct and rape the women of Uganda that it is a serious capital offence.

As a result, the accused was convicted of rape and sentenced to 15 years' imprisonment.

In *Uganda v Yiga Hamidu & Others*[121] the High Court invoked article 274 to abolish a cultural practice in terms of which a married woman was always assumed to have consented to sexual intercourse with her husband. In effect, the Court introduced the concept of marital rape in Ugandan law.[122] The Court's judgments have the effect of abolishing cultural practices instead of modifying these. This is understandable as such practices are prohibited by the Constitution[123] and the international human rights instruments ratified by Uganda.[124] However, the challenge is that the Court's judgment may have very little impact on the ground for the simple reason that many people who follow these cultural practices may not be aware that such judgments were handed down. Some of these people may even argue that the judges misunderstood their culture. This is one of the areas in which the legislature will have to intervene and enact the relevant legislation to stamp out such practices and also for the relevant government ministry to put in place measures to educate people on why such a cultural practice is unacceptable.

7 Contentious reliance on article 274

There have also been cases where courts have invoked article 274 of the Constitution in questionable circumstances. For example,

121 *Uganda v Yiga Hamidu & Others* Criminal Session Case 5 of 2002 [2004] UGHCCRD 5 (9 February 2004).

122 As above.

123 Art 32(2) of the Constitution provides that '[l]aws, cultures, customs and traditions which are against the dignity, welfare or interest of women … or which undermine their status, are prohibited by this Constitution'.

124 See, eg, arts 2 and 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005); art 2 of the Convention on the Elimination of All Forms of Discrimination against Women (1979).

in *Nabawanuka v Makumbi*[125] the petitioner, in a divorce matter, approached the High Court seeking, among others, a decree *nisi* dissolving the marriage to the respondent, maintenance and custody of the child. In reply the respondent argued that the matter was *res judicata* as the case had already been handled by the Shari'a Court of the Uganda Muslim Supreme Council.[126] In rebuttal, the petitioner argued that the Shari'a Court of the Muslim Supreme Council had not been established by law as required by the Constitution and that, therefore, it was not a court of competent jurisdiction.[127] The Court observed that the issue before it was whether

> the Sharia Court of the Muslim Supreme Council is a Court of judicature as contemplated [u]nder Article 129 of the Constitution. The relevant sub-article of Art 129 provides: Such subordinate Courts as Parliament may by law establish including Qadh's Courts for marriage, divorce, inheritance of property and guardianship as may be prescribed by Parliament.[128]

The respondent argued that Shari'a courts had not yet been established by Parliament, while the petitioner argued that Shari'a courts existed and 'are indeed envisaged under the Marriage and Divorce of Mohammedans Act'.[129] The Court held:[130]

> Whereas indeed it's true that Qadhis Courts envisaged under Art 129(1)(d) of the Constitution have not yet been established, I do not agree with [the petitioner's] view that the Sharia Courts currently operating are operating outside the law. My position is premised on the import of Article 274 of the Constitution which provides …

The Court concluded:[131]

> It is not in dispute that the Marriage and Divorce of Mohammedans Act Cap 252 is on our statute book. Section 2 thereof provides: 'All marriages between persons professing the Mohammedan religion and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe and sect in which the marriage or divorce takes place shall be valid and registered as provided under the Act.' Consequently my view is that the Sharia Courts of the Muslim Supreme Council are operating within the law and are competent courts to handle divorce cases and grant relief.

125 *Nabawanuka v Makumbi* Divorce Cause 39 of 2011 [2013] UGHCFD 3 (13 February 2013).
126 *Nabawanuka v Makumbi* (n 125) 1.
127 *Nabawanuka v Makumbi* 2.
128 As above.
129 *Nabawanuka v Makumbi* 3.
130 *Nabawanuka v Makumbi* 4.
131 As above.

It is argued that the High Court's reliance on article 274 in this case is debatable for at least two reasons. First, the Court did not point out which law was inconsistent with the Constitution for it to invoke article 274. None of the parties had argued that the Marriage and Divorce of Mohammedans Act was inconsistent with the Constitution for the Court to interpret it on the basis of article 274. Second, the Marriage and Divorce of Mohammedans Act does not contain a provision on Shari'a courts. Much as it states that marriages and divorces of Muslims shall be governed by Muslim law, it does not establish Shari'a courts to administer such law. Therefore, the Shari'a Courts at the Uganda Muslim Supreme Council are not a creature of the Marriage and Divorce of Mohammedans Act.

8 Conclusion

In this article the author has demonstrated how Ugandan courts have relied on article 274 to interpret laws that existed before the coming into force of the Constitution to protect human rights. It has been illustrated that, although only the Constitutional Court has the mandate to declare legislation inconsistent with the Constitution, other courts have invoked article 274 to make such declaration before interpreting such laws to bring them in conformity with the Constitution. It has also been demonstrated that the Constitutional Court or the Supreme Court will only declare a legislative provision unconstitutional if it cannot be modified on the basis of article 274. This explains why in some cases a court will declare some sections unconstitutional but modify others.

It has been argued that although courts are empowered to interpret legislation to bring it in conformity with the Constitution, they lack the mandate to overhaul legislation. Where it becomes clear to the court that invoking article 274 would require it to overhaul a legislative provision, it should declare such a provision unconstitutional (if it has the jurisdiction to do so). It is commendable that courts have used their mandate under article 274 to protect the rights of, especially, the most vulnerable. However, for better protection of these rights, it is also recommended that there may be a need for the Ugandan Constitution to be amended so that other courts other than the Constitutional Court (the High Court and the Court of Appeal) are also empowered to declare legislation unconstitutional. However, such a declaration should only become effective after it has been confirmed by the Constitutional Court if there is no appeal to the Supreme Court. If there is an appeal to the Supreme Court, the declaration should only become effective after it has been confirmed by the Supreme Court.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: RI Rotberg 'Book review: D Kuwali (ed) *Palgrave handbook on sustainable peace and security in Africa*' (2022) 22
African Human Rights Law Journal 548-551
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a10

Recent publications

D Kuwali (ed) *Palgrave handbook on sustainable peace and security in Africa*

Palgrave Macmillan (2022) 617 pages

Robert I Rotberg
Harvard Kennedy School

'Africa must take responsibility for its destiny.' These are words of the African Union (AU), echoed by Dan Kuwali in one of his several telling contributions to this well-edited and well-composed *Handbook on sustainable peace and security in Africa.* However, as so many of the chapters contained in this *Handbook* indicate, it is not yet possible for Africa or the AU to take charge of the continent's destiny. Peace is elusive, security an oxymoron.

A dozen states are at war against themselves in today's Africa. Cameroon, the Central African Republic, Chad, the Democratic Republic of the Congo (DRC), Ethiopia, Nigeria, Somalia, South Sudan and Sudan all harbour intrastate conflicts. Burkina Faso, Mali, Mozambique, Niger and, again, Nigeria and Somalia, are beset by Islamist insurgencies (in several cases) of long duration. Morocco occupies Western Sahara and battles the Polisario Front along the eastern edge of the desert territory.

As to the spread of terror into Western and Eastern Africa by adherents of the Islamic State (separately called of West Africa and of the Greater Sahara) and the continuing wars in the Sahel, chapters in this book by Kuwali and Mphatso Boti-Phiri suggest that in addition to 'better policing and secure borders', the affected nations need to create economic opportunities and political stability sufficient to dissuade the youth to reject violence. How that good result can be achieved, however, is not spelled out. The book was also in print before the full impact of Russian Wagner mercenaries in Central Africa, Mali and Sudan could be evaluated.

Military *coups* occur with surprising frequency, if not as often as they did in the 1960s. Elected autocrats rule some of Africa's nations, as well, with fully-fledged democracy a relatively uncommon phenomenon. Grand corruption prevails, as the South African trial of former President Jacob Zuma demonstrated and the 'Fishrot' scandal in Namibia revealed, but places like the DRC, the Republic of Congo, Equatorial Guinea and Zimbabwe have for decades been mired in similar financial misbehaviour.

In another of his chapters in the *Handbook*, titled 'Commend and condemn: Combating corruption in Africa', Kuwali agrees that 'corruption is an entrenched part of African political culture'. It contributes to underdevelopment and impoverishment throughout the continent. It 'fuels inequalities and undermines access to public service'. It 'scares off investors'. Africa loses billions of dollars each year via corruption and the flight of stolen assets.

Following this trenchant analysis, Kuwali discusses the impact of corruption on African peace and security. Corruption causes rent-seeking by military commanders (as in Guinea, Mali, Sudan and Zimbabwe), budgets that are misallocated and padded, and the shifting of resources away from social needs such as education into war preparation and war making.

Kuwali's list of ways in which to reduce the spread of corruption is broad and hortatory, but hard to put into practice so that politicians and military chiefs stop stealing. Although not discussed in the *Handbook*, one reason why a large Nigerian army has failed for more than a decade to crush the Boko Haram insurgency in the northeastern reaches of its country is the selling of rations and war materiel to Boko Haram by greedy generals and military officers.

Chapters in the *Handbook* deal effectively with some of these national deficits, and a long section discusses gently why it is that the AU has such a hard time either preventing or unravelling national

deviations from acceptable norms. There is a thorough exegesis of the AU's Peace and Security Architecture, but several authors are discreet and gentle. At the AU level, there is too little money available from the member states; the member states hardly want to be criticised or interfered with by AU machinery and bureaucrats. The result is that the AU is largely powerless to demand that military officers leave their coups and go back to barracks.

Likewise, as several authors hint, the AU at the best of moments can hardly criticise even the most egregious of the anti-democratic, poorly-governing despots in their midst. Even the staunchly democratic countries such as Botswana and Mauritius mostly keep their views of others to themselves. The AU is a regional organisation that even in the best of moments, and especially in the peace and security realm that this *Handbook* examines so well, can accomplish little.

One chapter in the *Handbook* examines the effective leadership that is lacking continentally and nationally. The AU leads from behind and so many of Africa's national leaders, now and in the past, have been transactional rather than transformational in their motivations and approaches. Moreover, many, if not most, of the political leaders of Africa have been concerned with furthering their political parties' interest, their lineage or group interest, their family interest, or the interests of criminalised corrupted factions. Few leaders in Africa's independent 60-plus years have really operated in the public interest. Sir Seretse Khama and Sir Ketumle Masire of Botswana were two worthy exceptions. It is possible that Hakainde Hichilema of Zambia and Lazarus Chakwera of Malawi will be two more, and that Cyril Ramaphosa of South Africa can overcome innumerable impediments to emerge similarly credible.

The chapter by Tadziwana Kapeni on 'The governance conundrum', which also covers leadership, unfortunately has neither been much informed by the governance nor the leadership literature. As a result, he credits Malawi President Bingu wa Mutharika and Tanzanian President John Magufuli with noble leadership accomplishments that neither in my view exhibited. He also mischaracterises the meaning and relevance of legitimacy, especially in securing leadership and governance advances in Africa.

The *Handbook* has many worthy chapters among its 34 chapters. Few handbooks range over so many important topics, but this one manages to include chapters on migrancy, illicit resource flows, conflict resolution, youth unemployment, the role of women in security, cyber security, social media, epidemics and pandemics,

organised crime, human rights, piracy at sea, the scourge of small arms, and the spread of weapons of mass destruction. The opening section considers 'securing the peace' in Africa, divided up into its relevant sections. Here the analyses are thorough and excessively formal rather than empirical.

Overall, the *Handbook* will become an important resource for anyone working to achieve peace and security in Africa or who seeks to understand why insecurity proliferates, bedevilling the lives of so many African civilians. Moreover, this is a *Handbook* entirely African in its focus and authorship. That, indeed, is a great editorial achievement.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: OA Dada 'Book review: KM Clarke *Affective justice: The International Criminal Court and the pan-Africanist pushback*' (2022) 22 *African Human Rights Law Journal* 552-556
http://dx.doi.org/10.17159/1996-2096/2022/v22n2a11

Recent publications

KM Clarke *Affective justice: The International Criminal Court and the pan-Africanist pushback*

Duke University Press (2019) 384 pages

Omowumi A Dada

The International Criminal Court (ICC) was established as one of the means to establish justice and peace but there have been debates and criticisms, such as whether the ICC is an extension of imperialism due to its focus on Africa. Authored by Kamari Clarke, *Affective justice: The International Criminal Court and the pan-Africanist pushback* contributes to the ongoing debate by providing ethnographic accounts of different regimes of emotions and affects that are mobilised in the quest for peace and justice. By exploring how they take shape within international law assemblages, the book takes a profound step in clarifying some of the most challenging complexities in the rule of law movement in Africa. It is a great addition to scholarship on international law for it closes the gap in understanding how 'moral and emotional affects' shape the practices of justice within international criminal law using particular approaches to assemblage theory.[1] It also leaves unanswered questions about the

1 KM Clarke *Affective justice: The International Criminal Court and the pan-Africanist pushback* (2019).

effects of perpetrators in the commission of violence and the place of activism in international justice arenas.

Professor Kamari Clarke is a recognised scholar who has published significantly on issues related to legal institutions, human rights, international law, religious nationalism and globalisation. With her primary discipline in anthropology and her secondary discipline in law, Clarke is a renowned legal anthropologist who has been involved in a range of projects that look at the gaps in international criminal law. Her goal is to both provide solutions for African institutions, such as the to-be-established African Court of Justice on Human and Peoples' Rights, and to develop theories of justice that considers particular forms of affective practice theory. *Affective justice* provides a snapshot of six years of research. It offers a framework of how daily lives are impacted by 'sentimentally institutionalised approaches to justice'.[2]

Assemblage theory serves as the conceptual framework for *Affective justice*.[3] This theory provides a way of analysing social complexities by seeing different component parts as fluid, related yet exchangeable with others because of multiple functionalities. Clarke theorises that affective justice is part of the international rule of law assemblages which plays out through three component parts – legal technocratic practices, embodied affects and emotional regimes. These three components shape the structuring of the book into six chapters, an introduction and an epilogue.

The theoretical framework deployed in this book is inspired by Deleuze and Guattari's theory of *rhizomatic model of learning/knowledge*. In the rhizomatic model, there is no beginning or an end and while Clarke, in some parts of *Affective justice*, oscillates between World War I and the Cold War as a key node in shaping the contours of affective justice in international legal circuits, she constantly reveals her anti-colonialist sentiments by placing colonialism as a critical node in Africa's engagement with the ICC. This is understandable considering that *Affective justice* is focused on sub-Saharan Africa.

Affective justice re-thinks the work of Richard Wilson and other socio-legal justice scholars who privilege justice analysis through the lens of those who claim 'victim' status. What it offers is a way of demonstrating how and why affects are central to the making

2 http://www.kamariclarke.com/professional-biography (accessed 10 September 2020).
3 http://www.oxfordbibliographies.com/view/document/obo-9780199874002/obo-9780199874002-0114.xml (accessed 10 September 2020).

of justice – whether through 'victim' narratives or through other narratives. Using case studies that are also theorised through presumptions of justice as 'affective', some of the key arguments that Clarke makes are that international criminal justice institutions as globalised formations have their foundations in affective justice domains. She is insistent that 'justice is a product of a set of competing practices that are shaped and expressed materially and socially' and that it should not be reserved for some at the exclusion of others, by demonstrating that people understand, challenge and influence legal orders through 'their embodied affects, interjections and social action'. In this regard, Clarke demonstrates that justice produced by international law formations such as the ICC and the African Court of Justice and Human and Peoples' Rights is influenced by several stakeholders that hold different forms of power. These include citizens (the public, victims, perpetrators), technocrats, judges, advertisers, investigators and evidence procurers, and these are affected by histories such as colonialism or agendas such as pan-Africanism.

The account that Clarke provides as case studies is transnational, multi-sectoral with different affective regimes and interactions showing how actors within the ICC, pan-Africanists and civil society movements arouse emotions to deliver the best (in their view) juridical justice. The book exposes readers to nuances that are gleaned from actions otherwise seen as neutral but which have undertones. For instance, it demonstrates how the emergence of justice as law is related to the structural inequalities within post-colonial Africa.

Combining approaches to justice and its complexities, Clarke engages concepts such as 'legal encapsulation' and 'reattribution' to explain components of international justice assemblages as well as to capture them as part of the larger justice assemblage. Chapter 1 explores the technocratic workings of the legal encapsulation of the invocation of the terms 'victim' and 'perpetrator' as part of the rule of law assemblage and how these legal encapsulations have influenced the kind of justice produced to save the victim and protect against the perpetrator. Chapter 1 is particularly graphic in how it shows that we sentimentalise legal processes through the view of victim to be saved and perpetrator to be held accountable. Chapter 2 explores reattribution through the workings of psycho-social embodied affects and how these produce passionate utterances that can mobilise action within international justice both internationally and regionally. In chapter 3 Clarke probes some online justice campaigns such as *#BringbackourGirls* and the *Kony 2012* campaign as one of the affective formations in international justice assemblage. These

campaigns, she argues, were driven by emotions and not 'necessarily an understanding of real individuals but the campaigns have shaped responses to international legality'.

It is in chapter 4 that Clarke combines an analysis of both reattribution and legal encapsulations within the discourse of culpability to show how a perpetrator has been fixed by legal encapsulations but also how 'competing feelings of reattribution' (fuelled by history of inequality) is shifting culpability. Clarke dives into African debates and criticisms against the ICC in chapter 5 highlighting how pan-Africanists have emotionally mobilised imageries that have influenced the re-making of African regional institutions and types of justice for Africa. The last main chapter is the sixth, where Clarke queries the alternative ways proposed by Africans to juridicalise justice by expanding the actionable crimes, introducing new modes of liability and, more importantly, to get justice legally and politically. Together these chapters articulate the complexities of affective justice as a rhizomatic project.

One conclusion in *Affective justice* is that the ICC is not the ultimate solution to Africa's problems because the gross human rights violations were not caused by emotions but fuelled by historical and contemporary political and economic problems that continue to be in place despite the juridical justice provided by the ICC. *Affective justice*, therefore, is a keen advocate for more politically and contextually-appropriate justice. In other words, Africa's colonial past set in place the conditions for under-development through the plundering of Africa's resources and even continued under neoliberalism through the Brentwood Institutions. These have led to new crimes that ought to be adjudicated not only as crimes but as after-effects of colonialism. Clarke conjures up a possible future within 'Africa's geographies of justice where legal and political subjectivities are created and negotiated to imagine new spaces of justice that holistically addresses peace and security in Africa'. This, she hopes, will be African-led transitional justice that is achieved by 'strategic sequencing of peace and security'. Perhaps, as Clarke posits, there is the possibility that the framework for peace and justice being considered by Africa will address foundational structural inequalities while also providing political and juridical solutions.

However, there are other sentiments (one of which I share) that doubt the true commitment of African leaders or other actors to setting up such peace and justice structures, and it is not clear what Clarke's position is on this, for by taking all subjects equally as affective justice producing agents, what we miss are the ways that their actions are suspiciously detrimental to the poor. While Clarke

is able to account for such leaders by highlighting the structural conditions of inequality, she does not necessarily critique their motives and the consequences of the forms of re-attribution that they produce. The main audiences for *Affective justice* are African leaders, pan-Africanists, activists, judges, international law experts as well as scholars of law and social processes. Other audiences that can benefit are those victimised by violence or those seen as perpetrators who seek to understand the nuances of international justice. Perhaps Clarke is right. There are no sides in international justice – everyone can lose and everyone can win. The goal of *Affective justice* is to understand the practices through which feelings of winning and losing are articulated.

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- LLM/MPhil (Multidisciplinary Human Rights)
- LLM/MPhil (Sexual and Reproductive Rights in Africa)
- LLM/MPhil (Disability Rights in Africa)
- LLM (Dissertation) Human Rights
- Doctoral Programme (LLD)
- *Alumni* Association: LLM (HRDA)

Projects

- Advanced Human Rights Courses (AHRC)
- Christof Heyns African Human Rights Moot Court Competition
- Nelson Mandela World Human Rights Moot Court Competition
- Human Rights Clinics
- Human Rights Conferences
- Impact of the Charter/Maputo Protocol/African Children's Charter
- Implementation and Compliance Project

Research and Advocacy Units

- Business and Human Rights Unit
- Children's Rights Unit
- Democracy and Civic Engagement Unit
- Disability Rights Unit
- Expression, Information and Digital Rights Unit
- Freedom from Violence Unit
- Litigation and Implementation Unit
- Migration Unit

- Sexual Orientation, Gender Identity and Expression and Sex Characteristics Unit
- Women's Rights Unit

Affiliated entities

- Institute for International and Comparative Law in Africa (ICLA)
- International Development Law Unit (IDLU)

Secretariat

- African Coalition for Corporate Accountability (ACCA)

Regular publications

- *AfricLaw.com*
- *African Human Rights Law Journal*
- *African Human Rights Law Reports* (English and French)
- *African Disability Rights Yearbook*
- *African Human Rights Yearbook*

AFRICAN HUMAN RIGHTS LAW JOURNAL
GUIDE FOR CONTRIBUTORS

Contributions should be e-mailed to:
idemeyer1@gmail.com

All communications should be sent to the same address.

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African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria 0002
South Africa

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- The *African Human Rights Law Journal* utilises plagiarism detection software. Please ensure that submissions do not infringe other persons' intellectual property rights.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- The manuscript should be in Arial, 12 point (footnotes 10 point), 1½ spacing.
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- Authors should supply a summary of their contributions (setting out the main *findings* of the article) of between 250 and 300 words, and at least four keywords.

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- The following general style pointers should be followed:
- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34) 243.
- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:

  1
  2
  3.1
  3.2.1
- Do NOT use automatic page numbering in headings.
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- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
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- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used ('Constitution').
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* or https://www.ahrlj.up.ac.za/submissions for additional aspects of house style.

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2022
Compiled by: I de Meyer
Source: http//www.au.int (accessed 30 October 2022)

	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	08/06/21
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				24/04/07
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		31/01/17	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	4/10/21*	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	12/10/21		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	
Morocco						
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**	**33**	**42**	**36**

Ratifications after 31 December 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.